

EXECUTIVE SESSION

NOMINATION OF ROBERT E. BACHARACH TO BE UNITED STATES CIRCUIT JUDGE FOR THE TENTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The assistant bill clerk read the nomination of Robert E. Bacharach, of Oklahoma, to be United States Circuit Judge for the Tenth Circuit.

The PRESIDING OFFICER. Under the previous order, there will be 30 minutes of debate equally divided and controlled in the usual form.

The Senator from Vermont.

Mr. LEAHY. This week, the country is facing indiscriminate across-the-board cuts from sequestration if Congress does not come to an agreement. The automatic cuts that will otherwise occur are in the tens of billions of dollars at a time when our economy is finally recovering but remains fragile. Among those who will have to endure these cuts are the overburdened Federal courts that are already suffering from longstanding vacancies that number almost 90. Budgetary cuts will mean more difficulty for the American people to get speedy justice from our Federal justice system.

According to the sequestration report released by the Office of Management and Budget, the sequestration would lead to a \$555 million reduction for our Federal courts. Despite their higher caseloads and the needs of the American people, the courts' funding will be capped at a level last utilized 6 years ago. This could result in elimination of nearly one third of the courts' staff, as many as 6,300 employees, or month-long furloughs system wide. The sequester will result in cuts that will force courts to hear fewer cases and hear them more slowly. Court proceedings will be delayed. Some 30,000 civil cases have already been pending for more than 3 years and this will only exacerbate the problems of delay. Sequestration cuts could even result in the suspension of civil jury trials in some courts. And consider that if probation and pretrial services offices are affected, that can mean that defendants in pretrial release and those convicted but not in prison may not be properly supervised.

Sequestration is bad for the courts, bad for the economy and bad for the American people.

Today, after an unprecedented filibuster, Senate Republicans will finally allow a vote on the nomination of Robert Bacharach to the U.S. Court of Appeals for the Tenth Circuit. Judge Bacharach should be a consensus nominee. He received the ABA Standing Committee on the Federal Judiciary's highest possible rating of well qualified. He was reported by the Judiciary Committee by voice vote last year and,

again, this year. Despite his experience, qualifications and bipartisan support, he was filibustered by Senate Republicans since July last year.

The filibuster of his nomination, which was supported by the Oklahoma Senators who had previously supported the nomination and who will likely reverse themselves again and support confirmation today, was the ne plus ultra of an unprecedented campaign of obstruction Senate Republicans have waged against President Obama's judicial nominees. That obstruction has spread to executive nominees, as well, including the nomination of Chuck Hagel, a recent Republican Senator from Nebraska whose nomination to serve as Secretary of Defense was filibustered earlier this month.

Judge Bacharach is the kind of nominee who every Senator should support. Over his 13-year career as a U.S. Magistrate Judge in the Western District of Oklahoma, he 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, he 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.

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 the careful and deliberate process in which Judge 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 who opposed his nomination on the merits. He was praised extensively by his home State Senators. Senator INHOFE has said of him:

I believe Judge Bacharach would continue the strong service Oklahomans have provided the Tenth Circuit. Throughout his career and education, he's distinguished himself. In 2007, the Oklahoma City Journal Record profiled Judge Bacharach as an example of leadership in law, where he simply stated that as a future goal he intends to improve. Always working to improve has de-

fined Judge Bacharach. . . . [H]is colleagues have characterized his service as remarkable, demonstrating superb judicial temperament, and a real asset to the Western District court family and legal community.

Senator COBURN said:

Judge Bacharach is well qualified for this position and has received widespread praise and hearty recommendations from Oklahomans, including members of academia and fellow members of the bar. . . . 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.

Unfortunately, along with 42 other Senate Republicans, Senator INHOFE and Senator COBURN filibustered Judge Bacharach since last July. The people of Oklahoma, Colorado, Kansas, New Mexico, Utah and Wyoming have been needlessly denied his service as a Tenth Circuit judge for 7 months. Republican Senators in Oklahoma, Kansas, Utah and Wyoming could have prevented the filibuster but went along with the obstruction that served no good purpose and established another damaging precedent: Judge Bacharach is the first circuit court nominee to be filibustered who had received bipartisan support before the Judiciary Committee. Senator COBURN was quoted last year admitting: "There's no reason why he shouldn't be confirmed." There was none other than the obstruction of Senate Republicans.

Their partisan obstruction was wrong, and it is damaging to our Nation's courts and the American people. The nonpartisan Congressional Research Service has reported that 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. This is the result of Republicans' partisan obstruction.

This obstruction has contributed to the damagingly high level of judicial vacancies that has persisted for over 4 years. Persistent vacancies force fewer judges to take on growing caseloads, and make it harder for Americans to have access to speedy justice. While Senate Republicans delayed and obstructed, the number of judicial vacancies remained historically high and it has become more difficult for our courts to provide speedy, quality justice for the American people. There are today 89 judicial vacancies across the country. By way of contrast, that is more than double the number of vacancies that existed at this point in the Bush administration. The circuit and district judges that we have been able to confirm over the last four years fall more than 30 short of the total for President Bush's first term.

Over the last 4 years, Senate Republicans have chosen to depart dramatically from Senate traditions in their

efforts to delay and obstruct President Obama's judicial nominations. Until 2009, Senators who filibustered circuit court nominees generally had reasons to do so, and were willing to explain those reasons. When Senate Democrats filibustered President Bush's most extreme circuit court nominees, it was over substantive concerns about the nominees' records and Republicans' disregard for the rights of Democratic Senators as they unfairly short-circuited the process of consideration over and over again. On the other hand, Senate Republicans have filibustered and delayed nearly all of President Obama's circuit court nominees even when those nominees have the support of their Republican home state Senators and their rights have been fully protected in a fair consideration process.

Until 2009, when a judicial nominee had been reported by the Judiciary Committee with bipartisan support, they were generally confirmed quickly. Until 2009, we observed regular order, usually confirmed nominees promptly, and we cleared the Senate Executive Calendar before long recesses. Until 2009, if a nominee was filibustered, it was almost always because of a substantive issue with the nominee's record. We know what has happened since 2009. The average district court nominee is stalled 4.3 times longer and the average circuit court nominee is stalled 7.3 times as long as it took to confirm them during the Bush administration. No other President's judicial nominees had to wait an average of over 100 days for a Senate vote after being reported by the Judiciary Committee.

Senate Republicans have also forced the Majority Leader to file cloture on 30 nominees, which is already in 4 years 50 percent more nominees than had cloture filed during President Bush's eight years in office. Almost all of these 30 nominations were non-controversial and were ultimately confirmed overwhelmingly. Fewer than 80 percent of President Obama's judicial nominees have been confirmed compared to almost 90 percent of President George W. Bush's nominees at this point in their Presidencies.

The record is clear: Senate Republicans have engaged in an unprecedented effort to obstruct President Obama's judicial nominations. Chief Justice Roberts, in his year-end Report on the Federal Judiciary in 2010 pointed to the "[P]ersistent problem [that] has developed in the process of filling judicial vacancies . . . This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads . . . There remains, however, an urgent need for the political branches to find a long-term solution to this recurring problem." Despite bipartisan calls to address longstanding judicial vacancies, Senate Republicans have continued their unwarranted obstruction of judicial confirmations. In

the case of Judge Bacharach, there was not even a pretense of any substantive concern—Senate Republicans just decided to shut down the confirmation process and contorted the "Thurmond rule."

At a time when judicial vacancies have again risen to almost 90, we must do more for our overburdened courts. It is past time for the partisan obstruction to end. We have a long way to go. After 4 years of delay and obstruction, we remain far behind the pace of confirmations we set during President Bush's administration, and there remain far too many judicial vacancies that make it harder for Americans to have their day in court. During President Bush's entire second term, the 4 years from 2004 through 2008, vacancies never exceeded 60. Since President Obama's first full month in office, and as far into the future as we can see, there have never been fewer than 60 vacancies, and for much of that time many, many more. The Senate must do much more to fill these vacancies and make real progress.

The Senate today will finally vote on the nomination of Robert Bacharach. He has served as a U.S. Magistrate Judge on the United States District Court for the Western District of Oklahoma since 1999. Previously, from 1987 to 1999, he was in private practice at the Oklahoma City law firm of Crowe & Dunlevy, P.C. From 1985 to 1987, he served as a law clerk to Judge William J. Holloway, Jr. of the U.S. Court of Appeals for the Tenth Circuit, the same court to which he has been nominated. Judge Bacharach was twice reported by the Judiciary Committee by voice vote—last June and again this month.

The Judiciary Committee has been working to vet, consider, and report nominees, and just before the recess we reported another dozen circuit and district nominees, all of whom had to be renominated from last year. The longest pending of these nominations is that of Caitlin Halligan, who the President first nominated to the D.C. Circuit back in 2010. At that time, there were already two vacancies on that court, a number which has now doubled to four. The purported justification for the partisan Republican filibuster of the Halligan nomination was that the circuit did not need another judge. The circuit is now more than one-third vacant and needs several, including Caitlin Halligan. I urge that the Senate act quickly on long-pending nominations. Further delay does not serve the interests of the American people. Hard-working Americans deserve better.

Mr. GRASSLEY. Mr. President, I rise today in support of Robert E. Bacharach, nominated to be United States Circuit Judge for the Tenth Circuit. Mr. Bacharach's nomination was pending before the Senate last year. In accordance with Senate custom and practice, the nomination was placed on hold, along with other circuit judge nominations, pending the outcome of

the 2012 Presidential election. Unfortunately, the nomination was subjected to some unnecessary political theater when a cloture motion was filed and defeated last July.

It is well-known that the practice and tradition of the Senate is to stop confirming circuit judge nominees in the closing months of a Presidential election year. One has to go back 20 years to find a Presidential election year when the Senate approved a circuit court judge in the latter part of the year. Of course, the rationale has been that whoever wins that election should be the one to pick these lifetime nominees who will run our judiciary system.

A Congressional Research Service report on this subject stated:

The Senator who most frequently has asserted the existence of a Thurmond rule has been the current chairman of the Judiciary Committee.

The CRS report noted that on March 7, 2008, the chairman recalled:

When President Reagan was running for President and Senator Thurmond, then in the Republican minority as ranking member of the Judiciary Committee, instituted a policy to stall President Carter's nominations. That policy, known as the "Thurmond Rule," was put in when the Republicans were in the minority. It is a rule that we still follow, and it will take effect very soon here.

Again, this was in March of that Presidential election year, not June or July. So that rule was very carefully laid out March 7, 2008—that they didn't intend to approve any more nominees after that point.

CRS went on to note the strong support the majority leader has expressed for the so-called Thurmond rule. According to CRS:

Senator Harry Reid, the Senate majority leader, has expressed agreement with Senator Leahy about the existence of a Thurmond rule. In April 10, 2008, floor remarks, Senator Reid said, In a Presidential election year, it is always very tough for judges. That is the way it has been for a long time, and that is why we have the Thurmond rule and other such rules.

Five days later, the Majority Leader said:

You know, there is a Thurmond doctrine that says: After June, we will have to take a real close look at judges in a Presidential election year.

These quotes indicate not only the expectation, but in fact a support for slowing down and cutting off the confirmation of judges in a Presidential election year.

Even setting aside the so-called Leahy-Thurmond rule, by any objective measure, President Obama has been treated fairly.

For example, with regard to the total number of confirmations, we confirmed 171 district and circuit nominations during President Obama's first term. We also confirmed two Supreme Court nominations during President Obama's first term. When Supreme Court nominations are pending in the committee, all other work on nominations is put on hold.

The last time the Senate confirmed two Supreme Court nominees was during President Bush's second term, and during that term the Senate confirmed a total of only 119 district and circuit court nominees.

Let me put it another way. Under similar circumstances when Supreme Court nominees were considered—the Senate confirmed 52 more district and circuit nominees for President Obama than for President Bush.

During the 2008 Presidential election year, the Senate confirmed a total of 28 judges—24 district and 4 circuit. During the 2012 Presidential election year the Senate greatly exceeded those numbers, having confirmed a total of 49 judges—44 district and 5 circuit. In fact, President Obama's confirmations during the 2012 election year exceed the previous five Presidential election years.

Furthermore, President Obama has the highest percentage of circuit confirmations over the past four Presidential terms. With regard to district confirmations, President Obama had more during the 112th Congress than in any of the previous eight Congresses, going back to 1994.

So those who say that this President is being treated differently either fail to recognize history or want to ignore the facts, or both.

With regard to today's nomination, I would like to say a few words about the nominee. I expect he will be approved and congratulate him on his confirmation.

Judge Bacharach graduated from University of Oklahoma with a B.A. in 1981 and earned his J.D. from the Washington University School of Law in 1985. Upon graduation, Judge Bacharach served as a law clerk from 1985 to 1987 to the Honorable William J. Holloway, Jr. on the U.S. Court of Appeals for the Tenth Circuit. After completion of his clerkship, he was hired as an associate at Crowe & Dunlevy, where he became a shareholder in 1994. He remained at the firm until becoming a U.S. magistrate judge in 1999. At Crowe & Dunlevy, he primarily practiced in commercial litigation, focusing on antitrust and franchise litigation. He also handled a considerable number of cases involving the Employee Retirement Income Security Act, ERISA, from 1996 to 1998.

From 1997 to 1999, Judge Bacharach served as an adjunct professor of law at the University of Oklahoma School of Law. During this period, he was a co-instructor for a class titled "Civil Pretrial Litigation."

In 1999, the U.S. district judges for the Western District of Oklahoma appointed Judge Bacharach to be a U.S. magistrate judge. As a magistrate judge, he manages all aspects of the pretrial process in civil and criminal cases: conducting evidentiary hearings, ruling on nondispositive motions, making reports and recommendations regarding dispositive motions, and issuing criminal complaints, search warrants, and arrest warrants.

Mr. LEAHY. Mr. President, I suggest the absence of a quorum. If there is time remaining, I ask the time be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. BOXER. Mr. President, we yield back the remaining time on the nomination.

The PRESIDING OFFICER. All debate time has expired.

Mrs. BOXER. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

There is a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Robert E. Bacharach, of Oklahoma, to be United States Circuit Judge for the Tenth Circuit?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Iowa (Mr. HARKIN), the Senator from New Jersey (Mr. LAUTENBERG), and the Senator from Colorado (Mr. UDALL) are necessarily absent.

Mr. CORNYN. The following Senators are necessarily absent: the Senator from Georgia (Mr. CHAMBLISS), the Senator from Idaho (Mr. CRAPO), the Senator from Wisconsin (Mr. JOHNSON), and the Senator from Kentucky (Mr. PAUL).

The PRESIDING OFFICER (Mr. DONNELLY). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 93, nays 0, as follows:

[Rollcall Vote No. 22 Ex.]

YEAS—93

Alexander	Enzi	McCain
Ayotte	Feinstein	McCaskill
Baldwin	Fischer	McConnell
Barrasso	Flake	Menendez
Baucus	Franken	Merkley
Begich	Gillibrand	Mikulski
Bennet	Graham	Moran
Blumenthal	Grassley	Murkowski
Blunt	Hagan	Murphy
Boozman	Hatch	Murray
Boxer	Heinrich	Nelson
Brown	Heitkamp	Portman
Burr	Heller	Pryor
Cantwell	Hirono	Reed
Cardin	Hoeven	Reid
Carper	Inhofe	Risch
Casey	Isakson	Roberts
Coats	Johanns	Rockefeller
Coburn	Johnson (SD)	Rubio
Cochran	Kaine	Sanders
Collins	King	Schatz
Coons	Kirk	Schumer
Corker	Klobuchar	Scott
Cornyn	Landrieu	Sessions
Cowan	Leahy	Shaheen
Cruz	Lee	Shelby
Donnelly	Levin	Stabenow
Durbin	Manchin	Tester

Thune
Toomey
Udall (NM)

Vitter
Warner
Warren

Whitehouse
Wicker
Wyden

NOT VOTING—7

Chambliss
Crapo
Harkin

Johnson (WI)
Lautenberg
Paul

Udall (CO)

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is considered made and laid upon the table, and the President will be immediately notified of the Senate's action.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume legislative session.

The Senator from Oklahoma.

BACHARACH CONFIRMATION

Mr. INHOFE. Mr. President, I am very pleased that we have just confirmed Judge Bacharach. He is going to make a great Federal judge. I have just been real pleased, I have to admit; I was literally running from the airport to get here because they had plane troubles, and I saw Senator PRYOR was in the same situation. So let me, first of all, thank the leadership for holding that vote open so I would not find myself in the embarrassing position of not voting to confirm my best friend from Oklahoma. So we are in that situation.

Let me just say that I am very proud of him. He actually started on the Tenth Circuit as a clerk. So he really knows this stuff. He has been there for a long time. As part of his profile, as a future goal, he intended to improve. He has actually made that statement. I believe "always working to improve" has been a defining characteristic of Judge Bacharach's career.

He graduated in the top 4 percent of his class in law school. He received all kinds of academic awards and maintained memberships in the highest orders of law school students. He began his legal scholarship on Law Review and has continued writing in a number of law journals.

As I said, he actually started in the Tenth Circuit working as a law clerk for the chief judge. So he knows that circuit. I do not think there is anyone out there who would know it better.

Judge Bacharach has multiple years of litigation experience working for the firm Crowe and Dunlevy in Oklahoma City and in public service as a Federal magistrate for the U.S. District Court in the Western District of Oklahoma. As evidence of his career of distinction, when Judge Bacharach was chosen to be a magistrate judge from a pool of many well-qualified candidates, the chief judge characterized the decision as "an easy one."

Since that time his colleagues have characterized his service as remarkable, demonstrating superb judicial temperament, and being a real asset to the Western District family and the