

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 25, 2004

Opening Statement Of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Judicial Nominations Hearing
February 25, 2004

In making his second recess appointment of a judicial nominee, a nomination that was debated at length before the Senate to which the Senate withheld its consent, President Bush has engaged in an inappropriate use of the constitutional authority to make recess appointments when the Senate is unavailable to consider them. This Administration and its partisan enablers in the Senate have again demonstrated their disdain for the constitutional system of checks and balances and for shared power among the three branches of our Federal Government. By such actions, this Administration shows that it seeks all power consolidated in the Executive and that it wants a Judiciary that will serve its narrow ideological purposes.

Such overreaching by this Administration is hurting the courts and the country. President Bush and his partisans have disrespected the Senate, its constitutional role of advice and consent on lifetime appointments to the federal courts, the federal courts, and the representative democracy that is so important to the American people. It is indicative of the confrontational and "by any means necessary" attitude that underlies so many actions by this Administration and that created the atmosphere on this Committee in which Republican staff felt justified in spying upon their counterparts and stealing computer files.

After eight years in office in which more than 60 judicial nominees had been stalled from consideration by Republican partisans, President Clinton made his one and only recess appointment of a judge. He did so to bring diversity to the Fourth Circuit, the last federal circuit court not to have had an African-American member. Judge Roger Gregory was subsequently approved by the Senate for a lifetime appointment under Democratic Senate leadership in the summer of 2001. This was made possible by the steadfast support of Senator John Warner, the senior Senator from Virginia, and I have commended my friend for his actions in this regard. Judge Gregory was one of scores of highly qualified judicial nominations stalled under Republican Senate leadership. Sadly, others, such as the nominations of Bonnie Campbell, Christine Arguello, Allen Snyder, Kent Markus, Kathleen McCree Lewis, Jorge Rangel, Carlos Moreno and so many others have not been reinstated and considered.

By contrast, the current President has made two circuit appointments in two months and his White House threatens that more are on the way. These appointments are from among the most

controversial and contentious nominations this Administration has sent the Senate. After reviewing their records and debating at length, the Senate withheld its consent. The reasons for opposing these nominations were discussed in open debate during which the case was made that these nominees were among the handful that a significant number of Senators determined had not demonstrated that they would be fair and impartial. By contrast, Republicans prevented Judge Gregory's nomination from being considered by the Judiciary Committee or the Senate.

Republicans shut down the confirmation process when they took issue with Executive Branch appointments by President Clinton. In contrast, Democratic Senators have proceeded to confirm two of this President's judicial nominees after he made the Pickering recess appointment and have offered to debate and vote on two others on which there have been anonymous Republican holds for months.

Today, the Judiciary Committee is holding its fifth judicial nomination hearing of 2004. We are one hearing away from the total number of such hearings held throughout 1996 and more than halfway to the total of those held in 2000. By this date in 1996 or 2000, the preceding two presidential election years, only one hearing had been held by this Committee to consider judicial nominees. At the end of this hearing, we will have held hearings on 12 judicial nominees this year. The total considered by this date in the last presidential election year was two. And, we have moved forward with hearings in spite of the pending investigation into the spying and stealing by Republican staff of the computer files of Democratic Senators from the Judiciary computer server.

The American people understand that Democrats on this Committee have shown great restraint and extensive cooperation in the confirmation of 171 of this President's judicial nominations and by continuing to move forward this year despite the partisanship shown by Republicans.

Today's hearing is to consider the nomination of Roger Benitez to the Southern District of California. Judge Benitez is being considered for the last of five new seats in the Southern District of California that were created by statute on November 2, 2002, as part of a package of judgeships created for border districts that have a massive caseload and that needed more federal judges. I worked hard with Senator Feinstein to help create these new positions under Democratic Senate leadership. By doing so, we did what the Republican majority refused to do in the years 1995 through 2000 when there was a Democratic President. We did so under Senate Democratic leadership with a Republican President.

Unlike many other nominees who have come before this Committee, Roger Benitez comes before us with judicial qualifications, having had experience serving as a judge both in State and federal courts. He served for four years as a California Superior Court Judge for Imperial County and three years as a U.S. Magistrate Judge for the Southern District for California.

Like some other nominees who have come before this Committee, however, Roger Benitez comes before us with concerns having been raised about his fitness to serve. Judge Benitez is the 26th judicial nominee of this President to be considered who received a partial or majority rating of "Not Qualified" from the ABA Committee that conducts a peer evaluation of judicial nominees. Of those, 16 have already been confirmed and another has been recess appointed.

Before President Bush ejected the ABA from the process of providing an informal rating prior to a nomination, temperament or ethics concerns would have been raised at the early stage of a nomination's consideration and in time for the White House to make a decision whether to proceed with that nominee, with knowledge of such determinations and the opportunity to conduct follow-up inquiry. The change in the role of the ABA has led to ABA ratings being less helpful.

The Senate Judiciary Committee's practice has been to invite the ABA to testify in connection with a nomination when a circuit or district court nominee has earned a majority or unanimous rating of "Not Qualified." This is the third time since this Administration took office that the ABA is here to testify about a nominee's majority "not qualified" rating.

The ABA reviews nominees in three areas: competence, integrity and judicial temperament. In Judge Benitez's case, based on interviews with 23 judges and 44 attorneys, more than 10 members of the ABA committee concluded that, based on his temperament, he is not qualified to serve a lifetime appointment on the federal bench. Members of this Committee and of the Senate now have the opportunity to form their own impressions and make their own determinations. We welcome the input from the ABA based on their investigation.

I am pleased to welcome the current Chair of the ABA's Standing Committee on the Federal Judiciary, Tom Hayward. Mr. Hayward is a partner at Bell, Boyd & Lloyd in Chicago and is a corporate and real estate lawyer. He is the past president of the Chicago Bar Association, where he was General Chair of the Committee on the Evaluation of Judicial Candidates and a founding member of the Young Lawyers Section. He has served as a member of the ABA House of Delegates since 1984 and has served on the ABA Board of Governors since 1998. I look forward to his testimony.

I also welcome here today Mr. Robert Macias, a former member of the American Bar Association's Standing Committee on Federal Judiciary who conducted the investigation into this nominee.

I would also like to recognize Chief Judge Marilyn Huff of the Southern District of California who has come today to speak in favor of Judge Benitez's confirmation.

Finally, I welcome Judge Benitez and look forward to hearing his testimony before us today.

#####