October 28, 2013

Honorable Members
United States Senate
Washington, D.C. 20510

Re: A Communication from the Chief Legal Officers of the States of Alabama, Arizona, Georgia, Oklahoma, Nebraska, South Carolina, and Texas Regarding Efforts to Politicize an Important Federal Court

Dear Senators:

We, the undersigned Attorneys General, write to express our serious concerns about President Obama's ongoing effort to appoint three new judges to the U.S. Court of Appeals for the District of Columbia Circuit, and to urge you to join your colleagues in passing S.699, the "Court Efficiency Act of 2013."[1]

The D.C. Circuit is the primary appellate court that reviews the constitutionality of regulations and decisions of federal administrative agencies. As a result, even though no state is part of the D.C. Circuit, all Attorneys General must come to the D.C. Circuit to litigate cases involving federal regulatory action. It is this uniquely national nature of the D.C. Circuit that causes many to consider it the second most important court in the nation. Its decisions impact everything from our First Amendment religious liberties to the price American consumers pay for electricity and the regulatory burden that employers must contend with in a struggling economy.

When we appear before the court, on behalf of our states and the citizens we represent, we do so with faith that our judges take seriously their obligation to decide cases on the basis of the Constitution and the applicable law. Regrettably, the circumstances surrounding President Obama's most recent nominations to the D.C. Circuit lead us to conclude that he is attempting to use that court to slant the playing field sharply in his favor with regard to challenges to his aggressive regulatory agenda—an agenda that is otherwise unconstitutional or too controversial to be approved by Congress.

Indeed, it is impossible not to conclude that this is a court-packing scheme when the uncontroverted facts show that there are many circuits whose need for additional judges far outweighs that of the D.C. Circuit. According to data from the Administrative Office of the U.S. Courts, last year the D.C. Circuit had 108 total appeals filed per authorized judgeship, while the national average was more than three times higher. In 2005 there were 1,379 appeals filed in the D.C. Circuit, but by last year that number had decreased by more than 13%, to the lowest for all federal appellate courts.[2]

In response to questions about the court's workload, Chief Judge Merrick Garland recently provided the Senate Judiciary Committee with data indicating that the number of consolidated cases scheduled for oral

[1] http://www.govtrack.us/congress/bills/113/s699
[2] http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=46534

argument per judge has been in steady decline, from 99 in 2003-2004, to 81 in 2012-2013. By virtually every measure, the D.C. Circuit is either last or nearly last when it comes to workload.

It is no wonder that even the D.C. Circuit's judges have explained that they do not need additional colleagues. One judge recently informed the Senate Judiciary Committee that "[i]f any more judges were added now, there wouldn't be enough work to go around."[3] Another judge wrote that "each judge's work product has decreased from thirty-some opinions each year in the 1990s, to twenty-some, and even fewer than twenty, opinions each year since then."[4]

Recognizing these facts, U.S. Senators Roy Blunt, Jeffrey Chiesa, Thad Cochran, Susan Collins, John Cornyn, Ted Cruz, Jeff Flake, Lindsey Graham, Charles Grassley, Orrin Hatch, Jim Inhofe, Mike Lee, Marco Rubio, Jeff Sessions, and David Vitter have co-sponsored S.699, the "Court Efficiency Act of 2013."[5] The Court Efficiency Act would eliminate the three unnecessary seats on the D.C. Circuit and instead add seats where they are genuinely needed – one to the U.S. Court of Appeals for the Second Circuit and another to the Eleventh Circuit.

The common-sense approach to allocation of judicial resources championed by the proponents of S.699 stands in sharp contrast to the motivations of those who support President Obama's scheme. At an event in March, Senator Chuck Schumer attacked the current D.C. Circuit judges for ruling against the Obama Administration in two important cases.[6] The first case, decided last August, involved the Environmental Protection Agency's (EPA) scheme to impose the Cross-State Air Pollution Rule, an extremely costly rule that would have unlawfully and unfairly forced states to implement emissions reductions on fossil fuel power plants beyond what they actually contribute to neighboring states. The D.C. Circuit found that the EPA had exceeded its legal authority and struck down the rule.[7]

The second case, decided in January, involved President Obama's attempt to avoid the advice-and-consent process by using his recess appointment power to place three new members on the National Labor Relations Board when the Senate was not actually in recess. The D.C. Circuit concluded that the U.S. Constitution does not permit recess appointments when the Senate is not in recess, so the three appointments were invalid.[8] After complaining about these cases, Senator Schumer promised that "We will fill up the DC circuit one way or another."[9]

The idea that President Obama is trying to pack the D.C. Circuit with judges who will substitute their own political preferences for the text and original meaning of the Constitution is not even a closely guarded secret among the President's allies. Doug Kendall, a liberal activist who supports President Obama's agenda, told the *Washington Post* that "the president's best hope for advancing his agenda is through executive action, and that runs through the D.C. Circuit."[10] Senate Majority Leader Harry Reid told Nevada Public Radio that "We need at least one more. There are three vacancies, we need at least one more and that will switch the majority."[11]

Using judicial vacancies to promote a political agenda undermines the rule of law and threatens to erode public confidence in our courts—something that Republicans and Democrats alike should seek to avoid. And in a time where judicial resources are scarce, and getting scarcer, the Congress should take seriously its obligation to allocate those resources where most needed. For these reasons, we urge you to reject President Obama's

---

[3] http://www.nationalreview.com/bench-memos/354411/there-wouldnt-be-enough-work-go-around-carrie-severino
[4] http://www.nationalreview.com/bench-memos/354411/there-wouldnt-be-enough-work-go-around-carrie-severino
[5] http://www.govtrack.us/congress/bills/113/s699
[6] http://cnsnews.com/news/article/schumer-judicial-appointees-we-will-change-rules-fill-dc-circuit
[7] http://www.politico.com/news/stories/0812/79940.html
[8] http://legaltimes.typepad.com/blt/2013/01/dc-circuit-declares-nlrb-recess-appointments-unconstitutional.html
[9] http://cnsnews.com/news/article/schumer-judicial-appointees-we-will-change-rules-fill-dc-circuit
[10] http://articles.washingtonpost.com/2013-04-02/politics/38220167_1_president-obama-caitlin-halligan-second-term-agenda
[11] http://blogs.rollcall.com/wgdb/reid-pushes-flipping-balance-of-power-on-d-c-circuit-defends-obamacare-from-union-attack/

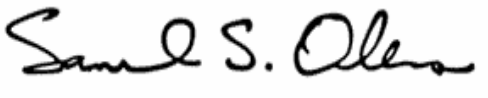
nominees to the D.C. Circuit, and to join your colleagues in allocating those judicial resources where they are needed by passing S.699, the "Court Efficiency Act of 2013."

Very Truly Yours,

Greg Abbott, Texas Attorney General

Joe Bruning, Nebraska Attorney General

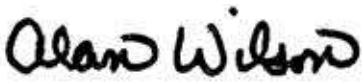
Tom Horne, Arizona Attorney General



Samuel S. Olens, Georgia Attorney General

E Scott Pruitt, Oklahoma Attorney General

Luther Strange, Alabama Attorney General



Alan Wilson, South Carolina Attorney General