

Statement of

The Honorable Patrick Leahy

United States Senator

Vermont

September 25, 2008

Opening Statement Of Senator Patrick Leahy (D-Vt.),

Chairman, Senate Judiciary Committee,

Executive Business Meeting

September 25, 2008

The first item on our agenda remains the authorization for subpoenas relating to the Office of Legal Counsel at the Department of Justice. As I noted last week, and have been saying for the better part of eight years, this Office's work has largely been kept secret from this oversight Committee, despite our efforts. For the last eight years, the Bush-Cheney administration has been having the Office of Legal Counsel (OLC) write secret laws by creating interpretations of the laws Congress has passed. Keeping binding interpretations of such secret law from Congress is wrong.

During this administration, OLC has been misused to provide legal justifications for misguided policies. That advice has been deeply flawed, sloppy, and flat out wrong - but it has been permitted to happen because secrecy has prevented our oversight. Unjustified secrecy continues to prevent the review by this Committee that would provide a check and some control on how the administration is interpreting the law that is Congress's constitutional responsibility to write. That obsessive secrecy even prevents us from knowing the subject matter on which OLC has written opinions.

There is no justification for keeping OLC legal interpretations secret from this Committee, let alone the index I have long sought. I seek this authorization after years of being rebuffed and slow-rolled in our attempts to find out how this administration has interpreted and applied the laws written by Congress.

I regret that Republican members have not rallied around our oversight effort, but that is their choice. Senator Kyl delayed action for the last week. I can report that despite my willingness to meet, the President's counsel has shown no interest in meeting or resolving this matter. In fact, in his most recent letter response to me he bucked the issue back to the Department of Justice - even though we all know

it is the White House that is calling the shots. Their saying that they will "get back to us" after five years of stonewalling, and as the sun sets on this administration is hardly a reason to delay further.

I understand that Senator Specter is more optimistic than I. He also thought that the White House would eventually agree to producing the witnesses and information we requested in connection with our investigation into the U.S. attorney firing scandal and he worked hard to make that happen. Regrettably, that did not happen either and the White House and Karl Rove remain in contempt.

After five years of being ignored with respect to the abuses at OLC, I believe it is time for this Committee to act and authorize subpoenas so that we can better perform our important oversight and legislative responsibilities. I ask for the Committee's support and favorable action on the subpoena authorization without further delay.

I said last week that when we make progress on the authorization, I believe that we will be able to proceed through the rest of the agenda fairly quickly. I still believe that to be the case. But cooperation around here has become a one-way street, and I have been granting request after request of the Committee's Republican members. A bit of cooperation from them at this, our last meeting, will be appreciated.

#####

Statement Of Senator Patrick Leahy,  
Chairman, Senate Committee On The Judiciary,  
On HR 3971, Death in Custody Reporting Act  
Executive Business Meeting  
September 25, 2008

Today the Committee will turn to the "Death in Custody Reporting Act." Bobby Scott, Chairman of the Crime Subcommittee in the House wrote this bill, and requested that we move it through Committee after its passage in the House. I am happy to accommodate his request and to support this piece of legislation.

This bill would ensure that states continue to report all deaths of individuals in state custody. This information is important for detecting and eliminating any serious abuses and mismanagement in state

correctional systems, as well as for helping states to monitor and improve their own correctional facilities.

States were required to provide this information under Federal law from 2000 through 2006, and the information proved to be useful without being burdensome for states. Unfortunately, these statutory reporting requirements have expired and need to be renewed. This bill also ties in other institutions like boot camps and private prisons, which were not included in the original bill, but for which it is also important that deaths be reported.

I am glad to introduce an amendment on Senator Kennedy's behalf that adds reporting requirements for deaths in Federal custody. Particularly given recent reports of abuses and unnecessary deaths in Federal immigration facilities, this expanded reporting requirement is crucial.

The bill does contain a provision penalizing states for non-compliance by reducing their Byrne grant funding for state and local law enforcement. I prefer to provide positive incentives for states to comply with important regulations, rather than threatening to cut needed funds for law enforcement. Since Vermont officials have assured me that states like Vermont are already in compliance and will have no problem remaining in compliance, I am nonetheless willing to accept the penalty provision in this bill.

Further, Senator Kennedy's amendment gives states more time to comply and makes the funding penalty for non-compliance discretionary, rather than mandatory, in its amount. This greater flexibility should ease concerns about the penalty provision.

This legislation strengthens oversight of correctional facilities and will contribute to needed improvements and reforms. I hope all Senators on the Committee will support it.

#####

STATEMENT OF CHAIRMAN PATRICK LEAHY

ON NOMINATIONS

EXECUTIVE BUSINESS MEETING

SEPTEMBER 25, 2008

We have on our agenda today 14 nominations, including 10 nominations for lifetime appointments to the Federal bench, and the nomination of Greg Garre to be Solicitor General of the United States, one of the highest and most prestigious positions at the Department of Justice.

I have placed these nominations on the agenda despite the late date in a Presidential election year and despite the abysmal Republican record of filibustering and refusing to give consent to proceed on important bills with broad bipartisan support. Indeed, we could have completed the Committee's work on eight of these nominations, including five judicial nominations, at least week's markup if not for the lack of Republican cooperation in fulfilling our oversight responsibilities.

We will try again today. With cooperation, we can complete our expedited consideration of the judicial nominations carried over from last week for district courts in Utah, Colorado, California, and Florida. These nominees, Clark Waddoups of Utah, Michael Anello of California, Mary Stenson Scriven of Florida, and two nominees from Colorado, Christine Arguello and Phillip A. Brimmer, were considered in the first of two nominations hearings I chaired this month. All of these nominees have the support of their home state Senators, Republicans and Democrats.

I was happy to accommodate Senator Salazar's request that we add two Colorado nominees to that hearing, after he and Senator Allard reached an agreement. That agreement led Senator Allard finally to return the blue slip for Ms. Arguello. Of course, Ms. Arguello was nominated by President Clinton to the 10th Circuit, but a Republican pocket filibuster in 2000 stalled her nomination. Today, we are attempting to right another wrong from the Republican abuses of those years. Ms. Arguello, like Judge Helene White, who was confirmed to the 6th Circuit earlier this year, has now been nominated by Presidents of both parties. I am hopeful that we can complete the consideration of her nomination promptly. If we can proceed and vote to report these nominations today, and if there are no delays in their floor consideration, they can be confirmed before we recess.

With cooperation we can also move forward with the judicial nominations listed on our agenda for the first time. These nominees to the Federal bench in Pennsylvania, Virginia and Kansas had a hearing just two days ago, which I held as an accommodation to Senator Specter, the Ranking Republican Member of our Committee and a former Chairman. Three of the nominees were included at Senator Specter's request. C. Darnell Jones II, Mitchell S. Goldberg, and Joel H. Slomsky all also have the support of Senator Casey. President Bush did not get around to nominating these men until just before the August recess. At the time I set their hearing last week, we still had not received ABA ratings based on peer reviews of all of them. We expedited our proceedings earlier this week and again today as a courtesy to Senator Specter.

The other nominees I have added to the agenda are Anthony J. Trenga of Virginia, a nominee with the support of both Virginia Senators who I added at the request of Senator Warner, and Eric Melgren of Kansas, who I added at the request of Senator Brownback.

Like the hearing we held September 9, this hearing was an exception to Thurmond Rule, established and followed by Republicans when there is a Democratic President in the White House. That rule calls for Senate consideration of judicial nominations to stop in the last several months before a presidential election in order to await the outcome of the election. Senator Hatch followed that practice in both 1996 and 2000 when he chaired the Judiciary Committee. In fact, in 1996, no one nominated after June 6 was considered and there were no judicial confirmations after the August recess. In 2000, there were no hearings after July 25.

I have said throughout my chairmanship that I would treat President Bush's nominees better than Republicans treated President Clinton's, and I have done so. In the 17 months I served as Chairman of this Committee during President Bush's first term with a Democratic Majority, the Senate confirmed 100 of the President's judicial nominations. At the beginning of this Congress, we expedited consideration of over a dozen nominations that had hearings in the last Congress but were stalled by Republican holds from Senator Brownback and others. Our consideration today of these 10 nominations for lifetime appointments is further evidence.

Despite our efforts to step away from the tit for tat of the nomination battles of the past, I have yet to hear praise from a single Republican for our fair consideration of this President's nominees. Despite our success in dramatically lowering judicial vacancies by approving the nominees of a President from the other party, those efforts have yet to be acknowledged. Yet despite the persistent difficulties we have had this Congress at gaining Republican cooperation to consider important matters in Committee and in the Senate, including bills with bipartisan support, we proceed with these nominations today.

We have already confirmed more judicial nominations in the 20 months of this Congress than were confirmed during the previous two years when a Republican Senate majority and Republican chairman of this Committee did not have to worry about the Thurmond Rule and an abbreviated session due to a presidential election. Indeed, in the 37 months I have served as Judiciary chairman, the Senate has already confirmed 158 of President Bush's judicial nominees, the same number of President Bush's nominees confirmed in the more than four years the Senate Republicans were in charge. We have cut the judicial vacancies I encountered in the summer of 2001 more than in half. In the prior six years of Senate Republican majority control during the Clinton administration, the pocket filibusters and obstruction of moderate, qualified nominees forced circuit court vacancies to more than double. By contrast, we have cut circuit court vacancies by two-thirds.

I suspect many of these facts will be lost among the election-year gambits and grumblings on judicial nominations from Republicans that always seem loudest when we are moving forward on nominations. Partisan Republican critics ignore the progress we have made on judicial vacancies. They also ignore the crisis that they had created by not considering circuit nominees in 1996, 1997 and 1998. They ignore the fact that they refused to confirm a single circuit nominee during the entire 1996 session. They ignore the fact that they returned 17 circuit court nominees without action to the White House in 2000. They ignore the public criticism of Chief Justice Rehnquist to their actions during those years. They ignore the fact that they were responsible for more than doubling circuit court vacancies during their pocket filibusters of moderate and qualified Clinton nominees or that we have reduced those circuit court vacancies by more than two thirds.

I have yet to hear in the Republican talking points any explanation for their actions during the congressional session in the 1996 presidential election year, when the Republican Senate majority refused to allow the Senate to confirm even one circuit court judge. I have yet to hear explanations for why they did not proceed with the nominations of Bonnie Campbell, Allen Snyder and so many others.

The reduction in judicial vacancies is one of the few areas in which conditions have actually improved over the last couple of years. I wish we could say the same about unemployment, the cost of gasoline, food prices, health care costs, inflation, the credit crisis, home mortgages and the national debt, but all those indicators have been moving in the wrong direction, as is consumer confidence and the percentage of Americans who see the country as on the wrong track.

Indeed, we proceed on these nominations at a time when the country is confronting the worst financial crisis we have experienced since the Great Depression, one that has exposed the American taxpayers to trillions in losses. Homeowners and investors are close to panic. The American economy has experienced job losses every month this year and they now total more than 650,000. Even the Republican candidate for President admits that the economy is in recession. We are working with Chairman Dodd and the Senate leadership on those overriding issues and this Committee has reported a number of legislative relief efforts that can help. In addition, just as I held a judicial confirmation hearing two days after the attacks of September 11, I also proceeded this week.

I have consistently said that by this stage of the year I will be working with the Majority Leader, as well as our Republican counterparts, in order to be able to proceed on consensus nominations. At this late date of a presidential election year, progress on judicial nominees requires consensus and the cooperation of all Senators. I want to thank the Majority Leader, with whom I have consulted, for his willingness to have us proceed with these nominations.

We also continue today with the extensive time and attention we have devoted to rebuilding the Department of Justice by considering the nomination of Greg Garre to be Solicitor General, George W.

Venables to be United States Marshal for the Southern District of California, Brian Albritton to be United States Attorney for the Middle District of Florida, and Dennis Michael Klein to be United States Marshal for the Eastern District of Kentucky. This follows our action earlier this month in reporting out three more of President Bush's executive nominations.

At the beginning of this Congress, the Judiciary Committee began its oversight efforts. Over the next nine months, our efforts revealed a Department of Justice gone awry. The leadership crisis came more and more into view as I led a bipartisan group of concerned Senators to consider the United States Attorney firing scandal, a confrontation over the legality of the administration's warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manner of excess and subverting the rule of law.

What our efforts exposed was a crisis of leadership that took a heavy toll on the tradition of independence that has long guided the Justice Department and provided it with safe harbor from political interference. It shook the confidence of the American people. Through bipartisan efforts among those from both sides of the aisle who care about federal law enforcement and the Department of Justice, we joined together to press for accountability. That resulted in a change in leadership at the Department, with the resignations of the Attorney General and virtually all of its highest-ranking officials.

We continue in our efforts to rebuild the Department. We have already confirmed 35 executive nominations so far this Congress, including the confirmations of 12 U.S. Attorneys, seven U.S. Marshals, and a new Attorney General, Deputy Attorney General, and Associate Attorney General. We are poised to add to this total.

We have seen what happens when the rule of law plays second fiddle to a President's agenda and the partisan desires of political operatives. It is a disaster for the American people. Both the President and the Nation are best served by a Justice Department that provides sound advice and takes responsible action, without regard to political considerations -- not one that develops legalistic loopholes and ideological litmus tests to serve the partisan ends of a particular administration.

The American people are also best served by a Federal judiciary they can trust to apply the law fairly regardless of who walks into the courtroom. The judiciary is the one arm of our government that should never be political or politicized, regardless of who sits in the White House. I will continue in the waning days of this Congress, and with a new President in the next Congress, to work with Senators from both sides of the aisle to ensure that the Federal judiciary remains independent, and able to provide justice to all Americans, without fear or favor.

#####