

Testimony of

# **The Honorable Patrick Leahy**

June 13, 2002

I would like to welcome the nominees to today's hearing. The nominees before us come from Kentucky, California, Pennsylvania, Florida, and Maryland. Many of the nominees' family members have made this journey with them, and I extend the welcome of this Committee to the friends and families in attendance.

With today's hearing, in 11 months, the Senate Judiciary Committee will have held 20 hearings involving a total of 75 judicial nominations. That is more hearings on judges than the Republican majority held in any year of its control of the Senate. In fact, the number of hearings we have held in less than a year of controlling the Senate is two more hearings than they held in the two years of the 104th Congress, only two fewer than they held in the two years of the 105th Congress, and five more hearings than the Republicans held in the two years of the 106th Congress. We have included more judicial nominees in hearings in this much shorter period than were accorded hearings in 1999 and 2000 combined. Indeed, one-sixth of President Clinton's judicial nominees - more than 50 - never got a Committee hearing and Committee vote from the Republican majority, which perpetuated longstanding vacancies into this year.

I am glad to say that the swift pace with which we have been moving judicial nominees is bringing down the high number of vacancies I inherited when I took over the Committee. On July 10, 2001, the day the Senate was permitted to reorganize, there were 110 judicial vacancies. Today there are 87, and the trend continues downward. I should note that we do not have nominees from the White House for almost half of those vacancies. Forty-one of the current vacancies are without a nominee. That includes 17 judicial emergency vacancies.

Today, we are considering Professor John Rogers for the U.S. Court of Appeals for the Sixth Circuit. By having a hearing for Professor Rogers today, we are trying to move forward in providing some much needed help to the Sixth Circuit. Earlier this year, we held a hearing for Judge Julia Gibbons to a seat on the Sixth Circuit. She has been voted out of the Senate Judiciary Committee and is pending on the floor.

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. The Sixth Circuit vacancies are a prime and unfortunate legacy of the past partisan obstructionist practices under Republican leadership. Vacancies on the Sixth 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.

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. 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. Under Republican control, the Committee averaged hearings on only about eight Courts of Appeals nominees a year and, in 2000, held only five hearings on Courts of Appeals nominees all year.

In contrast, Professor Rogers will be the fifteenth Court of Appeals nominee to receive a hearing by the Committee in less than a year since the reorganization of the Senate Judiciary Committee. He is being treated much better than Kathleen McCree Lewis, a distinguished lawyer from a prestigious Michigan law firm. She never had 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. While Professor Markus' nomination was pending, his confirmation was supported by individuals of every political stripe, including 14 past presidents of the Ohio State Bar Association and more than 80 Ohio law school deans and professors. Others who supported Professor Markus include prominent Ohio Republicans, including Ohio Supreme Court Chief Justice Thomas Moyer, Ohio Supreme Court Justice Evelyn Stratton, Congresswoman Deborah Pryce, and Congressman David Hobson; the National District Attorneys Association; and virtually every major newspaper in the state.

In his testimony to the Senate last month, Professor Markus summarized his experience as a federal judicial nominee, demonstrating how the "history regarding the current vacancy backlog is being obscured by some." Here are some of things he said:

"On February 9, 2000, I was the President's first judicial nominee in that calendar year. And then the waiting began. . . .

At the time my nomination was pending, despite lower vacancy rates than the 6th Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the 3rd, 9th and Federal Circuits . . . . No 6th circuit nominee had been afforded a hearing in the prior two years. Of the nominees awaiting a Judiciary Committee hearing, there was no circuit with more nominees than the 6th Circuit. With high vacancies already impacting the 6th Circuit's performance, and more vacancies on the way, why, then, did my nomination expire without even a hearing? To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me. Over and over again they told me two things: 1) There will be no more confirmations to the 6th Circuit during the Clinton Administration[.] 2) This has nothing to do with you; don't take it personally - it doesn't matter who the nominee is, what credentials they may have or what support they may have - see item number 1. . . .The fact was, a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees."

As Professor Markus identified, some on the other side of the aisle held these seats open for years for another President to fill, instead of proceeding fairly on the consensus nominees pending before the Senate. 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 last summer, the situation has been exacerbated further as two additional vacancies have arisen.

The Committee's April 25th hearing 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. Today we are holding a second hearing on a Sixth Circuit nominee, just a few short months later.

Just as we held 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. Today, we will hold our 20th judicial nominations hearing and our 15th hearing for a circuit court nominee. Additionally, Professor Roger's hearing will be the fourth judicial nomination from Kentucky to be considered by the Committee this year, and the eighth nomination from Kentucky overall. A professor from the University of Kentucky College of Law, Mr. Rogers has experience as a litigator and a teacher, and is a prolific author on a number of difficult legal topics. I look forward to hearing him further explain his views on some of them.

We will also hear from David Cercone, nominated to the U.S. District Court for the Western District of Pennsylvania. His will be the ninth nomination from Pennsylvania to be considered this year. Nine - this is more nominees than we have considered for any other state and is in stark contrast to the treatment President Clinton's Pennsylvania nominees received under Republican leadership. So many of President Clinton's Pennsylvania nominees were not granted hearings, despite the valiant efforts of the senior Senator from Pennsylvania, that this large number of vacancies remained for President Bush to fill. I say this to illustrate the progress being made under Democratic leadership and the fair and expeditious way this President's nominees are being treated.

Morrison England comes to us as a nominee to the U.S. District Court for the Eastern District of California, a seat that has been vacant since May of 2000. President Clinton's nominee for the seat, Marion Johnston, was nominated in September 2000, but never received a hearing or a vote by the Republican controlled Senate.

Kenneth Marra, nominated to fill a vacancy on the U.S. District Court for the Southern District of Florida, is here today as well. Until this Administration, there had been a fine tradition of bipartisan commissions working to agree on district court nominations in Florida. I am hopeful that this White House will be able to see its way clear to restoring that method of all important consultation with Florida's Senators, no matter what their political party.

Lawrence Greenfeld , nominated to be the next Director of the Bureau of Justice Statistics, has extensive knowledge of the operations and program of the agencies and has demonstrated a capability to enter into productive partnerships with criminal justice and statistical communities at all levels of government. He is well-qualified and committed, and we welcome him to our hearing today.

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