

**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
On The Nomination Of Paul J. Watford To The Ninth Circuit Court Of Appeals  
May 21, 2012**

Last week, the Majority Leader filed for cloture to end a Republican filibuster of the nomination of Paul Watford of California to fill a judicial emergency vacancy on the Ninth Circuit, which is by far the busiest Federal appeals court in the Nation. Republicans have refused to consent to debate and vote on the nomination since it was approved by the Judiciary Committee more than three and a half months ago. So, for the 27th time, the Majority Leader has been forced to file cloture to get an up-or-down vote on one of President Obama's judicial nominations, continuing a pattern that began when Senate Republicans filibustered President Obama's very first judicial nomination. Thankfully, Senate Republicans have abandoned their misguided filibuster, and have finally consented to vote on this highly qualified nominee.

Paul Watford is not a nominee who should be filibustered or require cloture in order to be considered by the Senate. He is a nominee with impeccable legal credentials and qualifications. He served as a Federal prosecutor and is now a highly-regarded appellate litigator in private practice. He served as a clerk at the United States Supreme Court and at the United States Court of Appeals for the Ninth Circuit. The ABA's Standing Committee on the Federal Judiciary unanimously gave him their highest rating of well qualified. He has the strong support of his home state Senators, Senator Feinstein and Senator Boxer. He also has widespread support from noted conservatives, including two former presidents of the Los Angeles Chapter of the Federalist Society, and Judge Alex Kozinski, the conservative Reagan appointee who is the Chief Judge of the Ninth Circuit.

By any traditional measure, Paul Watford is the kind of judicial nominee who should be confirmed easily by an overwhelming bipartisan vote. He is not a nominee against whom a partisan filibuster is in any way justifiable. He is not a nominee for whom cloture should have had to be filed in order to secure consent to have a vote. I had hoped after the agreement between the Democratic and Republican Senate leadership to begin finally considering the backlog of judicial nominations from last year that the Senate was at last returning to regular order. The refusal of Senate Republicans to consent to a debate and vote on this nomination for more than three and a half months, however, again required the Majority Leader to file cloture to end another Republican filibuster.

Senate Republicans continue to apply what they have admitted is a "new standard" to President Obama's judicial nominees. From the beginning of the Obama administration, Senate Republicans abandoned the standards and arguments they used to say should apply to judicial nominations. During the administration of the last President, a Republican, they insisted that filibusters of judicial nominees were unconstitutional. They threatened the "nuclear option" in 2005 to guarantee up-or-down votes for each of President Bush's judicial nominations. Many Republican Senators declared that they would never support the filibuster of a judicial nomination.

Senate Republicans reversed course and filibustered President Obama's very first judicial nomination, that of Judge David Hamilton of Indiana. They tried to prevent an up-or-down vote on that nomination even though he was nominated by President Obama after consultation with the most senior and longest-serving Republican in the Senate, Senator Dick Lugar of Indiana, who strongly supported the nomination. Fortunately, the Senate rejected that unjustified filibuster and Judge Hamilton was confirmed with Senator Lugar's support.

Senate Republicans previously engaged in misguided filibusters last year of Goodwin Liu's nomination to the Ninth Circuit and Caitlin Halligan's nomination to the D.C. Circuit. Each of those nominees is the kind of brilliant lawyer we should encourage to join the Federal bench. There were certainly no "extraordinary circumstances" for filibustering their nominations. Senate Republicans filibustered them anyway, setting a new and unfortunate standard for the Senate. Those filibusters demonstrated that any nominee can be filibustered based on concocted controversies and baseless claims. That was unfortunate and unwise. Senate Republicans have already succeeded in preventing confirmation votes on five of President Obama's judicial nominees who were blocked from a Senate vote after being voted out of the Senate Judiciary Committee. I urge Senate Republicans to reject that approach and proceed to vote and to confirm Paul Watford.

Paul Watford has a mainstream record demonstrating legal excellence and experience at the top of his profession. He clerked at the United States Supreme Court for Justice Ruth Bader Ginsburg and on the Ninth Circuit for now-Chief Judge Alex Kozinski, a conservative appointee of President Ronald Reagan. Over his 17-year legal career, Paul Watford has worked on briefs in nearly 20 cases before the United States Supreme Court, and has argued numerous cases before the Ninth Circuit Court of Appeals as well as the California appellate courts. As a Federal prosecutor in the 1990s, Mr. Watford handled prosecutions involving immigration and drug offenses, firearms trafficking, and major frauds. He was rated unanimously well qualified by the ABA's Standing Committee on the Federal Judiciary, the highest rating possible after their nonpartisan peer review. When confirmed, he will be only the second African-American judge serving on the Ninth Circuit, joining Judge Johnnie Rawlinson of Nevada on the bench.

It comes as no surprise to me that Paul Watford's nomination has received significant support from conservatives. The shock is that his nomination is being opposed at all. Two former presidents of the Los Angeles Chapter of the Federalist Society wrote to the Judiciary Committee in support of Mr. Watford. Jeremy Rosen wrote:

"Everyone who knows Paul (whether they are conservative or liberal, or somewhere in between) recognizes that he possesses the qualities that are most needed in an appellate judge. ... While I find myself in somewhat frequent disagreement with the President on many issues (and an active supporter of one of his opponents), his nomination of Paul to the Ninth Circuit is a home-run and should receive bi-partisan support."

Henry Weissman, another former Federal Society chapter President, wrote that he has "never seen any hint of politics in Mr. Watford's lawyering", and that he has "every confidence that, as a judge, Mr. Watford would apply the law faithfully, objectively, and even-handedly."

Conservative law professor Eugene Volokh of UCLA Law and creator of the conservative Volokh Conspiracy blog, expressed his strong support for Mr. Watford to the Committee, writing:

“He has all the qualities that an appellate judge ought to have: intellectual brilliance, thoughtfulness, fairness, collegiality, an ability to deal civilly and productively with colleagues of all ideological stripes, and a deep capacity for hard work. . . . Paul is the sort of moderate Democratic nominee that moderates and conservatives, as well as liberals, should solidly support.”

Conservative law professor Orin Kerr of George Washington University Law, a former special counsel to Senator Cornyn, called him “extremely bright, a moderate, and very much a ‘lawyer’s lawyer,’” and concluded an online post saying, “I hope he will be confirmed.”

In their letter of support, 32 of the clerks who served with him at the Supreme Court from the chamber of all the other Justices concluded: “We are unanimous in our view that Paul possesses all the qualities of the most highly regarded jurists: powerful analytical abilities, a readiness to listen to and consider fairly all points of view, a calm temperament, and a prodigious work ethic.”

A number of corporate general counsel’s from leading U.S. corporations have written us urging confirmation:

“Mr. Watford has represented a broad spectrum of clients, both in private industry as well as in the public sector. In doing so, he has demonstrated an understanding of the legal and economic challenges faced in both spheres, and an appreciation for the importance of fair, consistent application of the rules of law that govern business.”

The assistant general counsel of Mattel joins in this support, writing: “[I can] personally attest to his reputation for being remarkably intelligent, insightful and evenhanded. He is highly regarded within his firm, amongst his clients, and within the wider legal community for his exceptional skills as an appellate practitioner.”

Daniel Collins, an Associate Deputy Attorney General during the administration of President George W. Bush, wrote to the Committee and described Paul Watford as “incredibly intelligent and has solid integrity and great judgment.” He concluded that this judicial nominee would not “approach the job with any kind of agenda other than to do what is right and consistent with precedent as he understands it.”

I ask unanimous consent that copies of letters of support be included in the Record at the conclusion of my statement.

Paul Watford is far from an ideological or partisan selection. This nomination should not engender any serious objection. It is as if he is too good. He is the kind of nominee who in the past would have received unanimous support. He has the qualifications, judgment and

ability. Maybe it is that he is so well qualified and relatively young. It is as if some fear that he might someday be nominated to a still higher court so they want to avoid voting on his nomination, as they did when Elena Kagan was nominated to the D.C. Circuit by President Clinton; delay a vote on it as they did when Judge Sonia Sotomayor was nominated to the Second Circuit by President Clinton; or at least make sure to generate some controversy around and show opposition in the hope that he will not be considered for any future nomination.

I strongly disagree with those who seek to nitpick his legal career. After his service as a Federal prosecutor, he has worked at a highly respected Los Angeles law firm on a wide variety of matters and has always represented his clients ethically and to the best of his legal ability. That is what lawyers are supposed to do. That is what Republicans used to defend when Federalist Society and corporate lawyers were being nominated by a Republican President. As Chief Justice Roberts noted during his confirmation hearing, lawyers represent clients; they do not stand in their shoes and should not have their client's legal positions used against them. So let's abandon the crude and inaccurate litmus test being applied to President Obama's nominees. Let's stop the caricaturing. If not, no lawyer will be able to be confirmed to the Federal bench.

As an attorney in private practice Paul Watford has advocated positions well within the mainstream of legal argument. There were only two cases on which he worked as a lawyer among the hundreds and possibly thousands in which he has been involved, that were criticized by Committee Republicans.

In one, the well-known law firm with which he is affiliated represented groups challenging the controversial Arizona immigration law, and won a preliminary injunction against certain provisions for violating the Constitution. In his role as an attorney he was consulted by others working on the case to review and edit their preliminary injunction motion. That motion contains the arguments based on Federal preemption, due process, and other constitutional rights that are well within the mainstream of legal advocacy and that were raised, as well, by the U.S. Department of Justice in its filings. That a Senator might disagree with the position he assisted in developing on behalf of his firm's clients in this case is hardly a reason to oppose his nomination. I did not oppose Chief Justice Roberts' nomination because he helped and advised the challenge resulting in *Bush v. Gore*. Paul Watford's legal work at Munger, Tolles was professional, principled and not out of the mainstream.

The other case on which critics have fastened as if to justify their opposition was his legal advocacy on behalf of clinical ethicists and critical care providers challenging a specific lethal injection protocol. He did not challenge the death penalty as unconstitutional. The legal challenge was to the manner in which it was being administered. In fact, in direct and express answers to questions from Senator Grassley, the nominee wrote that he does not have any personal conviction or religious beliefs that would impact the way he would rule in a death penalty case and that he would have no difficulty ruling fairly and impartially in cases involving the death penalty. He also answered that he believes the death penalty an acceptable form of punishment and that he would have no difficulty faithfully applying the Supreme Court's precedent in that regard. How this record can be seen as justifying opposition is beyond me.

Our legal system is an adversary system, predicated upon legal advocacy for both sides. No nominee should be disqualified for representing clients zealously. John Adams, one of our most revered Founders, wrote that his representation of the British soldiers in the controversial case regarding the Boston Massacre was “one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country.”

At his confirmation hearing to become the Chief Justice of the United States, John Roberts made the point:

“[I]t’s a tradition of the American Bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients. The most famous example probably was John Adams, who represented the British soldiers charged in the Boston Massacre. He did that for a reason, because he wanted to show that the Revolution in which he was involved was not about overturning the rule of law, it was about vindicating the rule of law.

Our Founders thought that they were not being given their rights under the British system to which they were entitled, and by representing the British soldiers, he helped show that what they were about was defending the rule of law, not undermining it, and that principle, that you don’t identify the lawyer with the particular views of the client, or the views that the lawyer advances on behalf of the client, is critical to the fair administration of justice.”

That has always been our tradition—at least until now. This litmus test that would disqualify nominees because as a lawyer they represented a side in a case with which we disagree is dangerous and wrong. Almost every nominee who had been a practicing lawyer would be disqualified by such a test.

Republican obstruction of this nomination is particularly damaging given the dire need for judges on the Ninth Circuit. With three times the number of cases pending as the next busiest circuit and twice the caseload of the judges on other circuits, the Ninth Circuit cannot afford further delay filling its emergency vacancies. The 61 million people served by the Ninth Circuit are not served by this delay. I have been asked for months that the Senate expedite consideration of this nomination and that of Justice Hurwitz of Arizona to fill these judicial emergency vacancies.

The Chief Judge of the Ninth Circuit, Judge Alex Kozinski, a Reagan appointee, along with the members of the Judicial Council of the Ninth Circuit, wrote to the Senate months ago emphasizing the Ninth Circuit’s “desperate need for judges,” urging the Senate to “act on judicial nominees without delay,” and concluding “we fear that the public will suffer unless our vacancies are filled very promptly.” The judicial emergency vacancies on the Ninth Circuit are harming litigants by creating unnecessary and costly delays. The Administrative Office of U.S. Courts reports that it takes nearly five months longer for the Ninth Circuit to issue an opinion after an appeal is filed, compared to all other circuits. The Ninth Circuit’s backlog of pending cases far exceeds other Federal courts. As of September 2011, the Ninth Circuit had 14,041 cases pending before it, far more than any other circuit.

When Senate Republicans filibustered the nomination of Caitlin Halligan to the D.C. Circuit for positions she took while representing the State of New York, they contended that there underlying concern was that the caseload of the D.C. Circuit did not justify the appointment of another judge to that Circuit. I disagreed with their treatment of Caitlin Halligan, their shifting standards and their purported caseload argument. But if caseloads were really a concern, Senate Republicans would not have delayed action on this nomination to a judicial emergency vacancy on the overburdened Ninth Circuit for more than three months.

There is no justification for refusing to address the needs of the Ninth Circuit. A few years ago the Senate was forced to invoke cloture to overcome Republican filibusters of President Clinton's nominations of Richard Paez and Marsha Berzon to the Ninth Circuit. That obstruction is being repeated.

We did not engage in tit for tat when the presidency changed. During the Bush administration, the Senate proceeded to confirm seven of the nine Ninth Circuit nominees of President Bush. Four of President Bush's Ninth Circuit nominees were confirmed during his first four-year term: Judge Richard Clifton, Judge Jay Bybee, Judge Consuelo Callahan, and Judge Carlos Bea.

By contrast, Senate Republicans have been opposing our moving forward to consider and confirm Paul Watford and Andrew Hurwitz, who are both strongly supported by their home state Senators, to fill judicial emergency vacancies. Senate Republicans have already successfully filibustered the nomination of Goodwin Liu, who also had the strong support of his home state Senators.

I urge Senators to show that we can work together to reduce the vacancies that are burdening the Federal judiciary and the millions of Americans who rely on our Federal courts to seek justice. We should start by at long last confirming this good man, Paul Watford, an outstanding nominee to serve on the Ninth Circuit.

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