Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Hearing Before the Judiciary Committee
On The Nomination of Claude Allen
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For more than 200 years, the Constitution's advice and consent injunction has helped to temper partisan politics in the judicial nomination process. It has protected the courts and the American people from single-party domination, and it has helped ensure that those who become federal judges are fair judges who reflect mainstream legal thought. Historically, Democrats and Republicans alike have guarded the protections of the advice and consent process. They have done so because they have recognized the seriousness of the task we perform when we confirm a judge to a lifetime appointment, giving him or her extraordinary power -- indeed, it is power that often is unchecked. At one time or another, both parties have sought the protections of the process. The result has been that we have had a federal bench that has served us extraordinarily well over the course of our republic. Our independent federal judiciary has been the envy of the world, and may it ever be so.

The record of the 108th Congress, however, is a compilation of changed practices and of bent and even broken rules. Over the last nine months, we have seen the systematic dismantling of the protections upon which we all had come to rely. Republicans are rushing to confirm extreme nominees that do not reflect the mainstream values of the American people. To do this, they have had to discard many of the protections that have historically helped to ensure a fair and independent judiciary.

The blue slip policy is the enforcement tool to ensure consultation by the Executive Branch with home-state senators about judicial appointments to their states. Already the Chairman has changed his blue slip policy, so that even a negative blue slip from both home-state Senators is not sufficient to prevent action on a nominee. The rule used to be that no judicial nominee would move out of this Committee if the Chair knew that the nomination was opposed by both home-state Senators. When this rule was used to block President Clinton's nominees, it was followed stringently by the Republican majority. Indeed, it was even broadened by Republicans so that objections by a single Republican Senator from the circuit was sufficient cause to end a nomination without a hearing and without a vote. As soon as the traditional practice threatened to forestall an extreme Bush nominee, it was discarded.

The Chairman has also changed his interpretation of Rule 4 of this Committee, which protects the minority's right to continue debate on any subject. This rule allows any member of the

Committee to object to a matter coming to a vote. To override that objection, at least one member of the minority party must vote with the majority in favor of ending debate and moving forward to a vote. The Chairman had properly interpreted and implemented this rule in the past. Rule 4 was an important protection against single-party domination and extremism. Like the blue slip, it was a protection that was best used to encourage discussion and cooperation. It was most important to prevent unnecessary confrontations and divisive partisanship. And like the blue slip policy, when Rule 4 stood as a potential obstacle to a Bush nominee, it was promptly reinterpreted.

The Chairman's new and novel reinterpretation of Rule 4, that it is a device to force the Chairman to call a matter to a vote, is unsupported by the language and history of the rule, as well as by the Chairman's own prior interpretation. It is also unsupported by logic. The idea that the rule was intended to allow the Committee to force the Chairman to bring a matter to a vote is belied by the fact that the Chairman himself controls the agenda and therefore determines whether a matter would even be subject to Rule 4. The only thing that the new interpretation of Rule 4 did was to allow the Republican majority to force through the Committee controversial nominees on an expedited basis. I am glad that the Republican leadership worked with us to return such a nominee to the Committee for its consideration and has provided assurances that Rule 4 will not again be circumvented.

Today this Committee is dismantling another critical part of the judicial nomination process. The Chairman has decided to hold a hearing on the nomination of Claude Allen of Virginia. Virginia is currently represented by two Republican Senators, both whom support this nominee. I respect their views and have worked with them when I chaired this Committee to expedite consideration of several Virginia nominees. Roger Gregory was confirmed to the U.S. Court of Appeals for the Fourth Circuit, Henry Hudson was confirmed to the U.S. District Court for the Eastern District of Virginia, and Timothy Stanceau, to the Court of International Trade. This year, we cooperated in filling a second vacancy on the district courts in Virginia, with the confirmation of Glen Conrad to the Western District. So well have we worked together that there are no current vacancies at all on the federal courts in Virginia. None.

We also worked well to fill vacancies all over the Fourth Circuit, not just in Virginia. Of the five circuit court nominees President Bush has sent to the Senate, three have been confirmed to date. Roger Gregory is one, but also Dennis Shedd, from South Carolina, and Allyson Duncan from North Carolina. This stands in stark contrast to the way the Republican Senate treated President Clinton's nominees to this circuit, when three African-American nominees were blocked. Two, Judge James Beaty and Judge James Wynn, were from North Carolina, and were never even given a hearing. The third, Judge Andre Davis, was a Marylander who was given the same shabby treatment. I am proud that we did better for the Fourth Circuit while I was Chairman, and pleased that Senator Edwards was able to come to an agreement with the White House on Judge Duncan.

Working with this Administration has not been so simple for the Maryland Senators. The seat for which Mr. Allen has been nominated is a Maryland seat, last held by Judge Francis Murnaghan of Baltimore. Senators Sarbanes and Mikulski will tell the Committee more about him, but I can say that Judge Murnaghan was a brilliant and compassionate jurist. He practiced law for 30

years, including as Assistant Attorney General and as Assistant to the General Counsel to the High Commissioner for Germany, before being named to the federal bench. The Baltimore Sun said of Judge Murnaghan after his death in 2000: "[I]f a theme runs through Francis D. Murnaghan's career, it is using the law to realize the American people's constitutional freedoms." Judge Murnaghan was a fair jurist with mainstream views. He was also a lifelong Marylander.

In 2000 President Clinton nominated another Marylander, Andre M. Davis, an African-American district court judge from Baltimore, to fill Judge Murnaghan's seat. This Committee, under Republican control, refused to act on the nomination. At the time, Republicans claimed that the Fourth Circuit did not need any more judges, even though there were five vacancies on the 15-member court. As soon as President Bush was elected, however, the Republican majority reversed its position.

The White House originally recognized that Judge Murnaghan's seat was rightfully a Maryland seat. After the name of a non-Marylander was floated and rejected by the Maryland Senators, however, the White House apparently decided that it would rather work with Republican Senators from Virginia than have to reach consensus with the Senators from Maryland. Thus, a Virginian who works in D.C. and who used to staff a Republican Senator from North Carolina has been nominated to fill a Maryland seat on the Fourth Circuit.

This seat has traditionally been a Maryland seat and it should remain so. Maryland accounts for approximately 20 percent of the population of the Fourth Circuit. By this traditional measure for the allocation of judgeships, Maryland should have three seats on the Fourth Circuit. If this judgeship is allowed to be uprooted to Virginia, Maryland will be left with only two and this Committee will have acquiesced in the White House ploy to move circuit vacancies around to avoid having to allow balance or to have to consult with Democratic home-state Senators. These are among the dangers that advice and consent protect against.

On the merits, this nominee could not be more different from Judge Murnaghan. Claude Allen is a conservative political operative with little litigation experience and extreme views. He has practiced law for a total of six and one-half years. This is much less than the minimum 12 years suggested by the American Bar Association. This may be one reason why the ABA's peer review rating of this nomination included partially "not qualified." He is among the more than two dozen judicial nominees with "not qualified" or partially "not qualified" ratings.

Where Mr. Allen has had substantive experience, he has shown himself to be extreme with a reputation for recalcitrance and an unwillingness to work with others of differing views. A judge needs to be able to consider facts and legal arguments that might contradict the outcome he would personally like. I have a number of questions about Mr. Allen's actions, including when he served at the Virginia Department of Health and Human Resources and apparently refused to promote the Children's Health Insurance Program, and whether he used audits of safe-sex programs to strike out at critics and at programs with which he personally did not agree.

This is not a consensus nomination. Rather this is one that the White House has gone out of its way, with cold, politically motivated calculation, to inject all of the elements necessary to produce an impasse, at the expense of the independence of two other parts of our government, the judiciary, and United States Senate. As one journalist put it, Mr. Allen has infuriated "liberals and moderates of both parties who say he is at best an unresponsive manager and at worst an

executive who is trying to dismantle longstanding programs for women and children. . . [m]any lawmakers, including those in his own party, said they do not trust Allen to provide data and insight."

Rather than work with the distinguished Senators from Maryland to find a consensus nominee to fill this vacancy, someone like Roger Titus who is about to be confirmed unanimously to the federal court in Maryland, this nomination is another example of the Administration seeking to divide and insinuate partisan politics into the judicial nominations process.

When the Administration has been willing to work with the Senate, we have made progress. Indeed, last night the Senate confirmed the 167th judicial nominee of this President.

In less than three years' time, President George W. Bush has exceeded the number of judicial nominees confirmed for President Reagan in all four years of his first term in office. Senate Democrats have cooperated so that this President has now exceeded the record in his entire four-year first term of the President Republicans acknowledge to be the "all time champ" at appointing federal judges. Since July 2001, despite the fact that the Senate majority has shifted twice, a total of 167 judicial nominations have been confirmed, including 29 circuit court appointments. One hundred judges were confirmed in the 17 months of the Democratic Senate majority and now 67 have been confirmed during the comparative time of the Republican majority.

One would think that the White House and the Republicans in the Senate would be heralding this landmark. One would think they would be congratulating themselves for putting more lifetime appointed judges on the federal bench than President Reagan did in his entire first term and doing it in three-quarters of the time. But Republicans have a different partisan message, and this indisputable truth is not consistent with their efforts to mislead the American people into thinking that Democrats have launched widespread obstruction of this President's judicial nominations. Only a handful of the most extreme and controversial nominations have been denied consent by the Senate.

Not only has President Bush been accorded more confirmations than President Reagan achieved during his entire first term, but he has also achieved more confirmations this year than in any of the six years that Republicans controlled the Senate when President Clinton was in office. Not once was President Clinton allowed 67 confirmations in a year when Republicans controlled the pace of confirmations. Despite the high numbers of vacancies and availability of highly qualified nominees, Republicans never cooperated with President Clinton to the extent Senate Democrats have. President Bush has appointed more lifetime circuit and district court judges in 10 months this year than President Clinton was allowed in 1995, 1996, 1997, 1998, 1999, or 2000.

Last year, the Democratic majority in the Senate proceeded to confirm 72 of President Bush's judicial nominees and was savagely attacked nonetheless. Likewise in 1992, the last previous full year in which a Democratic Senate majority considered the nominees of a Republican President, 66 circuit and district court judges were confirmed. Historically, in the last year of an administration, consideration of nominations slows, the "Thurmond rule" is invoked and vacancies are left to the winner of the presidential election. In 1992, Democrats proceeded to confirm 66 of President Bush's judicial nominees even though it was a presidential election year. By contrast, in 1996, when Republicans controlled the pace for consideration of President Clinton's judicial nominees only 17 judges were confirmed and not a single one of them was to a circuit court.

In fact, President Bush has now already appointed more judges in his third year in office than in the third year of the last five presidential terms, including the most recent term when Republicans

controlled the Senate and President Clinton was leading the country to historic economic achievements. That year, in 1999, Republicans allowed only 34 judicial nominees of President Clinton to be confirmed all year, including only 7 circuit court nominees. Those are close to the average totals for the six years 1995-2000 when a Republican Senate majority was determining how quickly to consider the judicial nominees of a Democratic President. By contrast, with today's confirmation, the Senate this year will have confirmed 67 judicial nominees, including 12 circuit court nominees, almost double the totals for 1999.

These facts stand in stark contrast to the false partisan rhetoric that demonize the Senate for having blocked all of this President's judicial nominations. The reality is that the Senate is proceeding at a record pace and achieving record numbers. Time after time after time, the good faith that Democrats have shown this President, despite the egregious treatment of his predecessor's nominees, has been met with cynical political calculation to undermine the rules not only of this committee, but even the rules of the United States Senate itself. We have worked hard to balance the need to fill judicial vacancies with the imperative that federal judges need to be fair. In so doing, we have reduced the number of judicial vacancies to 41. More than 95 percent of the federal judgeships are filled. After inheriting 110 vacancies when the Senate Judiciary Committee reorganized under Democratic control in 2001, I helped move through and confirm 100 of the President's judicial nominees in just 17 months. With the additional 67 confirmations this year, we have reached the lowest number of vacancies in 13 years. There are more federal judges on the bench today than at any time in American history.

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