

2010

Fourth Circuit Judicial Appointments

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Courts Commons](#), and the [Judges Commons](#)

Recommended Citation

Carl Tobias, *Fourth Circuit Judicial Appointments*, 61 S. C. L. Rev. 445 (2010)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

FOURTH CIRCUIT JUDICIAL APPOINTMENTS

CARL TOBIAS*

Federal judicial selection has become increasingly controversial.¹ Accusations and recriminations, divisive partisanship, and continuing paybacks have suffused the appellate court confirmation process.² These phenomena were pervasive during the George W. Bush Administration, particularly affecting his appointments to the United States Court of Appeals for the Fourth Circuit. Instructive examples are the nominations of U.S. District Court Judge Terrence Boyle and Department of Defense General Counsel William J. Haynes II, whom President Bush renominated multiple times, with both Democratic and Republican senators opposing Haynes's nomination.³ During President Bush's last two years in office, he proposed six nominees to fill the five vacancies in the court's fifteen authorized judgeships.⁴ The 110th Senate confirmed only one, Virginia Supreme Court Justice Steven Agee, but never voted on the remainder.⁵

These vacancies may undermine the delivery of justice in the Fourth Circuit; operating without all the judges has already exacted a toll.⁶ From mid-2007 until early 2010, the court functioned absent a quarter of its full complement, and for almost a year, it operated without one-third.⁷ Indeed, in the twelve-month period ending on September 30, 2008, the tribunal issued published opinions for only

* Williams Professor of Law, University of Richmond School of Law. Thanks to Peggy Sanner for valuable ideas, Tracy Cauthorn for excellent processing, and Russell Williams for generous, ongoing support. Remaining errors are mine.

1. Carl Tobias, *Filling Federal Appellate Vacancies*, 41 ARIZ. ST. L.J. 829, 829 (2009).

2. *Id.*

3. See Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 39, 39–42 (discussing President Bush's failed attempts to appoint Judge Terrence Boyle and William J. Haynes II to the Fourth Circuit).

4. See U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2008), <http://www.uscourts.gov/vacancies/archives.cfm> (follow "2008" hyperlink; then follow "Judicial Vacancy List" hyperlink under "June 1, 2008") (listing Rod J. Rosenstein, Robert J. Conrad, Jr., Glen E. Conrad, and Steve A. Matthews); U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2008), <http://www.uscourts.gov/vacancies/archives.cfm> (follow "2008" hyperlink; then follow "Judicial Vacancy List" hyperlink under "April 1, 2008") (listing Steven Agee, Rod J. Rosenstein, Robert J. Conrad, Jr., and Steve A. Matthews); U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2007), <http://www.uscourts.gov/vacancies/archives.cfm> (follow "2007" hyperlink; then follow "Judicial Vacancy List" hyperlink under "December 1, 2007") (listing Rod J. Rosenstein, Robert J. Conrad, Jr., E. Duncan Getchell, Jr., and Steve A. Matthews).

5. See Jerry Markon, *U.S. Appeals Court Gets New Judge*, WASH. POST, Aug. 3, 2008, at PWE8; U.S. COURTS, FEDERAL JUDICIAL CONFIRMATIONS (2009), <http://www.uscourts.gov/vacancies/archives.cfm> (follow "2009" hyperlink; then follow "Judicial Confirmations" hyperlink under "January 1, 2009") (listing Steven G. Agee).

6. See Hansen, *supra* note 3, at 42–43.

7. U.S. Courts, *Judicial Vacancies, Archives*, <http://www.uscourts.gov/vacancies/archives.cfm> (last visited Mar. 19, 2010) [Judicial Vacancies Archives] (providing statistical information on federal judicial vacancies from January 1, 1981, to the present).

about 6% of cases terminated on the merits after oral hearings or submission on briefs, and terminated only about 12% on the merits after oral arguments.⁸

Because the Fourth Circuit selection process has reflected the difficulties that trouble modern appointments and this court of appeals presented the worst case scenario when President Barack Obama assumed office, numerous observers wondered if these phenomena would continue into the new Administration.⁹ Even though four vacancies remained after President Obama's first year as President, he has either filled or nominated strong candidates for all but one, mainly because he avoided these counterproductive dynamics. The Fourth Circuit process may set the tone for the Administration and provide an instructive model for future appointments.

Fourth Circuit judicial selection deserves an examination, which this Article undertakes. The first part investigates the background of the Fourth Circuit appointments process, emphasizing relevant developments throughout the Bush Administration. The second part descriptively and critically assesses nomination and confirmation in the Obama Administration. The third part derives lessons from the Fourth Circuit selection efforts by comparing them with Obama's national selection efforts and processes in other administrations. For example, all four Obama nominees are ethnic minorities or women and were sitting judges when nominated, and one is younger than fifty-five.¹⁰ Accordingly, their confirmation increases the appeals court's ethnic and gender diversity and may portend the institution of a "career judiciary"; however, the appointments do not enhance the court's diversity of experience and enhance its diversity only somewhat in terms of age. The last part proffers recommendations for how the President and Senate might improve appointments.

I. THE BACKGROUND OF FOURTH CIRCUIT JUDICIAL SELECTION

The development of Fourth Circuit judicial selection requires comparatively limited evaluation in this Article because that background has been thoroughly analyzed elsewhere.¹¹ Nonetheless, some treatment is warranted because a

8. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 40 tbl.S-1, 42 tbl.S-3 (2010), <http://www.uscourts.gov/judbus2009/JudicialBusinesspdfversion.pdf> [hereinafter JUDICIAL BUSINESS 2009].

9. See, e.g., Jerry Markon, *Obama's Appointments Are Expected to Reshape the U.S. Legal Landscape*, WASH. POST, Dec. 8, 2008, at A1 (discussing the potential for change on the Fourth Circuit under the Obama Administration and the Democrats' political strategy for effectuating that change); John W. Dean, *The New Nattering Nabobs of Negativism Are Gunning for Obama's Judicial Nominees: A Republican Strategy That We Must All Hope Fails*, FINDLAW, Apr. 17, 2009, <http://writ.lp.findlaw.com/dean/20090417.html> (noting President Obama's potential for transforming the Fourth Circuit while also acknowledging the likelihood that Republican senators would oppose transformation).

10. See *infra* Part II.A.

11. See, e.g., Peter G. Fish, *Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals For the Fourth Circuit*, 15 WAKE FOREST L. REV. 635 (1979) (examining the selection process of Judge J. Dickson Phillips); Carl Tobias, *Federal Judicial Selection in the*

review should increase understanding of the selection process for this court and in general. It will also help improve understanding of more recent developments, especially in the Obama Administration, and available constructive avenues for improvement.

A. *Early History*

Throughout much of the Fourth Circuit's history, judicial appointments to federal appeals courts were not controversial. After 1891, when the Evarts Act¹² created the modern appellate system, including the Fourth Circuit,¹³ selection was comparatively uncontroversial. Courts were small and presidents often consulted with senators who represented the jurisdictions in which openings materialized.¹⁴ As recently as 1960, Congress had authorized only three judges for the Fourth Circuit.¹⁵ As late as 1977, lawmakers had approved seven.¹⁶ Passage of the last comprehensive judgeships statute in 1990 increased the tribunal's membership to its present fifteen,¹⁷ but the court has never operated with all of these seats filled.¹⁸ The increasing number and frequency of vacancies may partly explain the delay in Fourth Circuit appointments, which is also a national phenomenon.¹⁹

There were occasional exceptions to the comparatively smooth nomination and confirmation regimes that prevailed before the 1990s. One dispute involved a North Carolina opening during the Carter Administration.²⁰ The novel U.S. Circuit Judge Nominating Panel for the Fourth Circuit recommended William Van Alstyne, a venerable Duke University constitutional law professor; Julius

Fourth Circuit, 80 N.C. L. REV. 2001 (2002) (describing the history of federal judicial selection in the Fourth Circuit). See generally MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 290–324 (2000) (discussing the federal judicial selection process and how to reform it); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997) (discussing the federal judicial appointment process during much of the twentieth century).

12. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

13. See THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 9 (1994) (“The [Evarts] Act created a circuit court of appeals for each circuit.”).

14. See Tobias, *supra* note 11, at 2006.

15. See Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80 (current version at 28 U.S.C. § 44 (2006)).

16. See Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632 (current version at 28 U.S.C. § 44).

17. Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5098, 5099 (codified as amended at 28 U.S.C. § 44).

18. See Judicial Vacancies Archives, *supra* note 7.

19. See Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 323–33 (1994); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 528 (1998); Tobias, *supra* note 11, 2004–05.

20. See GOLDMAN, *supra* note 11, at 273–74.

Chambers, a renowned civil rights attorney; Western District of North Carolina Judge James McMillan, who resolved the landmark Charlotte-Mecklenburg school desegregation litigation; University of North Carolina School of Law Dean Dickson Phillips; and Duke University Chancellor and former Duke Law School Dean Kenneth Pye.²¹ After machinations that involved Senator Jesse Helms (R-N.C.) and Senator Robert Morgan (D-N.C.), the President eventually nominated Dean Phillips, who easily secured confirmation.²²

B. *Modern History*

During the tenure of President Ronald Reagan, Fourth Circuit judicial selection generally operated well, in part, because Republicans enjoyed a Senate majority throughout his first six years,²³ and Reagan made no Fourth Circuit appointments over his last half-term.²⁴ The selection process also functioned somewhat smoothly for most of President George H.W. Bush's Administration.²⁵ Near his presidency's termination, however, appointments slowed.²⁶ Democrats contended that "sporadic" nominations frustrated prompt confirmation, but Republicans asserted that Democrats stalled review in hopes of leaving many vacancies for a Democratic president to fill.²⁷ Illustrative is the case of Eastern District of North Carolina Judge Boyle, who President Bush nominated in 1991 but was not granted a floor vote before the chamber adjourned the following year, even though the Senate did confirm Judge Karen Williams in 1992.²⁸

During the Clinton Administration, the selection process for openings in most states of the Fourth Circuit performed rather well. For example, two nominees from West Virginia and one each from Maryland and South Carolina easily won appointment, principally because they were very qualified and the White House had consulted home-state senators before official nomination.²⁹ One major exception was North Carolina. The Administration nominated four talented individuals from that jurisdiction, but none received a floor vote mainly

21. See Fish, *supra* note 11, at 647.

22. *Id.* at 635, 648–650.

23. See GOLDMAN, *supra* note 11, at 286.

24. Judicial Vacancies Archives, *supra* note 7.

25. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993) (surveying President George H.W. Bush's selection process and appeals court appointments).

26. See *id.* at 284, 296.

27. Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 751.

28. See Tobias, *supra* note 11, at 2026; Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Mar. 16, 2010) (follow "W" hyperlink; then follow "Williams, Karen J." hyperlink).

29. Tobias, *supra* note 11, at 2027 (discussing the nominations of Blane Michael and Robert King from West Virginia, Diana Gribbon Motz from Maryland, and William Traxler from South Carolina).

due to Senator Helms's opposition,³⁰ which partly seemed a payback for chamber inaction on Judge Boyle.

President George W. Bush enjoyed limited success in confirming his nominees. He rarely consulted home-state elected officials—even GOP members, rarely nominated consensus candidates, and rarely worked cooperatively with the Senate to approve nominees.³¹ Illustrative was Bush's repeated renomination of Mr. Haynes notwithstanding opposition to him from both parties' senators.³² Neither received a floor vote, and after Democrats recaptured a Senate majority in 2006, the White House decided not to submit the candidates again.³³ Mr. Bush also nominated Claude Allen, the Department of Health and Human Services Deputy Secretary, to a Maryland vacancy,³⁴ but the home-state Democratic senators, Paul Sarbanes and Barbara Mikulski, opposed the nominee because he lacked involvement and experience in the Maryland legal community.³⁵

After the Democrats reassumed Senate control in 2007, President Bush nominated six people to fill four openings in Maryland, North Carolina, South Carolina, and Virginia.³⁶ Maryland Senators Barbara Mikulski (D) and Ben Cardin (D) did not support Rod Rosenstein, the U.S. Attorney for the jurisdiction, because they wanted him to remain as the chief prosecutor.³⁷ Democrats and several interest groups opposed the North Carolina nominee, Western District of North Carolina Chief Judge Robert Conrad, partly because of his perspectives on several controversial issues.³⁸ Democrats did not favor the

30. *See id.* at 2007, 2027.

31. *See* Tobias, *supra* note 1, at 857–59.

32. *See* Sheldon Goldman et al., *Picking Judges in a Time of Turmoil*, 90 JUDICATURE 252, 265–66 (2007); Hansen, *supra* note 3, at 42; Neil A. Lewis, *Bush Drops Plans to Resubmit 3 Judicial Nominees*, N.Y. TIMES, Jan. 10, 2007, at A18.

33. Goldman et al., *supra* note 32, at 265–66; Lewis, *supra* note 32.

34. Michael D. Shear, 'Conservative Values' Guide Court Appointee, WASH. POST, May 5, 2003, at B1.

35. *See* Letter from Sen. Barbara A. Mikulski & Sen. Paul S. Sarbanes to Alberto R. Gonzales, Counsel to the President (July 11, 2003), in *Confirmation Hearing on the Nomination of Claude A. Allen, of Virginia, to Be Circuit Judge for the Fourth Circuit; and Mark R. Filip, of Illinois, to Be District Judge for the Northern District of Illinois: Hearing Before the Comm. on the Judiciary United States S.*, 108th Cong. 177–78 (2003); Letter from Sen. Barbara A. Mikulski & Sen. Paul S. Sarbanes to Sen. Orrin G. Hatch, Chairman, & Sen. Patrick J. Leahy, Ranking Member (July 11, 2003), in *Confirmation Hearing on the Nomination of Claude A. Allen, of Virginia, to Be Circuit Judge for the Fourth Circuit; and Mark R. Filip, of Illinois, to Be District Judge for the Northern District of Illinois: Hearing Before the Comm. on the Judiciary United States S.*, 108th Cong. 176 (2003).

36. *See* Tricia Bishop, *U.S. Courts Due for Left Turn with Obama*, BALT. SUN, Dec. 7, 2008, at 1A; Judicial Vacancies Archives, *supra* note 7 (listing the nominations of federal court appointees).

37. *See* Bishop, *supra* note 36.

38. They cited Conrad's opinion piece that labeled Planned Parenthood the "most radical legal advocate of unfettered abortion on demand." Robert Conrad, *Planned Parenthood: A Radical Pro-Abortion Fringe Group*, CHARLOTTE OBSERVER, June 14, 1988, at 19A. They also cited his letter that strongly criticized Sister Helen Prejean as a "Church-hating nun" and her book, *Dead*

South Carolina nominee, attorney Steve Matthews, claiming that he possessed ideological views outside the legal mainstream.³⁹ A Virginia nominee, lawyer Duncan Getchell, was opposed because he was not one of the five candidates who had secured a favorable recommendation from a bipartisan group established by Virginia's senators, John Warner (R) and Jim Webb (D).⁴⁰

The principal exceptions in the Bush years were Judge Agee, who was a candidate the Virginia senators' bipartisan group suggested and who was confirmed in two months;⁴¹ Judge Allyson Duncan, who was a consensus nominee from North Carolina and easily won approval;⁴² and Judge Roger Gregory, whom President Clinton initially placed on the court through a recess appointment and whom President Bush nominated at the instigation of Virginia GOP Senators John Warner and George Allen.⁴³

C. *Effects*

These developments mean that the Fourth Circuit has not functioned with its total complement of judges since Congress increased the number to fifteen.⁴⁴ From mid-2007 until early 2010, the court operated with four, and occasionally five, vacancies.⁴⁵ The tribunal now affords the lowest percentages of published opinions and oral arguments of any regional circuit.⁴⁶ The court also depends

Man Walking, as "liberal drivel." Robert Conrad, Letter to the Editor, *Habitually Wrong*, CATHOLIC DOSSIER, Jan.–Feb. 1999, at 3, 3–4.

39. See Hansen, *supra* note 3, at 42.

40. See *id.*; Jerry Markon, *Bush's Picks for Court Spur Criticism by Warner, Webb*, WASH. POST, Sept. 7, 2007, at B5; Carl Tobias, Editorial, *Baffling Vacancy on Federal Bench*, BALTIMORE SUN, Jan. 18, 2008, at 21A.

41. See Markon, *supra* note 5, at PWE8. Another Virginia nominee, Western District Judge Glen Conrad, who was among the five, was nominated too late in a presidential election year to secure confirmation. See U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2008), <http://www.uscourts.gov/vacancies/archives.cfm> (follow "2008" hyperlink; then follow "Judicial Vacancy List" hyperlink under "June 1, 2008").

42. See 149 CONG. REC. S9558–59 (daily ed. July 17, 2003) (statements of Sen. Dole, Sen. Edwards, Sen. Hatch, and Sen. Leahy); see also Tobias, *supra* note 27, at 765 (discussing the commitment of Democratic senators to approve expeditiously certain nominees in 2002 and 2003, including Judge Allyson Duncan); Mike Allen, *Virginian Picked for 4th Circuit Judgeship*, WASH. POST, Apr. 29, 2003, at B1 (discussing the nominations of Claude Allen and Allyson Duncan).

43. Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A16; see Tobias, *supra* note 11, at 207–28; David G. Savage, *Clinton Losing Fight for Black Judge*, L.A. TIMES, July 7, 2000, at A1. After the GOP recaptured the Senate in 2002, the Democrats, in an apparent goodwill gesture, confirmed Fourth Circuit Judge Dennis Shedd, whom they had previously opposed. Richard Simon, *Senate OKs Long-Delayed Appeals Court Nomination*, L.A. TIMES, Nov. 20, 2002, at A22.

44. See *supra* notes 17–18 and accompanying text.

45. See Judicial Vacancies Archives, *supra* note 7.

46. See JUDICIAL BUSINESS 2009, *supra* note 8, at 40 tbl.S-1, 42 tbl.S-3; see also Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1739, 1742–43 (2005) (stating that in 1997 the Fourth Circuit tied three other circuits for the lowest number of oral arguments and had the lowest percentage of published opinions).

rather significantly on visiting judges.⁴⁷ However, from the filing of notice of appeal to final disposition, the Fourth Circuit resolves appeals the fastest.⁴⁸ Although the percentages of published opinions and arguments are valuable measures of appellate justice, those empirical data cannot support definitive conclusions because they serve as partial snapshots.

II. ANALYSIS OF JUDICIAL SELECTION IN THE OBAMA ADMINISTRATION⁴⁹

A. Descriptive Analysis

President Obama has instituted numerous practices meant to facilitate judicial appointments in the Fourth Circuit and nationally.⁵⁰ Before he took office, he started planning for judicial selection.⁵¹ He promptly named as White House Counsel Gregory Craig, a respected lawyer with much expertise,⁵² and the Administration swiftly enlisted talented attorneys to vet and clear prospects.⁵³ The Administration also relied on Vice President Joe Biden's nearly forty years of experience on the Senate Judiciary Committee.⁵⁴ The selection group foresaw and felicitously treated difficulties that could arise when choosing judges.⁵⁵ For instance, it assembled "short lists" of excellent candidates for potential Supreme Court vacancies.⁵⁶ President Obama has stressed bipartisanship, particularly by

47. JUDICIAL BUSINESS 2009, *supra* note 8, at 41 tbl.S-2. It is important to recognize, however, that the Fourth Circuit fairs comparatively well in its use of visiting judges, relying on visitors at a rate half the national average. *Id.*

48. *Id.* at 105 tbl.B-4.

49. I rely substantially in this part on a commentary written for McClatchy Newspapers. See Carl Tobias, *Solving the Federal Judicial Selection Problem*, MCCLATCHY, Dec. 31, 2009, <http://www.mcclatchydc.com/2009/12/31/81522/commentary-solving-the-federal.html>.

50. See Peter Baker & Adam Nagourney, *Sotomayor Pick a Product of Lessons from Past Battles*, N.Y. TIMES, May 27, 2009, <http://www.nytimes.com/2009/05/28/us/politics/28select.html>. See generally Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?*, 7 FORUM, Issue 1, art. 9, 2009, at 1, 9–12, <http://www.bepress.com/forum/vol7/iss1/art9/> (speculating on what the judicial selection process might look like during the Obama Administration).

51. See Jeffery Toobin, *Are Obama's Judges Really Liberals?*, THE NEW YORKER, Sept. 21, 2009, at 42, 43–44; Baker & Nagourney, *supra* note 50 ("The selection process got its start in the weeks after Mr. Obama's election last fall when he gathered advisers in a conference room in downtown Chicago one day.").

52. Christi Parsons & Peter Nicholas, *A Time of Transition*, L.A. TIMES, Nov. 22, 2008, at A12.

53. See Jon Ward, *White House Beefs Up Legal Staff; Officials Cite Need to Tackle 'Nightmare' Vetting Process*, WASH. TIMES, July 21, 2009, at B1.

54. Keith Koffler, *Biden's Staff to Play Key Role in Sotomayor Confirmation*, ROLL CALL, May 26, 2009, <http://www.rollcall.com/news/35256-1.html?CMP=OTC-RSS>.

55. See, e.g., Baker & Nagourney, *supra* note 50 ("In the months leading up to Judge Sotomayor's selection . . . , the White House methodically labored to apply lessons from years of nomination battles to control the process and avoid the pitfalls of the past, like appearing to respond to pressure from the party's base or allowing candidates to be chewed up by friendly fire.").

56. *Id.*

seeking the guidance of Democratic and Republican senators and upper echelon party officials from the states in which openings arise prior to official nominations.⁵⁷ To foster appointments, Obama has worked with the chairman of the Senate Judiciary Committee, Senator Patrick Leahy (D-Vt.), who arranges hearings and votes; Senate Majority Leader Harry Reid (D-Nev.), who schedules floor action; and their GOP counterparts, Senator Jeff Sessions (R-Ala.), the ranking member on the Senate Judiciary Committee, and Senate Minority Leader Mitch McConnell (R-Ky.).⁵⁸

When the President assumed office, Maryland, North Carolina, South Carolina and Virginia experienced single vacancies.⁵⁹ The unfortunate July 8, 2009, retirement due to illness of Chief Judge Karen Williams, an experienced jurist, created a fifth opening.⁶⁰ President Obama has filled most of these vacancies with nominees from the same jurisdictions in which the openings materialized.

For the Maryland seat, which had remained empty since July 31, 2000, President Obama acted swiftly.⁶¹ He consulted with Senators Mikulski and Cardin, who promptly recommended U.S. District Judge Andre Davis, whom President Clinton had nominated in October 2000, but it was too late in the presidential election year for confirmation.⁶² Davis, who served on the trial bench for almost fifteen years,⁶³ is intelligent, ethical, independent, and diligent, and has a balanced temperament. The President announced the nomination of Judge Davis on April 2, 2009.⁶⁴ The Senate Judiciary Committee granted the

57. See 156 CONG. REC. S1573 (daily ed. Mar. 16, 2010) (statement of Sen. Leahy) (“President Obama deserves praise for working closely with home State Senators, whether Democratic or Republican, to identify and select well-qualified nominees to fill vacancies on the Federal bench.”).

58. See Jeff Zeleny, *As Obama Pares Supreme Court List, Secrecy Is a Priority*, N.Y. TIMES, May 14, 2009, at A22 (noting that President Obama met with the four senators for forty minutes to discuss Justice Souter’s replacement).

59. U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2009), <http://www.uscourts.gov/vacancies/archives.cfm> (follow “2009” hyperlink; then follow “Judicial Vacancy List” hyperlink under “Feb. 1, 2009”).

60. See Josh White & Jerry Markon, *Diagnosis of Early Alzheimer’s Forces Chief Judge to Retire*, WASH. POST, July 10, 2009, at B3; see also Eric Connor, *Court Faces Shift Under Traxler*, GREENVILLE NEWS, July 12, 2009, at 1A (reporting the elevation of Judge Traxler as the Fourth Circuit’s chief judge following the retirement of former Chief Judge Williams).

61. See, e.g., Tricia Bishop, *City Judge Nominated for Court of Appeals; U.S. District’s Davis Gets a Second Shot at 4th Circuit*, BALT. SUN, Apr. 3, 2009, at 3A (discussing the renomination of U.S. District Court Judge Andre M. Davis of Maryland to fill the seat of the deceased Francis D. Murnaghan, Jr. of Maryland).

62. See *id.*

63. Press Release, The White House, President Obama Announces Judge Gerard Lynch for United States Court of Appeals for the Second Circuit, Judge Andre Davis for the United States Court of Appeals for the Fourth Circuit (Apr. 2, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Judge-Gerard-Lynch-for-United-States-Court-of-Appeals-for-the-Second-Circuit-Judge-Andre-Davis-for-the-United-States-Court-of-Appeals.

64. *Id.*

jurist a quick hearing.⁶⁵ The panel approved Judge Davis by a 16–3 vote on June 4, 2009.⁶⁶ After five months passed, the Senate conducted floor debate and approved the judge 72–16 on November 9, 2009.⁶⁷

President Obama consulted Democratic senators about filling Virginia’s unoccupied position.⁶⁸ Senators Jim Webb and Mark Warner requested that Virginia bar organizations solicit applications for the vacancy and screen prospects.⁶⁹ Those groups received applications, interviewed candidates, and voted on recommendations to the senators in February 2009.⁷⁰ The Webb and Warner staffs and a few attorneys interviewed the prospects in April, and the senators recommended Virginia Supreme Court Justice Barbara Milano Keenan,⁷¹ whom President Obama nominated on September 14.⁷² The jurist had served in the four levels of the Virginia judicial system and had been a member of its Supreme Court since 1991.⁷³ She received a hearing on October 7, and the judiciary panel approved her by voice vote on October 29.⁷⁴ However, it was not until March 2, 2010, that the Senate confirmed Judge Keenan 99–0.⁷⁵

The President consulted Senator Kay Hagan (D-N.C.) heavily about the North Carolina seat, which had been vacant since Judge Phillips’s 1994 assumption of senior status.⁷⁶ Senator Hagan established a judicial selection panel, chaired by former North Carolina Supreme Court Chief Justice Burley Mitchell, which submitted recommendations to her.⁷⁷ Judge James Wynn, whom President Clinton had nominated in 1999 but on whom the Senate never voted,

65. Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 16, 2009, at A1.

66. *Id.*

67. 155 CONG. REC. S11,282 (daily ed. Nov. 9, 2009).

68. See 156 CONG. REC. S794 (daily ed. Feb. 25, 2010) (statement of Sen. Warner) (noting that Senator Warner and Senator Webb interviewed candidates for the Fourth Circuit and proposed Justice Barbara Keenan, and that President Obama subsequently nominated her). I was an applicant for this opening and rely partly on that experience below.

69. See SEAN P. KELLY, VA. STATE BAR, JUDICIAL NOMINATIONS COMMITTEE SUMMARY REPORT 1 (2009).

70. See *id.* at 1–5.

71. See 156 CONG. REC. S794 (daily ed. Feb. 25, 2010) (statement of Sen. Warner).

72. See Press Release, The White House, President Obama Nominates Justice Barbara Milano Keenan for United States Court of Appeals for the Fourth Circuit (Sept. 14, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-Nominates-Justice-Barbara-Milano-Keenan-for-United-States-Court-of-Appeals-for-the-Fourth-Circuit.

73. *Id.*

74. See 155 CONG. REC. D1254 (daily ed. Oct. 29, 2009); 155 CONG. REC. D1145 (daily ed. Oct. 7, 2009).

75. 156 CONG. REC. S910 (daily ed. Mar. 2, 2010); see also *infra* notes 103, 114 and accompanying text (discussing confirmation vote for Judge Keenan).

76. U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2010), <http://www.uscourts.gov/vacancies/archives.cfm> (follow “2009” hyperlink; then follow “Judicial Vacancy List” hyperlink under “Mar. 1, 2010”).

77. Jim Morrill, *Panel Will Screen Judicial Candidates*, CHARLOTTE OBSERVER, Apr. 1, 2009, at B2.

and Superior Court Judge Albert Diaz were among those suggested.⁷⁸ Senator Hagan negotiated with the White House about the two candidates and the nomination of one to the South Carolina position left vacant by Judge William Wilkins's assumption of senior status.⁷⁹ The White House subscribed to her proposal and Senator Burr expressed his support for the candidates.⁸⁰ Thus, on November 4, President Obama nominated Judges Wynn and Diaz.⁸¹ Judge Wynn had been a highly regarded member of the intermediate appellate court for nearly two decades.⁸² Judge Diaz served on the North Carolina Superior Court for several years before becoming Charlotte's first judge on the North Carolina Business Court in 2005.⁸³ Each jurist has served as a judge in the military justice system.⁸⁴ On December 16, the Judiciary Committee conducted a hearing for both nominees, at which Senators Burr and Hagan voiced support, and on January 28, the Committee overwhelmingly approved both jurists.⁸⁵

As of mid-April 2010, the White House has yet to nominate anyone for the opening created by Chief Judge Williams's retirement,⁸⁶ although rumors have circulated about prospects whom the elected officials in South Carolina may have recommended.

The four nominees are similar in certain respects. Each is an ethnic minority or woman and sat on a federal or state bench when nominated. Judges Wynn and Diaz have also served in the military justice process.⁸⁷ All four seem to be mainstream jurists. Prior judicial service means that nominees have records, which the Senate, the American Bar Association (ABA), and the public can

78. See Barbara Barrett & Mark Johnson, *2 N.C. Judges Nominated for 4th Circuit*, CHARLOTTE OBSERVER, Nov. 5, 2009, at 1A.

79. Barbara Barrett, *N.C. Sen. Hagan Drove 4th Circuit Court Nominations*, MCCLATCHY, Nov. 23, 2009, <http://www.mcclatchydc.com/2009/11/23/79318/nc-sen-hagan-drove-4th-circuit.html>; see also Rick Brundrett, *Judge Wilkins Stepping Down*, THE STATE, Dec. 1, 2006, at A1 (reporting Judge Wilkins's assumption of senior status).

80. See 156 CONG. REC. S1572 (daily ed. Mar. 16, 2010) (statement of Sen. Hagan) (“[W]e have not one but two qualified judges, supported by both myself and Senator Burr.”).

81. Press Release, The White House, President Obama Nominates Judge Albert Diaz and Judge James Wynn to the Fourth Circuit Court of Appeals (Nov. 4, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-albert-diaz-and-judge-james-wynn-fourth-circuit-cou>.

82. Editorial, *Senate Should Confirm Al Diaz, Jim Wynn to Court*, CHARLOTTE OBSERVER, Dec. 16, 2009, at 18A.

83. Kirsten Valle, *Among Charlotte Judges, He Gets the Business*, CHARLOTTE OBSERVER, Aug. 16, 2008, at 1D.

84. See Press Release, The White House, *supra* note 81.

85. 156 CONG. REC. S1575 (daily ed. Mar. 16, 2010) (statement of Sen. Cardin) (“These appointments have been approved overwhelmingly by the Judiciary Committee—Albert Diaz and James Wynn—by votes of 19 to 0 and 18 to 1. They have the support of Senators Burr and Hagan.”); Barbara Barrett, *4th Circuit Nominees Sail in Hearing*, CHARLOTTE OBSERVER, Dec. 17, 2009, at 4B.

86. U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2010), <http://www.uscourts.gov/vacancies/archives.cfm> (follow “2009” hyperlink; then follow “Judicial Vacancy List” hyperlink under “Mar. 1, 2010”).

87. Press Release, The White House, *supra* note 81.

easily access and scrutinize, and have valuable experience, which may aid them in promptly, inexpensively, and fairly resolving appeals. Furthermore, the ABA accords serious consideration to experience as a judge when evaluating federal judicial candidates,⁸⁸ and accordingly, it assigned all four nominees a well-qualified rating.⁸⁹

B. Critical Analysis

1. Beneficial Aspects

Many advantageous features have characterized President Obama's Fourth Circuit judicial selection efforts. In his first fourteen months as chief executive, President Obama nominated four well-qualified nominees and appointed two to a court that had long experienced numerous vacancies and had been operating for two and a half years with four, and periodically five, seats empty.⁹⁰ Early and ongoing White House consultation with home-state senators seemed to promote the smooth nomination and confirmation of talented judges and apparently has decreased the rancor, interparty squabbling, and paybacks which had long attended judicial selection. As the Fourth Circuit gains its full contingent of judges, the court should be able to resolve appeals promptly, economically and fairly. More specifically, the tribunal could provide higher percentages of published opinions and oral arguments and might depend less on visiting judges. Relatively cooperative judicial selection also facilitates confirmation and increases public respect for appointments, the President, the Senate, and the judiciary.⁹¹

The selection of individuals who presently serve as judges correspondingly affords numerous benefits. Perhaps most important, the jurists have acquired considerable relevant experience, which means they will adjust rather quickly to the substantial demands of resolving a large docket. Moreover, they should have expertise that will permit them to decide cases swiftly, inexpensively, and equitably. Moreover, the nominees have relatively diverse judicial experience. Judge Davis was a federal district judge; Judge Keenan was a state supreme

88. See AM. BAR ASS'N, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (1983) ("Substantial trial experience (as a lawyer or a trial judge) is important for prospective nominees to both the appellate courts and the trial courts.").

89. See 155 CONG. REC. S10,604 (daily ed. Oct. 21, 2009) (statement of Sen. Cardin) (observing that Judge Davis received a well-qualified rating); Press Release, The White House, *supra* note 81 (observing that Judge Diaz and Judge Wynn received well-qualified ratings); Press Release, The White House, *supra* note 72 (observing that Judge Keenan received a well-qualified rating).

90. See Judicial Vacancies Archives, *supra* note 7.

91. Cf. Tobias, *supra* note 27, at 743-44 ("The [existence of many vacancies] appears to have undermined respect for all three federal government branches, most significantly the institutions of the presidency and the Senate, but even the judiciary.").

court justice; Judge Wynn was a state intermediate appellate court judge; and Judge Diaz was a state trial and business court judge.⁹²

Increasing ethnic and gender diversity on the federal appellate courts yields many advantages. Outstanding ethnic minority and female jurists can ably discharge the usual judicial duties, but they can also bring more. The jurists often assist their colleagues in appreciating and deciding questions related to certain issues, such as discrimination,⁹³ and possess a broad range of different, helpful views on other areas, including criminal procedure and employment law.⁹⁴ The President's minority and female appointees and nominees could expand ideological diversity. President Obama may defend this approach because Republican presidents have appointed a number of conservatives to numerous appeals courts⁹⁵ and he has deemphasized ideology.⁹⁶ People of color and women might also help restrict the ethnic, gender, and other forms of prejudice that trouble the justice system.⁹⁷ A judiciary whose composition reflects the nation instills more public confidence.⁹⁸ Enhancing diversity also signifies the Administration's commitment to improving circumstances for ethnic minorities

92. See *supra* Part II.A.

93. Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610–15 (2003); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 20–21 (2001).

94. See, e.g., Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761–62 (2005) (finding that female judges are “significantly more likely than male judges to find for plaintiffs” in sexual discrimination and sexual harassment claims and that the presence of a female judge on a judicial panel significantly increases the probability of a male judge supporting the plaintiff in a sexual discrimination or sexual harassment claim). *But see* George, *supra* note 93, at 20 (“Empirical studies . . . have failed to find any broad, gender-based behavioral distinctions between jurists.”).

95. See Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 763–64 (1991) (“Of the approximately 150 appointments made to the United States Circuit Courts by Nixon, Ford, Reagan and Bush, approximately 97% were white, 93% were white males, 4% were white women and 3% were minority males.”); Russell Wheeler, *How Might the Obama Administration Affect the Composition of the U.S. Courts of Appeals?*, BROOKINGS, Mar. 18, 2009, http://www.brookings.edu/opinions/2009/0318_courts_wheeler.aspx (“At present, after eight years of the Bush administration, the percentage [of the circuit judgeships] of Republican appointees stands at 56% . . .”).

96. President Obama may believe that the political branches can better adopt social change than unelected judges. See Toobin, *supra* note 51, at 46. Justice Sotomayor and some lower court nominees have disavowed empathy. See Jess Bravin, *Sotomayor Grilled by Panel*, WALL ST. J., July 15, 2009, at A3.

97. See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 *passim* (1994).

98. See Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 247, 253 (1978) (“A judiciary composed of many racial or ethnic strains as well as both sexes and major political parties—in other words a pluralistic judiciary—is more likely to win the confidence of the diverse groupings in a pluralistic society.”); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008) (“A representative judiciary provides important symbolic and political meaning, has more legitimacy, demonstrates to the American public that the system is equitable and free of discrimination, and is better able to achieve its goals of fairness and justice.”).

and women in the legal profession, the justice system, and the country.⁹⁹ It is a powerful message that lawyers of any ethnicity or gender can be named judges.

2. *Detrimental Aspects*

President Obama's judicial selection efforts have provided numerous benefits; however, certain aspects may warrant improvement. One important dimension is expedition: Nomination and confirmation have proceeded less rapidly than is ideal.¹⁰⁰ For example, the President appointed only a single Fourth Circuit judge in 2009—and not until November—and chose a mere 2 nominees before that month, while the federal judiciary experienced 100 openings at the end of 2009.¹⁰¹ The White House has also failed to nominate anyone for the protracted South Carolina vacancy.

Insofar as Fourth Circuit nominations and confirmations experienced delay, Obama deserves some, but not most, of the responsibility. A few ideas explain the slow nomination process. Consultation, although valuable, requires much care and time. Elected officials' use of selection panels to solicit, interview, and propose candidates; those officials' scrutiny of panel suggestions; their choice of prospects and negotiations with the White House; and President Obama's eventual nomination decisions all consumed substantial time.

Much responsibility for delayed appointments can fairly be assigned to Republican senators, who have cooperated less than they might.¹⁰² For instance, the GOP regularly delayed Judiciary Committee votes for a week absent persuasive explanations for the delay even when the Committee approved those nominees the following week. Illustrative was the vote on Justice Keenan, which Senator Sessions held over, although the ranking member had lauded her qualifications at an earlier hearing and the Fourth Circuit, having five openings, urgently needed additional judges.¹⁰³

The major bottleneck has been the Senate floor.¹⁰⁴ Six of the nine appellate court nominees approved by the Committee in 2009 did not receive debates and

99. See Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1047–48 (2008).

100. Fletcher, *supra* note 65 (“Obama has won confirmation in the Democratic-controlled Senate for just three of his 23 nominations for federal judgeships . . .”).

101. See Judicial Vacancies Archives, *supra* note 7.

102. See, e.g., 155 CONG. REC. S10,752 (daily ed. Oct. 27, 2009) (statement of Sen. Cardin) (discussing anonymous holds on appellate court judges).

103. See Posting of Andrew Clevenger to Squawk Box, <http://blogs.wvgazette.com/squawkbox/2009/10/29/4th-circuit-update-keenan-approved-by-judiciary-committee/> (Oct. 29, 2009).

104. Carl Tobias, *With Obama Proceeding Reasonably to Fill Federal Judgeships, the Bottleneck Is the Senate*, FINDLAW, Oct. 30, 2009, http://writ.news.findlaw.com/commentary/20091030_tobias.html.

votes in 2009.¹⁰⁵ Senator Reid worked with Senator McConnell and other Republicans but realized limited success.¹⁰⁶ For example, the GOP opposed floor debate on any nominee until the chamber approved the nomination of Supreme Court Justice Sonia Sotomayor, which meant the first lower court prospect was not appointed until September.¹⁰⁷ Republicans also did not fully cooperate in entering temporal agreements on nominees.¹⁰⁸ Senator Leahy complained that Democrats have wasted weeks pursuing time agreements to consider nominees who received unanimous confirmation.¹⁰⁹ Illustrative is the confirmation of Central District of California Judge Jacqueline Nguyen, who waited almost six weeks before the Senate approved her 97–0.¹¹⁰

The GOP has correspondingly requested much time for Senate floor debates but then used little of it. A trenchant example is District Judge Roberto Lange, for whom Republicans secured two hours, yet consumed only minutes, after which the Senate confirmed Lange 100–0.¹¹¹ The unanimous consent procedure means one senator can delay the body,¹¹² while anonymous holds have prevented scrutiny of individual nominees. The use of holds for qualified nominees who provoke minimal controversy is historically rare, if not unprecedented, but the GOP has frequently implemented it.¹¹³ The Democrats have invoked cloture to

105. United States Senate Committee on the Judiciary, *Judicial Nomination Materials: 111th Congress*, <http://judiciary.senate.gov/nominations/111thCongressJudicialNominations/Materials111thCongress.cfm> (last visited Mar. 19, 2010).

106. See Tobias, *supra* note 104.

107. *Id.*

108. See Press Release, Sen. Patrick Leahy, *Leahy Renews Call to Confirm Pending Nominations Before Recess* (Dec. 15, 2009), http://leahy.senate.gov/press/press_releases/release/?id=813da21a-f325-4f36-8d7c-f52ee746e615 (“The Senate is poised to confirm fewer nominations to fill circuit and district court vacancies in this first year of the Obama administration than were confirmed in the first years of the last four presidencies. Only 10 lower court judicial nominations have been confirmed this year. Democrats have sought time agreements to consider and vote on pending nominations, but objections have stalled the efforts.”).

109. See 155 CONG. REC. S13,245 (daily ed. Dec. 15, 2009) (statement of Sen. Leahy) (“We have had to waste weeks seeking time agreements in order to consider nominations that were then confirmed unanimously.”).

110. *Id.* at S13,244.

111. See 155 CONG. REC. S10,587 (daily ed. Oct. 21, 2009) (statement of Sen. Reid) (“Following morning business, the Senate will proceed to executive session to consider the nomination of Roberto Lange to be a U.S. district judge for the District of South Dakota. Under an agreement reached last night, debate on the nomination will be limited to 2 hours . . .”); *id.* at S10,611 (statement of Sen. Sessions) (“I wish to briefly make a few comments about the confirmation vote we will soon be having on supporting this nominee.”).

112. See WALTER J. OLESZEK, CONG. RESEARCH SERV., *SENATE POLICY ON “HOLDS”: ACTION IN THE 110TH CONGRESS I* (2008).

113. See Doug Kendall, *The Bench in Purgatory: The New Republican Obstructionism on Obama’s Judicial Nominees*, SLATE, Oct. 26, 2009, <http://www.slate.com/id/2233309/> (“The emerging Republican strategy is to hold these uncontroversial nominees hostage as pawns in the larger war over President Obama’s agenda and the direction of the federal judiciary. . . . This is unprecedented and dangerous.”).

force a vote,¹¹⁴ but this procedure appears to have inflamed Republicans and exacerbated delay. The Senate approved fewer lower court nominees in Obama's first year than were confirmed during each of the initial years of the last four administrations.¹¹⁵

When Justice David Souter resigned in May, swiftly filling his seat became imperative, and that process required three months, during which virtually no lower court selection occurred.¹¹⁶ Moreover, the Administration confronted the "start-up" expenses of implementing a new government. Before December 15, 2009, the Senate failed to confirm several Assistant Attorneys General and many U.S. Attorneys.¹¹⁷ The President also faced critical needs for treating many intractable difficulties, such as the recession, Guantanamo, and the Iraq and Afghanistan conflicts, which earlier presidents bequeathed.

III. LESSONS FROM FOURTH CIRCUIT JUDICIAL SELECTION

A. *The Obama Administration's Selection Process*

The Obama Administration's Fourth Circuit judicial selection initiatives resemble its national appointments endeavors. The White House has consulted home-state elected officials when making nominations and confirming prospects. The officials, in turn, have often depended on selection panels or bar entities to screen and recommend candidates. The practices instituted have yielded talented appointees who have secured much relevant experience as judges, earned the highest ABA ratings, and been diverse in terms of ethnicity and gender. Fewer accusations and paybacks and less divisiveness and partisanship have marked selection. These considerations have facilitated appointments and will likely enhance citizen regard for the process, the Executive, the Senate, and the courts.

Most of those phenomena have been advantageous, yet some have drawbacks. Obama's efforts to foster bipartisanship and consensus yielded mixed success, partly because the GOP has not always reciprocated, and the endeavors have imposed costs, such as delay and compromise. For example, the Administration's consultation with senators and their invocation of panels have consumed time and slowed appointments, while consultation might have limited somewhat President Obama's ability to choose the type of judges that he favors

114. See 156 CONG. REC. S908–09 (daily ed. Mar. 2, 2010) (invoking cloture to vote on the confirmation of Judge Keenan); 155 CONG. REC. S11,421 (daily ed. Nov. 17, 2009) (invoking cloture to vote on the confirmation of Judge Hamilton).

115. Press Release, Sen. Patrick Leahy, *supra* note 108.

116. Tobias, *supra* note 104.

117. See Ed O'Keefe, *Key Positions Vacant as Nominees Await Senate Confirmation*, WASH. POST, Dec. 31, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/30/AR2009123002625.html>; Tobias, *supra* note 104; see also Press Release, Sen. Patrick Leahy, *supra* note 108 (noting that three nominees to be Assistant Attorneys General were awaiting confirmation as of December 15, 2009).

and thus mold the bench.¹¹⁸ The unwillingness of Republicans as a caucus and of particular GOP senators to cooperate in nominations and appointments has concomitantly wasted time and led to increased openings. The White House also may have not set priorities as well as it might. For instance, the time devoted to Fourth Circuit vacancies, although necessitated by the plethora of openings, may have limited the resources for addressing other empty seats. Indeed, by November 2009, the Second Circuit experienced a higher percentage of vacancies than the Fourth, all of which were “judicial emergencies” and lacked nominees for three openings, while the total federal judiciary had almost 100 unfilled positions.¹¹⁹

The choice of sitting judges, which offers advantages, particularly vis-à-vis relevant experience, might have downsides. For example, numerous observers, including the late Chief Justice William Rehnquist, have questioned the wisdom of establishing a “career judiciary” in the federal courts, which resembles the model practiced in many European countries.¹²⁰ Critics mainly premise their opposition on the American tradition of drawing federal judges from a broad spectrum—notably private practice, including both plaintiffs’ and defense counsel, federal prosecutors, public defenders, and legal scholars, who offer different perspectives and areas of expertise.¹²¹ Some assert that the interest in being elevated may undermine judicial independence or express concern about further bureaucratizing a judiciary which they already deem overly bureaucratic.¹²² President Obama’s Fourth Circuit appointees, who were sitting

118. President Obama’s views on these issues remain unclear. *See* Toobin, *supra* note 51, at 42–49; David Fontana, *Going Robe*, THE NEW REPUBLIC, Dec. 17, 2009, www.tnr.com/article/environment-energy/going-robe?page=0,1.

119. U.S. COURTS, FEDERAL JUDICIAL VACANCIES (2009), <http://www.uscourts.gov/vacancies/archives.cfm> (follow “2009” hyperlink; then follow “Judicial Vacancy List” hyperlink under “Dec. 1, 2010”). The Obama Administration focused on the Fourth Circuit because of the “judicial emergencies” on that circuit. Judicial emergencies are appellate vacancies (1) “where adjusted filings per panel” exceed 700 or (2) “in existence more than 18 months where adjusted filings are between 500 to 700 per panel.” *Id.* (follow “2009” hyperlink; then follow “Judicial Emergencies” hyperlink under “Dec. 1, 2010”). In November 2009, the Fourth Circuit had three judicial emergencies and the Second Circuit had four judicial emergencies. *Id.* (follow “2009” hyperlink; then follow “Judicial Emergencies” hyperlink under “Dec. 1, 2009”).

120. *See* Seth Stern, *A Career as Federal Judge Isn’t What it Used to Be*, CHRISTIAN SCI. MONITOR, Jan. 22, 2002, at 1, 4. *See generally* RUSSELL WHEELER, THE CHANGING FACE OF THE FEDERAL JUDICIARY (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf (surveying the demographics of the federal judiciary); Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 305–06 (2003) (mapping the trend of the career judiciary during the George W. Bush Administration).

121. *See, e.g.*, Goldman et al., *supra* note 120, at 306 (analyzing the backgrounds of President George W. Bush’s 2001–2002 federal judicial appointees).

122. *See, e.g.*, JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS 1–19 (2002) (analyzing the bureaucratization of the U.S. Courts of Appeals); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 115–19 (1985) (discussing the bureaucratization of the federal judiciary); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983) (surveying the bureaucratization of the judiciary).

judges when nominated, do not significantly increase this type of diversity of experience on the tribunal.

Additional observers have questioned certain attributes possessed by the Fourth Circuit appointees. Only one—Albert Diaz—is under fifty-five. Some have contended that Republican success in naming comparatively young jurists furnished longevity on appellate courts and experienced prospects for Supreme Court vacancies.¹²³ Others have treated the appointees' ideological perspectives, intimating that the judges are too liberal or overly conservative.¹²⁴ More particularly, some urge greater balance and argue that GOP opposition, even to moderate nominees, suggests compromise on ideology is an unproductive tactic and that Republican presidents have aggressively and candidly appointed conservative judges, even alleging they had popular mandates to increase conservatism on the bench.¹²⁵

B. *Comparison of Obama Administration to Prior Administrations*

The Obama Administration practices both resemble and differ from those of other recent chief executives in some ways. Obama, like all modern presidents, has centralized Supreme Court and appellate selection in the White House, but seems to have granted more deference to senators of each party in nominating most court of appeals candidates. Obama's reliance on the Department of Justice in helping nominees prepare for Senate analysis resembles that of most contemporary presidents. Many Obama selection procedures are similar to those of President Clinton.¹²⁶ President Clinton practiced bipartisanship and consultation. He was willing to consider and nominate less ideological, more

123. See, e.g., David Fontana & Micah Schwartzman, *Old World*, THE NEW REPUBLIC, July 17, 2009, <http://www.tnr.com/article/politics/old-world> (raising concerns regarding the average age of President Obama's judicial nominees). See generally George, *supra* note 93, at 16–18 (discussing age as a factor in judicial decision making).

124. See, e.g., John Fritze & Joan Biskupic, *GOP's Sessions 'Troubled' over Court Nominees; Worries Obama Picks Are Activist Judges*, USA TODAY, June 16, 2009, at 7A (describing comments from Sen. Jeff Sessions criticizing appellate nominees, including Judge Andre Davis).

125. See Fontana, *supra* note 118; see also Tobias, *supra* note 99, at 1043, 1045–46 (recommending that George W. Bush deemphasize ideology in selecting nominees); Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 28, 2008, available at <http://www.nytimes.com/2008/10/29/us/29judges.html> (describing ideology of George W. Bush's nominees). Ethnic and gender diversity have many positive features. However, a few observers have challenged the advisability of emphasizing this diversity, couching their arguments primarily in terms of merit—ideas that the “Wise Latina” controversy reflects. See, e.g., Michael D. Shear, *Riding Herd on the Message; White House Guides Fervent Sotomayor Supporters*, WASH. POST, June 15, 2009, at A3 (“The last thing the administration needed, senior aides to President Obama made clear to their liberal allies both publicly and privately, was a war . . . over whether [Sotomayor] is a racist. Stay on message, they counseled, and we will offer a clear case about her credentials and legal experience.”).

126. Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 278–79 (1995) (analyzing President Clinton's selection process).

consensus-oriented prospects, stress merit as well as ethnic and gender diversity, and depoliticize the process.¹²⁷

President Obama also differs from recent White House occupants in certain ways. For example, he has steadily nominated, employing press releases to announce several at nominees once.¹²⁸ This approach compares favorably with the George W. Bush and Clinton Administrations, which submitted large packages as the Senate recessed, a phenomenon that complicated efficient Senate assessment.¹²⁹ President Obama has correspondingly depoliticized appointments. For instance, Justice Sotomayor is the only candidate whom the President himself introduced,¹³⁰ which is appropriate for a Supreme Court nominee. President Obama's method contrasts with President Bush's employment of a White House ceremony attended by eleven nominees when publicizing his first set.¹³¹ Obama's conciliatory approach, especially regarding the Fourth Circuit, also sharply differs from President Bush's approach, as Obama vowed to end the confirmation wars,¹³² in part, by assiduously consulting with senators and tendering consensus prospects.

IV. SUGGESTIONS FOR THE FUTURE

The Obama Administration's Fourth Circuit selection procedures have been successful, filling vacancies that have long plagued the appellate court. Therefore, the White House and the Senate must continue following the techniques which have been efficacious, recalibrate the ideas that have proved less effective, and implement new devices which hold promise.

President Obama's nomination measures generally appear efficacious. For instance, consultation with Democratic and Republican senators has facilitated nomination and appointment, and should continue. The panels and bar entities that senators used have proved valuable and should be deployed, although they do consume time and some may lack transparency. The President ought to apply strategies, including greater resource commitment that will ensure prompter

127. See *id.* at 279 (“[T]here was the determined effort not to screen nominees ideologically. The president told Democratic senators and other officeholders that there should be no ideological screening.”); see also *id.* at 276 (“In 1993 and 1994 a record proportion of women and minorities, about three-fifths of all appointees, were appointed to the federal bench.”).

128. See Press Release, The White House, *supra* note 63 (announcing the nominations of Judge Gerard Lynch and Judge Andre Davis); Press Release, The White House, *supra* note 81 (announcing the nominations of Judge Albert Diaz and Judge James Wynn).

129. See Judicial Vacancies Archives, *supra* note 7.

130. See Shailagh Murray & Michael D. Shear, *First Latina Picked for Supreme Court; GOP Faces Delicate Task in Opposition*, WASH. POST, May 27, 2009, at A1 (noting that President Obama personally introduced Justice Sotomayor).

131. Neil A. Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. TIMES, May 10, 2001, at A29.

132. Carl Tobias, *Ending ‘Confirmation Wars’*, BALT. SUN, Nov. 30, 2009, http://articles.baltimoresun.com/2009-11-30/news/bal-op.confirmation30nov30_1_confirmation-wars-district-judge-david-hamilton-district-court-record.

nominations, so that the Senate always has a sufficient number of outstanding prospects to facilitate confirmation. The White House appropriately proceeded with caution, apparently recognizing that one misstep, such as nominating a candidate who lacks the requisite ability or character, will slow or even derail appointments.

The confirmation process has moved less swiftly than is optimal and that pace has contributed to the numerous present vacancies. The Judiciary Committee majority has expedited nominee analyses, hearings and votes, but the minority's routine dependence on holds has created some delay. Thus, the GOP should limit the tactic's use. The real bottleneck has been the Senate floor. Republicans ought to cooperate more. They should enter time agreements, limit anonymous holds, and eschew the practice of stalling consensus nominees. Although President Obama and Democrats have properly followed conciliatory approaches, such as nominating candidates whom GOP senators favor, the minority has not always reciprocated. If that party's senators persist in employing these strategies, Democrats ought to invoke cloture or related procedures. Should those actions prove ineffective, President Obama could rely on his bully pulpit to embarrass or threaten Republicans or even make judicial selection an election issue, as the GOP has.¹³³

President Obama must promptly fill the South Carolina vacancy by consulting with Senators Graham and DeMint and Representative Clyburn, assessing their recommendations and nominating an excellent candidate. When additional Fourth Circuit openings arise, the White House should follow the practices described with appropriate changes. To fill the remaining appellate vacancies, Obama and the Senate might extrapolate from the practices that were successful in the Fourth Circuit with alterations matched to specific courts' situations. For example, panels like those that Fourth Circuit senators deployed may prove helpful in eliciting recommendations for the two Connecticut Second Circuit openings,¹³⁴ while the cooperation that North Carolina's senators exhibited might be useful in addressing the Tenth Circuit vacancies.¹³⁵

133. See David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008) (book review) (discussing the institutional strength of the Presidency in influencing the confirmation of nominees).

134. See generally Edmund H. Mahony, *Changes Coming Down from Top*, HARTFORD COURANT, Oct. 5, 2009, available at http://articles.courant.com/2009-10-05/news/patronage-1005.art_1_appeals-court-district-court-connecticut-and-vermont (discussing two vacancies on the Second Circuit); Edmund Mahony, *Judge Chatigny Nominated to Seat on U.S. 2nd Circuit Court of Appeals*, HARTFORD COURANT, Feb. 25, 2010, http://articles.courant.com/2010-02-25/news/hc-chatigny-nominated-0225.artfeb25_1_judge-chatigny-chief-judge-federal-judge (discussing the nomination of Judge Chatigny to the Second Circuit).

135. See generally Robert Boczkiewicz, *Resignation Turns to Politics*, TULSA WORLD, Dec. 12, 2009, at A1 (discussing a vacancy on the Tenth Circuit created by the retirement of Judge Robert H. Henry); Thomas Burr, *Scott Matheson Named to 10th Circuit Appellate Court*, SALT LAKE TRIB., Mar. 4, 2010, http://www.sltrib.com/utahpolitics/ci_14506179 (discussing Senator Hatch's approval of the nomination of Scott Matheson to the Tenth Circuit).

V. CONCLUSION

A review of Fourth Circuit judicial selection in the nascent Obama Administration and the 111th Senate demonstrates that the President and the Senate have successfully filled numerous openings which had eroded the court's delivery of justice. The practices applied furnish a valuable model for subsequent vacancies that occur in the Fourth Circuit and the remaining appellate tribunals.