

Statement of
The Honorable Patrick Leahy

United States Senator
United States Senate
January 26, 2012

Today, the Judiciary Committee holds its first confirmation hearing of 2012. I thank Senator Durbin for chairing today's important hearing on the nominations of Andrew Hurwitz to fill a judicial emergency vacancy on the Ninth Circuit, Kristine Baker to the Eastern District of Arkansas, George Russell to fill a judicial emergency vacancy in the District of Maryland, and two nominees from his home state, John Lee and John Tharp, both nominated to fill judicial emergency vacancies in the Northern District of Illinois. I know Senator Kirk, the Republican Senator from Illinois, supports these nominees and we will continue to seek to move them forward while he recovers.

I had hoped to proceed with a hearing on these well-qualified nominees last year, but accommodated Senator Grassley's preferred schedule and did not proceed on them as the Republicans had not reviewed their materials. I am pleased that we will consider their nominations today and hope that we can now resume our reasonable schedule of regular confirmation hearings every two weeks. With vacancies on Federal courts across the country remaining extremely high, as they have throughout the term of the Obama administration, we cannot afford to slow down our consideration of nominations. I have not proceeded with hearings in back to back weeks as the Republican Chairman of this Committee did for President Bush's nominees at the beginning of 2004, a presidential election year.

I thank Senator Kyl for working with the President and for his strong support of Justice Hurwitz, and for serving as Ranking Member today. I hope that we can turn a page and provide better treatment to President Obama's well-qualified consensus nominees than the Senate has done during the last three years. President Obama's nominees have been confirmed at a lower percentage rate than the nominees of any president in the last 35 years. The Senate has confirmed just over 70 percent of President Obama's circuit and district nominees, leaving more than one in four not confirmed. In stark contrast, the Senate confirmed nearly 87 percent of President George W. Bush's nominees, nearly nine out of every 10 nominees he sent to the Senate over two terms.

We remain well behind the pace set by the Senate during President Bush's first term. By the end of President Bush's first term, the Senate had confirmed 205 district and circuit nominees. At the beginning of his fourth year in office, the Senate had lowered judicial vacancies to 46 and already confirmed 168 of his judicial nominees. In contrast, the Senate has confirmed only 125 of President Obama's district and circuit nominees, leaving judicial vacancies at 85. The vacancy rate remains nearly double what it had been reduced to by this point in the Bush administration.

Senate Republicans continue to use a strategy of across-the-board delays that has led to a shamefully high number of judicial vacancies. In 2009, the Senate was able to confirm only 12

Federal circuit and district court judges, the lowest total in 50 years. In 2010, the Senate was able to confirm 48 Federal circuit and district judges. That has led to the lowest confirmation total for the first two years of a new presidency in 35 years. As a result, judicial vacancies rose again over 110 and stayed near 90 for the longest period of historically high vacancies in 35 years.

Right now, nearly one out of every 10 Federal judgeships is vacant. Judicial emergency vacancies in Florida, Utah, California, Nevada and Texas remain unfilled despite nominees that were on the calendar to fill those vacancies at the end of last year, but who are still awaiting a final Senate vote. All but one of the 18 nominees still on the calendar was reported last year with significant bipartisan support, with 16 of them reported unanimously. These nominees should have been confirmed last year.

I am hopeful that the New Year will bring greater cooperation from Republican Senators, and that we can expedite consideration of President Obama's judicial nominees to address the serious vacancies crisis currently in our Federal courts. Today's hearing is a good start. First, we will consider the nomination of Justice Andrew Hurwitz to the U.S. Court of Appeals for the Ninth Circuit. Justice Hurwitz has spent the last nine years as a Justice on the Supreme Court of Arizona. Prior to that, he practiced for over 25 years at a law firm in Phoenix, Arizona, and has also served as Chief of Staff to Arizona Governors Bruce Babbitt and Rose Mofford. Justice Hurwitz has argued two cases before the U.S. Supreme Court, one which led to a groundbreaking decision on an issue relating to a defendant's right to a jury trial. A graduate of Yale Law School, Justice Hurwitz clerked for Justice Potter Stewart on the U.S. Supreme Court. He was rated unanimously well qualified by the ABA Standing Committee, the highest possible rating. He has the support of both his home state Senators - Republicans John McCain and Jon Kyl.

Justice Hurwitz has been nominated to fill one of four judicial emergency vacancies on the Ninth Circuit. The Ninth Circuit serves more than 61 million Americans, and handles double the caseload of the other Federal circuit courts. 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, have written to the Senate emphasizing the Ninth Circuit's "desperate need for judges," urging the Senate to "act on judicial nominees without delay," and concluding that they "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 March 2011, the Ninth Circuit had 13,913 cases pending before it. The second closest - the Sixth Circuit - had 5,231 cases pending before the court. Thus, it is critical that the Senate proceed without further delay to vote on the nomination of Judge Jacqueline Nguyen to the Ninth Circuit and that we expedite Committee consideration of the nomination of Paul Watford and that of Justice Hurwitz's nomination to alleviate this crushing burden.

We will also proceed with the four district court nominees - three of whom are nominated to fill judicial emergency vacancies. Kristine Gerhard Baker has been nominated to the Eastern District of Arkansas. Ms. Baker has been a partner at the law firm of Quattlebaum, Grooms, Tull &

Burrow in Little Rock, Arkansas since 2002. In her 25-year legal career, Ms. Baker has worked on a variety of complex, business-related litigation disputes and has tried approximately 13 cases to verdict. She has been named numerous times by Chambers Magazine as one of America's leading lawyers for business. Ms. Baker has the bipartisan support of Senator Pryor, a Democrat, and Senator Boozman, a Republican, from her home state of Arkansas.

John Z. Lee and John "Jay" Tharp have been nominated to the Northern District of Illinois. Mr. Lee is currently a partner at the law firm Freeborn & Peters, where he has been a litigator since 2001. There, Mr. Lee has litigated cases involving a wide-range of issues, including antitrust, intellectual property, labor and employment, and complex commercial disputes. He has been named a "Leading Lawyer" in commercial litigation for the last three years by the Leading Lawyers Network. Mr. Lee also spent three years at the Department of Justice, where he was a trial attorney at the Environment & Natural Resources Division. He received his undergraduate degree, magna cum laude, from Harvard University, and his law degree, cum laude, from Harvard Law School. If confirmed, Mr. Lee would be only the second Korean-American to serve as a Federal district court judge.

Mr. Tharp, formerly a nominee of President Bush at the end of his second term, is currently a partner at the law firm Mayer Brown, where he specializes in criminal investigations and complex commercial litigation. Prior to joining private practice, Mr. Tharp worked for five years as an Assistant United States Attorney at the Northern District of Illinois. He also clerked for Seventh Circuit Judge Joel Flaum for two years after graduating from Northwestern University Law School, magna cum laude. Mr. Tharp has been rated "Unanimously Well Qualified" to serve on the Northern District of Illinois by the ABA Standing Committee on the Federal Courts, its highest possible rating. Both Mr. Lee and Mr. Tharp have the bipartisan support of both their home state Senators, a Democrat and a Republican.

George Levi Russell III has been nominated to fill a judicial emergency vacancy on the District of Maryland. Judge Russell is currently serving as an associate judge in the Circuit Court of Maryland for Baltimore City, where he has been since 2007. Prior to that, Judge Russell served two separate stints at the U.S. Attorney's Office for the District of Maryland - first in the Civil Division from 1994-1999, and then at the Criminal Division from 2002-2007. Judge Russell has also worked in private practice at several law firms. As an attorney, he tried 13 cases to final verdict or judgment. Judge Russell has the support of his distinguished home state Senators.

I look forward to moving forward to consider these nominations without further delay.

#####