

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
May 4, 2006

Opening Remarks of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Executive Business Meeting
May 4, 2006

Gas Prices and Legislation

Last week we were able to join together without a single dissent to report to the Senate the "Oil and Gas Industry Antitrust Act of 2006," (S.2557). This is timely and important legislation that follows our hearing on March 14. 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 in this Republican-controlled Senate.

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 the Senate were considering those proposals. Unfortunately, we will waste the rest of this week and a good part of next week in a repeat of a futile attempt to restrict those injured by medical malpractice from seeking redress. Senator Kennedy and I have circulated a dear colleague on that matter that I ask be made part of the record. Instead of undermining people's rights, I wish we would take up our proposal to end the special interest protection for big insurance and make them subject to our antitrust laws and competition. This Committee had a hearing scheduled on our proposal, and ending misguided antitrust exemption, that I hope will be rescheduled.

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.

Regrettably, the tens of millions of dollars that big oil companies have reportedly committed to their lobbying campaigns is apparently having the effect of stalling congressional action. Those of us committed to meaningful change on behalf of the American people have our work cut out for us.

Voting Rights and Immigration

On Tuesday some of us on this Committee participated in an extraordinary bipartisan, bicameral event-- a display of unity in our government that we have not seen in the last 6 years.

Of course Senator Daschle and Democrats reached out to the President and congressional Republicans after 9/11, but it was not long before our good will was taken advantage of and good men and women like Max Cleland were under partisan assault.

Tuesday afternoon was different. The Democratic and Republican leadership of the Senate, the Democratic and Republican leadership of the House, the bipartisan leadership of the House Judiciary Committee and the bipartisan leadership of the Senate Judiciary Committee were all together, and all appeared united in our determination to

protect the right to vote for every American, regardless of economic circumstances, geography, race, or language ability. That extraordinary bipartisan, bicameral coalition came together to demonstrate our agreement on legislation reauthorizing the expiring provisions of the historic Voting Rights Act.

We have proceeded to introduce companion bills. The Senate bill is cosponsored by both leaders, Senator Frist and Senator Reid, as well as many Members of this Committee.

I mention these important developments because they were not a partisan election year stunt, but a meaningful joining together of Republicans and Democrats. Maybe because it was not a fight it did not generate much in the way of media attention, which is really too bad.

Last week we opened our hearings on this fundamental matter and next week they will continue. Chairman Sensenbrenner has an ambitious schedule for marking up the House companion bill next week and having the House pass it without delay. He is leading the way. Enactment of this measure will be a significant portion of his legacy as Chairman of the House Judiciary Committee. I hope that we can match his effort and conclude our hearings, as Chairman Specter has said, by May 17 and our Committee markup before Memorial Day.

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.

Oversight

The Committee held a hearing this week with the FBI Director in which Republicans and Democrats asked questions and raised concerns. We need to do more of that. Thinking back to some of the comments of the Chairman last Thursday at our meeting and thereafter, I was again struck by how unresponsive the Bush-Cheney Administration has been when we seek to fulfill our constitutional role as a check and conduct oversight. We will have an opportunity for more thorough discussion of this when we turn to how little we know about the President's program for warrantless wiretapping of Americans contrary to the provisions of the Foreign Intelligence Surveillance Act. At this juncture I simply wish to note that I will support, and I think the Democratic Members of the Committee, will support more concerted efforts to get answers to our questions. Joining together, Republican and Democratic Members could insist upon responsive answers and needed information. I hope that we will follow through in that regard on these important matters.

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Nomination of Norman Randy Smith
Executive Business Meeting
May 4, 2006

In nominating Judge Norman Randy Smith of Idaho for a lifetime appointment to the Court of Appeals for the Ninth Circuit, President Bush broke with the longstanding precedent of filling circuit court vacancies with a nominee from the same State as the judge who created the vacancy.

This President has tried this maneuver before when he nominated Claude Allen of Virginia to fill a Maryland vacancy on the Fourth Circuit. The Senators from Maryland objected. That nomination should not have gone forward but the previous Republican Chairman insisted on proceeding with a hearing and required the Senators from Maryland and Virginia to engage in a public conflict and confrontation.

In that case Senators respected the objection of the Maryland Senators and Mr. Allen was not confirmed to a lifetime appointment on the Fourth Circuit. The President made him his domestic policy adviser at the White House. Earlier this year Mr. Allen resigned from his senior position at the White House. Last month we learned the reason why when he was arrested for fraudulent conduct over an extended period of time. Had Democratic Senators not objected, the

Republican Senate would have rubberstamped the lifetime appointment to the federal courts of someone who is now the subject of a criminal prosecution for the equivalent of stealing from retail stores.

I remind Senators that we recognized the validity of the objection of the Senators from Maryland when the President tried to shift a Maryland Fourth Circuit seat to Virginia. We should do so again in this case in which the President is trying to take a California judgeship and turn it into an Idaho seat. I intend to support the Senators from California in their understandable objection to this maneuver. It is no coincidence that both times this White House has taken this action, it has sought to shift a judgeship from a State represented by two Democratic Senators to a State represented by two Republican Senators.

There are two Smith's on the agenda today who have been nominated to the Ninth Circuit. I will support the President's nomination of Milan Smith of California to a California vacancy on the court. I will not support his nomination of Norman Randy Smith because it would effectively transfer a judgeship from California to Idaho, violating historical precedent. Norman Randy Smith has been nominated to fill the seat last occupied by Judge Stephen Trott, an appointee from California. Judge Trott was from California when appointed and had practiced there for much of his career prior to becoming a judge. In fact, he was nominated to fill the seat of another Californian, Judge Joseph Sneed. At the time of his nomination, while he worked at the Department of Justice, the Senators from California were consulted and it was understood to be a California seat.

While an agreement can sometimes be worked out among Senators and the White House to proceed with someone from another State within the circuit first, so long as the subsequent nomination restores the balance of judgeships, I know of no precedent for shifting a circuit seat based on a judge's personal decision to change his or her personal residence.

I strongly support the notion, which I helped enact into law, that every State within a circuit should have at least one judge on the federal circuit court. I will defend Idaho's right to a seat on the Ninth Circuit and have defended Hawaii's right to a seat on the Ninth Circuit, just as I defend Vermont's right to a seat on the Second Circuit.

Senators Feinstein and Boxer reiterated their opposition to this nomination in a January 30, 2006, letter to Chairman Specter. In connection with the Committee hearing on this nomination, I urged President Bush to resolve this impasse by doing the right thing and nominating Judge Smith for the vacancy created by the retirement of Judge Thomas G. Nelson from Idaho. Regrettably, the White House is more interested in picking fights on judicial nominations in this election year than in filling vacancies. The President could easily resolve this matter yet he refuses to act as a uniter.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
On the Nomination of Brett Kavanaugh
May 4, 2006

I am pleased that finally we will be having another hearing on the nomination of Brett Kavanaugh, which the Democratic members of this Committee have asked for dating back a year now. The Senate Republican leadership has been all too willing in the past to answer the siren call from the right-wing special interest groups trying to prevent this Committee from doing its job on judicial nominations. This is a nomination for the second highest federal court in the country, the Court of Appeals for the D.C. Circuit. If we had considered this nomination today, we would have done so without answers to many critical questions about this nominee's record. The seven Democratic members of the "Gang of 14", the bipartisan group of 14 Senators who worked together a year ago to avert the "nuclear option" agree. They sent a letter asking for a new hearing so that they may learn enough about this nominee to make an informed decision. I ask that this letter be made part of the record. I am concerned that this Committee not fall short in applying the kind of scrutiny it should to such an important nomination, especially in light of the many recent failures in the White House's vetting of nominations.

Our job in this Committee should not be to score points or advance partisan agendas. Our job is to fulfill our duty under the Constitution for the American people so that we can assure them that the judges confirmed to lifetime

appointments to the highest courts in this country are fair to those who enter their courtrooms and to the law, rather than to advance a political agenda. The Senate Republican leadership is ready to cater to the extreme right-wing factions agitating for a fight over judicial nominations.

Rather than address the priorities of Americans by focusing on proposals to end the subsidies to big oil and rein in gas prices, rather than devote our time to passing comprehensive immigration reform legislation, rather than completing a budget, the Republican leader came to the floor last week to signal a fight over two controversial judicial nominations. The first of these nominations is that of Judge Terrence Boyle to the United States Court of Appeals for the Fourth Circuit. We have learned from recent news reports that, as a sitting United States District Judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. In at least one instance, he is alleged to have bought General Electric stock while presiding over a lawsuit in which General Electric was accused of illegally denying disability benefits to a long-time employee. Two months later, he ruled in favor of GE and denied the employee's claim for long-term and pension disability benefits. Whether or not it turns out that Judge Boyle broke federal law or canons of judicial ethics, these types of conflicts of interest have no place on the federal bench. Certainly, they should not be rewarded with a promotion to the Fourth Circuit. Certainly they should be investigated.

It is not as if we have not been victimized before by the White House's poor vetting of important nominations. If the White House had its way, we would already have confirmed Claude Allen to the Fourth Circuit. He is the former Bush Administration official who recently resigned his position as a top domestic policy adviser to the President. Last month we learned why he resigned when he was arrested for fraudulent conduct over an extended period of time. Had we Democrats not objected to the White House attempt to shift a circuit judgeship from Maryland to Virginia, someone now the subject of a criminal prosecution for the equivalent of stealing from retail stores would be a sitting judge on the Fourth Circuit confirmed with a Republican rubberstamp.

Less than two months ago, the President withdrew the nomination of Judge James Payne to the Court of Appeals for the 10th Circuit after information became public about that nominee's rulings in a number of cases in which he appears to have had conflicts of interest. Those conflicts were pointed out not by the Administration's screening process or by the ABA, but by online journalists.

Judge Payne joins a long list of nominations by this President that have been withdrawn. Among the more well known are Bernard Kerik to head the Department of Homeland Security and Harriet Miers to the Supreme Court. It was, as I recall, reporting in a national magazine that doomed the Kerik nomination. It was opposition within the President's own party that doomed the Miers nomination. I find it interesting that the same Republicans who demanded answers from Ms. Miers now seem to be lowering the bar for Mr. Kavanaugh. During the last few months, President Bush also withdrew the nominations of Judge Henry Saad to the Court of Appeals for the 6th Circuit and Judge Daniel P. Ryan to the Eastern District of Michigan after his ABA rating was downgraded.

The Senate's job as a check is so important. As these nominees have failed to withstand scrutiny for one reason or another, there are those who have slipped through as a result of a complicit Republican-controlled Senate, all too eager to act as a rubberstamp for the Bush-Cheney Administration. It was only after Jay Bybee was confirmed to a lifetime appointment to the Ninth Circuit that we learned of his involvement with the infamous Bybee memo seeking to justify torture. I had asked him what he had worked on while head of the Department of Justice's Office of Legal Counsel, but he had refused to respond. We should not repeat that mistake and proceed with the Mr. Kavanaugh's nomination without knowing what his involvement has been in the scandals that plague this White House, where he has been a member of the inner circle for the last six years.

We asked for another hearing because Mr. Kavanaugh failed to provide meaningful and substantive responses to many of the questions posed to him at his first hearing and he delayed for seven months before providing evasive and incomplete answers to written questions. In addition, a new hearing is warranted because several troubling issues have come to light since his initial nomination. As Associate White House Counsel and staff secretary, Mr. Kavanaugh has served as an influential member of the White House staff at a time when many controversial policies and decisions were being considered. We still do not have answers to the questions I posed last week, and which the Democratic members have raised in letters about his role in connection with such matters. For example, what was Mr. Kavanaugh's role in connection with the warrantless spying on Americans? What was his involvement in the policies affecting detainee treatment and interrogation? What was his involvement in connection with military

tribunals, torture, and rendition of prisoners to other countries? What was his involvement in the scandals now plaguing the White House, it is important to know whether Mr. Kavanaugh has had a role in connection with the actions of Jack Abramoff, Michael Scanlon, David Safavian, the matters being investigated in connection with the Plame matter, and many other matters.

The Democratic members of the "Gang of 14" asked for a new hearing. All Democratic Members of this Committee initially made a request for a new hearing in a letter on May 11, 2005 and followed up after his re-nomination with a letter on March 3, 2006. I ask that both these letters be made part of the record.

If we are going to have a complete picture of this nominee's record and a thorough understanding of the matters in which he has been involved, the right thing to do is to have another hearing and pose these questions to Mr. Kavanaugh. I can only hope that Mr. Kavanaugh is more responsive than he has been in the past. He waited four months to send this Committee his paperwork, and then another seven months to answer our questions, which once received were vague. If Mr. Kavanaugh really wants this job, I hope he'll be more responsive to this Committee. The Senate Judiciary Committee is not a rubberstamp for rewarding this Administration's cronies with a lifetime appointment to a high federal court. The American people deserve better.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
On the Nomination of Brett Kavanaugh
May 4, 2006

I am pleased that finally we will be having another hearing on the nomination of Brett Kavanaugh, which the Democratic members of this Committee have asked for dating back a year now. The Senate Republican leadership has been all too willing in the past to answer the siren call from the right-wing special interest groups trying to prevent this Committee from doing its job on judicial nominations. This is a nomination for the second highest federal court in the country, the Court of Appeals for the D.C. Circuit. If we had considered this nomination today, we would have done so without answers to many critical questions about this nominee's record. The seven Democratic members of the "Gang of 14", the bipartisan group of 14 Senators who worked together a year ago to avert the "nuclear option" agree. They sent a letter asking for a new hearing so that they may learn enough about this nominee to make an informed decision. I ask that this letter be made part of the record. I am concerned that this Committee not fall short in applying the kind of scrutiny it should to such an important nomination, especially in light of the many recent failures in the White House's vetting of nominations.

Our job in this Committee should not be to score points or advance partisan agendas. Our job is to fulfill our duty under the Constitution for the American people so that we can assure them that the judges confirmed to lifetime appointments to the highest courts in this country are fair to those who enter their courtrooms and to the law, rather than to advance a political agenda. The Senate Republican leadership is ready to cater to the extreme right-wing factions agitating for a fight over judicial nominations.

Rather than address the priorities of Americans by focusing on proposals to end the subsidies to big oil and rein in gas prices, rather than devote our time to passing comprehensive immigration reform legislation, rather than completing a budget, the Republican leader came to the floor last week to signal a fight over two controversial judicial nominations. The first of these nominations is that of Judge Terrence Boyle to the United States Court of Appeals for the Fourth Circuit. We have learned from recent news reports that, as a sitting United States District Judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. In at least one instance, he is alleged to have bought General Electric stock while presiding over a lawsuit in which General Electric was accused of illegally denying disability benefits to a long-time employee. Two months later, he ruled in favor of GE and denied the employee's claim for long-term and pension disability benefits. Whether or not it turns out that Judge Boyle broke federal law or canons of judicial ethics, these types of conflicts of interest have no

place on the federal bench. Certainly, they should not be rewarded with a promotion to the Fourth Circuit. Certainly they should be investigated.

It is not as if we have not been victimized before by the White House's poor vetting of important nominations. If the White House had its way, we would already have confirmed Claude Allen to the Fourth Circuit. He is the former Bush Administration official who recently resigned his position as a top domestic policy adviser to the President. Last month we learned why he resigned when he was arrested for fraudulent conduct over an extended period of time. Had we Democrats not objected to the White House attempt to shift a circuit judgeship from Maryland to Virginia, someone now the subject of a criminal prosecution for the equivalent of stealing from retail stores would be a sitting judge on the Fourth Circuit confirmed with a Republican rubberstamp.

Less than two months ago, the President withdrew the nomination of Judge James Payne to the Court of Appeals for the 10th Circuit after information became public about that nominee's rulings in a number of cases in which he appears to have had conflicts of interest. Those conflicts were pointed out not by the Administration's screening process or by the ABA, but by online journalists.

Judge Payne joins a long list of nominations by this President that have been withdrawn. Among the more well known are Bernard Kerik to head the Department of Homeland Security and Harriet Miers to the Supreme Court. It was, as I recall, reporting in a national magazine that doomed the Kerik nomination. It was opposition within the President's own party that doomed the Miers nomination. I find it interesting that the same Republicans who demanded answers from Ms. Miers now seem to be lowering the bar for Mr. Kavanaugh. During the last few months, President Bush also withdrew the nominations of Judge Henry Saad to the Court of Appeals for the 6th Circuit and Judge Daniel P. Ryan to the Eastern District of Michigan after his ABA rating was downgraded.

The Senate's job as a check is so important. As these nominees have failed to withstand scrutiny for one reason or another, there are those who have slipped through as a result of a complicit Republican-controlled Senate, all too eager to act as a rubberstamp for the Bush-Cheney Administration. It was only after Jay Bybee was confirmed to a lifetime appointment to the Ninth Circuit that we learned of his involvement with the infamous Bybee memo seeking to justify torture. I had asked him what he had worked on while head of the Department of Justice's Office of Legal Counsel, but he had refused to respond. We should not repeat that mistake and proceed with the Mr. Kavanaugh's nomination without knowing what his involvement has been in the scandals that plague this White House, where he has been a member of the inner circle for the last six years.

We asked for another hearing because Mr. Kavanaugh failed to provide meaningful and substantive responses to many of the questions posed to him at his first hearing and he delayed for seven months before providing evasive and incomplete answers to written questions. In addition, a new hearing is warranted because several troubling issues have come to light since his initial nomination. As Associate White House Counsel and staff secretary, Mr. Kavanaugh has served as an influential member of the White House staff at a time when many controversial policies and decisions were being considered. We still do not have answers to the questions I posed last week, and which the Democratic members have raised in letters about his role in connection with such matters. For example, what was Mr. Kavanaugh's role in connection with the warrantless spying on Americans? What was his involvement in the policies affecting detainee treatment and interrogation? What was his involvement in connection with military tribunals, torture, and rendition of prisoners to other countries? What was his involvement in the scandals now plaguing the White House, it is important to know whether Mr. Kavanaugh has had a role in connection with the actions of Jack Abramoff, Michael Scanlon, David Safavian, the matters being investigated in connection with the Plame matter, and many other matters.

The Democratic members of the "Gang of 14" asked for a new hearing. All Democratic Members of this Committee initially made a request for a new hearing in a letter on May 11, 2005 and followed up after his re-nomination with a letter on March 3, 2006. I ask that both these letters be made part of the record.

If we are going to have a complete picture of this nominee's record and a thorough understanding of the matters in which he has been involved, the right thing to do is to have another hearing and pose these questions to Mr. Kavanaugh. I can only hope that Mr. Kavanaugh is more responsive than he has been in the past. He waited four months to send this Committee his paperwork, and then another seven months to answer our questions, which once

received were vague. If Mr. Kavanaugh really wants this job, I hope he'll be more responsive to this Committee. The Senate Judiciary Committee is not a rubberstamp for rewarding this Administration's cronies with a lifetime appointment to a high federal court. The American people deserve better.