Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 8, 2007

Opening Statement of Chairman Patrick Leahy
Senate Judiciary Committee
Executive Business Meeting
February 8, 2007

INTRODUCTION

I begin today by thanking the Members for their participation in a number of constructive and insightful hearings the last two weeks. This Committee held hearings on congressional authority with respect to war and on certain recommendations of the Iraq Study Group. We continued our oversight efforts with Senator Feinstein's hearing on the US-VISIT program and Senator Schumer's hearing on the replacement of United States Attorneys around the country. We held our first hearing on judicial nominations and Senator Durbin chaired the first hearing of our new Subcommittee on Human Rights and the Law.

Next week we look forward to a hearing on judicial security and independence at which Associate Justice Anthony Kennedy will appear. Justice Kennedy's testimony will mark the first time a sitting Justice of the United States Supreme Court will testify before the Senate Judiciary Committee on legislative matters that I can remember. We greatly appreciate his willingness to appear. I hope that all Members will attend and expect all Members to treat Justice Kennedy with the great respect and courtesy he is due. In addition to our court security legislation and the need to promote judicial independence, I hope we will begin our discussion of the need to adjust judicial pay as the Chief Justice so strongly recommended.

I intend to add to the agenda next week the bipartisan, bicameral Court Security Improvement Act of 2007, S. 378. I urge all Senators to support our legislation to provide increased protections for the men and women of the judiciary and their families.

This week Senator Specter and I also joined in reintroducing our personal data privacy legislation that this Committee reported last Congress. The Personal Data Privacy and Security Act Of 2007, S.495, is a matter of importance and a priority for this Committee. I hope that we will proceed to it very soon, as well.

AGENDA

I put out the agenda for this meeting two weeks ago and in accordance with our Rules indicated last week that all amendments to U.S. attorney legislation, the affordable generic drug legislation

and the data mining reporting legislation needed to be timely filed. I hope and expect that we can clear our agenda this week. I provided this additional time and notice in order for us to be efficient in our work.

I know that vital matters have been bogged down on the Senate floor, but I hope that here in the Committee we can continue to work together in a bipartisan manner to make progress.

I would like to start with the matters that were held over from our last meeting and our first agenda. I understand that we can approve them in short order and that amendments have been worked out and circulated to accommodate a number of initial concerns.
I then intend to turn to the nominations listed for the first time, including a nomination to the Court of Appeals. When approved by the Committee, these five judicial nominations will bring our total to 10 already this year. Of course, five lifetime judicial appointments have already been approved and all were confirmed by the Senate last week. This group includes nominations that were stalled last year from Pennsylvania, Iowa, Ohio and Florida, as well as the Ninth Circuit nominee from Idaho.

Then we will proceed with the affordable drug legislation on which Senators Kohl and Grassley are our lead sponsors. I know of no objection or problem with that bill and no Member has filed an amendment or come to me with a concern. I understand that Mr. Tauzin of PhRMA has still not answered the one written question sent to him in connection with that legislation and has asked for additional time to do so. That should not prevent us from moving forward today.

Finally, I hope we can make progress today on our privacy agenda by reporting the data mining legislation on which this Committee held its first hearing back on January 10. This is legislation modeled on what the Senate has previously adopted. It provides for reporting by the Administration of the data mining programs and projects in which it has been engaged so that Congress may evaluate them.

That is our agenda for today. I ask for and look forward to the cooperation of our Members in getting our work done.

Now I turn to our Ranking Member, Senator Specter, for any opening comment he may have. Certainly no one works harder on this Committee than he.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee,
On Judicial Nominations
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I placed on the Committee's agenda today the nominations of five men and women to lifetime appointments as Federal judges. This list includes a circuit court nominee whose vacancy has been designated a judicial emergency by the Administrative Office of the Courts. All of these nominees had hearings and were approved by the Judiciary Committee in the last Congress, so I

have sought to expedite Committee consideration of them in this Congress. I have inquired of each Member of the Committee whether a hearing is requested on these nominations this year. I thank the Members for expediting their consideration of these nominations and, in particular, I thank our new Members.

I am pleased to be able to include the nomination of Norman Randy Smith of Idaho to the Ninth Circuit on today's agenda. With the cooperation of the Senators from California and the other Members of the Judiciary Committee, we were able to avoid having a hearing on Judge Smith's nomination in this Congress and to expedite his consideration, now that he has been designated for the Idaho vacancy on the Ninth Circuit.

In the last Congress, the President nominated Judge Smith, who is from Idaho, to a California seat on the Ninth Circuit. The California Senators opposed the nomination on that ground and I supported them, as I had Senators Sarbanes and Mikulski in a similar circumstance when this President sought to fill a Maryland seat on the Fourth Circuit with someone from Virginia. Judge Smith had been nominated to fill the seat last occupied by Judge Stephen Trott, an appointee from California who made a personal decision to move to Idaho. 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 have tried for some time to get the President to redesignate the Smith nomination and nominate him to fill the Idaho vacancy. At long last, the President has done the right thing. The White House finally changed course and the President nominated Judge Smith for the Idaho seat on the Ninth Circuit. I thank the President for finally doing the right thing.

I urge the Committee to report, and will next week urge the Senate to confirm the nomination of Randy Smith to the vacant seat on the Ninth Circuit from Idaho. At long last, Senator Craig and Senator Crapo will then have a judge on that important court from their home state.

We have worked hard since convening this Congress to make significant progress in our consideration of judicial nominations. At our first executive business meeting, the Judiciary Committee reported out five judicial nominations little more than two weeks after they were sent to us. Three of these were for vacancies determined by the Administrative Office of the U.S. Courts to be judicial emergencies. All five were among those returned to the President without Senate action at the end of last year when Republican Senators objected to proceeding with certain of the President's judicial nominees in September and December last year.

Last week, those five nominees were confirmed by the Senate. I worked cooperatively with Members from both sides of the aisle on our Committee, and in the Senate, to move quickly to consider and report these judicial nominations so that we could fill vacancies and improve the administration of justice in our nation's federal courts.

With the five confirmations last week we have confirmed more of President Bush's nominations in the 18 months I have served as Judiciary Committee Chairman than in the more than two years when Senator Hatch chaired the Committee with a Republican Senate majority or during the last Congress with a Republican Senate majority. That total is now 105 in 18 months.

This week, we held the first judicial nominations hearing of the new Congress and considered three more nominees, two of whom are nominated to fill judicial emergencies. We held that hearing on February 6. When a Republican chaired the Committee in 1999 and there was a Democratic President, the first hearing on a judicial nominee was not held until June 16. We could have postponed this hearing because it was at the same time as the Senators briefing on the new National Intelligence Estimate about the deteriorating situation in Iraq. As I did after 9/11, and after the Senate buildings were shut down by the anthrax letters, I chose to go forward with the nominations hearing.

I know some on the other side of the aisle have tried to raise a scare since I, again, became Chairman of the Judiciary Committee. They rant as if the sky is falling and as if we would not proceed on any judicial nominations. On the contrary, we have proceeded promptly and efficiently.

I have long urged the President to fill vacancies with consensus nominees. The Administrative Office of the U.S. Courts list 54 judicial vacancies, 25 of which have been deemed to be judicial emergencies. So far this Congress, the President has yet to send us nominees for 17 of those outstanding judicial emergency vacancies.

Today, we consider five more nominees, including nominees from the home states of Senator Specter and Senator Grassley. I want to thank Senators Casey and Brown for expediting their consideration of nominees from their home states and approving them so quickly after taking office. We will continue moving forward efficiently as long as the President sends us qualified, consensus nominees and we are able to work together. I would rather see us work together in the selection of nominees so that we can confirm judges than spend time fighting about them.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On S. 188, A Bill to Revise the Title of the Voting Rights Act Reauthorization
And Amendments Act of 2006 to Include César E. Chávez
Executive Business Meeting
February 8, 2007

Last month, I joined Senator Salazar in introducing a bill to include César E. Chávez among the names of the great civil rights leaders we honor in the title of last year's Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA). I supported taking this action last year during the Senate Judiciary Committee's consideration of the VRARA when I offered an amendment on behalf of Senator Salazar to add the Hispanic civil rights leader to those for whom the law is named. As Senator Salazar reminded us, César Chávez is an American hero who sacrificed his life to empower the most vulnerable in America. Like Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, for whom the VRARA is named, he believed strongly in the right to vote as a cornerstone of American democracy. I offered the amendment in the Judiciary Committee last year and it was adopted without dissent.

In order not to complicate final passage of the Voting Rights Act, the Senate proceeded to adopt the House-passed bill without amendment. This was done so that the bill could be signed into law without having to be reconsidered by the House. At that time, I committed to work with Senator Salazar to conform the law to include recognition of the contribution to our civil rights, voting rights and American society by César Chávez.

I have supported adding César Chávez's name to the law as an important recognition of the broad landscape of political inclusion made possible by the Voting Rights Act. This bill would not alter the bill's vital remedies for continuing discrimination in voting, but is overdue recognition of the importance of the Voting Rights Act to Hispanic-Americans. Prior to the VRA, Hispanics, like minorities of all races, faced major barriers to participation in the political process, through the use of such devices as poll taxes, exclusionary primaries, intimidation by voting officials, language barriers, and systematic vote dilution.

At our last meeting, Senator Cornyn circulated an amendment to the Salazar bill that would amend it to also add the name of Barbara Jordan to the title of the VRARA. Congresswoman Jordan was not only a pioneer as the first African-American woman from a southern state to serve in the House of Representatives, but also a great leader with an impressive career in public service as a Texas state legislator, a Member of Congress, and a professor at the University of Texas. She received the Presidential Medal of Freedom from President Clinton in 1994. Her work on the House Judiciary Committee in 1975 was instrumental in renewing the Voting Rights Act and adding the vital minority language provisions to the VRA. Barbara Jordan's life and career, not to mention her powerful speeches, have been an inspiration to so many that I am pleased to support adding her name to the bill.

On behalf of Senator Salazar I would also like to add the name of another Presidential Medal of Freedom honoree from Texas, William C. Velasquez. In 1974, Willie Velasquez founded the Southwest Voter Registration and Education Project, the nation's largest voter registration project aimed at the Hispanic community. Under his leadership, the SVREP launched hundreds of successful get-out-the-vote and voter registration drives throughout the Southwest, greatly expanding the number of registered Latino voters and increasing Hispanic participation in the political process. Mr. Velasquez, who was also a leader with the United Farm Workers and helped found the Mexican American Youth Organization (MAYO) and la Raza Unida, helped others believe as he did that "Su voto es su voz" (your vote is your voice). When President Clinton posthumously awarded
Mr. Velasquez the Presidential Medal of Freedom in 1995, he was only the second Latino to receive the Nation's highest civilian honor. We should honor him now by adding his name to the title of the VRARA. I offer this additional amendment on behalf of Senator Salazar.

Of course, there are many great leaders we could add to honor their great contributions to the expansion of voting rights to all Americans. Without leaders like Congressman John Lewis and House Judiciary Chairman John Conyers, we would not have the Voting Rights Act today. We are indebted to them as we are to so many others for the strides that we have made. I hope that we can report out this bill today and take it up and pass it soon to commit ourselves again to ensuring that the great promises of the 14th and 15th Amendments are kept for all Americans and

that the Voting Rights Act Reauthorization and Amendments Act is fully implemented to protect the rights of all Americans.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On S. 214, Preserving United States Attorney Independence Act of 2007
February 8, 2007

We have learned over the last few months of an apparent abuse of power by this Administration that threatens to undermine the effectiveness and professionalism of U.S. Attorneys offices around the country. I support Senator Feinstein's efforts to combat these abuses. I thank Senator Schumer for chairing our hearing into this matter this week, and Senator Specter for his active involvement. I urge the Committee to approve the Specter, Feinstein, Leahy substitute to S. 214, the "Preserving United States Attorney Independence Act of 2007," which would roll back changes to the law that invited the abuses.

During the Patriot Act Reauthorization last year, curbs on the authority of the Attorney General to appoint interim United States Attorneys to fill a vacancy temporarily were removed. The change to the law removed the 120-day limit for such appointments and removed the district court's role in making any subsequent interim appoints. This change in law, accomplished over my objection, allowed the Attorney General for the first time to make so-called interim appointments that could last indefinitely.

Regrettably, we do not have to imagine the effects of this unfettered authority. We learned recently that the Department of Justice has asked several outstanding U.S. Attorneys from around the country to resign their positions. Some are engaged in difficult and complex public corruption cases. We also understand the Attorney General has or is planning to appoint interim replacements, raising a potential of avoiding the Senate confirmation process altogether. This is a clear end-run around our system of checks and balances.

Many Senators have raised concern about this practice and several have asked the Attorney General about the reasons for the interim appointments. The situation in Arkansas highlights the troubling nature of this new authority and its abuse. The Attorney General removed respected U.S. Attorney Bud Cummins and replaced him with the interim appointment of Tim Griffin, a former political operative for Karl Rove. This appointment was not made pursuant to an agreement with the two home state Senators.

In our hearing this week, Paul McNulty, the second in command at the Department of Justice, testified that Mr. Cummins' dismissal was not related to how well he did his job. In fact, Mr. McNulty said he had no "performance problems," but was removed merely to give an opportunity to Mr. Griffin, a person whom he admitted was not the "best person possible" for the job and who is reported to have been involved in an effort during the 2004 election to challenge voting by primarily African-American voters serving in the Armed Forces overseas. This was not a vacancy created by necessity or emergency. This was a vacancy created by choice to advance a political crony.

Since this Administration has been creating these vacancies by removing U.S. Attorneys as it chooses for whatever reason - or no good reason - on a timeline it dictates, how can it now claim not to have had time to fill spots with Senate confirmed nominees? Why were agreed upon replacements not lined up before creating these vacancies? Why were home state Senators not consulted in advance? I would note that every one of the U.S. Attorneys who was asked to resign was someone chosen by this Administration, while the Attorney General served as White House Counsel, nominated by this President, approved by the home state Senators and confirmed by the Senate. This is a problem of the Administration's imagination and choosing, like so many others.

With respect to the law that has governed for the last decades, the authority given to the Attorney General to make a time-limited interim appointment has not proven to be a problem. For example, last Congress, the time from nomination to confirmation of U.S. Attorney nominations took an average of 71 days, with only three taking longer than 120 days and two of those only a few days longer.

The Department opposes the district court's role in the law that existed prior to the changes enacted in a Patriot Act Reauthorization conference. This was a conference in which Democratic members were excluded. The Department claims the District Court's role in filling vacancies beyond 120 days to be inconsistent with sound separation of powers principles. That is contrary to the Constitution, our history and our practices. In fact, the practice of judicial officers appointing officers of the court is well established in our history and from the earliest days. Morrison v. Olson should have laid to rest the so-called separation of powers concern now being trumpeted to justify these political maneuvers within the Justice Department. It is not just a red hearing but a bright red herring. Certainly no Republicans now defending this Administration voiced concern when a panel of judges appointed Ken Starr to spend millions in taxpayer dollars on going after President Clinton as a court-appointed prosecutor.

I have heard not a word from the apologists who seek to use the Constitution as a shield for these activities about what the Constitution says. The Constitution provides congressional power to direct the appointment power. In Article II, the part of the Constitution that this Administration reads as if it says that all power resides with the President, the President's appointment power is limited by the power of Congress. Indeed, between its provisions calling for appointments with the advice and consent of the Senate and for the President's limited power to make recess appointments, the Constitution provides: "But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the Heads of Departments." Thus, the Constitution contemplates exactly what our statutes and practices have always provided. Congress is well within its authority when it vests in the courts a share of the appointment power for those who appear before them.

Regrettably, this latest abuse of power follows this Administration's politicization of U.S. Attorneys offices. A recent study of federal investigations of elected officials and candidates shows that the Bush Justice Department has pursued Democrats far more than Republicans. The study by Dr. Donald C. Shields, Professor Emeritus from the Department of Communication, University of Missouri-St. Louis, and Dr. John F. Cragan, Professor Emeritus from the Department of Communication, Illinois State University, found that between 2001 and 2006, 79 percent of the elected officials and candidates who have faced a federal investigation were

Democrats and only 18 percent Republicans. The Administration's track record is not good and it again appears caught with its hand in the cookie jar.

Before 1986, 28 U.S.C. 546, the law governing the appointment of United States Attorneys, authorized the district court where a vacancy exists to appoint a person to serve until the President appointed a person to fill that vacancy with the advice and consent of the Senate. When Congress changed the law in 1986 to allow the Attorney General to appoint an interim U.S. Attorney, it carefully circumscribed that authority by limiting it to 120 days, after which the district court would make any further interim appointment needed. The substitute to S. 214 that we consider today would reinstate these vital limits on the Attorney General's authority and bring back incentives for the Administration to fill vacancies with Senate-confirmable nominees.

United States Attorneys around the country are the chief federal law enforcement officers in their states, and they have an enormous responsibility for implementing anti-terrorism efforts, bringing important and often difficult cases, and taking the lead to fight public corruption. It is vital that those holding these critical positions be free from any inappropriate influence and subject to the check and balance of the confirmation process. I support Senator Feinstein's effort to restore that process. I join with her and Senator Specter in their substitute amendment.