Testimony of

The Honorable Patrick Leahy

July 11, 2002

Statement of Senator Patrick Leahy
on the Anniversary of the
Reorganization of the Senate Judiciary Committee
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This week marks the first anniversary of the reorganization of the Senate Judiciary Committee following the change in majority last year. This past year has been a busy one for this Committee.

Just this week the Senate adopted as an amendment to the accounting reform and investor protection bill we are currently considering the text of S.2010, the Corporate and Criminal Fraud Accountability Act. That is a bill we reported in May after Committee action in February and April. Senator Biden, Senator Hatch, Senator Edwards and other members of this Committee are making important contributions to improve these measures, as well.

This is only one of the scores of measures this Committee has reported to the Senate in the last year. They range from important hate crimes legislation to bills augmenting the Violence Against Women Act to those seeking to improve competitive conditions and intellectual property matters to immigration matters to those on the issue of identity theft and significant law enforcement matters. These are in addition to the work of our members in the aftermath of the September 11 attacks on what became the USA PATRIOT Act.

Today, I hope the Committee will complete its consideration of a most important legislative initiative we began years ago, the Innocence Protection Act. I want to thank Senator Specter, Senator Feinstein and Senator Biden to work with us to broaden our consensus and thank all of those who have been cosponsors of S.486 and our House companion measure for which Bill Delahunt and Ray LaHood now have 240 cosponsors. Senators Feingold and Durbin have been extraordinary cosponsors who have helped improve and strengthen the bill from the outset. During the last year have also conducted a number of important oversight hearings regarding the Justice Department, the FBI, the Civil Rights Division, and the INS. I regret that the Attorney General canceled his commitment to appear before the Committee at a hearing that had been scheduled for today, but hope to have an oversight hearing with the Attorney General before the end of the month. He has not yet appeared before this Committee this year. In addition, there are a number of other, discrete but important oversight matters on which we are working in a bipartisan manner.

We have also had a record year in considering this President's nominees. Partisans have perpetuated an untrue and unfortunate myth that the Democratic-led Senate and Judiciary Committee have blocked the President's nominees. Nothing could be farther from the truth.

The Democratic-led Judiciary Committee has had a record-breaking year fairly and promptly considering President Bush's nominees. In addition to the dozens of high-ranking Justice Department officials for whom we held hearings and our work in connection with more than 185 Executive Branch nominees, we have had a record year with respect to judicial nominees. In this, our first year, we held hearings for 78 of the President's nominees. That is more hearings for this President's district and circuit court nominees than ever held in any of the six and one-half years that preceded the change in majority last summer. In particular, we held more hearings for more of President Bush's circuit court nominees,16, than in any of the six and one-half years in which the Republicans controlled the Committee before the change in majority last summer.

For that matter, we held twice as many hearings for Court of Appeals nominees than were held in the first year of the Reagan Administration when the Senate was controlled by Republicans and five times more than in the first year of the Clinton Administration when the Senate was controlled by Democrats. Those are the facts.

Under Democratic leadership, this Committee has also voted on more judicial nominees, 74, than in any of the six and one-half years of Republican control that preceded the change in majority. We voted on almost twice as many circuit court nominees, 14, than the Republican majority averaged in the years they were in control. In fact, this last year we voted on more nominees than were voted on in 1999 and 2000 combined and on more circuit court nominees than the Republicans allowed in 1996 and 1997 combined.

We have achieved what we said we would by treating President Bush's nominees more fairly and more expeditiously than President Clinton's nominees had been treated. By many measures the Committee has achieved almost twice as much this last year as Republicans averaged during their years in control. The Senate has confirmed more circuit and district court judges, 57, than were confirmed during 2000, 1999, 1997, 1996, and 1995, five of the prior six years of Republican control of the Senate.

There are another 16 judicial nominees on the Senate Executive Calendar. The delay in the votes on these nominees has been due to the delay in the Administration's fulfilling its responsibility to work with the Senate in the naming of members of bipartisan boards and commissions. I congratulate the Majority Leader for overcoming this impediment and for his patience and determination in achieving some movement on these matters.

I understand that he hopes to be able to resume voting on judicial nominations as soon as this Friday. Had the Administration not caused this delay, I am confident that the Senate would have confirmed more than 70 judicial nominations before today, far outdistancing any Republican total for any preceding year.

Nonetheless, we were able to overcome the other obstacles created by the Administration and proceed to confirm 57 judicial nominees in our first 10 months in the majority, a record outpacing any Republican total in any 10-month period in which they held the majority. Republicans averaged 38 confirmations per 12-month period. In spite of the obstructions from the Administration, the Senate this past year voted on more circuit court nominees and more nominees overall than in five of the prior six years of Republican control.

We have also addressed long-standing vacancies on circuit courts caused by Republican obstruction of President Clinton's judicial nominees, by holding the first hearing for a Fifth Circuit nominee in seven years, the first hearings for Sixth Circuit nominees in almost five years, the first hearing for a Tenth Circuit nominee in six years, and the first hearings for Fourth Circuit nominees in three years.

We have accomplished all this to address the vacancy crisis in the federal courts caused by Republican obstruction during the prior six and one-half years. We have reformed the process for considering judicial nominees. For example, we have ended the practice of anonymous holds that plagued the period of Republican control, when any Republican Senator could hold any nominee from his home state, his own circuit or any part of the country for any reason without any accountability. We have returned to the Democratic tradition of holding regular hearings, every few weeks, rather than going for months without a single hearing.

It would certainly have been easier and less work to retaliate for the unfair treatment of the last President's judicial nominees. We did not. We have been, and will continue to be, more fair than the Republican majority was to President Clinton's judicial nominees. More than 50 of Clinton's nominees never got a vote, many languished for months and years before they were returned without a hearing. Others waited years - not just a year, but up to more than four years - to be confirmed.

Those who now pretend that the Democratic majority in the Senate caused a vacancy crisis in the federal courts are ignoring the facts. Under Republicans, court vacancies rose from 63 in January 1995 to 110 in July 2001, when the Committee reorganized. During Republican control before the reorganization of the Committee, vacancies on the Courts of Appeals more than doubled, increasing from 16 to 33.

In one year of Democratic control, and despite 45 additional vacancies caused largely by the retirements of many past Republican appointees, we have reduced the number of district and circuit court vacancies. Vacancies continue to exist on the Court of Appeals, in particular, because a Republican Senate majority was not willing to hold hearings or vote on more than half - 56 percent - of President Clinton's circuit nominees in 1999 and 2000, and was not willing to confirm a single circuit judge during the entire 1996 session. Republicans caused the circuit vacancy crisis, and it has taken a tremendous effort to evaluate and have hearings for 16 circuit court nominees in less than a year.

We are hard at work evaluating the records of the few remaining nominees who have not yet had hearings. While we have moved as quickly as possible to evaluate all of the nominees, the Senate is not, and should not be, a rubber stamp. If this President is successful in filling all of the vacancies he inherited due to Republican obstruction as well as the new vacancies that have arisen on the circuits, Republican appointees will constitute the majority, and often a two-thirds majority, on 11 of the 13 appellate courts below the Supreme Court. Such a takeover would affect the next 20 years of judicial decisions coming from the Courts of Appeal.

The President and his advisors know this and, aside from the few relatively moderate nominees we have been able to confirm quickly, they have also chosen a number of people with records of judicial activism or out-of-mainstream ideology, including several young men in their thirties

and early forties for many of these lifetime appointments to the federal bench. What the President and his advisors have acknowledge they are doing is nominating ideologically conservative judicial nominees to stack the 5th, 6th, and D.C. Circuits with judicial activists of their choice. That is part two of the Republican strategy.

In part one, several Republicans in the Senate prevented many of these vacancies from being filled in the first place, so that whatever balance there might be, or might have been, on those courts is missing. They kept off well qualified moderate nominees, not chosen because of any litmus test or ideology. They did so to provide a Republican President with the opportunity to load the bench, especially the appellate court bench, with right wingers.

Advice and consent does not mean giving the President carte blanche to pack the courts. The ingenious system of checks and balances in our Constitution does not give the power to make lifetime appointments to one person alone to remake the courts along narrow ideological lines, to pack the courts with judges whose views are outside of the mainstream, and whose decisions would further divide our nation.

We have worked hard to balance these competing concerns over the past year: how to address the vacancy crisis we inherited while also not being a rubberstamp and abdicating our responsibilities to provide a democratic check on the President's choices for lifetime appointment to the federal courts. These are the only lifetime appointments in our system of government, and they matter a great deal to our future.

In 1801, when Thomas Jefferson, the first President who was not a member of the Federalist Party was elected, he faced a similar situation. The Federalists in Congress had passed, and the lame duck President Adams had signed, a bill creating a number of new seats on the federal courts. President Adams then appointed a number of Federalists who have been called "midnight judges." One of the first things President Jefferson did was to get that law repealed and to refuse to sign the appointment papers of some of those judges. That is part of the story of the famous Supreme Court case, Marbury v. Madison.

Thus, it took only 12 years of our new nation for an effort to pack the courts to occur. It took the first transition in political parties for one to give in to the temptation to try to stack the deck and affect the outcome of cases through the appointment of judges.

The best-known attempt to pack the courts, occurred during the administration of President Franklin Roosevelt. President Roosevelt's attempt to pack the Supreme Court with justices of his choosing, to get more votes on the side of cases he wanted to win, was rejected by Congress and the American people.

If one thoroughly examines the types of nominees this President is sending us, one might conclude that we are facing the challenge of a similar type of court packing today. The Senate Judiciary Committee is working very hard to analyze all of President Bush's judicial nominees fairly, one by one. We have already had 21 hearings on 78 judicial nominees, including 16 circuit court nominees. We are planning another hearing for next week.

In the meantime, Republicans have been unfairly critical that not every nominee has yet had a hearing or been confirmed. Some have asserted that there is some sort of "honeymoon" period for Presidents in getting confirmation of their first choices for the courts. Of course, the Constitution provides for no such abdication of responsibility for a President's first few lifetime appointees or his last. To support this extra-constitutional theory, Republicans assert that the last three presidents had a 100 percent confirmation rate on their first 11 circuit court nominees.

When they say this, they conveniently leave a few details out. First, it took previous Senates more than a year to confirm eleven circuit court nominees of past Presidents. We have only had a year and the Senate has already confirmed nine of this President's circuit court nominees and four more are awaiting a vote by the full Senate.

President George W. Bush has said previously that he would choose judges in the mold of two ideologically conservative activists, Justice Scalia and Justice Thomas. No judicial nominees should be rubber-stamped by the Senate, not even a President's first few choices. All nominees for these lifetime positions merit careful review by the Senate. When a President is using ideological criterion to select nominees, it is fair for the Senate to consider it, as well. Federalist Society credentials are not a substitute for fairness, moderation or judicial temperament. When a President is intent on packing the courts and stacking the deck on outcomes, consideration of balance and how ideological and activist nominees will affect a court are valid considerations.

The high dudgeon expressed by Republicans about the order in which we have been considering this President's circuit court nominees is especially unwarranted in light of the objectively unfair way they treated President Clinton's circuit court nominees. Some of the vacancies we inherited date back to 1990, 1994 and 1996.

Partisans conveniently ignore the Republicans' terrible record of obstruction when complain that a few of President Bush's nominees nominees have not yet had a hearing. Those nominees chosen without consultation with both parties in the Senate and, in particular, those who do not have home-state Senator support do not get hearings, according to long-standing Senate tradition. Republicans have tried to measure our achievements by standards they never met but surely even they are not now suggesting overriding the long-standing Senate tradition of consent or blue slips from both home-State Senators on which they themselves insisted.

I have tried to work with the White House on judicial nominations. I have gone out of my way to encourage them to work in a bipartisan way with the Senate, like past Presidents, but in all too many instances they have chosen to bypass bipartisanship. I have encouraged them to include the ABA in the process earlier, like past Presidents, but they have refused to do so even though their decision adds to the length of time nominations must be pending before the Senate before they can be considered.

At the beginning of this year, this past January, I again called on the President to stop playing politics with judicial nominations and act in a bipartisan manner. Just last month I sent a detailed letter to the President on these issues. My efforts to help the White House improve the judicial nominations process, met with a perfunctory acknowledgment or receipt, which I ask unanimous consent to place in the record at the end of my remarks. Unfortunately, this letter about the most

constructive response to any of my many efforts efforts that I have received from the White House.

Republican statements on judicial nominees regularly rely on superficially appealing but misleading statistics to gloss over the types of nominees they are choosing for our federal courts. For example, they complain that Presidents Reagan, Bush and Clinton got 97, 95 and 97 percent, respectively, of their first 100 judicial nominations confirmed. What they conveniently fail to mention is that it took two full years for President Reagan to have 89 of his judicial nominees confirmed, and well into year three to reach the 100 mark. Similarly, the first President Bush had only 71 judicial nominees confirmed after two full years, and it took well into year three to reach 100 confirmations.

We are moving quickly, but responsibly, to fill judicial vacancies with qualified nominees we hope will not be activists. Partisans ignore these facts. The facts are that we are confirming President Bush's nominees at a faster pace than the nominees of prior presidents, including those who worked closely with a Senate majority of the same political party. We have accomplished all this during a period of tremendous tumult and crisis.

The Judiciary Committee noticed the first hearing on judicial nominations within 10 minutes of the reorganization of the Senate, and held that hearing on the day after the Committee was assigned new members. Today is the one-year anniversary of that first hearing for Judge Roger Gregory.

We held unprecedented hearings during the August recess last year and proceeded with a hearing two days after the 9-11 attacks and shortly after the anthrax attack. We will hold our 22nd hearing for judicial nominees next week. We are doing our best to address the vacancy crisis we inherited. We have a record of achievement and of fairness to be proud of on this anniversary.

STATEMENT OF SENATOR PATRICK LEAHY, CHAIRMAN
SENATE JUDICIARY COMMITTEE
EXECUTIVE BUSINESS MEETING
ON THE LEAHY-SPECTER-FEINSTEIN-BIDEN-DURBIN-EDWARDS
SUBSTITUTE AMENDMENT TO S.486,
THE INNOCENCE PROTECTION ACT
July 11, 2002

Today this Committee is doing something that I have urged for a long time: We are marking up a version of S.486, the Innocence Protection Act. The legislation before us, the Leahy-Specter-Feinstein-Biden-Durbin substitute amendment to that bill, is not a cure-all for the criminal justice system, or even for the capital punishment system, but it is a very good bill. It reflects careful thought, and principled compromise, concerning the key reforms necessary to protect the innocent, and about the needs of law enforcement and States' rights. If we can pass it out of Committee today, and bring it to a vote this year, that will be a significant victory, not just for the many of us who have worked on it, but for American justice.

Over the past year, this Committee has held four hearings on the flaws in our nation's capital punishment system, which have repeatedly landed innocent people on death row. I believe that the members of this Committee have listened to the evidence carefully, and I am hopeful that we have reached a broad consensus, spanning Republicans and Democrats, those who support and those who oppose the death penalty.

One of Congress's most important responsibilities is to turn this sort of strong bipartisan consensus on fundamental principles of justice into practical legislation. So I am delighted today to recognize my colleagues who have worked hard and long to do just that in the area of capital punishment reform.

First, I want to commend and thank Bill Delahunt and Ray LaHood, the lead sponsors of the Innocence Protection Act in the House. Their commitment to this legislation has been truly outstanding. I also want to thank their cosponsors - there are now 240 cosponsors of the House bill - as well as Gordon Smith, Susan Collins, and all the other cosponsors of S.486.

I am especially grateful to all the Members of the Committee who have worked with me on this effort. Senator Feingold is an original cosponsor of S.486, and a powerful voice in the national debate on capital punishment. Senators Kennedy, Durbin, Cantwell, and Edwards are also cosponsors of S.486. Senator Feinstein has worked with me for the past year to find common ground on DNA and counsel provisions that would enable us to move forward together. Senator Specter brought his experience as a prosecutor to bear in crafting a bill that complements the Innocence Protection Act; several of his proposals have been incorporated in the substitute amendment. We also benefitted from Senator Biden's vast experience in the criminal justice system, and I welcome his cosponsorship of the substitute amendment.

Now let me turn to the specifics of the substitute amendment before the Committee.

Title I of the substitute amendment ensures that post-conviction DNA testing will be available in appropriate cases, where it can help expose wrongful convictions. It establishes the procedures to be followed in the federal system, and it requires States to adopt comparable procedures as a condition of receiving federal funds for DNA-related programs. In addition, it adopts the view of two federal judges - Judge Luttig of the Fourth Circuit Court of Appeals and Judge Weiner of the Eastern District of Pennsylvania - that inmates have a constitutional right to access biological evidence for the purpose of DNA testing.

Title II of the substitute amendment addresses the counsel issue. It establishes a grant program for States to improve the systems by which they appoint and compensate lawyers in death cases. States that authorize capital punishment may apply for these grants or not, as they wish. If they accept the money, they must open themselves up to a set of controls, which are designed to ensure that their systems truly meet basic standards. If a State does not wish to participate in this program, then the money will be used to fund one or more organizations in the State that provide legal services in capital cases.

Title III of the substitute amendment addresses the bizarre spectacle that occurs when the Supreme Court grants a petition and agrees to hear an appeal by a death row inmate, but then renders that decision meaningless by failing to stay the inmate's execution while that appeal is pending. We owe a great debt to Senator Specter for raising this issue and devising a solution

under which stays of execution would be automatic when the Supreme Court grants a petition to a death row inmate.

The remaining provisions of the substitute amendment relate to compensation of the wrongfully convicted, and loan forgiveness for prosecutors and public defenders. I thank Senator Durbin and Senator Kennedy for working out the details of the loan forgiveness program, which will help State and local prosecutor and public defender offices to recruit and retain the most talented young lawyers.

Those familiar with the original bill that I introduced, S. 486, will notice several key differences in the substitute amendment, which address the concerns of prosecutors and States. In essence, the substitute amendment tightens requirements for DNA testing to screen out frivolous applications, and seeks to improve counsel systems through more of a carrot than a stick approach. We will finally put an end to the sleeping lawyer syndrome, but in a manner that is respectful of state prerogatives and that does not interfere with the 1996 changes to habeas corpus law.

As I stated at the outset of my remarks, the substitute amendment is a product of both careful thought and principled compromise. In many - not all - respects, I prefer the original S.486. For example, my understanding of States' rights does not call for a completely hands-off approach to habeas corpus when some States have consistently failed to provide indigent defendants with competent lawyers.

But the issues this bill addresses are too important to play partisan gridlock games with. The bill before the Committee reflects a principled consensus on the most basic essential reforms; it raises no serious constitutional or law enforcement concerns; it will improve criminal justice in America considerably; and it may well save innocent lives. I am therefore proud to sponsor it, and I hope we can send it forward today with strong bipartisan backing.

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