



June 5, 2013

The President Plays Politics with the D.C. Circuit

Yesterday, President Obama announced three nominations to judgeships on the U.S. Court of Appeals for the D.C. Circuit. In presenting these nominations, the President righteously [claimed](#) there was no reason – “aside from politics” – not to have an up-or-down vote on each of them. Unfortunately, the President’s pecksniffery ignores the recent history, including his [own](#), of Senate Democrats blocking nominees. Moreover, the President’s blind obedience to the clamor of liberal activists to stack all three nominations neglects other circuit courts in greater need of judges.

Senate Democrats Create a New Test

In 2006, Senate Democrats created a new test for nominations to the D.C. Circuit. They insisted that before confirming anyone to the court, they needed to determine whether the judgeship was even necessary. They blocked the nomination of Peter Keisler for more than two years, until the Bush administration ended. Senator Schumer [admitted](#) that Keisler had “impeccable academic and professional credentials.” But filling the judgeship to which he had been nominated did not meet their new test.

A nominee to the D.C. Circuit “should under no circumstances be considered — much less confirmed — by this Committee before we first address the very need for that judgeship...”

-- [Senate Judiciary Committee Democrats](#), 2006

It is only fair to apply Senate Democrats’ test to the new nominees and first consider the need for any additional judges in this circuit. But the president has instead decided to nominate not just one, but three judges to this court.

A Dwindling Caseload

Since 2006, the D.C. Circuit has become even more underworked. As Senator Grassley has pointed out, there were nearly 200 fewer appeals filed in the D.C. Circuit in 2012 than in 2005. The number of cases that each active judge handles is nearly the same as it was in 2005, despite the court having two fewer judges. And, as Senator Lee has [noted](#), “in each of the last several

years the D.C. Circuit has canceled regularly scheduled argument dates due to a lack of pending cases.”

Today, the D.C. Circuit Court ranks last or almost last in nearly every category that measures workload. In fact, according to [Congressional Research Service](#), “the D.C. Circuit has the fewest number of appeals filed of the other regional appellate courts.” If the workload didn’t support an eleventh judge in 2006, as Democrat said, then it certainly doesn’t support one today.

Politically Motivated Nominations

The D.C. Circuit reviews many of the decisions of federal administrative agencies and hears appeals of many cases brought by special interest groups’ seeking to affect government policy. In recent years, the court has ruled against the President’s agenda several times:

- In 2011, the court [invalidated](#) a rule implementing the Dodd-Frank Wall Street reform law;
- In 2012, it [found](#) that the EPA exceeded its authority by regulating cross-state power plant emissions; and
- Earlier this year, the court [held](#) that the President’s unilateral appointment of three members of the National Labor Relations Board was unconstitutional.

The President and his political allies do not like many of the D.C. Circuit’s recent rulings. Rather than change their policies, they’ve decided to stack the court with judges that will rubber-stamp the President’s agenda. As one prominent ally [unmistakably put it](#), “the president’s best hope for advancing his agenda is through executive action, and that runs through the D.C. Circuit.”

“The court is critically important — the majority has made decisions that have frustrated the president’s agenda.”

-- [Nan Aron](#), President, Alliance for Justice, 2013

Even Majority Leader Reid [acknowledged](#) that the point of the additional nominations to the court was to correct a court that, as he saw it, was “wreaking havoc with the country.” Senator Schumer [confessed](#) that Senate Democrats want to “fill up” the D.C. Circuit “one way or the other,” even if means changing the rules of the Senate by [breaking the rules](#) of the Senate. It could not be clearer: these nominations are in response to the President not getting his way in Congress or before the D.C. Circuit. That is not the proper role for a court.

Ignoring More Pressing Needs

The President’s political gamesmanship in making these nominations en masse is underscored by the fact that he has been neglecting vacancies on other circuit courts. On other courts, the lack of judges has created judicial emergencies. The people whose cases are before those courts deserve better than delayed justice, and better treatment from the President. As the Wall Street Journal recently [noted](#), in 2012, the D.C. Circuit had 108 appeals per judgeship. By comparison, judges

on the Second Circuit have 425; and on the Eleventh Circuit they have 583 appeals per judgeship.

There are [currently](#) 33 judicial emergencies in courts across the country, but President Obama has nominated judges to just eight of them. By contrast, in 2006, there were only 20 judicial emergencies, for which President Bush had nominated 12 judges. In 2006, Senate Democrats [insisted](#) that judicial emergencies should be first addressed before a single nomination to the D.C. Circuit could be considered. They, and the President, should apply their own test to the same judgeships today.