

Testimony of

# **The Honorable Patrick Leahy**

January 24, 2003

Opening Statement  
Of Senator Patrick Leahy,  
Ranking Democratic Member,  
Judiciary Committee Business Meeting

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## **WELCOME**

I start by ceremonially handing a gavel to Senator Hatch. If we always used the same gavel it would be dizzy from the changes we have gone through over the last couple of years.

I welcome back to the Committee those stout-hearted Senators who have returned. I welcome Senator Craig, who sat with us during our bipartisan Ruby Ridge oversight hearings a few years ago and has now chosen to join the panel as a member. I also welcome the other new members of the Committee and look forward to working with them.

It is my hope that we will find consensus items on which we can all work closely together, as we have done, for example, with Senator Feinstein's Amber Alert bill that passed the Senate earlier this week. I always am looking for areas of agreement with Senator Hatch and other members of this Committee. It is with that in mind that I will especially miss Senator Brownback, who has chosen to leave the Committee for greener pastures. I appreciate, as I know Senator Kennedy does, his work on the Immigration Subcommittee and in support of our legislative effort on corporate responsibility. I look forward to working with him and with Senator McConnell on the Appropriations Committee and on matters within this Committee's jurisdiction in which they retain interest.

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In addition to handing the gavel over to Senator Hatch I can report that we have had a very smooth implementation of our 50-50 agreement for sharing resources and that we have already succeeded in having Republican phone lines and staff shifted to our Committee reception room and have agreed on a number of nondesignated staff members to serve the entire Committee.

We need to follow through on the Committee's organization for this Congress by organizing our subcommittees, designating chairs and ranking members and assigning members. We also need to reaffirm or revise our Committee rules and should consider whether we wish to continue the protocol we have had on commemorative resolutions, private relief bills and private immigration bills. Those have traditionally been matters that commanded the Committee's attention at its first markups early in the session.

With respect to subcommittees, I understand Senator Hatch was giving thought to creating a Homeland Security Subcommittee. My approach last Congress was to encourage all of our subcommittees, including Immigration, Crime and Drugs, Terrorism, Constitution and Administration Oversight, to be involved in hearings and matters affecting homeland security. Our Committee and subcommittees were among the most active in the last Congress on issues of Homeland Security. The expertise and energy of our members and of these subcommittees account for some of the special strengths we have on this Committee. I am happy to discuss with the Chairman any ideas he has for subcommittees and would want all members to be heard and involved in those considerations. That is obviously something we should do sooner rather than later so that Subcommittee chairs and Ranking Members can know their responsibilities and can begin working together on hearings.

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## BIPARTISAN INTELLECTUAL PROPERTY AND TECHNOLOGY AGENDA

I have also asked my staff to work with Senator Hatch's staff in developing a series of hearings and legislative initiatives relating to intellectual property and technology matters, an area in which we have historically worked closely together with great success.

## ANTITRUST POLICY

Given our partnership on the Curt Flood Act, by which we finally passed legislation ending professional baseball's antitrust exemption, I also want to invite Senator Hatch, in particular, but also all members of the Committee on both sides of the aisle, to join with Senator Kennedy, Senator Durbin, Senator Edwards and me in amending the immunity from federal antitrust laws for the insurance business in matters relating to medical malpractice insurance. Price-fixing, bid-rigging and market allocations in medical malpractice insurance is simply intolerable. Physicians, patients and our Nation's health care will be the beneficiaries of such long overdue congressional action.

## EXECUTIVE NOMINATIONS

We begin this session with a number of important Executive Branch vacancies. The Secretary of the Homeland Security Department was promptly confirmed earlier this week. The Commerce Committee held a hearing and meeting on the nomination of the Undersecretary of Border and Transportation Security. I was disappointed that that nomination was not referred to this Committee, as I believe it should have been, given the traditional jurisdiction of this Committee. Indeed, I chaired Administrator Hutchinson's hearing to head the Drug Enforcement Administration in the last Congress, and this Committee has traditionally exercised fundamental jurisdiction over immigration, our criminal laws, and our borders. It may be that a few of the dozens of presidential nominees to the new Homeland Security Department will be referred to this Committee, and I look forward to working with the Chairman to prepare for hearings on those nominations.

In addition, I expect that we will soon have pending before this Committee the nomination of the President for the Associate Attorney General position, the third- or fourth-highest post within the Department of Justice. The President announced his intention to make this nomination back in early December. We have yet even to discuss when that hearing might take place and how to deal with the orders involving that nominee issued by a federal court. That nominee to become the Associate has been the Assistant Attorney General for the Civil Division, so that is another vacancy that will arise. In addition, there is a vacancy in the important position of Assistant Attorney General for the Antitrust Division. I also understand that the Assistant Attorney General for Legislative Affairs has now been assigned other responsibilities and that position, the Attorney General's liaison to the Congress, is also without a nominee. Accordingly, we will face again this year the circumstance I faced in 2001 when we had to find time to prepare for and hold nominations hearings on important Executive Branch nominees as well as judicial nominees. The difference will be that while there will be a number of Executive Branch nominations hearings this year, they will not be nearly as many as we had to hold in 2001 and, hopefully, we will be able to proceed without the unprecedented circumstances we had to overcome in the wake of the September 11 attack and the anthrax letters sent to Senator Daschle and to me that closed the Senate office buildings and displaced so many for so long.

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Then there are the continuing problems caused by the Administration's refusal to work with Democratic Senators to select consensus judicial nominees who could be confirmed relatively quickly by the Senate. In spite of the President's lack of cooperation, the Senate in the 17 months of Democratic leadership of the Judiciary Committee was able to confirm 100 judges and vastly reduce the judicial vacancies that had built up and that were kept vacant by inaction on the nominations of President Clinton.

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Justice Rehnquist thanked the Committee for confirming 100 judicial nominees earlier this month it was the first time this accomplishment had been acknowledged by anyone other than Democrats and a few reporters.

I mention this because we have been hearing so much in the press about the need, or should I say the desire, of Republicans to move quickly on judicial vacancies. One member of this Committee even suggested that the Senate needed to confirm the 100 nominees blocked by the Democrats, despite the fact that everyone here must know that 100 nominees were confirmed - not blocked - many of whom proved to be quite controversial. Almost all of the judges confirmed are conservatives, many of them quite to the right of the mainstream. Many of these nominees have been active in conservative political causes or groups, but we moved fairly and expeditiously on as many as we could.

We cut the number of vacancies on the courts from 110 to 59, despite an additional 50 new vacancies that arose during my tenure. I recall that the Chairman said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also observed at one point that 67 vacancies meant "full employment" on the federal courts. With two additional vacancies since the beginning of this year, there are now 61 vacancies on the district and circuit courts, but the President has made nominations to only half of those seats. I am sure that the Chairman will try to chart a steady course to address those vacancies, and I hope it will be a fair one that does not leave the public with the impression that nominees for lifetime positions are racing through the Committee with little time for hearing questions and for thorough review.

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Throughout the last Congress I urged the President to work with us and stop politicizing the judicial confirmation process. I urged him to work with us to achieve a sense of balance on the circuits and to work with Democratic home-State Senators. I offered suggestions with respect to impasses in the 6th Circuit and the D.C. Circuit. All was to no avail. Instead, this White House chose to mischaracterize what we had achieved and to demagogue the issue during the last election. That partisan approach has continued from the White House and is most unfortunate. Sending the Senate divisive judicial nominations is something I have urged the President to avoid, but that is exactly what he has chosen to do.

As we begin this new Congress, it is also not helpful that the Chairman is apparently choosing to change practices in what appears to be an effort to railroad nominations through the Committee and the Senate without thorough hearings. We have not discussed any plans he has to change his own blue slip practices from the last three Congresses in which he chaired the Committee. When the President was a Republican, Senator Hatch was very careful to protect the rights and privileges of Republican Senators with respect to judicial nominations. I cannot recall a single occasion on which he proceeded to a hearing on a judicial nominee before both home-State Senators had returned blue slips indicating their agreement with proceeding.

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At the last Committee vote of the past Congress, the Committee was sharply divided in its evaluation of Judge Dennis Shedd to the Fourth Circuit. Despite unfair attacks against me by a number of Republicans, I kept my commitment that he would receive a Committee vote. Judge Shedd's record in civil rights cases and his record on the bench raised serious concerns among many African Americans living in the Fourth Circuit and across the country. His floor vote was also contentious, with a confirmation vote of 55 to 44.

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Although the campaign rhetoric of the Administration as it continued to politicize the selection of federal judges was in large measure about Judge Pickering and Justice Owen, and although the President has followed through on his threat to renominate them, the agenda for this our first meeting includes no mention of either of them. Perhaps this is a sign that the Republicans on this Committee recognize the unprecedented nature of these renominations and the divisiveness they engender.

#### THE ESTRADA NOMINATION

The Chairman has instead exercised his prerogative to list the nomination of Mr. Estrada to the D.C. Circuit. This, too, has been a difficult nomination for this Committee. I have significant concerns about Miguel Estrada's nomination to the U.S. Court of Appeals for the D.C. Circuit. Many of us would like to have sufficient confidence based on a record and a strong confidence about the type of judge he would be, in voting on this nomination. Sadly, that is not the record before this Committee. I am not convinced that he will not become an activist on that court, given what we have learned about him and given the insufficient record we have. Mr. Estrada has no judicial experience. He has no publications since his law school note. He is not a distinguished legal scholar or professor of law and has never taught a class. While he has experience arguing criminal cases before the Supreme Court, on which he clerked, he appears to have no experience handling the types of civil cases that make up the majority of the docket of the D.C. Circuit. Additionally, his selection for this court has generated tremendous controversy. I think that is, in part, because he appears to have been groomed to be an activist appellate judge by well-placed conservatives.

This has been another nomination that has divided, not united, the American people and the Senate.

Senator Schumer chaired a hearing for Mr. Estrada last September. I was hoping that the hearing would allay concerns that have been raised about this nomination, but I was left with more questions than answers after all of the steps Mr. Estrada took to avoid answering questions at that hearing. I was also left with little hope that he would ever answer any of the concerns raised about entrusting him for the rest of his life with the responsibility for deciding cases fairly and without favor toward any personal or political agenda. When we vote on Mr. Estrada's nomination, I will submit a longer statement detailing my concerns. I would also like to submit

for the record Senator Schumer's letter on the Department of Justice's refusal to follow precedent and provide the Committee with an opportunity to examine Mr. Estrada's writings.

My colleagues and I welcome the opportunity to discuss the merits of this nomination. It would be better if that debate and vote took place after the entire record on Mr. Estrada's nomination was assembled. Significant concerns have been raised and not answered. The opposition of so many Hispanic organizations and the Congressional Hispanic Caucus should also be of concern to the Committee. I will submit those letters and statements in opposition for the record.

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