

**Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The Nomination Of Robin Rosenbaum To The U.S. District Court For The Southern
District Of Florida
June 26, 2012**

The Republican 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 almost 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 talk of shutting down confirmations for consensus and qualified circuit court nominees is not helping the overburdened Federal courts to which Americans turn for justice.

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, Judge Robert Bacharach and Richard Taranto, three consensus, qualified circuit court nominees awaiting Senate confirmation so that they may serve the American people. I ask that a copy of his letter be included in the Record at this point.

He writes:

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.

He observes that “the Senate has a continuing constitutional duty to act with due diligence to reduce the dangerously high vacancy rate that is adversely affecting our federal judiciary.”

There is no good reason that the Senate should not vote on consensus circuit court nominees thoroughly vetted, considered and voted on 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 two months ago. This is the same person who Chief Justice John Roberts recommended to Kenneth Starr for a position in the Justice Department.

There is no reason the Senate cannot vote on the nomination of Judge Robert Bacharach of Oklahoma to the Tenth Circuit, who was supported by Senator Coburn during Committee consideration, and also by the state’s other Republican Senator, Senator Inhofe. Senator Coburn said that Judge Bacharach would make a great nominee for a Republican president. So why is the Republican leadership playing politics with his nomination?

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 three months ago, and is supported by conservatives such as Robert Bork and Paul Clement.

And the one circuit court nominee who was reported out of Committee with a split roll call vote – Judge Patty Shwartz of New Jersey – should not have been controversial, as seen by the bipartisan support she has received from New Jersey's Republican Governor Chris Christie.

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 with the Senate leadership to try 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.

Last week, I spoke about the announcement from Senate Republican leadership that they would be shutting down the confirmation process for qualified and consensus circuit court nominees for the rest of the year. As I noted, Senate Republicans have become the party of "no" – no help for the American people, no to jobs, no to economic recovery 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 is recent, 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 before 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, and Arizona. Just two weeks ago 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.

This 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 circuit 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. And every one of them was nominated 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.

Personal attacks on me, taking quotes out of context, trying to repackage 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 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.

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 74 at which they are 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 4 judges have been confirmed and all required the Majority Leader to file cloture to end Republican filibusters.

In 2004, a presidential election year, the Senate confirmed five circuit court nominees of a Republican President that had been reported by the Committee that 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 nominees for no good reason.

The nonpartisan Congressional Research Service recently released a report confirming that judicial nominees continue to be confirmed in presidential election years. The exceptions are when Republicans shut down the process because the President is a Democrat. 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. In the 1996 session, Senate Republicans did not allow any circuit court nominees to be confirmed at all. Vacancies at the end of the Clinton years stood at 75 at the end of 1996 and 67 at the end of 2000. (The third exception was in 1988, at the end of President Reagan's presidency, when vacancies were at 28.) According to CRS, the Senate confirmed 32 judges after May 31 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 far since May 31 of this year, only 4 judges have been confirmed and all required the Majority Leader to file cloture to end Republican filibusters.

In the past five presidential election years, 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. That is what Senate Republicans are now seeking to do by blocking votes on William Kayatta, Judge Bacharach and Richard Taranto. 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 are fond of taking quotes of things I have said out of context. Look at what I have done. I have not filibustered nominees with bipartisan support after May 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. That has meant that we are not able to proceed on current nominees from Arizona, Georgia, Nevada, and Louisiana. I even stopped proceedings on a circuit court nominee from Kansas when the Kansas Republican Senators reversed themselves and withdrew their support for the nominee. I had to deny the Majority Leader's request to push a Nevada nominee through Committee because she did not have the support of Nevada's Republican Senator. I will put my record of consistent fairness up against that of any Judiciary 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.

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 hearing and said that the Thurmond Rule does not exist. At that hearing, 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.

We remain far behind in filling the judicial vacancies to provide the Federal judges that American people need to get justice in our Federal courts. A comparison of judicial vacancies during the first terms of President Bush and President Obama shows a stark contrast to the way in which we moved to reduce judicial vacancies during the last Republican presidency.

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 and 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. By June 2004 we had reduced judicial vacancies to 43 on the way to 28 that August.

By comparison, vacancies have long remained near or above 80 and while little comparative progress has been made during the four years of President Obama’s first term. As contrasted to 43 vacancies in June 2004, there are still 74 vacancies in June 2012. If we could move forward to Senate votes on the 17 judicial nominees ready for final action, the Senate could reduce vacancies below 60 and make some progress. I noted last week that, compared to our progress under President Bush, 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 reduced judicial vacancies to below where we are now with 74 vacancies. 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 fact, when on November 14, 2002, the Senate proceeded to confirm 18 judicial nominees, vacancies went down to 60 throughout the country.

This is a true comparison of similar situations. The nonpartisan Congressional Research Service in its recent report likewise compares the first years of presidential administrations. False comparisons are to take the end of a second term of a presidency, when vacancies have already been significantly reduced and to contend that confirmation numbers for that period can be fairly compared to the beginning of a presidential term when vacancies are high.

Today, the Senate will vote on the nomination of Robin Rosenbaum to fill a judicial emergency vacancy in the U.S. District Court for the Southern District of Florida. Judge Rosenbaum has the support of her home state Senators, Democratic Senator Bill Nelson and Republican Senator Marco Rubio. Her nomination was reported with near unanimous voice vote by the Judiciary Committee nearly three months ago, with the only objection coming from Senator Lee’s

customary protest vote. Judge Rosenbaum was rated unanimously “well qualified” by the ABA Standing Committee on the Federal Judiciary, the highest possible rating.

Judge Rosenbaum is currently a United States Magistrate Judge in the district in which she has been nominated, and has served in that position for almost five years. She previously served for nine years as a Federal prosecutor, including five years as Chief of the Economic Crimes Section. After graduating from law school, she spent four years as a Trial Attorney in the Civil Division of the U.S. Department of Justice before serving as Staff Counsel in the Office of the Independent Counsel for the investigation of former U.S. Secretary of Commerce Ron Brown. Judge Rosenbaum clerked for Judge Stanley Marcus of the Eleventh Circuit Court of Appeals. She is a terrific nominee and she has my support.

Last week, the Judiciary Committee also voted Judge Brian Davis out of Committee favorably for a judicial emergency vacancy in the Middle District of Florida. Judge Davis is an exceptional nominee with a distinguished career in public service. He has been a state court judge for 18 years, and has also served as a prosecutor for nine years. The ABA Standing Committee on the Federal Judiciary has unanimously rated Judge Davis well qualified to serve on the district court, its highest possible rating. Judge Davis was selected based on a nonpartisan judicial selection commission appointed by Senators Nelson and Rubio, and both of the home state Senators have supported moving forward with consideration of this nomination. We should move to confirm him without delay so that he can get to work for the people of Florida.

After today’s vote, we need to continue confirming nominees. At a time when judicial vacancies remained historically high for three years, with 30 more vacancies and 30 fewer confirmations than at this point in President Bush’s first term, I would hope the Senate Republican leadership would reconsider and work with us on filling these longstanding judicial vacancies 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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