

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
May 11, 2006

Opening Remarks of Senator Patrick Leahy
Ranking Member, Judiciary Committee
Executive Business Meeting
May 11, 2006

Oversight

We did not accomplish much in the way of oversight this week.

Despite the Attorney General's continuing refusal to answer my questions and others about the Government's collective massive databases on ordinary Americans, we now are beginning to learn the truth. USA TODAY's front page headline reads: "NSA has massive database of Americans' phone calls." This secret collection of phone call records of tens of millions of Americans includes ordinary Americans not suspected of any crime or any contact with al Qaeda. The President concealed the NSA eavesdropping program when he reassured all Americans that when this Administration talks about a wiretap that requires a court-ordered search warrant. We now know that he had been having the NSA engage in warrantless wiretaps Americans since October 2001. So while the Administration has tried to reassure us about the NSA domestic spying activities by characterizing them in the most narrow and self-serving terms, as if they were merely listening to Osama bin Laden calling into the United States, I have had my doubts. We need truthful answers to the questions we asked of the Attorney General back in February. We need him to explain his subsequent letter recasting his testimony. We need to know what our Government is doing in its activities that spy upon Americans. The Republican Congress has failed in its oversight responsibilities to the American people.

Also today we learn that the Administration has shut down the Department of Justice investigation into the NSA wiretapping program that was to be conducted by the Office of Professional Responsibility. Reports are that the White House will not allow Justice Department investigators the security clearances they need to do their job. This is an internal government investigation that is being stymied by the White House. This further complicates the nomination of Steven G. Bradbury, the acting Assistant Attorney General for the Office of Legal Counsel, and the person currently responsible for legal opinions of the Attorney General and giving advice to the White House Counsel and other Government agencies.

What little we were able to accomplish this week came when Mr. Kavanaugh finally admitted that Karl Rove played a role in the selection of judicial nominees.

We need to do more in the way of oversight and to begin to hold the Bush-Cheney Administration accountable. I hope that with these developments this Committee will finally have had enough stonewalling and be ready to consider more effective action to obtain the information we need. I will support it and I think the Democratic Members of the Committee will support getting answers to our questions. Joining together, Republican and Democratic Members could insist upon responsive answers and needed information to fulfill our constitutional responsibilities to the American people. I hope that we will follow through on these important matters and thoroughly investigate what powers the President has secretly claimed and how he has secretly used them to spy on Americans.

Voting Rights

This week we proceeded with two more hearings on our bipartisan bill to reauthorize the Voting Rights Act. We should conclude our supplemental hearings next week and proceed to report out the Voting Rights Act reauthorization bill, S.2703, before Memorial Day. Our bill already has 34 bipartisan cosponsors.

Yesterday our House partners successfully reported the companion bill, H.R. 9, from the House Judiciary Committee by a vote of 33 to 1. I predicted that some would attempt to undercut our bicameral, bipartisan efforts and I worried that some might seek to undermine the remedial provisions in Section 203 that help language minorities achieve full participation in our democracy. I commend Chairman Sensenbrenner, Representative Conyers and the bipartisan membership of the House Committee for rejecting amendments that would have gutted voter language assistance.

Yesterday we heard from witnesses about the continuing importance of Section 203 to language minorities, including testimony from a representative of the Bush Administration's Justice Department emphasizing its efforts in this regard and how valuable those provisions are. President Bush has said that he wants "to make sure the Voting Rights Act is strong and capable" and that "it ought to be extended." Attorney General Gonzales has listed extending the Voting Rights Act as one of the Department of Justice's 2006 priorities and said "we will push for reauthorization of the Voting Rights Act, one of the most significant pieces of civil rights legislation in our history." This is an important matter on which there is bipartisan agreement.

There are few things as critical to the fabric of our Nation, and to American citizenship, as voting. The right to vote and to have your vote count is a foundational right because it secures the effectiveness of other protections. The legitimacy of our government is dependent on the access all Americans have to the political process. The continuing need for the expiring provisions cannot be overstated. Although there is sharp disagreement on the other side of the aisle concerning immigration reform legislation, I hope that we can all agree to reauthorize Section 5 and Section 203 to continue progress and inclusion of citizens from our language minorities who add so much to American life.

Immigration

It is my hope that we can, through the same sort of bipartisan coalition, return to and enact fair and comprehensive immigration legislation that strengthens our border enforcement while providing a path to earned citizenship for so many who work hard and want to contribute to our diversity and productivity as a nation. I know that the Senate leaders have been working on an agreement. I hope that we will turn to this matter next week and use the next two weeks to make real progress toward enacting a bill much like that reported by this Committee several weeks ago.

Gas Prices and Legislation

Two weeks ago we were able to report to the Senate the "Oil and Gas Industry Antitrust Act of 2006," (S.2557). I had hoped that following completion of the emergency supplemental appropriations bill, the Senate would turn its attention to legislation like ours that seeks to help alleviate the burdens on ordinary, hardworking Americans by the record-high prices for gas. Regrettably, that is not happening. Indeed, during consideration of the emergency supplemental the Republican leadership refused to allow votes on energy-related initiatives.

Although the bill that the Republican leadership is promoting has been termed "silly" and "stupid" by other Republicans, there are proposals that do make sense and can make a difference. I wish there were a way to have them considered.

When President Bush took office, Americans could fill their cars on gasoline that cost \$1.45 per gallon. In less than six years, fuel prices have skyrocketed more than 100 percent -- more than doubled. The end is nowhere in sight, unless we do something to help keep costs down. Over the years I have warned about a gallon of gasoline costing \$2.50 or \$3. I fear \$4 a gallon gasoline will be upon us all by summer.

Health Care

Like gas prices, the cost of health care and health insurance has also skyrocketed during the past six years. Unfortunately, instead of considering proposals to help those injured by medical errors or to bring accountability and

competition, we are again being prevented from offering proposals by way of amendment on the Senate floor. Much of last week and this have been spent in quorum calls and morning business rather than working on serious amendments and proposals to make a difference. Yesterday the Majority leader "filled the tree" on another bill thereby effectively preventing any votes on any amendments. I was eager to propose our bill to bring federal antitrust laws to bear on medical malpractice insurers in order to lower the costs of that insurance. Those costs have been rising while payouts have not. My proposal was to end the special interest protection for big insurance and make them subject to our federal antitrust laws and competition. In my view that antitrust exemption is misguided and the sooner it ends the better for consumers and those who purchase insurance. Senate Republicans continue to forestall action on my proposal.

Another proposal being blocked would afford our seniors more time and assistance in examining the prescription drug provisions that have frustrated so many. Seniors did not grow up in the computer age and many are not trained accountants who can sift through the confusion. They should not be penalized by an arbitrary cut off date which could easily be extended.

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Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee,
On the Nomination of Brett Kavanaugh
May 11, 2006

The difficult and controversial nomination and re-nomination of Judge Boyle, the recent nomination of Michael Wallace, and the re-nomination of Brett Kavanaugh indicate that the Bush-Cheney Administration and its allies in the Senate are more interested in heeding the siren call of special interest groups and picking election year fights than in finding well-qualified judges. The President's declared aim to be a uniter and not a divider by now is but a faded memory. These are nominees who divide the American people and who divide the Senate.

Local and national law enforcement have called upon the President to withdraw the nomination of Judge Boyle, and he would be well advised to do so. The nomination of Michael Wallace received the first ABA rating of unanimously "not qualified" that I have seen for a circuit court nominee since President Reagan. And the nomination of Mr. Kavanaugh is one of the few to be downgraded by the ABA upon further review. I cannot recall anyone being confirmed after such a development.

After seeing Mr. Kavanaugh at the hearing, I can appreciate why the ABA peer review committee heard from a judge that Mr. Kavanaugh's argument was "less than adequate" and as someone who demonstrated "experience on the level of an associate." Others interviewed recently raised concerns about Mr. Kavanaugh's ability to be balanced and fair given his many years in partisan positions working to advance a partisan political agenda. Mr. Kavanaugh was described by interviewees as "insulated," "sanctimonious," and "immovable and very stubborn and frustrating to deal with on some issues." These are not qualities that make for a good judge. Despite the word put out falsely by his White House defenders, it was not a change in membership on the ABA peer review committee that led to his downgrading. Indeed, three-quarters of those who had previously reviewed this nomination and continued on the committee voted to downgrade the rating based on the recent interviews and review.

His response to one simple question I asked during Tuesday afternoon's hearing spoke volumes. I asked why he had taken seven months to answer the written questions submitted to him following his initial hearing in 2004. His repeating the phrase that he "took responsibility" for such dismissive and irresponsible conduct and, implicitly, for his lack of seriousness about the confirmation process elicited laughter from the hearing room, but not from me. It was not the first time that I felt Mr. Kavanaugh had "dissembled" in response to my questions.

I suspect that the truth is that he made a political calculation and decided to expend his time and effort on his benefactor's re-election campaign during the spring, summer and fall of 2004. We did not receive any response to our

written questions until after that November 2004 election. Mr. Kavanaugh may be brilliant at politics and have powerful supporters, but that does not mean that he will be a good judge.

In my opening statement at his hearing I raised the key question regarding this nomination. Will he demonstrate his independence and show that he can serve in the last, independent branch of the government that the American people can look to as a check and balance on a President who is asserting extraordinary claims of power? He could have told us something about his responsibilities as Staff Secretary or as an associate White House counsel and given us examples of when he showed independence and good judgment, but he did not.

Instead, Mr. Kavanaugh appeared at his confirmation hearing to be a spokesman and representative for the Administration. Over and over he answered our questions by alluding to what the President would want and what the President would want him to do. We heard from a nominee who parroted the Administration's talking points on subject after subject. Rather than answer our questions, he referred us to the bland explanation offered by former presidential spokesman Scott McClellan. I do not think the Senate should confirm a presidential spokesman to be a judge on the second highest court in the land.

We heard from a young man who when invited by the Chairman to introduce his family, began his remarks by thanking the President for nominating him and later emphasized as if a qualification that he had "earned the trust of the President" and his "senior staff." All that may be useful for advancement within this President's Administration or Republican circles, but those are hardly qualities or qualifications for an independent judge of this President and this Administration's actions.

Senator Graham put the question this way during the course of the hearing: "There is a fine line between doing your job as a White House counselor, being part of the judicial selection team and being a judge yourself. There is a line between being advocate and being a judge." I do not believe that Mr. Kavanaugh demonstrated that he has left his role as a member of the President's Administration or that he will.

With the sudden resignation last Friday of the President's hand-picked head of the CIA, America witnessed another "heck of a job" accolade to an Administration insider leaving a critical job undone. What is desperately lacking throughout this Administration is accountability. A Republican-controlled Congress has not provided a check and has made it all the more important for the courts to be that check to preserve our rights and way of life, to check the Government's overreaching.

Last year, when the President nominated Harriet Miers, a woman who had not gone to Ivy League schools but had a more impressive background of legal experience than this nominee, Republicans questioned her qualifications and demanded answers about her work at the White House and legal philosophy. They defeated her nomination before allowing her a hearing. While it now appears that Republicans are back to their rubberstamping routine with every Senate Republican ready to approve this nomination without question or pause, the question raised by the nomination of the President's own counsel and staff secretary remain: Will that nominee act as a check and balance?

The Senate's job is to fulfill our duty under the Constitution so that we can assure the American people that the judges confirmed to lifetime appointments to the highest courts in this country are being appointed to be fair and protect their interests rather than to advance a political agenda or that of a presidential patron.

At his hearing Senator Feinstein and I gave Mr. Kavanaugh a way to answer concerns about his loyalty to this President affecting his decisions as a judge. We asked about recusal. He could have said that he would not hear any matter that raised questions about the President's claims or exercise of powers given his close association with the development of the policies and practices of this Administration. He could have walled off matters covered by the presidential signing statement, now reported to number 750, in which this President has shown an assertiveness of unchecked Executive power that exceeds those of Richard Nixon. He could have said that given his role in the development of this Administration's secrecy policies, he would recuse himself from those questions regarding the rights of the American people to know about their Government. Instead, we were served pabulum.

My concerns about Mr. Kavanaugh's judicial independence are heightened by the fact that he has been nominated to the D.C. Circuit, a court on which Republicans blocked President Clinton nominees for his second term and have already managed to pack it with two other nominees of this President who I found questionable.

When the Republican Senate majority stalled the nomination of Merrick Garland to the D.C. Circuit beyond the 1996 election, even Senator Hatch became frustrated and in March 1997 he proclaimed that the way that Republicans were opposing judicial nominees was "playing politics with judges," was "unfair" and that he was "sick of it." Regrettably, he did not follow through. That was the last nominee of President Clinton's that Senator Hatch and the Republican Senate were willing to consider to this important Circuit. Two highly qualified nominees, Elena Kagan, now Dean of the Harvard Law School, and Allen Snyder, who had served as a clerk to Justice Rehnquist and was an experienced and respected litigator, were left without consideration for years. The fact is that for the rest of President Clinton's entire second term, Senate Republicans would not consider another nominee to the D.C. Circuit. The result is that today, judges appointed by Republican Presidents outnumber those appointed by Democratic Presidents six to three on this pivotal Circuit.

At a time when the Senate should be addressing Americans' top priorities, including ways to make America safer, the war in Iraq, rising gas prices, health care and health insurance costs, stem cell research, comprehensive immigration reform and the reauthorization of the Voting Rights Act, the President and his Senate allies, instead, try to divide and distract from fixing real problems by pressing forward with controversial and unqualified nominations. The Senate Republican leadership is ready to cater to the extreme right-wing and special interest groups agitating for a fight over judicial nominations. They have made no secret of the reason for rushing this nomination through this Committee and to the Senate after it has languished for three years under Republican control and a nominee who admitted to slow-walking his responses to this committee. They want to stir up a fight.

Mr. Kavanaugh is a young and relatively inexperienced but ambitious person who in two hearings has failed to demonstrate his capacity for independence. Accordingly, I oppose reporting his nomination to the full Senate.

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