

Testimony of

The Honorable Patrick Leahy

March 19, 2002

I would like to welcome the nominees to today's hearing. The nominees before us represent nearly every region of our great nation: West, Midwest, Northeast, and South. Many of the nominees' family members have made the long journey with them, and I extend the welcome of this Committee to the friends and families in attendance. Today, we are holding the confirmation hearing for Terrence O'Brien, nominee to the Court of Appeals for the Tenth Circuit; Lance Africk, nominee to the United States District Court for the Eastern District of Louisiana; Paul Cassell, nominee to the United States District Court for the District of Utah, and Legrome Davis, nominee to the United States District Court for the Eastern District of Pennsylvania.

I am particularly pleased to welcome Judge Davis to this hearing, because it has been a long time coming for this well-qualified and extremely patient nominee. Judge Davis was first nominated to a vacancy on the District Court for the Eastern District of Pennsylvania by President Clinton on July 30, 1998. The Senate took no action on his nomination and it was returned to the President on October 21, 1998. On January 26, 1999, President Clinton renominated Judge Davis for the position. The Senate again failed to hold a hearing for Judge Davis and his nomination was returned to the President on December 15, 2000. I apologize to Judge Davis that in spite of my best efforts and those of Senator Specter, we were unable to have Judge Davis included in a hearing during those 29 months, those 868 days, between his initial nomination and the end of the last Administration.

I congratulate Senator Specter on the President's renomination of Judge Davis in January of this year. When we received his ABA peer review last week, I wanted to be sure to include Judge Davis in the earliest hearing possible in recognition of his extended wait from 1998 until today.

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 15th judicial confirmation hearing since the change in majority last summer and the fourth hearing for judicial nominees so far this year. We have held more hearings in fewer than nine months than the Republican majority ever held in any year in which it was recently in the majority. This is no "illusion of movement;" it is real progress.

Today's hearing includes 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 fewer District Court nominees than the Committee would have been willing to consider if paperwork for consensus nominees had been forwarded in a timely manner. I noted my concerns that ABA peer reviews might not be completed until after the Easter recess for the two dozen District Court nominations not sent to the Senate until January of this year and those

fears have proven well-founded. Only three other district court nominees have even received ABA peer reviews and two of those were received less than a week ago. That leaves 21 District Court nominees awaiting ABA peer reviews as well as the nominee to the International Trade Court.

Unfortunately, the Administration has chosen not to act on my suggestion to accelerate the notice to the ABA of those being selected for nomination and several weeks were lost recently while the Administration objected to nominees cooperating with the ABA peer review process. Of course more than two-thirds of the federal court vacancies continue to be on the district courts and more than half of the district court vacancies, 35 of 63, are still without a nominee. The Administration has been slow to make nominations to the vacancies on the federal trial courts.

After today, 41 of the 44 district court nominees with ABA peer reviews and completed files will have participated in hearings. In the last five months of 2001, 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.

In 2001, the President failed to make nominations to nearly 80 percent of the federal trial court vacancies. As we began the 2002 session, 55 out of 69 District Court vacancies were without a nominee. In late January, the White House finally sent up names for some of those trial court vacancies. It has been fewer than two months since we received these nomination and we have already scheduled hearings for some of them, within days of receiving ABA peer reviews and blue slips from their home State Senators.

Last year, the White House unilaterally changed the 50 year-old practice of nine Republican and Democratic Presidents by no longer allowing the ABA to begin its peer reviews during the selection process. As a result, the ABA peer reviews for many of these new nominations are not likely to become available for some time. We remain at the point where the lack of available nominations for district court 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 there were not enough district court nominations ready for hearings in July, August and September. That has proven to be a problem again at the beginning of this session since we completed work on so many of the nominations last year.

In order to make more progress, we need the cooperation of the White House, as I have been urging since the shift in majority. That is what I called for when I addressed the Senate on January 25, 2002. Yet, the requested cooperation has not been forthcoming from the White House or from the Republican Senate leadership. Instead, those on the other side of the aisle have unjustifiably attacked the Committee process and the Democratic members of the Judiciary Committee personally. They have obstructed unrelated nominations, legislation and oversight activities. That is most unfortunate.

We will make the most progress most quickly if the White House would begin working with home state Senators to identify more fair-minded, moderate, consensus nominees to fill the vacancies in the many federal courts. One of the reasons that the Committee has been able to work as quickly as it has and the Senate has been able to confirm 42 judges in less than nine

months, is because many of those nominations were supported by home state Senators and those across the political spectrum as qualified, consensus nominees.

I have heard of too many situations in too many states, involving many moderate home state Senators, in which the White House has demonstrated no willingness to work with these Senators to fill the judicial vacancies. As we move forward, I continue to urge that the White House show a greater spirit of inclusiveness and flexibility so that the nomination process becomes a truly bipartisan enterprise. Logjams exist in a number of settings. To repair the damage that has been done over previous years, and to build bridges with the Democratic majority, there is much the White House can do in terms of cooperation with all Senators, including Democratic Senators.

Last year we achieved results that were five times greater than the White House Counsel had predicted. Since the change in majority, the Senate has proceeded to confirm more judges faster than during the preceding six and one-half years of Republican control. Already this year, in the short time that the Senate has been in session, we have confirmed 14 judges. In only three months, we have confirmed just a few less than were confirmed in the entire 1996 session, the second year of the Republican control. Rather than work with us, some seem intent on creating controversy and obstructing the process. That is a shame.

As Chairman, I have sought to work with all Senators. In scheduling nominations for hearings, the Chair traditionally considers 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 about whom individual Senators have expressed personal interest. I will continue to take that into account and seek to accommodate Senators as much as possible.

Judicial nominees have never been scheduled for hearings based solely on the date of their nomination, contrary to recent claims and demands made by the Republican leadership. Certainly there was no "first-in, first-out" rule during the six and one-half years that preceded my chairmanship - a time when it could take years for nominees to get a hearing and more than 50 judicial nominees were never included in 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 should expect and understand that the more controversial nominees will require greater review. This process of careful review is part of our democratic process. It is a critical part of the checks and balances of our system of government that does not give the power to make lifetime appointments to one person alone to remake the courts along narrow ideological lines.

The scorched-earth campaign in which unrelated nominations and bills and oversight responsibilities of this Committee are being obstructed by Republican objections since last Thursday stands in sharp contrast to the way the Senate acted in the immediate wake of the disappointing party-line vote rejected the nomination of Judge Ronnie White in 1999. As I recall, even in our disappointment after the floor vote on that nomination, I proceeded to vote for the confirmation of Judge Ted Stewart of Utah.

Despite the harsh statements of some since last Thursday, today we are holding a hearing on another nominee for the District of Utah, Paul Cassell, a law professor from the University of Utah College of Law. This nomination is not without controversy. I would hope that my continuing goodwill is not lost on others in the Senate.

Today I continue to try to accommodate Senators from both sides of the aisle. Indeed, the court of appeals nominees scheduled for hearings so far this year have been at the request of Senator Grassley, Senator Lott, Senator Specter and now Senator Enzi. I extend my thanks to all of the Senators who have worked with the Committee to schedule this confirmation hearing today.

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