

Statement of

# **The Honorable Patrick Leahy**

United States Senator  
Vermont  
October 15, 2003

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Ranking Member, Senate Judiciary Committee  
Judicial Nominations Hearing  
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Over the course of this year in the Judiciary Committee, we have seen a number of firsts. At the first nominations hearing of the year, for the first time ever, Republicans unilaterally scheduled three controversial circuit court nominees at one hearing contrary to a long-established agreement and practices of the Committee. Then we saw Republicans declare that the longstanding Committee rules protecting the rights of the minority would be broken when Rule IV was violated. A rule that was adopted 25 years ago -- in order to balance the need to protect the minority Members of the Committee with the desire of the majority to proceed -- was unilaterally reinterpreted to override the rights of the minority for the first time in our history. For the first time ever this year Republicans insisted on proceeding on nominations that the Committee had previously voted upon and rejected after full and fair hearings and debate. Of course that followed the first ever resubmission by a President of the names of defeated nominees for appointment to those same judgeships.

Several other practices were reversed from when a Democratic President was making nominations in light of the Republican affiliation of the current President. This Committee has proceeded on nominations that did not have the approval of both home-state Senators. Moreover, this Committee altered its prior practice and overrode the objections of home-state Senators to vote on the nominations of Carolyn Kuhl in spite of the opposition of both home-state Senators. Then, in connection with a nomination to the circuit court from Michigan, this Committee for the first time proceeded with a hearing in spite of the opposition of both home-state Senators.

The hearing on the nomination of Michael Fisher to the U.S. Court of Appeals for the Third Circuit is also unprecedented. Never before to my knowledge has a President nominated to a lifetime position on a federal circuit court or this Committee held a hearing on a judicial nominee with an outstanding jury verdict naming him as personally liable for civil rights violations. In February 2003, a federal jury in the U.S. District Court for the Middle District of Pennsylvania found that Mr. Fisher and other high level officials of the Pennsylvania Office of the Attorney General violated the civil rights of two plaintiffs, former narcotics agents with the Bureau of Narcotics Investigation (BNI) in Philadelphia. Never before in the history of federal judicial nominees of which I am aware, has a nominee ever come before this Committee with an outstanding judgment against him for so serious a claim.

The jury verdict is so recent that the trial transcript has only been delivered to the parties within the last several weeks, and so complex that even Mr. Fisher and his lawyers have asked for extensions of time in order to complete their post-trial motions. Soon a federal district court trial judge will be called upon to review the verdict against a person the President has nominated to the Court of Appeals that review all appeals from that trial judge's court. In addition, if the jury verdict is sustained by the trial court, an appeal would lie to the very court to which Mr. Fisher has been nominated. These, too, appear to be unique circumstances.

Accordingly, this is a most unusual proceeding. As the Administration and Republican majority have abandoned traditional practices and standards we are being confronted with more and more difficulties. The few judicial nominations on which the Senate has withheld a final vote this year have each presented extraordinary circumstances or nominees with extreme positions. During the years in which President Clinton was in the White House, Republicans attempted a number of filibusters and, when they were in the majority, successfully prevented votes on more than 60 judicial nominees, including a number of nominees to the federal courts in Pennsylvania.

I begin this hearing without having reached a determination about this nomination. I am troubled by the jury verdict. I have heard from a number of supporters of Mr. Fisher whose opinions I value that they believe him qualified to serve as a judge of the Third Circuit nonetheless.

Today, we will also hear from two distinguished district court nominees. Magistrate Judge Sharpe comes to the Committee with the support of both of his home state Senators. He served as a prosecutor for over two decades before being selected to be a magistrate judge in the Northern District of New York. Not surprisingly, Judge Sharpe received a unanimous well-qualified rating from the ABA.

The other district court nominee before us today, Judge Dale Fischer, also received the ABA's highest rating and has significant judicial experience. She is nominated to a newly-created seat in the Central District of California and was recommended by the bipartisan selection commission established by Senators Feinstein and Boxer. The senators from California have worked hard to maintain this local mechanism that recommends consensus nominees for the district courts in their state. Judge Fischer is the latest example of the outstanding nominees to emerge from the California bipartisan selection commission. We welcome both district court nominees and their families to the hearing today.

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