

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Judiciary Committee

On the Nomination of Thomas M. Hardiman

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The Committee returns during the lame duck session of Congress for a hearing today on the nomination of Judge Thomas M. Hardiman to an important seat on the U.S. Court of Appeals for the Third Circuit. This lame duck session comes on the heels of national elections in which Americans overwhelmingly cast their ballots for change. For too long, the White House has undermined our bipartisan process for selecting judicial nominees by refusing to work with us on consensus nominees.

In the days following the election, the President spoke about becoming a uniter and working with Congress in a bipartisan way. Regrettably, it appears he will not be keeping that promise. I understand the President intends to renominate a number of controversial nominees. That unfortunate decision evidences that he intends to stay the partisan course when it comes to judicial nominations.

This needless conflict and emphasis on partisanship over progress is nothing new for this White House, and has been aided by the Republican-controlled Congress that is now coming to a close. At the end of our last legislative session, the Republican leadership did not follow through on the hard work done by the Chairman and by this Committee to report out more than a dozen consensus judicial nominations. Democrats on the Judiciary Committee worked hard to accommodate Chairman Specter and make up for time wasted by the Republican leadership on controversial nominations. Unfortunately, Republican objections led to the Senate recessing in September without confirming additional judicial nominations.

Only 31 judicial nominations have been confirmed in the first 10 months of this year. During the 17 months the Democrats were in charge of considering President Bush's judicial nominations and I was Chairman of the Judiciary Committee, we confirmed 100 judges. In the last 22 months of Republican control, with a Republican President, we have confirmed only half that - just 53 nominees. This number could have been much higher had Republicans cooperated. Instead, Republican objections in September blocked more than a dozen nominees, and we are left with continuing vacancies instead of sitting judges.

Six of these judicial nominees would have filled vacancies that the Administrative Office of the U.S. Courts has determined to be judicial emergencies. The confirmation of Judge Kent Jordan to the Court of Appeals for the Third Circuit would end a judicial emergency. So would the confirmations of Laurence O'Neill for the U.S. District Court for the Eastern District of California, Leslie Southwick for the U.S. District Court for the Southern District of Mississippi, and three nominees - Robert Jonker, Paul Maloney, and Janet Neff - to the U.S. District Court for the Western District of Michigan.

Our progress in confirming judges was undone by some on the Republican side. It is particularly ironic that after months of Republicans repeating a new mantra, that every one of the President's nominees, whether qualified or not, whether engaged in conflicts of interest or not, whether supported by home state Senators or not, is entitled to a swift up or down vote, Republican objections stalled more than a dozen judicial nominees. Apparently Republicans who were prepared to employ the nuclear option in the Senate and change its longstanding rules are still utilizing a double standard by which concerns of Democratic Senators are to be ignored but those of anonymous Republicans prevent Senate consideration.

After the last working session in September, I learned that several Republicans were objecting to Senate votes on some of President Bush's judicial nominees. According to press accounts, Senator Brownback had placed a hold on Judge Neff's nomination, even though he raised no objection to her nomination when she was unanimously reported out of Judiciary Committee. Later, without going through the Committee, Senator Brownback sent questions to Judge Neff about her attendance at a commitment ceremony held by some family friends several years ago in Massachusetts. There is no question about Judge Neff's qualifications. Judge Neff's nomination is part of a White House agreement. She was nominated by President Bush on the recommendation of her home state Senators. She would have filled a judicial emergency vacancy.

Of course, this is not the first time Republicans have objected to an up or down vote on judicial nominees. More than 60 of President Clinton's judicial nominees were pocket filibustered by Republicans without an up or down vote. Last year the President's nomination of Harriet Miers

to a vacancy on the Supreme Court was stalled and then withdrawn due to Republican objections. Republicans questioned her qualifications and demanded answers about her work at the White House and her legal philosophy. They defeated her nomination before allowing her a hearing.

I wish that earlier this year we had followed the customary practice in the Senate for the leaders, Republican and Democratic, to sit down with the Chairman and the Ranking Member of the Judiciary Committee and to work out a process to conclude the year with respect to judicial nominations. Sadly, that meeting did not occur.

I do want to acknowledge the kind words of the Majority leader who noted before the last recess that we have made "tremendous progress on confirming qualified judicial nominees." By Senator Frist's count, the Senate "has confirmed 88 percent of President Bush's judicial nominees, giving him the highest confirmation rate since President Reagan." He calculates that "95 percent of all judgeships are filled, including more than 92 percent of all circuit court judgeships and more than 95 percent of all district court judgeships." He notes that the Senate has confirmed "[n]early 160 nominees" for judgeships under the 46 months of his leadership. The only thing he leaves out is that fully 100 were confirmed during the 17 months that I chaired the Judiciary Committee and Senator Daschle was the Senate's leader. Likewise, Chairman Specter acknowledged before the recess that the Democrats on the Judiciary Committee and in the Senate have not been the obstructionists that some in the right-wing have claimed, but instead worked in an accommodating manner.

This year, we have confirmed 31 judicial nominees so far. This far surpasses the total number of judges confirmed in the 1996 congressional session, when Republicans controlled the Senate and stalled the nominations of President Clinton. In the 1996 session, Republicans would not confirm a single appellate court judge, not one, and moved forward on only 17 district court judges all session. That was the only session of the Senate I can remember in which the Senate simply refused to consider appellate court nominations. That was part of their pocket filibuster strategy to stall and maintain vacancies so that a Republican President could pack the courts and tilt them decidedly to the right. In confirming eight Circuit Court judges this year, we have already confirmed more Circuit Court judges than in 1996, 1997, 1999, or 2000.

We also could have accomplished more 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 other nominations and thereby prevented us from having the time to do any meaningful review. By contrast, there are five judicial emergencies still without any nominee at all. Nor has President Bush fulfilled his

pledge to make a nomination for every vacancy within 180 days. Of the vacancies currently without a nominee, 13 have been vacant for more than 180 days. An additional 13 of the pending nominees were nominated only after their vacancies had been open for more than 180 days.

The record is clear - when we work together on consensus judicial nominees, we can make progress. When I led the Judiciary Committee for 17 months, the Senate confirmed almost twice as many of this President's judicial nominees as have been confirmed in the two years of the current Congress.

I was encouraged by President Bush's pledge this week to work with Congress in a bipartisan and cooperative way, and I hope he intends to change course and honor that pledge by working with us to confirm consensus nominees. This process starts with the President. With all the divisiveness in the country today, the American people would cheer consultation and nominees who unite instead of divide.

The American people want the Senate to be more than a rubber stamp. They want the Senate to do its job by carefully evaluating nominees for lifetime judgeships. The American people expect the federal courts to be fair forums where justice is dispensed without favor to the right or the left. These are the only lifetime appointments in our entire government, and they matter a great deal to our future. I will continue to work with Senators from both sides of the aisle to ensure the independence of our federal judiciary.