Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
November 19, 2003

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Senate Judiciary Committee
Judicial Nominations Hearing
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Today, the Committee is holding its 23rd judicial nominations hearing this year. This pace stands in sharp contrast to the way President Clinton's nominees were treated by the Republican majority from 1995 through 2000. In those years, there were far fewer hearings for far fewer nominees.

This afternoon we will hear from this President's latest nominee to the Court of Appeals for the Fourth Circuit. Actually, there is no existing vacancy on the Fourth Circuit from Virginia, although an active judge may leave.

Over the course of Senate debate last week Republicans tried to rewrite history by claiming that filibusters of judicial nominees were unprecedented in the Senate. That is simply not correct. Contemporaneous and historical documents show that Senators, including Republican Senators led by Senator Robert Griffin, successfully filibustered President Johnson's 1968 nomination of Justice Abe Fortas to be Chief Justice of the Supreme Court.

The Senate's own website contains an article entitled "Filibuster Derails Supreme Court Appointment," which notes that: "Although the [Judiciary] committee recommended confirmation, floor consideration sparked the first filibuster in Senate history on a Supreme Court nomination." Congressional Quarterly's Guide to Congress (1995) contains a similar account of the events and no amount of partisan rhetoric can alter the historical fact that Justice Fortas' nomination was filibustered in the Senate. In addition to the filibusters of one, mounted through anonymous Republican holds on President Clinton's nominees, filibusters of his nominees also reached the floor and prompted cloture votes by the Senate on other nominees to the federal bench.

Having recently had occasion to revisit the Fortas filibuster, I was reminded that the reason given by some Senators for that filibuster and for their opposition was their concern that Justice Fortas was too close to the White House to be an independent arbiter. There were concerns that his coziness with the President and that Administration would inhibit Justice Fortas' independence to uphold the Constitution and protect against overreaching by the Executive Branch.

Alexander Hamilton wrote that the Senate was to be concerned about judicial candidates that were "in some way or other personally allied" with the Executive. The framers gave the Senate an important role to play in ensuring that the federal bench would not simply be an arm of the Executive Branch nor, as I have said through the years, should the courts be an arm of either political party. We honor the brilliant design in our Constitution when we take our role seriously.

When considering nominees who have worked for the President and advocated his policy choices, the Senate reviews the nominations to make certain that cronyism is not involved and that the nominees will demonstrate independence. The Senate has been highly accommodating in already confirming Judge

Bybee, Judge Chertoff and many others nominated from positions within this Administration. Now we are confronted with the nomination of Mr. Haynes, who as general counsel at the Defense Department has been intimately involved in President Bush's controversial policies regarding the detainment of designated individuals and with the Administration's unilateral determinations with regard to military tribunals.

In letters to the Senate, the Department of Justice has indicated that "the Department of Defense is responsible . . . for determining whether a particular individual is an enemy combatant over whom the armed forces should take control." As General Counsel of the Department of Defense, Mr. Haynes has been a key architect of the treatment of detainees and the prosecution of enemy combatants. He himself has noted the "unprecedented relationship" developed at the Department of Defense and the Department of Justice with regard to the Executive Branch's litigation strategies.

Some have suggested that Mr. Haynes was hand-picked for the 4th Circuit by the President's advisors because of his intimate knowledge of this Administration's plans with respect to military tribunals and treatment of detainees. The 4th Circuit is the circuit which hears appeals from the Moussaoui case and the Hamdi detention case among others. The Administration has shown its interest in making the 4th Circuit, its circuit of choice for detentions and policy determinations regarding Americans' civil liberties and for its efforts to avoid substantive review of Administration actions. We will all be interested to hear testimony about whether Mr. Haynes intends to be involved in cases that involve the policy and legal work he has been doing for the Administration while at Defense.

Mr. Haynes' nomination to a Virginia seat on the Fourth Circuit is unusual for several reasons. First, he is nominated to a Virginia seat on this Circuit that is currently not vacant. Second, when he was nominated Mr. Haynes was actually a resident of the District of Columbia. And finally, it is also unusual that the nominee for this Virginia seat is not admitted to practice law in the Commonwealth of Virginia, nor is he a member of the bar of the Fourth Circuit Court of Appeals.

Months ago I sent a letter to Mr. Haynes asking him several questions regarding implementation of the Convention Against Torture (CAT), including specific questions about the rendition of alleged terrorist suspects to foreign governments. Late last night, I received a cover letter with attachments from one of his assistants, all of which studiously avoid discussion of the CAT. This response also left unanswered my question about what guidelines, if any, are followed by the CIA when interrogating suspects. I find this recent correspondence to be totally non-responsive and terribly disturbing.

Another nominee at today's hearing, Mr. Kenneth Karas is currently serving on the prosecution team in the Moussaoui case. I look forward to hearing his testimony regarding how he will make the transition from prosecuting that case to presiding over cases, should he be confirmed.

Also at today's hearing is Virginia Hopkins, nominated to the U.S. District Court for the Northern District of Alabama. Ms. Hopkins has over 25 years experience in private practice, handling a range of cases including intellectual property and tax and estate planning issues. She is the fourth nominee of President Bush to this court and the seventh nominee for the district courts in Alabama to come before this Committee since July 2001. She is supported by her home-state Senators. Consideration of her nomination is being expedited as a courtesy to Senator Shelby and, of course, to Senator Sessions.

Magistrate Judge Louis Guirola is nominated to the Southern District of Mississippi. It is my understanding that he is the first Hispanic individual to be nominated to the federal bench in Mississippi. Democrats have long supported diversity on our federal judiciary. We have looked forward for some time to the nomination of an African American to serve the people of Mississippi, as well.

I welcome the nominees and their families to the hearing this morning. Both we and they are proceeding on short notice and little time for preparation. Democratic Senators on the Committee should be praised for their willingness to cooperate in expediting Committee hearings of these recent nominations, especially given the personal and partisan attacks they are being subjected to by Republican partisans.

This 23rd hearing for judicial nominees this year is in stark contrast to the way President Clinton's nominees were treated by the Republican majority from 1995 through 2000. For example, I recall that during the entire year of 1996, when judicial vacancies were far higher and rising, the Committee held a mere six hearings all year. During that 1996 session, not a single judge was confirmed to the Circuit Courts -- not one, in contrast to 12 circuit court confirmations this year.

During those years, when judicial vacancies were much higher and more than doubling while the Senate was under Republican leadership, it was easy to go three years without this many confirmation hearings for this many judicial nominees. In fact, Republicans have now held more hearings for President Bush's judicial nominees in less than 11 months than they held in all 24 months of 1999 and 2000 -- combined -- for President Clinton's judicial nominees. During the entire year of 2000, only eight judicial nominations hearings were held.

In 1999, the Committee did not have a hearing to consider a single judicial nominee until June 16th, and during the rest of 1999, it held only seven hearings to consider judicial nominees. That was the third year of President Clinton's second term. Like 1999, this year, 2003, is the third year of this President's term, and Republicans have held more than twice as many hearings for President Bush's judicial nominees as for President Clinton's that year. The Republican double standard is prominently on display.

The number of nominees who have been considered so far this year is at a record high for this Republican leadership, as well. With another four nominees included at this hearing, we will now have held hearings for 85 Article III judicial nominees this year. That is almost 30 more than the highest total in any one year of the Clinton Administration and nearly two times higher than their annual average of 44 nominees considered per year.

Of course during the Clinton years, having a hearing was no guarantee of anything. A number of nominees who participated in hearings were never listed on a Committee agenda for Committee attention and were never considered by the Senate. Among those nominees were Bonnie Campbell of Iowa, Allen Snyder of the District of Columbia, Fred Woocher of California, Clarence Sundram of New York and many more.

With a Republican in the White House, the Senate Republican majority has gone from the restrained pace it had insisted was required for reviewing judicial nominations to overdrive for President Bush's judicial nominees. The Committee has already reported 78 judicial nominees this year, which is far in excess of any year total and almost double the average during the years 1995 through 2000 when a Democratic President's nominees were being reviewed. Of course, the Senate has already confirmed 168 judges, including 68 this year. That is more confirmations this year than in any year from 1995 through 2000 and, in fact, almost double the annual average during those years.

A handful of the Administration's most divisive and extreme nominees have been denied approval by the Senate. So while 168 judges have been confirmed in less than three years and the Senate has already topped President Reagan's four-year total, a handful of those chosen for ideological and political reasons have not been granted consent.

This Committee has its confirmation conveyor belt cracked up to full speed with respect to the nomination of a Republican President as the Republicans' double standard affects their practices and the important work of this Committee.