Testimony of

The Honorable Patrick Leahy

April 3, 2003

A number of Senators who are members of this Committee and of the Senate Appropriations Committee or otherwise interested in the emergency supplemental appropriations request of approximately $80 billion may be necessarily absent today. The bill is before the Senate today, and several of us may have to leave as important floor amendments in which we and our States are interested come before the Senate.

Nominations
The Chairman has listed a number of nominees on today's agenda in spite of the fact that their hearing was only last Thursday afternoon and we did not even receive the transcript of those proceedings until yesterday afternoon. I understand that the Committee has extended the deadline for written questions at least until tomorrow. But while that deadline for followup inquiry is being extended, the nominations are nonetheless being listed on the agenda. That is inappropriate without the consent of all Senators.

In addition, in the interim, members of the Committee have also spent a good deal of time reviewing another set of nominees who participated in a hearing just Tuesday morning, as well as on the votes in relation to two circuit nominees and three district nominees on the Senate floor. We all have a responsibility to fully inform ourselves and the Senate about the qualifications and the records of nominees for lifetime appointments to the federal courts, and when the scheduling lever is shifted into "frantic,"it does not help the Senate make informed judgments.

I remind the Committee that since at least the 1985 agreement endorsed by Chairman Thurmond, Ranking Member Biden, Majority Leader Dole and Minority Leader Byrd, the standard practice of this Committee has been to provide at least one week from the hearing to the time the nomination is placed on the agenda of the Committee. I ask that a copy of that agreement outlining this Committee's longstanding protocols be included in the record. That standard practice is not being followed today. That is another protocol of this Committee that is being sacrificed this year.

Senator Feingold and others spoke last week about the serious violations of Rule IV of our longstanding rules. This week we witnessed another significant change in practice when a hearing was held on a controversial judicial nominee who lacks the support of her home-state Senators. This year, for the first time in our history, a President renominated a person who was voted down by the Committee to the same judicial vacancy, and last week the nomination was considered by this Committee, which was another action without precedent.

The Republican majority has shown a corrosive and raw-edged willingness to change, bend and even break the rules that have long governed our proceedings and those that they followed when

the judicial nominees involved were a Democratic president's choices, instead of a Republican president's choices. Lest some observers wrongly conclude that this sudden and orchestrated series of rules changes is just 'politics as usual,' it most certainly is not. The rights of the minority are being overriden and the practices that have guided this Committee for decades are being ignored.

When there was a Democratic President in the White House, his judicial nominees were delayed and deferred by the Republican majority. Now that there is a Republican President, it seems that there is no past practice that will not be violated, no rule that will not be broken or rewritten or reinterpreted in aid of this Administration's ideological court-packing scheme. The Senate has an important role in the confirmation process, and it is not to rubberstamp unexamined nominees on a high-speed assembly line.

This year with a Republican in the White House, the Senate Republican majority has gone from idling -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees. The plain and simple truth is that the Republican majority follows two distinct sets of practices: No longer does the Committee's blue slip used by Republicans say, as it did when there was a Democratic president in the White House: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." No longer is that practice being followed- as it was assiduously and without exception on behalf of Republican home-state Senators when there was a Democratic President in the White House.

Under Democratic leadership we held hearings on 20 circuit court nominees in 17 months. While Republicans averaged seven confirmations to the circuit courts every 12 months, the Senate under Democratic leadership confirmed 17 circuit judges in its 17 months in the majority - and we did so with a White House that was uncooperative in a magnitude of historic proportions. Overall, in our 17 months the Senate confirmed 100 of this President's judicial nominees. Last year alone we confirmed 72 new judges, which is almost twice the average during the preceding six and one-half years of Republican control.

This year, in spite of the lack of cooperation by the Administration and the overbearing exercise of power by the majority, we have cooperated with Committee action and voted on 19 judicial nominees during the first two months of this year. We have proceeded in the Senate to vote on the confirmations of 15 judicial nominees, including two controversial nominees to the Circuit Courts. Sometime today or tomorrow, I expect that the Senate will act to confirm the sixteenth new judge this year and the 116th overall when we take up the nominations of Cormac Carney of California. That compares most favorably to how Republicans treated President Clinton's nominees. In the 1996 session, for example, the Senate did not confirm a single circuit judge all year and confirmed only 17 judges that entire year. In 1999, the third year of the last presidential term, the Senate did not reach the level we have already attained of 15 confirmations until September.
With the confirmation of Judge Carney we will have cut the number of judicial vacancies from the 110 we inherited to 50 - the lowest level it has been over the last 13 years. 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.

Today, in spite of the overreaching by the Republican majority, Democrats will again seek to demonstrate our good faith by moving to a vote on the nomination of Judge Edward Prado, a nominee from Texas to the United States Court of Appeals for the Fifth Circuit. It has been more than a decade since a Hispanic nominees to that Court, had been allowed a hearing by the Senate Judiciary Committee. Neither of President Clinton's Hispanic nominees to the Fifth Circuit was accorded a hearing, nor for that matter was Christine Arguello allowed a hearing when she was nominated to a vacancy on the Tenth Circuit.

Unlike Miguel Estrada, a highly controversial nominee to the D.C. Circuit, Judge Prado has 18 years experience as a U.S. District Court judge, which provided a record for evaluate. A review of Judge Prado's record on the bench shows a record of fairness and evenhandedness. While I may not agree with each and every one of his rulings or every action he has taken as a lawyer or judge, my review of his record leads me to conclude that he will be a fair judge. No supervisor or colleague of Judge Prado's has questioned his ability or willingness to interpret the law fairly. Judge Prado enjoys the full support of the Congressional Hispanic Caucus and the Mexican American Legal Defense and Education Fund. There has not been a single person or organization that has submitted a single letter of opposition or raised concerns about Judge Prado. No controversy, no red flags, no opposition, no basis for concern. I believe Senate Democrats will support Judge Prado, as we have so many others.

As I noted throughout the last two years, we are able to move ahead expeditiously when we have consensus, mainstream nominees. Unfortunately, far too many of this President's nominees have records that raise serious concerns about whether they will be fair judges to all parties on all issues. Those types of nominees should not be rushed through the process.

Two district court nominees who have strong bipartisan support and who have not engendered controversy may also be reported out expeditiously today. They are Richard Bennett of Maryland and Dee Drell of Louisiana. In spite of the breakneck pace, I believe all Democratic Senators are prepared to vote on these nominees and on the two U.S. Marshal nominees Raul Bejarano of California and Allen Garber of Minnesota.

Other nominees whose records are controversial or who are nominated to a court that is in the midst of controversy, namely the Court of Federal Claims, should not have been listed on the agenda and will not be voted on today. There are 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 and a balanced group of nominees for what have traditionally been regarded as bipartisan boards and commissions.

The rushed processing of nominees for the past 10 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, broken rules, and the degradation of Senators' ability to represent their constituents and fulfill their constitutional

responsibilities as a check on the executive. Assembly line confirmations will lead to assembly line justice or worse ideologically driven results.

Legislation

I was pleased that on Tuesday afternoon this week, Senator Hatch, Senator DeWine, Senator Kyl and I were able to join with Senator Dodd to hold a summit with key stakeholders on finding a bipartisan solution to the asbestos litigation crisis. The summit demonstrated the emerging consensus for a national trust fund approach to fairly and efficiently compensate victims of asbestos exposure. Unlike class action litigation, all the stakeholders involved in asbestos litigation are agreed that Congress needs to act now to pass balanced reforms. I look forward to working the Senator Hatch, Senator DeWine, Senator Dodd and other members of the committee to craft a balanced and effective bill. I hope we and our staffs can start meeting on a bipartisan basis to being that drafting process. We must work together on a bipartisan basis in order to be able to enact asbestos litigation reform legislation this year.

Over the last several weeks I have urged the Chairman to include the First Responders Partnership Grant Act, S.466 or S.315, on our Committee 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. I renew that urgent request. Had we acted on these matters, we would be in a better position to act on them in connection with the emergency supplemental appropriations matter being voted on today. Already, the budget resolution has been adversely affected by our lack of action. We now have a situation in which budget authority for our first responders will effectively be cut come October because we failed to provide for them in the budget. That is wrong.

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 first mentioned 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.

Last week the Committee 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, the Sierra Club and a coalition of enviromentalists and the many others who oppose this legislation.

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. I will have a statement on the bill and on my amendments at the appropriate time.

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 intend to support Senator Biden's safe ID bill as I have the efforts by Senator Cantwell and Senator Feinstein on these matters.

Oversight
I have noted over the last several weeks 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 note that this week Representatives Sensenbrenner and Conyers, the chair and ranking on the House Judiciary Committee, have joined in a number of oversight inquiries to the Attorney General. As a member of the Senate Appropriations Committee and of the Homeland Security Subcommittee I will of course make inquiries in that capacity, but I would like to work with the Chairman to ensure that this Committee also maintain an active oversight agenda.

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