

**Floor Speech by Senator Elizabeth Warren**  
**Republican Filibusters of Judicial Nominees**  
**November 13, 2013**

Madame President, it hasn't been even a month since the end of the Republican shut down of the government, and they're already back at work trying to paralyze the government again.

Yesterday, the Republicans blocked an up-or-down vote on the nomination of Nina Pillard to the D.C. Circuit Court of Appeals. This filibuster comes just one week after Republicans filibustered the nomination of Patricia Millett to the D.C. Circuit, and less than a year after the Republicans filibustered Caitlin Halligan, who eventually just gave up and withdrew her nomination.

Republicans now hold the dubious distinction of having filibustered all three women that President Obama nominated to D.C. Circuit. Now, collectively, these three women have diverse experiences in private practice, in government, and in public interest law. Between them, they have argued an amazing 45 cases before the Supreme Court, and have participated in many more. All three have the support of a majority of Senators. So why have they been filibustered?

The reason is simple. They are caught in a fight over the future of our courts – a fight over whether the courts will be a neutral forum that decides every dispute fairly, or whether the courts will be stacked in favor of the wealthy and the powerful.

Every day in Congress we deal with the influence of powerful groups and their armies of lobbyists. But in our democracy, when we write our laws, sometimes we can push back on that power.

In our democracy, we have tools that can be used in the legislative process – tools like open debate, and public opinion, and political accountability – tools that can help the people win these fights. I saw it happen up close in the 2008 financial crisis, when we were able to get a strong consumer financial protection bureau despite the best efforts of the large financial institutions to kill it.

But the story doesn't end when Congress passes a law. Powerful interests don't just give up – they shift their fight to the courts – because they know that if they can weaken or overturn a law in court, they turn defeat into victory. And if they can rig the courts by putting enough sympathetic judges in lifetime positions, a friendly judicial system will give them the chance to undermine any law they don't like.

That's already happening in the Supreme Court. Three well-respected legal scholars – including Judge Richard Posner of the Seventh Circuit, a distinguished judge and conservative Reagan

appointee – recently examined almost 2,000 Supreme Court cases from the last 65 years. The researchers concluded that the five conservative justices currently sitting on the Supreme Court are in the top ten most pro-corporate justices in more than half a century – and Justices Alito and Roberts? Numbers one and number two.

Take a look at the win rate of the national Chamber of Commerce in cases before the Supreme Court. According to the Constitutional Accountability Center, the Chamber moved from a 43% win-rate during the last five terms of the Burger Court, to a 56% win-rate under the Rehnquist Court, to a 70% win rate with the Roberts Court. Follow this pro-corporate trend to its logical conclusion, and pretty soon you'll have a Supreme Court that is a wholly owned subsidiary of big business.

The powerful interests that work to rig the Supreme Court also want to rig the lower courts. The D.C. Circuit is a particular target because that court has the power to overturn agency regulations. If a business doesn't like it when the agencies implement the will of Congress, they try to undermine those agencies through the D.C. Circuit.

In the next five years, the D.C. Circuit will decide some of the most important cases of our time – including cases that will decide whether Wall Street Reform will have real bite or whether it will just be toothless. Swaps dealers, the securities industry, the Business Roundtable, and the Chamber of Commerce are all lining up to challenge the new rules that agencies have written to try to put some teeth in Wall Street Reform and other laws. These big industry players want business-friendly judges to help them out.

Let's be clear – nine of the 14 judges on the D.C. Circuit who currently hear cases were appointed by Republican Presidents. The President with the most appointees on that court right now is Ronald Reagan. And this lopsided court has been busy – striking down environmental regulations that stop companies from spewing mercury into the air we breathe - striking down investor protections that hold corporate boards accountable – striking down a requirement for employers to provide access to birth control under Obamacare.

Each of these regulations exists because Congress has passed laws telling the agencies to write them. Now, it's true that sometimes an agency may get it wrong. But these days, the D.C. Circuit seems to be finding more and more ways to help bail out the businesses that never wanted to be regulated in the first place.

Republicans have noticed what's going on with this lopsided court. They would like to keep things the way they are, and they have not been subtle about it. Many Republicans have talked openly of their opposition to any new judges to fill the three vacancies on this court precisely because the new nominees will give the court more balance and fairness.

Republicans may prefer a rigged court that gives their corporate friends and their armies of lobbyists and lawyers a second chance to undercut the will of Congress. But that's not the job of judges. Judges aren't supposed to make law. Judges aren't supposed to tilt politically one way or the other.

Republicans may not like Wall Street Reform. They may not like Obamacare. But Congress passed those laws. President Obama signed those laws. President Obama ran for reelection on those laws, while his opponent pledged to repeal them—and his opponent lost by nearly five million votes. It is not up to judges to overturn those laws or their associated regulations just because they don't fit the judges' policy preferences.

There are three vacancies on the D.C. Circuit, and the President has nominated three impressive people to fill those vacancies – including Patricia Millett and Nina Pillard. These nominees are not ideological. They have extraordinary legal resumes and have received bipartisan support from top litigators around the country. They are among the top legal minds of a generation.

This is how the President plans to push back against efforts to tilt our judicial system: by nominating judges who will be judges. Judges who will be fair. Judges who will be even-handed. Judges who will have the diversity of professional experience to understand and consider all sides of an issue.

I understand that Republicans may prefer to keep the D.C. Circuit exactly as it is. But Article II Section 2 of the Constitution says the President of the United States nominates judges, with the advice and consent of the Senate. There's no clause that says "...except when that President is a Democrat." Democrats allowed President George W. Bush to put four very conservative judges on the D.C. Circuit. All four are all still serving, and one is now Chief Justice of the United States.

There are three vacancies in the DC Circuit Court of Appeals. The President of the United States has nominated judges to fill those vacancies. That's his job. And it is the job of the Senate to confirm highly qualified, independent judges. That's how our system works—that's what the Constitution demands.

Republicans these days don't seem to like that. They keep looking for ways to keep this President from doing his job. So far, they have shut down the government, they have filibustered people he's nominated to fill out his Administration, and now they are filibustering judges to block him from filling *any* of the vacancies with highly qualified people.

We need to call out these filibusters for what they are: naked attempts to nullify the results of the last Presidential election—to force us to govern as though President Obama hadn't won the 2012 election.

Well, President Obama did win the 2012 election – by five million votes. And he has done what the Constitution requires him to do: nominated highly qualified people to fill open vacancies on the federal bench.

If Republicans continue to filibuster these highly qualified nominees for no reason other than to nullify the President's Constitutional authority, then senators not only have a right to change the filibuster rules – senators have a duty to change the filibuster rules. We cannot turn our backs on the Constitution. We cannot abdicate our oath of office. We have a responsibility to protect and defend our democracy, and that includes protecting the neutrality of our courts - and preserving the Constitutional power of the President to nominate highly qualified people to court vacancies.

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