

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
September 22, 2004

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Ranking Democratic Member, Judiciary Committee
Hearing of the Senate Judiciary Committee
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Pilot Project on Closed Captioning

This afternoon's nomination hearing marks a technological milestone for the Senate. Today the Senate Judiciary Committee officially begins broadcasting live on the Senate television system with closed captioning that uses the advanced technology of voice-recognition software. We have been eagerly awaiting this day when hearing impaired Americans will be able to follow the proceedings of this Committee as they occur through closed captioning.

Working with the Office of the Secretary of the Senate and with the Committee on Rules, the Judiciary Committee has developed a pilot project that will allow us to study the captioning of committee hearings, offering real-time captioning as a demonstration for the use of Senators and their staff. We are very proud of the Judiciary Committee's groundbreaking role in testing this new technology. I want to thank Senator Hatch for agreeing to work with me on this project.

Through this pilot project, we are helping the Senate determine the feasibility of providing real-time captioning for all Senate committee hearings. We hope to bring closer the day when Americans with impaired hearing will have access to the legislative process, which often occurs in the committees and not only on the floor of the Senate.

Today's launch is particularly noteworthy coming at a time when we see barriers being erected all around Washington. We are glad for this opportunity to actually bring down a barrier between the American people and their government.

Sentencing Commission Nomination

This week, at long last, the President has finally sent the Senate a nominee for the remaining vacancy on the United States Sentencing Commission. I thank Senator Hatch for expediting the hearing on this nomination.

The nonpartisan nature of the Sentencing Commission is preserved by making sure it is balanced and includes experienced Commissioners who stick to the merits and command the respect of both Congress and the Judiciary. Our nominee today is just such a person. Beryl Howell was a tough federal prosecutor who earned a number of commendations for her actions. She was the

deputy chief of the narcotics section and Assistant U.S. Attorney in the Eastern District of New York until she consented to join the staff of the Senate Judiciary Committee in 1993. She served here with great distinction and earned the respect of Republicans and Democrats alike. As my General Counsel, she devoted herself to resolving issues on the merits and was a tremendous asset to the Committee as we considered legislative challenges. No challenge we faced was greater than the one we met in the weeks following September 11, 2001. She led our Senate staff's negotiations with the Administration. Had the White House not reneged on some of the commitments they made in the course of our negotiations, the PATRIOT Act would have been a better, more balanced bill.

She has gone on to become highly successful as the managing director and general counsel of the Washington, D.C. office of Stroz Friedberg, LLC, one of the leading cybersecurity and forensic firms in the country.

Appointments to the Sentencing Commission have enjoyed a tradition of bipartisanship. President Clinton worked long and hard at reaching a compromise with Senate Republican leaders on a slate of nominees to this important Commission. Seats went unfilled for too long while a Democratic White House negotiated with Majority Leader Lott and Chairman Hatch. Finally, in late 1999, we were able to get agreement from the Republican caucus and nominations went forward. Instead of honoring this tradition and doing what President Clinton had done, President Bush did not consult with Senate Democrats initially. It has taken some time but now, finally, the President has accepted a recommendation from the Democratic leader for this vacancy created by the resignation of Judge Diana Murphy. I thank Senator Daschle, Senator Kennedy and all Democratic Senators for their support for this nomination. With this nomination, the Committee and the Senate should be in a position to proceed promptly to confirm all the outstanding nominations to the Sentencing Commission as a package.

The Commission has important work to do. Especially in light of the Blakely decision and the Supreme Court's expedited consideration of follow-up cases that will affect the federal sentencing guidelines, we need to have the expertise and authority of the Commission in place and working in the weeks and months ahead.

Retirement of Sheila Joy

Finally, I would like to take a moment to acknowledge a woman has been involved in the judicial nominations process since I joined the Senate. Sheila Joy is a career civil servant at the Department of Justice who is retiring this month after 26 years working on nominations and 37 years in public service. Whether the man in the White House was a Democrat or a Republican, Sheila Joy served the public by assisting and advising judicial nominees on their papers for their Senate Judiciary Committee hearings for more than a quarter of a century. Her non-partisan advice about FBI and ethics issues, as well as history and precedent, has been relied upon by the Senate Judiciary Committee's investigators and counsel over these many years.

We appreciate that very much. It is literally true that Sheila has written in the official history books of the United States, recording the names and outcomes -- confirmed or blocked -- of every judicial nomination of Nixon, Carter, Reagan, Bush, Clinton and the current administration. She knows every lifetime appointed judge serving in the federal courts today and

she knew them when they were humble nominees. She has served our country well and I commend her. I think it will be impossible for anyone to fill her shoes, with her breadth of experience and wisdom, but I wish her a wonderful and relaxing retirement.

Republican Double Standards for Judicial Nominations

Today marks another unfortunate milestone, however, in the way that Republicans have employed double standards for judicial nominees depending on the political affiliation of the President. From the way that home-state Senators are treated to the way hearings are scheduled, to the way the Committee questionnaire was altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated, the Republican Senate leadership has destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process. Their actions have contributed to the extended debate on controversial judicial nominees.

They have also demonstrated time and again that the rules they used to insist upon when Democratic Presidents occupied the White House do not apply to Republicans.

Today, less than six weeks before the presidential election, the Committee is holding a hearing on a lifetime appointment to a seat that does not become vacant for more than eight weeks after the November election. It is another extension of their power for Republicans to insist the Senate consider nominees for positions that will not even arise until after the presidential election. When a Democratic President was seeking reelection in 1996, the Senate Republican leadership did not consider or confirm a single judicial nominee after the August recess despite scores of existing and longstanding vacancies. That session Senate Republicans only allowed 17 judicial nominations to be confirmed and they did not include a single nominee to the Courts of Appeals. How the rules have changed with the political affiliation of the occupant of the White House.

There remain just 27 vacancies in the federal district and circuit courts combined, and there are more active judges sitting on the bench than at any time in this nation's history. The Senate has already confirmed 201 of this President's judicial nominees and reduced vacancies to the lowest level in decades.

In 1996, when a Democratic President was seeking re-election, the Republican leadership allowed only one hearing to consider one district court nominee after the August recess, and then never allowed that nominee to have a Committee vote. Indeed, that nominee, Judge Ann Aiken of Oregon, was obstructed so severely by the Republican majority that she was not confirmed to her position until nearly a year and a half later. In September 1996, Republicans said: "[T]he fact of the matter is that both sides realize this process somewhat collapses really at the end of August, and it certainly has during presidential years because both sides are hoping that their candidates will win the presidency."

In 2000, the Republican Senate leadership insisted on following the Thurmond Rule. After the August recess work on judicial nominations came to a halt. Although there were over 30 nominees pending, after July 25, 2000, no more judicial nominees were scheduled for hearings or considered by the Committee. A leading Republican observed: "I have never seen an end of a session in a presidential year that is highly charged where there weren't people who couldn't get through at that point, where you just don't stop the process." In September 2000, when the

vacancy rate was around seven percent, Republicans proclaimed that the judiciary was not suffering and that nominees would not move so late in the presidential election year. Today, the vacancy rate stands at around three percent, less than half of what it was in September 2000, after Republicans had shut down hearings for judicial nominees.

In both 1996 and 2000, Senate Republicans did not allow a single individual nominated after July 21st to be confirmed to the federal courts - even for seats that were long vacant. When Kent Markus of Ohio was nominated in February 2000 to the Sixth Circuit, he was told by Republicans that it was just too late. Today's hearing is for an individual nominated on July 22, 2004 to fill a district court seat that will not be vacant until December 31, 2004. Today's hearing is unprecedented but not surprising given the reversal of so many positions the Republican majority had followed during years in which the President was from another political party.

The Senate has already confirmed four of President Bush's district court nominees and two of his circuit court nominees from Ohio, including some who were problematic. Deborah Cook, now on the Sixth Circuit, is a staunch Republican and Federalist Society member who was one of the Ohio Supreme Court's most prolific and activist dissenters in favor of corporate interests. She was promoted by the Senators from Ohio and was confirmed last year. Another Sixth Circuit confirmation, Jeffrey Sutton, is an active Federalist Society member and one of the most controversial of President Bush's nominees confirmed. Prior to his confirmation to a lifetime appointment on the nation's second highest court, Judge Sutton sought out opportunities to attack federal civil rights laws and limit Congress' ability to protect individual rights. He received enough "negative" votes to have sustained a filibuster, but he was not blocked on the floor.

The Senate also confirmed four Ohio district court nominees, many of whom were active members of the Republican Party in Ohio and whose records were somewhat troubling. Michael Watson was just confirmed by the Senate earlier this month.

We moved forward with those nominations even though two of President Clinton's nominees to Ohio, Kent Markus and Steve Bell, were blocked during Republican control of the Senate. Neither received a hearing or a vote. Professor Markus was nominated to the Sixth Circuit in February 2000, but was told it was just too late. Steven Bell was nominated in August 1999 to the district court in Ohio and waited for more than a year without receiving a hearing.