

**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
On The Nomination Of Andrew D. Hurwitz To The Ninth Circuit Court Of Appeals  
June 11, 2012**

Last week's confirmation of Jeffrey Helmick to a judicial emergency vacancy in the Northern District of Ohio marked the 150th confirmation of a Federal circuit or district court of President Obama's. Before engaging in any self congratulations, we should acknowledge that we confirmed the 150th of President Bush's circuit and district court nominees nine months earlier, in September of his third year in office. That is one measure of how far behind we are in our consideration of President Obama's nominees. Another is that by June 15 of President Bush's fourth year in office the Senate had already confirmed 180 Federal circuit and district court judges. That is 30 more judges than we have been allowed to consider and confirm during President Obama's administration to date. There are still more than 70 judicial vacancies around the country, which is more than when President Obama came into office. Yet there are 18 judicial nominees approved by the Judiciary Committee awaiting final Senate consideration. It is my hope that the Senate will be allowed to consider those other nominees and make real progress.

The unprecedented delays in the consideration of President Obama's nominations were confirmed by a recent Congressional Research Service report on judicial nominations. The median number of days President Obama's circuit court nominees have been delayed from Senate consideration after being voted on by the Judiciary Committee has skyrocketed to 132 days. As the report notes, that is "roughly 7.3 times greater than the median number of 18 days for the 61 confirmed circuit nominees of his immediate predecessor, President G.W. Bush." Similarly, district court nominees are being unnecessarily delayed. The median time from Committee vote to Senate vote has gone from 21 days during the George W. Bush presidency to 90 days for President Obama's district nominees.

Today, the Senate is voting on whether to end a partisan filibuster against the nomination of Justice Andrew Hurwitz of Arizona to fill a judicial emergency vacancy in the Ninth Circuit. Last month, the Senate finally began taking actions I have been urging for months. We were finally able to consider and confirm the nominations of Judge Jacqueline Nguyen and Judge Paul Watford of California to judicial emergency vacancies on the United States Court of Appeals for the Ninth Circuit. The delay in the consideration of all these nominees follows the pattern also seen with Judge Morgan Christen of Alaska last December despite the strong support of the senior Senator from Alaska, Senator Murkowski. I commend Senators from both sides of the aisle who rejected the misguided effort to filibuster the nomination of Judge Watford.

This is the 28th time the Majority Leader has been forced to file for cloture to end a Republican filibuster and get an up-or-down vote on one of President Obama's judicial nominations. By comparison, during the entire eight years that President Bush was in office, cloture was filed in connection with 18 of his judicial nominees, most of whom were opposed as extreme ideologues.

Justice Hurwitz 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.

I urge Senators to see through the specious and unfair attacks from the extreme right and narrow special interest groups. Senator Kyl and Senator McCain are right to support his nomination, and this good man and excellent judge should be confirmed. Justice Hurwitz is a respected and experienced jurist on the Arizona Supreme Court. His nomination has the strong support of his home state Senators, Senator John McCain and Senator Jon Kyl. Justice Hurwitz was reported favorably out of Committee with bipartisan support over three months ago. His nomination received the highest possible rating of the American Bar Association Standing Committee on the Federal Judiciary after their nonpartisan peer review found him to be “well qualified.” He has all the credentials anyone could want, has exhibited good judgment on the bench, and has the right judicial temperament. He is the kind of nominee who would at any other time in our history be confirmed unanimously or nearly so by the Senate in an expeditious manner. Not so this year, during this presidential administration. Despite the fact that this President has reached across the aisle to work with Republican home state Senators, Justice Hurwitz faces partisan opposition.

When Senator Kyl introduced Justice Hurwitz to the Judiciary Committee at his hearing in January, he underscored what a qualified nominee he is. Senator Kyl said:

“It is very easy to see and it is obvious to those of us who have been in Arizona a long time why Justice Hurwitz was awarded the ABA’s highest rating, unanimous well qualified. So it will be my privilege to support his nomination, and I am honored to be able to introduce him to the panel today.”

Justice Hurwitz is an outstanding nominee with impeccable credentials and qualifications. He has had nine years of experience as a judge on Arizona’s highest court, and has shown a record of excellence as a jurist. No one has criticized a single decision he has made from the bench in his nine years as justice. Let me repeat that: No one can point to a single decision he has made and be critical. It is because of his record that he has the strong support of both Republican Senators from Arizona as well as many, many others from both sides of the political aisle.

A graduate of Princeton University and Yale Law School, Justice Hurwitz served as the Note and Comment Editor of the *Yale Law Journal*. Following graduation, he clerked on every level of the Federal judiciary: First for Judge Jon O. Newman, who was then U.S. District Judge on the District of Connecticut. Subsequently, he clerked for Judge Joseph Smith of the U.S. Court of Appeals for the Second Circuit. Then he clerked for Justice Potter Stewart of the U.S. Supreme Court.

He then distinguished himself in private practice, where he spent over 25 years at a law firm in Phoenix, Arizona. While in private practice, Justice Hurwitz tried more than 40 cases to verdict or final decision. He argued numerous times in the Ninth Circuit and other state and Federal appellate courts. One of the Supreme Court cases he argued was *Ring v. Arizona*, a case which he won 7-2, with the votes of Justices Scalia and Thomas.

Justice Hurwitz has also taught classes at Arizona State University’s Sandra Day O’Connor College of Law for approximately 15 years on a variety of subjects including ethics, Supreme Court litigation, legislative process, civil procedure, and Federal courts.

By any traditional measure, Justice Hurwitz is the kind of judicial nominee who should be confirmed easily by an overwhelming, bipartisan vote.

What is disappointing is that so many Republican Senators seem eager to oppose this nomination. An unfair campaign is being mounted by the extreme right against this outstanding nominee. The apparent basis of that campaign is not any decision that Justice Hurwitz made but rather a decision that Judge Newman rendered while Justice Hurwitz was a young law clerk 40 years ago. The case was a precursor of the Supreme Court's decision holding that the Constitution guarantees women certain reproductive rights of choice. Anyone who knows Judge Newman knows that was his decision and not that of a clerk. Judge Newman makes his own decisions and always has. In this case, he was right and his decision reflects what is recognized as the law of the land.

The opposition to this nomination marks a new low. Some are attempting to disqualify a nominee with impeccable credentials because a Federal judge for whom that nominee clerked some 40 years ago decided a case with which they disagree. They are against *Roe v. Wade* and oppose the constitutional rights of women and of privacy recognized in that case. That is their right. What is not right is them attributing responsibility for the judge's decision, which properly construed the Constitution in my view, to his clerk.

This opposition follows on the heels of their having opposed the nomination of Judge Paul Watford. He had clerked for a very conservative judge, Judge Alex Kozinski, who had been appointed by President Reagan and now serves as the Chief Judge of the Ninth Circuit. Judge Kozinski strongly supported his nomination. The 34 Senate Republicans who voted against the confirmation of Paul Watford did not credit him for having clerked for a conservative judge who wrote conservative opinions with which they agreed. So this is another one way street, another ratcheting down of the process, another excuse for opposing a highly qualified nominee. And it is wrong.

This also follows a pattern. Senate Republicans have attacked nominees by attributing the position of the nominee's legal client to the judicial nominee, something Chief Justice Roberts strongly condemned at his confirmation hearing. Just last week they opposed Judge Helmick and argued that because he served as a court-appointed lawyer for a defendant that it meant Judge Helmick supported terrorism. I took that occasion to remind them of our history and of John Adams having defended British soldiers after the Boston Massacre. They filibustered the nomination of Caitlin Halligan, who was serving as her state's top appellate lawyer, for defending the constitutionality of her state's law. They opposed the nomination of Jesse Furman objecting to something he wrote as a freshman in college, before he even attended law school. I have seen Senate Republicans grossly distorting a nominee's record to make him out to be a caricature, as with Goodwin Liu.

Now we are seeing Senate Republicans attack a nominee for serving as a law clerk to a distinguished Federal Judge. By their standards should Democrats oppose all clerks for Justice Scalia and Justice Thomas on that basis alone? This is wrong and leads down a dark and dangerous path. I urge Senate Republicans to reject this attack and vote to confirm Justice Hurwitz.

Justice Hurwitz should be judged on his own substantial record as a judge. This nominee has been a judge on the Arizona Supreme Court for nine years. Let us judge him on that record. In March when the Judiciary Committee voted on this nomination, Senator Kyl stated: “[T]he real question is . . . how he has comported himself in the place where you can really judge [him] – on the Arizona Supreme Court. Not once has an opinion that Justice Hurwitz wrote or joined in been overturned by a higher court.”

Senator Kyl further stated:

“[Justice Hurwitz] is a good example of a person who probably has some views personally that are different from mine, but whose opinions obviously carefully adhere to the law. And, after all, I think that is what most of us are looking for in judicial nominations. So I am pleased to support him without reservation and would urge my colleagues to support his nomination as well.”

I agree with Senator Kyl and commend him.

In direct and express answer to a question from Senator Sessions, Justice Hurwitz explained that his personal views would have no role in his decisions as a judge, and that they have never played a role in all his years as a judge. We know from Justice Hurwitz’s record that he is a judge’s judge. He is a person who meticulously analyzes the law and applies the facts of the case to the law. There is no evidence to contend that Justice Hurwitz would not do the same on the Ninth Circuit.

The Chief Judge of the Ninth Circuit 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 their 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 the nominations to judicial emergency vacancies on the overburdened Ninth Circuit for months and months.

We are still lagging behind what we accomplished during the first term of President George W. Bush. During President Bush’s first term we reduced the number of judicial vacancies by almost

75 percent. When I became Chairman in the summer of 2001, there were 110 vacancies. As Chairman, I worked with the administration and Senators from both sides of the aisle to confirm 100 judicial nominees of a conservative Republican President in 17 months.

We continued when in the minority to work with Senate Republicans to confirm President Bush's consensus judicial nominations well into 2004, a presidential election year. At the end of that presidential term, the Senate had acted to confirm 205 circuit and district court nominees. In May 2004, we reduced judicial vacancies to below 50 on the way to 28 that August. Despite 2004 being an election year, we were able to reduce vacancies to the lowest level in the last 20 years. At a time of great turmoil and political confrontation, despite the attack on 9/11, the anthrax letters shutting down Senate offices, and the ideologically driven judicial selections of President Bush, we worked together to promptly confirm consensus nominees and significantly reduce judicial vacancies.

In October 2008, another presidential election year, we again worked to reduce judicial vacancies and were able to get back down to 34 vacancies. I accommodated Senate Republicans and continued holding expedited hearings and votes on judicial nominations into September 2008. We lowered vacancy rates more than twice as quickly as Senate Republicans have allowed during President Obama's first term.

By comparison, the vacancy rate remains nearly twice what it was at this point in the first term of President Bush, and has remained near or above 80 for nearly three years. If we could move forward to Senate votes on the 18 judicial nominees ready for final action, the Senate could reduce vacancies below 60 and make progress.

Once the Senate is allowed to vote on this nomination, we need agreement to vote on the 17 other judicial nominees stalled on the Executive Calendar. Another point made by the Congressional Research Service in its recent report is that not a single one of the last three presidents has had judicial vacancies increase after their first term. In order to avoid this, the Senate needs to act on these nominees before adjourning this year.

As the Congressional Research Service report makes clear, in five of the last eight presidential election years, the Senate has confirmed at least 22 circuit and district court nominees after May 31. The notable exceptions were during the last years of President Clinton's two terms in 1996 and 2000 when Senate Republicans would not allow confirmations to continue. Otherwise, it has been the rule rather than the exception. So, for example, the Senate confirmed 32 in 1980; 28 in 1984; 31 in 1992; 28 in 2004 at the end of President George W. Bush's first term; and 22 after May 31 in 2008 at the end of President Bush's second term.

So let us move forward to confirm Justice Hurwitz. We need to work to reduce the vacancies that are burdening the Federal judiciary and the millions of Americans who rely on our Federal courts to seek justice. Let us work in a bipartisan fashion to confirm these qualified judicial nominees so that we can address the judicial vacancy crisis and so they can serve the American people. We can take a step today by confirming Justice Hurwitz to the Ninth Circuit.

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