

**THE CLASH OF OLD AND NEW FOURTH CIRCUIT IDEOLOGIES:  
BOYER-LIBERTO V. FONTAINEBLEAU CORP. AND THE MODERATION OF THE  
FOURTH CIRCUIT**

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The Fourth Circuit has changed.

What was, a few short years ago, the most stridently conservative Court of Appeals in the country,<sup>1</sup> has become—since 2010—a moderate, if not slightly liberal, court. Both the anecdotal and the empirical evidence bear out the Fourth Circuit’s ideological shift.<sup>2</sup> Further, based on the empirical evidence, the cause of this ideological shift appears to be the influx of President Obama’s successful nominees to the Fourth Circuit bench beginning in 2010.<sup>3</sup>

While this shift has been on display in several high profile, politically charged cases including, among others, *Bostic v. Schaefer*<sup>4</sup> (declaring Virginia’s ban on same-sex marriage unconstitutional) and *King v. Burwell*<sup>5</sup> (the “ObamaCare” tax subsidy case). The shift also vividly appears in more “run of the mill,” but no less significant, decisions outside of the political spotlight as

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1. See Carl Tobias, *A Fourth Circuit Photograph*, 45 WAKE FOREST L. REV. 1373, 1373 (2010).

2. See Jeremy W. Peters, *Building Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES, Sept. 13, 2014, at 22.

3. See *id.*

4. 760 F.3d 352, 384 (4th Cir. 2014) (holding that Virginia’s constitutional and statutory prohibitions on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution), *cert. denied*, 135 S. Ct. 308 (2014).

5. 759 F.3d 358 (4th Cir. 2014) (upholding the Patient Protection and Affordable Care Act’s tax subsidies for all eligible purchasers, including those using the federal exchange), *cert. granted*, 135 S.Ct. 475 (2014).

well. One such decision in 2014 was *Boyer-Liberto v. Fontainebleau Corp.*<sup>6</sup>, in which the “old” Fourth Circuit and the “new” Fourth Circuit clashed over the reasonableness of an employee’s conduct in reporting a racial slur in the workplace.

This essay proceeds as follows. Part I discusses the evolution of the Fourth Circuit from the beginning of the Clinton Administration in 1993 to the present, focusing on the political forces that resulted in four vacancies on the Fourth Circuit bench when President Obama took office and six vacancies during his first term, as well as President Obama’s highly successful nominations to the court. Part II discusses the empirical evidence of the Fourth Circuit’s ideological shift since President Obama’s successful nominees began to take the bench. Finally, Part III uses the Fourth Circuit’s recent decision in *Boyer-Liberto v. Fontainebleau Corp.* to illustrate the ongoing clash between the old Fourth Circuit and the new Fourth Circuit.

## I. THE IDEOLOGICAL AND POLITICAL EVOLUTION OF 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.<sup>7</sup> Presidents Ronald Reagan and George H.W. Bush successfully nominated eight judges to the Fourth Circuit bench,<sup>8</sup> and by the 1992 presidential election Republican nominees outnumbered Democratic nominees by a three to one margin.<sup>9</sup> During the presidencies of Bill Clinton and George W. Bush, nominations to the Fourth Circuit bench became more politicized than those to any other federal court as conservatives sought to maintain the ideological makeup of the court and Democrats sought to change it.<sup>10</sup>

During his two terms in office, President Clinton forwarded ten Fourth Circuit nominations to the Senate for confirmation.<sup>11</sup> Six of these nominations failed, despite the nominees being well qualified.<sup>12</sup> Senator Jesse Helms (R-

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6. 752 F.3d 350, 352 (4th Cir. 2014).

7. See Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1 (describing the Fourth Circuit as “the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members”).

8. See *Judges of the Fourth Circuit, Since 1801*, U.S.COURTS.GOV, <http://www.ca4.uscourts.gov/docs/pdfs/historyjudges.pdf> (last visited Apr. 3, 2015).

9. See Brian S. Clarke, *ObamaCourts?: The Impact of Judicial Nominations on Court Ideology*, 30 J.L. & POL. 195, 202 n.29 (2015).

10. See Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2188 (2014) [hereinafter *Tobias Filling*].

11. See Clarke, *supra* note 9, at 202 nn.30 & 34.

12. See *Judges of the Fourth Circuit, Since 1801*, *supra* note 8. 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). *Id.* President Clinton also used a recess appointment to place Judge Roger Gregory of Virginia on

N.C.) blocked all four of President Clinton's nominees from North Carolina:<sup>13</sup> Judge J. Rich Leonard,<sup>14</sup> Judge James A. Beaty,<sup>15</sup> Judge James A. Wynn, Jr.,<sup>16</sup> and Professor S. Elizabeth Gibson.<sup>17</sup> President Clinton's other failed nominees—Judge Andre M. Davis of Maryland and now-Judge Roger L. Gregory of Virginia—were both nominated late in his second term and the Republican majority Senate declined to take up either nomination in the months

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the Fourth Circuit bench on December 27, 2000. *Biography of Judge Roger L. Gregory*, U.S. COURTS, <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-roger-l-gregory>, (last visited Apr. 3, 2015). Judge Gregory was the first African American to serve on the Fourth Circuit. See Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 41 (2003). President George W. Bush subsequently renominated Judge Gregory for a full seat. *Id.* at 42.

13. *Tobias Filling*, *supra* note 10, at 2167.

14. President Clinton nominated Judge Leonard, who was a judge on the U.S. Bankruptcy Court for the Eastern District of North Carolina at the time, on December 22, 1995, Wilson, *supra* note 12, at 37 n.10, to a seat created by Congress in 1990 but which was never filled. Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. REV. 2001, 2026 (2002). Apparently, Senator Helms blocked Judge Leonard's nomination in retaliation for the failure by the Democrat majority Senate to act on the Fourth Circuit nomination of Judge Terrence Boyle (a former Helms aide) by President George H.W. Bush. See *Tobias Filling*, *supra* note 10, at 2167. Judge Leonard is now the Dean of the Campbell University School of Law. *Biography of J. Rich Leonard*, CAMPBELL UNIVERSITY, <http://law.campbell.edu/page.cfm?id=604&n=j-rich-leonard> (last visited Mar. 2, 2015).

15. President Clinton nominated Judge Beaty, who was a U.S. District Court Judge for the Middle District of North Carolina at the time, on December 22, 1995, to fill the seat previously held by Judge Dickson Phillips, Jr. See Wilson, *supra* note 12, at 37 n.10; Clarke, *supra* note 9, at 202 n.34. The prior failure of the Senate to act on Judge Boyle's nomination was Senator Helms's justification for his opposition to Judge Beaty. See *Tobias Filling*, *supra* note 10, at 2167. However, Judge Beaty was the first African American nominee to the Fourth Circuit. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 449 n.207 (2000). As a result, there has been consistent speculation and belief that Senator Helms in fact opposed Judge Beaty's nomination on racial grounds. See *id.*

16. President Clinton nominated Judge Wynn, who was a judge on the North Carolina Court of Appeals at the time, on August 5, 1999, to the seat previously held by Judge Phillips (like Judge Beaty). *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3293&cid=999&ctype=na&instat=na> (last visited Apr. 3, 2015). As with Judges Leonard and Beaty, Senator Helms's opposition was allegedly rooted in the prior failure of Judge Boyle's nomination. See *Tobias Filling*, *supra* note 10, at 2167. However, as with Judge Beaty, there has been much speculation that Senator Helms actually opposed Judge Wynn because he is African American. See David G. Savage, *Clinton Losing Fight for Black Judge*, L.A. TIMES, Jul. 7, 2000, at A16. Judge Wynn was eventually renominated to the Fourth Circuit by President Obama and, this time, he was confirmed. *Biographical Directory of Federal Judge*, *supra*.

17. President Clinton nominated Professor Gibson on October 26, 2000, See *Biography of S. Elizabeth Gibson*, UNC SCHOOL OF LAW, <http://www.law.unc.edu/faculty/directory/gibsonselizabeth/> (last visited Apr. 2, 2015), to fill the vacancy created by the death of Judge Samuel J. Ervin, III. As with President Clinton's other North Carolina nominees, Professor Gibson never received a hearing in the Senate and was opposed by Senator Helms. *Tobias Filling*, *supra* note 10, at 2167. She was and still is a Professor of Law at the University of North Carolina School of Law. See *Biography of S. Elizabeth Gibson*, *supra*.

surrounding the 2000 presidential election.<sup>18</sup> Frustrated with the Senate's failure to act on his Fourth Circuit nominees, President Clinton used a recess appointment to place Judge Gregory on the Fourth Circuit bench on December 27, 2000.<sup>19</sup> In short, President Clinton managed to shrink the Republican advantage on the Fourth Circuit from three-to-one to six<sup>20</sup>-to-five.<sup>21</sup> However, his inability to get his nominees confirmed late in his second term resulted in four empty seats on the Fourth Circuit bench as George W. Bush was sworn in as President on January 20, 2001.<sup>22</sup>

President George W. Bush enjoyed some early successes with his Fourth Circuit nominees, including the easy confirmations of Clinton recess appointee Roger Gregory to a full seat in July 2001 by a vote of 94 to 1<sup>23</sup> and Allyson Duncan of North Carolina in August 2003 by a vote of 93 to 0.<sup>24</sup> President Bush successfully nominated Dennis Shedd of South Carolina who, despite strong opposition from Democrats in the Senate, was confirmed in November 2002 on a largely party line vote of 55 to 44 with one abstention.<sup>25</sup> However, after 2003,

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18. See Wilson, *supra* note 12, at 40.

19. *Biography of Judge Roger L. Gregory*, *supra* note 4. Doing so broke the color barrier on the Fourth Circuit bench as Judge Gregory was the first African-American to occupy a seat on the Fourth Circuit. See Wilson, *supra* note 12, at 41.

20. Judges Widener, Wilkinson, Wilkins, Williams, Luttig, and Niemeyer.

21. Judges Michael, Motz, Traxler, King, and Gregory.

22. *Tobias Filling*, *supra* note 10, at 2188.

23. Wilson, *supra* note 12, at 41.

24. See Clarke, *supra* note 9, at 201 n.31. Judge Duncan was the first African American woman, and the second African American overall behind Judge Gregory, to be confirmed to the Fourth Circuit bench. The Hon. Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 HOW. L.J. 645 app. B (2010). Her nomination enjoyed the strong support of both of North Carolina's U.S. Senators, John Edwards (D) and Elizabeth Dole (R). See *Tobias Filling*, *supra* note 10, at 2169. Judge Duncan was also seen as a politically moderate nominee, which was necessary to ensure the support of Senator Edwards. See *id.* 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). Clarke, *supra* note 12, at 205 n.42 (citing Lee Epstein, *et al.*, *The Judicial Common Space*, 23 J. LAW, ECON. & ORG. 303 (2007); Micheal W. Giles *et al.*, *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). *Id.* 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. *Id.* Judge Duncan's JCS ideology score is 0.294999987, *Lee Epstein: Research*, WASH. U. IN ST. LOUIS, <http://epstein.wustl.edu/research/JCS.html> (follow link to data file) (last visited Apr. 2, 2015), and her GHP score is 0.295, *Measures of Ideology*, JUDICIAL RESEARCH INITIATIVE, <http://artsandsciences.sc.edu/poli/juri/measures.htm> (follow link to data file) (last visited Apr. 2, 2015), both of which reflect a fairly moderate Republican ideology. See Clarke, *supra* note 9, at 205 n.42. By contrast, Judge Paul Niemeyer's GHP score is 0.502, *Measures of Ideology*, *supra*, and his JCS score is 0.501999974, *Lee Epstein: Research*, *supra*, which reflect a much more staunch conservative ideology. See Clarke, *supra* note 9, at 205 n.42.

25. Clarke, *supra* note 9, at 202 n.31.

President Bush had only one more successful nominee to the Fourth Circuit, G. Steven Agee of Virginia, who was confirmed in May 2008 by a vote of 96 to 0.<sup>26</sup>

During his two terms, President Bush actually fared worse than President Clinton when it came to nominations to the Fourth Circuit. Bush forwarded twelve Fourth Circuit nominees to the Senate.<sup>27</sup> Eight of those nominations failed. In 2001, President Bush's renomination of Judge Terrence Boyle of North Carolina to the seat previously held by Judge Phillips was blocked by Senator John Edwards (D-N.C.), both on ideological grounds and as political payback for Senator Helms's actions in blocking President Clinton's nominations of Judges Beaty and Wynn to fill that same seat.<sup>28</sup> Similar fates scuttled the nominations of Claude Allen in 2004<sup>29</sup> and Rod J. Rosenstein in 2007<sup>30</sup> to the Maryland seat vacated by the death of Judge Francis Murnaghan, as both faced staunch opposition from both of Maryland's U.S. Senators as well as from various progressive groups.<sup>31</sup> The nominations of Judge Robert Conrad of North Carolina in 2007 to Judge Phillips's former seat,<sup>32</sup> Steve A. Matthews of South Carolina in 2007 to the seat vacated by the retirement of Judge William Wilkins,<sup>33</sup> E. Duncan Getchell of Virginia in 2007 to the seat vacated by the retirement of Judge Emory Widener, and Glen E. Conrad of Virginia in 2008 also to Judge Widener's former seat,<sup>34</sup> were all met with failure based largely on political disputes between the Bush Administration and the Democratic majority Senate.<sup>35</sup>

President Clinton's six failed nominees to the Fourth Circuit were the most nominees submitted for consideration to any Court of Appeals during his two

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26. *Id.* Like Judge Duncan in 2003, Judge Agee was a bipartisan nominee with the strong backing of both of Virginia's U.S. Senators, John Warner (R) and Jim Webb (D). *See Tobias Filling, supra* note 10, at 2168. Also like Judge Duncan, Judge Agee was a politically moderate nominee, with a GHP score of 0.221, *Measures of Ideology, supra* note 12, and a JCS score of .221. *Lee Epstein: Research, supra* note 24.

27. *See* Clarke, *supra* note 9, at 202 nn.31 & 34.

28. *See* Charles Lane, *N.C. Judge Has Spent 15 Years as a Nominee*, WASH. POST, May 12, 2005, at A5.

29. *Tobias Filling, supra* note 10, at 2167–68.

30. *Id.*

31. *Id.*

32. *Id.* at 2168 (citing Mark Hansen, *Logjam*, 94 A.B.A. J. 39, 39 (2008)).

33. *Id.* (citing Rick Brundrett, *Columbia Man Nominated for U.S. 4th Circuit Judge*, THE STATE, Jul. 3, 2007, at A1; Rick Brundrett, *Dreams and Doubts in The Federalist Society: Federalist Society Hopes Obama Picks Moderate Judge*, THE STATE, Jan. 18, 2009, at S5).

34. *Id.* at 2168–69. (citing Hansen, *supra* note 32, at 39).

35. Perhaps President Bush's primary failure was simply nominating people who were too conservative or too ideologically pure. *See Tobias Filling, supra* note 10, at 2168–69. Conservatives were increasingly concerned by late 2006 about the future of the Fourth Circuit as the vacancies mounted and President Bush's nominees faltered. *See* Jerry Markon & Michael D. Shear, *Conservatives' Grip on Key Virginia Court Is at Risk*, WASH. POST, Dec. 18, 2006, at A1 ("A growing list of vacancies on the federal appeals court in Richmond is heightening concern among Republicans that one of the nation's most conservative and influential courts could soon come under moderate or even liberal control, Republicans and legal scholars say.").

terms in office.<sup>36</sup> Clinton's failed nominations to the Fourth Circuit accounted for 25% of all his failed Court of Appeals nominees.<sup>37</sup> Likewise, President Bush's eight failed nominees to the Fourth Circuit were the most nominees submitted for consideration to any Court of Appeals during his two terms in office.<sup>38</sup> Bush's failed nominations to the Fourth Circuit accounted for 32% of all his failed Court of Appeals nominees.<sup>39</sup> In total, the fourteen failed nominees to the Fourth Circuit during the sixteen years of the Clinton and Bush Administrations were—by far—the most failed nominations to any federal Court of Appeals.<sup>40</sup> 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.<sup>41</sup>

Notwithstanding President Bush's considerable difficulty having his nominees confirmed, by the end of his first term the Fourth Circuit was, according to *The New York Times*, a court whose "decisions not only besp[oke] a conservative philosophy of law but also serve a conservative political agenda."<sup>42</sup> The Republican nominated majority on the court was "bold and muscular in its conservatism"<sup>43</sup> and not "reluctant to wield its majority forcefully,"<sup>44</sup> even allegedly "prevent[ing] the release of judicial opinions that displeased them."<sup>45</sup> However, President Bush's confirmation difficulties led to a Fourth Circuit bench with the same political makeup at the end of his presidency as when it

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36. Clarke, *supra* note 9, at 202 n.34 (discussing the recent political history of the Fourth Circuit).

37. *Id.* President Clinton had twenty-four total failed Court of Appeals nominations: six to the Fourth Circuit; three each to the Third, Fifth, Sixth and Ninth Circuits; two each to the Tenth and D.C. Circuits; and one each to the Eighth and Eleventh Circuits. He had no failed nominees to the First, Second, or Seventh Circuits. *Id.*; see also *Tobias Filling*, *supra* note 10, at 2166–69.

38. *Id.*

39. *Id.* 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; and one each to the First, Second, Seventh, Tenth, and Eleventh Circuits. *Id.* He had no failed nominees to the Eighth Circuit. *Id.*

40. Cumulatively, the fourteen failed nominations to the Fourth Circuit accounted for 28.57% of the forty-nine failed Court of Appeals nominees during the Clinton and Bush Administrations. *Id.* Further, nominees to the Fourth Circuit failed at more than twice the rate of nominations of any other circuit. *Id.* at 203; see *Tobias Filling*, *supra* note 10, at 2166–69.

41. *Id.* The next highest cumulative total for failed nominations during the Clinton and Bush years was six, which was shared by both the Sixth Circuit and the Ninth Circuit. *Id.* Even twelve failed nominations to the Sixth and Ninth Circuits combined do not equal the thirteen failed nominations to the Fourth Circuit.

42. Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAGAZINE, Mar. 9, 2013, at 42. See also Clarke, *supra* note 9, at 201–06 (discussing the recent political history of the Fourth Circuit).

43. Sontag, *supra* note 42, at 40.

44. *Id.*

45. *Id.*; see generally Lewis, *supra* note 7, at A1–22 (describing the Fourth Circuit as "the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members").

began: six judges nominated by Republican presidents,<sup>46</sup> five judges nominated by Democratic presidents,<sup>47</sup> and four vacancies.<sup>48</sup>

Thus, when President Barack Obama took office on January 20, 2009, he had the opportunity to nominate four judges to the Fourth Circuit. A fifth vacancy unexpectedly arose in July 2009 with the sudden retirement of Judge Karen Williams due to illness.<sup>49</sup> 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. With the chance to nominate fully one-third of the Fourth Circuit bench, President Obama had an opportunity to potentially shift the Fourth Circuit's judicial ideology.

Given President Obama's opportunity, Republicans were concerned that the new President would nominate a slate of liberal ideologues to fill the openings.<sup>50</sup> This prospect led Judge J. Harvie Wilkinson, III, the most senior judge on the Fourth Circuit, to write a rather extraordinary op-ed in *The Washington Post*, which ran on January 23, 2009, three days after President Obama's first inauguration.<sup>51</sup> Judge Wilkinson cautioned that "the tempting course" of "go[ing] for an ideological makeover" "would prove a misguided" course.<sup>52</sup>

President Obama essentially took Judge Wilkinson's advice, whether intentionally or inadvertently. In identifying and selecting his nominees, President Obama sought, first and foremost, bipartisan nominees who would be confirmed by the Senate rather than making selections based on ideological purity.<sup>53</sup> President Obama worked with members of both parties from the various states in the Fourth Circuit to identify nominees who would, generally speaking, have support on both sides of the political aisle.<sup>54</sup> He also worked

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46. Judges Wilkinson, Williams, Niemeyer, Shedd, Duncan, and Agee.

47. Judges Michael, Motz, Traxler, King and Gregory.

48. The vacant seats were 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). Clarke, *supra* note 9, at 202 n.34.

49. *Id.* Judge Williams, a George H.W. Bush nominee, was Chief Judge at the time but immediately retired upon being diagnosed with early onset Alzheimer's Disease. *Former Federal Judge Karen Williams Dies; Was a Native of Orangeburg*, THE STATE, Nov. 2, 2013, at A14. Judge Williams passed away from complications of Alzheimer's Disease on November 2, 2013. *Id.*

50. See Clarke, *supra* note 9, at 203.

51. J. Harvie Wilkinson III, *Obama's Judicial Choices: Storming the 4th Circuit?*, WASH. POST, Jan. 23, 2009, at A15.

52. *Id.*

53. Clarke, *supra* note 9, at 204.

54. *Tobias Filling*, *supra* note 10, at 2171 (citing Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 779 (2010)). 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. See *Judges of the Fourth Circuit, Since 1801*, *supra* note 8. As a result, the details of those nominations and how they came about need not be recounted here. For the specifics, see *Tobias Filling*, *supra* note 10, at 2171-75. As to Judge Thacker, it is highly likely that President Obama employed a similar process.

with Republican leadership in the Senate to help ensure floor votes for his eventual nominees.<sup>55</sup>

The end result of this process was a group of nominees, each of whom possessed “mainstream jurisprudential approaches, especially with respect to ideology.”<sup>56</sup> 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);<sup>57</sup> Judge Barbara M. Keenan of Virginia (confirmed March 2, 2010);<sup>58</sup> James A. Wynn, Jr. of North Carolina (confirmed August 5, 2010);<sup>59</sup> Judge Albert Diaz of North Carolina (confirmed December 18, 2010);<sup>60</sup> Judge Henry F. Floyd of South Carolina (confirmed October 3, 2011);<sup>61</sup> and Judge Stephanie D. Thacker of West Virginia (confirmed April 16, 2012).<sup>62</sup>

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

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55. *Tobias Filling*, *supra* note 10, at 2171.

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

57. *Id.* at 2172.

58. *Id.* at 2173.

59. *Id.* at 2174–75.

60. *Id.*

61. *Id.* The first five of President Obama’s nominees were sitting judges at the time of their nominations. Judges Davis and Floyd were U.S. District Judges for the District of Maryland and the District of South Carolina, respectively. *Id.* at 2172, 2176. Judge Wynn and Justice Keenan, were state appellate court judges on the North Carolina Court of Appeals and Virginia Supreme Court, respectively, and Judge Diaz was both a state trial court judge and military appellate court judge on the North Carolina Business Court and the Navy-Marine Corps Court of Criminal Appeals. *Id.* at 2173, 2174–75; Press Release, White House Office of the Press Sec’y, President Obama Nominates Judge Albert Diaz and Judge James Wynn to the Fourth Circuit Court of Appeals (Nov. 4, 2009), available at <https://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-albert-diaz-and-judge-james-wynn-fourth-circuit-cou>.

62. *Tobias Filling*, *supra* note 10, at 2175. 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 six nominees received a total of nineteen (19) “No” votes. Judge Davis was confirmed by a vote of 72-16. Clark, *supra* note 9, at 204 n.41. Judges Keenan (99-0), and Floyd (96-0) were confirmed on unanimous votes. *Id.* Judges Wynn and Diaz were confirmed by unanimous consent. *Id.* Finally, Judge Thacker was confirmed by a vote of 91-3. *Id.* 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—Pamela Harris of Maryland who was nominated to fill the seat vacated when Judge Andre Davis took senior status on February 28, 2014—proved far more controversial. *Id.* In 2013, Congress made a revision to the Senate’s Rules to allow cloture on Court of Appeals nominations on a simple majority vote. See generally ELIZABETH RYBICKI, CONG. RESEARCH SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 2 (2013) (describing changes to Senate Rule XXII). Thanks to this change, 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, Vote No. 242, 113<sup>th</sup> Cong., 2d Sess. (July 28, 2014). No Republicans voted in favor Professor Harris’s nomination, and two Democrats (Senator Joe Manchin of West Virginia and Senator Mark Pryor of Arkansas) voted against Professor Harris. *Id.* Seven senators (four Republicans and three Democrats) did not vote. *Id.*



Circuit into a heavily Democratic court, with ten judges nominated by Democratic presidents<sup>63</sup> and five nominated by Republican presidents.<sup>64</sup>

However, in light of (1) the Fourth Circuit's decades-long conservatism, (2) principles of *stare decisis*, and (3) the basic rule that one Fourth Circuit panel cannot overrule a prior decision of another panel,<sup>65</sup> has the court's ideology really changed, especially given the "mainstream" ideology of President Obama's six successful nominees? Based on both the anecdotal evidence and empirical data, the answer to this question is "Yes."

## II. THE EMPIRICAL DATA

In order to determine, empirically, whether the Fourth Circuit's ideology has actually shifted to the relative left, I designed and conducted a quantitative study of the Fourth Circuit's labor and employment decisions<sup>66</sup> from 2004, 2006, 2008,<sup>67</sup> 2010, and 2012.<sup>68</sup> My research assistants<sup>69</sup> and I identified, coded, and examined the outcomes of all of the Fourth Circuit's labor and employment decisions from five identified years.<sup>70</sup> We then compiled the coded outcomes and compared the outcomes in the pre-Obama Years to those in the Obama Years, both within the Fourth Circuit and as compared to the control group, which was the Eighth Circuit. We performed various statistical analyses on the

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63. William Bird Traxler, Jr.; Diana Gribbon Motz; Robert Bruce King; Roger Gregory; Barbara Milano Keenan; James A. Wynn, Jr.; Albert Diaz; Henry Franklin Boyd; Stephanie Thacker; Andre Davis.

64. J. Harvie Wilkinson, III; Paul V. Niemeyer; Dennis Shedd; Allyson K. Duncan; G. Steven Agee.

65. *See, e.g.*, *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc) (stating the "basic principle that one panel cannot overrule a decision issued by another panel").

66. Labor and employment law is an area where there is general agreement that ideological differences play a role in case outcomes. *See* Cass R. Sunstein et al., *Ideological Voting on the Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 309 (2004). Additionally, other 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.

67. The author refers to 2004, 2006, and 2008 collectively as the "pre-Obama Years."

68. The author refers to 2010 and 2012 collectively as the "Obama Years." 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 successful first term nominees to the Fourth Circuit bench. In 2004, the Fourth Circuit bench consisted of eight (8) judges nominated by Republican presidents, five (5) judges nominated by Democratic presidents, and two (2) vacant seats. Clarke, *supra* note 9, at 199 n.18. As of April 17, 2012, when the Senate confirmed President Obama's sixth and final first term nominee, Judge Stephanie Thacker, there were ten (10) Democratic nominees, and five (5) Republican nominees sitting on the Fourth Circuit bench. *Id.*

69. Primarily, Nicole Trautman and Alexandria Andresen, with additional assistance from Malena Wilkes and Eleanor Smith.

70. We gathered and coded the same data for the Eighth Circuit, which was the most stable Court of Appeals during the study period and was the only Court of Appeals to which President Obama had no first term nominees. Clarke, *supra* note 9, at 199. The Eighth Circuit served as the control group in the study. *Id.*

data from both courts to ensure that the quantitative differences were, in fact, statistically significant.<sup>71</sup>

Overall, the results of this study showed an evident 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.<sup>72</sup> 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 an apparent overall background trend toward the opposite result as seen in the Eighth Circuit.<sup>73</sup>

The Fourth Circuit’s ideological shift was demonstrated in two distinct places in the data. First, comparing the ideological outcomes<sup>74</sup> 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 corresponding decrease in conservative outcomes, in the Fourth Circuit in 2010 and 2012, the years in which President Obama’s nominated judges began serving on the court.<sup>75</sup> Second, looking only 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),<sup>76</sup> the employee prevailed in the Fourth Circuit in a significantly higher percentage of cases in the Obama Years than in the pre-Obama Years.<sup>77</sup> While the difference in outcomes in the Obama Years was statistically significant in comparison to the Fourth Circuit’s own outcomes in the pre-Obama Years, there was also a statistically significant difference in the outcomes in this group of cases when compared to the outcomes from the Eighth Circuit.<sup>78</sup>

Table 1<sup>79</sup> summarizes the data from both the Fourth and Eighth Circuits for the pre-Obama Years and shows that, based on a statistical *p*-value of 0.714, the slight differences in outcomes are not statistically significant. Table 2<sup>80</sup> summarizes the data from both the Fourth and Eighth Circuits for the Obama Years and shows that, with a *p*-value of 0.017, the differences in outcomes are statistically significant.<sup>81</sup>

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71. The methodology and overall findings of this study are discussed in detail in Clarke, *supra* note 9.

72. Clarke, *supra* note 9, at 200.

73. *Id.*

74. *See id.* at 207.

75. *Id.* at 213, tbl.3.

76. These were 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. On appeal, the Courts of Appeal apply a *de novo* standard of review. *See id.* at 210–22.

77. *See id.* at 218–19.

78. *Id.*

79. *See infra* Appendix.

80. *Id.*

81. The  $\alpha$  for all tables was 0.05. For further explanation of these tables, the data therein, and the statistical significance of the *p*-value statistic, see Clarke, *supra* note 9, at 210–22.

Table 3<sup>82</sup> summarizes the data from the Fourth Circuit for cases where the employee was the appellant for the pre-Obama Years and the Obama Years and shows that, with a *p*-value of 0.032, the differences in outcomes are statistically significant.<sup>83</sup> Table 4<sup>84</sup> compares the Fourth Circuit's outcomes in this class of cases to those in the Eighth Circuit in the pre-Obama Years, showing that far from having statistically significant differences in outcomes, they are essentially identical. Table 5,<sup>85</sup> on the other hand, compares the Fourth Circuit's outcomes in this class of cases to those in the Eighth Circuit in the Obama Years, and shows the moderation of the Fourth Circuit beginning in 2010.

Taken as a whole, a statistical analysis of the data from the Fourth Circuit and comparing it against the data from the Eighth Circuit over the study period strongly support three conclusions. First, the Fourth Circuit's decisions were significantly more employee-friendly and stereotypically liberal beginning in 2010. Second, that the presence of President Obama's successful nominees on the Fourth Circuit bench led to this increase in stereotypically liberal decisions. And third, that the Fourth Circuit's collective judicial ideology has shifted relatively closer to the liberal end of the ideological spectrum.<sup>86</sup>

### III. THE CLASH IN ACTION: BOYER-LIBERTO V. FONTAINEBLEAU CORP.

#### A. *The Opinions*

Reya C. Boyer-Liberto (Ms. Boyer-Liberto), an African American woman, sued her former employer the Fontainebleau Corporation trading as the Clarion Resort Fontainebleau Hotel (the Hotel) and its owner Leonard Berger (Berger) for, among other things, retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII)<sup>87</sup> and 42 U.S.C. § 1981 (Section 1981).<sup>88</sup> Ms. Boyer-Liberto alleged that the Hotel terminated her employment as a hostess and bartender in retaliation for complaining to the Hotel's Human Resources Director (Ms. Berghauer) that coworker Trudy Clubb (Clubb) called her a "porch monkey" on consecutive days in September 14, 2010, and again on September 15, 2010.<sup>89</sup> Ms. Boyer-Liberto reported Clubb's comments to Ms. Berghauer on

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82. See *infra* Appendix.

83. The  $\alpha$  for Table 3 and Table 4 was 0.05. See *infra* tbls. 3, 4. For further explanation of Tables 1 and 2 and the statistical significance of the *p*-value statistic, see Clarke, *supra* note 9 at 216.

84. See *infra* Appendix.

85. *Id.*

86. See Clarke, *supra* note 9, at 213, 222.

87. 42 U.S.C. §§ 2000e to 2000e-4 (2012).

88. Boyer-Liberto v. Fontainebleau Corp., 752 F.3d 350, 352 (4th Cir. 2014), *reh'g en banc granted* (4th Cir. July 1, 2014).

89. *Id.* at 353-54.

September 17, 2010.<sup>90</sup> On September 21, 2010, the Hotel terminated Ms. Boyer-Liberto's employment.<sup>91</sup>

As to her retaliation claim, Ms. Boyer-Liberto contended that her complaint to Ms. Berghauer about Clubb calling her a porch monkey on September 14 and 15, 2010, constituted protected "opposition activity" under Title VII and Section 1981.<sup>92</sup> The district court disagreed and granted summary judgment to the defendants.<sup>93</sup> Ms. Boyer-Liberto appealed.

The primary issue on appeal was whether or not Ms. Boyer-Liberto had an objectively reasonable belief that Clubb's conduct in twice calling her a porch monkey was "unlawful"<sup>94</sup> under Title VII<sup>95</sup> and Section 1981.<sup>96</sup> If Ms. Boyer-Liberto's belief was objectively reasonable, then she engaged in protected opposition activity.<sup>97</sup> If her belief was not objectively reasonable, then she did not engage in protected opposition activity and could not establish a retaliation claim under Title VII or Section 1981.<sup>98</sup>

The Fourth Circuit panel that heard Ms. Boyer-Liberto's appeal consisted of Judge Niemeyer, Judge Shedd, and Chief Judge Traxler.<sup>99</sup> Judge Niemeyer was nominated to the Fourth Circuit by President George H.W. Bush;<sup>100</sup> Judge Shedd was nominated by President George W. Bush;<sup>101</sup> and Chief Judge Traxler was nominated by President Clinton.<sup>102</sup>

In an opinion by Judge Niemeyer, which Judge Shedd joined, a majority of the Fourth Circuit panel held that Ms. Boyer-Liberto had not engaged in protected opposition activity because Clubb's comments, while "racially

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90. *Id.* at 354.

91. *Id.*

92. *Id.* at 360.

93. *Id.* at 355.

94. *Id.*

95. *Id.* at 356.

96. See 42 U.S.C. § 2000e-2(a)(1) (2012) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

97. *Boyer-Liberto*, 752 F.3d at 358 ("Liberto's hostile work environment claim under 42 U.S.C. § 1981 is governed by the same principles applicable to her hostile work environment claim under Title VII."). See 42 U.S.C. § 2000e-3(a) (2012) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ."). The Fourth Circuit has long held that, in order for Title VII's anti-retaliation provision to be applicable, the employee must have had an objectively reasonable belief that the subject matter of her complaint was unlawful under Title VII. See *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 338-39 (4th Cir. 2006) (citing *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 406-07 (4th Cir. 2005); *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)).

98. *Boyer-Liberto*, 752 F.3d at 359.

99. *Id.*

100. *Id.* at 352.

101. *Judges of the Fourth Circuit, Since 1801*, *supra* note 8.

102. *Id.*

derogatory and highly offensive,”<sup>103</sup> were insufficient to actually create a racially hostile work environment. In short, because Clubb’s conduct did not actually create a hostile work environment, Ms. Boyer-Liberto’s belief that it was unlawful was not objectively reasonable.<sup>104</sup> As Judge Niemeyer explained, “[because a] reasonable *juror* could have found the presence of a hostile work environment . . . it stands to reason that *Liberto* also could not have had an objectively reasonable belief that a hostile work environment existed.”<sup>105</sup>

The panel majority effectively charged Ms. Boyer-Liberto with knowledge of anti-harassment law generally and more specifically, of the typically amorphous point at which conduct in the workplace become sufficiently “severe or pervasive” to create a hostile work environment.<sup>106</sup> In doing so, the panel majority charged Ms. Boyer-Liberto with a level of legal knowledge not possessed by a vast majority of lawyers, much less by restaurant hostesses and bartenders.<sup>107</sup> Such a standard essentially guts the opposition clause of Title VII’s anti-retaliation provision and gives employers free reign to fire “complainers” except in those rare circumstances in which the complained of conduct happens to actually be unlawful.<sup>108</sup>

Chief Judge Traxler dissented as to the majority’s ruling on the retaliation claim.<sup>109</sup> Chief Judge Traxler stressed that opposition activity is not limited to opposing practices that are actually unlawful, provided that the employee reasonably believes the practice is unlawful.<sup>110</sup> Further, Chief Judge Traxler stated that because a single use of certain racial slurs directed at an employee can create an actionable hostile work environment, it was objectively reasonable for Ms. Boyer-Liberto to believe that Clubb’s conduct was unlawful.<sup>111</sup>

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103. *Boyer-Liberto*, 752 F.3d at 356.

104. *Id.* at 359–60.

105. *Id.* at 360.

106. Judges Niemeyer and Shedd relied primarily on *Jordan v. Alternative Res. Corp.* for their conclusion. *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006). However, *Jordan* is easily distinguishable. In *Jordan*, two white employees were watching news coverage of the capture of the “D.C. Snipers” (John Allen Mohammed and Lee Boyd Malvo) in the break room when one commented to the other “[t]hey should put those two black monkeys in a cage with a bunch of black apes. . . .” *Jordan*, 458 F.3d at 336. Robert Jordan, who was also in the break room, overheard the comment. *Id.* The comment was not directed at him nor was it—or any similar comment—ever repeated in the workplace. *Id.* Here, by contrast, the porch monkey comment was made by Clubb to Ms. Boyer-Liberto and was repeated two days in a row. See *Boyer-Liberto*, 752 F.3d at 353–54.

107. See *Boyer-Liberto*, 752 F.3d at 359.

108. See generally Matthew W. Green, Jr., *What’s So Reasonable About Reasonableness? Rejecting A Case Law-Centered Approach To Title VII’s Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759 (2014) (discussing the opposition clause and reasonable belief requirements of Title VII). Based on my experience as a management-side employment lawyer for more than eleven years (from 1999 to 2011), the vast majority of employee complaints do not involve conduct that is actually unlawful under Title VII or any other anti-discrimination statute, but do involve conduct that a lay person may reasonably (if mistakenly) believe to be unlawful.

109. *Boyer-Liberto*, 752 F.3d at 361.

110. *Id.* at 362.

111. *Id.* at 363.

Chief Judge Traxler concluded his dissent by highlighting Judge Robert King's dissent in *Jordan* as follows:

I share in the sentiment Judge King expressed so well in his dissent in *Jordan* that our very narrow interpretation of what constitutes a reasonable belief in this context has ‘place[d] employees who experience racially discriminatory conduct in a classic “Catch–22” situation.’ They can either report the offending “conduct to their employer at their peril, as the Supreme Court has essentially required them to do in order to preserve their rights, . . . or they can ‘remain quiet and work in a racially hostile and degrading work environment, with no legal recourse beyond resignation,’ *Jordan*, 458 F.3d at 355 (King, J., dissenting). Like Judge King, I cannot accept that an employee in circumstances like these can be forced to choose between her job and her dignity.<sup>112</sup>

### B. *The Clash*

Now, it is reasonable for a reader to think at this point that *Boyer-Liberto* does not in fact illuminate any new clash of ideologies on the Fourth Circuit, but merely continues a preexisting debate between the court's more moderate members such as Chief Judge Traxler and Judge King and more conservative members such as Judges Niemeyer and Shedd. The reader would be correct—to this point. However, the clash can be vividly seen in what happened next.

In *Jordan*, after the panel opinion, the plaintiff petitioned the Fourth Circuit for rehearing en banc.<sup>113</sup> The court, by an evenly divided vote of five to five, denied the petition.<sup>114</sup> The judges in favor of rehearing en banc were Chief Judge Wilkins (a Reagan nominee) and Judges Michael, Traxler, King, and Gregory (all Clinton nominees).<sup>115</sup> The judges opposed to rehearing en banc were Judges Widener (a Nixon nominee), Wilkinson (a Reagan nominee), Niemeyer (a George H.W. Bush nominee), and Shedd and Duncan (both George W. Bush nominees).<sup>116</sup> In short, all four voting judges nominated by a

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112. *Id.* at 363.

113. *Jordan v. Alternative Res. Corp.*, 467 F.3d 378, 381 (4th Cir. 2006), *reh'g en banc denied*.

114. *Id.* at 378. Both Rule 35(a) of the Federal Rules of Appellate Procedure and Local Rule 35.1(b) of the Local Rules of the Fourth Circuit provide that only “[a] majority of the circuit judges who are in regular active service and who are not disqualified” may order a rehearing en banc. FED. R. APP. 35(a); 4TH CIR. R. 35(a). As the active circuit judges split evenly 5 to 5 in *Jordan*, no majority existed and the court denied the petition.

115. *Jordan*, 467 F.3d at 381. *See also Judges of the Fourth Circuit, Since 1801*, *supra* note 8 (providing information for presidential appointments).

116. *Jordan*, 467 F.3d at 381.

Democratic president<sup>117</sup> voted in favor of rehearing en banc; while five of the six Republican nominees voted against rehearing en banc. Further, Judges King, Traxler, Michael, Gregory, and Chief Judge Wilkins all indicated, in a dissent from the denial of rehearing en banc, that they would have ruled in favor of Mr. Jordan had the case been reheard.<sup>118</sup>

Of course, now the ideological balance on the Fourth Circuit is very different, with ten judges nominated by Democratic presidents and only five nominated by Republican presidents.<sup>119</sup> Further, the panel that originally heard *Boyer-Liberto* contained two of the court's five Republican nominees and its two most conservative members: Judges Niemeyer and Shedd—who comprised the panel majority in *Boyer-Liberto*<sup>120</sup> and both of whom voted against rehearing *Jordan* en banc.<sup>121</sup> The views of Judges Niemeyer and Shedd in *Jordan* were rejected by all of the then-Democratic nominees to the Fourth Circuit,<sup>122</sup> a group that now comprises a near two-to-one super majority on the court.<sup>123</sup>

Given this profound change in the ideological makeup of the Fourth Circuit since it issued the opinion in *Jordan*, and the empirical data on

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117. For reasons that are unclear from the record, Judge Motz did not vote on the petition. *See id.* Perhaps she abstained from voting because the appeal was from the District of Maryland (Judge Deborah K. Chasanow), *see Jordan v. Alternative Res. Corp.*, No. Civ. A. DKC 2004–1091, 2005 WL 736610, at \*1 (D. Md. March 30, 2005), and Judge Motz's husband, Judge J. Frederick Motz, sat on the District Court for the District of Maryland at the time. *See Partners in Life, Colleagues on the Bench*, THE BALTIMORE SUN, Sept. 1, 1991, available at [http://articles.baltimoresun.com/1991-09-01/features/1991244188\\_1\\_motz-judge-diana](http://articles.baltimoresun.com/1991-09-01/features/1991244188_1_motz-judge-diana).

118. *Jordan*, 467 F.3d at 382, 383 (King, C.J., dissenting from denial of rehearing en banc; joined by Traxler, Michael, and Gregory, C.J.s and Wilkins, C.C.J.).

119. Currently, the Fourth Circuit consists of Chief Judge Traxler and Judges Wilkinson, Niemeyer, Motz, King, Gregory, Shedd, Duncan, Agee, Keenan, Wynn, Diaz, Floyd, Thacker, Harris, Hamilton, and Davis. *See Judges of the Court*, U.S. COURTS, <http://www.ca4.uscourts.gov/judges/judges-of-the-court> (last visited Apr. 5, 2015). For the breakdown of presidential appointments, *see Judges of the Fourth Circuit, Since 1801*, *supra* note 8.

120. *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 352 (4th Cir. 2014).

121. *Jordan*, 467 F.3d at 378. Additionally, Judge Niemeyer authored both the panel opinion in *Jordan* and an opinion in support of denial of rehearing en banc. *See id.* at 379 (opinion in support of denial of rehearing en banc); *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 336 (4th Cir. 2006) (panel opinion).

122. At the time of the *Jordan* decision, the judges nominated by Democratic presidents on the panel were King, Michael, Traxler, Motz, and Gregory. *See supra* note 20–21. All but Motz voted in favor of rehearing.

123. In mid-May 2014, Judge Andre Davis was no longer a regular active judge as he took senior status in February 2014, and Judge Harris had not yet been confirmed. *See Senior Judge Andre M. Davis*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/judges/judges-of-the-court/senior-judge-andre-m-davis> (last visited Apr. 2, 2015); *Judges of the Fourth Circuit, Since 1801*, *supra* note 51b. So, the Fourth Circuit bench consisted of nine Democratic nominees (Traxler, King, Motz, Gregory, Wynn, Diaz, Keenan, Floyd, and Thacker) and five Republican nominees (Wilkinson, Niemeyer, Duncan, Shedd, and Agee). *Id.*

the Fourth Circuit's ideological shift, as soon as I read the panel opinion in *Boyer-Liberto* I emailed lead counsel for Ms. Boyer-Liberto and urged him to petition for rehearing en banc and asserted that it "would have a better than average chance of success giving the 4th Circuit's demonstrable ideological shift."<sup>124</sup>

Ms. Boyer-Liberto indeed petitioned the full Fourth Circuit for rehearing en banc.<sup>125</sup> Unlike the petition in *Jordan*, the court granted this petition on July 1, 2014.<sup>126</sup> Although there is no public record of how the judges voted on the petition, my prediction is that Chief Judge Traxler and Judges King, Motz, Gregory, Wynn, Keenan, Diaz, Floyd, Thacker, Duncan, and Agee voted to grant the petition and that Judges Wilkinson, Niemeyer, and Shedd voted to deny it. The court heard en banc oral argument on September 18, 2014.<sup>127</sup>

Although the Fourth Circuit has not yet issued its en banc opinion in *Boyer-Liberto*, I anticipate an opinion substantially adopting the views of Judge King and Chief Judge Traxler in their dissents in *Jordan* and from the panel opinion in *Boyer-Liberto*, respectively. I predict that all ten of the Fourth Circuit judges nominated by Democratic presidents—Traxler, King, Motz, Gregory, Wynn, Keenan, Diaz, Floyd, Thacker, and Harris—will join this opinion. Additionally, Judges Duncan and Agee, and perhaps even Judge Wilkinson, may join their Democratic-nominated colleagues in ruling in favor of Ms. Boyer-Liberto.

#### IV. CONCLUSION

The Fourth Circuit's collective judicial ideology has changed considerably as a result of President Obama's successful nominees. Despite selecting primarily moderate, noncontroversial, consensus nominees in his first term, President Obama worked the ideological makeover Judge Wilkinson lobbied against. While the court's ideological shift remains most apparent in the high profile, politically charged cases it hears, that shift is regularly changing the outcome of cases. Employees are winning more often.<sup>128</sup> Employers are losing more often.<sup>129</sup> And many of the doctrines that made the Fourth Circuit the most conservative Court of Appeals in the country are being

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124. E-mail from Brian S. Clarke, Assistant Professor, Charlotte School of Law, to Robin Cockey, Lead Counsel for Ms. Boyer-Liberto (May 16, 2014, 01:31 EST) (on file with author).

125. *Boyer-Liberto*, 752 F.3d at 350.

126. *Id.*

127. Judge Harris joined the court in July 2014 and participated in the en banc oral argument. *See Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), *reh'g en banc docketed*, No. 13–1472, (4th Cir. 2014).

128. Clarke, *supra* note 9, at 200.

129. *Id.*



revisited. Among these is the standard for objective reasonableness in the opposition activity context. While the luck of the draw can still yield a panel reflecting the old Fourth Circuit—as it did in *Boyer-Liberto*—the breadth of the new Fourth Circuit’s majority will make petitions for rehearing en banc more viable in those cases. This is clearly not our parents’ Fourth Circuit.

## V. POSTSCRIPT<sup>130</sup>

On May 7, 2015, after this article was written and edited (and after I made the various predications set forth above), the Fourth Circuit issued its en banc opinion.<sup>131</sup> As anticipated, the en banc opinion provides a perfect – even somewhat jarring – demonstration of the extent of the Fourth Circuit’s ideological shift.

The en banc Fourth Circuit disagreed with the panel majority, reversed the district court, and explicitly overruled *Jordan*.<sup>132</sup> Judge King wrote the majority opinion. As predicted,<sup>133</sup> all of the judges nominated by Democratic presidents—Traxler, Motz, Gregory, Wynn, Keenan, Diaz, Floyd, Thacker, and Harris—joined the majority opinion. Additionally, Judge Duncan joined the majority opinion in full, as did (surprisingly) Judge Shedd, both of whom were nominated by Republican presidents.<sup>134</sup> Judge Wilkinson and Judge Agee (both Republican nominees) concurred in part and dissented in part, with Judge Wilkinson writing an opinion in which Judge Agee joined.<sup>135</sup> Only Judge Niemeyer, who authored the panel opinion, dissented in full.

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<sup>130</sup> My sincere thanks to the Editors of the South Carolina Law Review for allowing me to append this short Postscript, especially considering that when I made my request they had just concluded their law school careers and were celebrating graduation. This Postscript is not intended to provide a complete discussion of the en banc opinion in *Boyer-Liberto*, but simply to highlight the votes of the Fourth Circuit’s active judges and the aspects of the en banc court’s opinion that reflect the ideological shift discussed in this article.

<sup>131</sup> *Boyer-Liberto v. Fontainebleau Corp.*, \_\_\_ F.3d \_\_\_, 2015 WL 2116849, 2015 U.S. App. LEXIS 7557 (4th Cir. May 7, 2015).

<sup>132</sup> *Id.* at \*1.

<sup>133</sup> See *supra* at 16.

<sup>134</sup> I predicted that Judge Duncan would join the majority, but did not anticipate that Judge Shedd would do so. In retrospect, Judge Shedd’s concurrence at the panel level solidly indicated that he felt that *Jordan* dictated the judgment in favor of Fontainebleau. Of course, on rehearing en banc, neither Judge Shedd nor any other member of the court was constrained by *Jordan*.

<sup>135</sup> Judges Wilkinson and Agee concurred with the majority’s judgment in favor of Ms. Boyer-Liberto on her retaliation claim. However, they dissented as to the majority’s revival of her hostile work environment harassment claim. See *Id.* at \*20 (Wilkinson, J., concurring in part and dissenting in part).

In sum, on the retaliation claim, the vote was 14 to 1, with fourteen (14) votes in favor of Ms. Boyer-Liberto and one (1) in favor of the employer. On the hostile work environment racial harassment claim, the vote was 12 to 3, with twelve (12) votes for Ms. Boyer-Liberto and three (3) for the employer. This near unanimity shows, in (perhaps) startling terms, the ideological shift worked by President Obama and his successful nominees to the Fourth Circuit.

This ideological shift is even more apparent given the breadth of the en banc majority's opinion on both the retaliation claim and the harassment claim. On the retaliation claim, the en banc court explicitly rejected the standard of objective reasonableness articulated in *Jordan*, namely that when an "employee has complained to his employer of an isolated incident of harassment..., the employee cannot have possessed a reasonable belief that a Title VII violation was in progress, absent evidence 'that a plan was in motion to create such an environment' or 'that such an environment was [otherwise] likely to occur.'"<sup>136</sup> In place of this restrictive standard, the en banc majority adopted the following far more employee-friendly standard:

[A]n employee is protected from retaliation for opposing an isolated incident of harassment when she reasonably believes that a hostile work environment is in progress, *with no requirement for additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur.*"<sup>137</sup>

Further, the majority's discussion makes it clear that the employee need not have detailed knowledge of anti-harassment law in order to engage in objectively reasonable opposition activity. Rather, "employees who reasonably perceive an incident to be physically threatening or humiliating do not have to wait for further harassment before they can seek help from their employers without exposing themselves to retaliation."<sup>138</sup>

As to Ms. Boyer-Liberto's hostile work environment harassment claim, the en banc majority reversed the district court's grant of summary judgment to the employer. Noting "that this is a first for our Court,"<sup>139</sup> the majority held that a single incident of harassment, if "extremely serious," could be sufficient to "engender a hostile work

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<sup>136</sup> Id. at \*14.

<sup>137</sup> Id. (emphasis added).

<sup>138</sup> Id. at \*19.

<sup>139</sup> Id.

environment.”<sup>140</sup> And, critically, it is up to the jury to make this determination.<sup>141</sup>

While the en banc majority’s resolution of the retaliation claim – and the overruling of *Jordan* – is strongly demonstrative of the Fourth Circuit’s ideological shift, the court’s revival of Ms. Boyer-Liberto’s hostile work environment harassment claim came as a bit of a surprise and, given the 12 to 3 vote on that claim, vividly demonstrates that the Fourth Circuit’s ideological shift is very real and likely continuing.

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<sup>140</sup> Id. at \*12-\*13. As relevant to Ms. Boyer-Liberto’s claim, the court held that a reasonable jury could conclude that “two uses of the ‘porch monkey’ epithet—whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment.” Id. at \*13.

<sup>141</sup> Id. The Fourth Circuit’s movement to a more “pro-employee” stance in hostile work environment harassment cases has been more pronounced than in other types of cases. In particular, the Fourth Circuit has made the role of the jury much more central to the resolution of hostile work environment harassment claims. See, e.g., *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326 (4th Cir. 2010)(stating that whether or not “harassment was sufficiently severe or pervasive is quintessentially a question of fact” for the jury; reversing summary judgment for employer on hostile work environment sex harassment claim; and remanding for trial); *Hoyle v. Freightliner, LLC*, 650 F.3d 321 (4th Cir. 2011)(same); *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202 (4th Cir. 2014)(same); *Okoli v. City of Baltimore*, 648 F.3d 216 (4th Cir. 2011)(reversing summary judgment for the employer; and remanding for trial on employee’s hostile work environment claim); *Freeman v. Dal-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014)(same). This strengthening of the jury’s role in resolving hostile work environment claims is a critical “pro-employee” development on the Fourth Circuit.

## APPENDIX

**Table 1**<sup>142</sup>

<b>Comparison of Fourth Circuit and Eighth Circuit Outcomes in Years without Obama Nominated Judges on the Fourth Circuit Bench (2004, 2006, 2008)</b>			
Outcome	Court of Appeals		Total
0 = Conservative/Employer win 1 = Liberal/Employee win	4th Cir.	8th Cir.	
0	188 72.03%	191 73.46%	379 72.74%
1	73 27.97%	69 26.54%	142 27.26%
Total	261 100%	260 100%	521 100%
Pearson's $\chi^2 = 0.1345$		$p$ -value=0.714	

142. *Id.* at 211 tbl.1.

**Table 2**<sup>143</sup>

<b>Comparison of Fourth Circuit and Eighth Circuit Outcomes in Years with Obama Nominated Judges on the Fourth Circuit Bench (2010, 2012)</b>			
Outcome	Court of Appeals		Total
0 = Conservative/Employer win 1 = Liberal/Employee win	4th Cir.	8th Cir.	
0	87 68.50%	119 80.95%	206 75.18%
1	40 31.50%	28 19.05%	68 24.82%
Total	127 100%	147 100%	274 100%
Pearson's $\chi^2 = 5.6588$		<b><i>p-value=0.017</i></b>	

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143. *Id.* at 212 tbl.2.

**Table 3**<sup>144</sup>

<b>Fourth Circuit: Combined Data for Cases in which Employee was Appellant (Base Outcome Codes 1 and 4)</b>			
<b>Outcome</b>	<b>Years</b>		<b>Total</b>
4 = Employer win 1 = Employee win	<b>pre-Obama years</b> (2004, 2006, 2008)	<b>Obama Years</b> (2010, 2012)	
4	176 84.21%	84 74.34%	260 80.75%
1	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	

144. *Id.* at 216 tbl.5.

**Table 4**<sup>145</sup>

<b>Direct Comparison of Fourth Circuit and Eighth Circuit Outcomes in Cases in which Employee was Appellant: Pre-Obama Years (2004, 2006, 2008)</b>			
<b>[Base Outcome Codes 1 and 4]</b>			
Outcome	Court of Appeals		Total
4 = Employer win 1 = Employee win	4th Cir.	8th Cir.	
4	176 84.21%	173 83.98%	349 84.10%
1	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	

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145. *Id.* at 220 tbl.8.

**Table 5**<sup>146</sup>

<b>Direct Comparison of Fourth Circuit and Eighth Circuit Outcomes in Cases in which Employee was Appellant: Obama Years (2010 and 2012)</b>			
<b>[Base Outcome Codes 1 and 4]</b>			
Outcome	Court of Appeals		Total
4 = Employer win 1 = Employee win	4th Cir.	8th Cir.	
4	84 74.34%	112 91.06%	196 83.05%
1	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	

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146. *Id.* at 220 tbl.9.