Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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On The Nomination Of Thomas B. Griffith
To The United States Court Of Appeals For The D.C. Circuit
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When we last met as a Committee for a hearing on the nomination of Thomas Griffith to the D.C. Circuit, it was a somewhat unusual hearing during a very brief post-election lame-duck session of Congress to consider a controversial nominee to the second highest court in the country. At the time, I thought that through working together there were a number of relatively noncontroversial judicial nominations on whom we might have been able to make progress. But there appeared to be little interest from the Republican majority in seizing that opportunity for progress. And what I have become convinced of since that time is that this White House continues to seek unnecessary confrontation over judicial nominees by renominating troublesome choices such as this one.

Four years ago, after Senate Republicans had abused their power to prevent more than 60 moderate and qualified judicial nominations of President Clinton from being considered and confirmed, I nonetheless urged this White House and Senate Republicans to work with all Senators to fill judicial vacancies. I pressed forward in the 17 months I chaired the Judiciary Committee to put the Senate in position to confirm 100 of President Bush's lifetime appointments to the federal courts. I tried to meet Republicans half way by making and fulfilling commitments to do what Republicans had not done, and we held hearings on even some of President Bush's most controversial nominees. For all of our efforts we were rewarded with vilification and personal attacks.

Over the last two years the Bush Administration continued down its course of politicizing judicial nominations. The Senate Republican leadership has abandoned its responsibilities to the Senate in this regard, choosing, instead, to serve as a wholly-owned subsidiary of the White House in their effort to turn the federal judiciary into an arm of a particular ideological wing of the Republican Party. Over the last two years Senate Republicans bent, broke or ignored our traditional rules governing Committee consideration of judicial nominees. This year Senate Republicans are working to exercise the "nuclear option" to destroy the one Senate rule left that allows the minority any protection. Changing the rules to remove the threat of the filibuster, which has allowed the Senate to serve as a check on a powerful Executive, would destroy the Senate, undermine the independence and fairness of the federal judiciary, and lead to a rollback of the rights and freedoms of the American people.

At the beginning of this Congress the new Senate Democratic Leader reached out to the White House and offered an olive branch and cooperation. His good efforts have likewise been spurned by the White House, which remains intent on seeking confrontation over reconciliation.

Just last week the Senator from Colorado sent a letter to the President urging that we join in common cause on these matters and suggesting that the President make a show of good faith by ratcheting down the conflict by withdrawing those divisive judicial nomination on which the Senate has previously withheld its consent. He offered President Bush some wise counsel noting that "the decision to re-nominate these individuals will undoubtedly create the animosity and divisiveness between the President and the Unites States Senate as an institution that is not helpful to our Nation and will sidetrack our collective efforts to work on other crucial matters." It was a sensible suggestion. It, too, has been rejected out of hand by a White House that seeks absolute authority and seeks to undermine the checks and balances that have served for 200 years to protect our rights and our democracy.

Unlike the many anonymous Republican holds and pocket filibusters that kept scores of President Clinton's qualified judicial nominees from moving forward, the concerns about Mr. Griffith are no secret. He knows full well my concern that he has not honored the rule of law by practicing law in Utah for five years without ever bothering to fulfill his obligation to become a member of the Utah Bar. I assume he has by now obtained a Utah driver's license and that he pays Utah State taxes. But he is not yet a member of the Utah Bar, despite practicing law there since 2000.

I will be interested to learn what steps Mr. Griffith took since our last hearing to take the Utah Bar examination recently held in February or to apply for the Utah Bar examination next scheduled to take place this summer. By one count, Mr. Griffith has so far foregone 10 opportunities to take the Utah Bar exam while applying for and maintaining his position as General Counsel at BYU. This conscious and continuous disregard of basic legal obligations is not consistent with the respect for law we should demand of lifetime appointments to the federal courts. He has yet to explain why he obstinately insists on refusing to do what hundreds of lawyers do twice a year in Utah and thousands of lawyers do around the country: Apply for and take the state bar exam and qualify to become a member of the state bar in order to legally practice law.

As was reported last summer in The Washington Post, and confirmed through Committee investigation, Mr. Griffith has spent the last five years as the General Counsel to Brigham Young University. In all that time he has not been licensed to practice law in Utah, nor has he followed through on any serious effort to become licensed. He has hidden behind a curtain of shifting explanations, thrown up smokescreens of letters from various personal friends and political allies, and refused to acknowledge what we all know to be true. He should have taken the bar. He should be a member of the Utah Bar.

Practicing law without a license, or as the bars call it, unauthorized practice of law, is not a technicality like forgetting to pay your bar dues. In some States it is a crime. In Texas, for example, it is a third-degree felony. It is a serious dereliction of a lawyer's duty. It is a commonplace of American jurisprudence that no one is above the law. If the American people are to have confidence in our system of laws, that must include the lawyers, and beyond question, it must include the judges. I hope today that we will hear better, more coherent and more forthright answers from Mr. Griffith about the problems with his bar memberships. I would expect those answers to start with a commitment to do what is now long overdue -- namely, to take the Utah Bar exam and become properly licensed to practice law in Utah, where Mr. Griffith has been practicing law for the last five years.

When this process of examining Mr. Griffith's record and qualifications began last May, I had a few questions for him. Now, after significant staff investigation, one Committee hearing and an extensive round of written questions and answers, I have even more questions for him which require careful examination and deliberation. His answers to Senators' written questions submitted after his hearing raised still more questions.

In addition to that threshold matter of practicing law without being a member of the Utah Bar, there are other reasons for serious concern among many about Mr. Griffith's fitness to be a member of the United States Court of Appeals for the District of Columbia Circuit. He has spoken in Federalist Society circles of his judgment that President Clinton was properly impeached and that he would have voted for his conviction and removal from office. Given his role as Senate Legal Counsel at the time, these public musings are unseemly and unsound. Rather than campaigning for this nomination and placing himself in the minority of Senators, Mr. Griffith would have better spent his time preparing for and taking the Utah Bar exam. His judgment is likewise brought into question by his views on Title IX of our civil rights laws.

This charter of fundamental fairness has been the engine for overcoming discrimination against women in education. It is best known as the foundation of the growth of women's athletics in this country. I urge all Senators to think about our daughters and granddaughters, the pride they felt when the U.S. women's soccer team began winning gold medals and world cups, the joy they see in young women with the opportunity to play basketball and ski and compete and grow. I urge each Senator to listen to the words of Julie Foudy and to consider the sincere opposition of the National Women's Law Center and so many women's organizations to this nomination before they vote in a way that will serve to turn back the clock on women's rights and equality.

In the 17 months I chaired the Committee, we went forward with the first hearing on a nominee to the D.C. Circuit in three years. Had the Administration shown anything approaching the level of traditional cooperation with the Senate,

that nominee would have received an up or down vote. Given the Administration's stonewalling, the Senate withheld consent to the nomination of Miguel Estrada. The Republican blockage against President Clinton's moderate and qualified nominees to the D.C. Circuit was never abandoned. Nonetheless, in another reconciliatory effort by Democrats, we did proceed to consider and confirm a Bush nominee to the D.C. Circuit in 2003. That effort has not been reciprocated in any way. With respect to judicial nominations, it appears that no good deed by Senate Democrats goes unpunished. I have urged this President for more than four years to send us a balanced package of nominees to this important court. He refuses.

It is ironic given that President Bush recently spoke so eloquently about the fundamental requirements of a democratic society when he met with President Putin of Russia. He acknowledged there at that meeting something that partisan Republicans are desperately seeking to undermine here -- that we rely on the sharing of power, on checks and balances, on an independent court system, on the protection of minority rights, and on safeguarding human rights and human dignity. The President recently promised the American people in a radio address in this country that he would serve all Americans and would "work to promote the unity of our great nation." I commend that sentiment but wish the President and Senate Republicans would work to fulfill that promise. His renomination of controversial judicial nominees already considered by the Senate is inconsistent with that promise and undercuts the fundamental principles that protect our democracy. Their insistence on deploying the nuclear option is an affront that will further undermine unity and fundamental safeguards of the rights and freedoms of Americans.

The confrontational approach of this Administration is unnecessary and unwise. Senate Republicans' insistence that this President be given carte blanche in his efforts to pack the federal courts and that the Senate become a rubberstamp and give up its distinctive protection of minority rights is shortsighted at best. It is most unfortunate that this White House persists in its single-minded effort to pack the federal courts. It is unfortunate that the Senate Republican leadership is acting as an arm of the Administration rather than on behalf of the Senate and providing the checks and balances on which our democracy and our freedoms depend.

As Senator Reid and Senator Salazar have recently suggested, if the Bush Administration would work with us, we could reach consensus on nominees to fill the current judicial vacancies. There are currently 24 judicial vacancies without nominees, including eight for circuit courts around the country. There are several more for which we could be working together to find consensus on rather than the divisive nominees before us. I wish the Republican Administration and the Republican Leadership in the Senate would work with us to find consensus nominees, experienced, qualified, fair men and women who could garner virtually unanimous support.

The only new judicial nomination received all year is such a nominee. Brian Edward Sandoval, a nominee to the District Court in Nevada, is a nominee with the support of both his home-state Senators, one Republican and the other the Senate Democratic Leader. When we had a vacancy on the Second Circuit from Vermont, I joined with the Republican Governor and Senator Jeffords in recommending and supporting Peter Hall. Unfortunately, this Administration too often chooses not to follow the path of consensus but, instead, seeks to serve the interests of a narrow partisan wing of their political party over the interests of the American people.

This hearing marks the third hearing on the President's controversial circuit court nominations in barely more than a week. Chairman Specter is affording some of these nominees, including Mr. Griffith, another opportunity to provide the Committee and the Senate with additional information and assurance that they have earned and merit the consent of the Senate to their lifetime appointment as a custodial of the rights of all Americans. I thank the Chairman for following the proper order of the Committee in that, but it is Mr. Griffith's refusal to follow proper order in taking the bar that remains a lingering concern over this nomination.