

**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
On Judicial Nominations  
December 1, 2010**

Two weeks ago, before the Thanksgiving Day recess, I again urged Republicans and Democrats in the Senate to come together and take action to begin to end the vacancy crisis that is threatening our Federal courts. My call was not extreme nor radical nor partisan. I asked only that Senators follow the Golden Rule. Regrettably that did not happen. That is too bad.

There are now 38 judicial nominees being delayed who could be confirmed before we adjourn, 38 judicial nominees who have had their hearings and whose qualifications are well established.

Two weeks ago, I asked the Republican leadership to treat this President's nominees as they would have those of a Republican President. I asked for nothing more than that we move forward together in the spirit that we teach our children from a young age by referring to a nearly universal rule of behavior that extends across most major religions and ethical behavior systems.

I urge adherence to the Golden Rule as a way to look forward and make progress. I had hoped that we could remember our shared values. That simple step would help us return to our Senate traditions and allow the Senate better to fulfill its responsibilities to the American people and the Federal judiciary.

Had we adhered to the Golden Rule, 16 of the judicial nominees being held hostage without a vote, who were each reported unanimously by all Republicans and Democrats on the Judiciary Committee, would have been confirmed before Thanksgiving. So too would an additional nominee supported by all but one of the Committee's 19 members. They would be on the Federal bench and Federal judicial vacancies would have been reduced to less than 100. Instead, the across the board stalling of judicial nominations that I have been trying to end continues, with many noncontroversial nominations being delayed and obstructed for no good reason. There is no good reason to hold up consideration for weeks and months of nominees reported without opposition from the Judiciary Committee. I have been urging since last year that these consensus nominees be considered promptly and confirmed. If Senators would merely follow the Golden Rule, that would have happened.

As the Senate recessed, *The Washington Post* and *The Charlotte Observer* each criticized the stalling of noncontroversial judicial nominees in editorials published the weekend of November 19. *The Washington Post* entitled its editorial "Unconscionable Delays for President Obama's Court Picks" and recognized that "even nominees without a whiff of opposition are being blocked" and concluded "the hold-up of nominees who have garnered unanimous, bipartisan support is particularly offensive." *The Charlotte Observer* entitled its editorial "Senate Must End Games, Confirm Strong N.C. Judges" and called what is going on "infantile political gamesmanship" and "partisan high jinks" in its comments about the delays in considering Judge Albert Diaz and Judge Catherine Eagles. In an opinion column in *Politico*, a former judge appointed by a Democratic President and one appointed by a Republican joined together to call

for the Senate to address the judicial vacancies crisis. They cited the use of “secret holds and filibusters to block the votes” and observed:

“Fewer nominees have been confirmed during the Obama administration than at any time since President Richard Nixon was in office. These tactics are, as one senator noted, ‘delay for delay’s sake.’ They are creating an unprecedented shortfall of judicial confirmations and, ultimately, a shortage of judges available to hear cases. For many Americans, this means justice is likely to be unnecessarily delayed—and often denied.”

I ask that copies of these pieces be included in the record at the end of my statement.

In addition to letters from the President of the United States, the Chief Judge of the United States Court of Appeals for the Ninth Circuit, the Chief Judge of the United States District Court for the District of Columbia, and the American Bar Association that I placed in the record with my statement on November 18, I have now received a copy of the November 19 letter to Senators Reid and McConnell from the Federal Bar Association that I ask also be included in the record at the conclusion of my statement. The Federal Bar Association President notes that “the large number of judicial vacancies prevents the prompt and timely administration of justice” and that this “is causing unnecessary hardship and increased costs on individuals and businesses with lawsuits pending in the federal courts.” She also notes that seven of the judicial nominees who were reported with near unanimity but are being stalled would fill judicial emergency vacancies: Albert Diaz of North Carolina, Kimberly Mueller of California, Ray Lohier of New York, John Gibney of Virginia, Susan Nelson of Minnesota, Mary Murguia of Arizona and Charlton Reeves of Mississippi.

As of today, there are 110 vacancies on the Federal courts around the country, 50 of them are for vacancies deemed judicial emergencies by the Administrative Office of the U.S. Courts. We already know of 20 future vacancies. In addition, the Senate has not acted on the request by the Judicial Conference of the United States to authorize 56 additional judges, which will allow the Federal judiciary to do its work. Accordingly, the Federal judiciary is currently almost 190 judges short of those needed.

The vast majority of the President’s judicial nominees are consensus nominees and should be confirmed by large bipartisan majorities. These are well-qualified nominees with the support of their home state Senators, both Republicans and Democrats. I have not proceeded in the Judiciary Committee with a single nominee who was not supported by both home state Senators and I have worked with all Republican Senators to ensure that they were included in the process. President Obama has worked hard with home-state Senators regardless of party affiliation, and by so doing has done his part to restore comity to the process, as have I as Chairman.

Regrettably, despite our efforts and the President’s selection of outstanding nominees, the Senate is not being allowed to promptly consider his consensus nominees. To the contrary, as the President has pointed out, nominees are being stalled who, if allowed to be considered, would receive unanimous or near unanimous support, be confirmed, and be serving in the administration of justice throughout the country. This is counterproductive.

Like the President, I welcome debate and a vote on those few nominees that some Republican Senators would oppose. Nominees like Benita Pearson of Ohio, William Martinez of Colorado, Louis Butler of Wisconsin, Edward Chen of California, John McConnell of Rhode Island, and Goodwin Liu of California. I have reviewed their records and considered their character, background and qualifications. I have heard the criticisms of the Republican Senators on the Judiciary Committee as they have voted against this handful of nominees. I disagree, and believe the Senate would vote, as I have, to confirm them. That they will not be conservative activist judges should not disqualify them from serving.

But that is not what is happening. Republican Senators are not debating the merits of those nominations, as Democratic Senators did when we opposed the most extreme handful of nominees of President Bush. What is happening is that judicial confirmations are being stalled virtually across the board.

What is new and particularly damaging is that 26 judicial nominees who were all reported unanimously by the Senate Judiciary Committee, without Republican opposition, are still being delayed. These nominees include Albert Diaz and Catherine Eagles of North Carolina. They are both supported by Senator Hagan and Senator Burr. Sadly, Senator Burr's support has not freed them from the across the board Republican hold on all judicial nominees. Judge Diaz was reported unanimously in January, almost 12 months ago, and still waits for an agreement from the minority in order for the Senate to consider his nomination so that he may be confirmed.

Also being delayed for no good reason from joining the bench of the most overloaded Federal district in the country in the Eastern District of California is Kimberly Mueller, whose nomination was reported last May, more than seven months ago, without any opposition. Her nomination is one of four circuit and district nominations to positions in the Ninth Circuit currently on the Executive Calendar that Republicans are blocking from Senate consideration. In addition to the Liu and Chen nominations, the nomination of Mary Murguia from Arizona to the Ninth Circuit has been stalled since August despite the strong support of Senator Kyl, the Assistant Republican Leader.

Justice Anthony Kennedy spoke to the Ninth Circuit Judicial Conference about skyrocketing judicial vacancies in California and throughout the country. He said: "It's important for the public to understand that the excellence of the federal judiciary is at risk." He noted that "if judicial excellence is cast upon a sea of congressional indifference, the rule of law is imperiled."

The Advisory Board of the Ninth Circuit sent a letter last week to the Majority and Minority Leaders urging action on pending nominations to address the growing vacancy crisis in that circuit. The Board writes: "Allowing the current judicial vacancy crisis to continue and expand --as it inevitably will if nothing changes-- is unacceptable. The current situation places unreasonable burdens on sitting judges and undermines the ability of our federal courts to serve the people and businesses of the Ninth Circuit." I ask that this letter be included in the record at the conclusion of my statement.

The District of Columbia suffers from four vacancies on its Federal District Court. We have four outstanding nominees who could help that court, but they are now being delayed. Beryl Howell

was reported by the Committee unanimously. She is well known to many of us from her 10 years of service as a counsel on the Senate Judiciary Committee. She is a decorated former Federal prosecutor and the child of a military family. Robert Wilkins was also reported without opposition. James Boasberg and Amy Jackson could have been reported before Thanksgiving, but were needlessly delayed in Committee for another two weeks.

John Gibney of Virginia, James Bredar and Ellen Hollander of Maryland, Susan Nelson of Minnesota, Edmond Chang of Illinois, Leslie Kobayashi of Hawaii, and Denise Casper of Massachusetts are the other district court nominees reported unanimously from the Judiciary Committee and could have been confirmed as consensus nominees long ago.

Another district court nominee is Carlton Reeves of Mississippi, who is supported by Senator Cochran and is a former president of the Magnolia Bar Association. Only Senator Coburn asked to be recorded as opposing his nomination. I believe Mr. Reeves would receive a strong bipartisan majority vote for confirmation.

Counting Judge Diaz, there are seven consensus nominees to the circuit courts who are being stalled on the Senate Executive Calendar. Judge Ray Lohier of New York would fill one of the four current vacancies on the United States Court of Appeals for the Second Circuit. He is another former prosecutor with support from both sides of the aisle. His confirmation has been stalled for no good reason for more than six months, as well. Scott Matheson is a Utah nominee with the support of Senator Hatch who was reported without opposition. Mary Murguia is from Arizona and is supported by Senator Kyl and was reported without opposition. Judge Kathleen O'Malley of Ohio, nominated to the Federal Circuit, was reported without opposition. Susan Carney of Connecticut was reported with 17 bipartisan votes by the Judiciary Committee to serve on the Second Circuit. James Graves of Mississippi was reported unanimously to serve on the Fifth Circuit.

Many of these nominees could have been considered and confirmed before the August recess. Twenty three of them could have been considered and confirmed before the October recess. They could and should have been confirmed before the Thanksgiving recess. They were not. They were not because of Republican objections that, I suspect, have nothing to do with the qualifications or quality of these nominees. These are not judicial nominees whose judicial philosophy Republicans question.

The President noted in his September letter to Senate leaders that the “real harm of this political game-playing falls on the American people, who turn to the courts for justice” and that the unnecessary delay in considering these noncontroversial nominations “is undermining the ability of our courts to deliver justice to those in need . . . from working mothers seeking timely compensation for their employment discrimination claims to communities hoping for swift punishment for perpetrators of crimes to small business owners seeking protection from unfair and anticompetitive practices.”

The Senate should end this across the board blockade against confirming noncontroversial judicial nominees. Democrats did not engage in such a practice with President Bush and

Republicans should not continue their practice any longer. With 110 vacancies plaguing the Federal courts, we do not have the luxury of indulging in such games.

The Senate is well behind the pace set by a Democratic majority in the Senate considering President Bush's nominations during his first two years in office. At the end of President Bush's second year in office, the Senate, with a Democratic majority, had confirmed 100 of his Federal circuit and district court nominations. They were all considered and confirmed during the 17 months I chaired the Senate Judiciary Committee. Not a single nominee reported by the Judiciary Committee remained pending on the Senate's executive calendar at the end of the Congress.

In sharp contrast, during President Obama's first two years in office, the minority has allowed only 41 Federal circuit and district court nominees to be considered by the Senate. In 2002, we proceeded in the lame duck session after the election to confirm 20 of President Bush's judicial nominees. There are 34 judicial nominations ready for Senate consideration and another 4 noncontroversial nominations on the Committee's business agenda. That is 38 additional confirmations that could be easily achieved with a little cooperation from the minority. That would increase the confirmations from the historically low level of 41, where it currently stands, to almost 80. That would be in the range of judicial confirmations during President George H.W. Bush's first two years (70), while resting below President Reagan's first two years (87), and pale in comparison to the 100 confirmed in the first two years of the George W. Bush administration or those confirmed during President Clinton's first two years (127).

During the 17 months I chaired the Judiciary Committee during President Bush's first two years, I scheduled 26 hearings for the judicial nominees of a Republican President and the Judiciary Committee worked diligently to consider them. During the two years of the Obama administration, I have tried to maintain that same approach. The Committee held 25 hearings for President Obama's Federal circuit and district court nominees this Congress. I have not altered my approach and neither have Senate Democrats.

One thing that has changed is that we now receive the paperwork on the nominations, the nominee's completed questionnaire, the confidential background investigation and the America Bar Association (ABA) peer review almost immediately after a nomination is made, allowing us to proceed to hearings more quickly. During 2001 and 2002, President Bush abandoned the procedure that President Eisenhower had adopted and that had been used by President George H.W. Bush, President Reagan and all Presidents for more than 50 years. Instead, President George W. Bush delayed the start of the ABA peer review process until after the nomination was sent to the Senate. That added weeks and months to the timeline in which hearings were able to be scheduled on nominations.

I was puzzled to hear the ranking Republican on the Senate Judiciary Committee say a few weeks ago that "President Obama's nominees have fared better and moved better than President Bush's nominees." I have worked with the ranking Republican in connection with our consideration and confirmation of the President's two nominees to the Supreme Court, Justice Sotomayor and Justice Kagan. He opposed both, but agreed that the process was fair. I have worked with him on procedures to consider the President's other nominees and with some

exceptions we have been able to have the Judiciary Committee consider and report them. In terms of comparisons, however, we actually reviewed far more of President Bush's nominees during his first two years than we have been allowed to consider during President Obama's first two years.

The comparison is that I held 26 hearings for 103 of President Bush's Federal circuit and district court nominees and the Committee favorably reported 100 of them. All 100 were confirmed by the Senate. We did that in 17 months. By comparison, during the 19 months the Committee has been holding hearings on President Obama's Federal circuit and district court nominees, we have held 25 hearings for 80 nominees. Of the 75 favorably reported, only 41 have been considered by the Senate. Several required cloture petitions and votes to end unsuccessful Republican filibusters. There were no Democratic filibusters of President Bush's nominees during the first two years of his Presidency.

In sum, the bottom line is that the Senate has been allowed to consider and confirm less than half of the Federal circuit and district court nominees we proceeded to confirm during President Bush's first two years. Forty-one confirmations does not equal or exceed the 100 confirmations we achieved during the first two years of the Bush administration. For that matter, the 75 Federal circuit and district court nominees voted on and favorably reported by the Senate Judiciary Committee does not equal the 100 we reported out in less time during the Bush administration. How the ranking Republican can contend that President Obama's nominees "have fared better and moved faster than President Bush's nominees" during their first two years in office is beyond me.

When I became Chairman of the Judiciary Committee midway through President Bush's first tumultuous year in office, I worked very hard to make sure Senate Democrats did not perpetuate the "judge wars" as tit-for-tat. Despite the fact that Senate Republicans pocket filibustered more than 60 of President Clinton's judicial nominations and refused to proceed on them while judicial vacancies skyrocketed during the Clinton administration, in 2001 and 2002, during the 17 months I chaired the Committee during President Bush's first two years in office, the Senate proceeded to confirm 100 of his judicial nominees.

By refusing to proceed on President Clinton's nominations while judicial vacancies skyrocketed during the six years they controlled the pace of nominations, Senate Republicans allowed vacancies to rise to more than 110 by the end of the Clinton administration. As a result of their strategy, Federal circuit court vacancies doubled. When Democrats regained the Senate majority halfway into President Bush's first year in office, we turned away from these bad practices. As a result, overall judicial vacancies were reduced during the Bush years from more than 10 percent to less than four percent. During the Bush years, the Federal court vacancies were reduced from 110 to 34 and Federal circuit court vacancies were reduced from a high of 32 down to single digits.

This progress has not continued with a Democratic President back in office. Instead, Senate Republicans have returned to the strategy they used during the Clinton administration of blocking the nominations of a Democratic President, again leading to skyrocketing vacancies. Last year the Senate confirmed only 12 Federal circuit and district court judges, the lowest total

in 50 years. This year we have yet to confirm 30 Federal circuit and district judges. We are not even keeping up with retirements and attrition. As a result, judicial vacancies are, again, at 110, more than 10 percent.

Regrettably, the Senate is not being allowed to consider the consensus, mainstream judicial nominees favorably reported from the Judiciary Committee. It has taken nearly five times as long to consider President Obama's judicial nominations as it did to consider President Bush's during his first two years in office. During the first two years of the Bush administration, the 100 judges confirmed were considered by the Senate an average of 25 days from being reported by the Judiciary Committee. The average time for confirmed circuit court nominees was 26 days. By contrast, the average time for the 41 Federal circuit and district and circuit court judges confirmed since President Obama took office is 90 days and the average time for circuit nominees is 148 days—and that disparity is increasing.

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