

Testimony of
The Honorable Patrick Leahy

March 20, 2003

Opening Statement of Senator Patrick Leahy
Business Meeting of the Senate Judiciary Committee
Mar. 20, 2003

Subcommittees

I have been urging the Committee to complete its organization since our first meeting on January 24. I hope that today we will be able finally to agree upon the subcommittee restructuring. Since the Republicans made a proposal in early February we have been trying to accommodate their interests in revising the subcommittee names and jurisdictional statements while asking them to accommodate Democratic Senators' interests in membership opportunities on those subcommittees. The last sticking point, which has taken most of this month to resolve was our request to have the ratio on the Terrorism, Technology and Homeland Security Subcommittee be 6:5. I want to thank Senator Hatch's staff for working with our Democratic staff to get these matters resolved at long last.

Of course, last week two of our subcommittees held a joint hearing on border technology with the Undersecretary for Border and Transportation of the Department of Homeland Security. With the approval of subcommittees restructuring, I expect our subcommittees will become more active. I urge all chairs and ranking Democrats to consult and work together on hearings and in developing their subcommittee agendas.

Other Administrative Matters

Unfortunately, the Committee's fixation on controversial circuit court nominees has had the consequence of our Committee failing to fulfill a number of our initial responsibilities this Congress. This Committee did not report a basic funding resolution for the next two years in accordance with Senate Rule 26 and the instructions of the Rules Committee. We were able to compensate by obtaining Senate consent to discharge S. Res. 65 from the Committee and have it referred to the Rules Committee so that our Committee funding could be included in S. Res. 66, which was passed just before the March 1 deadline.

We still need to consider whether we wish to continue the protocol we have had on commemorative resolutions, private relief bills and private immigration bills. Those have traditionally been matters that commanded the Committee's attention at its first markups early in the session. I included copies of those longstanding protocols in the record of our February 27 business meeting.

Despite my best efforts, we failed to consider our Committee rules and publish them in accordance with Senate Rule 26 by March 1. Our old rules continue in force and those are the rules that the Chairman has continued to display on the official Judiciary Committee website

both before and after March 1. There has been a most unfortunate development when the Chairman on February 27 chose to override our Committee Rule IV and insist on unilaterally terminating Committee debate on two controversial judicial nominations. In the wake of those events, we no longer share an understanding of our rules. I urge the Chairman to reconsider and join us in confirming the modest protection of the minority that our rules have included since 1979. Democrats should not and will not agree or consent to rules that do not contain that protection, protection that has been accorded Republican and Democratic minorities over the last 24 years on this Committee under all Democratic and Republican Chairmen until last month.

Another of our early obligations is to send the Budget Committee information to help them formulate a budget resolution. In the past, I attempted to send a joint submission from this Committee. This year, I was left to send a submission on behalf of the Democratic minority in order to meet the Budget Committee's deadline of March 1. I understand that the Republicans sent a submission dated March 12, the very day the Budget Committee Chairman released his mark. It was made available to us for the first time in the Budget Committee report on the budget resolution as debate began this week. I wish we would coordinate better to help ensure that the funds needed for homeland security, first responders and other law enforcement programs were included in the budget resolution.

Legislative Activities

Although many of us have joined together to have the Senate expedite its consideration and passage of the Hutchison-Feinstein Amber Alert legislation, S.121, and of the Hatch-Leahy PROTECT Act, S.151, which Senator Hatch described as his number one legislative priority, we have been unable to get the House to cooperate with us and consider and pass those Senate bills.

Yesterday, the two-week deadline that the Chairman imposed at the asbestos litigation hearing expired. We have not yet made the progress that he or I hope to make but I remain committed to our working together in partnership to see whether we cannot achieve a fair resolution for all concerned. I want to thank, in particular, those asbestos victims and the forward-thinking companies that make up the Asbestos Study Group for their willingness to work with us and make helpful suggestions. I thought a number of our witnesses at the recent hearing were very helpful, including David Austern of the Manville Trust and Jon Hiatt of the AFL-CIO. Working together we can develop a serious legislative proposal that will help address the problems noted again recently by the Supreme Court in its decision in the Norfolk and Western case. In that case, the United States Supreme Court affirmed claims for asbestosis and fear of cancer.

Oversight

Our oversight responsibilities are a fundamental part of our congressional responsibilities. The Senate was intended to be a check on Executive power and to provide balance in our government. We need to fulfill our intended role in this constitutional democracy.

Since Chairman Grassley, Chairman Specter and I released an important oversight report in February we have had a single hearing involving the Secretary of Homeland Security, Attorney General, and FBI Director, and the subcommittee hearing with the Undersecretary for Border and Transportation that I previously mentioned. A number of us have urged that we have additional oversight hearings and I am hopeful that the Chairman will work with us to schedule them without further delay. Oversight is essential to having an accountable and effective law

enforcement effort against terrorism. In times of national stress there is an understandable impulse to give government more power. Under our system, checks and balances and oversight are intended to help in deciding when more government power is warranted, and when it is not. It is vital for us first to examine and understand how federal agencies are using the power that they already have.

The American people want, expect and deserve effective congressional oversight of the law enforcement powers being employed in the struggle against terrorism. Doing that job is one of our constitutional duties. Robust congressional oversight helps ensure that the balance is properly calibrated and is a check on overuse, underuse or misuse of surveillance power by government agencies.

Executive Nominations

We continue to have a number of important Executive Branch vacancies. It may be that a few of the dozens of presidential nominees to the new Homeland Security Department will be referred to this Committee and I look forward to working with the Chairman to prepare for hearings on those nominations.

I remain puzzled about why we have not received the nomination that the White House announced last year would be coming to fill the important post of Associate Attorney General. We also expect nominations to be Assistant Attorney General for the Civil Division, Assistant Attorney General for the Antitrust Division, and Assistant Attorney General for Legislative Affairs. None have been received although the President has indicated another intention to nominate. We also will need to consider the President's nominee to fill the critical post of Director of the Violence Against Women Office at the Department of Justice. Both the Office and the position were created in the Department of Justice authorization legislation enacted last year. We are experiencing some difficulty in getting the Administration to follow this important law.

Today the Judiciary Committee is being asked to consider a number of presidential nominees. It is my hope that we can make progress on several, in particular the U.S. Marshals and U.S. Attorney. When they are confirmed we will have confirmed 86 U.S. Attorneys and 80 U.S. Marshals for this President since he finally began nominating them in August, 2001.

Proceeding with the nominations to the Court of Federal Claims and U.S. Sentencing Commission raise fairness concerns. This President continues to proceed unilaterally on what have traditionally been bipartisan boards and commissions. That is unfortunate and problematic. Senate Democrats would appreciate this White House beginning to work with us rather than dictate to us. We look forward to hearing from the White House that it intends to work with the Senate Democratic leader and us in filling such vacancies.

Judicial Nominations

Then there is the continuing problems caused by the Administration's refusal to work with Democratic Senators to select consensus judicial nominees who could be confirmed relatively quickly by the Senate.

In spite of the President's lack of cooperation, the Senate in the 17 months I chaired the Judiciary Committee was able to confirm 100 judges and vastly reduce the judicial vacancies that had built

up and were prevented by the Republican Senate majority from being filled by President Clinton. Last year alone the Democratic-led Senate confirmed 72 judicial nominees, more than in any of the prior six years of Republican control. Not once did the Republican-controlled Committee consider that many of President Clinton's district and circuit court nominees, even though there were often many judicial nominees waiting for a hearing. In our efforts to turn the other cheek and treat this President's nominees better than his predecessor's, we confirmed 100 judges in 17 months. Yet not a single elected Republican has acknowledged this tremendous bipartisanship and fairness. When Chief Justice Rehnquist thanked the Committee for confirming 100 judicial nominees, it was the first time this accomplishment had been acknowledged by anyone from a Republican background. I thanked him this week when I appeared before the Judicial Conference.

Almost all of the judges confirmed are conservatives, many of them quite to the right of the mainstream, and many are pro-life. Many of these nominees have been active in conservative political causes or groups, but we moved fairly and expeditiously on as many as we could.

We cut the number of vacancies on the courts from 110 to 54, despite an additional 60 new vacancies that have arisen. I recall that the Chairman said in September of 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also repeatedly stated that 67 vacancies meant "full employment" on the federal courts. Even with the vacancies that have arisen since we adjourned last year, we remain below the "full employment" level that Senator Hatch used to draw for the federal courts with only 54 vacancies on the District Courts and Courts of Appeals. Unfortunately, the President has not made nominations to a number of those seats, and on more than one half of the current vacancies he has missed his self-imposed deadline of a nomination within 180 days. Of course, several of the nominations he has made are controversial.

This year the President has taken the truly unprecedented action of re-nominating candidates voted down in Committee in spite of the serious concerns expressed by fair-minded members of this Committee. That is a significant problem.

This year we have had a rocky beginning with a hearing that has caused a great many problems we might have avoided. The Chairman's insistence on terminating debate on the Cook and Roberts nominations is another serious problem. Of course, the Administration's unwillingness to work with the Senate so that we may be provided the documents and information needed to proceed with a final vote on the Estrada nomination has already proved to be a significant problem. The opposition to the Sutton nomination is also extensive.

Nonetheless, the Senate has proceeded to confirm 111 of President Bush's judicial nominees, including 11 this year alone. Last week, the Senate confirmed the controversial nomination of Jay Bybee to the 9th Circuit. Another pro-life judicial nominee. Already this year the Senate has confirmed more circuit court judges than Republicans allowed to be confirmed in the entire 1996 session. It was not until late July in 1999 that 11 of President Clinton's judicial nominees were confirmed in the first session of the last Congress in which Republicans controlled the Senate majority.

If we are able to report to the Senate the California and Indiana District Court nominees on today's agenda and they are confirmed, that will bring the Senate's total to 15. The California

nominees come from the bipartisan selection commissions Senator Feinstein and Senator Boxer have established in California and the Indiana nominees have the bipartisan support of their Senators. The Senate did not confirm 15 of President Clinton's judicial nominees in 1999 until September of that year.

The rushed processing of nominees in these past few weeks has led to editorial cartoons showing conveyor belts and assembly lines with Senators just rubber-stamping these important, lifetime appointments without sufficient inquiry or understanding. What we are ending up with is a pile-up of nominees at the end of this rapidly-moving conveyer belt. There is no way that we can meaningfully keep up with our constitutional duty to determine the fitness of these nominees. The quality of our work must suffer, and slippage in the quality of justice will necessarily follow. I hope we will do all we can to prevent more of these "I Love Lucy" moments.

The Chairman has indicated that he intends to hold another judicial nominations hearing next Wednesday. That will be the sixth hearing for judicial nominees this year. The Chairman did not hold his sixth hearing on President Clinton judicial nominees in 1999 until October 26 of that year.

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Remarks on Commemoratives on the 3/20/03 Agenda

I am pleased that the Committee will be able to move ahead today with commemorative resolutions from Senators Akaka, Campbell, and Allen.

As Co-Chairman of the Senate National Guard Caucus, I was pleased to cosponsor Senator Allen's resolution to designate the week beginning June 1, 2003, as "National Citizen Soldier Week." Our nation's citizen soldiers are providing us with invaluable service both at home and abroad and they deserve our support and admiration. I look forward to seeing this resolution approved by the full Senate soon.

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Statement of Senator Patrick Leahy
On The
Veterans' Memorial Preservation and Recognition Act of 2003, S.330
Senate Committee on the Judiciary
March 20, 2003

I thank the Chairman for including this matter on the agenda at my request. I am a cosponsor of Senator Campbell's bill, as is Senator Craig.

This is a measure we passed last year as S.1644. The Senate's action in May unfortunately met with resistance in the House of Representatives and it was not enacted into law last year as it should have been. Senator Campbell correctly proceeded to reintroduce the bill, S.330, earlier

this year. The bill provides for two things: highway signs to guide visitors to veterans cemeteries and a criminal provision for the willful destruction of memorials and cemeteries for our armed forces veterans.

I urge all Senators, Republicans and Democrats to support this modest legislative effort to help honor our armed forces veterans. In addition, of course, I will continue to support efforts to improve medical services, veterans hospitals, and other benefits for the women and men who risk and have risked their lives and livelihoods to protect all of us.

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