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Considering Patricia Millett for the D.C. Circuit

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Comments Off on Considering Patricia Millett for the D.C. Circuit

By Carl Tobias

Politics fuels D.C. Circuit appointments. Barack Obama was the first President in over 50 years who approved no one for the country's second most important court, even though three of eleven seats lacked judges. Thus, appointing fine nominees was essential for circuit functioning. On June 4, Obama nominated three individuals: Patricia Millett, who has argued 32 Supreme Court appeals, Cornelia Pillard, who has won landmark High Court victories, and Robert Wilkins, who had served as a D.C. District Court judge for three years. The court's allegedly smaller caseloads prompted Republicans to halt yes or no votes for all the nominees. But because well-qualified, moderate nominees warrant thorough consideration and final ballots, their Senate review deserves analysis, which this paper conducts by emphasizing Millett. It first surveys the nominee's process and then shows how her evaluation concluded.

Obama has improved judicial selection, pursuing aid from each party.[1] He cooperated with Senators Patrick Leahy (D-Vt.), the Judiciary Committee Chair, who schedules hearings and votes; Harry Reid (D-Nev.), the Majority Leader, who handles the floor; and GOP analogues, Chuck Grassley (R-Iowa) and Mitch McConnell (R-Ky.). Notwithstanding these concerted efforts, Republicans refused to coordinate. McConnell cooperated little to set final ballots, and his colleagues employed anonymous or unsubstantiated holds for talented, mainstream nominees; this complicated appointments, mandating cloture.[2] The GOP aggressively requested numerous roll call votes and debate minutes.[3] At Obama's election, the D.C. Circuit had two open judgeships; these actions indicate why he only suggested the first candidate near 2010's end and the second in mid-2012. [4]

A. Descriptive Analysis

1. Caitlin Halligan

In nominating Caitlin Halligan, Obama depicted her as a "nationally-recognized appellate litigator who has practiced extensively before the Supreme Court."[5] The GOP twice refused her floor votes,[6] primarily because they contended she would be activist[7] and putative case decreases showed the openings must remain.[8] Denying her multiple final votes illustrates the counterproductive dynamics that attend the "confirmation wars."[9] Halligan's

loss informs appreciation of the 2013 nominees, particularly ideology's role, but contrasts with the second prospect.

2. Srikanth Srinivasan

On June 11, 2012, Obama nominated Srikanth Srinivasan, the Principal Deputy U.S. Solicitor General, claiming he was a preeminent Supreme Court advocate.[10] The prospect's April hearing was smooth. Republicans lauded his competence and posed few questions.[11] At the time Srinivasan was being considered, Grassley announced he was sponsoring the Court Efficiency Act that would move two D.C. Circuit judgeships to the Second and Eleventh Circuits and eliminate the third.[12]Nevertheless, on May 16, the committee unanimously approved Srinivasan and only addressed him positively, but GOP senators mentioned a "court packing" accusation while expressing concern regarding appeals, even while Democrats contested these ideas.[13] Because Republicans would not agree on an expeditious floor vote, Democrats pursued cloture and Srinivasan won unanimous May 23 confirmation with nominal debate.[14]

3. The 2013 Nominees

When introducing all three nominees, Obama contended that they earned the finest ABA rating and that the D.C. Circuit needed its empty seats filled. He observed that he was happy Republicans did not "play politics" to obstruct Srinivasan, as they had with Halligan, and he hoped to capitalize on the progress.[15] He rejected the GOP allegation that the

selections were discredited court packing: “We’re not adding seats. We’re trying to fill” existing ones.[16]

In nominating Patricia Millett, Obama described her as one of the nation’s “finest appellate attorneys [,who had nearly] the most Supreme Court arguments” by a woman.[17] In a July hearing, many Republicans found the nominee highly qualified, lodging few difficult questions.[18] But a number wondered if the court needed judges, and Senator Ted Cruz (R-Tx.) argued the court “is a battleground for politicization” and even contended Obama and senior Democrats were packing the circuit because they dislike the “outcomes of judges applying the law fairly.”[19] Some GOP members who remarked on Millett in the August 1 committee discussion frankly admitted that she was exceptional yet were concerned about the need for the seats; Democrats agreed on capability but asserted the court warrants added judges and reminded minority lawmakers that Democrats had promptly filled the last three judgeships in President George W. Bush’s years.[20] After vigorous debate, Millett earned a 10-8 party-line ballot.[21] The GOP rejected a final vote, so Democrats petitioned for October 31 cloture that lost.[22] However, the majority altered filibuster strictures in November and Millett won cloture.[23]

B. Critical Analysis

Obama’s nomination efforts have afforded benefits: he has confirmed able, diverse jurists for long vacancies. Consultation with

Republicans facilitated easy appointment for certain nominees, like Srinivasan.[24] Furthermore, his appointments' diversity, in terms of ethnicity and gender, has increased the understanding and disposition of essential issues that judges resolve.[25]

Some facets of the nomination process deserve improvement. One problem is speed: D.C. Circuit nominations and confirmations have been delayed, although Obama deserves little responsibility for this.[26] He seemed cautious about nominating D.C. Circuit prospects, lest the process consume months and stall numerous other nominations, a concern that Halligan's unfavorable treatment demonstrated. Primary responsibility for delayed processing is fairly ascribed to Republicans. They made Democrats file ample cloture petitions, especially involving the D.C. Circuit nominees.[27]

These delays force the nominees to put their careers on hold and prevent capable lawyers from joining the bench.[28] It deprives circuits of needed resources, eroding justice and respect for the selection process. Assimilating D.C. Circuit and Supreme Court appointments could worsen those detrimental effects and reduce the possibility of seating the entire tribunal complement, leaving perpetual vacancies.[29]

C. Summary

Obama tendered five exceptional D.C. Circuit nominees, but the GOP delayed three recent nominees.[30] Why the chamber should have accorded Millett better treatment, thus,

deserves closer investigation. Both parties agree that Article II and longstanding customs require nominees to receive thorough, efficient inquiries and floor debates with up or down ballots.[31]Republicans should have facilitated an expeditious review of Millett in which the Senate thoroughly explored the merits of the nominee's candidacy and swiftly voted, similar to the manner in which the Democrats granted many requests to evaluate Halligan and Srinivasan and helped appoint four Bush nominees.[32]

This is why all five nominees had full, careful analysis of competence at the committee stage. Article II contemplates that senators will evaluate the ability, ethics and temperament of presidential nominees, but downplay the importance of ideology, which has little relevance for nominees' ability to discharge the responsibilities for which they have been chosen.[33] Republicans should have put aside any ideological concerns they might have entertained about Millett as a justification for delaying her confirmation as that phenomenon undermines judicial independence.[34] The GOP should have eschewed more filibusters because competent, mainstream lawyers warrant votes unless inquiry reveals numerous concerns which indubitably disqualify the possibilities.[35]

Millett's evaluation demonstrated that she was an extremely qualified nominee with moderate ideological outlooks that did not rise to the level of "extraordinary circumstances," the standard for filibustering judicial nominations since the Gang of 14 compromise.[36] Moreover, this

review illustrates the D.C. Circuit's need for 11 judges to resolve cases, an idea which the Judicial Conference reaffirmed last March. [37] Accordingly, lawmakers should have followed the suggestions prescribed below in assessing Patricia Millett.

Conclusion

In June, President Obama nominated Patricia Millett, a highly competent, mainstream D.C. Circuit nominee. Because her qualifications are extraordinary, Millett's nomination warranted complete, stringent and frank chamber debate with a positive or negative ballot like Srinivasan received and Halligan was denied. Millett's testimony and her responses to written follow-up questions showed that she is exceedingly qualified and possesses moderate ideological views. Even those Republicans, namely Senator Cruz, who found approval particularly troubling largely due to political infighting, disavowed concerns regarding Millett's capability or ideology, and lauded her Supreme Court endeavors.[38] Yet, when the minority refused to agree on final consideration and Democrats petitioned for cloture, it failed, so they aggressively continued pursuing a final vote that resulted due to filibuster reform.

Epilogue

After brief debates in which Republicans emphasized the D.C. Circuit's minimal need for more judges while Democrats stressed the necessity for additional jurists, the Senate confirmed Millett 56-38 on December 10, Pillard 51-44 two days later, and Wilkins on January 13, 2014.[39] The nuclear option's

detonation permitted confirmation of three well-qualified, moderate nominees and the court to realize a full complement. However, in the short term, reliance on that device has apparently exacerbated the already gravely deteriorated confirmation process. This is witnessed by the close appointments votes and the 92 current vacancies. [40]

Carl Tobias is the Williams Chair in Law, University of Richmond. Thanks to Peggy Sanner for ideas, Karen Berry for processing and Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Errors that remain are mine. [1] *See generally* Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 Judicature 262 (2011) (discussing Obama's court appointments). *See also* Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 Notre Dame L. Rev. 2233, 2239, 2242 (2013).
[2] *See, e.g.*, 155 Cong Rec. S11421 (daily ed. Nov. 17, 2009); 156 Cong. Rec. S820 (daily ed. Feb. 26, 2010); *see also* Tobias, *supra*note 1, at 2245–47 (providing illustrations of how cloture consumes resources). [3] GOP senators sought 60 and used 5 minutes for strong nominees like Judge Beverly Martin; she won approval 97-0. 156 Cong. Rec. S13, S18 (daily ed. Jan. 20, 2010).
[4] The vacancies resulted from John Roberts' 2005 elevation and Judge Raymond Randolph's 2008 assumption of senior status.Admin. Office of the U.S. Courts, Vacancies in the Federal Judiciary, *available at*http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx (accessed by clicking "2005"); *id.* (accessed by clicking "2008"). Judges Douglas Ginsburg and David Sentelle later assumed senior status. *Id.*(accessed by clicking "2011"); *id.* (accessed by clicking "2013").
[5] Press Release, White House, Office of the Press Sec'y, *President Obama Names Two to U.S. Circuit Courts* (Sept. 29, 2010).
[6] 157 Cong. Rec. S8346–47 (daily ed. Dec. 6, 2011) (statement of Sen. McConnell); 159 Cong. Rec. S1142 (daily ed. Mar. 6, 2013) (statement of Sen. Grassley).

[7] *Hearing on Caitlin Halligan to be a D.C. Circuit Judge Before the S. Judiciary Comm*., 112th Cong. 13-21 (Feb. 2, 2011) (statements of Sens. Grassley, Kyl and Lee); *see generally* Kermit Roosevelt, The Myth Of Judicial Activism: Making Sense of Supreme Court Decisions (2008) (activism unclear).
[8] 159 Cong. Rec. S1142 (daily ed. Mar. 6, 2013) (statement of Sen. Grassley); *see also* Dahlia Lithwick, *Punch and Judge Judy*, Slate Mag. (Dec. 6, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/caitlin_halligan_filibuster_senate_republicans_spend_a_day_protecting_the_courts_just_to_trash_them.html.
[9] The GOP has more responsibility. These vacancies, , have remained at 10 percent for an unprecedented 4 years. *Supra* note 4.
[10] He argued 20 High Court cases. Press Release, White House, Office of the Press Sec'y, *President Obama Nominates Two To Serve on the U.S. Court of Appeals for the District of Columbia Circuit* (June 11, 2012).
[11] *Hearing on Srikanth Srinivasan to be a D.C. Circuit Judge Before the S. Judiciary Comm.*, 113th Cong. (Apr. 10, 2013) (statements of Sens. Cruz, Hatch & Lee).
[12] *Hearing*, *supra* note 11 (statement of Sen. Grassley); S. 699, 113th Cong. (2013). It contravenes Judicial Conference judgeship recommendations premised on conservative caseload projections in empirical data. Judicial Conference of the U.S.,*Report of the Proceedings of the Judicial Conference of the United States*, (Mar. 2013), *available at*http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2013-03.pdf.
[13] Senate Judiciary Comm., *Results of Executive Business Meeting*, 28 (2014), *available at*http://www.judiciary.senate.gov/legislation/upload/113thCongressBusinessMeeting.pdf. President Franklin Roosevelt used court packing in the 1930s. Jeff Shesol, Supreme Power 263 (2010).
[14] 159 Cong. Rec. S3816 (daily ed. May 23, 2013). [15] Press Release, White House, Office of the Press Sec'y, *Remarks by the President on Nominations to the D.C. Circuit* (June 4, 2013).
[16] He invoked the Conference proposal that stated that the court needs 11 judges. *Id.* Chief Justice Roberts chairs the Judicial Conference. *Id.*
[17] She served in the Solicitor General's Office for Democratic and Republican Presidents. Press Release, *supra* note 15.

[18] *Hearing on Patricia Millett to be a D.C Circuit Judge Before the S. Judiciary Comm*., 113th Cong. (July 10, 2013) (statement of Sen. Lee).
[19] He said strong Bush nominees were blocked and his views were "irrespective of [her] fine professional qualifications."*Hearing*, *supra* note 18.
[20] Senate Judiciary Comm., *supra* note 13, at 17. Cruz and Senator Mike Lee (R-Utah) aired court packing again. Senate Judiciary Comm., *Executive Business Meeting*, (Aug. 1, 2013), http://www.senate.gov/isvp/?comm=judiciary&type=live&filename=judiciary080113. For Democrats' views, see *id.* (statements of Sens. Leahy & Schumer).
[21] It mainly treated court slots. *Executive Business Meeting*, *supra* note 20.
[22] The debate focused on the need for judges. 159 Cong. Rec. S7708 (daily ed. Oct. 31, 2013).
[23] 159 Cong. Rec. S8418–28 (daily ed. Nov. 21, 2013); Jeremy Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. Times, Nov. 22, 2013, at Al.
[24] *See supra* text accompanying notes 1, 10-14. He ably set priorities, while cooperation improved selection.
[25] Richard Delgado, The Rodrigo Chronicles (1995); Sally Kenney, Gender and Justice (2013). *But see* Stephen Choi et al.,*Judging Women*, 8 J. Empirical Legal Stud. 504 (2011). Diverse judges also limit ethnic, gender and related prejudices that erode justice. Tobias, *supra* note 1, at 2249 n.73.
[26] He named fewer judges his initial year than 4 predecessors, requiring 7 months. The next two years were better. Tobias,*supra* note 1, at 2246.
[27] *See supra* notes 6, 14, 22 and accompanying text.
[28] Tobias, *supra* note 1, at 2253; 159 Cong. Rec. S5520 (daily ed. July 8, 2013) (statement of Sen. Leahy).
[29] The 90-day hiatus required for lower court nominations hinders other nominees and even erodes separation of powers and judicial independence.
[30] *See* Vacancies, *supra* note 4.
[31] *See* Orrin Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 Harv. J. L. & Pub. Pol'y 1035, 1039-40 (2009) ("[T]he use of the filibuster to defeat majority-supported judicial nominees is inconsistent with the separation of powers."). For an example of how this should be handled on the floor, *see Senate Compromise on Judicial Nominations*, N.Y. Times, May 24, 2005, at A18.

[32] 159 Cong. Rec. S3894 (daily ed. June 3, 2013) (statement of Sen. Leahy); Kevin Drum, *Senator Leahy and Blue Slips*, Mother Jones (Mar. 4, 2013), http://www.motherjones.com/kevin-drum/2013/03/senator-leahy-and-blue-slips (describing how Democrats have refused to change the "blue slip" rule, despite its historical manipulation by Republicans and the difficulty it presents to Obama nominations in the face of staunch obstructionism).
[33] *Should Ideology Matter?: Hearing Before the S. Judiciary Subcomm. on Admin. Oversight & the Courts*, 107th Cong. (2001). *But see* Douglas Laycock, *Forging Ideological Compromise*, N.Y. Times, Sept. 18, 2002, at A31 ("Republicans say that Mr. McConnell is a highly talented lawyer of good character, which is certainly true, and that this is the only question that should legitimately concern the Senate, which is not true. The central issue in this and other nominations is the nominees' views on the Constitution, federal law and the role of the federal courts.").
[34] *See generally* Stephen Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315 (1999). [35] Only such concerns can rise to the level of "extraordinary circumstances" that justify a filibuster. *See Compromise*, *supra*note 31.
[36] *See* Michael Gerhardt & Richard Painter, "Extraordinary Circumstances:" The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform (2011), *available at* http://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf.
[37] *See supra* note 6 and accompanying text. The Conference view undercuts the GOP claim that putatively smaller dockets constitute an extraordinary circumstance. *See supra* note 12. *But see* 159 Cong. Rec. S7702 (daily ed. Oct. 31, 2013) (statement of Sen. McCain).
[38] *See supra* text accompanying notes 17-21. Thus, her circumstances were not extraordinary.
[39] Democrats also stressed the nominees' superb qualifications, while some Republicans criticized Pillard's ideological views. 159 Cong. Rec. S8584 (daily ed. Dec. 10, 2013); *id.* at S8667 (daily ed. Dec. 11, 2013); 160 Cong. Rec. S280 (daily ed. Jan. 13, 2014).
[40] *See supra* note 39 and accompanying text; Vacancies, *supra* note 4.