Testimony of

The Honorable Jeff Sessions

May 9, 2002

STATEMENT OF
SENATOR JEFF SESSIONS
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
"GHOSTS OF NOMINATIONS PAST: SETTING THE RECORD STRAIGHT"
May 9, 2002

I am pleased that on this day when there is so much talk about judicial nominees, that Senator Schumer has called this hearing on the "Ghosts of Nominations Past: Setting the Record Straight."

But the Ghost of Nominations Past did not arise in 1995 when Senator Hatch became Chairman of this Committee, it arose years earlier in the mid 1980s. I remember it well.

Certainly, we will never forget the hotly contested hearings in which Robert Bork, William Rehnquist, and Clarence Thomas were bitterly attacked. Some might even remember the Sessions, Manion, Fitzwater hearings, those earlier and fainter ghosts. We were "Borked" before they had given it a name.

Poor Judge Fitzwater, a wonderful Baptist, an honors graduate of Baylor, young with a fine family and rated by the Bar as the best judge in Houston suffered mercilessly because in an election in which he was a candidate, he had passed out flyers that warned if one violated the voting laws of Texas one could be prosecuted. They said he "chilled voting rights".

One judge was required to give up membership in an historic but all male British Club which he attended only once or twice a year. Once having given it up the Torquemada team, their zealotry assuaged, allowed him to move by.

First, I would like to compliment Senator Hatch for the way he conducted this Committee during his chairmanship. He elevated the debate, treated nominees with respect, and kept vacancies low enough to ensure that the nation's judicial business would not be unduly delayed. In fact, I cannot recall a single hearing at which special interest group representatives were called to testify against one of President Clinton's judicial nominees. Further, Senator Hatch continued the tradition that a nominee that had the approval of the President and his two home state Senators, a clean background check by the FBI, and, in most cases ABA rating of "qualified" or better, was presumed to move to confirmation.

Of course, the Senate must never be considered a potted plant in these matters, but a strong presumption of confirmation exists in these situations. At the end of the first Bush Administration, there were 97 vacancies and 54 nominations that expired without action. Under Chairman Hatch, and a Republican Senate, at the end of the Clinton Administration, there were only 67 vacancies and 41 nominations that expired without action. Thus, in my view, Ghosts arising from the remains of prior nominees are overwhelmingly the product of my Democratic colleagues administration of the committee, not from Senator Hatch's tenure as Chairman.

The problem is that the Ghost of Nominations Present is beginning to bring back bad memories. The New York Times reported that on April 30, 2001, at a private retreat, Professor Laurence Tribe, along with Professor Cass Sunstein and Marcia Greenberger, lectured Democratic Senators on how to block Republican judicial nominees by "changing the ground rules." Neil A. Lewis, Democrats Readying for a Judicial Fight, N.Y. Times, May 1, 2001, at A19.

Then on June 26, 2001, Professor Tribe, along with Professor Sunstein and Ms. Greenberger, were invited to testify before this Subcommittee at a hearing entitled, "Should Ideology Matter? Judicial Nominations 2001." They argued, that political ideology (at its base that means the politics of the nominee) was a legitimate issue to be considered, thus, setting a higher hurdle for Republican nominees than had been used to confirm Democratic nominees. Then on September 4, 2001, this Subcommittee held a second hearing entitled, "The Senate's Role in the Confirmation's Process: Whose Burden?" At this hearing we were told that the burden that Senator Hatch had placed on the Senate to reject a nominee should be shifted to the nominee , that is, Bush nominees now had the burden to prove that he or she had characteristics worthy of confirmation that exceeded those shown on the paper record.

As support for the use of ideology to aggressively oppose judicial nominees, we have heard the assertion from Professor Tribe, Ms. Greenberger and members of this Committee, that during the first 100 years of our country's history, one out of four nominees to the Supreme Court were rejected by the Senate based largely on the nominees' ideologies. We have examined the history and discovered a different story. A number of the early Supreme Court nominees, were not rejected at all, but declined to serve on what then was perceived as a low-paying, non-prestigious job. Those declining to serve were Robert Hanson Harrison, Levi Lincoln, William Smith, Roscoe Conkling, William Cushing, and John Quincy Adams.1 Further, two nominees that some count as "rejected" were only temporarily delayed and were eventually confirmed. Those nominees were: Roger B. Taney,2 and Stanley Matthews.3

Moreover, 10 nominees were not acted upon or were rejected primarily because of the lame duck or near lame duck status of the nominating President, not primarily because of their personal ideology. These include: Jeremiah S. Black , John J. Crittenden, Reuben Walworth, Edward King, John Spencer, John M. Read, Edward A. Bradford, George E. Badger, William C. Micou, and Henry Stanbery. In the instance of Henry Stanbery, who was nominated after Andrew Johnson's failed impeachment, the Senate not only declined to act upon his nomination, but passed legislation to remove the tenth seat for which Stanbery was nominated.4 Regardless of whatever personal ideology these men may have had, the Senate would not have confirmed them. And William Hornblower and Wheeler Peckham were rejected because New York Senator David Hill refused to confirm anyone that President Cleveland nominated unless it was his personal choice from New York.5

It appears that only four nominees were not confirmed primarily because of their personal ideology. These five nominees are: John Rutledge, who opposed Jay's Treaty6; Alexander Wolcott, who vigorously sought enforcement of the Embargo Act7; Ebenezer R. Hoar, who opposed Andrew Johnson's impeachment8; George Woodward, who was an extreme American nativist9; and Caleb Cushing, whose constant political party switching incensed his fellow Senators.10

Thus, only about 5 % of the Supreme Court nominees can fairly be said to have been rejected due to their own personal ideology - clearly the historical exception, not the historical rule. I can therefore say with confidence that the assertion that one of four nominees in the first 100 years of

this country were rejected on the basis of their personal ideology is totally false and creates a false impression of the early confirmation process. The fact that such a view has never been the rule is confirmed by the testimony of Lloyd Cutler, White House Counsel to Democratic Presidents Carter and Clinton, and the independent Miller Commission that absolutely rejected the contention that political ideology should be used by the Senate to reject nominees.

If history is to serve as the guide, however, we would do well to examine it with respect to the burden, or lack thereof, on nominees to prove their worthiness of confirmation beyond their paper record. During the first 130 years of our country's history, the Senate did not ask nominees any questions at hearings, probing or otherwise. The first nominee to even appear before the Senate was Harlan Fiske Stone in 1925, and nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan II in 1955.

Occasionally, the Committee asked a few nominees questions in writing, but there was no probing examination and cross-examination in Committee. It would be difficult to believe that the early Senate thought that a nominee was required to bear some illusory burden of earning confirmation, to submit to vigorous cross examination, and to personally convince senators on the Committee that he truly meets the criteria in a way not reflected in his record, if the nominee never even came before the Senate. If we are to use history as a guide, and it is usually a good one, then I suggest that we understand it first.

In conclusion, I am concerned with the injection of political ideology - the focus on the political popularity of the results of a case - instead of judicial philosophy - the focus on the integrity of the process. I agree with President Clinton's White House Counsel, Lloyd Cutler that the use of ideology could politicize our independent judiciary. And I am concerned with the call to shift the burden to all of President Bush's nominee - a call we did not hear from our colleagues across the aisle with respect to all Clinton nominees. I agree with Senator Hatch that it would be improper to shift the burden to all judicial nominees. These developments make the Ghost of Nominations Present scary indeed.