

Testimony of

# **The Honorable Orrin Hatch**

May 9, 2002

Thank you, Chairman Schumer, for giving me the opportunity to weigh in on the topic of judicial nominations from the past. I don't believe in ghosts, but I agree with you that there seem to be a number of illusions floating around Capitol Hill related to this Committee's handling of judges. I applaud your desire to set the record straight - and I am here to help you do exactly that.

I wish that instead of this cute hearing, we were having a hearing to confirm the many nominees that are pending in limbo before the Committee, but the Democrats are in power, and they set the pace and agenda for such nominations hearings. So, given this hearing, I want to shine a candle to five points that never seem to see the light of day in any discussion of past confirmations.

First, there is a seemingly immortal myth around here that it was the Republicans who created the current vacancy crisis by stalling President Clinton's nominees. That is purely and unmistakably false. The fact is that the number of judicial vacancies decreased by three during the six years of Republican leadership. There were 70 vacancies when I became chairman of the Judiciary Committee in January 1995, and President Clinton was in office, and there were 67 at the close of the 106th Congress in December 2000, the end of President Clinton's presidency. The Republicans did not create - or even add to - the current vacancy crisis.

Each member of this Committee is entitled to his or her opinion on what happened, but not to his or her own SET OF FACTS. Enron-type accounting should not be employed, regardless of which liberal interest-group is insisting on them, when we are talking about something as serious as our independent judiciary.

Second, there has been considerable slight-of-hand when it comes to the true, overall record of President Clinton's nominations. The undisputed fact is that Republicans treated a Democrat President just as well as they did a Republican one. We did not use any litmus tests, regardless of our personal views, whether it was abortion, religion, race or personal ideology. I am disappointed to note that that seems to be precisely what is happening with the Democrat controlled Senate now.

Let's be honest and look at the true facts. During President Clinton's 8 years in office, the Senate confirmed 377 judges - essentially the same (only five fewer) as Reagan (382). And President Reagan had 6 years of a Senate controlled by his own party, while President Clinton had only 2. This proves that the Republicans did not let partisanship get in the way of principle when it comes to judicial nominations. True, there were individual instances where a handful of nominees did not move, but it is nothing like the systematic and calculated stalling tactics being employed by this Democrat Senate to stop President Bush's highly-qualified nominees. At this point, I should also add that the Clinton nominees we confirmed, were no mainstream moderates as some of us may be led to believe. We confirmed nominees, such as Judge Marcia Berzon,

Judge Richard Paez, Judge Margaret Morrow, Judge Willy Fletcher, and I could go on down the line. These nominees were confirmed with my support, as Chairman. And I could tell you, not a single one of these would be characterized, by any measure of the imagination, as nominees with political ideology "within the mainstream." I had personal political views almost completely opposite to them, but they were confirmed, and I applied NO litmus test to them, I reviewed them on their legal capabilities and qualifications to be a judge, and that is all I am asking for from the Democrat majority. That is not what is happening, and it is clear. There is this calculated and wholesale slow-walking of President Bush's nominees, and particularly for the circuit court nominees.

Third, let me say that an illusion has been created out of thin air that the Republicans left an undue number of nominees pending in Committee without votes at the end of the Clinton Administration. Again, more Arthur Anderson accounting here. Get ready for the truth: There were 41 such nominees, let me repeat, 41 - which is 13 less than the 54 that Democrats who controlled the Senate in 1992 left at the end of the first Bush Administration, that is 41 under my Chairmanship, and 54 under Democrat-controlled Senate in 1992, at the end of the first Bush Administration. I could go on and name these so-called "Ghosts" that the Senate Democrats left hanging from the past Republican administration, but I thought better of it. It makes for good theatrics, but if anyone was interested in the names we can provide them.

My fourth point is that President Clinton, just like President Reagan and the first President Bush, got all of his first 11 Circuit Court nominees confirmed. And all 11 were confirmed well within one year of their nominations. This is a stark contrast to today; Eight of President Bush's first 11 nominations are still pending without a hearing despite being here for a whole year as of today, all have their ABA ratings, all rated well qualified or qualified, and all but one, have their home state Senators' support, and that one is the North Carolina nominee, who Sen. Edwards has yet to return a blue-slip for.

Finally, my fifth point is that President Clinton had the privilege of seeing 97 of his first 100 judicial nominees confirmed. And the average time from nomination to confirmation was 93 days. Such a record was par for the course until the current Senate leadership took over last year: President Reagan got 97 of his first 100 judicial nominations confirmed in an average of 36 days, and President George H.W. Bush saw 95 of his first 100 confirmed in an average of 78 days.

But the ground rules have obviously been changed, as the extreme interest groups have reportedly instructed my Democratic colleagues. As we sit here today, the Senate has confirmed only 52, only 52, not the 97 President Clinton got, only 52 of President Bush's first 100 nominees, and the average number of days to confirm those few that have been is over 150 - and increasing every day.

The reason I mentioned these five points is that, there are some people who read the title of this hearing, saw the witness list, and noted that it is being held on the one-year anniversary of President Bush's first 11 nominations, who jumped to the conclusion that the purpose of this hearing is to find historical justification for blocking President Bush's choices for the federal judiciary. But first of all, I would never accuse my good friend from New York of such a thing, and second, there simply is no historical justification for blocking President Bush's first 11 or first 100 judicial nominees. Nor, is there any truth to the myth that the vacancies we have today were

caused by the Republican Senate. In other words, anything conjured up from the past and dressed up as a reason to thwart the requests of President Bush, should be dismissed.

Now, I want to switch gears a little bit and say something that I consider to be personal even though it has had - and still could have - a lot of bearing on this process.

Back before I became Chairman of this Committee in 1995, I was personally affected by several events that occurred under the auspices of advice and consent. Those events included the mistreatment of nominees including Sessions, Bork, Thomas, Ryskamp, Rehnquist and others. I saw how politics can affect the human spirit - both in success and defeat. And I saw how baseless allegations can take on a life of their own, and how they can take away the life from their victims. By the time I became Chairman, I had determined to change the process that had gotten so vicious.

I worked to restore dignity back to the Committee and the Senate. I championed the cause of President Clinton's Supreme Court nominee Ruth Bader Ginsburg, even though she was criticized by many as a liberal activist and was a former general counsel of the ACLU. I used my influence to quiet her detractors. I helped secure her vote of 96-to-3.

Under my chairmanship: I ended the practice of inviting witnesses to come into hearings to disparage nominees; I dealt with FBI background issues in private conference with Senators, never mentioning them in public hearings - that is a practice I am concerned is not being followed.

I told interest groups - even the ones whose work I liked in other areas - that they were not welcome to smear Clinton nominees; I refused to alter the 200-year tradition of deference to Presidents by shifting the burden onto nominees; and I informed the White House of problems that could, if made public, lead a nominee to a humiliating vote of defeat so the nominee could withdraw rather than face that fate.

These are the reasons that we were able to confirm 377 Clinton nominees, including some pretty contentious ones such as Berzon and Paez for the Ninth Circuit. I worked to get those two confirmed. I stuck my neck out for them. And I still believe to this day that I did the right thing - even though I am increasingly pessimistic that someone on the other side of the aisle will step up to the plate and reciprocate for any Bush nominees, who might be in the same circumstance. I urge and call upon the Democrat majority to show some leadership and put partisanship and politics of personal destruction behind. Give fair hearings and confirmations of qualified nominees, and keep the judiciary independent as our forefathers intended and keep the left-wing interest groups out of the nominations process.

So, Chairman Schumer, thank you for letting me share my personal thoughts about this process and clarify my five points. I hope this adds to your discussion of these important issues.

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