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The Nomination of Three New Judges to the D.C. Circuit: To Support and Defend the Constitution

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On June 4, 2013, Barack Obama nominated Patricia Millett,[1] Robert Wilkins,[2] and Cornelia Pillard[3] to fill vacancies on the United States Court of Appeals for the District of Columbia Circuit. Some Republicans immediately objected. Describing his nominations as wholly political, they alleged that President Obama sought to pack the court,[4] invoking rhetoric used against the FDR presidency to cast aspersions and plant a negative seed in the minds of those who do not know much about judging, or judges, or courts, or even American government. These Republicans argued that the nominees were, or would inevitably evolve into judicial activists, skewing the federal appeals court[5] to the "left."[6]

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1. Patricia Millett is my close friend, but she has had no involvement in or knowledge of my research into this issue. She was confirmed by the Senate on December 10, 2013, by a vote of 56-38.

2. Robert Wilkins is currently a district judge on the United States District Court for the District of Columbia. He is expected to be confirmed to the D.C. Circuit within days of this writing.

3. Cornelia "Nina" Pillard was confirmed by the Senate on December 12, 2013, by a vote of 51-44.

4. *See, e.g.*, *Packing the Court*, WALL ST. J., May 19, 2013, at http://online.wsj.com/news/articles/SB10001424127887323628004578456872854815956. *See also, e.g.*, 159 CONG. REC. S8446 (daily ed. Nov. 21, 2013) (statement of Sen. Jeff Sessions (R-AL)) ("So the President is being pressured by a lot of these special interests, and there are others who are advocating these kind of actions. But the court is a court that is well constituted to do its duty, and it will continue to do so and needs no more judges. We don't have the money to fill them. We don't have the money to spend on it just to allow the President to pack the court with some of his nominees that will more likely advance an agenda. At least the agenda that he and his activist friends seem to favor that."), 159 CONG. REC. S7710 (daily ed. Oct. 31, 2013) (statement of Sen. John Cornyn (R-TX)) ("Well, I am sorry to reach the conclusion, but I think the evidence is overwhelming that what the President is trying to do by nominating these unneeded judges to this critical court, the second most powerful court in the Nation, is he is trying to pack the court in order to affect the outcomes."). Of course, many disagree with this statement, differentiating between filling the three existing vacancies on this court and FDR's attempt to *add* Justices to the United States Supreme Court. *See, e.g.,* 159 CONG. REC. S7701, (daily ed. Oct. 31, 2013) (statement of Sen. Dianne Feinstein (D-CA)) ("I would also like to take a moment to address this notion of 'court packing,' a term that originated with a plan by President Franklin Roosevelt to authorize new seats on the Supreme Court when he was not getting decisions he favored. This is not about creating new seats. This is about filling seats that exist, seats that have been authorized by Congress for many years, seats that the Judicial Conference continues to recommend be filled, and seats that my Republican colleagues pushed to fill not so many years ago. This is not 'court packing.'") 159 CONG. REC. S7710 (daily ed. Oct. 31, 2013) (statement of Sen. Debbie Stabenow (D-MI)) ("I wish to make a comment, if my colleague will excuse me. I have to say I am amazed to hear that we are court packing when what we are talking about is trying to fill three vacancies on a court. I hadn't heard that before with other Presidents. Hopefully, we can fill vacancies and try to do it in a bipartisan way.").

5. Many consider the D.C. Circuit to be the second-most important court in the country, after only the U.S. Supreme Court.

Inherent to the Republicans' assertion—and, indeed, the Democratic response—was a critical assumption: the decision-making of judges is substantially affected by their ideology at the time of appointment.[7] Moreover, the objectors explicitly asserted and the proponents implicitly assumed that those different votes would affect the panels ideologically in such a way that the outcome of a significant number of cases would change in ways important to the political agendas of each party.[8]

Indeed, so strong was the conviction among Democrats that by pushing through the nominations of Millett, Wilkins, and Pillard to the D.C. Circuit, they could significantly affect the law made by that Circuit (and thereby advance the Democratic agenda in general and the current President's agenda in particular)[9] that Majority Leader Harry Reid led his party in making the most substantial change to the Senate filibuster rules since their adoption.[10] After Republicans refused to allow votes on any of the three nominees, the Democrats eliminated the filibuster on judicial appointment, and, in so doing, prevented the Republicans from blocking votes on Millett, Wilkins, and Pillard.[11]

But one basic premise at the heart of this assumption was incorrect, at least to the extent that the behavior of the judges on the D.C. Circuit over the past five years is an indicator. I analyzed

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6. There is substantial ambiguity in the way politicians and commenters use terms such as "activist," "left," and "right" when it comes to judges and the judicial process. For purposes of this analysis, therefore, the question is not whether any given position is "left" or "right," but whether some ideological divergence can be detected between Republican nominees and Democratic nominees.

7. For the purposes of this analysis, I assumed that a judge's ideology is highly correlated with the party affiliation of the President appointing him or her. This is somewhat more likely to be true on the D.C. Circuit than on other circuit courts. Unlike most circuits, the appointment process to the D.C. Circuit is not affected by any senators who might have a "home" interest in any particular appointment. Thus, these nominations are entirely controlled by the White House. However, as Epstein and her co-authors have acknowledged, this assumption can be perilous but may be unavoidable. LEE EPSTEIN, ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 71 (2013).

8. *See, e.g.,* 159 CONG. REC. S8658 (daily ed. Dec. 11, 2013) (statement of Sen. Mitch McConnell (R-KY)) ("I think this is about as clear as it could be. There are people who do not like the decisions coming out of the court and so their intention is to pack the court with people who share their political views and will therefore sustain decisions about the advancement of their liberal agenda.") 159 CONG. REC. S8552 (daily ed. Dec. 9, 2013) (statement of Sen. Charles Grassley (R-IA)) ("It's hard to imagine the rationale for nominating three judges at once for this court given the many vacant emergency seats across the country, unless your goal is to pack the court to advance a certain policy agenda.").

9. Because the D.C. Circuit reviews the decisions of executive agencies, it would have the power to affirm agency decisions made with the President's approval.

10. What made the change so dramatic was not the substance—the rules on filibusters have changed a number of times over the last fifty years—but the way it was done. Essentially, rather than requiring a two-thirds vote to change the rules of the Senate (the basic premise since they were written by Thomas Jefferson), they can now be changed at any time by a bare majority of the senators present and voting. *See*, T. Jefferson, MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES (1801).

11. Of course, as many have noted, they also eliminated the filibuster with respect to most other Presidential nominees, as well, opening the door to the nomination and confirmation of numerous judicial and executive nominees over at least the next three years.

the 1009 merits opinions issued by that court between January 1, 2009 and December 6, 2013[12] and found that the judges on the D.C. Circuit have rarely chosen to dissent, and most opinions are unanimous.[13] When judges have dissented, panel composition is not statistically related to that decision.[14] To put it simply, a D.C. Circuit judge is no more or less likely to dissent from the majority opinion if he or she sits on an ideologically "pure" or "mixed" panel.[15]

Certainly, it is true that the introduction of three new judges onto an existing court may change this dynamic.[16] However, if they behave like their existing colleagues on the court have behaved over the last five years,[17] the political affiliation of the President who appointed them is unlikely to be the deciding factor in whether they agree or disagree with their judicial colleagues.[18] Some have also noted that, with the confirmation of three new "blue" judges, the potential for all-blue panels increases exponentially. In fact, it would have to do so, as over the past five years, only 9 of the 1009 cases in my survey were decided by all-blue panels, while 276 were decided by all-red panels.

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12. These opinions are available on the D.C. Circuit's website at http://www.cadc.uscourts.gov/internet/opinions.nsf. I included all opinions on the merits, including those by three-judge panel and en banc panels. I also included per curiam opinions. I did not include orders or sealed opinions.

13. Dividing the total number of dissents over the five-year period (108) by the total number of opinions (1009) demonstrated that D.C. Circuit panels are unanimous 89.6% of the time. For the purposes of the analysis of the limited question here, I consider "unanimous" opinions to be opinions in which no judge dissented. Where a judge concurred but ultimately voted with the majority on the outcome of the case, I did not factor the concurrence into my analysis. I used dissenting opinions as a proxy, hypothesizing that, if ideology is an important factor in judicial decision-making, one would expect there to be comparatively more dissents arising from panels with mixed ideologies than from those which are ideologically pure, one way or the other. For the purposes of this article, I did not consider concurrences as "disagreement," as the judges who concurred did agree on the disposition of the case. However, information about concurrences may be useful in future research.

14. The statistician used a chi-square test for independence to investigate the relationship between a panel's ideological makeup (i.e., pure vs. mixed) and its propensity for unanimity. Results of the chi-square test revealed no relationship between panel composition and level of unanimity (χ^2 (1, N = 1009) = .05, p = .83, φ = .01), suggesting that "pure" ideological panels were no more likely than "mixed" ideological panels to have reached a unanimous decision. The opposite (that "mixed" panels were no more likely to be unanimous than "pure" panels) was also true, although that information is less useful to analyzing the topic at hand.

15. Throughout this article, I will use the term "ideologically pure" panel to refer to panels on which all the judges were appointed by a President of the same political party. I will also sometimes call these panels "all red" or "all blue" panels. I will use the term "ideologically mixed" to refer to panels on which at least one judge was appointed by a Democratic President and at least one judge was appointed by a Republican President (a "mixed red and blue" panel).

16. *See generally, e.g.*, LEE EPSTEIN, ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); RICHARD A. POSNER, HOW JUDGES THINK (2008).

17. And I recognize that this is a large—albeit necessary—assumption, given that we are talking about human beings and not, say, vaccines.

18. Since the beginning of the legal realism movement almost one hundred years ago, scholars have recognized that, in making decisions, federal judges tend to depart from the purely "legal model," or one in which they base their decisions exclusively on law. Instead, studies have supported the theory that most judges adhere (consciously or not) to an "attitudinal model," in which their ideology drives their decision-making. More recently, a theory of "new institutionalism" has come into vogue, whereby political scientists look at individual judges as merely players within existing institutions, players who act strategically in reaching decisions.

However, if, as these findings seem to show, an increase in mixed red/blue panels would not necessarily increase the number of dissents,[19] then there is no reason to believe that the increase in all-blue panels would cause the resulting decisions, on average, to be further "left."

Naturally, in some small percentage of cases, ideology will win the day.[20] But even in those cases, ones in which so-called experts claim they can predict the outcome with confidence,[21] judges with a strong ideological bent may surprise them, just as the usually reliably conservative Chief Justice Roberts shocked the world with his vote in the health care cases in 2012 (basing his vote on a clause in the Constitution)[22] and the almost always conservative Justice Scalia has surprised many with his votes in favor of criminal defendants over the years (again, basing his vote on the Constitution).[23]

The Republicans' attempted use of political capital to try to block Obama's nominees may therefore have been misplaced.[24]

That is because, on a level apart from all of these statistics, there is still one underlying force. Judges must support and defend the Constitution.

The new judges on the D.C. Circuit will have to swear to do so.

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19. Some researchers have looked at unanimity patterns in other circuits, although their dates and methodologies differed enough from mine that point to point comparisons were impossible. *See generally* EPSTEIN, *supra* note 16; POSNER, *supra* note 16; Epstein, et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, U. Chi. Working Paper No. 510 (2010); Harry T. Edwards, *Collegiality and Decision-making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Richard A. Posner & William M. Landes, *Rational Judicial Behavior: A Statistical Study*, 2009 J. LEGAL ANALYSIS 775 (2009).

20. *See* Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit,* 56 U. COLO. L. REV. 619, 622 (1985) ("The courts of appeals . . . operate within an area whose boundaries have in large part been marked out by statute and precedent, and yet within which there is the opportunity for significant exercise of judgment. . . . [T]here are certain sorts of cases in which a judge's moral and political views unavoidably come into play, [but], on the whole, the function performed by the courts of appeals is characterized by the effort to intelligently and faithfully apply legal principles, a task that demands the exercise of judgment but that does not involve 'political' considerations to any significant extent.").

21. *See, e.g.,* Harry T. Edwards, *supra* note 20, at 619 ("Not too long ago, a friend, who is a prominent practicing attorney in Washington, D.C., said to me that he could accurately predict the outcome of most cases in the D.C. Circuit once he knew the panel of judges assigned to hear the case. His suggestion was that the "politics" of individual judges assured that they would vote in a prescribed way in most cases. I responded by suggesting that his proposed formula for forecasting judicial decisions was utterly meaningless because he had failed to consider whether the result in a given case would be different if a different panel of judges was assigned to hear it. I also told my friend that it was very likely that he could indeed predict the outcome of most cases heard in the D.C. Circuit — not because of what he thought he knew about the panel of judges, but rather because of what he knew about the merits of the cases.").

22. Natl. Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

23. *See, e.g.,* Maryland v. King, 133 S. Ct. 1958 (2013) (dissenting in favor of the defendant); Florida v. Jardines, 133 S. Ct. 1409 (2013) (writing for the majority in favor of the defendant); United States v. Jones, 132 S. Ct. 945 (2012) (writing for the majority in favor of the defendant). *See also* Stuart Taylor, Jr.., *Rehnquist's Court: Tuning out the White House*, N.Y. TIMES, Sept. 11, 1988 ("Even Scalia, who sometimes seems to have displaced Rehnquist as the most conservative Justice, has taken liberal positions on some criminal law . . . issues.").

24. In making these arguments, I recognize that most of the controversy arises over the very small number of cases each year that might be very heated and controversial along ideological lines. I do not seek to undervalue these cases, but merely to place them in the greater context of a circuit court's work, much of which is remarkably mundane and largely without ideological content.

And that means they will have to make decisions that are not driven merely by ideology or strategy, but by law.

In their quest to stop the President from carrying out his Constitutional duty, Republicans forgot that they have pledged to do the very same job as the judicial nominees and the President they oppose.

The extremely high level of unanimity on the D.C. Circuit[25]—and lack of ideological division—might be because federal appeals court judges are bound by precedent and must follow the Supreme Court's rulings, at least in areas where the Supreme Court has ruled. The three new D.C. Circuit judges, because they are extremely experienced lawyers, professors, and jurists, understand the concept of precedent.[26] They also understand that the prior cases that bind them present in different ways, with different twists, requiring thoughtful application of rule and reasoning.

As educated lawyers, they will also respect and seek to protect the institution—the venerable D.C. Circuit—of which they are a part. Making transparently ideological decisions is consistent with neither of these objectives. Working with their colleagues to reach agreement outside of ideological bounds is consistent with both. And, in the real world, that's what the judges on the now evenly split D.C. Circuit do.

By challenging the nominees to the D.C. Circuit—indeed, by saying that they would not confirm any more Obama nominees to that Circuit at all—the Republican Senators delegitimized the role of the judicial branch. And the risks inherent to causing the public to doubt that their disputes can fairly be resolved—that is a risk far greater than the risk of so-called judicial activism.[27]

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25. I recognize the limitations of calling the rate of unanimity "very high." In fact, Lee Epstein and colleagues found that, in 2007, the D.C. Circuit had the highest rate of dissent among the federal appeals courts (although she did not include the Federal Circuit in her analysis). *See* Epstein, et al., *supra* note 19. Therefore, my analysis that the unanimity rate is high is based on pure numbers, not on comparison to other circuits. Were we to compare to other circuits, it would also be important to note that the D.C. Circuit hears far fewer criminal cases than other circuits, and these cases are more likely to be decided without dissent, even without written opinion. It is also critical to mention that both red and blue judges on the D.C. Circuit perceive the court as qualitatively collegial and not prone to dissent as a matter of course; they believe that the comparatively high numbers found by statisticians ignore the realities and levels of dissent on an everyday basis. *See, e.g.,* Douglas H. Ginsburg, *The Behavior of Federal Judges: A View from the D.C. Circuit*, 97 JUDICATURE Sept./Oct. 2013, at 109, __, (responding to EPSTEIN, ET AL., THE BEHAVIOR OF JUDGES) (differentiating between "deep dissent and a minor disagreement," noting that one or two frequently dissenting judges can skew statistics, and stating, "I was surprised by the high dissent rate in the D.C. Circuit because I was under the impression that the high degree of collegiality here obviates any need or desire to dissent if common ground can be found."); Edwards, *supra* note 19, at 1338. ("In part because of shared legal principles, and in part because of deliberation, we almost always reach agreement on the correct judgment in a case. The most powerful proof of our collegiality is that, regardless of panel composition, very few dissenting opinions are written by the judges on the D.C. Circuit. . . . [M]ost of the time the judges on the court are taking account of the views of one another and reaching consensus on the correct judgment in cases involving straightforward legal questions."); Edwards, *supra* note 20, at 619 ("[M]ost decisions of the court of appeals are rendered pursuant to well-established tenets of law and issued without dissent");.

26. *See* Epstein, *supra* note 19, at 15.

27. Judge Harry Edwards agrees. *See* Edwards, *supra* note 20, at 1337 ("[Articles saying that the judges on the D.C. Circuit are too ideological in their decision-making] may mislead the unsuspecting (who rely on secondhand

It's impossible to predict how an ideological judge will come out in any particular case, if ideology is your only measure. But it is eminently possible to predict how smart judges will come out, if their oath is any indicator.

They—just like the President who nominated them and the Senators who opposed them—will support and defend the Constitution of the United States.

reports of an article's contents) into thinking that judges are lawless in their decision making, influenced more by personal ideology than legal principles. . . . I cannot leave unaddressed suggestions that the members of my court are faithless to the public trust implicit in our judicial assignments.").