Testimony of

The Honorable Patrick Leahy

July 30, 2003

Opening Statement of Senator Patrick Leahy
Judicial Nominations Hearing
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Today is the first time that our Chairman will ever have convened a hearing for a judicial nominee with two negative blue slips returned to the Committee -- the first time ever. I believe it may be the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It is certainly the only time in the last 50 years, and I know it to be the only time during my 29 years in the Senate.

Today will be long remembered in the annals of the Senate and of our Committee for the precedent set by this hearing, for the hubris behind it, and for the brazenness of the double standard it sets. In collusion with a White House of the same party, the Senate's majority this year has launched a lengthening series of changed practices and broken rules on this Committee. The White House and some in the Senate have even suggested changing the Senate's rules to consolidate the White House's control over the judicial nominations process. Over the last three years, time and again the good faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous six years has been met with nothing but more hubris - the kind of hubris that now is also having corrosive effects in the other body, as we have seen in recent weeks.

When Chairman Hatch chaired this Committee and we were considering the nominations of a Democratic President, one negative blue slip from one home-state Senator was enough to doom a nomination and prevent a hearing on that nomination. Indeed, among the more than 60 Clinton judicial nominees who this Committee did not consider there were several who were blocked in spite of the positive blue slips from both home-state Senators. So long as a Republican Senator had an objection, it appeared to be honored, whether that was Senator Helms objecting to an African-American nominee from Virginia or Senator Gorton objecting to nominees from California.

Earlier this year this Committee under this Chairman took the unprecedented action of proceeding to a hearing on the nomination of Carolyn Kuhl to the Ninth Circuit over the objection of Senator Boxer. When the senior Senator from California announced her opposition to the nomination, as well, at the beginning of a Judiciary business meeting, I suggested to the Chairman that further proceedings on that nomination ought to be carefully considered and that he had never proceeded on a nomination opposed by both home-state Senators once their opposition was known. Senator Feinstein has likewise reminded the Chairman of his statements in connection with the nomination of Ronnie White that had he known both home-state Senators were opposed, he would never have proceeded. Nonetheless, in one in a continuing series of

changes of practice and position this year, this Committee was required to proceed with the Kuhl nomination, and a party-line vote was the result.

Now this Committee is making a further profound change in its practices. When a Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home-state Senator stalled the nomination. The Chairman cannot cite a single example of a single time that he went forward with a hearing over the objection or negative blue slip of a single Republican home-state Senator. Now that a Republican President is doing the nominating, no amount of objecting by Democratic Senators is sufficient. The Chairman overrode the objection of one home-state Senator with the Kuhl nomination. The Chairman overrides the objections of both home-state Senators with a Michigan nomination today.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two policies the Chairman has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways, some to work unfairness, and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now.

The double standards that the Republican majority has adopted obviously depend upon the occupant of the White House. This change in practice marks another example of their double standards. Last week, the Republican majority chose to abandon our historic practice of bipartisan investigation and to abandon the meaning and consistent practice of protecting minority rights through a longstanding Committee rule that required a member of the minority to vote to cut off debate in order to bring a matter to a vote. This week, the Committee takes another giant step in the direction of unprincipled partisanship through this hearing. Republican Senators will apparently stop at nothing in their efforts to aid and abet this White House, with a Republican President, in their efforts to politicize the federal judiciary.

Both of the Senators from Michigan are respected Members of the Senate. Both are fair-minded. Both of these home-state Senators have attempted to work with the White House to offer their advice, but their input was rejected. They have now suggested another way to end the impasse on judicial nominations for Michigan. Their suggestion that a bipartisan commission along the lines of a similar commission in Wisconsin is a good one. I am familiar with the work of bipartisan screening commissions. Vermont and its Republican, Democratic and Independent Senators have used such a commission for more than 25 years with great success. I commend the Senators representing Michigan for their constructive suggestion and for their good faith efforts to work with this White House in spite of the Administration's refusal to work with them.

So today this Committee is faced with a nomination from Michigan to the United States Court of Appeals for the Sixth Circuit opposed by both Michigan Senators. Republicans are picking another fight over judicial nominations.

In addition, if we have time, we may get to review the nominations of Michael Mosman for the District of Oregon, Judge Kim Gibson to the Western District of Pennsylvania, Glen Conrad to the Western District of Virginia, Judge Henry Floyd to the District of South Carolina and Magistrate Judge Larry Burns and Judge Dana Makoto Sabraw, both nominated to the Southern

District of California. All of the District Court nominees before us today have the support of both of their home-state Senators. Two of these District Court nominations are the product of a bipartisan selection commission that has worked extremely well for the citizens of California. I congratulate the Senators from the State of California for their efforts to maintain this important mechanism that ensures experienced and consensus candidates are recommended for district court nominations. Had such a bipartisan commission been allowed to include California's circuit court nominees, the Senate might not be faced with the divisive nomination of Carolyn Kuhl.

Although President Bush promised on the campaign trail to be a uniter and not a divider, his practice once in office with respect to judicial nominees has been most divisive. Citing the remarks of a White House official, The Lansing State Journal recently reported, for example, that the President is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that the White House is not willing to work toward consensus with all Senators.

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founding Fathers established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will wrote this past weekend, "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate.

When there was a Democratic president in the White House, circuit court nominees were delayed and deferred, and vacancies on the Courts of Appeals more than doubled under Republican leadership from 16 in January 1995 to 33, when the Democratic majority took over part way through 2001.

Under Democratic leadership we held hearings on 20 circuit court nominees in 17 months. Indeed, while Republicans averaged 7 confirmations to the circuit court every 12 months, the Senate under Democratic leadership confirmed 17 in its 17 months in the majority with an historically uncooperative White House.

This year with a Republican in the White House, the Republican majority has shifted from the restrained pace it had said was required for Clinton nominees into overdrive for the most controversial of President Bush's nominees. We have already confirmed 10 circuit court judges in the first seven months of this year. By contrast, when a Democratic president occupied the White House, the Republican majority averaged fewer than 4 circuit court confirmation by late July. This is another example of Republican Senators' double standards.

Without going through a lengthy discussion of blue slips and practices and policies let me illustrate the double standards Republicans use by asking that examples of two of this Chairman's blue slips be included in the record. These pieces of blue paper are what the Chairman uses to solicit the opinion of home-state Senators about the President's nominees.

Simply stated, the blue slip practice is the enforcement mechanism for the consultation that the Constitution calls for. When President Clinton was in office, here was the blue slip sent to Senators, asking their consent. On the face of the form is written the following:

"Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators."

When President Bush began his term, and Senator Hatch took over the chairmanship of this Committee with a Republican President he changed his blue slip to drop the assurance he had always provided Republican Senators who had an objection and eliminated the statement of his consistent practice in the past by striking the sentence that provided: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." Of course what that had meant in practice in the years 1995-2000 was that no hearings would take place on a judicial nominee unless both home-state Senators returned blue slips indicating that they did not object to proceeding with a hearing on the nominee.

I know Republican partisans hate being reminded of the double standards by which they operated when asked to consider so many of President Clinton's nominees. I know that they would rather exist in a state of "confirmation amnesia," but that is not fair and not right. The blue slip policy in effect, and enforced strictly, by the Chairman during the Clinton Administration operated as an absolute bar to the consideration of any nominee to any court unless both home-state Senators had returned positive blue slips. No time limit was set, no reason had to be articulated. Remember, before I became Chairman in June of 2001, all of these decisions were being made in secret. Blue slips were not public, and they were allowed to operate as an anonymous hold on otherwise qualified nominees.

A few examples of the operation of the blue slip, and how it was scrupulously honored by the Committee during the Clinton Presidency are worth remembering. Remember, in the 106th Congress alone, more than half of President Clinton=s circuit court nominees were defeated through the operation of the blue slip or other such partisan obstruction.

Perhaps the most vivid is the story of the United States Court of Appeals for the Fourth Circuit, where Senator Helms was permitted by this Committee to resist President Clinton's nominees for six years. Judge James Beaty, was first nominated to the Fourth Circuit from North Carolina by President Clinton in 1995, but no action was taken on his nomination in 1995, 1996, 1997, or 1998. Another Fourth Circuit nominee from North Carolina, Rich Leonard, was nominated in 1995, but no action was taken on his nomination either in 1995 or 1996. Judge James Wynn, again a North Carolina nominee to the Fourth Circuit, sent to the Senate by President Clinton in 1999, sat without action in 1999, 2000, and early 2001 until President Bush withdrew his nomination.

A similar tale exists in connection with the Fifth Circuit where Enrique Moreno, Jorge Rangel and Alston Johnson were nominated but never included in a confirmation hearing.

Perhaps the best documented abuses are those that stopped the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to the Sixth Circuit. Judge White

and Ms. Lewis were themselves Michigan nominees. Republicans in the Senate prevented consideration of any of President Clinton's nominees to the Sixth Circuit for years. When I became Chairman in 2001, I ended that impasse. Under Democratic leadership, in spite of the abuses by Republicans, we proceeded to consider and confirm two nominees to the Sixth Circuit among the 17 circuit judges we were able to confirm in our 17 months. We have proceeded to confirm two more this year. The vacancies that once plagued the Sixth Circuit have been cut in half. Where Republican obstruction had led to eight vacancies on that 16-judge court, Democratic cooperation has allowed four of those vacancies to be filled over the past few months. The Sixth Circuit currently has more judges and fewer vacancies than it has had in years.

Those of us who were involved in this process in the years 1995-2000 know that the Clinton White House bent over backwards to work with Republican Senators and seek their advice on appointments to both circuit and district court vacancies. There were many times when the White House made nominations at the direct suggestion of Republican Senators, and there are judges sitting today on the Ninth Circuit and the Fourth Circuit, in the district courts in Arizona, Utah, Mississippi, and many other places only because the recommendations and demands of Republicans Senators were honored.

In contrast, since the beginning of its time in the White House, this Bush Administration has sought to overturn traditions of bipartisan nominating commissions and to run roughshod over the advice of Democratic Senators. They attempted to change the exemplary systems in Wisconsin, Washington, and Florida that had worked so well for so many years. They ignored the protests of Senators like Barbara Boxer who not only objected to the nominee proposed by the White House, but who, in an attempt to reach a true compromise, also suggested Republican alternatives. And today, despite the best efforts of the well-respected Senators from Michigan, who have proposed a bipartisan commission similar to their sister state of Wisconsin, the Administration has flatly rejected any sort of compromise.

Although I object to this reversal of position for partisan gain and the unprecedented hearing being held, I will participate in the questioning of Judge Saad, whose nomination raises concerns. His judicial opinions against whistleblowers and other victims of discrimination, as well as his opinions on cases involving workers rights give me great concern about his willingness to follow the law.

With respect to the other nominees, I look forward to their testimony and to Committee and Senate consideration of their nominations in due course. I am sorry that they were chosen to be appended to what will be a long and difficult hearing.

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