

Testimony of

The Honorable Patrick Leahy

February 27, 2003

Opening Statement of Senator Patrick Leahy
Business Meeting of the Senate Judiciary Committee
Feb. 27, 2003

Administrative Matters

Since before our first meeting I have been urging the Committee to complete its organization. At our January 24th meeting I was able to report that we have had a very smooth implementation of our 50-50 agreement for sharing resources, that we had shifted our Committee reception room staff and agreed upon the nondesignated staff to serve the entire Committee under Senator Hatch's chairmanship.

Since then, however, we have made little progress. Instead, we have been bogged with an unprecedented hearing for three controversial circuit court nominees and the unwillingness of the Administration to cooperate with us on the Estrada nomination.

Earlier this week we tried to have an emergency meeting to report out our basic funding resolution for the next two years in accordance with Senate Rule 26 and the instructions of the Rules Committee but were unable to assemble a quorum on short notice. The Democratic minority cooperated by waiving the required notice. Senator Hatch introduced S. Res. 65 later that day and we were able to get Senate consent to discharge this Committee and refer the resolution to Rules in our effort to comply with Senate Rules and fulfil our responsibilities. I thank the Chairman and Ranking Democratic Member of the Rules Committee for accepting this action as the equivalent of Committee action reporting a funding resolution.

Another Senate Rule requirement that we run the risk of violating is that in Senate Rule 26, calling upon us to reaffirm and publish our Committee Rules by March 1. Since this is obviously our last meeting before March 1, I hope the Chairman intends to take up that matter. I will support extending the current rules, which have guided our action as a Committee for decades. I ask that a copy of those longstanding rules be included in the record at this point.

I had hoped we would have made more progress on subcommittee organization but our staffs have not yet met to work out differences, and our questions about the changes the Republicans have proposed have not been answered. We are trying to understand the jurisdictional changes that were recently proposed. In addition, we have a number of Democratic members who have expressed interest in subcommittee memberships that have been restricted and reduced in the Republicans' proposal. I would hope the Majority has enough members with interest in antitrust and crime to accommodate our interests in keeping Democratic membership on those Committees at the levels maintained in the last Congress. Although Democratic staff has been asking for information and asking questions since receiving a draft proposal on February 7, those

questions have not been answered, the information has not been provided and the staffs have not met to work out differences. I hope that Republican side will cooperate with us to work this out before our next meeting so we can affirm our subcommittee structure before our next meeting.

We also need to 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. I ask that copies of those longstanding protocols be included in the record at this point.

I understand that Chairman Hatch this week has begun at last to distribute blue slips to home-state Senators on some nominations. No one knows better than I that the across-the-board, all-court push for immediate and simultaneous consideration of a number of controversial judicial nominees has been distracting and time consuming. For our part, we have tried to work with the Chairman, to be reasonable and to be helpful. I hope that we can all find time to finish our Committee organizational activities before too much longer.

Legislative Activities

This week the Senate did act favorably on the PROTECT Act, S.151, which Senator Hatch described as his number one legislative priority. I was glad to have been the lead Democratic cosponsor and to help pave the way for passage of the Chairman's number one legislative item in an 84 to zero vote. Although I have concerns about some provisions in the bill, I worked to craft the best bipartisan legislation we could. Now the Committee and the Senate have endorsed our bill. I have strongly urged the House to follow suit and not complicate or delay passage of this legislation again this Congress.

Oversight

Our oversight responsibilities are a fundamental part of our congressional responsibilities. The Senate was intended to be a check on Executive power and to provide balance in our government. We need to fulfill our intended role in this constitutional democracy.

Earlier this week Chairman Grassley, Chairman Specter and I released an important oversight report. Oversight is essential to having an accountable and effective law enforcement effort against terrorism. The report we issued this week distills our bipartisan findings and conclusions from numerous hearings, classified briefings and other oversight activities in the 107th Congress. Our efforts added up to the first comprehensive, public FBI oversight effort in decades and demonstrated the pressing need for reform of the FBI.

In times of national stress there is an understandable impulse to give government more power. Under our system, checks and balances and oversight are intended to help in deciding when more government power is warranted, and when it is not.

It is vital for us first to examine and understand how federal agencies are using the power that they already have. We must answer two questions:

1. Is that power being used effectively. Our citizens not only want to feel safer, they want to be safer?
2. Is that power being used appropriately, so that our liberties are not sacrificed?

The American people want, expect and deserve effective congressional oversight of the law enforcement powers being employed in the struggle against terrorism. Doing that job is one of our constitutional duties. Robust congressional oversight helps ensure that the balance is properly calibrated and is a check on overuse, underuse or misuse of surveillance power by government agencies.

Our joint oversight report focused on the FBI's ability to use the Foreign Intelligence Surveillance Act, or FISA. As is set out in our joint report, our hearings revealed that the FBI is ill-equipped to implement FISA.

Here are a few of our report's basic conclusions about the problems that plague the FBI:

Excessive secrecy: The surplus of secrecy that shrouds the most basic legal and procedural aspects of the FISA has hurt, not helped, implementation of FISA.

Inadequate training: Key FBI agents and officials were inadequately trained in important aspects of not only FISA, but also in fundamental aspects of criminal law.

Bureaucratic Bottlenecks: FBI headquarters often not only fails to support the work of many of its best street agents, but sometimes hinders them in doing their jobs.

Weak Information Analysis: The FBI does not properly analyze or disseminate intelligence in its possession.

Stifling of Internal FBI Criticism: The FBI has a deep-rooted culture of punishing those who point out problems. This has hurt the FBI's intelligence operations.

Equally disturbing were the FBI and DOJ's reactions to our bipartisan oversight and report.

During the 107th Congress, as Senator Grassley said on Tuesday, they set up unnecessary roadblocks and made our oversight too "adversarial". Then, when we released our bipartisan report after sharing it first with DOJ and the FBI, a DOJ spokesperson simply dismissed it as "old news."

Well, I agree that the FBI's problems are, unfortunately "old news." What would be new would be if the DOJ and FBI would be less adversarial about our bipartisan oversight and would actually fix their longstanding problems. This culture of denial is too costly to persist.

Our report is of paramount importance in making the DOJ and FBI as effective as we need them to be in protecting America. I want to compliment Senators Grassley and Specter and their staffs for their hard work on these oversight issues and their commitment to continue this work. I ask consent to place a full copy of the report in the record.

The problems we have found in our oversight are not the types of issues that are amenable to "quick fixes." They require broader and systemic change, both administratively and through legislation and our oversight has begun producing that type of reform, and last Congress our Committee worked with the FBI and the Justice Department to achieve initial reforms.

Most notably, last fall we enacted a new Department of Justice charter that included some provisions of the FBI Reform Act that Senator Grassley and I introduced last year. We need to enact the rest of that bipartisan bill.

Our hearings of homeland security issues and, in particular, our whistleblower hearings last Congress were important events. It was not sheer coincidence that it was on the day of our hearing with FBI Agent Rowley that the Bush Administration reversed its position and began supporting a Homeland Security Department.

I was also pleased to join with Senators Grassley and Specter on Tuesday in introducing the "Domestic Surveillance Oversight Act of 2003," S. 436. This is another reflection of our bipartisan efforts to strengthen effective oversight of the FBI. This bill would let a little much-needed sunlight into the domestic surveillance activities of our government.

I urge early Committee attention to these matters.

I am also encouraged to see a notice of a hearing next week with the Attorney General, FBI Director, Secretary Ridge and Director Tenet. That will undoubtedly be a full day with lots of questions and concerns from all Senators on this Committee.

I hope this is a signal that we will build upon the important oversight activities we began in the last Congress. Our oversight responsibilities are a fundamental part of our congressional responsibilities. The Senate was intended to be a check on Executive power and to provide balance in our government. We need to fulfill our intended role in this constitutional democracy.

Executive Nominations

We began this session with a number of important Executive Branch vacancies. The Secretary of the Homeland Security Department as was the Undersecretary of Border and Transportation Security. I was disappointed that this 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 Agency last Congress. 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.

I remain puzzled about why we have not received the nomination that the White House announced last year would be coming to fill the important post of Associate Attorney General. We also expect nominations to be Assistant Attorney General for the Civil Division, Assistant Attorney General for the Antitrust Division, and Assistant Attorney General for Legislative Affairs. None have been received. We also will need to consider the President's nominee to fill the critical post of Director of the Violence Against Women Office at the Department of Justice. Both the Office and the position were created in the Department of Justice authorization legislation enacted last year. We are experiencing some difficulty in getting the Administration to follow this important law.

We are approaching circumstances like those 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 deadly anthrax letters sent to Senator Daschle and to me that closed the Senate office buildings and displaced so many for so long.

Today the Judiciary Committee is being asked to consider a number of presidential nominees. It is my hope that we can make progress on several. Proceeding with the nominations to the Court of Federal Claims and U.S. Parole Commission raise fairness concerns. This President continues to proceed unilaterally on what have traditionally been bipartisan boards and commissions. That is unfortunate and problematic. Senate Democrats would appreciate this White House beginning to work with us rather than dictate to us.

Judicial Nominations

Then there is 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 I chaired the Judiciary Committee was able to confirm 100 judges and vastly reduce the judicial vacancies that had built up and were prevented by the Republican Senate majority from being filled by President Clinton.

Last year alone the Democratic-led Senate confirmed 72 judicial nominees, more than in any of the prior six years of Republican control. Not once did the Republican-controlled Committee consider that many of President Clinton's district and circuit court nominees, even though there were often more judicial nominees than that waiting for a hearing. In our efforts to turn the other cheek and treat this President's nominees better than his predecessor's had fared, we confirmed 100 judges in 17 months. Yet not a single elected Republican has acknowledged this tremendous bipartisanship and fairness. When Chief Justice Rehnquist thanked the Committee for confirming 100 judicial nominees, this was the first time this accomplishment had been acknowledged by anyone from a Republican background.

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 stated at one point that 67 vacancies meant "full employment" on the federal courts. Even with the vacancies that have arisen since we adjourned last year, we remain below the "full employment" level that Senator Hatch used to draw for the federal courts with 60 vacancies on the District Courts and Courts of Appeals. Unfortunately, the President has not made nominations to two dozen of those seats, and on more than one half of the current vacancies he has missed his self-imposed deadline of a nomination within 180 days. Of course, several of the nominations he has made are controversial.

Last Congress, we worked hard to keep a steady pace of hearings, even though so many of this President's judicial picks proved to be quite divisive and raised serious questions about their willingness to be fair to all parties. We held hearings for 90 percent of his nominees eligible for hearings, a total of 103 nominees, including a record 20 circuit court nominees. We voted on 102 of them, two of which were defeated after fair hearings and lengthy debate. The President has taken this unprecedented action of re-nominating candidates voted down in Committee in spite of the serious concerns expressed by fair-minded members of this Committee.

This year we have had a rocky beginning with a hearing that has caused a great many problems we might have avoided. We have proceeded to a Committee vote on the Estrada nomination and to a Committee vote on the Sutton nomination. We have been able to report and the Senate has already confirmed three more District Court nominees, bringing the total number of judicial nominations confirmed for President Bush to 103.

The rushed processing of nominees in these past few weeks has led to editorial cartoons showing conveyor belts and assembly lines with Senators just rubber-stamping these important, lifetime appointments without sufficient inquiry or understanding. What we are ending up with is a pile-up of nominees at the end of this rapidly-moving conveyer belt. There is no way that we can meaningfully keep up with our constitutional duty to determine the fitness of these nominees. The quality of our work must suffer, and slippage in the quality of justice will necessarily follow. I hope we will do all we can to prevent more of these "I Love Lucy" moments.

Of course, I do not wish to return to the days during President Clinton's Administration when the Republican majority scheduled so few hearings. The Chairman has indicated that he intends to hold another judicial nominations hearing next Wednesday but we do not know the identities of the nominees he intends for the Committee to consider. It is difficult to plan and prepare when we are denied even the minimum notice required by Senate rules. I once again ask that he work with us and note that the rush of activity and unnecessary secrecy is not helpful to the work of the Committee.

Today, it is my understanding that we are prepared to debate and vote on the controversial nomination of Jay Bybee to the United States Court of Appeals for the Ninth Circuit. He will be the third circuit court nominee considered by this Committee in the last month.

A number of Senators have asked the Chairman to reconvene the hearing with Justice Cook and Mr. Roberts because of the circumstances under which it was held and not satisfactorily completed. We have also taken the White House up on its offer to make the nominees available with a joint letter seeking an opportunity to make further inquiries of them. Regrettably, yesterday the White House withdrew its offer and now refuses to proceed. That change of position by the White House on top of the inadequate hearing on these important nominations has created another impasse and unnecessary complication. I ask that copies of the exchange of letters with the White House be included in the record. This circumstance will make it impossible to proceed on either of those nominations today.

Let me be specific: On January 29, the Judiciary Committee met in an extraordinary session to consider six important nominees for lifetime appointments to the federal bench, including three controversial nominees to circuit courts, Jeffrey Sutton, Deborah Cook and John Roberts. Several Senators only officially learned the names of the nominees on the agenda for that hearing at 4:45 p.m. on the January 28, the day before.

On learning that the Chairman did indeed intend to include three controversial circuit court nominees on one hearing, something virtually unprecedented in the history of the Committee, and absolutely unprecedented in this Chairman's tenure, Democrats on the Committee wrote to the Chairman to protest. We explained that since 1985, when Chairman Thurmond and Ranking Member Biden signed an agreement about the pace of hearings and the number of controversial nominees per hearing, there has been a consensus on the Committee that Members ought to be given ample time to question nominees, and that controversial nominees in particular deserve more time.

We explained that we were surprised by the Chairman's rush to consider these three nominees at

the same time, considering the pace at which President Clinton's nominees were scheduled for hearings. During the time Republicans controlled the Senate and Bill Clinton was president, there was never a hearing held to consider three circuit court nominees at once. Never. Finally, we explained the importance of giving Senators sufficient time to consider each nominee and properly exercise their Constitutional duty to give advice and consent to the President's lifetime appointments to the federal bench. I ask that a copy of that letter be included in the record.

But our request went unanswered, and we were expected to question three nominees in the space of a single day. That proved impossible, as was evident throughout that long day. My colleagues and I asked several rounds of questions of Mr. Sutton, and were only able to ask a very few questions of the other two nominees. We asked, during the hearing itself, that the Chairman reconsider and ask the other two nominees to return the next day or the next week, and to give them the time they deserved in front of the Committee, but he refused.

We asked the same thing after the hearing, and were told that indeed the nominees would make themselves available to meet with each of us, so we wrote this week to accept those offers, although as we explained, we would have preferred to meet with them altogether, and in a public session. But again, we were rebuffed. I wonder, though, if they were available for one sort of meeting, why were they not available for another. I regret that we were not able to arrange that. So, at our last meeting, we explained that we were prepared to debate and vote on the Sutton nomination, but that we were not prepared to consider Justice Cook or Mr. Roberts. Nothing has changed in that time. Today, my colleagues and I are prepared to debate and vote on the Bybee nomination, but we continue to insist that we have additional time with the other two nominees before we are rushed into considering their nominations in the Committee.

During the last four years of the Clinton Administration, his entire second term in office after being reelected by the American people, this Committee refused to hold hearings and Committee votes on his qualified nominees to the D.C. Circuit and the Sixth Circuit. Today, in sharp contrast, this Committee is being required to proceed on three controversial nominations to those circuit courts -- simultaneously. This can only be seen as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance.

That having been said, and despite the extensive delays the Republican Senate majority caused in the consideration of President Clinton's nominations to the Ninth Circuit, we are prepared to proceed to debate the nomination of Jay Bybee to the Ninth Circuit. I know that Senator Biden has strong views about this nomination and expect other Senators will want to be heard, as well.

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Statement of Senator Patrick Leahy
On the Nomination of Jay Bybee to the U.S. Court of Appeals for the Ninth Circuit
Judiciary Committee Business Meeting
February 27, 2003

The nomination of Jay Bybee for a lifetime appointment to the Ninth Circuit Court of Appeals is a difficult one for me.

It is made all the more difficult by the respect I have for the senior Senator from Nevada, who has supported this nomination.

I know that Senator Biden will make a compelling case against this nomination. I know that we intended to and did establish a separate Violence Against Women Office at the Department of Justice and a Director subject to Senate confirmation when we wrote the Department of Justice authorization legislation and enacted it last year. How Mr. Bybee could misinterpret that measure is beyond me. Yet because we are being prohibited from knowing his reasoning, we are left in a void.

Obviously, the work Mr. Bybee has done while Assistant Attorney General for the Office of Legal Counsel at the Department of Justice has earned him the President's nomination for this lifetime appointment. The Senate is being asked to take his work on faith without having an opportunity to evaluate it. That is most troubling to me.

Mr. Bybee appeared before us in 2001 when he was nominated to serve at the Department of Justice. During that confirmation hearing, Mr. Bybee promised this Committee that as Assistant Attorney General, he would "not trample civil rights in the pursuit of terrorism" and that he would "bring additional sensitivity to the rights of all Americans" to his work at the Justice Department. I have serious concerns about how the Department of Justice has been operating. Given the veil of secrecy imposed by the Administration, we have little basis on which to evaluate Mr. Bybee's role in the positions and actions of the Department.

Unfortunately, Mr. Bybee's hearing for judicial office took place on a particularly busy morning when many Senators had other Committee obligations and during the Secretary of State's address to the United Nations regarding Iraq. Many of us were unable to attend Mr. Bybee's hearing in person that day. At least five of us submitted detailed sets of written questions to ask about his promise to the Committee regarding his important work at the Justice Department, as well as some controversial views he has taken in his academic writings.

After reviewing his responses to our questions, I must admit that I am disappointed with Mr. Bybee's repeated refusal to comment on anything he worked on since his confirmation to the Justice Department. Mr. Bybee has proven himself to be the latest judicial nominee to adhere to the Administration's strategy of stonewalling the Committee. In response to more than 20 different questions by five Senators, Mr. Bybee refused to provide any answer that would allow us to review either his personal views about important legal positions that the Administration has taken or whether he even rendered advice to the Administration on these issues.

I have given a lot of thought to this nomination but must honestly admit that I remain undecided how I will ultimately vote. I have grave concerns that Mr. Bybee is another in a long line of circuit court nominees from this President who will prove to be an ideologically driven conservative activist if accorded lifetime tenure on the Court of Appeals. The President himself has said that he does not favor appointing ideological activists to the federal courts, but apparently he did not mean conservative ones.

I will vote to allow the Committee to report this nomination to the Senate for further consideration and action as another gesture of goodwill to the Chairman and to the Administration.

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