

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
December 16, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The Nominations Of James Wynn And Albert Diaz Of North Carolina,
To The United States Court Of Appeals For The Fourth Circuit
December 16, 2009

Today's hearing gives us another golden opportunity to make progress. The two nominees before us can fill two longstanding vacancies on the United States Court of Appeals for the Fourth Circuit. Both are from North Carolina. I commend President Obama for his selections, and his White House Counsel, Greg Craig, for his diligence and good work in bringing us to this day. Senator Burr and Senator Hagan have worked with each other and with the White House on these nominations. And I wish to thank Senator Graham of South Carolina for his graciousness and cooperation in connection with these matters.

Judge Wynn is a well-respected judge who is familiar to many of us on this Committee. Judge Wynn has been a North Carolina state appellate judge for nearly 20 years, serving both on the North Carolina Court of Appeals and the North Carolina Supreme Court. He dedicated 30 years to the U.S. Navy, where he was a Judge Advocate General and a military trial judge. He also worked as an attorney in private practice and as a public defender. Judge Wynn earned his B.A. from the University of North Carolina, his J.D. from Marquette University School of Law, and his L.L.M. from the University of Virginia School of Law.

Dean Joseph D. Kearney of Marquette Law School, a former clerk to Justice Antonin Scalia, wrote to the Judiciary Committee in support of Judge Wynn, describing him as "a man of unfailing courtesy, intelligence, commitment to the rule of law, and loyalty." More than a decade after Judge Wynn's first nomination to the Fourth Circuit, I am pleased that he will finally receive a hearing before this Committee. With his confirmation, we can take an important step toward righting a wrong and strengthening the Fourth Circuit.

Judge Albert Diaz is a well-respected judge who serves on the North Carolina Business Court and the North Carolina Superior Court. If confirmed, Judge Diaz will be the first Latino on the Fourth Circuit. He already has the honor of being the first Latino to serve as a Superior Court judge in North Carolina.

Judge Diaz has a wealth of experience, much of which comes from his time in the Marine Corps. He gave nearly 30 years of service to the Marines, serving as an officer, a prosecutor, a defense attorney, and a judge. He also spent six years in private practice. Judge Diaz earned his B.S. in

economics from the University of Pennsylvania's Wharton School, his J.D. from the New York University School of Law, and his M.S. in business administration from Boston University.

The Charlotte News & Observer noted that these "outstanding" nominees are "widely regarded as intelligent, ethical judges who have won respect for their judicial and military careers," and it emphasized that "they are the kind of judges the federal bench needs." The newspaper urged the Senate to quickly confirm Judge Wynn and Judge Diaz, as did the president of the North Carolina Bar Association. We should heed their advice and consider these nominations without extended delays.

Both of the nominees appearing before us today are experienced judges, highly-decorated veterans, and both received unanimous "well qualified" ratings from the American Bar Association's Standing Committee on the Federal Judiciary, the highest rating possible.

These nominations are just the most recent examples of this President reaching out to home state Senators from both parties to consult before making nominations. Just as I worked last year to end a decade-long impasse on the Sixth Circuit with the confirmations of Judge Helene White and Ray Kethledge of Michigan, I will work to see that these nominations are considered fairly, and confirmed expeditiously. With the support of the senior Senator from North Carolina, a Republican, and the determined efforts of Senator Hagan, a Democrat, North Carolina will finally get the representation on the Fourth Circuit that it deserves.

Our ability to work together to fill vacancies on the Fourth Circuit stands in stark contrast to the time and effort we have wasted for the previous eight years on controversial nominations. For example, the nomination and renomination of Jim Haynes led the Richmond Times-Dispatch to write an editorial in late 2006 entitled "No Vacancies," about President Bush's counterproductive approach to nominations in the Fourth Circuit. The editorial criticized the Bush administration for pursuing political fights at the expense of filling vacancies. President Bush's insistence on nominating and renominating Terrence Boyle over the course of six years to a North Carolina vacancy on the Fourth Circuit contributed to the longstanding vacancy. He should have heeded the opposition of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and the Paramedics of North Carolina. Law enforcement officers from North Carolina and across the country opposed that nomination along with civil rights groups.

The years wasted on President Bush's controversial nominations followed in the wake of the Republican Senate majority's refusal to consider any of President Clinton's nominees to the Fourth Circuit from North Carolina. All four of these nominees were blocked from consideration by the Republican Senate majority. These outstanding nominees included United States District Court Judge James Beaty, Jr., United States Bankruptcy Judge J. Richard Leonard, Professor Elizabeth Gibson and Judge James Wynn, who is finally before us today. The failure to proceed on Judge Wynn's nomination and the other nominations was never explained. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit.

I worked to change course and to break through the impasse in North Carolina with the confirmation of Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. When I chaired the Senate Judiciary Committee from the summer of 2001 to the end of 2002, I presided over the consideration and confirmation of three Fourth Circuit judges nominated by President Bush.

Today, as the Judiciary Committee holds its final confirmation hearing of President Obama's first year, the Senate threatens to achieve the lowest number of judicial confirmations in the first year of a new presidency in modern history.

The Senate has been allowed to confirm only one judicial nominee all month. It is now December 16. By this date in President Bush's first year the Senate had confirmed 27 men and women to fill important vacancies on Federal circuit and district courts. Ultimately, the Democratic Senate majority confirmed 10 judicial nominations in December 2001. That was, of course, a tumultuous year with the September 11 attacks and the anthrax attack on the Senate. By this date in President Clinton's first year in office, the Senate had also confirmed 27 Federal circuit and district court judges. In stark contrast, as it stands today, due to Republican objection and obstruction, the Senate has confirmed only 10 of President Obama's nominations for circuit and district courts, roughly one third of the number confirmed during the first years of the last two Presidents.

Judicial nominees have been and are available for consideration. This lack of action is no fault of the President. He has made quality nominations. They have had hearings, have been considered by the Senate Judiciary Committee and favorably reported to the Senate. There are now more judicial nominations on the Senate's Executive Calendar--12--than the number that have been confirmed all year. One has been ready for Senate consideration for more than 13 weeks, another more than 10 weeks, and the list goes on. Nor are these controversial nominees. Eight of the 12 were reported from the Judiciary Committee without a single dissenting vote. The Majority Leader and all Democratic Senators have been ready to proceed. The Republican Senate leadership has not.

The Republican obstruction and delay in considering well-qualified noncontroversial nominees comes at a tremendous cost to the ability of our Federal courts to provide justice for all Americans. We have seen a tremendous spike in judicial vacancies. Although there have been nearly 110 judicial vacancies this year on our Federal circuit and district courts around the country, only 10 vacancies have been filled. That is wrong. The American people deserve better.

When I became Chairman in June of President Bush's first year in office, I was determined not to repeat the Republican practices in the 1990s which had resulted in more than 100 Federal court vacancies, and the doubling of circuit court vacancies. Senate Republicans pocket filibustered more than 60 of President Clinton's nominees. The crisis they created eventually led to public criticism of their actions by Chief Justice Rehnquist during those years. Instead, in only five months of President Bush's first year in office when I served as Senate Judiciary Committee Chairman and with a Democratic Senate majority, we confirmed 28 judicial nominees. During 17 months of President Bush's first two years in office, we confirmed 100 of his judicial nominees. Although two Republicans chaired the Senate Judiciary Committee and Senate Republicans held the Senate majority for more than half of President Bush's time in office, more judges were

confirmed by the Senate Democratic majority and when I served as Senate Judiciary Committee Chairman. During President Bush's last year in office, we had reduced judicial vacancies to as low as 34, even though it was a presidential election year. When President Bush left office, we had reduced vacancies in nine of the 13 circuits since President Clinton left office.

As matters stand today, judicial vacancies have spiked and are being left unfilled. We will start 2010 with the highest number of vacancies on Article III courts since 1994, when the vacancies created by the last comprehensive judgeship bill were still being filled. While it has been nearly 20 years since we enacted a Federal judgeship bill, judicial vacancies are nearing record levels, with 97 current vacancies and another 23 already announced. If we had proceeded on the judgeship bill recommended by the Judicial Conference to address the growing burden on our Federal judiciary, as we did in 1984 and 1990, in order to provide the resources the courts need, current vacancies would stand at 160 today. That is the true measure of how far behind we have fallen. I know we can do better. Justice should not be delayed or denied to any American because of overburdened courts and the lack of Federal judges.

Earlier this year, after extended delay, we confirmed Judge Andre Davis of Maryland to a Fourth Circuit seat. Before the end of the year, with Republican cooperation, we can confirm the nomination of Justice Barbara Keenan of Virginia, which has been pending on the Senate Executive Calendar since being reported by the Committee nearly two months ago by unanimous consent, with not a single dissenting vote. When Justice Keenan is confirmed and Judge Wynn and Judge Diaz are confirmed, we will have reduced the five vacancies that existed on the Fourth Circuit to one.

Part of the challenge to Republican Senators is to reject the efforts of the extreme right to treat these nominations in a partisan manner and obstruct them. The head of one far right-wing group has urged Republican Senators to obstruct these nominations saying: "I will predict ... that life will not be made easy for these two nominees." I urge all Senators to join together as Senator Burr and Senator Hagan have to make progress. The nominations today show what we can accomplish by working to fill judicial vacancies with qualified nominees.

#####