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Selecting the Next Nominee for the Federal Circuit: Patently Obvious to Consider Diversity¹

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Over the summer of 2009, Judge Alvin Schall of the Court of Appeals for the Federal Circuit notified the White House of his decision to take senior status⁴ that Fall. This decision took effect on October 5, 2009. As a result, there is now an official vacancy on the Federal Circuit, and President Obama has the opportunity to appoint a new appellate judge to the twelve-member court. In addition, Chief Judge Paul Michel has announced his intent to retire in May 2010.

During the past eight years of the Bush Administration, only two appointments were made – Sharon Prost in 2001 and Kimberly Moore in 2006. For President Obama, however, that trend is expected to change. With at least two vacancies by mid-year 2010, this could be an excellent opportunity to identify candidates who, first and foremost, have outstanding credentials and experience – but also to consider diversity as a worthy factor.

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⁴ Senior status is a classification for federal judges at all levels who voluntarily elect semi-retired status under 28 U.S.C. § 371(c). Electing senior status permits a sitting judge to retire from full-time service while still maintaining a part-time role on the court. Colloquially referred to as the "Rule of 80," a judge may elect senior status once 65 years of age and 15 years of active service have been reached. After that, a sliding scale of increasing age and decreasing service is applied (e.g., 70+10 = 80). The election of senior status is entirely voluntary.

As shown in Table 1 below, the current breakdown of the Federal Circuit indicates that in 2010 a total of six judges could elect senior status. (Judges Schall and Michel are not included in this count as Judge Schall has already elected and Chief Judge Michel is eligible but retiring.) That means President Obama could have the chance to shape the composition of the court in a profound manner.

Table 1: U.S. Court of Appeals for the Federal Circuit

Judge	Age	Senate Control	Appointed	Status	Eligible for Seniority	Background
Paul R. Michel, Chief	68	D	1988	Active	Yes	Congress / Gov't
Pauline Newman	81	R	1984	Active	Yes	Corporate
Haldane Robert Mayer	68	D	1987	Active	Yes	Military/Gov't
Alan D. Lourie	74	D	1990	Active	Yes	Corporate
Randall R. Rader	60	D	1990	Active	No	Congress
Alvin A. Schall	65	D	1992	Senior	Yes	Gov't / DOJ
William C. Bryson	64	D	1994	Active	2010	Gov't / DOJ
Arthur J. Gajarsa	68	R	1997	Active	Yes	Law Firm
Richard Linn	65	R	1999	Active	No	Law Firm
Timothy B. Dyk	72	R	2000	Active	Yes	Law Firm
Sharon Prost	58	D	2001	Active	No	Congress / Gov't
Kimberly A. Moore	41	R	2006	Active	No	Academic

Many qualified candidates would be worthy of serving on the Federal Circuit. Some may be driven to candidacy by the prestige of the appointment and the opportunity to have a lasting and powerful impact on patent law and policy. When considering the critical purpose and objectives served by the Federal Circuit, however, it would be prudent to consider other intangibles in addition to fundamental judicial competencies and qualifications.

In the past, the patent community has often expressed its support for Federal Circuit judicial nominees in a reactive manner, not through proactive identification and promotion. In the last few months, however, the Intellectual Property Owners Association (IPO) sent a letter to former White House Counsel Gregory Craig urging consideration of key factors when formulating a selection for the next nominee, while explicitly refraining from endorsement of any individual.⁵ Those factors included (1) substantial prior experience as a practicing patent attorney (either as a chief patent counsel or

⁵ See Letter from Steven Miller to Gregory Craig of September 3, 2009, available at <http://www.ipo.org/AM/Template.cfm?Section=Home&CONTENTID=24117&TEMPLATE=/CM/ContentDisplay.cfm>.

trial attorney), (2) registration and past practice before the U.S. Patent and Trademark Office, (3) prior “deep technological experience,” and/or (4) prior service as a trial judge on a U.S. district court.

Without question, these factors are meritorious in identifying and evaluating potential candidates and ensuring the court’s commitment to excellence. At a Federal Circuit Bar Association symposium last March, Judge Randall Rader indicated that “The court could profit greatly from district judge experience.” Chief Judge Paul Michel agreed, noting that there were no former district court judges on the bench and stating that “The court might benefit greatly by having a highly experienced jury trial lawyer.” Another area of expertise where the Federal Circuit could benefit is corporate experience: the last appointment to emphasize this particular background was nearly twenty years ago.

Besides these important factors, however, the Administration should take into consideration other characteristics which are no less significant. Since the Court of Appeals for the Federal Circuit was formed in 1982, while there has been evidence of diversity in terms of professional background, the same cannot be said for cultural diversity. In fact, in the *twenty-seven year* history of the Federal Circuit spanning 31 judges, there has been only one judge from a minority ethnic group.⁶

The judicial nominees submitted by the Administration since President Obama was inaugurated last January reveal a striking trend: diversity is playing a critical role in the selection process. Of the 37 formal judicial nominations sent to the Senate, nearly half are women and over fifty-five percent are minorities. Tables 2 and 3 detail President Obama’s selections to date.

⁶ The only minority judge to serve on the Court of Appeals for the Federal Circuit was Asian American Judge Shiro Kashiwa, who served on the bench from the court’s inception in 1982 until early 1986.

Table 2: Obama Administration Judicial Nominees

Name	Ethnicity	Court Nomination	Nomination Date	Confirmation Date
David Hamilton	Caucasian	7 th Circuit	17-Mar	19-Nov
Florence Y. Pan	Asian-Am	DC Superior Court	24-Mar	21-May
Marisa J. Demeo	Hispanic/Latina	DC Superior Court	24-Mar	Pending
Andre Davis	African-Am	4 th Circuit	2-Apr	9-Nov
Gerard Lynch	Caucasian	2 nd Circuit	2-Apr	17-Sep
Sonia Sotomayor	Hispanic/Latina	Supreme Court	1-Jun	6-Aug
Stuart Gordon Nash	Caucasian	DC Superior Court	8-Jun	Pending
Joseph A. Greenaway	African-Am	3 rd Circuit	19-Jun	Pending
Beverly Baldwin Martin	Caucasian	11 th Circuit	19-Jun	Pending
Charlene E. Honeywell	African-Am	Middle District FL	24-Jun	9-Nov
Jeffrey L. Viken	Caucasian	District of S. Dakota	24-Jun	29-Sep
Irene Cornelia Berger	African-Am	S. District of WV	8-Jul	27-Oct
Roberto A. Lange	Spanish	District of S. Dakota	8-Jul	21-Oct
Abdul K. Kallon	African-Am	N. District of AL	31-Jul	21-Nov
Jacqueline H. Nguyen	Asian-Am	C. District of CA	31-Jul	1-Dec
Edward Milton Chen	Asian-Am	N. District of CA	6-Aug	Pending
Dolly M. Gee	Asian-Am	C. District of CA	6-Aug	Pending
Richard G. Seeborg	Caucasian	N. District of CA	6-Aug	Pending
Jane Branstetter Stranch	Caucasian	6 th Circuit	6-Aug	Pending
Thomas I. Vanaskie	Caucasian	3 rd Circuit	6-Aug	Pending
Barbara Milano Keenan	Caucasian	4 th Circuit	14-Sep	Pending
Louis Butler	African-Am	W. District of WI	1-Oct	Pending
Denny Chin	Asian-Am	2 nd Circuit	6-Oct	Pending
O. Rogeriee Thompson	African-Am	1 st Circuit	6-Oct	Pending
Christina Reiss	Caucasian	District of VT	9-Oct	21-Nov
Rosanna M. Peterson	Caucasian	E. District of WA	13-Oct	Pending
William Conley	Caucasian	W. District of WI	29-Oct	Pending
Brian Jackson	African-Am	M. District of LA	29-Oct	Pending
Albert Diaz	Hispanic/Latino	4 th Circuit	4-Nov	Pending
James A. Wynn, Jr.	African-Am	4 th Circuit	4-Nov	Pending
Nancy D. Freudenthal	Caucasian	District of WY	4-Dec	Pending
Denzil Price Marshall, Jr	Caucasian	E. District of AR	4-Dec	Pending
Benita Y. Pearson	African-Am	N. District of OH	4-Dec	Pending
J. Michelle Childs	African-Am	District of S. Carolina	22-Dec	Pending
Richard Mark Gergel	Caucasian	District of S. Carolina	22-Dec	Pending
Timothy S. Black	Caucasian	S. District of Ohio	24-Dec	Pending
Gloria M. Navarro	Hispanic/Latina	District of Nevada	24-Dec	Pending

Table 3:
Statistics of Obama Administration Judicial Nominees

46% of nominations are women

57% of nominations are minority candidates

30% of nominations are African-American

Even more striking are the various press releases that have accompanied the judicial announcements. Included among the nominees are many “firsts.” Judge Irene Berger, upon confirmation, became the first ever African-American federal judge in West Virginia.⁷ In the case of Justice O. Rogeriee Thompson, if confirmed she would become the first African American judge and the second woman ever to serve on the U.S. Court of Appeals for the First Circuit.⁸ And Judge Denny Chin, if confirmed, would become not only the first ever Asian-American to sit on the U.S. Court of Appeals for the Second Circuit but also the first ever Asian-American appellate judge to serve outside the Ninth Circuit.⁹

The Obama Administration has not stopped at the federal bench. Diversity has been a theme that has permeated throughout the federal legal community.

According to the U.S. Department of Justice (DOJ) official website,¹⁰ representatives of the Office of Attorney Recruitment and Management or other Department of Justice officials attended attorney recruitment events in 2009 spanning a particularly wide array of diverse interest groups, including those shown in Table 4.

⁷ See <http://www.wvrecord.com/news/221850-manchin-has-list-of-six-to-replace-berger>.

⁸ See <http://newsblog.projo.com/2009/10/obama-nominates-thompson-to-fi.html>.

⁹ See <http://www.advancingequality.org/en/rel/237/>.

¹⁰ <http://www.usdoj.gov/jmd/eeos/events.htm> (as last visited during November 2009)

Table 4: DOJ Recruitment Events in 2009

Organization	Location	Date
U.S. Hispanic Leadership Conference	Chicago, IL	March 17-21
41 st Annual National Black Law Students Association Convention	Irvine, CA	March 18-22
Federal Bar Association Indian Law Conference	Santa Fe, NM	April 2-3
36 th National Annual Latino Peace Officers Association National Training Institute	Los Angeles, CA	May 27-30
Society of American Indian Government Employees (SAIGE)	San Diego, CA	June 1-5
Women in Federal Law Enforcement (WIFLE) Convention	Tucson, AZ	June 15-19
National Federation of the Blind/Association of Blind Lawyers	Detroit, MI	July 3-8
Federally Employed Women (FEW) National Training Program	Orlando, FL	July 20-24
National Organization for Mexican American Rights (NORMAR)	Las Vegas, NV	August
National Congress of American Indians (NCAI)	Palm Springs, CA	October 11-16
National Conference of Puerto Rican Women (NACOPRW)	San Juan, PR	November 9-11
National Asian/Pacific American Bar Association (NAPABA)	Boston, MA	November 18-22
International Association of Jewish Public Safety Employees	Miami, FL	November 9-11
Perspectives on Employment of People with Disabilities	Bethesda, MD	December 10-12

It is evident that the Obama Administration has made – and continues to make – notable efforts to reach across the multi-faceted divide in terms of culture, ethnicity, gender, religion, and disabilities and attract extremely talented and capable candidates who also bring a dimension of diversity.

In light of the concerted efforts of the Obama Administration to reach those qualified to serve, now is the time to address the historical omissions at the U.S. Court of Appeals for the Federal Circuit. The nomination of the next judge for the Federal Circuit may be a landmark opportunity to advance this effort – while also adding to the immense talent, judicial experience, and technological expertise already on the court. Moreover, considering its subject matter jurisdiction beyond patent law,¹¹ this court could greatly benefit from a variety of viewpoints and backgrounds. It will be interesting to see whether an Administration committed to cultural diversity will seize the chance to combine both competence and experience with diversity in evaluating candidates for the Federal Circuit.

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¹¹ The jurisdiction of the U.S. Court of Appeals for the Federal Circuit includes international trade, government contracts, federal personnel, veterans’ benefits, and certain money claims against the United States government; See <http://www.cafc.uscourts.gov/about.html>