

Testimony of
The Honorable Patrick Leahy

July 8, 2003

Statement of Senator Patrick Leahy,
Senate Judiciary Committee
Nominations Hearing
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Today, the Senate Judiciary Committee holds a hearing for the 8th and 9th Executive Branch nominees given hearings in the past six months, in addition to 12 circuit court nominees and 26 district court nominees who have been given hearings this year.

This rapid pace for hearings for both short-term and lifetime appointees represents a stark change from the pace of consideration of nominees by a Republican majority when a Democrat was in the White House. Today's hearing is scheduled back to back with a hearing tomorrow for five more district court nominees and another Executive Branch nominee whose paperwork was not even submitted until the Wednesday before the 4th of July.

I mention this because the Committee is moving at such a rapid pace that I am very concerned that the Senate's role as a check on the Executive Branch is being reduced to that of a rubber-stamp, no matter the concerns or issues raised about these nominees for powerful positions that affect the lives of millions of Americans.

The hearing today includes two nominees, for two very different positions, one in the Department of Homeland Security (DHS) and the other in the Department of Justice. Both of these important positions would warrant separate hearings if the Committee were truly interested in allowing Members an opportunity to fully explore the weighty responsibilities these nominees are being selected to exercise in these two Departments.

If confirmed, both nominees will be in a position to make initial interpretations of the legal rights of all Americans as well as immigrants, such as whether this Administration will allow individuals to have public hearings or whether their fate will be decided by secretive tribunals behind closed doors.

Today marks the second confirmation hearing this committee has held for a DHS position. I do want to thank Chairman Hatch, Senator Kennedy and Senator Chambliss for working together

and with me to seek and obtain unanimous consent that the nomination of Michael Garcia to lead the Bureau of Immigration and Customs Enforcement (BICE) be referred to the Judiciary Committee after consideration by the Government Affairs committee.

Immigration policy remains the responsibility of this committee, and oversight over the way the new powers of this new department are being used is very important.

Like me, Mr. Garcia is a former prosecutor.

As an Assistant United States Attorney, he prosecuted cases involving terrorism, immigration and document fraud, and was involved in several high-profile cases, including the trial of four defendants following the first World Trade Center Bombing in 1993, the trial of Ramzi Yousef, and the prosecution of four defendants following the 1998 bombings of U.S. Embassies in East Africa.

Shortly before 9-11, Mr. Garcia was appointed Assistant Secretary for Export Enforcement with the Department of Commerce and served there until December 2002, when he was appointed Acting Commissioner of the Immigration and Naturalization Service (INS). He has served as the acting Assistant Secretary of BICE since March 2003.

The Assistant Secretary of BICE is responsible for the enforcement of immigration and customs laws within the United States, as well as the protection of certain Federal buildings and air and marine interdiction. These are weighty responsibilities.

If confirmed, Mr. Garcia will also be responsible for a number of Vermonters who worked for the INS and for Customs before the transition to DHS. I have asked Undersecretary Asa Hutchinson and Eduardo Aguirre, the head of the Bureau of Citizenship and Immigration Services ("BCIS"), about their restructuring plans and the impact of those plans on Vermont employees.

They each have assured me that reorganization will make use of those workers and that Vermont will not suffer job losses as a result. Mr. Garcia, you will find that the Vermonters you inherited from the legacy INS offices in Vermont, including the Eastern Regional and Administrative Centers, are some of the hardest working and most dedicated people in the country. I am confident that they will exceed your expectations.

I ask that you make sure they know what you expect of them, and that you keep them in the loop as you adopt reorganization plans.

In particular, I recently sent a detailed letter about the legacy of INS Detention and Removal (D&R) personnel who are based at the former INS Eastern Regional office.

I appreciate the quick follow-up by DHS staff on the issues raised in that letter but I do look forward to a more thorough reply from you. I also know you are well aware that Vermont is home to the Law Enforcement Support Center (LESC). This database is available 24 hours a day, 365 days a year, to provide information about criminal aliens to local, state and federal law enforcement officials. The center has become a national resource for federal and local law enforcement.

I look forward to working with you on integrating the LESC into the mission of the Homeland Security Department.

When Congress passed the Homeland Security Act, many of us made clear that as we divide immigration services and immigration enforcement, we need to ensure open and clear communication between the two due to the overlap between the agencies' responsibilities. For example, both BICE and BCIS will play a significant role in the Student Exchange and Visitor Information System (SEVIS), which tracks foreign students in the United States. Although BICE will be primarily responsible for the program, BCIS will still adjudicate petitions from foreign students.

In addition to the need to work together on day-to-day concerns, it is important for both BICE and BCIS to be strong, and not have either enforcement or services become a DHS priority at the expense of the other. I look forward to hearing your thoughts about how services and enforcement can work together and that balance can be retained.

I understand from your staff that you have an ambitious plan to reduce the "absconder rate" of aliens who have been ordered removed from the country to zero within six years. Of course, a major reason that the absconder rate is currently so high is that we simply do not have room to house these aliens while they await removal. Solving that problem will take a tremendous dedication of resources, and I hope to hear today how you think those resources can be provided. In addition, because one of your responsibilities will be the detention and removal of unlawful aliens, I would be remiss not to mention the recent OIG report on the treatment of September 11 detainees. This report addresses the treatment many permanent residents and other aliens received in detention and the long delays in removing aliens who had final removal orders. I hope that the report is instructive for you, and that its recommendations will guide your actions in this area.

Finally, there is one other area of concern that has been brought to my attention which I hope you will address today. During your hearing before the Governmental Affairs Committee, you were asked about the role of BICE in the search for an airplane of a Texas legislator in May, while you were serving as Acting Assistant Secretary.

I and many Americans were troubled by the use of the resources and technology of the Department of Homeland Security for partisan political purposes, to track down Democratic state legislators who had left the state in protest of Republican plans to change the rules and boundaries for electing Members of Congress.

I must say that I am concerned about the discrepancy between the reasons you gave for refusing to answer questions asked of you by the Senate Governmental Affairs Committee and the response provided to the Committee by the Inspector General's office. I hope you can clarify this issue and discuss any steps you have taken to prevent your bureau's resources and power from being misused ever again to aid a partisan scheme. I look forward to your testimony.

I also would like to comment on some of the concerns raised by the record of the President's nominee to be the Assistant Attorney General, Jack Goldsmith III. Mr. Goldsmith is a law professor at the University of Virginia who clerked for Judge J. Harvie Wilkinson on the United States Court of Appeals for the Fourth Circuit and for Justice Anthony Kennedy on the Supreme Court.

In his writings on matters of international law and human rights, Professor Goldsmith has often taken a narrow view of human rights law and our international obligations. For example, Professor Goldsmith has written and advocated in opposition to precedents relating to the Alien Tort Claims Act (ATCA).

This may sound like an obscure area of the law but it has been an important tool to allow victims of torture and abuse to file claims against foreign governments, multi-national corporations, and torturers. For example, the ACTA has been relied upon to bring federal suits against notorious violators of human rights like war criminal Radovan Karadzic and the former prime minister of the Philippines, Ferdinand Marcos, as well as banks and companies that profited from Nazi war crimes.

In his opposition to the ATCA, he has echoed the views of Robert Bork that this important federal statute should be limited to only those offenses against the law of nations that were in effect at the time it was enacted in 1789, such as piracy on the high seas. Such a narrow reading of the plain language of this federal law is troubling both in the context of human rights law and because of what such an approach bodes for his view of other laws affecting the rights of people in the United States and abroad.

This is important because if confirmed to lead the Justice Department's Office of Legal Counsel his primary responsibility will be to provide interpretations of the scope of people's rights and the government's power in many areas of law.

Professor Goldsmith has also taken a very narrow view of human rights law generally.

He has been a vocal supporter of the President's authority to try suspected terrorists by military

tribunal, despite the concerns raised by many Americans about these practices and the inconsistent decisions of the Administration in bringing some cases in federal court while referring other similar cases to military tribunals, along with the Administration's decision to ignore the Geneva Convention on the treatment of prisoners of war.

Goldsmith has also been a vocal opponent of the International Criminal Court.

These are just a few of the concerns raised by Professor Goldsmith's writings. Members of the Senate have expressed other concerns about the veil of secrecy that has been drawn by Attorney General Ashcroft over the operations of the Office of Legal Counsel.

I have sent a letter to the Attorney General regarding this practice and I hope Professor Goldsmith will shed some light on it today. The Office of Legal Counsel and the Department of Justice, along with the Department of Homeland Security, face many challenges in the defense of our nation in these troubled times, but no one should forget that the defense of our nation includes the defense of the civil rights and civil liberties guaranteed to all Americans by our Constitution.

I hope that Mr. Garcia and Professor Goldsmith will be able to provide the Committee with some assurances about their commitment to following the requirements of our Constitution and interpreting the law fairly.

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