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ObamaCourts?:
The Impact of Judicial Nominations on Court Ideology
*by Brian S. Clarke**

ABSTRACT

The federal Courts of Appeals are the courts of last resort for the vast majority of contested legal issues, and decide the cases that are of the greatest importance for the development of the law in the United States. Presidents seek to leave their political and ideological marks on these courts through their judicial nominations.

But what happens when a new president nominates judges to a Court of Appeals with a collective ideology different than his or her own? What near term effect do these new judges have on the overall ideology of the Courts of Appeals on which they serve? Given the body of precedent each Court of Appeals builds over years and decades, can new judges have a meaningful impact on the overall ideology of a Court of Appeals in the near term?

This paper seeks to begin answering these questions by engaging in the first ever quantitative analysis of the near term impact of a president's successful judicial nominees on the ideology of a federal Court of Appeals. As the results of this study show, new judges can have a significant impact on the ideology of a Court of Appeals in the near term and can even alter the court's overall ideology.

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I. INTRODUCTION

The American fascination with the interplay of law and politics has spawned best-selling novels,¹ blockbuster movies,² and story lines on television.³ Cable news breathlessly covers the political theater surrounding presidential nominations to the U.S. Supreme Court and, more frequently, ideologically contentious Supreme Court opinions.

The media typically portrays the connection between political ideology and case outcomes as clear and unambiguous: judges are either “liberal” or “conservative,” and “liberal judges” always vote in a “liberal” way, while “conservative” judges always vote in a “conservative” way. As with most media narratives, this one is grossly oversimplified, but does contain some kernels of truth. For example, studies have shown that, at least in certain types of cases, judges nominated by Democratic presidents are more likely to vote in a “stereotypically liberal”⁴ way than judges nominated by Republican presidents.⁵

Much of the research on the link between political ideology and case outcomes has focused on the U.S. Supreme Court.⁶ However, it is the

¹ See, e.g., JOHN GRISHAM, *THE PELICAN BRIEF* (1992) (#1 on N.Y. Times Best Seller List March 15 through May 10, 1992, see *BEST SELLERS: May 10, 1992*, N.Y. TIMES (May 10, 1992), <http://www.nytimes.com/1992/05/10/books/best-sellers-may-10-1992.html>); BRAD METZLER, *THE TENTH JUSTICE* (1997); ANTHONY J. FRANZE, *THE LAST JUSTICE* (2012).

² See *THE PELICAN BRIEF* (Warner Bros. 1993).

³ See *The West Wing: The Short List* (NBC television broadcast Nov. 24, 1999); *The West Wing: Celestial Navigation* (NBC television broadcast Feb. 16, 2000); *The West Wing: The Supremes* (NBC television broadcast Mar. 24, 2004).

⁴ Throughout this paper, I use the terms “stereotypically liberal” and “stereotypically conservative” (or simply “liberal” and “conservative”). These terms are, of course, oversimplified and I do not mean to imply that every judge nominated by a Democratic president will vote in a “stereotypically liberal” way in every case (or even in every labor and employment case), or that every judge nominated by a Republican president will vote in a “stereotypically conservative” way in every case (or in every labor and employment case). Studies have shown that the applicable law is the most significant driver of case outcomes and that political ideology is an important, but secondary, factor. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1514 (2003).

⁵ Cass R. Sunstein et al., *Ideological Voting on the Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004) [hereinafter Sunstein et al., *Ideological Voting*]. See also LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 106–16 (2013); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 147–50 (2006) [hereinafter SUNSTEIN ET AL., *ARE JUDGES POLITICAL?*]; Cross, *supra* note 4, at 1504–06.

⁶ For a very small sample of research regarding the Supreme Court, see Clifford J. Carrubba et al., *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. POL. SCI. 400, 400 (2012); Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice’s Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267 (2012); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court?: Probably Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2011); Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009); Lee Epstein et al., *The Bush Imprint on the*

U.S. Circuit Courts of Appeals, which [issue] probably the decisions of greatest importance for the development of the law in the United States . . . [because they] are the courts of last resort for the vast majority of litigants and, hence, for the vast majority of contested legal issues⁷ These are the courts that define and develop “principles of law and policy directly governing their respective regions and indirectly affecting the rest of the nation.”⁸

Of the scholarship focused on the federal Courts of Appeals, much has been written on decision-making in the federal Courts of Appeals generally,⁹ as well as on the individual voting patterns of federal Courts of Appeals judges.¹⁰ However, prior research on the federal Courts of Appeals has generally focused on broad trends over large time frames,¹¹ testing various models of judicial decision-making,¹² or, more recently, on whether political ideology (whether their own or that of the president who nominated them) impacts the individual votes of Courts of Appeals judges in various types of “ideologically contested” cases.¹³

Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear, 43 TULSA L. REV. 651 (2008); Lee Epstein et al. *On the Perils of Drawing Inferences about Supreme Court Justices from their First Few Years of Service*, 91 JUDICATURE 168 (2008); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

⁷ Cross, *supra* note 4, at 1459–60.

⁸ *Id.* at 1460 (quoting Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1636 (1998)). See also DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 3 (2000).

⁹ See, e.g., SONGER ET AL., *supra* note 8; J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981); Cross, *supra* note 4.

¹⁰ See, e.g., EPSTEIN ET AL., *supra* note 5; SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 5; Sunstein et al., *Ideological Voting*, *supra* note 5.

¹¹ See SONGER ET AL., *supra* note 8.

¹² See Cross, *supra* note 4.

¹³ See EPSTEIN ET AL., *supra* note 5; SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 5; Susan Haire et al., *Presidents and Courts of Appeals: The Voting Behavior of Obama’s Appointees*, 97 JUDICATURE 137 (2013); Sunstein et al., *Ideological Voting*, *supra* note 5.

In *Presidents and Courts of Appeals*, Professor Haire, et al., analyze the individual voting habits of President Obama’s first term Court of Appeals nominees based on a sample of cases gathered consistent with the methodology used to create the U.S. Courts of Appeals Database (available at <http://artsandsciences.sc.edu/poli/juri/appct.htm>). Professor Haire and her colleagues conclude that “[a]cross all time periods, decisions of judges appointed by Democratic presidents Obama, Clinton, and Carter tended to be more liberal than those made by judges appointed by Republican Presidents G.W. Bush, Reagan, and G.H.W. Bush.” Haire et al., *supra* note 13, at 139. As to President Obama’s nominees, Professor Haire found that their decisions “were slightly more conservative than those of judges appointed by other Democratic presidents with thirty-six percent of the votes by Obama judges supporting liberal policy outcomes.” *Id.* at 140. Given these individual voting tendencies, Professor

What the prior studies have not examined is the direct, near term effect of successful presidential judicial nominations on the *overall* ideology of the Courts of Appeals on which those new judges serve. Given the body of precedent that each Court of Appeals builds over years and decades (which new judges cannot simply ignore because they may subjectively disagree), can new judges have a meaningful impact on the overall ideology of a Court of Appeals in the near term?

This study, which is the first ever to focus on whether successful Courts of Appeals nominees have a near term impact on the collective judicial ideology of the Court of Appeals on which they sit, will begin filling this gap in the scholarly literature.¹⁴

Broadly, my hypothesis is that successful judicial nominations to a federal Courts of Appeals with a judicial ideology contrary to that of the nominating president have a measurable impact on that court's collective ideology in the near term (from zero to two years following confirmation).¹⁵ The results of this study, which I discuss in detail below, provide strong support for this hypothesis.

Haire predicted that President Obama's successful nominees were most likely to have a "significant policy impact" on the Fourth Circuit and the Third Circuit. *Id.* at 143. This study proves Professor Haire's prediction correct, at least as far as the Fourth Circuit is concerned.

¹⁴ This is the first in what will (hopefully) be a series of papers using the data set developed for this project and (hopefully) an expanded dataset that encompasses all the federal Courts of Appeals.

¹⁵ The impetus for this study was my experience as a practicing lawyer in the Fourth Circuit and my work on behalf of the North Carolina and South Carolina Bar Associations to give an annual update on the Fourth Circuit to their respective labor and employment law sections. In the course of this work, which I started in 2008, I began to see surprising results in cases from 2010, 2011, and 2012. The pattern was clear to me. During my presentations and in my manuscripts in both 2011 and 2012, I stated that, based on my observations, the Fourth Circuit was moderating as a result of President Obama's nominees. See Brian S. Clarke, *The Fourth Circuit Year In Review: October 1, 2010 through September 30, 2011* 7-8 (Oct. 21, 2011) (unpublished manuscript) (available at <http://ssrn.com/abstract=2064779>). While I saw the pattern and could share my observations with others, I began this study to see if I could *prove*, quantitatively and empirically, that my observations were, in fact, correct.

One could legitimately argue that the Fourth Circuit has "obviously" shifted toward the left given certain high profile decisions, such as upholding the Patient Protection and Affordable Care Act ("ACA") in *Liberty University v. Geithner*, 671 F.3d 391 (4th Cir. 2011) (majority opinion by Motz, J.) (Wynn, J., concurring) (Davis, J., dissenting) (holding that penalties for non-compliance with the ACA's individual mandate constituted a "tax" and, therefore, a pre-enforcement challenge was barred by the Anti-Injunction Act), *vacated and remanded for reconsideration in light of National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), and *Liberty University v. Lew*, 733 F.3d 72 (4th Cir. 2013) (unanimous opinion by Motz, J., joined by Davis, J. and Wynn, J.). Likewise, this can be seen in the court's decision upholding the ACA's tax subsidies for all eligible purchasers in *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (unanimous opinion by Gregory, J., joined by Thacker, J., and Davis, J.); its decision declaring Virginia's ban on same sex marriage to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (majority opinion by Floyd, J., joined by Gregory, J.) (Neimeyer, J., dissenting); or even its decision reversing a capital murder conviction on ineffective assistance of counsel grounds in *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011) (majority opinion by King, J., joined by Gregory, J.) (Wilkinson, J., dissenting). See also Sharon McCloskey, *Is the 4th Circuit Veering Back to the Center?*,

Summary of Methodology.

In this study, I focused on two federal Courts of Appeals: the Fourth Circuit, to which President Obama had six successful nominees in his first term, and the Eighth Circuit, to which President Obama had no nominees in his first term. The Fourth Circuit, with its influx of successful nominees by President Obama, was the study group; the Eighth Circuit, with its stability and lack of Obama nominees, was the control group. My study-specific hypothesis is that President Obama's successful nominations to the Fourth Circuit bench during his first term shifted the Fourth Circuit's collective ideology and resulted in more "stereotypically liberal" decisions in the near term (i.e., 2010-2012).

For each of these Courts of Appeals, we¹⁶ identified, coded, and examined the outcomes of all of their labor and employment cases¹⁷ from 2004, 2006, 2008, 2010, and 2012.¹⁸ I then compared the outcome data from the Fourth Circuit (the study group) to the outcome data from the

N.C. POLICY WATCH (Feb. 13, 2013), available at <http://www.ncpolicywatch.com/2013/02/13/is-the-4th-circuit-veering-back-to-the-center/>. However, it is difficult to draw broad conclusions based on isolated cases. While my own professional experience, my knowledge of the Fourth Circuit's case law, and instinct told me an ideological shift was afoot on the Fourth Circuit, the only way to actually *prove* it was to do what I have done in this study, namely study cases over a period of years and analyze the data.

¹⁶ I use the term "we" here and throughout the description of methodology because I was aided by several outstanding research assistants, primarily Nicole Trautman and Alexandria Andresen, with additional assistance from Malena Wilkes and Eleanor Smith in the data collection and coding process. But for their work, this data set would not exist.

¹⁷ Labor and employment law is an area where there is "general agreement" that ideological difference plays a role in case outcomes. See Sunstein et al., *Ideological Voting*, supra note 5, at 309. Additionally, empirical studies have shown a strong link between ideology and the individual votes of Court of Appeals judges in at least some types of employment law cases. *Id.* at 305, 314, 318-21, 324-25.

¹⁸ This time frame encompasses both the Fourth Circuit's most recent peak of Republican nominees (2004 through 2006) and the confirmation of all six of President Obama's successful first-term nominees to the Fourth Circuit bench. In 2004, the Fourth Circuit bench consisted of eight judges nominated by Republican presidents, five judges nominated by Democratic presidents, and two vacant seats. There were also two active senior judges in 2004, one of whom was nominated by a Republican president and one by a Democratic president. Counting the senior judges as one-fourth of a Circuit Judge (the typical case load for a senior circuit judge), there were 8.25 Republican nominees and 5.25 Democratic nominees sitting on the Fourth Circuit in 2004 (for a total of 13.5 judges). Thus, judges nominated by Republican presidents accounted for 61.11% of the sitting Fourth Circuit judges throughout 2004 and until the resignation of Judge Michael Luttig in May 2006.

Of President Obama's nominees to the Fourth Circuit, one was confirmed in 2009 (Judge Andre Davis, confirmed Nov. 2009), three were confirmed in 2010 (Judges Barbara Keenan, confirmed March 2010; James Wynn, confirmed August 2010; and Albert Diaz, confirmed December 2010), and one each in 2011 and 2012 (Judges Henry Floyd, confirmed October 2011; and Stephanie Thacker, confirmed April 2012). As of Judge Thacker's confirmation on April 17, 2012, there were ten Democratic nominees and five and a quarter Republican nominees (including one senior judge) sitting on the Fourth Circuit bench. Thus, judges nominated by Democratic presidents accounted 63.16% of the sitting Fourth Circuit judges from January 1, 2012, to April 16, 2012, and 65.57% of the sitting Fourth Circuit judges from April 17, 2012, through the end of that year.

Eighth Circuit (the control group) and performed various statistical analyses on the data from both courts to ensure that the quantitative differences were, in fact, statistically significant.

Summary of Findings.

Overall, the results of this study show a marked and statistically significant near term shift in the ideology of the Fourth Circuit toward the “stereotypically liberal” end of the ideological spectrum as President Obama’s nominees took their seats on the court. This shift in ideology has resulted, most critically, in a statistically significant **decrease** in employer victories on appeal in cases appealed by employees to the Fourth Circuit, despite what appears to be an overall background trend toward the opposite result as seen in the Eighth Circuit.

The Fourth Circuit’s ideological shift is demonstrated in two separate places in the data. First, comparing the ideological outcomes¹⁹ of all of the Fourth Circuit’s labor and employment cases in the study period to those from the Eighth Circuit shows a statistically significant increase in “liberal” outcomes (and a corresponding decrease in “conservative” outcomes) in the Fourth Circuit in 2010 and 2012, the years in which judges nominated by President Obama began serving on the court. Second, looking solely at the cases in which the employer prevailed in the district court and the employee appealed (i.e., cases in which the employee was the appellant),²⁰ the employee prevailed in the Fourth Circuit in a significantly higher percentage of cases in the years with judges nominated by President Obama (2010 and 2012) than in those without (2004, 2006, and 2008). While the difference in outcomes in 2010 and 2012 is statistically significant in comparison to the Fourth Circuit’s own outcomes from 2004, 2006, and 2008, there is also a statistically significant difference in the outcomes in this group of cases when compared to similar cases from the Eighth Circuit.²¹

This paper is organized as follows. Part II provides a brief overview of the two Courts of Appeals in the study, including the makeup of their benches during the study period. Part III describes the methodology of the study in detail. Part IV examines the results of the study by (A) engaging

¹⁹ See *infra* note 35 and accompanying text.

²⁰ As discussed in Part IV, below, these are primarily cases in which the employer prevailed on a Motion for Summary Judgment or Motion to Dismiss in the district court and the employee appealed to the Court of Appeals. These procedural postures, and the *de novo* standard of review that accompanies them on appeal, are undoubtedly significant in illustrating the ideological shift seen in the data.

²¹ See *infra* Part IV.

in a comparison of the overall outcome data from the Fourth Circuit and Eighth Circuit in the Obama years (2010 and 2012) versus the pre-Obama years (2004, 2006, and 2008);²² (B) focusing on the cases in which the employee was the appellant and comparing the outcomes in this subset of cases in the pre-Obama years and the Obama years within each court;²³ and (C) focusing again on the cases in which the employee was the appellant and comparing the outcomes in this subset of cases from the Fourth Circuit with the outcomes in this subset from the Eighth Circuit in the pre-Obama years versus the Obama years.²⁴ Finally, Part V discusses the conclusions drawn from the study and the implications of those conclusions.

II. THE COURTS: STUDY GROUP AND CONTROL GROUP

A. The Study Group: The United States Court of Appeals for the Fourth Circuit

For most of the last twenty years, the Fourth Circuit has been regarded as one of the most—if not *the* most—conservative of the U.S. Courts of Appeals.²⁵ Presidents Ronald Reagan and George H.W. Bush successfully nominated seven judges to the Fourth Circuit bench. By the 1992 presidential election, Republican nominees outnumbered Democratic nominees by a two to one margin.²⁶ In the late 1990s and early 2000s, the Fourth Circuit was, according to the *New York Times*, a “model of conservative pursuits” and “the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members.”²⁷ The Republican-nominated majority on the court was “bold and muscular in its conservatism”²⁸ and not “reluctant to wield its majority forcefully,” even

²² See *infra* Part IV.A.

²³ See *infra* Parts IV.B.1–2.

²⁴ See *infra* Part IV.B.3.

²⁵ Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, <http://www.nytimes.com/2003/03/09/magazine/the-power-of-the-fourth.html> (“[W]hen it comes to high-profile decisions, the Fourth Circuit tends to divide neatly along party lines. And taken together, those decisions not only bespeak a conservative philosophy of law but also serve a conservative political agenda.”). See Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, <http://www.nytimes.com/1999/05/24/us/a-court-becomes-a-model-of-conservative-pursuits.html?src=pm&pagewanted=1> (describing the Fourth Circuit as “the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members”).

²⁶ Sontag, *supra* note 25 (noting there were eight conservative judges and four liberals in 2003).

²⁷ Lewis, *supra* note 25.

²⁸ Sontag, *supra* note 25.

allegedly “prevent[ing] the release of judicial opinions that displeased them.”²⁹

During the Clinton³⁰ and G.W. Bush³¹ administrations, the relative percentage of Republican-nominated judges on the Fourth Circuit varied, but never dipped below 54.5%.

When Barack Obama was sworn in on January 20, 2009, the Fourth Circuit bench contained six judges nominated by Republican presidents,³² five judges nominated by Democratic presidents,³³ and four vacant seats.³⁴

²⁹ Lewis, *supra* note 25. When President Clinton took office in January 1993, the Fourth Circuit was at its numerical apogee of Republican nominated judges. The Circuit consisted of nine judges nominated by Republican presidents, three nominated by Democratic presidents, and three vacant seats.

³⁰ President Clinton’s successful nominations to the Fourth Circuit were as follows: Judges Blane Michael of West Virginia, who took his seat on October 1, 1993; Diana G. Motz of Maryland, who took her seat on June 16, 1994; William B. Traxler, Jr., of South Carolina, who took his seat on October 1, 1998, and Robert B. King of West Virginia, who took his seat on October 9, 1998 (all confirmed by unanimous consent). President Clinton also used a recess appointment to place Judge Roger Gregory of Virginia on the Fourth Circuit bench on December 15, 2000. Judge Gregory was the first African-American to serve on the Fourth Circuit. President Bush subsequently re-nominated Judge Gregory for a full seat.

For purposes of this study, I classify Judge Gregory as being nominated by a Democratic president (Clinton), as it was President Clinton who first nominated Judge Gregory and first placed him on the Fourth Circuit via a recess appointment. For the other judges, I classify them as either Democratic nominees or Republican nominees based on the political party of the President who nominated the judge for service on the Court of Appeals, even if a President of a different political party first nominated the judge for a seat on lower federal court. For example, Judge Traxler is a Democratic (Clinton) nominee to the Fourth Circuit, even though he was a successfully nominated to the U.S. District Court for the District of South Carolina by a Republican president (G.H.W. Bush).

³¹ President G.W. Bush’s successful Fourth Circuit nominees, excluding Judge Gregory, were as follows: Judges Allyson K. Duncan of North Carolina, who took her seat on August 15, 2003 (confirmed by a vote of 93-0); Dennis Shedd of South Carolina, who took his seat on November 26, 2002 (confirmed on a largely party line vote of 55-44 with one abstention); and G. Steven Agee of Virginia, who took his seat on July 1, 2008 (confirmed by a vote of 96-0).

³² Judges Wilkinson (Reagan), Williams (G.H.W. Bush), Niemeyer (G.H.W. Bush), Shedd (G.W. Bush), Duncan (G.W. Bush), and Agee (G.W. Bush).

³³ Judges Michael, Motz, Traxler, King and Gregory (all Clinton).

³⁴ The vacant seats had been most recently occupied by Judge Dickson Phillips (senior status, July 1994); Judge Francis Murnaghan (death, August 2000); Judge Emory Widener (senior status, July 2007); and Judge William Wilkins (senior status, July 2007). An additional seat became vacant when then-Chief Judge Karen Williams suddenly retired in July 2009 upon being diagnosed with early onset Alzheimer’s disease. With Judge Williams’s retirement, the Fourth Circuit reached a strange sort of equilibrium with five Republican nominees, five Democratic nominees, and five vacant seats.

The story of how four seats on the Fourth Circuit were open upon President Obama’s nomination is an interesting one. Presidents Clinton and G.W. Bush tried to fill those vacancies repeatedly. However, they were consistently rebuffed, to the tune of thirteen failed nominations to the Fourth Circuit between them. President Clinton’s five failed nominees were the most for any Court of Appeals during his two terms in office and accounted for 24.74% of all his failed Court of Appeals nominees. (President Clinton had twenty-three total failed Court of Appeals nominations: five to the Fourth Circuit; three each to the Third, Fifth, Sixth and Ninth Circuits; two each to the Tenth and DC Circuits; one each to the Eighth and Eleventh Circuits; and zero to the First, Second, or Seventh Circuits.) Likewise, President G.W. Bush’s eight failed nominees to Fourth Circuit were the most for any Court of Appeals during his two terms in office and accounted for 32% of all his failed Court of Appeals nominees.

With the chance to nominate one-third of the Fourth Circuit bench, President Obama had a potential opportunity to shift the Fourth Circuit's judicial ideology.

With this prospect looming, Judge J. Harvie Wilkinson, III, the most senior judge on the Fourth Circuit, wrote a rather extraordinary op-ed column, which ran in *The Washington Post* on January 23, 2009 (three days after President Obama's first inauguration).³⁵ Judge Wilkinson cautioned that "the tempting course" of "go[ing] for an ideological makeover" "would prove a misguided" course.³⁶

Law . . . is a medium through which judges of disparate beliefs often can find common ground. Ideological fervor is law's great antithesis. This is especially true on the courts of appeal, which, unlike the Supreme Court, do not have self-selected dockets and whose cases are often more technically challenging than ideologically flavored Wisdom in judging resides, now more than ever, in knowing all that we do not know, in resisting the urge to become ideologically self-assured Wherever wisdom resides, it does not lie with the ideologues; activism of all persuasions is a trade best practiced away from the bench.³⁷

Judge Wilkinson closed with this plea: "I pray that [the] coming appointments to our court will not cause the doors of communication and

(President Bush had twenty-five total failed Court of Appeals nominations: eight to the Fourth Circuit; three each to the Sixth and Ninth Circuits; two each to the Fifth and DC Circuits; one each to the First, Second, Seventh, Tenth, and Eleventh Circuits; and zero failed nominees to the Eighth Circuit.) In total, the thirteen failed nominees to the Fourth Circuit during the sixteen years of the Clinton and G.W. Bush Administrations, which accounted for 27.08% of the forty-eight failed Court of Appeals nominees during their combined terms, were, by far, the most failed nominations to any federal Court of Appeals. Further, nominees to the Fourth Circuit failed at more than twice the rate of nominations of any other circuit. In fact, there were more failed nominees to the Fourth Circuit during the Clinton and Bush years than to any other two federal Courts of Appeals combined. For an excellent discussion of the political history behind these failed nominations, see Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. Rev. 2161 (2011).

³⁵ J. Harvie Wilkinson III, *Obama's Judicial Choices: Storming the 4th Circuit?*, THE WASHINGTON POST, Jan. 23, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/22/AR2009012202842.html>. I am not aware of another situation in which a sitting Court of Appeals judge wrote an op-ed purporting to give advice to a President of the United States on prospective nominees to that judge's court.

³⁶ *Id.*

³⁷ *Id.*

compromise to slam shut. A polarized 4th Circuit would bring no discernible public benefit.”³⁸

President Obama essentially took Judge Wilkinson’s advice (even if he did not mean to do so). In identifying and selecting his nominees, President Obama sought, first and foremost, bipartisan nominees who would be confirmed by the Senate, rather than ideological purity. As detailed by Professor Carl Tobias:

President Obama . . . emphasized bipartisanship, partly by soliciting the advice of Democratic and Republican committee members and high-ranking party officials from the states in which openings result, prior to formal nominations Often before, and invariably after, nominations, the White House and Senate have coordinated. To facilitate appointments, President Obama cooperated with Senators Patrick Leahy (D-Vt.), the panel chair, who schedules hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who arranges floor consideration; and their GOP analogues, Senators Jeff Sessions (R-Ala.) and Mitch McConnell (R-Ky.).³⁹

The end result of this process was a group of nominees each of whom possessed “mainstream jurisprudential approaches, especially with respect to ideology.”⁴⁰ It also resulted in six successful nominees to the Fourth Circuit in President Obama’s first term: Judge Andre M. Davis of Maryland (confirmed November 9, 2009); Judge Barbara M. Keenan of Virginia (confirmed March 2, 2010); James A. Wynn, Jr. of North Carolina (confirmed August 5, 2010); Judge Albert Diaz of North Carolina (confirmed December 18, 2010); Judge Henry F. Floyd of South Carolina (confirmed October 3, 2011); and Judge Stephanie D. Thacker of West Virginia (confirmed April 16, 2012).⁴¹

³⁸ *Id.*

³⁹ Tobias, *supra* note 34, at 2170–71 (internal citations omitted). Professor Tobias details the selection process for each of President Obama’s successful nominees with the exception of Judge Stephanie Thacker, who was nominated on September 8, 2011, after Professor Tobias’s article was complete. As a result, the details of those nominations and how they came about need not be recounted here. For the specifics, see *id.* at 2171–75. As to Judge Thacker, it is highly likely that President Obama employed a similar process.

⁴⁰ *Id.* at 2176. In this sense, President Obama followed Judge Wilkinson’s advice and, ironically, achieved an “ideological makeover” of the Fourth Circuit nonetheless.

⁴¹ Not only were all six of President Obama’s first term nominees successful, but they were, at the end of the day, almost entirely uncontroversial. Out of 600 total votes in the Senate, President Obama’s

With six confirmed nominees to the Fourth Circuit bench during his first term in office, President Obama—at least on the surface—remade the Fourth Circuit into a heavily Democratic court, with ten judges nominated by Democratic presidents and five nominated by Republican presidents.

Given the Fourth Circuit’s decades-long conservatism, however, has the Court’s ideology actually changed, especially given the “mainstream” ideology of his six successful nominees? Based on the results of this study, the answer to this question is: “Yes.”

B. The Control Group: The United States Court of Appeals for the Eighth Circuit

In contrast to the Fourth Circuit, the Eighth Circuit remained virtually unchanged between 2004 and 2012, both as to membership and ideology. Throughout this nine-year period, the composition of the Eighth Circuit has remained between eleven Republican-nominated judges and three Democratic-nominated judges in 2004⁴² to nine Republican and two Democratic nominees in 2012. The Eighth Circuit was the only Court of

six nominees received a total of nineteen “No” votes. Judge Davis was confirmed by a vote of 72-16. Judges Keenan (99-0) and Floyd (96-0) were confirmed on unanimous votes. Judges Wynn and Diaz were confirmed by unanimous consent. Finally, Judge Thacker was confirmed by a vote of 91-3. Based on these outcomes, a total of 3.17% of the votes in the Senate were opposed to President Obama’s six first-term nominees.

President Obama’s lone second-term nominee to date – Professor Pamela Harris of Maryland (nominated to fill the seat vacated when Judge Andre Davis took senior status on Feb. 28, 2014) – proved far more controversial. Thanks to the 2013 revision to the Senate’s Rules to allow cloture on Court of Appeals nominations on a simple majority vote, Professor Harris’s nomination advanced to the full Senate on July 28, 2014, and she was confirmed by a largely party line vote of 50-43. *See* U.S. Senate Roll Call Votes 113th Congress - 2nd Session, Vote No. 242, July 28, 2014, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00242. No Republicans voted in favor of Professor Harris’s nomination and two Democrats (Sen. Joe Manchin of West Virginia and Sen. Mark Pryor of Arkansas) voted against Professor Harris. *Id.* Seven senators (four Republicans and three Democrats) did not vote. *Id.*

⁴² Two judges nominated by President George W. Bush were confirmed in 2004, Judge Raymond Gruender in June and Judge William Benton in July, replacing judges who took senior status in 2003. Both of these Senior Judges remained active during at least part of the study period: Judge Pasco Bowman, a Reagan appointee, throughout, and Judge Theodore McMillian, a Carter appointee, until his death in 2006. One additional G.W. Bush nominee, Judge Bobby Shepherd, was confirmed in October 2006, replacing Judge Morris Arnold, a G.H.W. Bush nominee. Two leading systems for rating the political ideology of federal judges are the “Judicial Common Space” ideology score (the “JCS”) and the “Giles-Hettinger-Pepper” ideology score (the “GHP”). *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007); Micheal W. Giles, Virginia Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001). Both are rated on a scale from –1 (liberal) to 1 (conservative). For both the JCS and the GHP, the closer the score to 1, the more conservative the judge, and the closer to –1, the more liberal the judge. Judge Shepherd has ideology scores of GHP = 0.531. Judge Arnold, whom he replaced, had ideology scores of JCS = 0.578 and GHP = 0.502. With virtually identical JCS and GHP scores, Judge Shepherd’s confirmation should have had no ideological impact on the Eighth Circuit.

Appeals to which President Obama did not nominate a single judge during his first term.

Additionally, the Fourth Circuit and the Eighth Circuit have a number of similarities from a socio-political standpoint that support using them as comparisons. Both contain, politically speaking, a “blue state” (Maryland in the Fourth and Minnesota in the Eighth); one or more “red” states (South Carolina in the Fourth and Nebraska, North Dakota, and South Dakota in the Eighth); and several “purple” states (North Carolina, Virginia, and West Virginia in the Fourth and Iowa, Missouri, and Arkansas in the Eighth). Ideologically speaking, the Fourth and Eighth Circuits were also virtually identical in composition and ideological voting patterns as of 2002, as shown in the Sunstein studies on ideological voting on the Courts of Appeals.⁴³

Although there are numerous variables that one cannot account for—such as the types of cases, the quality of the attorneys, the background public attitude, and the like—there is no reason to believe that any of these factors were significantly different in the Fourth Circuit and the Eighth Circuit. Further, as all the cases involved primarily federal statutory claims, any changes in the law, whether from the Supreme Court or from Congress, applied equally in both circuits.

As the most stable Court of Appeals from 2004 and 2012, the only Court of Appeals to which President Obama did not appoint a judge during his first term, and the court with the greatest similarity to the Fourth Circuit in studies by Sunstein, the Eighth Circuit serves as the control group in this study.

III. METHODOLOGY

While not a perfect lens through which to evaluate the impact of judicial nominees on court ideology, labor and employment law jurisprudence generally correlates with a Court of Appeals’ judicial ideology. For example, in the study by Sunstein on ideological voting on the Courts of Appeals, four⁴⁴ of the thirteen potentially “ideologically contested” areas of law were within the realm of employment law.⁴⁵ Further, in each of these areas of employment law, Sunstein concluded there was a strong

⁴³ See Sunstein et al., *Ideological Voting*, *supra* note 5, at 331 fig.6.

⁴⁴ Sunstein identified these as “racial discrimination,” “sex discrimination,” “disability discrimination,” and “sexual harassment.” *Id.* at 305.

⁴⁵ *Id.*

correlation between ideology and voting.⁴⁶ Similarly, employment law cases are separately tracked and correlated with ideology (either “liberal” or “conservative”) in both the Supreme Court database and the U.S. Courts of Appeals database. In general, ideology correlates to the outcomes of labor and employment law cases as follows: an outcome in favor of an employee, or an agency acting on behalf of an employee, is “liberal” while an outcome in favor of the employer is “conservative.”⁴⁷

For this study, we identified, coded, and examined the outcomes of every labor and employment decision from the Fourth Circuit and the Eighth Circuit from 2004, 2006, 2008, 2010, and 2012. I then compared the outcome data from the Fourth Circuit (the study group) to the outcome data from the Eighth Circuit (the control group) and performed various statistical analyses on the data from both courts to ensure that the quantitative differences were, in fact, statistically significant

In order to gather the cases for this study, for each year of the study, we executed the following search in the Westlaw database for all Fourth Circuit cases (CTA4) and, separately, in the Westlaw database for all Eighth Circuit cases (CTA8):

("title vii" flsa ada adea fmla "genetic information"
"section 1981" owbpa "equal pay act" "rehabilitation act"
userra erisa eppa nlra nlrp lmra) & da(aft 12/31/20__ &
bef 01/01/20__)⁴⁸

This search resulted in a list of all federal labor and employment law cases issued by each court in that calendar year—both published and unpublished⁴⁹—plus a number of irrelevant cases.⁵⁰ We reviewed each case

⁴⁶ *Id.*

⁴⁷ *Id. See also Online Code Book*, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/documentation.php?s=1> (last visited Oct. 11, 2014); *U.S. Appeals Courts Database*, THE JUDICIAL RESEARCH INITIATIVE AT THE UNIVERSITY OF SOUTH CAROLINA, <http://artsandsciences.sc.edu/poli/juri/appct.htm> (last visited Oct. 11, 2014).

⁴⁸ The blanks in the dates were filled in for each year as follows: 2004 = da(aft 12/31/2003 & bef 01/01/2005); 2006 = da(aft 12/31/2005 & bef 01/01/2007); 2008 = da(aft 12/31/2007 & bef 01/01/2009); 2010 = da(aft 12/31/2009 & bef 01/01/2011); and 2012 = da(aft 12/31/2011 & bef 01/01/2013).

⁴⁹ Unlike the Sunstein study, I included unpublished opinions in my study cohort as the Courts of Appeals often engage in significant substantive analysis even if they ultimately do not publish the opinion. All of the substantive opinions are readily and publically available. Despite the fact that they are not officially “binding” precedent, Courts of Appeals and District Courts regularly cite unpublished opinions. Further, it is possible that the nature of unpublished opinions makes them a better vehicle for decisions influenced by ideology. This is an additional issue to explore and is part of the data set created for this study, but is beyond the scope of this paper.

and removed those that did not involve substantive labor or employment law claims. Finally, we removed all cases in which *both* (1) the court of appeals affirmed on the reasoning of the district court without any discussion of the substantive law; *and* (2) the plaintiff/employee appeared *pro se* before the court of appeals.⁵¹ This process resulted in a set of 389 cases from the Fourth Circuit⁵² and 418 cases from the Eighth Circuit.⁵³

We then coded the outcome of each case as follows:

<i>Code</i>	<i>Description</i>
1	Reversal of Judgment for Employer (“ER”), in whole or in substantial part (i.e., ER won in the district court, and Employee (“EE”) won, in whole or in substantial part, in the Court of Appeals [“COA”]).
2	Affirm Judgment for EE, in whole or in substantial part (i.e., EE won in the district court, and the EE also won, in whole or in substantial part, in the COA).
3	Pure Tie (EE and ER won on equal number of issues in COA – this should be rare).
4	Affirm Judgment for ER, in whole or in substantial part (i.e., ER won in the district court, and the ER also won, in whole or in substantial part, in the COA).
5	Reversal of Judgment for EE, in whole or in substantial part (i.e., EE won in the district court, and ER won, in whole or in substantial part, in the COA).

I call this the “Base Outcome Code.” Base Outcome Codes 1 and 2 correlate with “liberal” outcomes (coded as “1” for the statistical analysis), and Base Outcome Codes 4 and 5 correlate with “conservative” outcomes

⁵⁰ This search also successfully identified cases brought under other labor and employment law statutes which were not explicitly part of the search, such as the LMRDA, the Mine Safety and Health Act, and others.

⁵¹ Essentially I used *either* representation by counsel *or* a substantive opinion as a proxy for the theoretical merit of the appeal. So, if either of my proxies for merit – a substantive opinion *or* representation of the plaintiff by counsel – was present, I included the opinion in the study. I omitted the cases where *neither* of my proxies for merit was present on the basis that because the plaintiff/employee appeared *pro se* and the court did not engage in any substantive analysis, it was highly unlikely that the appeal had legal merit. If the court engaged in any substantive analysis or if the plaintiff/employee was represented by counsel, the case was included in the study. Specifically, there are a significant number of non-substantive, per curiam opinions affirming on the reasoning of the district court included because the employee was represented by counsel on appeal.

⁵² The 388 Fourth Circuit cases were spread across the five years as follows: 2004 = 94; 2006 = 83; 2008 = 85; 2010 = 61; and 2012 = 66.

⁵³ The 418 Eighth Circuit cases were spread across the five years as follows: 2004 = 92; 2006 = 101; 2008 = 74; 2010 = 80; and 2012 = 71.

(coded as “0” for the statistical analysis).⁵⁴ Additionally, we coded a variety of information regarding the claims asserted, whether the opinions were published, the members of the panel, the author of the panel opinion, the authors of any concurring or dissenting opinions, the individual votes of the judges, the ideology of those votes, and the composition of the panels by the party of the president who nominated each judge and by the identity of the president.⁵⁵

Using the coded data, I engaged in a variety of both quantitative and statistical analyses of the outcomes. I analyzed the Outcome Ideology data within each court for year-to-year variation and for variation between the years in which President Obama’s nominees served on the Fourth Circuit (2010 and 2012) and those they did not (2004, 2006, and 2008). I also analyzed the Outcome Ideology data by comparing the outcomes from the two courts on both year-to-year and pre-Obama years versus Obama years bases; and also by comparing expected outcomes from the study group, the Fourth Circuit, to see if it behaved like the control group, the Eighth Circuit. I performed the same analyses both within each court and comparatively between the two courts using the Base Outcomes data. -

As part of each analysis, I tested for statistical significance using a chi-squared (χ^2) test and resulting *p*-value. A *p*-value of less than 0.05 indicates statistical significance.⁵⁶

⁵⁴ This ideological coding is consistent with the methodology used by Sunstein and others but is somewhat more realistic. See Sunstein et al., *Ideological Voting*, *supra* note 5. In Sunstein’s study, which focused on individual judge’s votes rather than on case outcomes, a vote to give the plaintiff/employee any relief whatsoever (no matter how slight) was coded as liberal (1); only votes to give the plaintiff/employee no relief of any kind were coded as conservative (0). While my coding injects a larger degree of subjectivity, the overall subjectivity in coding remains circumscribed and provides a more realistic categorization of the case outcome. In the statistical analysis, I omitted the handful of cases with a Base Outcome Code of “3,” which indicated an even split. There were eleven such cases in the Eighth Circuit out of 418 total cases during the study period (three in 2004, four in 2006, zero in 2008, and two in both 2010 and 2012) and one such case in the Fourth Circuit (in 2004) out of 389 total cases.

⁵⁵ Likewise, the coding of this data is consistent with the methodology used by Sunstein and others. See Sunstein et al., *Ideological Voting*, *supra* note 5.

⁵⁶ As explained by Professor Peter Hooper of the University of Alberta Department of Mathematical and Statistical Sciences:

We wish to test a null hypothesis against an alternative hypothesis using a dataset. The two hypotheses specify two statistical models for the process that produced the data. The alternative hypothesis is what we expect to be true if the null hypothesis is false. We cannot prove that the alternative hypothesis is true but we may be able to demonstrate that the alternative is much more plausible than the null hypothesis given the data. This demonstration is usually expressed in terms of a probability (a P-value) quantifying the strength of the evidence against the null hypothesis in favor of the alternative.

IV. RESULTS OF THE STUDY

Because I located and coded the entire case population for each year, the preliminary analysis of the data set involved nothing more complicated than basic math. Looking at the Fourth Circuit data set as a whole (and in isolation), there did not appear to be a significant ideological shift in the Fourth Circuit during the 2004 to 2012 timeframe. Overall, the rate of “liberal” and “conservative” outcomes remained relatively consistent ranging from an average of 72.03% “conservative” in 2004, 2006, and 2008 (the “pre-Obama years”) to an average of 68.50% “conservative” in 2010 and 2012 (the “Obama years”), a difference of 4.47%. This minor variation is not, in and of itself, statistically significant.⁵⁷ However, a comparison of the Fourth Circuit data with the data from the Eighth Circuit, as well as a deeper look at the Fourth Circuit data itself, reveal a very different result.

A. Comparison of Overall Outcome Data: Fourth Circuit vs. Eighth Circuit

In each of the first two years of the study, 2004 and 2006, the Fourth and Eighth Circuits displayed very similar ideological outcome profiles. The Fourth Circuit had 70 conservative outcomes (75.27%) and 23 liberal outcomes (24.73%) in 2004; and 61 conservative outcomes (73.49%) and 22 liberal outcomes (26.51%) in 2006. The Eighth Circuit had 63 conservative outcomes (70.79%) and 26 liberal outcomes (29.21%) in

See Peter Hooper, What is a P-Value 1 (missing date) (unpublished manuscript) (available at <http://www.stat.ualberta.ca/~hooper/teaching/misc/Pvalue.pdf>). As further explained by Dr. Laurence Greene, then of the University of Colorado:

As the P value gets lower (i.e., closer to 0% and farther away from 100%), researchers are more inclined to accept the research hypothesis and to reject the null hypothesis . . . [With an “alpha” value of 0.05,] if the P values that are calculated in statistical tests are less than alpha . . . $P < .05$. . . the researchers would conclude that their study results are statistically significant. A relatively simple way to interpret P values is to think of them as representing how likely a result would occur by chance. For a calculated P value of .001, we can say that the observed outcome would be expected to occur by chance only 1 in 1,000 times in repeated tests on different samples of the population.

See Laurence Greene, A Brief Explanation of Statistical Significance and P Values 2 (2008) (unpublished manuscript) (available at http://www.colorado.edu/intphys/Class/IPHY3700_Greene/slides/generatingContentInterpret/explainPValues.pdf). The null hypothesis in this study would be that the differences in the data was not due to the presence of President Obama’s nominees on the Fourth Circuit bench and the “alpha” would be 0.05.

⁵⁷ Analyzing this data using Pearson’s chi-squared test resulted in $\chi^2 = 0.5148$ and $p\text{-value} = 0.473$. A $p\text{-value}$ greater than 0.05 indicates that the differences in the data are not statistically significant.

2004; and 70 conservative outcomes (71.43%) and 27 liberal outcomes (27.55%) in 2006. Combined, during 2004 and 2006, the Fourth Circuit had 131 (74.43%) conservative outcomes and 45 (25.57%) liberal outcomes; the Eighth Circuit had 133 (71.51%) conservative and 53 (28.49%) liberal outcomes. The difference between the two courts was 2.92%, with the Fourth Circuit the more “conservative” court. In 2008, the Eighth Circuit was the more “conservative” court by about 11%. Regardless, at the end of the “pre-Obama” period, the Fourth and Eighth Circuits were separated by only 1.43%, with the Eighth Circuit being the slightly more “conservative” court.⁵⁸

Table 1. Comparison of Fourth Circuit and Eighth Circuit Outcomes in Years without Obama-nominated Judges on the Fourth Circuit Bench (2004, 2006, 2008)

Outcome	Court of Appeals		Total
	4th Cir.	8th Cir.	
0 = Conservative (Employer) win	188 72.03%	191 73.46%	379 72.74%
1 = Liberal (Employee) win	73 27.97%	69 26.54%	142 27.26%
Total	261 100%	260 100%	521 100%
Pearson's $\chi^2 = 0.1345$		$p\text{-value} = 0.714$	

While the Fourth and Eighth Circuits were, overall, quite similar in the pre-Obama years of the study, once President Obama's judicial nominees began to take their seats on the Fourth Circuit, the outcome data shows the courts moving in different ideological directions.⁵⁹ In 2010, the Fourth Circuit had 41 conservative outcomes (67.21%) and 20 liberal outcomes (32.79%). The Eighth Circuit, by contrast, had 66 conservative (84.62%) and 12 liberal (15.38%) outcomes. Similarly, in 2012, the Fourth Circuit had 46 conservative (69.70%) and 20 liberal (30.30%) outcomes. The

⁵⁸ This slight difference was not statistically significant. Analyzing this data using Pearson's chi-squared test resulted in $\chi^2 = 0.1790$ and $p\text{-value} = 0.672$.

⁵⁹ President Obama's first successful nominee to the Fourth Circuit, Judge Andre Davis, took his seat on November 10, 2009. Three additional nominees took their seats in 2010: Judges Keenan (March 9, 2010); Wynn (August 10, 2010); and Diaz (December 22, 2010). See *Biographical Directory of Federal Judges, 1789-present*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct. 12, 2014). One successful nominee took his seat on the Fourth Circuit in 2011: Henry Floyd (October 5, 2011). President Obama's final first term nominee to the Fourth Circuit, Stephanie Thacker, took her seat on April 17, 2012. *Id.*

Eighth Circuit, meanwhile, moved slightly toward the center in 2012 compared to 2010, with 53 conservative (76.81%) and 16 (23.19%) liberal outcomes.

Overall, during the years of the study in which President Obama's judicial nominees were sitting on the Fourth Circuit (2010 and 2012), the Fourth Circuit had 87 (68.50%) conservative outcomes and 40 (31.50%) liberal outcomes, while the Eighth Circuit had 119 (80.95%) conservative outcomes and 28 (19.05%) liberal outcomes. During these years, the Eighth Circuit was the more conservative court by 12.45%. Statistical analysis of this data shows that there is a statistically significant correlation between the presence of President Obama's judicial nominees on the Fourth Circuit and the difference in case outcomes in these courts, as reflected in Table 2.⁶⁰

Table 2. Comparison of Fourth Circuit and Eighth Circuit Outcomes in Years with Obama-nominated Judges on the Fourth Circuit Bench (2010, 2012)

Outcome	Court of Appeals		Total
	4th Cir.	8th Cir.	
0 = Conservative (Employer) win	87 68.50%	119 80.95%	206 75.18%
1 = Liberal (Employee) win	40 31.50%	28 19.05%	68 24.82%
Total	127 100%	147 100%	274 100%
Pearson's $\chi^2 = 5.6588$		<i>p-value=0.017</i>	

Further, if the Fourth Circuit and the Eighth Circuit behaved in identical ways in 2010 and 2012, then one would expect the Fourth Circuit's case outcome percentages for each ideological category to match the outcome percentages for each ideological category from the Eighth Circuit. Applying the percentage of conservative (code "0") outcomes (80.95%) and liberal (code "1") outcomes (19.05%) from the Eighth Circuit to the

⁶⁰ The contents of Table 1 and Table 2 were generated by running a two-way table with measures of association in STATA (set to calculate Pearson's chi-squared statistic and the *p*-value, to report the relative frequencies within each column, and to repeat the command by groups on the "Obama" variable). The data set (named "Ideology All") contains a total of 795 observations, each with the following variables: Year (2004, 2006, 2008, 2010, and 2012); Obama (0 = No; 1 = Yes) [meaning were there Obama nominated judges on the Fourth Circuit during that year]; Court (4 or 8); and Outcome (0 = conservative; 1 = liberal).

Fourth Circuit's case total from 2010 and 2012 (127), yields an expected number of conservative outcomes in the Fourth Circuit of 102.8095 and liberal outcomes of 24.19048. Engaging in a statistical analysis of the difference between the observed outcomes from the Fourth Circuit and the expected outcomes based on the Eighth Circuit percentages shows that the difference in outcomes is statistically significant, as reflected in Table 3.

Table 3. Fourth Circuit Observed Outcomes versus Expected Outcomes if Fourth Circuit Had Same Outcome Percentage as Eighth Circuit (Obama Years: 2010, 2012)

	0: Conservative (Employer)	1: Liberal (Employee)
Observed:	87	40
Expected:	102.8095	24.19048
	χ^2 <i>p</i> -value	0.000353486

Overall, the comparison between the Fourth Circuit's outcomes, in 2010 and 2012, and those of the Eighth Circuit, shows that President Obama's successful nominations to the Fourth Circuit during his first term had a near immediate impact on the Fourth Circuit's judicial ideology—resulting in fewer “conservative” and more “liberal” outcomes, both in absolute terms and, more importantly, as compared to the control group.

Additionally, the overall trend in the Eighth Circuit data suggests⁶¹ that factors independent of successful judicial nominations by President Obama—the most impactful of which would likely be changes in the applicable law, whether via the Supreme Court or Congress⁶²—resulted in a more “conservative” or “employer-friendly” legal environment during the study period. This potential is reflected in an increase in the rate of conservative outcomes in the Eighth Circuit from an average of 73.46% “conservative” in 2004, 2006, and 2008 to an average of 80.95% “conservative” in 2010 and 2012, a difference of 7.49%. While this internal shift is not, in and of itself, statistically significant,⁶³ it does suggest a broader pro-employer trend. If this trend existed during the study

⁶¹ Though data does not prove this, there is a potential pattern revealed in the data.

⁶² In *Decisionmaking in the U.S. Circuit Courts of Appeals*, Professor Cross has concluded that the “systematic application” of the “external, objective” law (what he called the “[legal] theory of judicial decisionmaking”) “clearly explains a significant part of [judicial] decisionmaking, even after controlling for ideology and other variables.” Cross, *supra* note 4, at 1462, 1514.

⁶³ Analyzing this data using Pearson's chi-squared test resulted in $\chi^2 = 2.9028$ and *p*-value = 0.088.

period (which is uncertain), then it likely masked the true scope of the Fourth Circuit's ideological shift.

Regardless, based on the data collected in this study, beginning nearly immediately after President Obama's successful nominees to the Fourth Circuit began taking their seats, the Fourth Circuit's collective ideology began to shift toward the "liberal" end of the political spectrum, resulting in a collectively more moderate ideology and correspondingly more moderate outcomes in its labor and employment cases.

B. Comparison of Outcome Data for Cases in which the Employee was the Appellant

Given the hypothesis this study was designed to test, namely whether the Fourth Circuit's ideology has shifted toward the liberal end of the ideological spectrum as a result of President Obama's successful nominees, the types of cases in which this shift would be most likely to manifest is in cases in which the employer prevailed in the district court (applying existing Fourth Circuit precedent) and then the employee appealed to the Fourth Circuit. These cases primarily involved district court rulings on motions for summary judgment and motions to dismiss pursuant to Rule 12(b). Because of the inherently subjective analysis involved in ruling on summary judgment motions and Rule 12(b)(6) motions to dismiss,⁶⁴ and the *de novo* standard of review for these determinations on appeal, these cases are the ones where ideological differences, as to the proper application of the law, are the most likely to result in different outcomes in the Obama years as compared to the pre-Obama years.⁶⁵

Focusing on the data with Base Outcome Codes 1 and 4, which indicate that the employer prevailed in the district court and the employee appealed,⁶⁶ the Fourth Circuit's case outcomes are markedly different and markedly more "liberal" or "pro-employee" in the Obama years as compared to the pre-Obama years. This internal comparison, in and of itself, reveals a statistically significant shift in ideology. The existence of

⁶⁴ Determining when there is a "genuine dispute of material fact" under Fed. R. Civ. P. 56 or whether the complaint asserts sufficient facts to make the claim(s) therein "plausible" under Fed. R. Civ. P. 12(b)(6) and the *Twombly/Iqbal* standard for plausibility pleading are inherently subjective.

⁶⁵ By contrast, the cases in which the employee prevailed in the district court and the employer appealed are less likely to show any ideological shift, largely because of the types of decisions at issue and the applicable standards of review. These cases (which have Base Outcome Codes of 2 or 5), are primarily appeals from decisions regarding ERISA benefit awards, agency orders, administrative subpoenas, or trial judgments.

⁶⁶ The employer prevailed in the district court in the cases coded 1 (where the Court of Appeals reversed the district court in whole or in majority part) or 4 (where the Court of Appeals affirmed the district court in whole or in majority part).

this ideological shift is further supported by comparing the Fourth Circuit's outcome in this class of cases with the Eighth Circuit's outcomes in the same class of cases. This comparison of the study group and the control group, likewise, shows a statistically significant shift in outcomes and ideology.

1. The Fourth Circuit Study Group Data: Cases in which the Employee was the Appellant (Base Outcome Codes 1 and 4)

In cases where the employee was the appellant in the Fourth Circuit, the outcomes in the Fourth Circuit for each year of the study were as follows:

Table 4.

Year	Number of Employer Victories in Fourth Circuit (Base Outcome = 4)	Number of Employee Victories in Fourth Circuit (Base Outcome = 1)	Percentage of cases in which Employer prevailed in Fourth Circuit ⁶⁷	Ratio of Employer Victories to each Employee Victory in Fourth Circuit ⁶⁸
2004	64	13	83.12%	4.92 to 1
2006	57	6	90.48%	9.5 to 1
2008	55	14	79.71%	3.93 to 1
2010	38	13	74.51%	2.92 to 1
2012	46	16	74.19%	2.875 to 1

In these cases, the win percentage of employers decreased from a maximum of 90.48% in 2006 to a minimum of 74.19% in 2012, a decrease of 16.29%; and from 83.12% in the first year of the study period (2004) to 74.19% in the last year (2012), a decrease of 8.93%. Even starker is the change in the ratio of employer victories to each employee victory. This ratio declined from a maximum of 9.5 to 1 in 2006 to 2.875 to 1 in 2012, a decrease of 70.75%; and from 4.92 to 1 in the first year of the study to 2.875 to 1 in the last, a decrease of 41.57%. In short, in these cases, the

⁶⁷ This percentage is a relative percentage of the number of employer victories, divided by the total of cases in these Base Code categories, times 100, rounded to the nearest hundredth. For example, for 2004, the percentage was calculated as follows: $64 \div (64+13 = 77) \times 100 = 83.12\%$.

⁶⁸ The ratio was calculated by dividing the number of employer victories by the number of employee victories, rounded to the nearest hundredth. For example, for 2004, the ratio was calculated as follows: $64 \div 13 = 4.92$.

employer won in the Fourth Circuit nearly 42% less often in 2012 than they did in 2004, as compared to the number of times that employees won.

Looking at the combined data for the pre-Obama years versus the Obama years in the Fourth Circuit, the combined outcomes were as follows:

Table 5. Combined Data for Cases in which Employee was Appellant in the Fourth Circuit

Outcome	Years		Total
	Pre-Obama years: (2004, 2006, 2008)	Obama Years: (2010, 2012)	
4 (Employer win)	176 84.21%	84 74.34%	260 80.75%
1 (Employee win)	33 15.79%	29 25.66%	62 19.25%
Total	209 100%	113 100%	322 100%
Pearson's $\chi^2 = 4.59964$		p -value=0.032	

Combining the number of outcomes in this class of cases shows that, overall, employers won 10.02% less often with President Obama's nominees on the Fourth Circuit than they did in the years before those nominees took their seats. As reflected in Table 5, this difference in outcomes is statistically significant, with a p -value of 0.032. Additionally, as a ratio of employer victories to each employee victory, employers prevailed in 5.33 cases for each case in which the employee prevailed in the pre-Obama years (a ratio of 5.33 to 1). In the Obama years, however, this ratio fell to 2.9 employer victories for each employee victory (a ratio of 2.9 to 1), a comparative decrease of 45.59% in employer victories for each employee victory.

Even without comparing the Fourth Circuit outcome data to the control group, the differences in outcomes in this class of cases in the Obama years as compared to the pre-Obama years is both stark and statistically significantly supportive of the hypothesis that President Obama's successful nominees to the Fourth Circuit bench had a near term impact on the court's overall ideology. This conclusion is even more apparent, however, after comparing the Fourth Circuit data for this class of cases to the data from the same class of cases in the Eighth Circuit.

2. *The Eighth Circuit Control Group Data: Cases in which the Employee was the Appellant (Base Outcome Codes 1 and 4)*

In cases where the employee was the appellant in the Eighth Circuit, the outcomes in the Eighth Circuit for each year of the study were as follows:

Table 6.

Year	Number of Employer Victories in Eighth Circuit (Base Outcome = 4)	Number of Employee Victories in Eighth Circuit (Base Outcome = 1)	Percentage of cases in which Employer prevailed in Eighth Circuit	Ratio of Employer Victories to each Employee Victory in Eighth Circuit
2004	56	14	80.00%	4.00 to 1
2006	63	13	82.89%	4.85 to 1
2008	54	6	90.00%	9.00 to 1
2010	61	6	91.04%	10.17 to 1
2012	51	5	91.07%	10.20 to 1

In these cases, the win percentage of employers in the Eighth Circuit steadily *increased* from 80.00% in the first year of the study period (2004) to 91.07% in the last year (2012), an increase of 11.07%. Even starker is the change in the ratio of employer victories to each employee victory. This ratio increased in the Eighth Circuit from 4.00 to 1 in the first year of the study to 10.20 to 1 in the last, an increase of more than 150%. In short, in these cases, the employer won in the Eighth Circuit more than *150% more often* in 2012 as they did in 2004, as compared to the number of times that employees won.

Looking at the combined data for the pre-Obama years versus the Obama years in the Eighth Circuit, the combined outcomes were as follows:

Table 7. Combined Data for Cases in which Employee was Appellant in the Eighth Circuit

Outcome	Years		Total
	Pre-Obama years (2004, 2006, 2008)	Obama Years (2010, 2012)	
4 (Employer win)	173 83.98%	112 91.06%	285 86.63%
1 (Employee win)	33 16.02%	11 8.94%	44 13.37%
Total	206 100%	123 100%	329 100%
Pearson's $\chi^2 = 3.3288$		p -value=0.068	

Combining the number of outcomes in this class of cases shows that, overall, employers won 7.08% more often in the Obama years than they did in the pre-Obama years. Additionally, as a combined ratio of employer victories to each employee victory, employers prevailed in 5.24 cases for each case in which the employee prevailed in the pre-Obama years (a ratio of 5.24 to 1).⁶⁹ In the Obama years, however, this ratio increased to 10.18 employer victories for each employee victory (a ratio of 10.18 to 1),⁷⁰ a comparative increase of nearly 100% in employer victories for each employee victory.

3. Comparison of the Fourth Circuit and the Eighth Circuit: Cases in which the Employee was the Appellant (Base Outcome Codes 1 and 4)

Simply reading the Eighth Circuit data for this class of cases and comparing it to the Fourth Circuit data above, without the benefit of any statistical analysis, leads to the inescapable conclusion that, in the Obama years, these courts were heading in very different ideological directions.

The following graphs show the changes in the combined ratio of employer victories to employee victories in each court (Figure A) and the combined win percentage for employers in each court (Figure B):

⁶⁹ Note that this ratio is nearly identical to the combined ratio in the Fourth Circuit for the pre-Obama years, which was 5.33 to 1.

⁷⁰ Compare this ratio to the Fourth Circuit's ratio of employer victories to employee victories in the Obama years: 2.9 to 1.

Figure A:

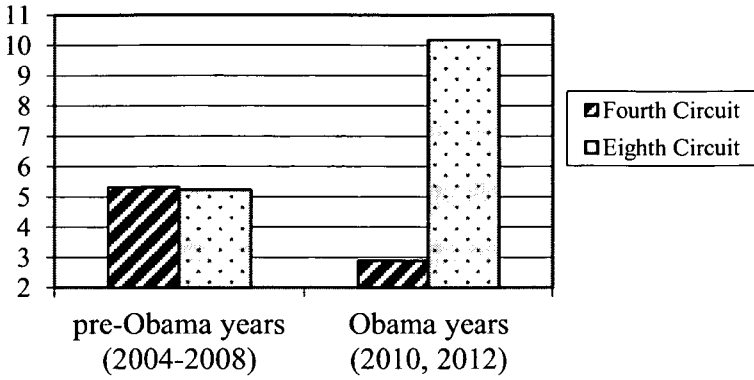
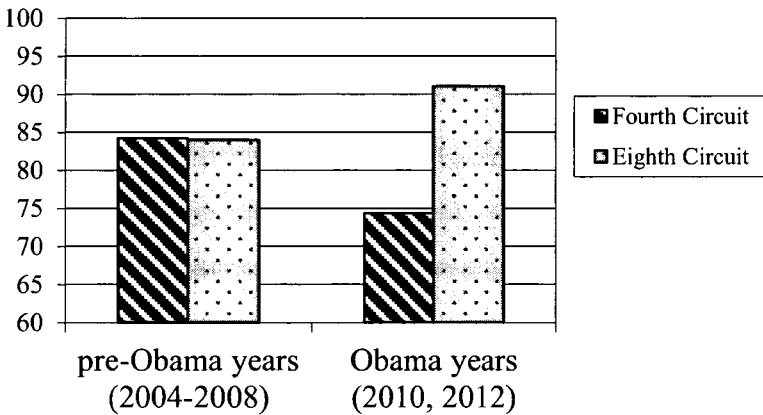


Figure B:



Despite very similar starting points in the pre-Obama years, there is significant divergence as to both employer win percentage (Figure B) and ratio of employer wins to each employee win (Figure A) in the Obama years.

The statistical analysis reveals much the same thing. In the pre-Obama years, the Fourth Circuit and the Eighth Circuit decided cases on a virtually identical basis, as shown in Table 8:

Table 8. Direct Comparison of Fourth Circuit and Eighth Circuit Outcomes in Cases in which Employee was Appellant (Pre-Obama Years: 2004, 2006, 2008)

Outcome	Court of Appeals		Total
	4th Cir.	8th Cir.	
4 (Employer win)	176 84.21%	173 83.98%	349 84.10%
1 (Employee win)	33 15.79%	33 16.02%	66 15.90%
Total	209 100%	206 100%	415 100%
Pearson's $\chi^2 = 0.0041$		p -value=0.949	

These outcomes in the pre-Obama years are all but identical, with the only variation being three additional employer victories in the Fourth Circuit. However, the Obama years, with President Obama's successful nominees sitting on the Fourth Circuit bench, are extremely different, as shown in Table 9:

Table 9. Direct Comparison of Fourth Circuit and Eighth Circuit Outcomes in Cases in which Employee was Appellant during Obama Years (2010, 2012) [Base Outcome Codes 1 and 4]

Outcome	Court of Appeals		Total
	4th Cir.	8th Cir.	
4 (Employer win)	84 74.34%	112 91.06%	196 83.05%
1 (Employee win)	29 25.66%	11 8.94%	40 16.95%
Total	113 100%	123 100%	236 100%
Pearson's $\chi^2 = 11.6973$		p -value=0.001	

With a p -value of 0.001, the difference in outcomes between the Fourth Circuit and the Eighth Circuit in 2010 and 2012 is statistically significant and very strongly supports the hypothesis that the presence of President Obama's successful nominees on the Fourth Circuit bench led to the increase in employee victories and an ideological shift by the Fourth Circuit toward the "liberal" end of the ideological spectrum.

Similarly, I tested the observed outcomes in the Fourth Circuit (the study group) against the expected outcomes if the Fourth Circuit and the Eighth Circuit (the control group) behaved in identical ways. Looking first at the pre-Obama years, the percentage of employer victories when the employee was the appellant (Base Outcome Code 4) in the Eighth Circuit was 83.98%, and the percentage of employee victories when the employee was the appellant (Base Outcome Code 1) was 16.02%. If the Fourth Circuit acted in an identical manner, this would yield expected outcomes of 175.59 employer victories (Base Outcome Code 4) and 33.48 employee victories (Base Outcome Code 1). This is, in fact, almost precisely what the Fourth Circuit produced, as reflected in Table 10 (and Table 8 above):

Table 10. Fourth Circuit Observed Outcomes versus Expected Outcomes if Fourth Circuit Had Same Outcome Percentage as Eighth Circuit in Cases in which the Employee was the Appellant (Pre-Obama Years: 2004, 2006, 2008)

	4 (Employer Victory)	1 (Employee Victory)
Observed:	176	33
Expected:	175.519	33.48
	χ^2 <i>p</i> -value	0.9278

In the years in which President Obama's successful nominees were sitting on the Fourth Circuit bench, comparing the observed outcomes from the Fourth Circuit to the expected outcomes if it behaved identically to the Eighth Circuit leads to a very different outcome. In 2010 and 2012 combined, the percentage of employer victories when the employee was the appellant (Base Outcome Code 4) in the Eighth Circuit was 91.06%, and the percentage of employee victories when the employee was the appellant (Base Outcome Code 1) was 8.94%. If the Fourth Circuit acted in an identical manner, this would yield expected outcomes of 102.89 employer victories (Base Outcome Code 4) and 10.106 employee victories (Base Outcome Code 1). As reflected in Table 11, this is not what occurred:

Table 11. Fourth Circuit Observed Outcomes versus Expected Outcomes if Fourth Circuit Had Same Outcome Percentage as Eighth Circuit in Cases in which the Employee was the Appellant (Obama Years: 2010, 2012)

	4 (Employer Victory)	1 (Employee Victory)
Observed:	84	29
Expected:	102.8943	10.106
	χ^2 <i>p</i> -value	0.00000000047

With a *p*-value of 0.00000000047, the difference in observed outcomes in the Fourth Circuit versus the expected outcomes if it acted identically to the Eighth Circuit in 2010 and 2012 is statistically significant and provides extremely strong support for the hypothesis that the presence of President Obama's successful nominees on the Fourth Circuit bench led to the increase in observed employee victories and an ideological shift by the Fourth Circuit toward the "liberal" end of the ideological spectrum.

Overall, the comparison between the Fourth Circuit's outcomes, in 2010 and 2012, and those of the Eighth Circuit shows that President Obama's successful nominations to the Fourth Circuit during his first term had a near immediate impact on the Fourth Circuit's judicial ideology resulting in fewer "conservative" and more "liberal" outcomes, both in absolute terms and, more importantly, as compared to the control group.

V. CONCLUSIONS, IMPLICATIONS, AND FUTURE DIRECTIONS

Overall, the results of this study support the hypothesis that President Obama's successful nominations to the Fourth Circuit bench during his first term shifted the Fourth Circuit's collective ideology and resulted in more "liberal" decisions in the near term (i.e., 2010-2012); and, more broadly, that successful presidential nominations to a federal Court of Appeals with a judicial ideology contrary to that of the sitting president have a measurable impact on that court's collective ideology in the near term (from zero to two years following confirmation).⁷¹

⁷¹ I certainly acknowledge the possibility that my conclusions about the results of this study are conflating correlation and causation. I do not think this is the case, but it is possible. Based on the quantitative and statistical analyses, the Fourth Circuit decided cases differently in the Obama years than in the pre-Obama years, especially in cases where the employee was the appellant and subjective standards were at issue. The main change was, of course, the arrival of President Obama's successful nominees. Similarly, the Fourth Circuit moved toward the "liberal" end of the spectrum in the Obama years, while the Eighth Circuit moved toward the "conservative" end. Given the similarities between

The results of this study show a marked and statistically significant decrease in “stereotypically conservative” outcomes/employer victories in cases appealed by employees to the Fourth Circuit, both in relation to the Fourth Circuit’s own outcomes in the pre-Obama years and in comparison with the study’s control group, the Eighth Circuit. Further, the data also shows a statistically significant increase in “stereotypically liberal” outcomes/employee victories in the Fourth Circuit overall in 2010 and 2012 as compared to the Eighth Circuit. Both of these results support the conclusion that the overall judicial ideology of the Fourth Circuit shifted toward the “liberal” end of the ideological spectrum as President Obama’s nominees took their seats on the court beginning in 2010.⁷²

The study results reported in this paper have a number of implications, for practicing attorneys, for political actors, and for scholars (among others). First, attorneys practicing in the federal courts in the Fourth Circuit should understand that the Fourth Circuit is a different court now than it was in 2008. The Fourth Circuit has moderated and, while not a “liberal” court by any means, it is significantly more liberal now than it has been in the past. The more recent decisions from the Fourth Circuit, which reflect its ideological shift, have undoubtedly trickled down to the district courts in the circuit and have likely resulted in a more moderate litigation environment in the district courts. These changes must be reflected in the advice attorneys practicing in the courts of the Fourth Circuit are providing to their clients.

On a political level, the Fourth Circuit’s ideological shift resulted from a group of uncontroversial, bipartisan nominees, with “mainstream jurisprudential approaches, especially with respect to ideology.”⁷³ Further, five of the six nominees were sitting judges with extensive judicial records that were useful in shedding light on their ideological leanings and decision-making tendencies.⁷⁴ While it is possible for a single nominee to

the courts and their outcomes in the pre-Obama years, combined with President Obama’s lack of nominees on the Eighth Circuit in his first term, the only significant change seems to be the presence of President Obama’s successful nominees on the Fourth Circuit. Nevertheless, I may be mistaking correlation for causation.

⁷² Of course, this shift was relative to where the Fourth Circuit fell on the ideological spectrum in the pre-Obama years. Thus, while the shift was leftward, politically speaking, it took the Fourth Circuit toward the political center given that the starting point was to the right (or conservative) side of the political center.

⁷³ Tobias, *supra* note 34, at 2176.

⁷⁴ *Id.* at 2172–76. Judges Davis and Floyd were federal district court judges on the District of Maryland and the District of South Carolina, respectively; Judge Keenan was a Justice on the Virginia Supreme Court; Judge Wynn was a judge on the North Carolina Court of Appeals and a former North Carolina Supreme Court Justice; and Judge Diaz was a Special Superior Court Judge serving on the North Carolina Business Court and a Judge on the Navy-Marine Corps. Court of Criminal Appeals.

conceal his or her political ideology, it would be extremely difficult for six nominees to do so successfully. Perhaps this is primarily a testament to just how conservative the Fourth Circuit had become prior to the Obama administration. Perhaps the influx of President Obama's nominees, and the resulting shift in the composition of the en banc court, led to moderation by the Fourth Circuit's Republican nominees.⁷⁵ Regardless, the evidence of an ideological shift on the Fourth Circuit, resulting from a group of consensus nominees, is eye opening.

Professor Tobias suggests that President Obama's very successful, inclusive, consensus-building approach to selecting his first term nominees to the Fourth Circuit should be a model for future nominations because nominations premised on ideological purity face a much tougher test in confirmation before the Senate.⁷⁶ The results of this study support Professor Tobias' advice. Additionally, however, the results suggest that ideological purity is unnecessary even if a president is seeking to achieve an ideological makeover of a Court of Appeals. Mainstream, relatively moderate nominees will do just fine (provided they are closer to the center than the current judges on that court).⁷⁷

For scholars of judicial behavior, judicial nominations, political science and the like, this study should provide some interesting data and insight. The results of this study show that the ideological shift on the Fourth Circuit happened very quickly. The shift was well underway by the end of 2010, despite the fact that only one of President Obama's nominees (Judge Davis) served on the Fourth Circuit for all of 2010 and one (Judge Diaz) served for only nine days of 2010.⁷⁸ Nevertheless, the ideological shift was well underway and continued through 2012.

There is still much information to glean from the data set we created for this study, including, among many others, the particular types of claims in

Only Judge Thacker was not a judge prior to her nomination to the Fourth Circuit. She was in private practice in Charleston, West Virginia, at the time of her nomination and previously served as an Assistant United States Attorney.

⁷⁵ This is a subject for more in-depth treatment in a subsequent paper based on the data set created for this study.

⁷⁶ Tobias, *supra* note 34, at 2177.

⁷⁷ While I would never want to do anything to make the confirmation of Court of Appeals judges more politically contentious than it already is, this study suggest that the President and his or her staff, and members of the Senate and their staffs, carefully consider the ideological dynamics on each Court of Appeals as nominations are made, including number of vacancies, potential near term future vacancies, the ideological make-up of the court, and the relative ideology of the nominee(s).

⁷⁸ Judge Diaz took his seat on December 22, 2010. Judge Keenan served just less than eight months of 2010 (March 2 to December 31), and Judge Wynn served just less than five months of 2010 (August 8 to December 31). Thus, in 2010, four Obama nominees served a total of about 25 judge months during 2010.

which the Fourth Circuit's ideological shift is most and least pronounced; the panel effects (if any) that occur when President Obama's successful nominees are on panels with more conservative and experienced judges, such as Judges Niemeyer, Shedd and Wilkinson; the effect (if any) of such a large Democratic-nominated majority on the behavior of the Fourth Circuit's Republican-nominated judges; the use of unpublished opinions to potentially mask an ideological shift; the precise tipping point when the ideological shift began; and the extent of ideological purity necessary in successful nominees to cause an ideological shift.

Additionally, there is still much to learn about the near term ideological impacts of successful presidential nominations to the Courts of Appeals, including the Fourth Circuit. For example, expanding the data set to other "ideologically contested" case types, such as cases involving capital punishment, abortion, environmental regulation, and the like,⁷⁹ may show that the ideological shift observed in the labor and employment context is, in fact, limited to the labor and employment context and is not a broader phenomenon. Similarly, expanding the data set to other circuits may show that the ideological shift observed in the Fourth Circuit was a unique impact related primarily to the volume of nominees, either in pure numeric terms or as a percentage of the seats on the court, and not to any other factor.

Nevertheless, based on this study, the data supports the conclusion that the overall judicial ideology of the Fourth Circuit has indeed shifted toward the "liberal" end of the ideological spectrum as President Obama's nominees have taken their seats on the court beginning in 2010. In short, President Obama took Judge Wilkinson's advice; yet in doing so, he actually achieved an "ideological makeover"⁸⁰ of the Fourth Circuit, at least in the labor and employment law realm.

⁷⁹ See SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 5, at 145; Sunstein et al., *Ideological Voting*, *supra* note 5, at 347.

⁸⁰ Wilkinson, *supra* note 35.

