

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On the Nomination of Judge Robert Bacharach of Oklahoma to the United States Court of
Appeals for the Tenth Circuit
July 30, 2012

Today's debate and vote on the partisan filibuster of the Oklahoma judicial nominee, who has had the support of the Republican Senators from Oklahoma since President Obama nominated him six months ago, is another example of how extreme Senate Republicans have gone in their efforts to obstruct judicial confirmations. If they succeed in their partisan filibuster, it will be another first for them. Never before has the Senate filibustered and refused to vote on a judicial nominee with such strong bipartisan support, who was voted out of the Judiciary Committee with virtually unanimous support.

Their partisan efforts to shutdown Senate confirmations of qualified judicial nominees who have bipartisan support do not help the American people. This is a shortsighted policy at a time when the judicial vacancy rate remains more than twice what it was at this point in the first term of President Bush. Judicial vacancies during the last few years have been at historically high levels. Nearly one out of every 11 Federal judgeships is currently vacant. Their shutting down confirmations for consensus and qualified circuit court nominees is not helping the overburdened Federal courts to which Americans turn for justice.

Over his 13-year career as a U.S. Magistrate Judge in the Western District of Oklahoma, Judge Robert Bacharach has handled nearly 3,000 civil and criminal matters, presided over 400 judicial settlement conferences, and issued more than 1,600 reports and recommendations. As an attorney in private practice, Judge Bacharach tried 10 cases to verdict, argued two cases before the Tenth Circuit Court of Appeals, and briefed scores of other cases to the Tenth Circuit and the Oklahoma Supreme Court. The ABA Standing Committee on the Federal Judiciary has rated Judge Bacharach unanimously well qualified, the highest possible rating from its non-partisan peer review.

Judge Bacharach's judicial colleagues in the Western District of Oklahoma stand strongly behind his nomination. Vicki Miles-LaGrange, Chief Judge of the U.S. District Court for the Western District of Oklahoma, has said of Judge Bacharach:

He is an outstanding jurist and my colleagues and I enthusiastically and wholeheartedly recommend him for the Tenth Circuit position... We knew that we were lucky to have Bob as a Magistrate Judge, and he's been remarkable in this position for over 12 years. He is an absolutely great Magistrate Judge. His research and writing are excellent, his temperament is superb, his preparation is top-notch, and he is a wonderful colleague to all of the judges and in general to the entire court family.... All of the other judges and I – Republicans and Democrats alike – enthusiastically and wholeheartedly recommend Judge Bob Bacharach for the Tenth Circuit position. All of us believe very strongly that Judge Bacharach would be a superb choice for the position.

Throughout this very careful and deliberate process in which Judge Robert Bacharach has been thoroughly vetted, considered, and voted on by the Judiciary Committee, I have not heard a single negative word about him. There is no Senator that I know of who is opposed to his nomination on the merits. The only obstacle standing between Judge Bacharach being confirmed to serve the people of the Tenth Circuit is partisan obstruction.

Nor is Judge Bacharach the only victim of this abuse. In a letter dated June 20, 2012, the President of the American Bar Association urged Senator Reid and Senator McConnell to work together to schedule votes on the nominations of William Kayatta and Richard Taranto, as well as Judge Bacharach. These are three consensus, qualified circuit court nominees awaiting Senate confirmation so that they may serve the American people. I ask that a copy of that letter be included in the Record along with an article from *The Oklahoman* on this nomination.

The ABA president wrote:

Amid concerns that the judicial confirmation process is about to fall victim to presidential election year politics through the invocation of the “Thurmond Rule,” I am writing on behalf of the American Bar Association to reiterate our grave concern for the longstanding number of judicial vacancies on Article III courts and to urge you to schedule floor votes on three pending, noncontroversial circuit court nominees before July and on district court nominees who have strong bipartisan support on a weekly basis thereafter.

This is the precise danger that was the reason for that letter. Including Judge Bacharach, William Kayatta of Maine, and Richard Taranto, there are currently 20 judicial nominees voted out of the Judiciary Committee and being blocked by Senate Republicans.

During the Judiciary Committee meeting approving the nomination of Judge Bacharach, Senator Coburn noted:

“I believe that Judge Bacharach will uphold the highest standards and reflect the best in our American judicial tradition by coming to the bench as a well-regarded member of the community. At a time when our country seems as divided as ever, it is important that citizens respect members of the judiciary and are confident they will faithfully and impartially apply the law. . . I believe Judge Bacharach would be an excellent addition to the Tenth Circuit.”

Senator Inhofe likewise has said: “I believe that Judge Bacharach would continue the strong service Oklahomans have provided the Tenth Circuit.” When asked last month about this effort to block a vote on Judge Bacharach’s nomination, Senator Coburn told *The Oklahoman*: “I think it’s stupid.” He is right. It is just obstruction.

There is no good reason that the Senate should not vote on consensus circuit court nominees thoroughly vetted, considered and voted on and approved with nearly unanimous bipartisan support by the Judiciary Committee. There is no reason the Senate cannot vote on the nomination of William Kayatta of Maine to the First Circuit, a nominee strongly supported by

both of Maine's Republican Senators and reported nearly unanimously by the Committee three months ago and two months before considering Judge Bacharach's nomination. This is the same person who Chief Justice John Roberts recommended to Kenneth Starr for a position in the Justice Department. He is widely respected in Maine. Republicans cannot seriously oppose his nomination on the merits or for ideological reasons. It is just more obstruction.

There is also no reason the Senate cannot vote on Richard Taranto's nomination to the Federal Circuit. He was reported almost unanimously by voice vote nearly four months ago, and is supported by conservatives such as Robert Bork and Paul Clement. Republicans cannot seriously oppose his nomination to the Federal Circuit on the merits or for ideological reasons. It is just more obstruction.

Each of these circuit court nominees has been rated unanimously well qualified by the nonpartisan ABA Standing Committee on the Federal Judiciary, the highest possible rating. These are not controversial nominees. They are qualified and should be considered as consensus nominees and confirmed. Senate Republicans are blocking consent to vote on superbly qualified circuit court nominees with strong bipartisan support. This is a new and damaging application of the Thurmond Rule.

It is hard to see how this new application of the Thurmond Rule is really anything more than another name for the stalling tactics we have seen for months and years. I have yet to hear any good reason why we should not continue to vote on well-qualified, consensus nominees, just as we did up until September of the last two presidential election years. I have yet to hear a good explanation why we cannot work to solve the problem of high vacancies for the American people. I will continue to work to confirm as many of President Obama's qualified judicial nominees as possible to fill the many judicial vacancies that burden our courts and the American people across the country.

Senate Republicans have become the party of "no" – no help for the American people, no to jobs, no to economic recovery, no help to extend tax cuts for the middle class, and no to judges to provide Americans with justice in their Federal courts. Although the public announcement that they would be blocking qualified and consensus circuit court nominees was not until June, the truth is that Senate Republicans have been obstructing President Obama's judicial nominees since the beginning of his presidency, beginning with their filibuster of his first nominee.

Senate Republicans used to insist that filibustering of judicial nominations was unconstitutional. The Constitution has not changed but as soon as President Obama was elected they reversed course and filibustered President Obama's very first judicial nomination. Judge David Hamilton of Indiana was a widely-respected 15-year veteran of the Federal bench nominated to the Seventh Circuit and was supported by Senator Dick Lugar, the longest-serving Republican in the Senate. They delayed his confirmation for five months. Senate Republicans then proceeded to obstruct and delay just about every circuit court nominee of this President, filibustering nine of them. They delayed confirmation of Judge Albert Diaz of North Carolina to the Fourth Circuit for 11 months. They delayed confirmation of Judge Jane Stranch of Tennessee to the Sixth Circuit for 10 months. They delayed confirmation of Judge Ray Lohier of New York to the Second Circuit for seven months. They delayed confirmation of Judge Scott Matheson of Utah

to the Tenth Circuit and Judge James Wynn, Jr. of North Carolina to the Fourth Circuit for six months. They delayed confirmation of Judge Andre Davis of Maryland to the Fourth Circuit, Judge Henry Floyd of South Carolina to the Fourth Circuit, Judge Stephanie Thacker of West Virginia to the Fourth Circuit, and Judge Jacqueline Nguyen of California to the Ninth Circuit for five months. They delayed confirmation of Judge Adalberto Jordan of Florida to the Eleventh Circuit, Judge Beverly Martin of Georgia to the Eleventh Circuit, Judge Mary Murguia of Arizona to the Ninth Circuit, Judge Bernice Donald of Tennessee to the Sixth Circuit, Judge Barbara Keenan of Virginia to the Fourth Circuit, Judge Thomas Vanaskie of Pennsylvania to the Third Circuit, Judge Joseph Greenaway of New Jersey to the Third Circuit, Judge Denny Chin of New York to the Second Circuit, and Judge Chris Droney of Connecticut to the Second Circuit for four months. They delayed confirmation of Judge Paul Watford of California to the Ninth Circuit, Judge Andrew Hurwitz of Arizona to the Ninth Circuit, Judge Morgan Christen of Alaska to the Ninth Circuit, Judge Stephen Higginson of Louisiana to the Fifth Circuit, Judge Gerard Lynch of New York to the Second Circuit, Judge Susan Carney of Connecticut to the Second Circuit, and Judge Kathleen O'Malley of Ohio to the Federal Circuit for three months.

As a recent report from the nonpartisan Congressional Research Service confirms, the median time circuit nominees have had to wait for a Senate vote has skyrocketed from 18 days for President Bush's nominees to 132 days for President Obama's circuit court nominees. This is the result of Republican foot dragging and obstruction. In most cases, Senate Republicans have been delaying and stalling for no good reason. How else do you explain the filibuster of the nomination of Judge Barbara Keenan of Virginia to the Fourth Circuit who was ultimately confirmed 99-0? And how else do you explain the needless obstruction of Judge Denny Chin of New York to the Second Circuit, who was filibustered for four months before he was confirmed 98-0?

The only change in their practices is that Senate Republicans have finally acknowledged that they are seeking to shut down the confirmation process for qualified and consensus circuit court nominees. Three of the five circuit court judges finally confirmed this year after months of unnecessary delays and a filibuster should have been confirmed last year. The other two circuit court nominees confirmed this year were both subjected to stalling and partisan filibusters, which were thankfully unsuccessful.

The American people need to understand that Senate Republicans are stalling and filibustering judicial nominees supported by their home state Republican Senators. Just consider the states I have already mentioned as having circuit nominees supported by their home state Republican Senators unnecessarily stalled – Indiana, North Carolina, Utah, South Carolina, Georgia. Just last month we needed to overcome a filibuster to confirm Justice Andrew Hurwitz of the Arizona Supreme Court to the Ninth Circuit despite the strong support of Senators Jon Kyl and John McCain. Now it is nominees from Oklahoma and Maine who are being filibustered despite the support of their home state Republican Senators.

The year started with the Majority Leader having to file cloture to get an up-or-down vote on Judge Adalberto Jordan of Florida to the Eleventh Circuit even though he was strongly supported by his Republican home state Senator. And every single one of these nominees for whom the Majority Leader was forced to file cloture this year was rated unanimously well qualified by the

nonpartisan ABA Standing Committee on the Federal Judiciary, the highest possible rating. Most were to fill a judicial emergency vacancy. So when I hear some Senate Republicans say they are now invoking the Thurmond Rule and have decided they are not going to allow President Obama's judicial nominees to be considered, I wonder how the American people are supposed to be able to tell the difference from how they have been obstructing for the last three and one half years.

The minority's stalling of votes on judicial nominees with significant bipartisan support is all to the detriment of the American people. This has been a tactic that they have employed for the last three and one half years, despite repeated appeals urging them to work with us to help solve the judicial vacancy crisis. We have seen everyone from Chief Justice John Roberts, himself appointed by a Republican president, to the nonpartisan American Bar Association urging the Senate to vote on qualified judicial nominees that are available to administer justice for the American public. Sadly, Republicans insist on being the party of "no".

What the American people and the overburdened Federal courts need are qualified judges to administer justice in our Federal courts, not the perpetuation of extended, numerous vacancies. Today vacancies on the Federal courts are more than two and one half times as many as they were on this date during the first term of President Bush. The Senate is more than 40 confirmations off the pace we set during President Bush's first term.

Because they cannot deny the strength of this comparison – using apples to apples by comparing first terms – Senate Republicans instead try to draw comfort by making comparisons to President Bush's second term after we had already worked hard to reduce vacancies by 75 percent. In fact, during President Bush's second term, the number of vacancies never exceeded 60 and was reduced to 34 near the end of his presidency. In stark contrast, vacancies have long remained near or above 80, with little progress made in these last three and one half years. Today, there are still 76 vacancies. Their tactics have actually led to an increase in judicial vacancies during President Obama's first term – a development that is another sad first.

But the real point is that their selective use of numbers does nothing to help the American people. We should be doing better. I know that we can because we have done better. During President Bush's first term, notwithstanding the 9/11 attacks, the anthrax attack on the Senate, the ideologically-driven selections of judicial nominees by President Bush, and his lack of outreach to home state Senators, we reduced the number of judicial vacancies down to 29 by this point during his first term and acted to confirm 205 circuit and district court nominees by the end of his first term.

Another excuse from the minority comes across more as partisan score settling than anything else. They claim that having confirmed two Supreme Court justices, the Senate cannot be expected to reach the 205 number of confirmations in President Bush's first term.

But those Supreme Court confirmation proceedings from years ago do not excuse the Senate from taking the actions it could now on the 20 judicial nominees voted out of the Judiciary Committee and ready for final Senate action. That second Supreme Court confirmation was in August 2010. That is almost two years ago and it was opposed by most Senate Republicans.

Senate Republicans held down circuit and district court confirmations in President Obama's first two years in office to historically low numbers – 12 by the end of 2009 and another 48 in 2010 for a total of only 60. They refused to act on 10 nominees ready at the end of 2009 and on 19 as 2010 drew to a close. Last year they employed the same tactic in stalling action on another 19 judicial nominees at the end of 2011. Now it is 20 judicial nominees in this summer of 2012 that they are stalling. Had Republicans not stalled 19 nominations at the end of last year and dragged those confirmations out into May of this year, we, the American people, and the Federal courts would be much better off. As it is, however, the fact remains that there are 20 qualified judicial nominations that the Senate could be voting on without further delay.

They refuse to acknowledge that in addition to confirming two Supreme Court justices in President Clinton's first term, the Senate was able to confirm 200 circuit and district court judges. And in 1992, at the end of President George H.W. Bush's term, the Senate with a Democratic majority was able to confirm 192 circuit and district court judges despite confirming two Supreme Court justices. Republicans have kept the Senate well back from those numbers by only allowing the Senate to proceed to confirm 154 of President Obama's circuit and district court nominees. That is a far cry from what we have been able to achieve in addition to our consideration of Supreme Court nominations when the Senate was being allowed to function more fairly and to consider judicial nominees reported with bipartisan support.

Nor are the nominees about whom we are concerned recently nominated. These are not nominees dumped on the Senate in scores at the end of a presidential term. These are, instead, nominations that date back to October of last year. Most were nominated before March. In fact the circuit court nominees who Republicans are refusing to consider date back to October and November of last year and January of this year. William Kayatta was voted on by the Committee and placed before the Senate by mid-April and could have been confirmed then. Richard Taranto and Judge Patty Shwartz have been stalled before the Senate even longer, since March. The truth is that Senate Republicans have shut down confirmations of circuit court judges not just in July but, in effect, for the entire year. The Senate has yet to vote on a single circuit court nominee nominated by President Obama this year. Since 1980, the only presidential election year in which there were no circuit nominees confirmed who was nominated that year was in 1996, when Senate Republicans shut down the process against President Clinton's circuit nominees. The fact that Republican stalling tactics have meant that circuit court nominees that should have been confirmed in the spring – like Bill Kayatta, Richard Taranto and Patty Shwartz – are still awaiting a vote after July 4th is no excuse for not moving forward this month to confirm these circuit nominees.

The American people who are waiting for justice do not care about excuses. They do not care about some false sense of settling political scores. They want justice, just as they want action on measures the President has suggested to help the economy and create jobs rather than political calculations about what will help Republican candidates in the elections in November.

When Republican Senators try to take credit for the Senate having reached what they regard as their "quota" for confirmations this year, they should acknowledge their strenuous opposition and attempts to filibuster many of the nominations for which they now take credit. As recently

as 2008, Senate Republicans denied there was a Thurmond rule. They used to say that any judicial nominee reported by the Senate was entitled to an up-or-down vote and that they would never filibuster judicial nominees. Well, the Majority Leader has had to file 30 cloture petitions to end their filibusters of judicial nominees. Now they are flip-flopping on their own call for up-or-down votes.

What they are doing now is a first. As I have noted, no circuit court nominee reported with the bipartisan support of the Judiciary Committee has ever been successfully filibustered. Senate Democrats have never denied an up-or-down vote to any circuit court nominee of a Republican President who received bipartisan support in the Judiciary Committee. They are denying votes not only to Robert Bacharach, a nominee from Oklahoma supported by his conservative home state Republican Senators but also to William Kayatta, a universally respected nominee from Maine supported by his home state Republican Senators, and Richard Taranto, whose nomination to the Federal Circuit received virtually unanimous support. Even Judge Patty Shwartz, whose nomination to the Third Circuit received a split roll call vote, has the bipartisan support of New Jersey Governor Chris Christie.

Personal attacks on me, taking quotes out of context, trying to repackaging their own actions as if following the Thurmond Rule or what they seek to dub the Leahy Rule do nothing to help the American people who are seeking justice in our Federal courts. I am willing to defend my record but that is beside the point. The harm to the American people is what matters. Republicans are insisting on being the party of no even when it comes to judicial nominees who have home state Republican Senators support.

As Chairman and when I served as the ranking member of the Judiciary Committee, I have worked with Senate Republicans to consider judicial nominees well into presidential election years. I have taken steps to make the confirmation process more transparent and fair. I have ensured that the President consults with home state Senators before submitting a nominee. I have opened up what had been a secretive, blue slip process to prevent abuses. All the while I have protected the rights of the minority, of Republican Senators. If Republicans want to talk about the Leahy Rules, those are the practices I have followed. And I have been consistent. I hold hearings at the same pace and under the same procedures whether the President nominating is a Democrat or a Republican. Others cannot say that.

Senate Republicans are fond of taking quotes of things I have said out of context. But look at my record as Chairman. I have not filibustered nominees with bipartisan support in July of presidential election years. As Chairman of this Committee, I have steadfastly protected the rights of the minority. I have done so despite criticism from Democrats. I have only proceeded with judicial nominations supported by both home state Senators. I will put my record of consistent fairness up against that of any chairman and remind Senate Republicans that it is they who blatantly disregarded evenhanded practices when they were ramming through ideological nominations of President George W. Bush. They would proceed with nominations despite the objection of both home state Senators.

So those are the Leahy Rules – respect for and protection of minority rights, increased transparency, consistency, and allowing for confirmations well into presidential election years for nominees with bipartisan support.

And what were the results? In the last two presidential election years, we were able to bring the number of judicial vacancies down to the lowest levels in the past 20 years. In 2004, at end of President Bush’s first term, vacancies were reduced to 28, not the 76 we have today. In 2008, in the last year of President Bush’s second term, we again worked to fill vacancies and got them down to 34, less than half of what they are today. In 2004, 25 nominees were confirmed from June 1 to the presidential election. In 2008, 22 nominees were confirmed between June 1 and the presidential election. So far, since June 1 of this year, only eight judges have been confirmed and five required the Majority Leader to file cloture to end Republican filibusters.

In 2004, the Senate confirmed five circuit court nominees of a Republican President that had been reported by the Committee that year. This year we have confirmed only two circuit court nominees that have been reported by the Committee this year, and we had to overcome Republican filibusters in both cases. By this date in 2004 the Senate had already confirmed 35 of President Bush’s circuit court nominees. So far, the Senate has only been allowed to consider and confirm 30 of President Obama’s circuit court nominees – five fewer, 17 percent fewer – while higher numbers of vacancies remain, and yet the Senate Republican leadership demands an artificial shutdown on confirmation of qualified, consensus nominee for no good reason.

In fact, during the last 20 years, only four circuit nominees reported with bipartisan support have been denied an up-or-down vote during a presidential election year by the Senate; all four were nominated by President Clinton and blocked by Senate Republicans. While Senate Democrats have been willing to work with Republican presidents to confirm circuit court nominees with bipartisan support, Senate Republicans have repeatedly obstructed the nominees of Democratic presidents. In the previous five presidential election years, a total of 13 circuit court nominees have been confirmed after May 31. Not surprisingly, 12 of the 13 were Republican nominees. Clearly, this is a one-way street in favor of Republican presidents’ nominees.

Senate Republicans, on the other hand, have repeatedly asserted that the Thurmond Rule does not exist. For example, on July 14, 2008, the Senate Republican caucus held a forum and said that the Thurmond Rule does not exist. At that meeting, the senior Senator from Kentucky, the Republican leader stated: “I think it’s clear that there is no Thurmond Rule. And I think the facts demonstrate that.” Similarly, the Senator from Iowa, my friend who is now serving as Ranking Member of the Judiciary Committee, stated that the Thurmond Rule was in his view “plain bunk.” He said: “The reality is that the Senate has never stopped confirming judicial nominees during the last few months of a president’s term.” We did not in 2008 when we proceeded to confirm 22 nominees over the second half of that year.

So at the end of President Bush’s second term, and at the beginning of his first term as well, Senate Democrats worked to confirm consensus nominees and reduce the judicial vacancy rate. Despite the pace we set during President Bush’s first term for reducing vacancies, vacancies have remained near or above 80 for most of President Obama’s first term and little comparative progress has been made during the three and a half years of President Obama’s first term. As

contrasted to 29 vacancies in July 2004, there are still 76 vacancies in July 2012. If we could move forward to Senate votes on the 20 judicial nominees ready for final action, the Senate could reduce vacancies to less than 60 and make some progress. We were nine months later in confirming the 150th circuit or district judge to be appointed by President Obama. Another way to look at our relative lack of progress and the burden the Republican obstruction is placing on the American people seeking justice is to note that by mid-November 2002 we had already reduced judicial vacancies to below where we are now. In fact, when on November 14, 2002, the Senate proceeded to confirm 18 judicial nominees, vacancies went down to 60 throughout the country. We effectively worked twice as efficiently and twice as fast. By that measure, the Senate is almost 20 months behind schedule. This is hardly then the time to be shutting down the process.

In a letter to Senators Coburn and Inhofe dated July 19, 2012, the American Bar Association's State Delegate for Oklahoma urged the Republican Senators to rise above politics and to end this filibuster of Judge Bacharach. I ask unanimous consent to include a copy of this letter in the Record. It is time for reasonable and independent thinking Senators to end this needless and damaging filibuster on Judge Bacharach's nomination and confirm him. With judicial vacancies remaining at such high levels for so long, we need to continue confirming judicial nominees. At a time when judicial vacancies remained historically high for three years, with 40 more vacancies and 40 fewer confirmations than at this point in President Bush's first term, the Senate Republican leadership should reconsider its obstruction and work with us to fill these longstanding judicial vacancies in order to help the American people. We have well-qualified, consensus nominees with bipartisan support who can fill these vacancies. It is only partisan politics and continued tactics of obstruction that stand in the way.

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