

Testimony of

# **The Honorable Patrick Leahy**

January 24, 2002

I thank Senator Cantwell for chairing this important hearing and also thank all of the nominees and their Senators and Representatives for arranging to appear today.

This is the second day of this session of Congress and we are proceeding with our first confirmation hearing for judicial nominees. Last year I announced our first judicial nominations hearing within 10 minutes of the Senate reorganization last summer. We held that first hearing last session on the day after Committee Members were assigned. In fact, in the last five months of last year we held 11 hearings involving judicial nominees. That is more hearings involving judicial nominees than were held in all of 1996, 1997, 1999 or 2000 and hearings at a more rapid pace than in either 1995 or 1998. Unlike the preceding six and one-half years in which no hearings were held in 30 months, since the Committee reorganized last summer, we have held at least one hearing for judicial nominees every month. In fact, we held two in July, two unprecedented hearings during last summer's August recess, two in December, and three in October.

In the last five months of last year, the Committee considered and reported favorably to the Senate 32 judicial nominations. We reported more judicial nominees after the August recess than in any of the preceding six years and more than in any similar period over the preceding six and one-half years. And last year was no ordinary year for the country or the Senate. Nonetheless, the Committee worked hard to make progress with judicial nominations, and I extend my thanks to all Senators who helped in those efforts and assisted in the work that it takes to consider the scores of nominations that we did in the last five months of last year.

One of the reasons that the Senate was able to confirm 28 judges in the last five months of the last session was because they were strongly supported as consensus nominees by people from across the political and legal spectrums. In the last five months of last year, not only did the Senate confirm almost twice as many judges as were confirmed in the first year of the George H.W. Bush Administration; we confirmed more judges, including twice as many judges to the Courts of Appeals, as in the first year of the Clinton Administration.

Our hard work led to some success. By the time the Committee was organized and beginning its work last summer, the vacancies on the federal courts were peaking at 111. The Committee has begun the process of lowering the vacancies on our federal courts. Since I became Chairman, 25 additional vacancies have arisen. Through our work in the last five months of last year we were able to outpace this high level of attrition. By contrast, when Republicans took charge of the Senate in January 1995 until the majority shifted in the summer of 2001, federal judicial vacancies rose from 65 to more than 100, an increase of almost 60 percent.

In spite of our short year, the need to focus our attention on responsible action in the fight against international terrorism; the threats and dislocation of the anthrax attacks; the long overdue oversight of the FBI; the need to overcome a partisan filibuster that prevented action on the measure that funds our nation's foreign policy initiatives and provides funds to help build the international coalition against terrorism; and the partisan efforts to delay the organization and then the reorganization of the Senate, we persevered and attended to the work of the Committee.

A good part of that work can be found in the 16 confirmation hearings in the last five months of last year for Executive Branch nominees; the confirmations of 77 senior Executive Branch officials including the Director of the FBI, the head of the DEA, the Commissioner of INS, the Director of U.S. Marshals, the Associate Attorney General, the Director of ONDCP, the Director of PTO, seven Assistant Attorneys General and 59 U.S. attorneys. I regret that the White House did not begin sending U.S. Marshal nominations until very late in the session, and that more U.S. Attorneys and U.S. Marshals were not available to be considered.

I recall soon after Judge Gregory's confirmation last July that the White House Counsel said in a public interview that he did not expect the Senate to confirm more than five judges before the end of 2001. We reached that mark by September, when the Senate confirmed Judge Prost, our third Court of Appeals confirmation in two months. We went on to confirm more than five times the number predicted by the White House Counsel in just five months.

One might have thought from the constant barrage of partisan criticism that 2001 resembled 1996, a year in which a Republican Senate majority confirmed only 17 judges, none of which were confirmed to the Courts of Appeals. The fact is that the Senate can be proud of its achievements during the final five months of 2001.

I had hoped that more Senators would recognize what we were able to accomplish and consider our record in historical context. I have yet to hear any Republican concede any shortcomings in the practices they employed over the previous six and one-half years. Since the change in majority last summer, we have been exceeding the pace and productivity that they had maintained. If their efforts were acceptable or as praiseworthy as some would argue, I would expect them to acknowledge that our efforts are also to be commended. If they did things they now regret, their admissions would go far to helping establish a common basis of understanding and comparison. Taking that step would be a significant gesture, one that has not yet occurred.

We know that our work has not been completed. There are still far too many judicial vacancies that we must work together to fill. We begin this session with our first Committee activity being a judicial nominations hearing, our twelfth since the change in majority last summer. We will continue our work to keep the confirmation numbers and the vacancy numbers both moving in the right directions.

At the end of 1999, Chief Justice Rehnquist was encouraged when only 34 judges were confirmed all year and 35 were left pending. Similarly, at the end of 2000, the Chief Justice commended the Senate for confirming 39 judges all year, a year in which 41 judicial nominations were returned to the President without Senate action. Last year, we were able to confirm 28 judges in only five months and the Committee reported four additional nominees to the Senate

for final action from the 65 Court of Appeals and District Court nominations sent to the Senate during the course of the year.

More than two-thirds of last year's vacancies and this year's continue to be on our federal trial courts. The Administration has been slow to make nominations to the vacancies on the federal trial courts. In the last five months of last year, the Senate confirmed 22 of the 37 District Court nominees it received. That is a higher percentage of the President's trial court nominees than the prior Republican majority had allowed the Senate to confirm in the first session of either of the last two Congresses with a Democratic President. Unfortunately, we ended last year without a nominee for 55 of the current 69 District Court vacancies; i.e., almost 80 percent of the current trial court vacancies had no nomination for the Senate to consider. The White House nominated only one District Court nominee in the last two months of last year.

This session we have received nominations for two dozen of the four and one-half dozen District Court vacancies that were without a nominee. That is a start. Unfortunately, last year the White House also acted unilaterally to change the practice of nine Republican and Democratic Presidents to allow the ABA to begin its peer reviews during the selection process. Those professional peer reviews for judicial nominees cannot even begin now until after the nomination and may take several months to complete. The ABA peer reviews on the nominations being made this week, for example, are not likely to become available until late March or April. If the nominees have the support of their home state Senators, and after the Committee has received ABA peer reviews, these nominees will then be eligible to be included in Committee hearings, but not until sometime this spring. And even then, over two dozen of the current federal trial court vacancies, 31, almost half of all current federal trial court vacancies, will still be without eligible nominees.

To make real progress will take the cooperation of the White House. The most progress filling judicial vacancies can be made most quickly if the White House would begin working with home State Senators to identify fair-minded, non-ideologue, consensus nominees. One of the reasons that the Senate was able to confirm 28 judges in the last five months of the last session was because they were strongly supported as consensus nominees by people from across the political and legal spectrums. In the last five months of last year, not only did the Senate confirm almost twice as many judges as were confirmed in the first year of the first George H.W. Bush Administration and more judges, including twice as many judges to the Courts of Appeals as in the first year of the Clinton Administration, but the Committee held more hearings for more nominees and favorably reported more nominees after the August recess than in any of the preceding six years of Republican control.

I will continue my effort to work with all Senators to schedule nominations for hearings considering a number of factors, including the consensus of support for the nominee, the needs of the court to which the person is nominated, the interests of the home state Senators, and the work load and legislative schedule of the Committee. We have a number of persisting vacancies that should have been filled by qualified candidates nominated from 1995 through 2000. Over the six and one-half years that preceded the Democratic Senate majority, a total of only 46 judges were confirmed to fill vacancies on the Courts of Appeals, an average of approximately seven a year. This has resulted in multiple vacancies in a number of Circuits. There are many problems

that have grown and even festered over time and they cannot all be remedied immediately. In the last five months of last year, the Senate proceeded to confirm six Court of Appeals judges. Indeed, last year the Senate confirmed the first new member of the 5th Circuit in seven years, the first new judge to the 4th Circuit in three years, and the first new judge to the 10th Circuit in six years.

I again urge the White House to redouble its efforts to work with home state Senators from both parties, Democratic Senators as well as Republican Senators. I urge the White House, as I have for years, to work with home State Senators of both parties to identify, select and nominate strong, consensus, fair nominees for these important vacancies. Today we demonstrate, again, that consensus nominees with widespread and bipartisan support are more easily and more quickly considered by the Committee.

As some indication of the bipartisan manner in which we proceeded last year, I note that the Senate confirmed 11 nominees from States with two Republican Senators, nine from States with a Democratic Senator and a Republican Senator, five from States with two Democratic Senators, and three for courts in the District of Columbia which is without Senate representation. That is a decidedly bipartisan record. Today's group of nominees reflects that bipartisanship as well. Two are from States with two Republican Senators, two are from a State with a Democratic Senator and a Republican Senator, one is from a State with two Democratic Senators and one is for a vacancy in the District of Columbia.

Last year, the Senate acted promptly to confirm all of judges in an average of fewer than 60 days from the time we received a peer review from the ABA. This stands in sharp contrast to recent years in which the average time for consideration had risen to historic levels, above 200 days from nomination to confirmation and more than a year on average for the few lucky Court of Appeals judges to be considered.

We have also completed work on a number of judicial nominations in a more open manner than ever before. For the first time, this Committee is making public the "blue slips" sent to home state Senators. Until my chairmanship, these matters were treated as confidential materials and restricted from public view. We have moved nominees with less time from hearings to the Committee's business meeting agenda, and then out to the floor, where nominees have received timely roll call votes and confirmations. Over the preceding six and one-half years, at least eight judicial nominees who completed a confirmation hearing were never considered by the Committee and simply left without action. Additionally, the past practices of extended unexplained anonymous holds on nominees after a hearing were not evident in the last five months of last year as they were in the past.

Throughout last year and, in particular, in the wake of the terrorist attacks on September 11, some of us have been seeking to join together in a bipartisan effort in the best interests of the country. For those on the Committee who helped in those efforts and assisted in the hard work to reviewing and considering the scores of nominations the Committee reported in the last five months to last year, I commend them. As we demonstrated last year and again today at this hearing, we are moving ahead to fill judicial vacancies and consider judicial nominees with strong bipartisan support.

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