Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Senate Judiciary Committee
Hearing on Judicial Nominations
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We open this year confronted with three additional disappointing developments regarding judicial nominations: the Pickering recess appointment, the renomination of Claude Allen, and the pilfering of Democratic offices' computer files by Republican staff.

Late last Friday afternoon President Bush made his most cynical and divisive appointment to date when he bypassed the Senate and unilaterally installed Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit. That appointment is without the consent of the United States Senate and is a particular affront to the many individuals and membership organizations representing African Americans in the Fifth Circuit who have strongly opposed this nomination.

With respect to his extreme judicial nominations, President George W. Bush is the most divisive President in American history. Through his extreme judicial nominations, President Bush is dividing the American people and undermining the fairness and independence of the federal judiciary on which all Americans depend.

After fair hearings and open debate, the Senate Judiciary Committee rejected the Pickering nomination in 2002. Originally nominated in 2001 by President Bush, this nominee's record underwent a thorough examination by the Senate Judiciary Committee and was found lacking. Rejected for this promotion by the Committee in 2002 because of his poor record as a judge and the ethical problems raised by his handling of his duties in specific instances, Judge Pickering's nomination was nonetheless sent back to the Senate last year by a President who is the first in our history to reject the judgment of the Judiciary Committee on a judicial nominee. This is the only President who has renominated someone rejected on a vote by the Judiciary Committee for a judicial appointment.

The renomination of Charles Pickering lay dormant for most of last year while Republicans reportedly planned further hearings. Judge Pickering himself said that several hearings on his nomination were scheduled and cancelled over the last year by Republicans. Then, without any additional information or hearings, Republicans decided to forego any pretense at proceeding in regular order. Instead, they placed the name of Judge Pickering on the Committee's markup agenda and pushed his nomination through with their one-vote majority. The Committee had

been told since last January that a new hearing would be held before a vote on this nomination, but that turned out to be an empty promise.

Why was the Pickering nomination moved ahead of other well-qualified candidates late last fall? Why was the Senate required to expend valuable time rehashing arguments about a controversial nomination that has already been rejected? The timing was arranged by Republicans to coincide with the gubernatorial election in Mississippi. Like so much about this President's actions with respect to the federal courts, partisan Republican politics seemed to be the governing consideration. Indeed, as the President's own former Secretary of the Treasury points out from personal experience, politics governs more than just federal judicial nominations in the Bush Administration.

Charles Pickering was a nominee rejected by the Judiciary Committee on the merits - a nominee who has a record that does not qualify him for this promotion, who injects his personal views into judicial opinions, and who has made highly questionable ethical judgments. The nominee's supporters, including some Republican Senators, have chosen to imply that Democrats opposed the nominee because of his religion or region. That is untrue and offensive. These smears have been as ugly as they are wrong. Yet the political calculation has been made to ignore the facts, to seek to pin unflattering characterizations on Democrats for partisan purposes and to count on cynicism and misinformation to rule the day. With elections coming up this fall, partisan Republicans are apparently returning to that page of their partisan political playbook.
Never before had a judicial nomination rejected by the Judiciary Committee after a vote been resubmitted to the Senate, but this President took that unprecedented step last year. Never before has a judicial nomination debated at such length by the Senate, and to which the Senate has withheld its consent, been the subject of a presidential appointment to the federal bench.
In an editorial following last week's appointment, The Washington Post had it right when it summarized Judge Pickering's record as a federal trial judge as "undistinguished and downright disturbing." As the paper noted: "The right path is to build consensus that nonpartisanship and excellence are the appropriate criteria for judicial selection." Instead we see another dangerous step down the Republican's chosen path to erode judicial independence for the sake of partisanship and their ideological court-packing efforts. The New York Times also editorialized on this subject and it, too, was correct when it pointed out that this end-run around the advice and consent authority of the Senate is "absolutely the wrong choice for one of the nation's most sensitive courts."

Civil rights supporters who so strenuously opposed this nominee were understandably offended that the President chose this action the day after his controversial visit to the grave of Dr. Martin Luther King Jr. As the nation was entering the weekend set aside to honor Dr. King and all for which he strived, this President made one of the most insensitive and divisive appointments of his Administration.

So many civil rights group and individuals committed to supporting civil rights in this country have spoken out in opposition to the elevation of Judge Pickering that their views should have been respected by the President. Contrary to the false assertion made by The Wall Street Journal editorial page this week, the NAACP of Mississippi did not support Judge Pickering's nomination. Indeed, every single branch of the Mississippi State Chapter of the NAACP voted to

oppose this nomination -- not just once, but three times. When Mr. Pickering was nominated to the District Court in 1990, the NAACP of Mississippi opposed him, and when he was nominated to the Fifth Circuit in 2001 and, again, in 2003, the NAACP of Mississippi opposed him. They have written letter after letter expressing their opposition. That opposition was shared by the NAACP, the Southern Christian Leadership Conference, the Magnolia Bar Association, the Mississippi Legislative Black Caucus, the Mississippi Black Caucus of Local Elected Officials, Representative Bennie G. Thompson and many others. Perhaps The Wall Street Journal confused the Mississippi NAACP with the Mississippi Association of Trial Lawyers, which is an organization that did support the Pickering nomination.

This is an Administration that promised to unite the American people but that has chosen time and again to act with respect to judicial nominations in a way that divides us. This is an Administration that squandered the goodwill and good faith that Democrats showed in the aftermath of September 11, 2001. This is an Administration that refused to acknowledge the strides we made in filling 100 judicial vacancies under Democratic Senate leadership in 2001 and 2002 while overcoming anthrax attacks and in spite of Republican mistreatment of scores of qualified, moderate judicial nominees of President Clinton.

Then, just two days ago, the President sent the nomination of Claude Allen back to the Senate. From the time this nomination was originally made to the time it was returned to the President last year, the Maryland Senators have made their position crystal clear. This Fourth Circuit vacancy is a Maryland seat and ought to be filled by an experienced, qualified Marylander. Over the Senate recess, the White House had ample time to find such a nominee, someone of the caliber of sitting U.S. District Court Judges Andre Davis, or Roger Titus, two former Maryland nominees whose involvement in the state's legal system and devotion to their local community was clear. This refusal to compromise is just another example of the White House engaging in partisan politics to the detriment of an independent judiciary.

The third disappointment we face is the ongoing fallout from the cyber theft of confidential memoranda from Democratic Senate staff. This invasion was perpetrated by Republican employees both on and off the Committee. As revealed by the Chairman, computer security was compromised and, simply put, members of the Republican staff took things that did not belong to them and passed them around and on to people outside of the Senate. This is no small mistake. It is a serious breach of trust, morals, and possibly the rules and regulations governing the U.S. Senate. We do not yet know the full extent of these violations. But we need to repair the loss of trust brought on by this breach of confidentiality and privacy, if we are ever to recover and be able to resume our work in a spirit of cooperation and mutual respect that is so necessary to make progress.

Democratic cooperation with the President's slate of judicial nominees has been remarkable in these circumstances. One way to measure that cooperation and the progress we have made possible is to examine the Chief Justice's annual report on the federal judiciary. Over the last couple of years, Justice Rehnquist has been "pleased to report" our progress on filling judicial vacancies. This is in sharp contrast to the criticism he justifiably made of the shadowy and unprincipled Republican obstruction of consideration of President Clinton's nominees. In 1996, the final year of President Clinton's first term, the Republican-led Senate confirmed only 17

judicial nominees all year and not a single nominee to the circuit courts. At the end of 1996, the Republican Senate majority returned to the President almost twice as many nominations as were confirmed.

By contrast, with the overall cooperation of Senate Democrats, which partisan Republicans are loathe to concede, this President has achieved record numbers of judicial confirmations. Despite the attacks of Sept. 11 and their aftermath, the Senate has already confirmed 169 of President Bush's nominees to the federal bench. This is more judges than were confirmed during President Reagan's entire first four-year term. Thus, President Bush's three-year totals rival those achieved by other Presidents in four years. That is also true with respect to the nearly four years it took for President Clinton to achieve these results following the Republicans' taking majority control of the Senate in 1995.

The 69 judges confirmed last year exceeds the number of judges confirmed during any of the six years from 1995 to 2000 that Republicans controlled the Senate during the Clinton presidency years in which there were far more vacant federal judgeships than exist today. Among those 69 judges confirmed in 2003 were 13 circuit court judges. That exceeds the number of circuit court judges confirmed during all of 1995, 1996, 1997, 1999, and 2000, when a Democrat was President.

The Senate has already confirmed 30 circuit court judges nominated by President Bush. This is a greater number than were confirmed at this point in the presidencies of his father, President Clinton, or the first term of President Reagan. Vacancies on the federal judiciary have been reduced to the lowest point in two decades and are lower than Republicans allowed at any time during the Clinton presidency. In addition, there are more federal judges serving on the bench today than at any time in American history.

I congratulate the Democratic Senators on the Committee for showing a spirit of cooperation and restraint in the face of a White House that so often has refused to consult, compromise or conciliate. I regret that our efforts have not been fairly acknowledged by partisan Republicans and that this Administration continues down the path of confrontation. While there have been difficult and controversial nominees whom we have opposed as we exercise our constitutional duty of advice and consent to lifetime appointments on the federal bench, we have done so openly and on the merits.

For the last three years I have urged the President to work with us. It is with deep sadness that I see that this Administration still refuses to accept the Senate's shared responsibility under the Constitution and refuses to appreciate our level of cooperation and achievement.

I also note the Chief Justice's disappointment that this Administration has failed to support our third co-equal branch, the federal judiciary, with respect to fair compensation or to respect its judicial authority. I, too, was troubled by the Feeney Amendment that was added by Republicans at the last minute to important child protection legislation. The Chief Justice's criticisms on these matters are amply justified.

Today, the Chairman has scheduled hearings on four more judicial nominees: one for the United States Circuit Court of Appeals for the Eighth Circuit, and three for United States District Courts in Washington, Pennsylvania and Arizona. I welcome the nominees and their families to the Committee.

Included among the nominees today is Raymond Gruender, nominated to the U.S. Court of Appeals for the Eighth Circuit. President Clinton's nomination of Bonnie Campbell to this court was blocked by a secret Republican hold from ever getting Committee or Senate consideration. By contrast, the Senate has already confirmed four of President Bush's nominees to this circuit -- William Riley, Michael Melloy, and Lavenski Smith were confirmed while Democrats held the majority and, last year, Steven Colloton was confirmed to this court, as well.

For the past two years, Mr. Gruender has served as the U.S. Attorney for the Eastern District of Missouri. In this capacity, he has been a strong defender of Attorney General John Ashcroft's aggressive and controversial tactics. I will be glad to afford him the opportunity to expound his views on a number of issues.

Today, we will also hear from Gene Pratter, nominated to the U.S. District Court for the Eastern District of Pennsylvania. She will be the fourteenth nominee of President Bush's to the U.S. district courts in Pennsylvania who is being given a hearing. While I was Chairman, the Senate held hearings for and confirmed 10 nominees to the district courts in Pennsylvania. President Bush's nominees have been treated far better than President Clinton's were. Indeed, there is no State in the Union that has had more federal judicial nominees confirmed by this Senate than Pennsylvania.

Despite the best efforts of the senior Senator from Pennsylvania, there were nine nominees by President Clinton to Pennsylvania vacancies who were never considered. Despite their qualifications, those nominations sat pending for extensive periods of time without action. Ms. Pratter was just nominated on Nov. 3, 2003 and is another nominee by President Bush who, by contrast, is being accorded a prompt hearing.

We want to comment briefly, as well, on the nomination of Judge Ricardo Martinez. This nomination from Washington State has the support of both home-state Senators. Senator Murray and Senator Cantwell have both worked hard to establish a bipartisan process for making recommendations to the President for federal judicial vacancies in their State. They are to be commended for their work. Judge Martinez is the third Washington State nominee who is a product of Washington's bipartisan selection commission, and appears to be another well-qualified, consensus nominee. This shows what can be achieved if the Administration will work with us.

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