Testimony of

The Honorable Patrick Leahy

June 20, 2002

Today we will be considering another half dozen or so of President Bush's nominees, including three district court nominees.

In the 11 months since the Committee was permitted to reorganize last July, we have held hearings for 75 of President Bush's judicial nominees at 20 judicial nominations hearings. That is more judicial nominees than given hearings in any year of the prior six and one-half years of Republican control of the Senate and the Senate Judiciary Committee. In fact, it is more hearings than Republicans held in 1996 and 1997 combined and includes more judicial nominees than were accorded hearings in 1999 and 2000 combined. Next week, I am planning to hold another judicial nominations hearing.

Over the last 11 months, we have had hearings for more judicial nominees than in seven of the eight years President Reagan was in office. We have held hearings for more judicial nominees than in any of the four years of the first President Bush. The Democratic-led Senate Judiciary Committee has held hearings for more district and circuit court nominees in less than a year than received hearings in 20 of the past 22 years.

Unfortunately, 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. If the Republicans had not left more than 50 of President Clinton's nominees without a hearing or a vote, the current number of vacancies might be closer to 37 than 87.

After today, this Committee will have reported to the Senate more than 70 judicial nominees since July 10, 2001. That is ten times the number reported out in the year prior to the reorganization of the Senate under Democratic control. We have far exceeded the number of judicial nominees reported than in any year of the recent six and one-half years of Republican control. Not once in the last six years of Republican control did the Senate Judiciary Committee report as many as 70 judicial nominees and only once did they report 60. They averaged 40. In fact, in less than one year, we have reported out more judicial nominees than in the last two years of Republican control of the Committee combined. We have done two years of work in less than one.

In fact, we have also reported more judicial nominees that the Republicans reported in 1996 and 2000 combined. In addition, I should note that in those years combined, the Republican majority reported only three Court of Appeals nominees all year. The Republican majority averaged seven Court of Appeals nominees reported a year. We have already voted upon 13 and reported 12 circuit court nominees over the last 11 months.

The Senate has already confirmed 57 of this President's judicial nominees. Twelve more have been voted out of Committee and are awaiting a vote by the full Senate. If the Senate takes final action to confirm them, we will have confirmed more judges in this first year of Democratic control than in any of the preceding six and one-half years of Republican control. Republicans never worked through more judicial nominees when they last controlled the Senate. If all of those nominees on the floor are confirmed, we will have confirmed more judges in one year than were confirmed by the Republican majority in the 1996 and 1997 sessions combined. And, we have four more on the agenda this morning for reporting to the Senate.

Democrats are working hard to reduce judicial vacancies and we have moved quickly on these nominees, as well as many, many others. I have noted how we could have been even more productive with a little cooperation from the White House, but that has not been forthcoming. Moreover, of the current vacancies, 41 do not have a nominee. We are almost out of district court nominees to include at hearings, because the President has been so slow to nominate district court nominees and insists on delaying the ABA peer review process until after the nominations are made. We have only two district court nominees with completed paperwork who have not yet had hearings, and further steps are being taken to evaluate their files.

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. In less than one year, we have already held 15 hearings for circuit court nominees.

On the agenda for a vote today is Judge David Cercone, who is nominated to the U.S. District Court for the Western District of Pennsylvania. He is the ninth nominee 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 never received a hearing or a vote by the Republican controlled Senate. I commend Senator Feinstein and Senator Boxer for crafting a working bipartisan judicial selection process in California that resulted in this nomination.

Additionally, on today's agenda for a Committee vote is Judge Kenneth Marra, who is nominated to fill a vacancy on the U.S. District Court for the Southern District of Florida. Until the current Bush Administration, there had been a fine tradition of bipartisan commissions working to agree on district court nominations in Florida. The Senators of Florida have returned the blue slips on Judge Marra as a sign of good faith that the President will seek their advice and consent regarding other judicial nominees from their State. 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.

I would also note that on the agenda for a vote today is Lawrence Greenfeld , who is nominated to be the next Director of the Bureau of Justice Statistics. He 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 to a non-partisan approach to the important crime statistics tracked by the Justice Department.

With the reporting of Director Greenfeld's nomination and those of the U.S. Marshals for Massachusetts, Washington and Georgia, the Committee will have acted on 32 nominees to the Executive Branch in addition to 63 U.S. Marshals and 78 U.S. Attorneys. The Committee will have taken action on more than 180 Executive Branch nominees, including more than 175 since the change in majority last summer.

Senator Patrick Leahy
"Patent and Trademark Authorization Act of 2002"

I am pleased to report out of the Judiciary Committee a bill - S. 1754 - which I introduced on November 30, 2001.

This bill - the "Patent and Trademark Authorization Act of 2002" - will send a strong message to America's innovators and inventors that the Congress intends to protect and enhance our patent system. The PTO serves a critical role in the promotion and development of commercial activity in the United States by granting patents and trademark registrations to our nation's innovators and businesses. I appreciate that Senators Hatch, Cantwell, Reid, Bennett and Carper joined with me in co-sponsoring this bill.

The costs of running the PTO are entirely paid for by fees collected by the PTO from users - individuals and companies that seek to benefit from patent and trademark protections. However, since 1992 Congress has diverted over $800 million of those fees for other government programs unrelated to the PTO.

This bill sends a strong message that Congress should appropriate to the PTO a funding level equal to these fees. The reason for this is simple: the creation of intellectual property by Americans, individuals and businesses, is massive positive driving force for our economy and is a huge plus for our trade balance with the rest of the world. In recent years, the number of patent applications has risen dramatically - and that trend is expected to continue. Our patent examiners

are very overworked, and emerging areas such as biotechnology and business method patents may overwhelm the system.

If fully implemented as intended, this bill can greatly assist the PTO in issuing quality patents more quickly which means more investment, more jobs and greater productivity for American businesses. The House of Representatives has passed a bill - HR 2047 - which contains some similar provisions but just for fiscal year 2002 regarding the authorization of appropriations.

We reported out of the Committee a substitute bill, with the assistance of Senator Hatch, and without objection, which simply moved back some dates in S. 1754, as originally introduced. Below is a short summary of S. 1754, as reported.

Section 1of the bill sets forth the title - "The Patent and Trademark Office Authorization Act of 2002."

Section 2 authorizes Congress to appropriate to the PTO, in each of fiscal years 2003 through 2008, an amount equal to the fees estimated by the Secretary of Commerce to be collected in each of the next five fiscal years. The Secretary shall make this report to the Congress by February 15 of each such fiscal year.

This bill thus sets forth the goal, strongly supported by users of the patent system, that the PTO should have a budget equal to the fees collected for each year. In recent years, the appropriations' committees have not provided annual appropriations equal to the fees collected. This bill sets forth the wishes of the Committee that the PTO be funded at levels determined by the anticipated fee collections.

Section 3 of the bill directs the PTO to develop, in the next three years, an electronic system for the filing and processing of all patent and trademark applications that is user friendly and that will allow the Office to process and maintain electronically the contents and history of all applications. Of the amount appropriated under section 2, section 3 authorizes Congress to appropriate not more than $50 million in fiscal years 2003 and 2004 for the electronic filing system. The PTO is working on this electronic system.

In section 4, the bill requires the Secretary of Commerce to annually report to the Judiciary Committees of the House of Representatives and the Senate on the progress made in implementing its strategic plan. The PTO issued short version of its "21st Century Strategic Plan" on June 3, 2002, which is available on their website.

The bill also contains two sections which will clarify two provisions of current law and thus provide certainty and guidance to the PTO and for inventors and businesses.

Section 5 of S. 1754 expands the scope of matters that may be raised during the reexamination process to a level which had been the case for many years. In background, Congress established the patent reexamination system in 1980 for three purposes: to attempt to settle patent validity questions quickly and less expensively than litigation; to allow courts to rely on PTO expertise; and, third, to reinforce investor confidence in the certainty of patent rights by affording an opportunity to review patents of doubtful validity.

This system of encouraging third parties to pursue reexamination as an efficient method of settling patent disputes is still a good idea. However, by clarifying current law this bill increases the discretion of the PTO and enhances the effectiveness of the reexamination process. It does this by permitting the use of relevant evidence that was considered by the PTO, but not necessarily cited. Thus, adding this new language to current law will help prevent the misuse of defective patents, especially those concerning business method patents.

It permits a reexamination based on prior art cited by an applicant that the examiner failed to adequately consider. Thus, this change allows the PTO to correct some examiner errors that it would not otherwise be able to correct. In a sense it deals with In re Portola Packaging, 110 F.3rd 786 (Fed. Cir. 1997), in a manner which should reduce the number of cases which will be handled in federal court in a manner that fully protects the rights of interested parties, and the public interest. Thus, section 5 does not change the basic approach of current law but rather eliminates a presumption which could be wrong, allowing for mistakes to be fixed without expensive litigation.

Section 6 of the bill modestly improves the usefulness of inter partes reexamination procedures by enhancing the ability of third-party requesters to participate in that process by allowing such a third party to appeal an adverse reexamine decision in Federal court or to participate in the appeal brought by the patentee. This may make inter partes reexamination a somewhat more attractive option for challenging a patent in that a third party should feel more comfortable that the courts can be accessed to rectify a mistaken reexamination decision. This section should increase the use of the reexamine system and thus decrease the number of patent matters adjudicated in federal court.

I hope we will be able to quickly pass this bill in the full Senate.