

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
September 21, 2006

Opening Statement, Senator Patrick Leahy

Ranking Member, Judiciary Committee

Executive Business Meeting,

September 21, 2006

This is the Judiciary Committee's second markup this week. I cooperated on Tuesday with the Chairman's request for a Special Executive Business Meeting. I came to the meeting and established the quorum. The Chairman had said that the meeting would be held to burn holds on two non-controversial circuit court nominees. I agreed to try to expedite consideration of the nomination of Kent Jordan, a nominee to the Third Circuit. Peter Keisler's nomination to the DC Circuit is, however, by no means non-controversial. Nonetheless, in an effort to work with the Chairman I stayed and discussed the Republican hold on that nomination.

Then, although we had not discussed either in advance, in order to be accommodating, I went further and, at the request of Senator Grassley and Senator DeWine, also burned the holds on the nominations of John Alfred Jarvey and Sara Elizabeth Lioi. Those nominations will now be reviewed by all members and available for consideration next week in accordance with the Rules of the Committee.

The Democratic Senators on this Committee and our staffs have worked hard this month to be accommodating on judicial nominations. The Chairman has held three hearings in three weeks, with four nominees in each hearing. That is a breakneck pace and one I think is simply too fast for lifetime appointments. There is another nominations hearing scheduled for next week. This is a faster pace than is appropriate for careful consideration of lifetime appointments to the nation's courts. That is especially true in these busy days with so much of the Senate's agenda still undone and only a few days remaining in this session before recess. I thank the Democratic Senators for working with us to make progress and clear nominations on such an expedited basis.

This year, the Senate has so far confirmed 30 judicial nominees. The Republican Senate confirmed only 17 of President Clinton's judicial nominees in the 1996 session. We have almost doubled that number. We have held 18 judicial nominations hearings this year, including a Supreme Court hearing, and four executive nominations hearings. We have confirmed seven circuit court nominees, which is seven more than the Republican Senate confirmed with a Democratic President in 1996. That year Republicans would not consider or confirm a single appellate court nomination, not one. It is already as many circuit court nominees as were confirmed in 1997 and 1999.

This is a far cry from the days when the Republican Congress pocket filibustered more than 60 of President Clinton's nominees, refusing even to bring them up for a vote in Committee. Of course, during the 17 months that I was Chairman, we were able to confirm 100 of President Bush's nominees. In 20 months of Republican control, with a Republican President, that number now stands at about half that-- just 52.

Of course, we could have moved much faster this year if the White House had sent over consensus nominees early in the year. The White House did not. Many of the nominees we are now trying to consider were not even nominated until July. Regrettably the Administration concentrated on a few highly controversial nominees and delayed until recently sending nominees thereby preventing us from having the time to do any meaningful review.

Even in September, the White House has undermined this process. Instead of focusing on consensus nominees, the President sent back to us five highly controversial nominees who had been returned to the White House in the hope that the President would take the opportunity to move on to consensus choices and to doing the work of the American people. Sadly, this Senate appears to be abetting those bad decisions and may force us to spend our time and energy debating troublesome nominations, rather than reviewing and confirming good ones.

We are now in the position of trying to rush through too many nominees too quickly for us to give them real consideration. There are 16 judicial nominees listed on today's agenda at various stages of consideration.

We have been accommodating, and we will continue to be, but this Committee should not be a rubber stamp for the President's nominations. We should be taking our constitutional responsibility to advise and consent seriously. That means carefully reviewing the nominees' records and making sure that these are appropriate nominees for lifetime appointments to important federal judgeships.

I hope that we have time in the few days remaining in this legislative session to consider as many as reasonably possible of these nominations. A customary practice in the Senate would have been for the leaders, the Republican and Democratic leaders, to have sat down with the Chairman and the Ranking Member by now and have worked out a process to conclude the year. I would have urged that we concentrate on completing our work on those nominations most likely to be confirmed and to maximize the number of confirmations. Sadly, that meeting has not occurred and apparently will not.

I have been noting for some weeks now my worry that, like so much of the Nation's pressing business over the last two years, even noncontroversial nominations can be delayed or derailed by the misguided priorities of the Bush-Cheney Administration and the Republican leadership. With so little time remaining in this Congress, I would have hoped that the Administration and the Republican leadership would be anxious to make up for lost time by trying, at last, to address the many urgent and unresolved needs of Americans. Instead, I fear that today we will spend hours of Committee time on divisive nominations that have stalled in the past, just as we have squandered most of this week on the Senate floor.

I had hoped that we could join together to change course from the failed policies that have stretched from the Persian Gulf to the Gulf Coast and left America less secure and set us back as a Nation. Regrettably, rather than learn lessons from these failures, it appears that the President and his allies in the Senate are intent on staying the course.

As I have noted, the Administration has also chosen to stay the disastrous course on judicial nominations by choosing to renominate five extremely controversial choices for lifetime positions on the Nation's highest courts. These five nominations represent a troubling group. This Administration seems intent on heeding the marching orders of the narrow, special interest groups on the right and picking fights. While I have urged the Senate Republican leadership to join with us in the waning days of this Congress to do the work of the American people, it appears this week we will take the Administration's bait and waste valuable time.

I will speak further on each of these problematic nominations when they come up and explain why I do not think they are fit for lifetime appointments to the nation's highest courts other than the Supreme Court. I would rather use Committee time to consider legislation of importance to the American people and to review and confirm consensus nominees, but I will also try to ensure that the Senate exercises its constitutional responsibilities, rather than acting as a rubber stamp.

Yesterday I joined with the Chairman in sending a letter to the Senate leaders regarding the military commissions issue that until this week the Republican leader had indicated would be our number one priority. Now the Republican leadership seems intent on leading what he would call a leadership led partisan filibuster of the Warner-Levin legislation. A year ago we were lectured about how such a thing was outside the bounds of Senate practice but here we are. The Chairman and I want to improve the Armed Services Committee bill by fixing the habeas corpus provisions. The Chairman spoke about that on the floor yesterday. I would have hoped that we would be considering together how to discuss that important issue here today and hold hearings and find the best way to bring our Committee's expertise to bear. I still hope that we can.

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Statement of Senator Patrick Leahy

Ranking Member, Judiciary Committee

Nomination of Norman Randy Smith

September 21, 2006

I am disappointed that the Committee has taken the bait dangled by the Bush-Cheney Administration to engage in an unnecessary political fight over a controversial judicial nomination rather than tend to the many urgent needs of Americans. I hoped that we could join together to change the course of failed policies from the Persian Gulf to the Gulf Coast that have left America less secure and set us back as a Nation. Regrettably, by moving forward with consideration of the nomination of Judge Norman Randy Smith of Idaho for a lifetime appointment to the Court of Appeals for the Ninth Circuit, we are following the President and his political advisors and staying the disastrous course on judicial nominations.

In nominating Judge Smith, 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. A few weeks later 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 pleaded guilty to 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 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.

I will not support the President's nomination of Judge Smith because it would effectively transfer a judgeship from California to Idaho, violating historical precedent. Judge 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.

This controversy was avoidable. I had suggested to the President several times that he re-nominate Judge Smith for the vacancy created by the retirement of Judge Thomas G. Nelson from Idaho. Instead, the President has again nominated William Gerry Myers III for that seat. Mr. Myers is another Administration insider and lobbyist whose record has raised serious questions about his ability to be a fair and impartial judge. I opposed this nomination when it was considered by the Judiciary Committee in March 2005. This was a nomination that the so-called "Gang of 14" expressly listed as someone for whom they made no commitment to vote for cloture, and with good reason.

Mr. Myers' anti-environmental record is reason enough to oppose his confirmation. His lack of independence is another. If anyone sought to proceed to this nomination, there would be a need to explore any connections to the lobbying scandals associated with the Interior Department and Republican lobbyist Jack Abramoff. I again urge President Bush to resolve this impasse and turn Idaho's vacancy into a judge by withdrawing the controversial Myers nomination and nominating Judge Smith for the Idaho vacancy to which he could be easily confirmed.

Continuation of Misguided Priorities

Unfortunately, President Bush's re-nomination of these controversial nominees is a continuation of a now-familiar pattern of misguided priorities that has plagued the Administration and the Senate's Republican leadership since the beginning of this Congress. Instead of urging his party to take early and decisive action to pass comprehensive immigration reform, as he signaled he would in February 2001, the President began his second term campaigning to undercut the protections of our Social Security system. As a result, at the start of this Congress in 2005, the Administration's top priority was not increasing national security or the economic security of working Americans who are sharing in a smaller piece of the country's wealth than they have in decades. Had the Administration been successful at privatizing Social Security, it would have gutted the program that ensures for all Americans that growing old does not mean growing poor. Thankfully, Americans rejected this effort. Unfortunately, the President continues to voice his support for his rejected approach and refuses to concede his error.

Like the Administration, the Senate's Republican leadership turned away last spring and summer from addressing the priorities of most Americans. They focused instead on the fierce legal battle over the medical treatment of Terri Schiavo, who was in a persistent vegetative state for more than a decade. Politicians engaged in extraordinary measures to override what state courts determined to be her personal wishes. The power of the Federal Government was wielded by some to determine deeply personal choices. The Republican leader even made a medical diagnosis on the floor of the Senate, and the President cut short one of his vacations to come

back to Washington to sign legislation to override the precise wishes of this one patient. The American people recoiled from this misuse of the Government's time and authority.

The President's re-nomination of divisive nominees is a repeat of last Congress and last year, when the Administration and the rubberstamp Republican Senate created a massive confrontation over controversial nominees. The Senate narrowly averted the so-called "nuclear option," a bid to achieve one-party rule by thwarting the Senate rules. They were willing to destroy a fundamental check and balance in order to be a more efficient rubberstamp for this President. Thankfully, this attempt also failed, but not before the Senate expended much energy and lost precious time.

This summer the Republican leadership determined, despite the many pressing issues facing the country and affecting Americans, to turn away from the legislative agenda to focus on two constitutional amendments that would result in restricting the rights of the American people. Although not among our Nation's most pressing priorities, the constitutional amendments were considered and rejected. The marriage amendment and the flag amendment would have artificially created division among the American people.

With more Americans in poverty and extreme poverty and more children without health care, we must do better. With rising interest rates, rising mortgage rates, rising health care costs, rising insurance costs, we must do better for America's working families. While corporate profits are taking a greater and greater share of our GNP, wages are stagnant and those in charge refuse to allow a long overdue raise to the minimum wage. We have just come through a summer of record high gas prices, and for many families, the threat of record high home heating prices this winter looms around the corner.

The full agenda before us as we enter the final days of this legislative session reflects how little the Republican leadership has accomplished, even with control of the White House and both Houses of Congress. A steady course of misguided priorities has cost Americans progress on real issues that matter most. And these failures to focus on our real priorities have left America less secure. Just last week, the Senate Democratic leadership reached out again to refocus our efforts against the terrorists. We introduced the REAL Security Act in the hope that Senate Republicans would finally turn to that issue.

The Republican-controlled Congress has yet to enact a federal budget. We are in violation of the statutory deadline of April 15. We have passed but two appropriations bills, and we are required by law to pass a dozen. We have yet to reconcile and enact lobbying reform and ethics legislation. We have yet to deal with the skyrocketing cost of gasoline and health care. We have yet to reconcile and enact a bipartisan and comprehensive immigration reform bill. And for the second year in a row, the Republican-led Senate will not even take up the annual intelligence authorization bill.

As we commemorated the first anniversary of Hurricane Katrina last month, we were reminded that the situation in the Gulf Coast remains a tragedy with serious human consequences. We need to commit ourselves and our resources to helping our fellow citizens who are still in need after the appalling lack of responsiveness by this Administration. We need to provide the assistance to that region of our country where rubble remains a fixture of the landscape one year later. Many residents still do not have homes to return to or jobs waiting for them when they get there.

As we commemorated the fifth anniversary of the deadliest foreign terrorist attack on American soil earlier this month, we should refocus our efforts and our resources there they belong; on the real terrorists and providing real security. More than five years after 9/11, Osama bin Laden remains at large, taunting us and threatening us-- this despite the bipartisan efforts by the Senate to authorize the President to use the most powerful military force in the world to bring him to justice. Had the President not diverted our forces from Afghanistan to Iraq, we would be much more successful in the war on terrorism.

Americans would be better served if we used our remaining time in this Congress to address these vital issues than to focus on political fights over a handful of divisive and failed nominations.

The President could easily resolve this matter yet he refuses to act as a uniter. Because he has not, I will support Senators Feinstein and Boxer in opposing the nomination of Judge Smith for California's seat on the Ninth Circuit.

Statement of Senator Patrick Leahy,

Ranking Member, Judiciary Committee,

On OPEN Government Act of 2005

September 21, 2006

Mr. Chairman, I am pleased that today the Committee is taking up the OPEN Government Act. I want to commend Senator Cornyn for his leadership on strengthening our open government laws.

I have devoted a considerable portion of my work in the Senate to improving government openness, to make our government work better for the American people. At times, this has been a lonely battle and I am delighted to have Senator Cornyn as a partner on this issue.

This bill is a collection of commonsense modifications designed to update FOIA and to improve the timely processing of FOIA requests by Federal agencies. The bill also clarifies that FOIA applies to agency records that are held by outside private contractors, no matter where these records are located.

This bill was drafted after a long and thoughtful process of consultation with individuals and organizations that rely on FOIA to obtain information and share it with the public, including the

news media, librarians, and public interest organizations representing all facets of the political spectrum. I believe that it reaffirms the fundamental premise of FOIA - government information belongs to all Americans.

As we celebrate the 40th anniversary of the Freedom of Information Act this year, I hope that this Committee will do its part to reinvigorate this important law and favorably report the OPEN Government Act by unanimous consent.

Again, I thank Senator Cornyn for the time and effort he has devoted to protecting the public's right to know, and I urge all members of the Committee join us in supporting this important legislation.