

Testimony of

The Honorable Patrick Leahy

May 2, 2002

Today, I hope that we will be able to consider and report more than a dozen of President Bush's nominees. We have included on the agenda a nominee to the United States Court of Appeals for the Sixth Circuit and a number of district court nominees, as well as three more nominees to become United States Attorneys and five more nominees to become United States Marshals. In addition to these nominations, we also have several items of important legislative business.

I would like to thank Senator Edwards for volunteering to chair the hearing the Committee had last week for six of the judicial nominees on the agenda today, including Judge Julia Gibbons of Tennessee who is nominated to the United States Court of Appeals for the Sixth Circuit, Justice Leonard E. Davis, nominated to the District Court for the Eastern District of Texas, Judge David C. Godbey, nominated to the District Court for the Northern District of Texas, Andrew S. Hanen, nominated to the District Court for the Southern District of Texas, Samuel H. (Hardy) Mays, Jr., nominated to the District Court for the Western District of Tennessee, and Judge Thomas M. Rose, nominated to the District Court for the Southern District of Ohio.

I also want to thank Senator DeWine for working with us and helping complete that hearing on a day of Senate voting that threatened to disrupt our proceedings. Our bipartisan cooperation included having Senator DeWine chair a good portion of that hearing. I do not remember a time when roles were reversed during which the Republican majority authorized a Senator from the Democratic party to chair a portion of a hearing, but I have now done so on several occasions.

The good work of Senators Edwards and DeWine and the thoroughness of their questioning is allowing us to proceed so quickly to consideration of a number of these nominees by the Committee.

In a little less than 10 months, the Senate Judiciary Committee has held 17 hearings involving a total 61 judicial nominations, which is more hearings on judges than the Republican majority held in any year of its control of the Senate.

We included Judge Gibbons in last week's hearing at Senator Fred Thompson's request. Of the six Court of Appeals nominees who have received hearings this year, all have been at the request of Republican Senators. By putting Judge Gibbons on the agenda today, we hope to provide some much needed help to the Sixth Circuit. Vacancies on that Circuit were perpetuated during the last several years of the Clinton Administration when the Republican majority refused to hold hearings on the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to vacancies in the Sixth Circuit.

All three of those Sixth Circuit nominations were pending for more than one year without a hearing-- all three. Judge White's nomination may have set a record. Her nomination was pending without a hearing before this Committee for more over four years- 51 months. She was

first nominated in January 1997 and renominated and renominated through March of last year when President Bush chose to withdraw her nomination. This was at a time when the Committee averaged hearings on only nine Courts of Appeals nominees a year and in 2000 held only five hearings on Courts of Appeals nominees all year.

In contrast Judge Gibbons will be the eleventh Court of Appeals nominees voted on by this Committee during the last 10 months. In this regard, we all know that there is a nominee to the Third Circuit who had a hearing but has yet to be considered by the Committee, Judge Smith of Pennsylvania. Judge Smith received a prompt hearing from the Judiciary Committee at the request of Senator Specter. I understand that he recently submitted written responses to Senators' questions and that his unreported opinions are still being reviewed. In addition, a number of significant issues have been raised about Judge Smith's promotion to a higher court, including his long delay before resigning from a club that discriminates against women, his recusal from two cases in which he had conflicts of interest due to his financial holdings and his wife's employment, and his speeches to activist conservative groups about the constitutionality of federal statutes, such as the Violence Against Women Act, while serving as a federal judge.

I know, however, that there is not an effort to delay consideration of this nomination and I urge all Senators to complete their review of this nomination as soon as possible. I intend to proceed to list Judge Smith for consideration of the Committee on the agenda for our next meeting. I make this announcement because I want Senators to have a full and fair opportunity to consider the matter but would like to move ahead to Committee consideration and a vote.

We do not want to see a return to the past practice of extensive delays between hearings and votes or the unfortunate precedent of the last several years in which nominees were given a hearing but then held off the agenda of the Committee and never considered by the Committee. Such recent nominees never accorded a Committee vote include Allen Snyder nominated to the D.C. Circuit, Bonnie Campbell nominated to the 8th Circuit, Fred Woocher nominated to the Central District of California and Clarence Sundram nominated to the Northern District of New York. These were nominees with bipartisan and home-state Senator support who had uncontroversial hearings but were nevertheless never acted upon by this Committee.

Some have been critical that 60 days have passed since Judge Smith's hearing in front of the Judiciary Committee. We all wish it were less. He has now recently furnished his opinions and written responses to questions and we should all do our best to review those materials promptly. Of course this does not begin to rival the extensive delays suffered by President Clinton's nominees. For example, Judge Paez had to wait 728 days, more than two years, from his hearing until a final Committee vote. Judge Merrick Garland and Judge Tim Dyk each waited more than a year (461 days). Judges Margaret Morrow and Marsha Berzon waited almost a year (352 and 336 days, respectively) between their hearings and Committee votes. In contrast, since Judge Smith's hearing we have been working to move to the next stage of the process, a Committee vote on his nomination.

Let me return briefly to the Sixth Circuit vacancies, which are a prime and unfortunate legacy of these recent partisan obstructionist practices. Half of the seats on the Sixth Circuit are vacant. Most of those vacancies arose during the Clinton Administration and before the change in

majority last summer. None, zero, not one of the Clinton nominees to those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership.

One of those seats has been vacant since 1995, the first term of President Clinton. Judge Helene White of the Michigan Court of Appeals was nominated in January 1997 and did not receive a hearing on her nomination during the more than 1,500 days before her nomination was withdrawn by President Bush in March of last year. Kathleen McCree Lewis, a distinguished lawyer from a prestigious Michigan law firm, also did not receive a hearing on her 1999 nomination to the Sixth Circuit during the years it was pending before it was withdrawn by President Bush in March 2001. Professor Kent Markus, another outstanding nominee to a vacancy on the Sixth Circuit that arose in 1999, never received a hearing on his nomination before his nomination was returned to President Clinton without action in December 2000.

Some on the other side of the aisle held these seats open for years for another President to fill, instead of proceeding fairly on those consensus nominees. Some were unwilling to move forward knowing that retirements and attrition would create four additional seats that would arise naturally for the next President. That is why there are now eight vacancies on the Sixth Circuit, why it is half empty.

Long before some of the recent voices of concern were raised about the vacancies on that court, Democratic Senators in 1997, 1998, 1999, and 2000 implored the Republican majority to give the Sixth Circuit nominees hearings. Those requests, made not just for the sake of the nominees but for the sake of the public's business before the court, were ignored. Numerous articles and editorials urged the Republican leadership to act on those nominations. Fourteen former presidents of the Michigan State Bar pleaded for hearings on those nominations.

The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask that the nominees get hearings and that the vacancies be filled. The Chief Judge noted that, with four vacancies - the four vacancies that arose in the Clinton Administration - the Sixth Circuit "is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court." He predicted: "By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them." Nonetheless, no Sixth Circuit hearings were held in the last three years of the Clinton Administration, despite these pleas. Not one. Since the shift in majority the situation has been exacerbated further as two additional vacancies have arisen.

Last week's hearing for on the nomination of Judge Gibbons to the Sixth Circuit was the first hearing on a Sixth Circuit nomination in almost 5 years, even though three outstanding, fair-minded individuals were nominated to the Sixth Circuit by President Clinton and pending before the Committee for anywhere from one year to over four years. Just as this is the first hearing on a Sixth Circuit nominee in many years, the hearing we held on the nomination of Judge Edith Clement to the Fifth Circuit last year was the first on a Fifth Circuit nominee in seven years and she was the first new appellate judge confirmed to that Court in six years. When we held a hearing on the nomination of Judge Harris Hartz to the Tenth Circuit last year, it was the first

hearing on a Tenth Circuit nominee in six years and he was the first new appellate judge confirmed to that Court in six years. When we held the hearing on the nomination of Judge Roger Gregory to the Fourth Circuit last year, it was the first hearing on a Fourth Circuit nominee in three years and he was the first appellate judge confirmed to that court in three years.

Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half - 56 percent - of President Clinton's Courts of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session. From the time the Republicans took over majority control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than doubling.

Democrats have broken with that recent history of inaction. Nine nominees have already been confirmed to the Courts of Appeals in less than 10 months. Judge Gibbons is the twelfth nominee to a Circuit Court to receive a hearing in less than 10 months, the eleventh to be voted upon and, I predict, will be the tenth to be confirmed.

The number of judicial confirmations we have already achieved in fewer than 10 months - 52 - exceeds the number confirmed during all of 2000, 1999, 1997 and 1996, four out of six full years under Republican leadership. I would like to commend all Senators, but in particular the members of this Committee, for their efforts to consider scores of judicial nominees for whom we have held hearings and on whom we have had votes during the last several months.