

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Opening Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Executive Business Meeting
September 29, 2005

The Flanigan Nomination

While we have been considering the nomination of John Roberts to be Chief Justice of the United States, another nomination for another important position inside the Bush Administration needs additional consideration by this Committee.

The President has nominated Timothy E. Flanigan to serve as Deputy Attorney General, the number two person in the Justice Department. This nomination has raised a number of questions, some of which were answered last night and some of which remain unanswered. Several members of this Committee continue to seek substantive responses to our concerns, and so yesterday we requested another hearing on this troubling nomination.

Lack Of Prosecutorial Experience At The Department Of Justice

This debate is all the more important in the wake of the Nation's recent tragic experience with Hurricane Katrina, an experience made worse by the appalling failure of the federal government to respond appropriately and in a timely manner. We quickly discovered the high cost of cronyism to the public, with the head of FEMA not having any significant experience in disaster response. His top two deputies did not have any relevant experience in disaster response. All three had been given their jobs only through political patronage. Know-who had replaced know-how at the top of the nation's disaster response agency, and the results were tragic.

For Americans to have confidence in their government, federal agencies need to be run by professionals with relevant experience, not merely by well-connected individuals who are beholden to the White House. This is especially true at the Department of Justice, which is the federal agency called upon to investigate the actions of government officials. It has long been recognized that the Justice Department, more than any other federal department, must maintain a sufficient degree of independence from the White House.

It has also long been recognized that expertise in law enforcement within the top management levels of the Justice Department is valuable in guiding the Department in fulfilling its missions. For justice to be served, prosecutorial experience among those who run the criminal components of the Department is useful, and maybe invaluable.

It is regrettable that the White House does not hold to this standard, and this Justice Department is a reflection of that. The Attorney General had no significant law enforcement experience when he was confirmed earlier this year. He had served as a corporate lawyer, a Texas state Supreme Court judge on civil -- not criminal -- matters, and as White House Counsel. The nominee to lead the Criminal Division, who was given a recess appointment in August, also had no history of working as a prosecutor. The Associate Attorney General was never a prosecutor. The Solicitor General was never a prosecutor. And Mr. Flanigan does not have prosecutorial experience either. And so it is that we have reached the point that the top five positions heading the Justice Department on criminal law enforcement matters have never, among the five of them, prosecuted a single case, as far as I know.

Like Mike Brown and his two top subordinates at FEMA, Mr. Flanigan has a long history in the service of Republican administrations. That is all well and good. But it does not qualify someone for crucial law enforcement responsibilities in the nation's top law enforcement department. Indeed, with the recent arrest of the Bush Administration's top federal procurement official, the continuing investigations into the activities of Republican lobbyist Jack Abramoff, the ongoing investigation by the Office of Inspector General into the reassignment of a U.S. Attorney who had tried to investigate Mr. Abramoff in 2002, the unfinished investigation into the outing of a CIA agent, and the unfinished investigation into the theft of documents from our own server here on the Committee by Republican staff, there is every reason to insist on greater independence from the White House, not less independence.

Mr. Flanigan cannot credibly claim that he is independent of this Administration. But prosecutorial experience and independence from the White House are exactly what are needed, and Mr. Flanigan offers neither. He is being named to replace a seasoned prosecutor who had the confidence of Republicans and Democrats alike. I know Jim Comey, I have worked with Jim Comey, and Tim Flanigan is no Jim Comey.

Mr. Flanigan's Role In The Formulation Of Interrogation Policies

A lack of prosecutorial experience is not the only concern I have with this nomination. Before his confirmation hearing, we understood that Mr. Flanigan was involved to some degree in the development of Bush Administration policies on detention and interrogation. What I learned in the hearing and from his answers to written questions does not give me comfort.

Mr. Flanigan acknowledged that that he was present at two briefings conducted by the Office of Legal Counsel (OLC) in the summer of 2002 regarding that office's interpretation of the torture statute. That office's legal opinions are considered to be binding on the Executive Branch. The OLC drafting process on which Mr. Flanigan was briefed produced the infamous "Bybee torture memo" that was dated August 1, 2002. That memo asserted that the President has a commander-in-chief override to order torture and immunize from prosecution anyone who commits torture subject to his order. It also stated that for action to rise to the level of torture, it must result in the type of pain associated with major organ failure or death.

The OLC analysis could not stand the light of day. Once it was made public, that memorandum was withdrawn by the Bush Administration. It should have been denounced from the first moment it was presented to White House officials in the summer of 2002 - just the way that it

was condemned by Members of Congress and the American public when it was disclosed by the press in 2004. But the White House officials who were briefed by OLC, including Mr. Flanigan, apparently said nothing.

Mr. Flanigan did not say to Members of this Committee that he took issue with the legal analysis presented by OLC in those briefings. Furthermore, he acknowledges that specific interrogation techniques were brought up in these briefings and does not claim that he spoke out against their use. Rather, he claims that it was not his role to evaluate the methods discussed or to provide his own legal judgment about them. Incredibly, he contends that his role was merely to assure that OLC was responsive to the request for an analysis of the torture statute.

I also find it deeply troubling that Mr. Flanigan has endorsed the Bush Administration's flawed interpretation of the Torture Convention related to cruel, inhuman and degrading treatment, commonly referred to as "CID." The Administration asserts that the Convention's prohibition on CID does not apply to aliens captured overseas by the United States. Such an interpretation is in direct conflict with statements made to Congress by Reagan Administration officials when the Convention was ratified. The original interpretation of the Convention was reaffirmed this year by the Reagan Administration official, Ambassador Abraham Sofaer, who handled its Senate ratification.

It is on this topic that The Washington Post's lead editorial yesterday on the Flanigan nomination raised particular concerns. The editorial concludes: "[I]t is an odious thing that the top two law enforcement officers of the United States will both be people who resort to evasive legalisms in response to simple questions about uncivilized conduct." I ask that a copy of that editorial be included in the record.

More Questions Need Answers On Tyco's Relationship To Jack Abramoff

Mr. Flanigan joined Tyco International as its General Counsel in December 2002 after leaving his position in the White House. Mr. Flanigan states that in Spring of 2003, Jack Abramoff, who was at Greenberg Traurig, began to lobby on behalf of Tyco. Mr. Abramoff was engaged to lobby against proposed tax legislation targeting so-called "Benedict Arnold" corporations. These are American corporations that are incorporated outside the United States, and Tyco is apparently incorporated in Bermuda.

Mr. Flanigan claims that Mr. Abramoff offered to use his contacts to House Majority Leader Tom DeLay and White House Political Director Karl Rove to lobby against the proposed legislation. He says that he did not personally ask Mr. Abramoff to lobby Mr. Rove.

Tyco then engaged another firm, GrassRoots Interactive, at the suggestion of Mr. Abramoff. Abramoff's firm later notified Tyco that approximately \$1.5 million in payments from Tyco to GrassRoots Interactive had been diverted to accounts that were controlled by Mr. Abramoff.

Members of this Committee have asked a number of questions of Mr. Flanigan about these incidents, but each set of responses leads to more questions. Senator Kennedy still has pending a number of questions on these points that deserve to be answered, and others among us received written responses only last night. A number of us believe it is important for the Committee and

the Senate to have more information about these relationships and issues before Senators are asked to vote on this nomination. Such information is directly relevant to Mr. Flanigan's management capabilities.

Other Questions

In addition, a number of questions and issues remain outstanding with respect to this nomination and with regard to the Justice Department's law enforcement effort. It is now almost three weeks since I wrote to the Attorney General regarding my concerns that two United States Attorneys' Offices were forced to close as a result of the Hurricane Katrina. I received no response, nor did I receive answers to any of my inquiries about the fate of the Justice Department employees in the region or about the adverse effects on evidence and the administration of justice. Yesterday I sent the Attorney General a follow up letter seeking the answers that should have been provided weeks ago. Lack of responsiveness from the Justice Department, regrettably, is what the American people and their elected representatives have become accustomed to during this Administration. I do not see how Mr. Flanigan's nomination is anything other than a prescription for more politics and partisanship and less responsiveness at the Justice Department.