Testimony of

The Honorable Patrick Leahy

March 27, 2003

Opening Statement Of Senator Patrick Leahy
Business Meeting Of The Senate Judiciary Committee
March 27, 2003

A number of Senators who are members of this Committee and of the Senate Appropriations Committee have informed the Chair that we will not be able to be present this morning in light of the Appropriations Committee hearing with members of the President's Cabinet on the President's request for $75 billion in emergency appropriations for military operations in Iraq. Wanting to participate fully in the proceedings of this Committee and its debate, we suggested that this meeting be rescheduled for another time. I will have to leave after only a few minutes this morning to hear from Secretary Rumsfeld, Secretary Ridge and others on the emergency appropriations request.

Today in this Committee much of the debate will center on a most unfortunate development when the Chairman on February 27 chose to override our Committee Rule IV and insisted on unilaterally terminating Committee debate on two controversial judicial nominations. The modest protection provided by our Committee Rule IV had been accorded Republican and Democratic minorities over the last 24 years on this Committee under all Democratic and Republican Chairmen. It has been honored by Chairman Kennedy, Chairman Thurmond, Chairman Biden, Chairman Hatch previously, and by me. I will have more to say about this as our debate ensues today. I continue to urge the Chairman to reconsider and join us in confirming the modest protection of the minority that our rules have included since 1979.

Legislation
Last week I urged the Chairman to include the First Responders Partnership Grant Act, S.466 or S.315, on the agenda. These are urgently needed legislative efforts we have offered to help our state and local police, fire and medical personnel, who are on the front lines on the home front in the war on terrorism. I believe that they should be among our top priorities.

Senator Schumer and I urged greater budget authority for first responders in the Senate's consideration this week of the budget resolution. Unfortunately, with every Republican voting against the first responder amendments, we were unsuccessful. My amendment, for example, would have amended the budget resolution to ensure that there was adequate budget authority for first responders in fiscal year 2004, which begins this fall. Without a single Republican vote, that amendment failed. We now have a situation in which the President is sending the Congress an emergency supplemental appropriations request that includes a few billion dollars for first responders this year, but we will then effectively cut their budget authority come October because we failed to provide for them in the budget. That is wrong.

What this Committee can do to improve matters is to move ahead expeditiously with the First Responders Partnership Grant Act, work for its Senate consideration and passage, and help improve our readiness and our homeland security. Acting promptly would help facilitate the budget and funding decisions that the Congress will be making in the weeks ahead.

Instead of proceeding with the First Responders Partnership Grant Act, the Committee has chosen to list S.274, a class action bill. When the Chairman mentioned last week in response to my request that he was thinking about class action legislation, a number of us wrote to him asking for a hearing. I ask that a copy of the March 25 letter sent by Senator Kennedy, Senator Biden, Senator Feingold, Senator Durbin, Senator Edwards and myself be included in the record. We noted that the class action bill has far-reaching impact and that it would be useful to hold hearings "to help the Committee develop consensus reforms to better serve defendants and plaintiffs before the Committee proceeds to a markup." Our request apparently has been rejected.

Just yesterday the Chairman received a letter from the Judicial Conference on S.274, in which the Conference notes that it "continues to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses." The Judicial Conference bases its opposition on principles of federalism and workload concerns.

The Judicial Conference goes on to indicate that any effort to increase federal court jurisdiction over class actions that are truly nationwide class actions "should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and States' jurisdiction over in-state class actions is left undisturbed."

Given the significant opposition and reservations of the Judicial Conference of the United States -- a body that is headed by the Chief Justice and which represents the federal judges to whom S. 274 would send class action cases -- we would have been wise to have held a hearing. We should consider their legitimate concerns as well as those of the Leadership Conference on Civil Rights and the many others who oppose this legislation.

The priority of this Committee is to force confrontation on controversial class action legislation rather than develop a broader consensus. Most importantly, I regret that this class action matter is being treated as a higher priority than homeland security and efforts better to provide the assistance needed by our local and state police, fire and medical personnel.

Oversight

I said last week that 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.

I have also asked the Chairman to schedule prompt Committee action on S.436, the Domestic Surveillance Oversight Act. This is a bill that Chairman Grassley, Chairman Specter, Senator Feingold, Senator Edwards and I introduced based in large part on the oversight work we have accomplished over the last few years. I also hope that we will continue the robust congressional oversight we began.

Nominations
This year the President has taken the truly unprecedented action of renominating candidates voted down by this Committee. That is a significant problem.

This year we have had a rocky beginning with a hearing that has caused a great many problems we might have avoided. Holding one hearing for three controversial circuit court nominees broke the agreement struck back in 1985 between Democratic and Republican members on this Committee and in the Senate.

The Chairman's insistence on terminating debate on the Cook and Roberts nominations in contravention of Rule IV is another serious problem. I will return to it in our discussion of the recent violations of Rule IV.

The Chairman apparently intends to reverse another practice that he followed without exception when he previously chaired the Committee, at a time when a Democratic president occupied the White House. He intends to proceed on a judicial nominee who does not have the support of a home-state Senator. He never proceeded over the opposition of a home-state Republican Senator. Now that the objection come from a Democratic Senator, that practice is being changed, as well.

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 the most recent period of Democratic control of the Judiciary Committee, was able to confirm100 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. In our efforts to repair damage done to the process in the previous six years of Republican control of the Senate, we initiated many good-faith steps to 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 our 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. I thanked him last week when I appeared before the Judicial Conference.

Almost all of the judges confirmed are conservatives, many of them quite to the right of the mainstream, and many have pro-life beliefs and records. 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 54, despite an additional 60 new vacancies that had arisen. I recall that Senator Hatch said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also repeatedly stated 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 additional confirmations this week, we could move below 50 vacancies.

The Senate has proceeded to confirm 111 of President Bush's judicial nominees, so far, including 11 this year alone. The Senate recently confirmed the controversial nomination of Jay Bybee to the 9th Circuit, another pro-life judicial nominee. Already this year the Senate has confirmed more circuit court judges than Republicans allowed to be confirmed in the entire 1996 session. It was not until late July in 1999 that 11 of President Clinton's judicial nominees were confirmed in the first session of the last Congress in which Republicans controlled the Senate majority.

I expect that the Senate will soon proceed to confirm the California and Indiana District Court nominees the Committee reported out last week. The California nominees come from the bipartisan selection commissions Senator Feinstein and Senator Boxer have established in California and the Indiana nominees have the bipartisan support of their Senators. They will bring the Senate's total this year to15. The Senate did not confirm15 of President Clinton's judicial nominees in 1999 until September of that year. Thus, we are already 6 months ahead of the pace Republicans maintained when considering President Clinton's judicial nominees.

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.

The Chairman has indicated that he intends to hold another judicial nominations hearing this afternoon and another next Tuesday. These will be the sixth and seventh hearings for judicial nominees this year. There were whole years in which the Chairman did not hold seven hearing on President Clinton judicial nominees.

Also on the agenda today are nominations to the Court of Federal Claims and U.S. Sentencing Commission. These 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. We look forward to hearing from the White House that it intends to work with the Senate Democratic leader and us in filling such vacancies.

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Statement of Senator Patrick Leahy
On The Nomination of Priscilla Owen
To Be a Judge on the United States Court of Appeals For the Fifth Circuit
March 27, 2003

Two weeks ago today, this Committee met in an extraordinary, unprecedented session to reconsider the nomination of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. Never before has a President resubmitted a circuit court nominee already rejected by the Senate Judiciary Committee, for the same vacancy. And until two weeks ago, never before had the Judiciary Committee rejected its own decision on such a nominee and granted a second hearing. But, having decided not to give even one hearing to President Clinton's nominees to the Fifth Circuit from Texas -- Enrique Moreno and Judge Jorge Rangel -- and having decided not to give satisfactory hearings to President Bush's nominees to the D.C. and Sixth Circuits -- John Roberts and Deborah Cook -- the Committee nonetheless proceeded with another hearing for Justice Owen.

And what did we learn in that second hearing? We learned that given some time, Justice Owen was able to enlist the help of the talented lawyers working at the White House and the Department of Justice to come up with some new justifications for her activism. And we learned that given six months to reconsider the severe criticism directed at her by her Republican colleagues, she still admits no error. Mostly, I think we learned that the objections expressed last September were sincerely held then and sincerely held now. Nothing Justice Owen amplified about her record -- indeed, nothing anyone else tried to explain about her record - actually changed her record.

In September, when we considered this nomination in Committee the first time, I said that I was proud that Democrats and some Republicans had kept to the merits of the nomination, and chose not to vilify, castigate, unfairly characterize and condemn without basis Senators working conscientiously to fulfill their constitutional responsibilities. After hearing some of the ugly things that were subsequently said at that business meeting, some of the accusations made against my colleagues and those interested citizens who expressed opposition to Justice Owen's nomination, I was sorely disappointed that not everyone kept to the merits.

I continue to believe that what Senator Feinstein said that day is true: by doing its job on the Owen nomination, by exercising due diligence, examining records, and not just rubber stamping every nominee that the President sent to us, this Committee showed itself to be alive and well. We confirmed the overwhelming majority of the President's judicial nominees, 100 out of 103 considered while I was Chairman, but we took the time to look at their records, and gave each person nominated to a lifetime seat on the federal bench the scrutiny he or she deserved. We did not have an assembly line like that which has been in overdrive since the beginning of this Congress.

The rush to judgment on so many of the nominees before us does not change the fact that we fully and fairly considered the nomination of Priscilla Owen fairly last year. The record was sufficient when we voted last year. It needed no "setting straight." So, I will submit for the record the reasons I articulated for voting "no" the last time this nomination was before us.

I have read her written answers, many newly formulated, that attempt to explain away her very disturbing opinions in the Texas parental notification cases. Her record is still her record, and the record is clear. She still does not satisfactorily explain why she infuses the words of the Texas legislature with so much more meaning than she can be sure they intended. She adequately

describes the precedents of the Supreme Court of the United States, to be sure, but she simply does not justify the leaps in logic and plain meaning she attempted in those decisions.

I have read her responses to Senator Hatch's "testimony" of two weeks ago, at her second hearing, where he attempted to explain away cases about which I had expressed concern last year. For example, I know what the Chairman explained to her the opinion she wrote in a case called F.M. Properties v. City of Austin. I read how he recharacterized the dispute in an effort to make it sound innocuous, just a struggle between two jurisdictions over some unimportant regulations. I know how, through a choreography of leading questions and short answers, they tried to respond to my question from last July, which was never really answered, about why Justice Owen thought it was proper for the legislature to grant large corporate landowners the power to regulate themselves. Again, I am unconvinced. The majority in this case, which invalidated a state statute favoring corporations, does not describe the case or the issues as the Chairman and the nominee have. A fair reading of the case shows no evidence of a struggle between governments. This is all an attempt at after-the-fact justification where there really is none to be found.

Justice Owen and Chairman Hatch's explanation of the case also lacked even the weakest effort at rebutting the criticism of her by the F.M. Properties majority. In its opinion, the six justice majority said, and I am quoting, that Justice Owen's dissent was, "nothing more than inflammatory rhetoric." They explained why her legal objections were mistaken, saying that no matter what the state legislature had the power to do on its own, it was simply unconstitutional to give the big landowners the power they were given. No talk of the City of Austin v. the State of Texas. Just the facts.

Likewise, the few explanations offered for the many other examples of the times her Republican colleagues criticized her were unavailing. The tortured reading of Justice Gonzales' remarks in the Doe case were unconvincing. He clearly said that to construe the law in the way that Justice Owen's dissent construed the law would be activism. Any other interpretation is just not credible.

And no reasons were offered for why her then-colleague, now ours, Justice Cornyn, thought it necessary to explain the principle of stare decisis to her in his opinion in Weiner v. Wasson. Or why in Montgomery Independent School District v. Davis, the majority criticized her for her disregard for legislative language, saying that, "the dissenting opinion misconceives the hearing examiner's role in the . . . process," which it said stemmed from, "its disregard of the procedural elements the Legislature established . . . to ensure that the hearing-examiner process is fair and efficient for both teachers and school boards." Or why, in Collins v. Ison-Newsome, a dissent joined by Justice Owen was so roundly criticized by the Republican majority, which said the dissent agrees with one proposition but then "argues for the exact opposite proposition . . . [defying] the Legislature's clear and express limits on our jurisdiction."

I have said it before, but I am forced to say it again. These examples, together with the unusually harsh language directed at Justice Owen's position by the majority in the Doe cases, show a judge out of step with the conservative Republican majority of the Texas Supreme Court, a majority not afraid to explain the danger of her activist views. No good explanation was offered for these critical statements last year, and no good explanation was offered two weeks ago.

Politically motivated rationalizations do not negate the plain language used to describe her activism at the time.

Conclusion

I know my Republican colleagues will unfairly castigate us again today. Indeed, at her hearing two weeks ago, the Chairman was very dismissive of our concerns and our efforts to evaluate this nomination on the merits. She has now been before the Committee two times and neither time did the explanations change the facts we have before us. Priscilla Owen's record, as I have described it today, as we described it in September, does not qualify her for a lifetime appointment to the federal bench.

As I have demonstrated many times, I am ready to consent to the confirmation of consensus, mainstream judges, and I have on hundreds of occasions. But the President has resent the Senate a nominee who raises serious and significant concerns. In his selection of Priscilla Owen for the Fifth Circuit, the President and his advisors are trying to do to the Fifth Circuit what they did to the Texas Supreme Court. Plucked from a law firm by political consultant Karl Rove, Justice Owen ran as a conservative, pro-business candidate for the Texas Supreme Court, and she received ample support from the business community. She fulfilled her promise, becoming the most conservative judge on a conservative court, standing out for her ends-oriented, extremist decision making. Now, on a bigger stage, the President and Mr. Rove want a repeat performance on a court one step below the Supreme Court of the United States. I oppose this nomination.

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Statement Of Senator Patrick Leahy
On The Breach Of Judiciary Committee Rules
March 27, 2003

It should concern all members of the Committee, of both parties, that during the course of the February 27 business meeting, the Committee's current majority repeatedly violated our longstanding Committee rules and unilaterally declared the termination of debate on two controversial circuit court nominations. This is no small matter. It is of significant importance not only for now, but also for the future, and my detailed statement this morning is offered so the record will be clear for audiences now, and later.

Senator Daschle termed this breach of the rules deeply troubling and a "reckless exercise of raw power by a Chairman," and he is right. He observed that the work of this Senate has for over 200 years operated on the principle of civil debate, which includes protection of the minority. When a Chairman can on his own whim choose to ignore our rules that protect the minority, not only is that protection lost, but so is an irreplaceable piece of our integrity and credibility.

The Democratic Leader noted that faithful adherence to rule is especially important for the Senate and for its Judiciary Committee. He noted "how ironic that in the Judiciary Committee, a Committee which passes judgment on those who will interpret the rule of law," that it acted in conscious disregard of the rules that were established to apply to its proceedings. If this is what those who pontificate about "strict construction" mean by that term, it translates to winning by

any means necessary. If this is how the judges of the judicial nominees act, how can we expect the nominees they support as "strict constructionists" to behave any better? Given this action in disrespect of the rights of the minority, how can we expect the Judiciary Committee to place individuals on the bench that respect the rule of law?

In my 29 years in the Senate and in my reading of Senate history, I cannot think of so clear a violation of Senators' rights.

As Chairman of the Agriculture Committee, as Chairman of the Subcommittee on Foreign Operations of the Appropriations Committee and as Chairman of the Judiciary Committee, I strove always to protect the rights of the minority. I did not always agree with what they were saying or doing, I did not always find it convenient, but I protected their rights. It was not always as efficient as I might have liked, but I protected their rights. That is basic to this democracy and fundamental to the Senate of the United States. Senators respect other Senators' rights and hear them out.

There is no question that the Senate majority is in charge and responsible for how we proceed. I understand that and always have - I only wish that some on the other side of the aisle had shared that view when I chaired the Judiciary Committee last year. But in the Senate the majority's power is circumscribed by our rules and traditional practices. We protect and respect the rights of the minority in this democratic institution for the same reason we steadfastly adhere to the Bill of Rights.

I am concerned about this abuse of power and breach of our Committee rules. When the Judiciary Committee cannot be counted upon to follow its own rules for handling important lifetime appointments to the federal judiciary, everyone should be concerned. In violation of the rules that have governed that Committee's proceedings since 1979, the Chairman chose to ignore our longstanding Committee Rules and short-circuit Committee consideration of the nominations of John Roberts and Deborah Cook. Senator Daschle spoke to that matter that day. Senator Feinstein, Senator Schumer, Senator Durbin and Senator Feingold have also spoken to this breach of our rules as well as a number of other liberties that Republicans have been taking with the rules.

Since 1979 the Judiciary Committee has had this Committee rule, Rule VI, to bring debate on a matter to a close while protecting the rights of the minority. It may have been my first meeting as a Senator on the Judiciary Committee in 1979 that Chairman Kennedy, Senator Thurmond, Senator Dole, Senator Cochran and others discussed adding this rule to those of the Judiciary Committee.

Senator Thurmond, Senator Hatch and the Republican minority at that time took a position against adding the rule and argued in favor of any individual Senator having a right to unlimited debate- so that even one Senator could filibuster a matter. Senator Hatch said that he would be "personally upset" were unlimited debate ended.

He explained:
"There are not a lot of rights that each individual Senator has, but at least two of them are that he can present any amendments which he wants and receive a vote on it and number two, he can

talk as long as he wants to as long as he can stand, as long as he feels strongly about an issue. I think those rights are far superior to the right of this Committee to rubber stamp legislation out on the floor."

It was Senator Dole who drew upon his Finance Committee experience to suggest in 1979 that the Committee rule be that "at least you could require the vote of one minority member to terminate debate." Senator Cochran likewise supported having a "requirement that there be an extraordinary majority to shut off debate in our Committee."

The Judiciary Committee proceeded to adopt Rule IV and it has been maintained ever since. It struck the balance that Republicans had suggested by requiring the agreement of one member of the minority before allowing the Chairman to cut off debate.

That protection for the minority has been maintained by the Judiciary Committee for the last 24 years under five different chairmen - Chairman Kennedy, Chairman Thurmond, Chairman Biden, under Chairman Hatch previously and during my tenure as chairman.

Rule IV of the Judiciary Committee provides the minority with a right not to have debate terminated and not to be forced to a vote without at least one member of the minority agreeing. That rule and practice had until last month always been observed by the Committee, even as we have dealt with the most contentious social issues and nominations that come before the Senate.

Until last month, Democratic and Republican Chairmen had always acted to protect the rights of the Senate minority. The rule has been the Committee's equivalent to the Senate's cloture rule in Rule 22. It had been honored by all five Democratic and Republican chairman, including Senator Hatch - until last month.

It was rarely utilized, but Rule IV set the ground rules and the backdrop against which rank partisanship was required to give way, in the best tradition of the Senate, to a measure of bipartisanship in order to make progress. That is the other important function of the rule.

Besides protecting minority rights, it enforced a certain level of cooperation between the majority and minority in order to get anything accomplished. That, too, has been lost as the level of partisanship on the Judiciary Committee and within the Senate reached a new low when Republicans chose to override our governing rules of conduct and proceed as if the Senate Judiciary Committee were a minor committee of the House of Representatives.

That this was a premeditated act is apparent from the debate in the Committee. Senator Hatch indicated that he had checked with the parliamentarians in advance, and he apparently concluded that since he had the raw power to ignore our Committee rule so long as all Republicans on the Committee stuck with him, he would do so. I understand that the parliamentarians advised Senator Hatch that there is no enforcement mechanism for a violation of Committee rules and that the parliamentarians view Senate Committees as "autonomous." I do not believe that they advised Senator Hatch he should violate our Committee rules or that they interpreted our Committee rules.

I cannot remember a time when Senator Kennedy or Senator Thurmond or Senator Biden were chairing the Committee when any of them would have even considered violating their responsibility to the Senate and to the Committee and to our rules. Accordingly, we have never been faced with a need for an "enforcement mechanism" or penalty for violation of a fundamental Committee rule.

In fact, the only occasion I recall Senator Hatch was previously faced with implementing Committee Rule IV, he did so. In 1997 Democrats on the Committee were seeking a Senate floor vote on President Clinton's nomination of Bill Lann Lee to be the Assistant Attorney General for Civil Rights at the Department of Justice.

Republicans were intent on killing the nomination in Committee. The Committee rule came into play when in response to an alternative proposal by Chairman Hatch, I outlined the tradition of our Committee. I said:
"This committee has rules, which we have followed assiduously in the past and I do not think we should change them now. The rules also say that 10 Senators, provided one of those 10 is from the minority, can vote to cut off debate. We are also required to have a quorum for a vote.

I intend to insist that the rules be followed. A vote that is done contrary to the rules is not a valid one."

Immediately after my comment, Chairman Hatch abandoned his earlier plan and said:
"I think that is a fair statement. Rule IV of the Judiciary Committee rules effectively establishes a committee filibuster right, as the distinguished Senator said."

With respect to the nomination in 1997, Chairman Hatch acknowledged:

"Absent the consent of a minority member of the Committee, a matter may not be brought to a vote. However, Rule IV also permits the Chairman of the Committee to entertain a non-debatable motion to bring any matter to a vote.

The rule also provides as follows: 'The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a rollcall vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the Minority."

Thereafter, given the objection, the Committee proceeded to a roll call vote whether to end the debate.

That was consistent with our longstanding rule. In that case, Chairman Hatch followed the rules of the Committee.

At the beginning of our meeting on February 27, I referenced the Committee's rules and during the course of the debate on nominations both Senator Kennedy and I sought to have the Committee follow them. We were overridden.

Last month the bipartisan tradition and respect for the rights of the minority ended when Chairman Hatch decided to override the rule rather than follow it. He did so expressly and intentionally, declaring: "[Y]ou have no right to continue a filibuster in this committee."

He decided, unilaterally, to declare the debate over even though all members of the minority were prepared to continue the debate and it was, in fact, terminated prematurely. I had yet to speak to any of the circuit nominees and other Democratic Senators had more to say.

Senator Hatch completely reversed his own position from the Bill Lann Lee nomination and took a step unprecedented in the history of the Committee. Contrast the statements of Senator Hatch in 1979 when he supported unlimited debate for a single Senator - with Republicans in the minority - with his action overriding the rights of the Democratic minority and his recent letter to Senator Daschle in which, now that Republicans hold the Senate majority, he says that he "does not believe the Committee filibuster should be allowed and [he] thinks it is a good and healthy thing for the Committee to have a rule that forces a vote."

But our Committee rule, while providing a mechanism for terminating debate and reaching a vote on a matter, does so while providing a minimum of protection for the minority. It is even that minimum protection that Chairman Hatch will no longer countenance.

Contrast Senator Hatch's recognition in 1997 that Rule IV establishes a Judiciary Committee "filibuster right" and that "[a]bsent the consent of a minority member of the Committee, a matter may not be brought to a vote," with his declaration last month that there is no right to filibuster in committee.

In his recent letter to Senator Daschle he declared that he "does not believe that Committee filibusters should be allowed." It is Senator Hatch who "turned Rule 4 on its head" last month, after 24 years of consistent interpretation and implementation by five chairmen. Never before his letter to Senator Daschle has anyone since the adoption of the rule in 1979 ever suggested that its purpose was to be narrowed and redirected to thwart "an obstreperous Chairman who refuses to allow a vote on an item on the Agenda." After all, as Senator Hatch recognizes in his letter, it is the chairman's prerogative to set the agenda for the markup.

This revisionist reading of the rule is not justified by its adoption or its prior use and appears to be nothing other than an after the fact attempt to justify the obvious breaches of the longstanding Committee rule and practice that occurred last month. It was not even articulated contemporaneously at the business meeting.

I appreciate the frustrations that accompany chairing the Judiciary Committee. I know the record we achieved during my 17 months of chairing the Committee, when we proceeded with hearings on more than 100 of President Bush's judicial nominees and scores of his executive nominees, including extremely controversial nominations, when we proceeded fairly and in accordance with our rules and Committee traditions and practices to achieve almost twice as many confirmation for President Bush as the Republicans had allowed for President Clinton, and I know how that record was mischaracterized by partisans. Those 100 favorably reported nominations included Michael McConnell, Dennis Shedd, D. Brooks Smith, John Rogers, Michael Melloy and many others.

I know that sometimes a chairman must make difficult decisions about what to include on an agenda and what not to include, what hearings to hold and when. In my time as chairman I tried to maintain the integrity of the Committee process and to be bipartisan. I noticed hearings at the request of Republican Senators and allowed Republican Senators to chair hearings. I made sure the Committee moved forward fairly on the President's nominees in spite of the Administration's unwillingness to work with us to fill judicial vacancies with consensus nominees and thereby fill those vacancies more quickly.

But I cannot remember a time when Chairman Kennedy, Chairman Thurmond, Chairman Biden, Chairman Hatch previously, or I, ever overrode by fiat the right of the minority to debate a matter in accordance with our longstanding Committee rules and practices.

The Committee and the Senate have crossed a threshold of partisan overreaching that should never have been crossed. I urge the Republican leadership to recommit the nominations of Deborah Cook and John Roberts to the Judiciary Committee so that they can be considered in accordance with the Committee's rules. The action taken last month should be vitiated and order restored to the Senate and to the Judiciary Committee.

I urge this Committee to rethink the misstep taken last month and urge the Chairman and the Committee to disavow the violations of Rule IV that occurred.

Since January 24, the Democratic minority on this Committee has debated and voted upon a number of controversial circuit court nominees. The Senate has moved forward to confirm Jay Bybee to the 9th Circuit and by so doing has already confirmed more circuit judges this year than the Republican majority allowed to be confirmed in the entire 1996 session.

The Senate has voted to confirm 111 of President Bush's judicial nominees, including 11 this year alone. In 1999, the Republican leadership of the Senate did not move forward to confirm 11 of President Clinton's nominees until July.

We have also worked hard to report a number of important executive nominations in spite of the continued partisanship by the White House and Senate Republicans. As Senator Feinstein has recently noted, we have cooperated by not insisting on our rights to seven days' notice or seven days' holdover on various matters and we have not insisted on three days' notice of items on the agenda.

We have proceeded to debate with less than a quorum present and Democrats have been responsible for making quorum after quorum so that this Committee could conduct business. Ironically, we did so even last month while our rights were being violated. Order and comity need to be restored to this Committee.

An essential step in that process is the restoration of our rights under Rule IV and recognition of our rights thereunder.

All of the Democratic Senators who serve on the Judiciary Committee have asked the Chairman to reconvene the hearing with Judge 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, 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 unnecessary complication.

That is why the minority, while prepared to debate and vote on the Bybee nomination to the 9th Circuit and nine other presidential nominations on February 27, wished to continue the debate on the Cook and Roberts nominations.

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.

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 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 if they were available for one sort of meeting, why were they not available for another. I regret that the White House refused our request to bring closure to those matters.

During the last four years of the Clinton Administration, his entire second term in office after being reelected by the American people, the Judiciary Committee refused to hold hearings and Committee votes on his qualified nominees to the D.C. Circuit and the Sixth Circuit. Last month, in sharp contrast, this Committee was required to proceed on two controversial nominations to those circuit courts in contravention of the rules and practices of the Committee. This can only be seen as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance. Unfortunately, the violations of Rule IV are now part of that effort, as well.

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