

Statement of

# **The Honorable Patrick Leahy**

United States Senator  
Vermont  
February 11, 2010

Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
Nominations Hearing  
February 10, 2010

Today the Senate Committee on the Judiciary will hear from six more of President Obama's judicial nominees. I thank Senator Sessions for working with me to schedule this hearing and to work to include these nominees. We meet today while the Federal Government and most of the city remains shut down in the wake of a blizzard and record snow falls for this area. I commend Senator Klobuchar for chairing and Senator Sessions for serving as the ranking Republican at this hearing.

The nominees before us today traveled to the District of Columbia earlier this week. They include nominees from California, Indiana, Missouri and Nevada. I did not want their travel to Washington between snowstorms to go for naught. Working with them, I rescheduled their hearing from yesterday afternoon to this morning. Some of them had already been delayed from a planned hearing last week when the Republican side was not prepared to proceed. Although we were required to postpone our legislative hearings scheduled for Tuesday and Wednesday, I wanted to complete our hearing for these nominees if at all possible.

Just as I was determined for the Committee to proceed in the immediate aftermath of the 9/11 attacks and the anthrax attacks on the Senate to consider President Bush's nominees, I have asked the Committee to continue to do its work this week in connection with President Obama's nominees. They will bring to 35 the number of President Obama's Federal circuit and district court nominees who have had confirmation hearings.

This group of judicial nominees illustrates, again, how President Obama has reached across the aisle. This President has from the outset worked with Senators from both parties to select outstanding, qualified judicial nominees. Five of these nominees come from states with a Democratic Senator and a Republican Senator. Each nominee has the support of both home state Senators.

That is why it is so frustrating that Senate Republicans have chosen to delay and obstruct President Obama's nominations. Even nominees chosen after consultation with Republican home state Senators have been filibustered, delayed and obstructed. Senate Republicans unsuccessfully filibustered the nomination of Judge David Hamilton of Indiana to the Seventh Circuit, despite support for his nomination from the senior Republican in the Senate, Dick Lugar of Indiana. Republicans delayed for months Senate consideration of Judge Beverly Martin of Georgia to the Eleventh Circuit despite her endorsement from both her Republican home state Senators. When

Republicans finally agreed to her consideration on January 20, she was confirmed unanimously. Whether Jeffrey Viken or Roberto Lange of South Dakota, who were supported by Senator Thune, or Charlene Edwards Honeywell of Florida, who was supported by Senators Martinez and LeMieux, virtually all of President Obama's nominees have been prevented prompt Senate action by Republican objections.

I noted when the Senate considered the nominations of Judge Christina Reiss of Vermont and Mr. Abdul Kallon of Alabama relatively promptly that they should serve as the model for Senate action. Sadly, they are the exception rather than the model. They show what the Senate could do, but does not. Time and again, noncontroversial nominees are delayed. When the Senate does finally consider them, they are confirmed overwhelmingly. Of the 15 Federal circuit and district court judges confirmed, 12 have been confirmed unanimously.

That is right. Republicans have only voted against three of President Obama's nominees to the Federal circuit and district courts. One of those, Judge Gerry Lynch of the Second Circuit, garnered only three negative votes and 94 votes in favor. Judge Andre Davis of Maryland was stalled for months and then confirmed with 72 votes in favor and only 16 against. Judge David Hamilton was filibustered in a failed effort to prevent an up or down vote.

So why all the obstruction and delays? It is part of a partisan pattern. Even when they can't say "no," Republicans nonetheless demand that the Senate go slow. The practice is continuing. There have already been 16 filibusters of President Obama's nominees. Earlier this week, Republicans engaged in their 16th filibuster stalling the nomination of Craig Becker to be a member of the National Labor Relations Board. So far during President Obama's time in office, Senate Republicans have engaged in as many filibusters as there have been judicial nominees considered by the Senate. Think about that. And that comparison does not include the many other nominees who were delayed or are being denied up or down votes by Senate Republicans refusing to agree to time agreements to consider even noncontroversial nominees.

During the first two years of President Bush's time in office, the Democratic Senate majority proceeded to confirm 100 of his judicial nominees. By contrast, Senate Republicans have allowed only 15 of President Obama's Federal circuit and district court nominees to be acted upon by the Senate. So even though President Obama has worked more closely with Senate Republicans, they have chosen to treat his nominees much, much worse.

Despite the fact that President Obama began sending judicial nominees to the Senate two months earlier than President Bush, last year's total was the fewest judicial nominees confirmed in the first year of a Presidency in more than 50 years - since 1953 when President Eisenhower only made nine nominations all year, all of which were confirmed. Those 12 confirmations were even below the 17 the Senate Republican majority allowed to be confirmed in the 1996 session. After that presidential election year, even Chief Justice Rehnquist began criticizing the pace of judicial confirmations and the partisan Republican tactics.

Last week, at the Democratic Policy Committee's issues retreat, I asked President Obama if he will continue to work hard to send names to the Senate as quickly as possible, and to commit to work with us, both Republicans and Democrats, to get these nominees confirmed. So far since taking office the President has reached across the aisle working with Republicans and Democrats

to identify well-qualified nominations. Yet, even these nominations are delayed or obstructed. The President responded by stating:

Well, this is going to be a priority. Look, it's not just judges, unfortunately, Pat, it's also all our federal appointees. We've got a huge backlog of folks who are unanimously viewed as well qualified; nobody has a specific objection to them, but end up having a hold on them because of some completely unrelated piece of business.

On the judges front, we had a judge for the--coming out of Indiana, Judge Hamilton, who everybody said was outstanding--Evan Bayh, Democrat; Dick Lugar, Republican; all recommended. How long did it take us? Six months, six, seven months for somebody who was supported by the Democratic and Republican senator from that state. And you can multiply that across the board. So we have to start highlighting the fact that this is not how we should be doing business.

I could not agree more with President Obama. This should not be the way the Senate behaves.

Unfortunately, we have seen the repeated abuse of filibusters, and delay and obstruction have become the norm for Senate Republicans. We have seen unprecedented obstruction by Senate Republicans on issue after issue - over 100 filibusters last year alone, which affected 70 percent of all Senate action. Instead of time agreements and the will of the majority, the Senate is faced with a requirement to find 60 Senators to overcome a filibuster on issue after issue. Those who just a short time ago said that a majority vote is all that should be needed to confirm a nomination, and that filibusters of nominations are unconstitutional, have reversed themselves and now employ any delaying tactic they can.

Just as Senate Republicans reversed themselves when it came time to vote on the deficit reduction commission that they had sponsored, just as Senate Republicans who voted for the USA PATRIOT Act Sunset Extension Act, S.1692, which was reported by the Senate Judiciary Committee last October, have reversed themselves and abandoned it, so, too, have Senate Republicans reversed themselves on filibusters against nominations. They have ratcheted up their partisanship to delay and obstruct the President's nominees -- once the American people elected a Democratic President.

The Republican practice of making supermajorities the new standard to proceed to consider many noncontroversial and well-qualified nominations for important posts in the executive branch, and to fill vacancies on the Federal courts, is having a debilitating effect on our Government's ability to serve the American people. Hard-working Americans who seek justice in our overburdened Federal courts are the ones who will pay the price for Republicans' obstruction and delay. They deserve better.

Even after years of Republican pocket filibusters that blocked more than 60 of President Clinton's judicial nominees and led to skyrocketing judicial vacancies, Democrats did not practice this kind of obstruction and delay in considering President Bush's nominations. We worked hard to reverse the Republican obstructionism. In the second half of 2001, the Democratic majority in the Senate proceeded to confirm 28 judges.

By February 10, 2002, the comparable date in President Bush's first term, the Senate had confirmed 32 circuit and district court nominations. Because of Republican obstruction, the Senate has confirmed less than half that total during President Obama's time in office. Only 15 Federal circuit and district court judges have been confirmed. Meanwhile, judicial vacancies have skyrocketed to more than 100.

During just the second year of President Bush's first term, the Democratic Senate majority confirmed 72 judicial nominations and helped reduce the vacancies left by Republican obstructionism of President Clinton's judicial nominees from over 110 to 59 by the end of 2002. Overall, in the 17 months that I chaired the Senate Judiciary Committee during President Bush's first term, the Senate confirmed 100 of his judicial nominees.

We continued to be fair and worked to reduce vacancies even during President Bush's last year in office. With Senate Democrats again in the majority, we 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 Federal circuits.

As matters stand today, judicial vacancies have spiked again, as they did due to Republican obstruction in the 1990s. These vacancies are again being left unfilled. We started 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 102 current vacancies and another 21 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 over 160 today and would be headed toward 180. That is the true measure of how far behind we have fallen.

Republican Senators insisted on stalling confirmation of the nomination of Judge Gerard Lynch, who was confirmed with more than 90 votes. They insisted on stalling the nomination of Judge Andre Davis, who was confirmed with more than 70 votes. They unsuccessfully filibustered the nomination of Judge David Hamilton last November, having delayed its consideration for months. They stalled Judge Beverly Martin's nomination for at least two months because they would not agree to consider it before January 20. They stalled for three additional weeks on Judge Greenaway's nomination and this week he was confirmed unanimously. We have wasted weeks and months having to seek time agreements in order to consider nominations that were reported by the Senate Judiciary Committee unanimously and who are then confirmed overwhelmingly by the Senate once they are finally allowed to be considered.

I, again, urge Senate Republicans to reconsider their strategy and allow prompt consideration of the other judicial nominees awaiting Senate consideration: Judge Barbara Keenan of Virginia, nominated to the Fourth Circuit; Jane Stranch of Tennessee, nominated to the Sixth Circuit; Judge Thomas Vanaskie of Pennsylvania, nominated to the Third Circuit; Judge Denny Chin of New York, nominated to the Second Circuit; Judge William Conley, nominated to the Western District of Wisconsin; Justice Rogerie Thompson of Rhode Island, nominated to the First Circuit; Judge James Wynn of North Carolina, nominated to the Fourth Circuit; Judge Albert

Diaz of North Carolina, nominated to the Fourth Circuit; Judge Edward Chen, nominated to the Northern District of California; and Justice Louis Butler, nominated to the Western District of Wisconsin. I note, again, that the judicial nominees from states with Republican Senators are supported by their home state Republican Senators. Senators Alexander and Corker have supported Judge Stranch's nomination from Tennessee to the Sixth Circuit and Senator Burr came to their hearing and testified in favor of Judge Wynn and Judge Diaz of North Carolina and President Obama's nominating them to the Fourth Circuit.

Last December I urged Senate Republicans to allow the Senate to proceed to confirm all the judicial nominees reported by the Senate Judiciary Committee without dissent. That would have included Judge Keenan, Judge Chin, and Judge Conley. They refused and those nominations remained stalled before the Senate because of Republican delay. Since returning from the recess, the Senate Judiciary Committee has proceeded to report Judge Thompson and Judge Diaz without a single dissent. There are five more judicial nominees the Senate should be able to consider and confirm in short order were it not for Republican stalling.

I am prepared to enter into time agreements to debate and vote on the nominations of Judge Stranch, Judge Vanaskie and Judge Wynn, as well. Only Senator Coburn voted against Judge Wynn, with the 18 other Republicans and Democrats on the Committee all voting in favor. Only three Republicans voted against Judge Vanaskie, and only four against Ms. Stranch, who is supported by Senator Alexander. In addition, it is high time to enter into time agreements to debate and vote on the nominations of Judge Chen of California and Justice Butler of Wisconsin. They have each twice been favorably reported by the Judiciary Committee.

Today, the Senate Judiciary Committee has the opportunity to make additional progress. On the agenda after completing their hearing last month are four more district court nominees for Wyoming, Arkansas and Ohio. Reporting them would bring to 29 the Federal circuit and district court nominees so far sent to the Senate for final consideration and confirmation. Regrettably, obstruction and delay has meant that only 15 of those have been considered by the Senate and confirmed.

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