

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
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Opening Statement Of Senator Patrick Leahy, D-Vt.,
Ranking Member, Senate Judiciary Committee
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This hearing is another demonstration of how untrue the rhetoric is that is so often bandied about by Republican partisans that Democrats are obstructing the confirmations of this President's judicial nominees. The reality is that we have cooperated to an extraordinary extent, especially when contrasted with Republican treatment of President Clinton's judicial nominees.

Today marks the Judiciary Committee's second hearing in the last two weeks for circuit court nominees. Traditionally, the number of nominees who have received hearings and who are considered in a presidential election year has been lower than in other years. In 1996, only four circuit court nominees by President Clinton received a hearing from the Republican Senate majority. In 2000, only five circuit court nominees by President Clinton received a hearing from the Republican Senate majority. Of course, two of those outstanding and well-qualified nominees in 2000 were never allowed to be considered by the Committee or the Senate. By contrast, here we are, before the end of the first month of 2004, and we have already held hearings for two circuit court nominees. By the standard Republicans set in 1996 and 2000, we would be half done for the entire year.

Second, an area in which Democrats and Republicans have taken very different approaches is the issue of recess appointments. Despite the Committee's rejection of the Pickering nomination in 2002 and the Senate's unwillingness to give its consent to the nomination in 2003, President Bush has nonetheless appointed Charles Pickering to the Fifth Circuit. His renomination of Judge Pickering after rejection of that nomination by the Judiciary Committee and his recess appointment are both unprecedented. The President made his appointment on Friday, January 16, 2004, during the congressional recess and the weekend set aside to honor the memory and work of Dr. Martin Luther King, Jr.

This temporary appointment can be distinguished from President Clinton's recess appointment of Judge Roger Gregory to the Fourth Circuit in December 2000 in many ways: Roger Gregory had been denied a Judiciary Committee hearing even though he had the bipartisan support of both of his home-state Senators - Democratic Senator Chuck Robb and Republican Senator John Warner. By contrast, Judge Pickering participated in hearings and an extensive record was developed on which his nomination was opposed in the Judiciary Committee and in the Senate on the merits on the basis of

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his record as a district court judge. Roger Gregory's nomination was never allowed to be considered by the Judiciary Committee. By contrast, Judge Pickering's nomination was fully and fairly debated in 2002 and rejected by the Judiciary Committee. Indeed, Judge Pickering's renomination was the first time a President had resent a judicial nomination to the Senate after the Judiciary Committee had voted on and rejected that judicial nomination. Likewise, Judge Pickering's temporary appointment is the first after rejection by the Judiciary Committee and after the Senate has debated a judicial nomination and withheld its consent.

Moreover, Roger Gregory's recess appointment fit squarely in the tradition of presidents' exercising such authority in order to expand civil rights and to bring diversity to the courts. Four of the five first African American appellate judges were recess-appointed to their first Article III position, including Judge William Hastie in 1949, Judge Thurgood Marshall in 1961, Judge Spottswood Robinson in 1961, and Judge Leon Higginbottom in 1964. Unlike these nominees and the public purposes served, Judge Pickering was opposed by civil rights groups, including all chapters of the Mississippi NAACP, the Southern Christian Leadership Conference, and by the Magnolia Bar Association. Rather than bring people together and move the country forward, this President's recess appointment is another source of division.

In addition to the differences in how the power of recess appointments has been exercised, the Senate reaction to such appointments has also differed dramatically. When President Clinton used his recess appointment power to appoint James Hormel ambassador to Luxembourg, Senator Inhofe responded by saying that President Clinton had "shown contempt for Congress and the Constitution" and declared that he would place "holds on every single Presidential nomination." Which Republicans did in obstruction President Clinton's nominees. Republicans continued to block nominations until President Clinton agreed to make recess appointments only after Congress was notified in advance. On November 10, 1999, 17 Republican Senators sent a letter to President Clinton telling him that if he violated the agreement, they would "put holds for the remaining of the term of your Presidency on all of the judicial nominees."

In November 1999, President Clinton sent a list of 13 positions to the Senate that he planned to fill through recess appointments. In response, Senator Inhofe spoke out on the Senate floor denouncing five of the 13 civilian nominees with a threat that if they went forward, he would personally place a hold on every one of President Clinton's judicial nominees for the remainder of the administration. That led to more delays and to the need for cloture to override the Republican objections.

When President Clinton appointed Judge Gregory, Senator Inhofe called it "outrageously inappropriate for any president to fill a federal judgeship through a recess appointment in a deliberate way to bypass the Senate." Judge Gregory was eventually confirmed after his renomination in 2001 with near unanimity. There was only one negative vote. Senator Lott cast that vote and his spokesman said his opposition was done to underscore

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his stance that "any appointment of federal judges during a recess should be opposed." Ironically, Senator Lott is now one of Judge Pickering's strongest supporters.

As far as I know, no Senate Democrats were consulted by this President before he made his divisive appointment of Judge Pickering. It was only after President Bush appointed Charles Pickering to the bench that I learned about the appointment. Despite that, Senate Democrats are today participating in making sure the process of judicial appointments moves forward. Democrats have not obstructed the confirmation process for judicial and executive branch nominations as Republicans did when President Clinton made recess appointments. In fact, already this week, less than two weeks after President Bush appointed Judge Pickering and a number of other executive branch officials, we have joined in confirming 18 presidential nominees by unanimous consent.

This morning we continue our work with the senior Senator from Pennsylvania to fill judicial vacancies in Pennsylvania. I look forward to the testimony of Judge Franklin Van Antwerpen, who has been nominated for the Third Circuit. I know of Senator Specter's strong support for this nomination. In contrast to many of President Bush's nominees, Judge Van Antwerpen comes to us with a distinguished career on the bench - both on the State and federal levels. I welcome him to the Committee.

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