Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
September 22, 2005

STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, SENATE JUDICIARY COMMITTEE,
ON THE NOMINATION OF JOHN G. ROBERTS, JR.
TO BE CHIEF JUSTICE OF THE UNITED STATES
EXECUTIVE BUSINESS MEETING
SEPTEMBER 22, 2005

There are few decisions we face in the Senate that are as consequential and enduring as the one this Committee considers today. I believe that each Senator must carefully weigh the matter and decide it for himself or herself.

I have approached the nomination of Judge Roberts to be Chief Justice of the United States with an open mind. I have served in the Senate for three decades and on this Committee for most of that time. I am one vote out of 100, but I recognize that those 100 of us privileged to serve in the Senate are entrusted with protecting the rights of 280 million of our fellow citizens. There is no entitlement to confirmation for lifetime appointments on any court for any nomination by a president, Democratic or Republican. This nomination presents a close question for me, for the reasons I discussed at greater length on the Senate floor yesterday.

I want a Supreme Court that acts in its finest tradition as a source of justice. The Supreme Court must be an institution where the Bill of Rights and human dignity are honored.

I have not reflexively opposed Republican nominees or conservative judicial nominees nominated by Republican presidents. I have drawn the line only at those nominees who were among the most ideologically extreme and who came to us in the mold of activists.

I do note my extreme disappointment in the Administration's lack of cooperation with the Senate on this nomination. Although we started off well with some early efforts at consultation, it never resulted in any meaningful discussions. The President's naming of Judge Roberts as his choice to replace Justice O'Connor came as a surprise, not as a result of meaningful consultation. He then preemptively announced that he had decided to withdraw that nomination and, instead, nominated Judge Roberts to succeed Chief Justice Rehnquist. There could and should have been consultation with the Senate on the nomination of someone to serve as the 17th Chief Justice of the United States.

Yesterday Chairman Specter and I, along with the Republican and Democratic leaders of the Senate, met with the President about a possible replacement for Justice O'Connor. I trust that this

time the President will follow through, share with us his intentions and seek our advice before he acts.

The Bush Administration committed another disservice to this nomination by withholding information that has traditionally been shared with the Senate. The Bush Administration treated Senators' requests for information with little respect. They stonewalled entirely the narrowly-tailored request for the most important work papers from John Roberts's time as the principal deputy to Kenneth Starr at the Solicitor General's office. The precedent from Chief Justice Rehnquist's hearing and others, of course, go the other way. Previous Presidents have paid the appropriate respect to the Senate and to the constitutional process by working with the Committee to provide such materials. Accordingly, I would understand if a Senator were to vote against the President's nomination of Judge Roberts on this basis alone. I urge the Administration to work with us and cooperate on any future nomination.

Some Republican Senators also disserved the confirmation process by urging the nominee not to answer questions during the course of this hearing. Unfortunately, Judge Roberts heeded that advice to too great a degree and should have been more forthcoming in his answers.

The President asked for dignified hearings and an up-or-down vote. That is what we have done on this Committee. The hearings were dignified and they were fair.

I thank and commend the public witnesses who appeared before the Committee. They were extraordinarily helpful in underscoring what is at stake for all Americans with these nominations. No one who heard Congressman John Lewis, Wade Henderson and Judge Nathaniel Jones can doubt the fundamental importance of our refusal to retreat from our Nation's commitment to civil rights. Coach Roderick Jackson and Beverly Jones reminded us how courageous Americans are still opening doors and righting wrongs through our courts. Anne Marie Talman of MALDEF reflected what is at stake when undocumented immigrant children are denied education and benefits that should be available to every child in America.

As I consider this nomination, I reflect on the hearings and my meetings with Judge Roberts. In particular, I was encouraged by his answer to my question about providing the fifth vote needed to stay an execution when four other Justices vote to review a capital case. That has not always been the practice of late and he was right to recognize the illogic, if not the injustice, of having the necessary votes to review the case but lacking the necessary vote to allow that review to take place especially where a life hangs in the balance.

Judge Roberts testified about his admiration for Justice Robert Jackson. Justice Jackson's protection of fundamental rights, including unpopular speech under the First Amendment, and his willingness to serve as a check on presidential authority are among the finest actions by any Justice in our history. I expect Judge Roberts to act in the tradition of Justice Jackson and serve as an independent check on the President. When he joins the Supreme Court he can no longer simply defer to presidential authority. We know that we are in a period in which the Executive has a complicit and compliant Republican Congress that refuses to serve as a check or balance. Without the courts to fulfill that constitutional role, excess will continue, and the balance will be tilted.

When Congress acts to protect the interests of Americans through the Commerce Clause, spending powers and the 14th Amendment, that needs to be respected. I am encouraged by Judge Roberts's assurances that he will respect congressional authority. His steadfast reliance on the Supreme Court's recent Raich decision as significant precedent contravening further implications from Lopez and Morrison was intended to reassure us that he will not join the assault on congressional authority. I heard him and rely on him to be true to the impression that he created.

At the hearing, he took pains to assure me and Senator Feinstein, among others, that as Chief Justice he would respect congressional authority. To do otherwise would greatly undermine Congress's ability to serve the interests of Americans and protect the environment, ensure equal justice, and provide health care and other basic benefits. I think he knows that now.

As Chief Justice, John Roberts will be responsible for the way in which the judicial branch administers justice for all Americans. He must know in his core that the words engraved in the Vermont marble on the Supreme Court building are not just "Under Law" but "Equal Justice under Law." It is not just the rule of law that he must serve, but the cause of justice under our great charter.

After hours of private meetings with Judge Roberts and hours of public testimony, I am called upon to cast a vote on this important nomination. In my judgment, in my experience, but especially in my conscience I find it is better to vote yes than no. Ultimately my Vermont roots have always told me to go with my conscience.

Judge Roberts is a man of integrity. I take him at his word that he does not have an ideological agenda. For me, a vote to confirm requires faith that the words he spoke to us have meaning. I take him at his word that he will steer the court to serve as an appropriate check on potential abuses of presidential power.

I respect those who have come to different conclusions, and I readily acknowledge the unknowable at this moment, that perhaps they are right and I am wrong. Only time will tell.

The Senate will vote next week but only later will we know if Judge Roberts proves to be the kind of Chief Justice he says he will be, if he truly will be "his own man." I hope and trust that he will be.

Statement on Senator Patrick Leahy
On Nomination of Timothy E. Flanigan
To Deputy Attorney General
July 26, 2005

The Committee today will consider the nomination for the position of Deputy Attorney General. The Deputy is a key player in the Department of Justice who serves in the number two position, advising and assisting the Attorney General in developing and implementing departmental policies and programs.

The person in this position provides supervision and direction to all units of the Department. In addition, the Deputy is authorized to exercise nearly all the power and authority of the Attorney General, and, in the absence of the Attorney General, acts as the Attorney General.

I list the responsibilities of the Deputy Attorney General to illustrate the importance of this position. The Deputy Attorney General may, under certain circumstances, be called upon to serve as the nation's top law enforcement officer. The current Deputy, James Comey, and his predecessor, Larry Thompson, both had extensive experience serving as prosecutors. The current nominee does not have any prosecutorial experience. He worked in the Office of Legal Counsel in the first Bush Administration, and spent some years in a white collar criminal law practice. I might not find this fact so troubling but for the fact that the serving Attorney General had no prosecutorial experience before being named to his position.

They are not alone. In addition, Alice Fisher, the individual named to serve as the head of the Criminal Division, has never worked as a prosecutor. If Mr. Flanigan and Ms. Fisher are both confirmed by the Senate, then not one of the top three leaders of the Department with responsibility for criminal law enforcement will have critical experience in that area.

I am concerned by the public reports that have suggested Mr. Flanigan played a key role in developing the Administration's policies regarding the interrogation and prosecution of terrorist suspects after September 11, 2001. These attacks were truly horrific in nature, and we all expected the Administration to move aggressively to ensure the security of the Nation and pursue the perpetrators. The White House, however, took steps that many in the Congress, and even many in the Executive branch, believed went too far - that we believed would not ultimately make us safer.

In November 2001, the President signed a military order to authorize military commissions to try suspected terrorists. The Administration argued that it did not need the authorization of Congress to establish the tribunals, which were called "kangaroo courts," by New York Times columnist William Safire, because they fell vastly short of the procedural protections guaranteed in our criminal courts and military courts-martial. News reports suggest that Mr. Flanigan and an adviser to Vice President Cheney drafted the order.

I am disturbed by the arguments put forward by the Bush Administration that so-called "enemy combatants" can be held indefinitely, without charge, and without access to legal counsel. Terrorist suspects should be prosecuted to full extent of the law, but that is not what has occurred in certain cases. Yassir Hamdi, once called an enemy combatant too dangerous to try in the criminal courts was deported last year, after being held without charge for nearly three years. Jose Padilla remains in custody while legal battles over his status and treatment continue.

According to press accounts, Mr. Flanigan rejected the idea of using criminal courts to try terrorist suspects, believing that access to defense lawyers and due process rights would hamper information collection. The nominee also purportedly rejected the notion that suspects designated by the President as enemy combatants should be granted access to counsel. According to Newsweek magazine, heated debates occurred between the White House and the Justice Department, based upon the fact that the Solicitor General's office feared that complete denial of counsel to enemy combatants would not withstand Supreme Court review. These accounts state

that Mr. Flanigan "argued against any modification, urging that more suspect be designated as enemy combatants." ("A Court Pushes Back," Newsweek, Dec. 29, 2003.)

Finally, we understand from public comments he himself has made that Mr. Flanigan was involved in reviewing proposed interrogation techniques for terrorist suspects. He reportedly reviewed and discussed with DOJ lawyers the infamous "torture memo" signed by Jay S. Bybee, then the head of the Office of Legal Counsel. Mr. Flanigan was also reportedly involved in discussions of specific interrogation techniques such as refusing pain for injuries, feigning suffocation, simulated drowning (also called "waterboarding"), and other tactics. The CIA purportedly asked for specific advice on whether such techniques were legal. The so-called torture memo stated that for an action to rise to the level of torture it must be equivalent to the type of pain experienced in organ failure or death. It also argued that the President possess the authority to order the commission of torture and to immunize from prosecution those who commit such acts at his direction.

We need to get to the bottom of this and understand how Mr. Flanigan responded to these issues. Did he agree with the Department's interpretation of the torture statute at the time the memo was issued in August 2002? Did he argue against what the Department eventually determined to be flawed reasoning? What did he think of that memo's assertion of unchecked Executive authority, the so-called "commander in chief override"? I questioned the Attorney General at length on this point in his confirmation hearing and he refused to state directly that he disagreed with the memo's legal analysis on this topic. I hope Mr. Flanigan will state clearly that he disagrees with this disturbing assertion. It is not enough to say that the memo in question was withdrawn, as it represented Administration policy for well over two years.

Clearly, there are important areas to explore in today's hearing and our subsequent review of the nominee.

In my review of the nominee's writings and public statements, I was interested to find one particular piece of testimony he gave regarding judicial philosophy. This statement was made in 1997 when he testified before the Judiciary Committee on the topic of judicial activism. These words are especially relevant in light of the pending Supreme Court nomination process. In his statement, Mr. Flanigan described proposals for the Senate to consider in addressing "the problem of judicial activism":

First among these, in my view, is [the] need for the Judiciary Committee and the full Senate to be extraordinarily diligent in examining the judicial philosophy of potential nominees. In evaluating judicial nominees, the Senate has often been stymied by its inability to obtain evidence of a nominee's judicial philosophy. In the absence of such evidence, the Senate has often confirmed a nominee on the theory that it could find no fault with the nominee. I would reverse the presumption and place the burden squarely on the judicial nominee to prove that he or she has a well-thought out judicial philosophy, one that recognizes the limited role of federal judges. Such a burden is appropriately borne by one seeking life tenure to wield the awesome judicial power of the United States.

I welcome Mr. Flanigan to the Committee today and I hope that he will provide the members of this Committee with candid responses to our questions.