Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Today's hearing marks another unfortunate milestone in the Senate Judiciary Committee's break with longstanding precedent and Senate tradition. In the past year and a half, with the Senate and the White House under control of the same political party we have witnessed rule after rule broken or misinterpreted away.

The Republican Way

The list is long. From the way that home-state Senators are treated to the way hearings are scheduled, to the way the Committee questionnaire is altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated; the Republicans on the Committee have destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process. Some are now beginning to talk openly about ignoring another longstanding practice, the Thurmond rule, for the first time in this particular presidential election year. We suffered through three years during which Republican staff stole Democratic files off the Judiciary computers during what has been a "by any means necessary" approach. Their approach to our rules and precedents follows their own partisan version of the golden rule, which is that "he, with the gold, rules." That has not been helpful to the process, the Senate or the country.

During the past several weeks we have begun to see how this Administration -- at the Department of Defense, at the Department of Justice and at the White House -- reinterpreted the law and treaties that had governed our nation's policy and practices for the detention and interrogation of prisoners and how it led to torture and abuse. That has severely undercut and endangered our men and women serving in Iraq and around the world. I cannot remember a time in decades when the United States has faced more criticism abroad. And as Secretary Ridge conceded at our hearing last week, such abuses have had the effect of increasing recruiting by anti-American and terrorist organizations.

It is as if those currently in power believe that that they are above our constitutional checks and balances and that they can reinterpret any treaty, law, rule, custom or practice they do not like or they find inconvenient.

Some of these interpretations are so contrary to well-established understandings that it is like we have fallen down the rabbit hole in Alice in Wonderland. I am reminded that the imperious Queen of Hearts rebuked Alice for having insufficient imagination to believe contradictory things, saying that some days she had believed six impossible things before breakfast. I have seen things I thought impossible on this Committee in recent times, things impossible to square

with the past practices of Committee and the history of the Senate. This Committee is entrusted by the Senate to help determine whether judicial nominees will follow the law. It is unfortunate that the Committee that judges the judges has not followed our own rules.

Partisan Patterns

Today's hearing is another example of the downward spiral this Committee continues to travel. Nearly a year ago, the Chairman crossed a line that he had never before crossed when he held a hearing for Henry Saad, a nominee to the U.S. Court of Appeals for the Sixth Circuit, who was opposed by both his home-state Senators. As I said at the time, I think it may not only have been the first time that this Chairman held a hearing for a nominee without two positive blue slips, indicating support from home-state Senators, but it may have been the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It was certainly the only time in the last 50 years, and I know it to be the only time during my nearly 30 years in the Senate.

Today, having broken a longstanding practice of this Committee founded on respect for the wishes of a home-state Senator, whether in the case of a district or circuit court nominee, the Chairman does it again. But today he has chosen to up the ante by doubling the violation. The two nominations for which he set today's hearing are both opposed by their home-state Senators.

The Michigan Senators have come to the Committee and articulated their very real grievances with the White House and their honest desire to work towards a bipartisan solution to the problems filling vacancies in the Sixth Circuit. We should respect their views, as the views of home-state Senators have been respected for decades. I have urged the White House to work with them. I have proposed reasonable solutions to the impasse that the White House rejected. The Michigan Senators have proposed reasonable solutions, including a bipartisan commission, which the White House continues to reject.

It is telling that the other nominee today is the product of a bipartisan commission. Judge Virginia Maria Hernandez Covington, who has been nominated to the federal District Court in Florida, has the full support of both of her home-state Senators. I congratulate the Senators from Florida for their efforts to maintain this important mechanism for promoting experienced and consensus candidates for the federal bench.

Although President Bush promised on the campaign trail to be a uniter and not a divider, his practice once in office with respect to judicial nominees has been most divisive. Citing the remarks of a White House official, The Lansing State Journal reported that President Bush is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that the White House is not willing to work toward consensus with all Senators.

Republican White House, Different Rules

Together with a White House of the same party, the Senate's majority over the past year and a half has launched an ongoing series of changed practices and broken rules on this Committee. The White House and some in the Senate have even suggested changing the Senate's rules to consolidate the White House's control over the judicial nominations process. Over the last three

years, time and again the good faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous six years have been rejected.

I have explained this before, but given the continued flaunting of precedent, it bears repeating. When Republicans chaired this Committee and we were considering the nominations of a Democratic President, one negative blue slip from just one home-state Senator was enough to doom a nomination and prevent a hearing on that nomination. This included all nominations, including those to the circuit courts. How else to explain the failure to schedule hearings for such qualified and non-controversial nominees such as James Beaty and James Wynn, African-American nominees from North Carolina? What other reason could plausibly be found for what happened to the nominations of Enrique Moreno and Jorge Rangel -- both Latino, both Harvard graduates, both highly rated by the ABA, both denied hearings in the Judiciary Committee? There is no denying that was the rule during the previous Democratic Administration. There is no way around the conclusion that with a Republican in the White House, the Republicans in the Senate have found it politically convenient to change the rules.

In all, more than 60 of President Clinton's judicial nominees and more than 200 of his executive branch nominees were defeated in Senate committees through the enforcement of rules and precedents that the Republican majority now finds inconvenient -- now that there is a Republican in the White House. Indeed, among the more than 60 Clinton judicial nominees who this Committee did not consider there were several who were blocked despite positive blue slips from both home-state Senators. So long as a Republican Senator had an objection, it appeared to be honored, whether that was Senator Helms objecting to an African-American nominee from Virginia or Senator Gorton objecting to nominees from California.

As I noted last year, this Committee under this Chairman took the unprecedented action of proceeding to a hearing on the nomination of Carolyn Kuhl to the Ninth Circuit over the objection of Senator Boxer. When the senior Senator from California announced her opposition to the nomination as well at the beginning of a Judiciary Committee business meeting, I suggested to the Chairman that further proceedings on that nomination ought to be carefully considered. I noted that he had never proceeded on a nomination opposed by both home-state Senators once their opposition was known. Senator Feinstein has likewise reminded the Chairman of his statements in connection with the nomination of Ronnie White when he acknowledged that had he known both home-state Senators were opposed, he would never have proceeded. Nonetheless, in one in a continuing series of changes of practice and position this year, this Committee was required to proceed with the Kuhl nomination; a party-line vote was the result.

Now this Committee is making a further profound change in its practices. When a Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home-state Senator stalled the nomination. The Chairman cannot cite a single example of a single time that he went forward with a hearing over the objection or negative blue slip of a single Republican home-state Senator. Now that a Republican President is doing the nominating, no amount of objecting by Democratic Senators is sufficient. The Chairman overrode the objection of one home-state Senator with the Kuhl nomination. The Chairman overrode the objection of both home-state Senators when he held a hearing on the Saad

nomination last year. And now, he does so again with the two circuit court nominees on today's hearing agenda.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two policies the Chairman has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip process in different ways, some to work unfairness and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now.

The double standards that the Republican majority has adopted obviously depend upon the occupant of the White House. This change in practice marks another example of their double standards. Last year the Republican majority chose to abandon our historic practice of bipartisan investigation. The Republican majority also chose to abandon the meaning and consistent practice of protecting minority rights through a longstanding Committee rule that required a member of the minority to vote to cut off debate in order to bring a matter to a vote. With this hearing, the Committee takes another giant step in the direction of unprincipled partisanship. Republican Senators will apparently stop at nothing in their efforts to aid and abet this White House in its efforts to pack the federal judiciary.

I am disappointed that there are still vacancies on the Sixth Circuit. During President Clinton's second term, the Republican Senate majority shut down the process and three outstanding nominees to Sixth Circuit vacancies were not accorded hearings or consideration. When I chaired the Committee, we broke the impasse with the first Sixth Circuit confirmation in many years and proceeded to confirm two conservative nominees. We have since proceeded with and confirmed two more. That is four circuit confirmations in three years as opposed to no confirmation in the last three years of the Clinton Administration. We cut Sixth Circuit vacancies in half. With cooperation from the White House, we could have done even better.

The Republican Senate majority refused for over four years to consider President Clinton's well-qualified nominee, Helene White, to the Sixth Circuit. Judge White has served on the Michigan Court of Appeals with Judge Griffin since 1993, and, prior to her successful election to that seat, served for nearly 10 years as a trial judge, handling a wide range of civil and criminal cases. She was first nominated by President Clinton in January 1997, but the Republican-led Senate refused to act on her nomination. She waited in vain for over 1,454 days for a hearing, before President Bush withdrew her nomination in March 2001.

President Clinton had also nominated Kathleen McCree Lewis. She is the daughter of a former Solicitor General of the United States and a former Sixth Circuit Judge. She was also passed over for hearings for years. No effort was made to accord her consideration in the last 18 months of President Clinton's term. We have a double standard at work now.

Conclusion

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founders established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will wrote: "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in

policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus.

Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate. It has acted to ignore precedents and reinterpret longstanding rules to its advantage. This practice of might makes right is wrong.