

Statement of

The Honorable Patrick Leahy

United States Senator

Vermont

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Chairman, Senate Judiciary Committee,

Hearing on Nominations

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Despite Republican filibusters and their refusal to give consent to proceed even on important bills with broad bipartisan support, I have, nonetheless, again gone the extra mile by proceeding with yet another confirmation hearing for the President's nominees.

This hearing includes the President's nominee to be Solicitor General, which will bring to near completion our work at expediting consideration of replacements for the entire leadership of the Justice Department that resigned in the wake of the scandals of the Gonzales era.

This hearing also includes five additional judicial nominations, which, if confirmed, are lifetime appointments. Their tenure will not expire when President Bush leaves office in five months. This is extremely late in a presidential election year for such a hearing and serves as an exception under the Thurmond Rule. That rule dates back to 1980, when Republican Senator Strom Thurmond was the Ranking Minority Member of this Committee, and called for shutting down the judicial confirmation process. At the time, there was a Democratic President and Senator Thurmond wanted to wait until the next President, a Republican, was elected and had the opportunity to send his nominations to the Senate. Republicans used the Thurmond Rule in another recent presidential election year, 1996, when the Republican Senate majority did not confirm a single judge after the August recess and, in fact, refused to confirm any circuit court nominees during the entire 1996 session.

This Congress has already confirmed more judges than were confirmed during the entire 109th Congress, 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. That is the same number of President Bush's nominees confirmed by the Senate Republican majority in the more than four years it controlled the pace of confirmations for this Republican administration.

I have long 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. At this juncture, during a presidential election year, progress on judicial nominees requires consensus and the cooperation of all Senators.

Today the Committee is poised to hear from five more nominees for lifetime appointments to the Federal bench: Clark Waddoups of Utah, Michael Anello of California, Mary Stenson Scriven of Florida, and two nominees from Colorado, Christine Arguello and Phillip A. Brimmer. 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 the hearing today, after he and Senator Allard reached an agreement. Yesterday, Senator Allard finally returned 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 Committee consideration of today's nominees is expedited, if the nominations are not held over, but can be reported promptly to the Senate, and if there are no delays in their floor consideration, then they can be confirmed before we recess later this month.

By hearing from the President's nominee to be Solicitor General, Greg Garre, we continue with the extensive time and attention we have devoted to rebuilding the Department of Justice. This is the ninth hearing we have held to restock and restore the leadership of the Department of Justice in the last year alone, including confirmation hearings for the new Attorney General, the new Deputy Attorney General, the new Associate Attorney General, and so many others.

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.

The two reports we have received so far from the Department's Inspector General and Office of Professional Responsibility have confirmed what our oversight efforts in this Congress have uncovered about the politicization of hiring practices at the Department. It confirms our findings and our fears that the same senior Department officials involved with the firing of United States Attorneys were injecting improper political motives into the process of hiring attorneys for career positions throughout the Department, from career prosecutors, to immigration judges, to young attorneys through the Department's prestigious honors program. I suspect the further reports we expect from the Inspector General will continue to shed light on the extent to which the Bush administration has allowed politics to affect - and infect - the Department's priorities, from law enforcement to the operation of the crucial Civil Rights Division.

I hope that Mr. Garre shares my view that it is vital to ensure that we have a functioning, independent Justice Department, and that we ensure that this sad era in the history of the Department is not repeated. 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.

I am holding these proceedings in spite of the legislative obstructionism from Republicans. The Judiciary Committee has worked throughout this Congress to advance the priorities of Americans. We have reported legislation to support local law enforcement to make our cities and towns safe from crime, which is on the rise after consistent declines in the 1990s. These legislative efforts include the COPS Improvements Act, S.368, and my bill to extend the Bulletproof Vest Partnership Grant Act, S.2511. We have reported legislation to combat fraud and corruption, like the War Profiteering Prevention Act, S.119, and the Public Corruption Prosecution Improvements Act, S.1946. We have reported legislation to protect the civil rights and voting rights of Americans, like the Emmett Till Unsolved Civil Rights Crime Act, S.535, and Senator Obama's Deceptive Practices and Voter Intimidation Prevention Act of 2007, S.453. We have reported legislation to protect Americans' data privacy, like my Personal Data Privacy and Security Act, S.495. We have reported measures to provide the Federal judiciary with increased resources both in terms of salary restoration and additional judgeships, S.1638 and S.2774. We have reported intellectual property measures like the Shawn Bentley Orphan Works Act, S.2913. And, of course, we have reported the bill to confront the OPEC cartel, NOPEC, S.879. I have also been seeking

for months to find a way to extend the EB-5 investor visa pilot program that brings benefits not only to Vermont but to Pennsylvania and Iowa, and elsewhere. Authority for this worthwhile program that leads to investments here in the United States expires in September. My efforts to clear H.R. 5569, a bill to extend the program for five years, have been stymied by Republicans who insist on using this bill as a vehicle for other immigration-related matters. They have ensnared it in a series of competing concerns. I look forward to a time when Republicans work with us on these matters instead of obstructing us at every turn.

Legislation with broad bipartisan support that I have managed to move through the Judiciary Committee has then been stalled on the Senate floor by the obstruction of a few Republicans. Of the bills that have been reported from the Judiciary Committee this Congress, Republicans have blocked legislation to support runaway and homeless young people, S.2982; to help law enforcement cope with mentally-ill offenders, S.2304; to support the investigation and prosecution of Civil Rights Era murders left unsolved for too long, S.535; and to protect our children from the scourges of drugs, child pornography, and child exploitation, such as S.1210, S.1738 and S.2344. I joined the Majority Leader in introducing a measure that combined some of these Committee-approved and House-passed bipartisan measures into one bill, S.3297. These should have been consent items and already been considered and passed by the Senate. Instead, they fell victim to another Republican filibuster.

Republicans have become masters of obstruction, boycotting business meetings of the Judiciary Committee and cutting short important hearings, including a hearing at which two courageous women from Pennsylvania testified about severe injuries they suffered to help us understand the plight of hardworking Americans whose legitimate grievances have been rejected by a pro-business Supreme Court. Sadly, we have seen Republican obstructionism since the beginning of this Congress, with Republicans using filibuster after filibuster to thwart the will of the majority of the Senate from doing the business of the American people.

Republican filibusters prevented Senate majorities from passing the Lilly Ledbetter Fair Pay Act; the climate change bill; the Employee Free Choice Act; the DC Voting Rights Act; the Renewable Fuels, Consumer Protection, and Energy Efficiency Act of 2007; the Renewable Energy and Job Creation Act of 2008; the Medicare Improvements for Patients and Providers Act of 2008; the Consumer-First Energy Act and the Advancing America's Priorities Act. These are critical pieces of legislation to address urgent priorities like ensuring equal pay for equal work for women and fair wages for all working Americans, the energy crisis, the environment, voting rights, health care and law enforcement needs. All of them had the support of the majority of the Senate. And all were blocked by a minority of Republican Senators bent on preventing us from making progress. Republicans have now filibustered more than 80 pieces of legislation in this Congress and are heading for 100 before we adjourn. Imagine what we could have accomplished in this Congress with cooperation rather than obstruction.

This long list of priorities unaddressed because of the Republicans in Congress would be even longer if we were to include the many important bills President Bush has vetoed since the beginning of this Congress. This list includes legislation to fund stem cell research to fight debilitating and deadly diseases, to extend and expand the successful State Children's Health Insurance Program that would have provided health insurance to more of the millions of American children without it, to set a timetable for bringing American troops home from the disastrous war in Iraq, and to ban waterboarding and help restore America as a beacon for the rule of law.

I have always said that we would treat this President's nominees more fairly than Republicans treated President Clinton's. Despite their legislative obstruction, we have. Indeed, we have matched the confirmation record that Republicans achieved for a President from their own party. We have not pocket filibustered more than 60 of this President's nominees. We are not going to return 17 circuit court nominees without action to this President as the Republican-led Senate did to President Clinton. We have not doubled the judicial vacancies and forced them above 100 nationwide, nor have we doubled the number of circuit court vacancies. To the contrary, we have cut judicial vacancies by more than half, and reduced circuit court vacancies by more than two-thirds from a high point of 32, to a low of single digits throughout all 13 Federal circuits.

The 100 nominations we confirmed in only 17 months in 2001 and 2002, while working with a most uncooperative White House, reduced the vacancies by 45 percent by the end of 2002. With 40 additional confirmations last year, and another 18 already this year, we have already exceeded the total confirmations for the last Congress, which was under Republican majority control. Nearly half of the judicial nominees the Senate has confirmed while I have served as the Chairman of the Judiciary Committee have filled vacancies classified by the Administrative Office of the Courts as judicial emergency vacancies. Eighteen of the 27 circuit court nominees confirmed while I have chaired the Committee filled judicial emergency vacancies, including nine of the 10 circuit court nominees confirmed this Congress. This is another aspect of the problem created by Republicans that we have worked hard to improve. When President Bush took office there were 28 judicial emergency vacancies. Those have been reduced by more than half.

We have reduced Federal judicial vacancies from the 10 percent level they hit after Republican pocket filibusters of President Clinton's nominees, to less than half that number. With respect to the circuit courts, we have done even better. We have moved from the 32 circuit court vacancies that arose from years of Republican pocket filibusters of President Clinton's moderate and qualified nominees and more than doubled the circuit court vacancies nationwide to less than 10 earlier this summer. Thus, we have reduced circuit court vacancies by more than two thirds.

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 praise from a single Republican for our work in lowering vacancies. I also 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.

There are currently 10 judicial vacancies without a nominee, even though the White House has in the last weeks rushed forward with a number of new nominations on which the paperwork has yet even to be completed. Eleven judicial nominations had yet to be reviewed by the ABA when we noticed the hearing on September 2nd. Currently eighteen do not have blue slips or support from both their home state Senators. No nominations received after June 6 were confirmed when the Republicans were in charge in 1996. Following that standard would eliminate 18 recent nominees, more than half of all those pending. Instead, working with Senators from both parties we are proceeding today with the nomination of Mary Stenson Scriven of Florida.

The reduction in judicial vacancies is one of the few areas in which conditions have actually improved over the last couple of year. 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.

Just last week unemployment was reported at 6.1 percent. It is much higher in some communities. Americans have suffered through job losses every month this year and they now exceed 600,000. The day-to-day lives of hardworking Americans have only become more difficult during the last several years. The Treasury Secretary has been quite sobering about the financial difficulties still ahead. Thousands of Americans are in danger of losing their homes after falling behind on mortgage payments. Inflation is now on the rise, jobs are being lost, gas and food prices have skyrocketed, health care and college are less affordable, the American dream of owning a home is under assault -- and yet we can expect Republicans to pick a partisan fight about judicial confirmations, an area in which we have done better than they have, even with this Republican President, and where we have taken great strides to fix the system they broke.

Hardworking Americans trying to do the best they can for their families are more concerned about critical issues they face in their lives each day. They are concerned about affording to heat their homes this winter. They are concerned about gas prices that have skyrocketed so high they do not know how they will afford to drive to work. They are concerned about the steepest decline in home values in two decades. Americans are worried about soaring health care costs, rising health insurance costs, the rising costs of education and rising food prices. The partisan, election-year rhetoric over judicial nominations, at a time when judicial vacancies have been significantly reduced, is a reflection of misplaced Republican priorities.

I look forward to hearing from the nominees today. The Federal 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 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.

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