Testimony of

The Honorable Patrick Leahy

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This week the Judiciary Committee is holding its fourth and fifth hearings this year involving a total of 20 Article III judicial nominees, three nominees to the Court of Federal Claims and two nominees to the Sentencing Commission. This is so much faster and more extensive than in prior years in which the Republican majority was last in charge, it makes one's head spin. This week, the Republican-led Senate Judiciary Committee will hold its sixth hearing for a circuit court nominee since January. In all of 1996 and in all of 2000, the Republican majority did not hold hearings on as many as six circuit nominees. In 1997 and 1999, Republicans did not hold a hearing for as many as six circuit nominees until September and, in 1995, this mark was not reached until June. Never in any of their most recent six and one-half years in the majority did Republicans hold hearings for as many as six circuit court nominees by March, never. In addition, it was not until the fall of 1997 that Republicans proceeded with hearings as many as 20 Article III judicial nominees of President Clinton and in the three other years in which they were in the majority during the Clinton Administration, they took until the summer to reach that benchmark. The current pace makes the editorial cartoons about assembly line rubber-stamping of lifetime appointments to the federal bench all too accurate. The Senate Judiciary Committee review and hearing process has been changed overnight by the Republican majority as have so many aspects of the confirmation process. Their double standards are showing in the way they approach hearings, Committee debates and floor action on judicial nominees.

We all know that we work better when we work together in a bipartisan manner; when we honor traditions and rules that respect both sides of the aisle; when there is give and take; when there is advising, as well as consenting. I am sorry that the Bush Administration is so resistant to those traditions, those processes and bipartisanship. I believe that we need to uphold the Aadvice@ prong of our advise and consent responsibilities by involving home-state Senators, this Committee and the Senate. I continue to hear from home-state Senators that they receive little more than notification from this Administration and that it remains most reluctance to consult about potential nominations. When Democrats were in the majority in the 107th Congress, we took many steps in good faith to repair damage done to the confirmation process through the intransigence shown to President Clinton's nominees by a Republican Senate. We confirmed 100 of President Bush's judicial nominees in that time - including to circuits for which Republicans had repeatedly refused to act on Clinton nominees. The Democratic Senate acted far faster and more fairly than the Republican-led Senate had with Clinton nominees.

This Administration continues to resist efforts to increase the use of bipartisan selection commissions, which have been so useful for so many years and worked so well in previous Administrations. Such bipartisan commissions can help us all ensure that nominees are selected based upon professional merit and experience. The recommendations of such commissions have the support of members from their community on both sides of aisle. Accordingly, these bipartisan commissions can help preserve the independence and integrity of the judicial branch of government and ensure the fair and equal administration of justice and enforcement of the law.

This President's White House Counsel has indicated publicly that he disfavors bipartisan committees because he believes that they Ausurp the president=s constitutional authority to choose judges.@ That is so unfortunate. Recommendations from bipartisan commissions have helped me, many other Senators and many other Presidents as we fulfill our constitutional duties in connection with judicial appointments. Bipartisan commissions do not make nominations in lieu of the President and do not confirm in place of the Senate. The Administration=s disdain for bipartisan commissions ignores past precedent and longstanding traditions.

To their credit, the Senators from California have persevered in their efforts to have potential candidates for at least the federal district courts in their State to be reviewed by bipartisan review committees. I am pleased to see two nominees from California on today=s hearing who are the product of the bipartisan selection commission established by the Senators from California and the White House. Both of these nominees are current judges who come before us with the support of California=s highly-regarded selection commissions. I welcome Judge Carney and Judge Selna and their families here today. I regret that the President and his advisors have resisted naming other qualified recommendations from those commissions over the last two years.

The two other District Court nominees before us today are from Indiana. They, too, are supported by their home-state Senators, a bipartisan delegation. Senator Bayh supports them and Senator Lugar wrote me a wonderful letter about the outstanding qualifications of these two nominees. I have a great deal of respect for their judgment and I look forward to hearing from Magistrate Judge Springman and Mr. Simon today.

Today, we also have before us two nominees each to the Court of Federal Claims and the U.S. Sentencing Commission. Appointments to these two specialized bodies have enjoyed a tradition of bipartisanship. I fear that bipartisan cooperation is breaking down, however. The rules are again changing and this Administration appears to be acting unilaterally in disregard for tradition and bipartisanship in the selection of nominees to this court and commission as it has so far in connection with the U.S. Parole Commission. That, too, is most unfortunate and unnecessary.

The process for nominating judges to the Court of Federal Claims has traditionally included accommodation and compromise. For more than two years Senate Republicans blocked President Clinton=s appointment of Larry Baskir to the court until a compromise could be reached. They refused to give him a hearing and refused to allow any of the other vacancies to be filled unless the Clinton Administration promised to keep conservative Judge Loren Smith as the Chief Judge. Republicans also insisted on the reappointment of another Republican appointee, Judge Christine Miller. Finally, Senator Hatch agreed to allow five Clinton nominees to have hearings and votes if the Administration also named a member of his staff to the court and promised to retain Judge Smith as Chief until his retirement into lifetime senior status at the end of his term appointment.

Upon Chief Judge Smith's Aretirement,@ President Clinton named Judge Baskir the Chief Judge. Shortly after his inauguration, President George W. Bush summarily removed Judge Baskir as Chief Judge and installed Judge Damich as the Chief Judge.

Last fall when the Democrats were in the majority, we took the exceptional action of quickly moving the nomination of Larry Block to the Court of Federal Claims at the request of the Ranking Republican, Senator Hatch. At that time, I noted that we would expect fairness and consideration in return, including true bipartisan consultation with respect to Federal Court of Claims nominations. Despite our accommodation on Judge Block=s nomination, the White House refused to act on the nomination of Judge Sarah Wilson, who up until a few months ago was already serving with distinction on the Court of Federal Claims. Judge Wilson is a well-respected and talented lawyer who graduated from Columbia Law School, clerked for a federal judge, was a fellow with the Administrative Office of the Courts, and served in the Department of Justice and in a prior White House. Yet the Administration and the Senate Republicans refused to accommodate our request to consider her nomination for a continued position on the court. Indeed, none of this Administration's nominations to the Court of Federal Claims are being made at the suggestion of the Senate's Democratic Leader.

It troubles me that despite a long history of compromise and accommodation regarding appointments to this court, there has been no consultation with the Democratic leadership regarding the remaining nominations to the Court of Federal Claims. Instead, the White House proceeds as it does with most thingsB unilaterally.

It is unfortunate that this Administration has adopted the same approach with respect to the Sentencing Commission. As my colleagues well remember, President Clinton worked long and hard at reaching a compromise with Senate Republican leaders on a slate of nominees to this important Commission. Seats went unfilled for too long while a Democratic White House negotiated with Majority Leader Lott and Chairman Hatch. Finally, in late 1999, we were able to get agreement from the Republican caucus and nominations went forward. Instead of honoring this tradition and doing what President Clinton had done, President Bush did not consult with Senate Democrats. Thus, with respect to the nominations before us today for the Sentencing Commission, they are not based on recommendations of the Senate's Democratic Leader or leadership. That is certainly not consistent with the traditions and understandings so long adhered to between White Houses and Senate leaders. It is just another example of the serious lack of consultation between the White House and Senate Democrats on nominations of all sorts.

Mr. Victor Wolski is one of the President's nominees to the Court of Federal Claims. In 1999, Mr. Wolski told the National Journal that Aevery single job [he has] taken since college has been ideologically oriented, trying to further [his] principles.@ Mr. Wolski has dedicated his brief legal career to expanding property rights and restricting the power of government. I am concerned that Mr. Wolski has been moved to the front of the list of nominees to the Court of Federal Claims because of his ideology. His has advocated for property rights at the expense of environmental protection. The Court of Federal Claims has jurisdiction for many so-called "takings" cases that seek large monetary damages from the government. I fear that Mr. Wolski was selected for this particular nomination to implement an ideological agenda from the bench.

I am also concerned that this particular court has no pressing need for additional judges in light of its caseload. My friends on the other side of the aisle repeatedly asserted when a Democratic President occupied the White House that we should not be confirming nominees to courts where the caseload is especially light. Senators Sessions and Grassley have both argued that vacancies on courts such as the D.C. Circuit should remain open due to the enormous costs that are involved in filling positions. Senator Grassley told us that it costs U.S. taxpayers about a million dollars per judge. A recent law review article by Professor Schooner at the George Washington Law School has issued a comprehensive report on the Court of Federal Claims. In this report, he compiles data on the surprisingly light caseload of the 24 judges who currently serve on the Court of Federal Claims. We will need to consider whether there is a sufficient need for additional judges on this specialized court.

If we decide that additional positions are necessary on the Court of Federal Claims, I urge the White House and Chairman Hatch to work with us to assemble the type of bipartisan panel that Senator Hatch helped assemble in 1997 and 1998 to fill the justified vacancies on the Court of Federal Claims in a way that respects the tradition of bipartisanship that has been required for appointments to this court.

It is one thing for a President to appoint members of his Cabinet to carry out his political agenda, but it should be different with respect to judicial appointments. When a President makes nominations for positions to a co-equal branch of government, he should not be able to tip the scales of justice by packing the courts with ideologues who are selected to implement his political agenda. Recently, Walter Dellinger noted that the President=s Aslate of nominees, considered as a whole, . . .[is] a list tilted to the right and from which any other views have been carefully culled.@ I agree that we need to broaden the slate. Working together on the Court of Federal Claims, traditional bipartisan commission, through bipartisan judicial selection commissions and in other ways are important places to continue our traditions of bipartisanship on which Republicans were so insistent during the Clinton Administration.

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