Testimony of

The Honorable Patrick Leahy

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Opening Statement of Senator Patrick Leahy
Hearing before the Constitution Subcommittee,
Senate Judiciary Committee
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I look forward to a fair, balanced and bipartisan discussion of the judicial nomination and confirmation process. Since July 2001 a number of Senators have worked very hard to repair the damage done during the years 1995 through the early part of 2001. We made significant progress. Unfortunately our efforts have received little acknowledgment and the current Administration continues down the strident path of confrontation and court packing rather than working with Senators of both parties to identify and nominate consensus, mainstream nominees.

While the nation's unemployment rate rose last month to 6 percent. The vacancy rate on the federal judiciary has been lowered to 5.7 percent. While the number of private sector jobs lost since the beginning of the Bush Administration is 2.7 million, almost 9 million Americans are now out of work, and unemployment has risen by more than 45 percent, Democrats in the Senate have cooperated in moving forward to confirm 123 of this President's judicial nominees, reduce judicial vacancies to the lowest level in years, and reduce federal judicial vacancies by almost 60 percent. Yet the Republican-led Senate remains obsessed with seeking to force through the most divisive of this President's controversial, ideologically-chosen nominees.

In just the last two years 123 of the President's judicial nominees will have been confirmed. One hundred of those confirmations came during the 17 months of Democratic leadership of the Senate. No fair-minded observer could term that obstructionism. By contrast, during the six and one-half years during which Republicans controlled the Senate and President Clinton's nominations were being considered, they averaged only 38 confirmations a year. During the last two years of the Clinton administration, the Senate confirmed only 73 federal judges. Combining the 1996 and 1997 sessions, Republicans in the Senate allowed only 53 judges to be confirmed in two years, including only seven new judges to the circuit courts. One entire congressional session, the Republican-led Senate confirmed only 17 judges all year and none at all to the circuit courts. The Senate confirmed 72 judges nominated by President Bush last year alone under Democratic leadership.

The fact is that when Democrats became the Senate majority in the summer of 2001, we inherited 110 judicial vacancies. These are the facts. Over the next 17 months, despite constant criticism from the Administration, the Senate proceeded to confirm 100 of President Bush=s nominees, including several who were divisive and controversial, several who had mixed peer review ratings from the ABA and at least one who had been rated not qualified. Despite the additional 40 vacancies that arose, we reduced judicial vacancies to 60, a level below that termed Afull employment@ on the federal judiciary by Senator Hatch.
Since the beginning of this year, in spite of the fixation of the Republican majority on the President=s most controversial nominations, we have worked hard to reduce judicial vacancies even further. As of today, the number of judicial vacancies is at 47. That is the lowest it has been in several years. That is lower than it ever was allowed to go at any time during the entire eight years of the Clinton Administration. We have already reduced judicial vacancies from 110 to 47, in less than two years. We have reduced the vacancy rate from 12.8 percent to 5.6 percent, the lowest it has been since 1990. With some cooperation from the Administration think of the additional progress we could be making.
The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation and, in the case of Miguel Estrada, he has even managed to divide Hispanics across the country. The nomination and confirmation process begins with the President, and I urge him to work with us to find a way forward to unite, instead of divide, the nation on these issues.

Republican talking points will likely focus on the impasse on two of the most extreme of the President's nominations rather than the 123 confirmations and the lowest judicial vacancy rate in 13 years. They will ignore their own recent filibusters against President Clinton's executive and judicial nominees in so doing.

What is unprecedented about the Estrada matter is that the Administration and Republican leadership have shown no willingness to be reasonable and accommodate Democratic Senators' request for information traditionally shared with the Senate by past administrations. That we have endured numerous cloture votes is an indictment of Republican intransigence on this matter, nothing more. What is unprecedented is that there has been no effort on the Republican side to work this matter out, as these matters have always been worked out in the past. What is unprecedented is the Republican insistence to schedule cloture vote after cloture vote without first resolving the underlying problem caused by the Administration's inflexibility.

What is unprecedented about the Owen nomination is that it was made at all. Judge Owen had a fair hearing and was given fair consideration before the Judiciary Committee last year. We proceeded is spite of the fact that the Republican majority had refused to proceed with any of President Clinton's Fifth Circuit nominees during his last four-year term. Never before in our history has a President renominated for the same vacancy someone voted down by the Judiciary Committee.

I wish this hearing had been organized in a truly bipartisan manner with cooperation and equal numbers of witnesses. Unfortunately, the Ranking Democrat only learned about it when given the minimum one-week notice required by Senate Rules last week and the minority is allowed to invite only one-third of the witnesses. That is not a good start to what should be a fair, balanced and bipartisan discussion. Thus, this is not a hearing that all interested Senators have considered and collaborated on over a period of time and in which they have worked jointly allowing equal time and equal witnesses, as is our better practice. I commend Senator Feingold for his work in preparing for this hearing and for being one of the most constructive and conscientious members of this Committee on these matters.

I fear that this hearing will serve as an ironic bookend to the hearings held in 1997 by former Senator Ashcroft. In Senator Ashcroft's hearings former Attorney General Meese, a future Deputy White House Counsel and other partisan Republicans sought to justify the Republican majority's stalling tactics for slowing down consideration of President Clinton's judicial nominees before the United States Senate. In the entire 1996 session the Republican majority would only confirm 17 district judges all year and refused to confirm any judges at all to the Courts of Appeals. Indeed, except for the 1998 session, which followed strong criticism from Chief Justice Rehnquist of the Republican stalling, starting with the 1996 session and continuing to the change in Senate majority in the summer of 2001, the Republican majority would never confirm as many as 40 judges any year and overall, from 1995 through the summer of 2001, averaged only 38 confirmations a year with only seven to the Courts of Appeals. That explains why federal judicial vacancies rose from 63 to 110 on the Republican watch and circuit vacancies more than doubled from 16 to 33.

Of course, during those years there were no Republican-led hearings calling for prompt action or fair consideration of President Clinton's moderate judicial nominees. To the contrary, Senator Ashcroft held hearings designed to justify the slowdown. Senator Ashcroft and others perfected the practice of using anonymous holds both in Committee and on the floor so that judicial nominees were stalled for months and years without consideration. Scores of nominees never received hearings, at least 10 who received hearings never received Committee consideration and those who were ultimately considered often were delayed months and years.

Beginning in July 2001, Democrats started bringing accountability and openness to the process. In the 17 months of the Democratic Senate majority we held more hearings on more judicial nominees, held more Committee votes and more Senate votes than before. We were able virtually to double the pace and productivity of the process. We did away with the secrecy of the "blue slip" and the anonymous hold. We considered President Bush's nominees fairly, responsibly and in those 17 months confirmed 100 of this President's nominees. We reversed the destructive trends with respect to the numbers of vacancies and length of time that nominees had to wait to be considered. While we could not consider all nominations simultaneously, we considered more, more quickly than in the preceding years. The Democratic majority inherited 110 judicial vacancies including a record 33 to the circuit courts. By December 2002, we were able through hard work to outpace the 40 additional vacancies that had arisen and reduce the remaining vacancies to 60, including 25 to the circuit courts. We have continued to cooperate and today the

remaining vacancies number 47, including 20 on the circuit courts. This is the lowest vacancy number and lowest vacancy rate in 13 years.

Senator Hatch used to say, when President Clinton was nominating moderates to more than 100 vacancies, that there was no vacancies crisis. He used to say that he considered 67 vacancies to be "full employment" on the federal judiciary. Today we are well short of 100 vacancies and well beyond what he used to term "full employment" with 47 vacancies. Today I expect the Senate to consider and confirm both Judge Cecilia Altonaga, who will be the first Cuban-American woman to serve on the federal judiciary, and Patricia Minaldi, and thereby bring the remaining vacancies down to 47. The Committee continues to report nominations to fill additional vacancies, as well, with another hearing scheduled for tomorrow.

This is not to say that our work is done. Last week, with the help and hard work of the Senate Leadership we were able to make additional progress. Last Wednesday, Majority Leader Frist used that word "progress" to describe how we have been able to resolve complications caused by the manner in which these nominations were forced through the Judiciary Committee. Last Thursday, I thanked the Majority Leader and the Democratic Leader and others for their efforts in this regard and for working with us to bring the nomination of Judge Edward Prado to a vote without further, unnecessary delay.

Yesterday the Senate debated and voted on the nomination of Deborah Cook to the Sixth Circuit. She is the fourth nominee of President Bush to be confirmed to the Sixth Circuit in less than two years. During the entire second term of President Clinton, the Republican majority would not hold hearings or consider a single one of President Clinton's nominees to the Sixth Circuit - not Judge Helene White, not Kathleen McCree Lewis, not Professor Kent Markus. Nonetheless, while I was chair of the Judiciary Committee we proceeded to consider and confirm two conservative nominees of President Bush to the Sixth Circuit and this year the Senate has proceeded to confirm two more.

The work of the Senate would be more productive if this Administration were more interested in filling vacancies with qualified, consensus nominees rather than packing the federal courts with activist judges. The nominations and confirmation process begins with the President. Far from being someone who has sought consensus and to unite us on judicial nominees, this President has used judicial nominees as a partisan weapon and sought sharply to tilt the courts ideologically. That is unfortunate. Some of us have urged another course, a course of cooperation and conciliation, but that is not the path this Administration has chosen. Yet, in spite of the historically low level of cooperation from the White House, the Senate has already confirmed 123 of President Bush's judicial nominees, including some of the most divisive and controversial sent by any President.

Last week the Senate proceeded to a vote on the nomination of Jeffrey Sutton to the Sixth Circuit. He received the fewest number of favorable votes of any nominee in almost 20 years with 52. He is the third controversial judicial nominee of this President against whom more than 40 negative votes were cast, yet those three nominees were not stalled and not subjected to a filibuster.

Our Senate leadership, both Republican and Democratic, have worked to correct some of the problems that arose from some of the earlier hearings and actions of this Committee. Last week we were able to hold a hearing on the nomination of John Roberts to the District of Columbia Circuit. We are all working hard to complete Committee consideration of that nomination at the earliest opportunity. Thus, a number of additional, controversial nominations are in the process of being considered and will be considered by the Senate in due course.

My point is to underscore that we have made and are making real progress from the thoroughgoing obstruction from 1996 until 2001. While "the glass is not full," it is more full than empty and more has been achieved than some want to acknowledge. One hundred and twenty-three lifetime confirmations in less than two years is better than any two-year period from 1995 through 2000. We have reduced judicial vacancies to 47, which is the lowest number and lowest vacancy percentage in 13 years. During the entire eight-year term of President Clinton it was never allowed by Republicans to get that low. We have made tremendous progress and I want to thank, in particular, the Democratic members of this Committee for their hard work in this regard. These achievements have not been easy.

The Administration has chosen confrontation with the Congress, with the Senate and with this Committee. We are now proceeding at three to four times the pace Republicans maintained in reviewing President Clinton's judicial

nominees. We have reached the point where this Committee and the Senate are often moving too fast on some nominations and we risk becoming a racing conveyor belt that rubber stamps rather than examines these lifetime appointments. Democrats have worked hard to repair the damage to the confirmation process and achieved significant results. Republicans seem merely results oriented and interested in ideological domination of the federal courts.

Apparently, the topic for today's hearing is the propriety of the filibuster in connection with judicial nominations. I trust the Republican majority will not overlook the precedent on this question. Republicans not only joined in the filibuster of Abe Fortas to be Chief Justice of the United States Supreme Court, they joined in the filibuster of Stephen Breyer to the 1st Circuit, Judge Rosemary Barkett to the 11th Circuit, Judge H. Lee Sarokin to the 3rd Circuit, and Judge Richard Paez and Judge Marsha Berzon to the 9th Circuit. The truth is that filibusters on nominations and legislative matters and extended debate on judicial nominations, including circuit court nominations, have become more and more common on the initiative of Republicans working against Democratic nominees. Now that a Republican President, intent on packing the courts with ideologues, has seen two nominees delayed by filibusters, and even though the other 123 judges he nominated have been confirmed, partisans want to change the rules to make it easier for this President to get his way.

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Of course, when they are in the majority Republicans have more successfully defeated nominees by refusing to proceed on them and have not publicly explained their actions, preferring to act in secret under the cloak of anonymity. From 1995 through 2001, when Republicans previously controlled the Senate majority, Republican efforts to defeat President Clinton=s judicial nominees most often took place through inaction and anonymous holds for which no Republican Senator could be held accountable. Republicans held up almost 80 judicial nominees who were not acted upon during the Congress in which President Clinton first nominated them and eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and Committee votes. These are just the sorts of stealth tactics Democrats have rejected.

Beyond judicial nominees, Republicans also filibustered the nomination of Executive Branch nominees. They successfully filibustered the nomination of Dr. Henry Foster to become Surgeon General of the United States in spite of two cloture votes in 1995. Dr. David Satcher=s subsequent nomination to be Surgeon General also required cloture but he was successfully confirmed.

Other Executive Branch nominees who were filibustered by Republicans included Walter Dellinger's nomination to be Assistant Attorney General. Two cloture petitions were required to be filed on that nomination and both were rejected by Republicans. We were able finally to obtain a confirmation vote for Professor Walter Dellinger after significant efforts and he was confirmed to be Assistant Attorney General with 34 votes against him. He was never confirmed to his position as Solicitor General because Republicans had made clear their opposition to him. In addition, in 1993, Republicans objected to a number of State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in more cloture petitions. In 1994, Republicans successfully filibustered the nomination of Sam Brown to be an Ambassador. After three cloture petitions were filed, his nomination was returned to President Clinton without Senate action. Also in 1994, two cloture petitions were required to get a vote on the nomination of Derek Shearer to be an Ambassador. And it likewise took two cloture petitions to get a vote on the nomination of Ricki Tigert to chair the FDIC. So when Republican Senators now talk about the Senate Executive Calendar and presidential nominees, they must be reminded that they recently filibustered many, many qualified nominees.

Filibusters should be and are rare. That there are two this year is a direct result of the strategy of confrontation sought by the White House and Senate Republicans. The Administration holds the key to ending the Estrada impasse, as it has for the last year. It should cooperate with the Senate and provide access to his work papers, following the example set by all previous Republican and Democratic administrations. The renomination of Judge Owen was most ill-advised and unprecedented. Her nomination had already been rejected after fair hearings and thorough debate and a Committee vote last year. Some apparently want to rewrite the rules so that this President can have every nominee confirmed, no matter how divisive and controversial, by the Republican Senate majority.

Recently, I heard a respected Republican and senior advisor to the Majority Leader describe cloture as "the fulcrum on which you balance the rights of the individual and the rights of the institution." He explained how important the rights of the minority party are in the Senate and how Senate rules are deliberately constructed to reflect that and protect the minority. That Republicans are now intent on rewriting longstanding Senate rules shows just how partisan and ends-oriented they have become.

The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation. He has even managed to divide Hispanics across the country with the nomination of Mr. Estrada. He has managed to outrage disabled individuals by his nomination of Jeffrey Sutton. The nomination and confirmation process begins with the President. I, again, urge him to work with us to identify and nominate qualified, consensus, mainstream nominees who all Americans can be confident will be fair and impartial and to abandon his ideological court packing scheme.

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