Testimony of

The Honorable Patrick Leahy

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I thank Senator Feingold for chairing this important hearing on judicial nominations.

The Judiciary Committee has continued to hold regular judicial nominations hearings throughout this session, as we have since the shift in majority last summer. We held the first January confirmation hearing in seven years on the second day of this session. Today the Judiciary Committee holds its second February judicial confirmation hearing. In 1997, 1999 and 2001, the Republican majority held no confirmation hearings in either January or February. Today's hearing is the fourteenth hearing involving judicial nominations since the change in majority last summer. That is more hearings within the last seven months than the Republican majority ever held in any calendar year in which it was recently in the majority.

Today's hearing follows the tradition of including a Court of Appeals nominee as well as a number of District Court nominees. Unfortunately, because the White House has been slow to send nominations to the many vacancies in the federal District Courts, the federal trial courts across the country, today's hearing includes a fewer number of District Court nominees than the Committee was willing to consider. Indeed, the Committee is virtually out of District Court nominees to include at such confirmation hearings. After today, 35 of the 36 District Court nominees with ABA peer reviews will have participated in hearings. We are in the process of scheduling a hearing on the most controversial District Court nominee currently pending.

Of course more than two-thirds of the federal court vacancies continue to be on the District Courts and 35 are still without a nominee. The Administration has acted very slowly in making nominations to the vacancies on the federal trial courts. In the last five months of last year, the Senate confirmed a higher percentage of the President's trial court nominees, 22 out of 36, than a Republican majority had allowed the Senate to confirm in the first session of either of the last two Congresses with a Democratic President.

Last year the President did not make nominations to almost 80 percent of the trial court vacancies that existed at the beginning of this year. As we began this session, 55 out of 69 District Court vacancies were without a nominee. Finally, in late January the White House sent up names for some of those trial court vacancies. Unfortunately, none have completed the paperwork needed to be included in hearings and none has yet received an ABA peer review.

Because the White House last year unilaterally changed the practice of nine Republican and Democratic Presidents and will no longer allow the ABA to begin its peer reviews during the selection process, ABA peer reviews on these new nominations are not likely to become available for some time to come. In the interim, we have already reached the point where the lack of available nominations for District Courts vacancies is holding back the number of judicial nominees the Judiciary Committee and the Senate could be considering. We experienced the

same problem when the majority shifted last summer and we did not have enough District Court nominations ready for hearings in July through September last year.

After the Committee receives the indication that a judicial nominee has the support of his or her home state Senators and after the Committee has received ABA peer reviews, the nomination will then be eligible to be considered for inclusion in Committee hearings. Because the White House shifted the time at which the ABA does its evaluation of nominees to the post-nomination period, this year's nominees are unlikely to have completed files ready for evaluation until after the Easter recess. Of course, even then, over two and one-half dozen of the current federal trial court vacancies, 35, may still be without nominees.

To make real progress will take the cooperation of the White House. That is what I have been urging since the shift in majority. That is what I, again, called for when I spoke to the Senate on January 25, 2001. That cooperation is still not forthcoming.

We will make the most progress, most quickly if the White House would begin working with home state Senators to identify fair-minded, nonideological, consensus nominees to fill these court vacancies. One of the reasons that the Committee was able to work as quickly as it did and Senate was able to confirm 39 judges, as it has in the last seven months, was because those nominations were strongly supported as consensus nominees by people from across the political and legal spectrums.

I have heard of too many situations in too many states involving too many reasonable and moderate home state Senators in which the White House has demonstrated no willingness to work with home state Senators to fill judicial vacancies cooperatively. As we move forward, I have urged the White House to show greater inclusiveness and flexibility and to help make this a truly bipartisan enterprise. Logjams exist in a number of settings. To make real progress, repair the damage that has been done over previous years, and build bridges toward a more cooperative process, there is much that the White House could do to work more cooperatively with all home state Senators, including Democratic Senators.

In addition, as I have noted, the White House could help speed the Committee process if it would restore the ABA peer review participation to an earlier stage in the process. For more than 50 years the ABA was able to conduct its peer reviews simultaneously with the FBI background check procedures. This meant that when nominations were sent to the Senate, the FBI report and informal ABA peer review were completed and followed very quickly. Together with the endorsement of the nominee's home state Senators, the basic requirements of the nominations file were available to be reviewed by the Committee much more quickly than they are now. This process allowed hearings to be scheduled soon after nominations were received in many instances. One of the consequences of the White House's unilateral decision last year to discontinue this longstanding bipartisan practice is that nominations are now not available to be considered or scheduled for hearings until many weeks have passed and these basic background materials can be assembled and submitted to the Committee. That is unfortunate and unnecessary.

There were occasions last year when we proceeded with hearings including fewer District Court nominees than I would have liked because recent nominees' files were not yet complete. I noted

in my statement to begin this year that I feared that same circumstance being repeated this year. It already is. That is regrettable.

I have urged the White House to rethink its recent changes in traditional practices that were initially instituted by President Eisenhower and worked well for Presidents Kennedy, Johnson, Nixon, Ford, Carter, Reagan, (George Herbert Walker) Bush and Clinton. I suggest that the White House reconsider the delays caused by the abandonment of the traditional practice and that this Administration consider returning to the tried and true practice of sharing information with the ABA earlier in the process so that it can begin and complete its peer reviews by the time the nomination is made to the Senate.

Just as no Senator is bound by the recommendations of the ABA, so, too, the White House can make clear that it is reinstituting the traditional practice not because it intends to be bound by the results of that peer review or even take it into account, but solely to remove an element of delay that its actions introduced into the confirmation process. The White House can expressly ask the ABA not even to send the results of its peer review to the Executive Office, but only transmit them to the Committee, if it chooses. Whether or not the White House considers the ABA peer reviews, they are considered by many Senators. For example, a number of Republican Senators cited favorable peer reviews for judicial nominations as an indication that they merit the Senate's support. On the other hand, the fact that they are advisory and not binding on Senators is seen from the recent action confirming a nominee who received a "not qualified" rating from the ABA and the many nominees of this Administration who have been confirmed with mixed ratings.

As Chairman, I have sought to work with all Senators. In scheduling hearings for nominations, chairmen traditionally consider a number of factors, including the consensus of support for the nominee, the needs of the court to which the person is nominated, and the interests of the home state Senators. We have a number of nominees for whom individual Senators have expressed personal interest. I will continue to take that into account and seek to accommodate Senators in as orderly a process as possible.

Judicial nominations have never been scheduled for hearings based solely on the date of their nomination. Certainly there was no first-in-first-out rule during the six and one-half years that preceded my chairmanship, when it could take years to get a hearing and more than 50 judicial nominees never received a nominations hearing at all.

I hope to integrate a number of nominations received before I became Chairman into hearings throughout this session. I anticipate that not all those nominations will be regarded as consensus candidates. We can anticipate that the more controversial nominations will occasion more review and more Senators raising questions that concern them during the course of our hearings.

In our first full week in session we proceeded with a hearing on the nomination of Judge Charles Pickering to the 5th Circuit. Senator Lott is very supportive of this nomination and even though his was not among the first sent to the Senate by President Bush last spring, we have tried to move forward to consideration of the nomination in recognition of the strong interest of the Republican leader.

Similarly, I knew of Senator Specter's strong interest in the Committee scheduling a hearing as soon as possible on the nomination of Judge D. Brooks Smith to a vacancy on the 3rd Circuit. Judge Smith was not nominated until September 10 and the Committee did not receive his peer review from the ABA until October 31, 2001. Although there were 44 judicial nominees nominated before Judge Smith, of which several remain pending, I have sought to accommodate Senator Specter by including Judge Smith in our hearing today. Of course, the previous nominee for this vacancy was Judge Robert Cindrich, also a District Judge in the Western District of Pennsylvania. Although he was nominated in February 2000, received a well qualified peer review rating by the ABA and was pending for more than 10 months, he was never included in a confirmation hearing. His nomination was returned to the President without any action having been taken by the Senate.

Likewise, other Senators, Republicans and Democrats, have asked me to give priority to various nominees. Senator Enzi requested attention to the nomination of Terrence O'Brien to the 10th Circuit, for example, and I will be trying to accommodate him, as well. I tried to take those requests into account in the last seven months and expect to continue to do so. Such interest was a factor in the scheduling of hearings for Judge Prost to the Federal Circuit, Judge Gregory to the 4th Circuit, Judge Clement to the 5th Circuit, Judge Riley to the 8th Circuit, Judge Harris to the 10th Circuit and Judge Melloy to the 8th Circuit. It was considered in the cases of Judge Mills in Mississippi, Judge Wooten in South Carolina, Judge Robinson in Kansas, the four judges the Senate confirmed last year for Oklahoma, the three judges the Senate confirmed for Kentucky, the two judges the Senate confirmed for Montana, the two judges the Committee confirmed for Alabama, and in connection with many of the 44 judicial nominees on whom the Committee has been holding hearings in the last seven months.

I expect to continue to try to accommodate Senators from both sides of the aisle in this regard. In so doing, I have tried to be forthright with Senators if a nominee has generated concerns. Not all of the judicial nominations scheduled for hearings have been without detractors, many are proving to be controversial.

A general impression, heightened by the White House's refusal to work cooperatively with some home state Democratic Senators in spite of precedent in that regard and its disdain for suggestions to proceed to assemble recommendations through bipartisan commissions as has been the tradition is many States, such as mine, is that the White House and some in the Senate are intent on an ideological takeover of the courts. With the Circuits so evenly split in so many places, nominees to the Courts of Appeals may have a significant impact on the development of the law for decades to come. Some of us are concerned that the Administration not orchestrate a roll back in the protections of individual rights, civil rights, consumer rights and privacy rights through its judicial nominations.

In addition to Judge Smith of Pennsylvania, this hearing includes another nominee to a District Court vacancy in Arizona, the third included in a hearing since the shift in majority last summer, another nominee for a District Court vacancy in Texas after the confirmation of Judge Martinez earlier this year, and a nominee for a vacancy in Alaska whose file was not completed until this year. I give my thanks to all Senators who have worked with the Committee to schedule this confirmation hearing and especially to Senator Feingold for chairing today.