Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Executive Business Meeting
Senate Judiciary Committee
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I appreciate the opportunity to make this opening statement. I know that Senator Kennedy wants to be heard, as well, before we proceed, and I will, if necessary, defer to him. I would hope the Committee would extend to Senator Kennedy the courtesy to be heard, as well.

PRYOR RECESS APPOINTMENT
Before any discussion of today's agenda, I need to say a few words about a deeply disappointing development regarding judicial nominations - President Bush's appointment of William Pryor to the Eleventh Circuit Court of Appeals last Friday, at the end of the short Presidents' Day break in the Senate's session.

Over the past few weeks, I have shared with the Senate information about three other divisive developments regarding judicial nominations: The Pickering recess appointment, the renomination of Claude Allen, and the theft of Democratic computer files by Republican staff. In spite of all those affronts, Senate Democrats cooperated in confirming two additional judicial nominees this year and continue to participate in hearings for judicial nominees. We have done so without the kinds of delays and obstruction that Republicans relied upon to stall more than 60 of President Clinton's judicial nominees.

Today, I report upon the President's appointment of William Pryor in what the Democratic Leader has properly termed an abuse of power. It was an abuse of the constitutional authority of the Executive to make necessary recess appointments during the unavailability of the Senate. This is unprecedented.

Actions like this show the American people that this White House will stop at nothing to try to turn the independent federal judiciary into an arm of the Republican Party. Doing this further erodes the White House's credibility and the respect that the American people have for the courts.

This is an Administration that promised to unite the American people but that has chosen time and again to act in ways that divide us, to disrespect the Senate and our representative democracy. This is an Administration that squandered the good will 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 during 17 difficult months in 2001 and 2002, while overcoming the September

11 attacks, the subsequent anthrax attacks and in spite of Republican mistreatment of scores of qualified, moderate judicial nominees of President Clinton.

This is an Administration that has once again demonstrated its unilateralism, arrogance and intention to divide the American people and the Senate with its controversial judicial nominations. With this appointment, the President is acting - as he has in so many areas over the past three years -- unilaterally, overextending and expanding his power, with disregard for past practice and tradition, and the rule of law.

The recess appointment of Mr. Pryor threatens both the independence of the judiciary and the constitutional balance of power between the Legislative and Executive Branches. We entrust to the stewardship of lifetime judges in our independent Federal judiciary the rights that all of us are guaranteed by our Constitution and laws. That is an awesome responsibility. Accordingly, the Constitution was designed so that it would only be extended after the President and the Senate agreed on the suitability of the nomination. The President has chosen for the second time in as many months to circumvent this constitutional design.

I have sought in good faith to work with this Administration for the last three years in filling judicial vacancies, including so many left open by Republican obstruction of President Clinton's qualified nominees. When Chairman, I made sure that President Bush's nominees were not treated the way his predecessor's had been. They were treated far more fairly, as I had promised. Republicans had averaged only 37 confirmations a year while vacancies rose from 65 to 110 and circuit vacancies more than doubled from 16 to 33. Under Democratic leadership, we reversed those trends and opened the system to public accountability and debate by making home-state Senators' objections to proceeding public for the first time and debating and voting on nominations. We were able to confirm 100 judges in just 17 months and virtually doubled the Republican annual average with 72 confirmations in 2002, alone.

I have urged that we work together, that we cooperate, and that the President live up to the promise he made to the American people during the last campaign when he said he would act as a uniter and not a divider. I have offered to consult and made sure we explained privately and in the public record why this President's most extreme and controversial nominations were unacceptable. Our efforts at reconciliation continue to be rebuffed.

Both these recess appointments are troubling. The President says that he wants judges who will "follow the law" and complains about what he calls "judicial activism." Yet, he has acted -- with disregard for the constitutional balance of powers and the Senate's advice and consent authority-- unilaterally to install on the federal bench two nominees from whom the Senate withheld its consent precisely because they are seen by so many as likely to be judicial activists, who will insert their personal views in decisions and will not follow the law.

In the case of Mr. Pryor, he is among the most extreme and ideologically committed and opinionated nominees ever sent to the Senate. Mr. Pryor's nomination to a lifetime appointment on the federal bench was opposed by every Democratic member on the Senate Judiciary Committee after hearings and debate. It was opposed on the Senate floor because he appears to have extreme - some might say "radical" -- ideas about what the Constitution should provide with regard to federalism, criminal justice and the death penalty, violence against women, the

Americans with Disabilities Act, and the Government's ability to protect the environment on behalf of the American people. He has been a crusader for the federalist revolution. He has urged that federal laws on behalf of the disabled, the aged, women, minorities, and the environment all be limited. His comments have revealed insensitivity to the barriers that disadvantaged persons and members of minority groups and women continue to face in the criminal justice system. He has testified before Congress in support of dropping a crucial part of the Voting Rights Act and has repeatedly described the Supreme Court and certain justices in overtly political terms. He received the lowest possible qualified rating from the American Bar Association - a partial rating of "Not Qualified" - underscoring his unfitness for the bench. In sum, Mr. Pryor has demonstrated that he is committed to an ideological agenda that puts corporate interests over the public's interests and that he would roll back the hard-won rights of consumers, minorities, women, and others.

Mr. Pryor's nomination was considered in Committee and on the Senate floor. The Senate debated his nomination, and had enough concerns about his fitness for a lifetime appointment that two motions to end debate on his nomination failed. That is the constitutional right of the Senate.

But President Bush has decided to use the recess appointment clause of the Constitution to end-run the Senate. As far as I know, this power has never been used this way before this President. Of course this is the first President in our nation's history to renominate someone rejected after hearings, debate and a fair vote by the Senate Judiciary Committee. He did that twice. He has now twice overridden the Senate's withholding of its consent after hearings and debate on judicial nominees. This demonstrates contempt for the Constitution and the Senate. The New York Times editorialized over the weekend about "President Bush . . . stacking the courts with right-wing judges of dubious judicial qualifications" and even The Washington Post observed that recess appointments of judges "should never be used to mint judges who cannot be confirmed on their merits."

The recess appointments clause of the Constitution was not intended to change the balance of power between the Senate and the President that is established as part of the fundamental set of checks and balances in our government. Indeed, the appointments clause in the Constitution requires the consent of the Senate as just such a fundamental check on the Executive. This was meant to protect against the "aggrandizement of one branch at the expense of the other." The clause was debated at the Constitutional Convention, and the final language - with shared power - is intended to be a check upon favoritism of the President and prevent the appointment of unfit characters.

The President's claimed power to make a unilateral appointment of a nominee, Mr. Pryor, who the Senate considered and effectively rejected, slights the Framers' deliberate and considered decision to share the appointing power equally between the President and the Senate. This President's appointment of Mr. Pryor to the Eleventh Circuit - after he was considered by the full Senate - seems irreconcilable with the original purpose of the appointments and recess appointment clauses in the Constitution. Perhaps that explains why the Pryor and Pickering recess appointments by this President are the first times in our centuries-long history that the

recess appointment power has been so abused. No other President has engaged in this manner. No other President sought such unilateral authority without balance from the Senate.

The President chose to sully the Martin Luther King Jr. weekend with his unilateral appointment of Judge Pickering. Sadly, he chose the Presidents' Day congressional break unilaterally to appoint Mr. Pryor. We resumed our proceedings in the Senate this week with the traditional reading of President's George Washington's farewell address. The Senate proceeds in this way every year. I urge this President and those in his Administration to recall the wisdom of our first President. George Washington instructs us on the importance of not abusing the power each branch is given by the Constitution. He urges the three branches of our government to "confine themselves within their respective constitutional spheres." He said more than 200 years ago words that ring true to this day:

"The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism . . . . The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositaries, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern. . . . To preserve them must be as necessary as to institute them."

The current occupant of the White House might do well to take this wisdom to heart and respect the constitutional allocations of shared authority that have protected our nation and our rights for more than 200 years so brilliantly and effectively.

The recess appointments power was intended as a means to fill vacancies when the Senate was not available to give its consent; it was intended to ensure effective functioning of the government when the Senate adjourned for months at a time. It was never intended as an alternative means of appointment by the Executive when the President chose to serve some partisan short-term goal by simply overriding the will of the Senate to employ his own--especially with respect to our third branch of government, the federal judiciary.

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 hurts 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 a climate 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. Contrast that appointment with the actions of the current President:

President Clinton acted 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. When Judge Gregory's nomination was finally considered by the Senate it passed by consensus and with only one negative vote. Senator Lott explained his vote as a protest vote against President Clinton's use of the recess appointment power. How ironic then that Judge Pickering now serves based on President Bush's abuse of that power.

Judge Gregory was one of scores of highly qualified judicial nominations stalled under Republican Senate leadership. Indeed, Judge Gregory and so many others were prevented from having a hearing, from ever being considered by the Judiciary Committee and from ever being considered by the Senate. 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 more, have not been reinstated and considered. But President Clinton did not abuse his recess appointment power. Instead, his appointment of Judge Gregory was in keeping with traditional practices and his use of that power with respect to judicial appointments was limited to that one occasion.

By contrast, the current President has made two circuit recess 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 hearings and 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 their fairness and impartiality to serve of judges.

Contrast Roger Gregory's recess appointment, which fit squarely in the tradition of President's exercising such authority in order to expand civil rights and to bring diversity to the courts, with that of Mr. Pryor. Four of the five first African American appellate judges were recess-appointed to their first Article III position, including Judge William Hastie in 1949, Judge Thurgood Marshall in 1961, Judge Spottswood Robinson in 1961, and Judge Leon Higginbotham in 1964. The recent appoints of Judge Pickering and Mr. Pryor stand in sharp contrast to these outstanding nominees and the public purposes served by their appointments.

The nominations of Judge Pickering and Mr. Pryor were opposed by individuals, organizations and editorial pages across the nation. Organizations and individuals concerned about justice before the federal courts, such as Log Cabin Republicans, the Leadership Conference on Civil Rights, and many others opposed the Pryor nomination. The opposition extended to include organizations that rarely take positions on nominations but felt so strongly about Mr. Pryor that they were compelled to lodge their opposition in the record,, such as the National Senior Citizens Law Center, Anti-Defamation League, and Sierra Club. Rather than bring people together and

move the country forward, this President's recess appointment is another example of unnecessarily divisive action.

Further, the legality of this use of the recess appointments power, without precedent and during such a short Senate break, is itself now a source of division and dispute. Recent Attorneys General have all opined that a recess of 10 days or less does not justify the President's use of the recess appointments power and would be considered unconstitutional. Starting in 1921, Attorney General Daugherty advised the President that he could make recess appointments during a mid-session adjournment of approximately four weeks but that two days was not sufficient "nor do I think an adjournment for five or even 10 days can be said to constitute the recess intended by the Constitution." More recently, a memo from the Reagan Administration Justice Department concluded: "Under no circumstances should the President attempt to make recess appointment during intrasession recess of less than 10 days." This year, a Federalist Society paper noted the dubious constitutionality of appointments during short intrasession breaks.

We will not resolve the question of legality of these recess appointments here today, but we can all anticipate challenges to rulings in which Mr. Pryor participates. Thus, we can expect this audacious action by the Administration will serve to spawn litigation and uncertainty for months and years to come.

I thank the Democratic Leader for the statements he made this week in connection with the abuse of the recess appointment power by this President. I remind the Senate that a few years ago when President Clinton used his recess appointment power with regard to a short-term Executive appointment of James Hormel to serve as ambassador to Luxembourg, Senator Inhofe responded by saying that President Clinton had "shown contempt for Congress and the Constitution" and declared that he would place "holds on every single Presidential nomination." Republicans continued to block nominations until President Clinton agreed to make recess appointments only after Congress was notified in advance. On November 10, 1999, 17 Republican Senators sent a letter to President Clinton telling him that if he violated the agreement, they would "put holds for the remaining of the term of your Presidency on all of the judicial nominees."

In November 1999, President Clinton sent a list of 13 positions to the Senate that he planned to fill through recess appointments. In response, Senator Inhofe denounced five of the 13 civilian nominees with a threat that if they went forward, he would personally place a hold on every one of President Clinton's judicial nominees for the remainder of his term. That led to more delays and to the need for a floor vote on a motion to proceed to consider the next judicial nomination, in order to override Republican objections.

When President Clinton appointed Judge Gregory at the end of 2000, Senator Inhofe called it "outrageously inappropriate for any president to fill a federal judgeship through a recess appointment in a deliberate way to bypass the Senate." When the Gregory nomination was confirmed with near unanimity under Senate Democratic leadership in 2001, Senator Lott's spokesperson indicated that Senator Lott's solitary opposition was to underscore his position that "any appointment of federal judges during a recess should be opposed."

FILE THEFT INVESTIGATION

The recess appointment of Mr. Pryor is not the only disturbing development in recent weeks. At

our last meeting we began the discussion of the spying by Republican staff and their theft of internal Democratic computer files from the Judiciary Committee computer server. A number of us commended Chairman Hatch for acknowledging that this conduct by Republican staff was unacceptable, improper and unethical. I was encouraged by the comments of Republican Senators at that meeting who listened respectfully to our statements, and responded with what I heard as genuine regret for the actions of the Republican staff. I especially appreciate the acknowledgement by Senator Graham of the atmosphere of rabid partisanship. What I see as the "by any means necessary" approach of this Administration and its partisans is what changed in the Senate and in this Committee that contributed to this breakdown in appropriate conduct. I look forward to hearing from those who have yet to speak out on this important matter.

The beginning of the discussion at our last meeting does not end the matter for our Committee, however. The breach is not healed and many, many questions remained unanswered. A number of Senators acknowledged at our last meeting that resolving that matter must be our first order of business and matter of concern. We expect a report from the Senate Sergeant at Arms soon to advise us of the progress of his investigation. What is apparent is that thousands of computer files were taken and that the secret surveillance took place from at least 2001 into 2003. Democrats on this Committee were victims of wrongdoing by calculation and stealth. It was intentional, repeated, longstanding, systematic and malicious. This shameful misconduct cannot be swept under the rug.

We still do not know who benefited from these thefts, how these computer files were used, and how and with whom they were shared inside or outside the Committee. We do not yet know who inside the Senate, the Department of Justice, or the White House saw the stolen documents or was apprised of the information they contained. We do not yet know for certain if judicial nominees who have passed through this Committee were coached for their hearings based on the stolen files or on information they contained.

Answers to these and so many other questions are essential to our ability to move ahead on judicial nominations. Senator Durbin made some very constructive suggestions at our last meeting for how best to proceed and bring that important matter to a head so that we can restore the necessary trust and comity required for any Committee of the Senate to function. This week Senator Hatch and I took another step forward by jointly requesting that the GAO examine and report on our computer security and make recommendations for improving it. I ask that a copy of our letter be included in the record.

Of course, we all know that there is no substitute for honorable and ethical conduct. Senator Feinstein made that point at our last meeting. Establishing public accountability and restoring that fundamental commitment to comity are additional steps we need to consider once the investigation is complete. These are necessary steps for this Committee to function and fulfill its constitutional responsibilities.

PROGRESS OF FILING JUDICIAL VACANCIES

The American people understand that Democrats on this Committee and in the Senate have shown great restraint and extensive cooperation in the confirmation of 171 of this President's judicial nominations. Some Republicans are loath to acknowledge that cooperation but with it this President has been achieving record numbers of judicial confirmations, and we have reduced

judicial vacancies to the lowest level in decades. Despite the unprecedented political upheavals and the aftermath of September 11, as of today, the Senate has already confirmed more judges than were confirmed during President Reagan's entire first four-year term. Indeed, at this point in President Clinton's last term, only 140 judges had been confirmed, as compared to the 171 confirmed and two recess appointed by this President.

We need to restore our relationships on this Committee. Working together we can do so more promptly. That is what will allow us to resume our other work and make additional progress on judicial nominations. We have already achieved much. If we resolve these other pressing matters, we can do even more.

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