

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
November 15, 2007

Opening Statement Of Chairman Patrick Leahy  
November 15, 2007

Today I will, again, attempt to focus our efforts on proposals to amend the Foreign Intelligence Surveillance Act (FISA). These are extremely important matters. We have held two hearings and a number of briefings and meetings on this issue so we can deal with these matters in an informed way.

Senator Specter and I wrote a joint letter seeking referral of this matter in accordance with Senate procedures, but our Committee's jurisdiction is limited in time. It is set to expire this week. I tried to make that point last week, and to proceed through the amendments to Title I so that we could turn to the retroactive immunity issue in Title II this week, and provide the Senate with our best collective judgment on how best to proceed.

I was pleased with the airing of views last week, but we were unable to make real progress when Republican objections required the entire bill to be held over and considered this morning. We have a lot of amendments that have been circulated and clearly have our work cut out for us if we are to complete the Committee's consideration of this bill.

After my brief opening remarks and any brief opening remarks by the Ranking Member, I intend to place before the Committee the amendment to Title I of the bill, which we circulated last week, have revised and re-circulated again yesterday after consulting with a number of offices. I am offering the amendment on behalf of myself, Senator Feinstein, Senator Schumer, and Senator Whitehouse.

Title I deals with the new authority for surveillance of targets overseas, the role of the FISA Court in that surveillance, and protections for the privacy and liberties of Americans. I would ask that the Committee adopt this substitute amendment to Title I as a starting point, with the understanding that it would be open to amendment and that any amendments filed to Title I of the underlying bill will be considered in order as amendments to it.

At some point I would like to turn to Title II and the important issue of retroactive immunity. Senator Feingold has an amendment to strike the provisions, which I will support. Senator Specter has an amendment, and I intend to recognize him to offer it. The Specter amendment builds on the concept of substitution as an alternative to retroactive immunity. The hope is that it will incorporate a limit on the use of preemptive legal doctrines, like the state secret doctrine or sovereign immunity, so that substitution would provide a way to test the merits of the claims with the government standing in the shoes of the telecommunications carriers.

As I have said before, I have grave concerns with retroactive immunity for telecommunications carriers for their warrantless surveillance activities from 2001 through early this year, contrary to FISA and the privacy rights of Americans. A retroactive grant of immunity would do more than let the carriers off the hook. Immunity is designed to shield this Administration from any accountability for conducting surveillance outside the law. It could make it impossible for Americans whose privacy has been violated illegally to be made whole.

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Statement of Senator Patrick Leahy  
Chairman, Senate Judiciary Committee,  
On Judicial and Executive Nominations  
Executive Business Meeting  
November 15, 2007

Today the Committee will reach a significant landmark in our progress on the consideration of nominations for lifetime appointments to the Federal bench. We will report out four judicial nominations on our agenda today. With the nominations of Joseph N. Laplante for the District of New Hampshire, Reed Charles O'Connor for the Northern District of Texas, Thomas D. Schroeder for the Middle District of North Carolina, and Amul R. Thapar for the Eastern District of Kentucky, the Committee will have reported 40 judicial nominations this year.

The Committee has worked hard all year to expeditiously consider the President's nominations. I thank the home-state Senators - Senators Gregg, Sununu, Hutchison, Cornyn, Dole, Burr, McConnell and Bunning - for their consideration of these nominees. I especially want to thank Senator Whitehouse for chairing the hearing on these nominations.

I am glad we were able to accommodate the request of Senator Specter, our ranking member, to promptly consider the nomination of Mr. Thapar. The National Asian Pacific American Bar Association wrote to us in support of his nomination, which is the first of a South Asian American to be an Article III judge. If confirmed, he would become only the seventh Asian Pacific American Article III judge in our Nation's history.

The 40 nominations we will have reported after today, one week before the Thanksgiving recess, exceeds the totals reported in all of 2004 and 2005, when a Republican-led Judiciary Committee was considering this President's nominees; all of 1989; all of 1993, when a Democratic-led Senate was considering President Clinton's nominees; all of 2000, when a Republican-led Judiciary Committee was considering President Clinton's nominees; and all of 1996, when the Republican-led Senate did not confirm a single one of President Clinton's circuit nominees.

Of these 40 nominations, six have been for seats on federal appellate courts, far exceeding the total reached during the entire 1996 session during which a Republican-led Senate did not confirm a single one of President Clinton's circuit nominees.

We continue to make similar progress in the full Senate. Earlier this week the Senate confirmed the nomination of Robert Dow to the Northern District of Illinois, the 35th nomination for a lifetime appointment to the Federal bench this session alone. And we are poised to make even more progress. The Senate could easily confirm one more judicial nomination previously reported by this Committee that is now pending on the executive calendar, that of John Daniel Tinder to the Court of Appeals for the Seventh Circuit. With those two nominations, along with the four nominations we report out today, the Senate is positioned to confirm 40 nominations by Thanksgiving, easily exceeding the totals of each of the last three years when a Republican-led Senate was considering this President's nominees.

This Committee has treated President Bush's nominations fairly. Those who urge that we expedite the nomination of Judge Catharina Haynes to the Fifth Circuit fail to mention that the Senate has already confirmed two Fifth Circuit nominations this year, those of Judge Jennifer Walker Elrod and Judge Leslie Southwick.

I wish that President Clinton's nominations to that same court had fared as well with a Republican Congress. When President Bush came into office in 2001, not a single Fifth Circuit nominee had been confirmed in six years, Republicans having blocked consideration of three qualified nominees to that court among the 60 judicial nominations that were pocket filibustered.

Those who urge us to expedite the nomination of Judge Haynes - a nominee from Texas - fail to mention that we have already confirmed five of President Bush's nominees to the Fifth Circuit, three of whom were from Texas, and we have another nomination on today's agenda for the Northern District of Texas.

Compare that record to the fate of many of President Clinton's judicial nominees from Texas, who were blocked and delayed by the Republican majority, including Enrique Moreno, nominated to the Fifth Circuit Court of Appeals, but who never got a hearing, never got a vote; Judge Jorge Rangel, nominated to the Fifth Circuit Court of Appeals, but who never got a hearing, never got a vote; and Judge Hilda Tagle to the District Court, whose confirmation was delayed for nearly two years for no good reason.

We continue to make significant progress on ALL circuit court nominations. When the Senate confirms the Tinder nomination now pending on the Senate's Executive calendar, we will have confirmed six circuit court nominees, matching the total circuit court confirmations for all of 2001.

We will also have exceeded the circuit court totals achieved in all of 2004 when a Republican-led Senate was considering this President's circuit nominees; all of 1989; all of 1983, when a Republican-led Senate was considering President Reagan's nominees; all of 1993 when a Democratic-led Senate was considering President Clinton's nominees; and, of course, the entire 1996 session during which a Republican-led Senate did not confirm a single one of President Clinton's circuit nominees the entire session.

Yet despite all of our efforts to promptly consider and report judicial nominees, some on the other side continue to complain. If they were candid they would concede that we Democrats - we Democrats - have confirmed more of President Bush's nominees for any given period of time while we have been in charge than the Republicans did. We have had three different leaderships in this Committee during the time President Bush has been in office. Yet, it is a little known fact that during the Bush Presidency, more circuit judges, more district judges -- more total judges -- were confirmed in the first 24 months that I served as Judiciary Chairman than during the 2-year tenures of either of the two Republican Chairmen working with Republican Senate majorities.

Indeed, I recall the generous treatment Democrats gave the circuit court nominees of Presidents Reagan and Bush in the Presidential election years of 1988 and 1992. In those two elections, the Democratic-controlled Senate averaged nine circuit court confirmations. Regrettably, the Republican Senate reversed that course in the treatment of President Clinton's circuit court nominations, confirming an average of only four in the Presidential election years of 1996 and 2000, and none in the entire 1996 session.

We have placed a priority on working to restore integrity and independence to the Justice Department. Last week, we reported out of Committee the nomination of Michael J. Sullivan to be Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives. The nomination of Ronald Jay Tenpas will be on the agenda of our next business meeting. Of course, we still await nominations for the Deputy Attorney General, the Associate Attorney General, a number of Assistant Attorney General positions and, importantly, 21 U.S. Attorney positions around the country -- over one-fifth of all U.S. Attorney positions. When we receive those nominations, they will go to the top of our priority list.

Despite criticism from this Administration, we continue to make progress on judicial vacancies when the White House will work with us. Twenty-six of these vacancies - more than half - have no nominee. Of the 17 vacancies deemed by the Administrative Office to be judicial emergencies, the President has yet to send us nominees for nine of them, more than half of them. Of the 14 circuit court vacancies, six - nearly half - are without a nominee. If the President had worked with the Senators from Michigan, Rhode Island, Maryland, California, New Jersey, and Virginia, we could be in position to make even more progress.

I recall at the end of last Congress Senator Specter decrying the nominations then stalled on the Senate floor due to Republican holds. He said:

A good number of these nominees are also in districts where there are judicial emergencies. I think that from time to time we in the Senate, where we have the responsibility for confirmation, don't really take seriously enough the impact of judicial vacancies. The courts are busy. The Third Circuit, my circuit, is overwhelmed. District Court Judge Jordan ought to be confirmed. My colleagues have told me about the problems posed by vacancies in their states. If these other 13 districts nominees are not confirmed today, they will languish until who knows--January turns into February and February in March. We always find a reason around here not to do something. That applies most emphatically to the judges.

I took Senator Specter's advice very seriously, as I always do, and we have found a way this year to make progress on those nominations that once languished on the floor and many more as well. We will continue to proceed promptly and efficiently to confirm nominations to fill vacancies and improve the administration of justice in the country.

One of the signs of this progress is that we have helped cut the number of circuit vacancies from a high water mark of 32 in the early days of this Administration to as low as 13 this year. Contrast that with the Republican-led Senate's lack of action on President Clinton's moderate and qualified nominees that resulted in increasing circuit vacancies during the Clinton years from 17 when he was inaugurated to 26 when he left office. During those years, the Republican-led Senate engaged in strenuous and successful efforts under the radar to keep circuit judgeships vacant in anticipation of a Republican President. We have reversed that course.

I would rather see us work together as we have today in the selection of nominees so that we can confirm judges rather than fight about them.

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