

Testimony of  
**The Honorable Patrick Leahy**

April 1, 2003

Today we meet to consider the nomination of California Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit, Florida Judge Cecilia Altonaga to the United States District Court for the Southern District of Florida, and Louisiana Judge Patricia Minaldi to the United States District Court for the Eastern District of Louisiana.

The District Court nominees have the support of their home-state Senators, although, as I will discuss in a moment, Senators Graham and Nelson have had a most difficult time getting the White House to agree to continue the tradition of the Florida bipartisan selection commission, and have only recently come to a meeting of the minds with the White House.

The Circuit Court nominee before us today, Judge Carolyn Kuhl, however, is not supported by both of her home-state Senators.

Her appearance before this Committee, despite that clearly stated opposition, is the latest in a string of transparently partisan actions taken by the Senate's new majority since the beginning of this Congress. In each of these actions - each of them unprecedented -- Republicans have done something they never did while in the majority from 1995 to 2001. Each provocative step, taken in tandem with the White House, has broken new ground in politicizing the federal judiciary.

The Republican majority has shown a corrosive and raw-edged willingness to change, bend and even break the rules that they themselves followed before when the judicial nominees involved were a Democratic president's choices, instead of a Republican president's choices. Lest some observers wrongly conclude that this sudden and orchestrated series of rules changes is just 'politics as usual,' it most certainly is not.

First, in January, one hearing was held for three controversial Circuit Court nominees, scheduled to take place in the course of a very busy day in the Senate. There was no precedent for this in the years that Republicans served in the majority and a Democrat was in the White House. In six years during the Clinton Administration, never once were three Circuit Court nominees, let alone three very controversial ones, before this body in a single hearing. But in this session, it is the very first hearing that was scheduled. Why the change in practice? The only conceivable difference is that now there is a Republican in the White House.

When there was a Democratic president in the White House, circuit nominees were delayed and deferred, and vacancies on the Courts of Appeals more than doubled under Republican

leadership, from 16 in January 1995, to 33 when the Democratic majority took over partway through 2001.

Under Democratic leadership we held hearings on 20 Circuit Court nominees in 17 months.

Indeed, while Republicans averaged 7 confirmations to the Circuit Courts every 12 months, the Senate under Democratic leadership confirmed 17 in its 17 months in the majority - and we did so with a White House that was uncooperative in a magnitude of historic proportions.

This year with a Republican in the White House, the Republican majority has gone from idling -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees.

But that dramatic change in pace is not the only politicized action taken by the Senate's new majority this year. Next, the Republican majority supported and facilitated the re-nomination of Priscilla Owen to a seat on the U.S. Court of Appeals for the Fifth Circuit, for which she already had been rejected by this Committee. Then they brought her back for a hearing during which no new facts of any significance were introduced, but during which many leading questions were asked and accusations of unfairness made.

This is a nomination that never should have been re-sent to the Senate, and which, if it succeeds, will only be because of a display of raw politics.

Now the Republican majority has scheduled this hearing for a nominee who does not have blue slips returned from both of her home-state Senators - that is, a nominee for whom only one of her home-state Senators has indicated she agrees that a hearing should be held. Now, we will surely hear today, in defense of this hearing, a long recitation of the history of the blue slip.

We will hear how it was used unfairly during the unfortunate past of the Committee, to keep the federal bench from being integrated. We will hear how other Chairmen, Senators Kennedy and Biden, modified their policies to allow for more fairness in the consideration of a more diverse federal bench. And, we will hear how the Chairman's real objection during the Clinton Administration was the so-called "lack of consultation" with Republican Senators, and how fairly and successfully President Bush's White House has consulted with obstreperous Democrats.

The Chairman will tell us that he considers himself the heir to Democratic traditions, that he has always followed those policies and is only now acting consistent with his own past practice.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two distinct practices the majority has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways, some to maintain unfairness, and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now.

Today is the first time that this Chairman will ever have convened a hearing for a judicial nominee who did not have two positive blue slips returned to the Committee. The first time, ever.

Despite protestations that this has been the Chairman's consistent policy over time, the facts show exactly the opposite.

Without going through a dissertation-length statement on each blue slip and the policies they articulated, let me just show you examples of two different ones.

These pieces of blue paper are what the Chairman uses to solicit the opinion of home-state Senators about the President's nominees. When President Clinton was in office, this was the blue slip sent to Senators, asking their consent. On the face of the form is written the following:

Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators.

When President Bush began his term, and Senator Hatch took over the Chairmanship at the start of the 107th Congress in late January, 2001, the blue slip sent out to Senators changed, and today says simply:

Please complete the attached blue slip form and return it as soon as possible to the Committee office.

The blue slip practice is an enforcement mechanism for consultation by the White House with Senators about nominees to their home states.

This new blue slip contains no requirement that the President may have to engage in sufficiently meaningful consultation with home-state Senators in order to gain their consent, no rule that one Senator's agreement is enough to move a nominee, no distinction between District and Circuit Court nominees. All it contains is a simple, unobvious, 180-degree turn in the direction of the policy, now that the person nominating the judges is a Republican.

I know my colleagues on the other side do not want to be reminded of what happened to so many of President Clinton's nominees, but I cannot entirely leave that part of this story out. The blue slip policy that was in effect and that was strictly enforced by the Chairman during the Clinton Administration operated as an absolute bar to the consideration of any nominee to any court unless both home-state Senators had returned positive blue slips. No time limit was set, no reason had to be articulated. Remember, before the Senate's change to Democratic majority in July of 2001, all of these decisions were being made in secret. Blue slips were not public, and they were allowed to function as an anonymous hold on otherwise qualified nominees.

A few examples of the operation of the blue slip and how it was scrupulously honored by the Committee during the Clinton Presidency are worth remembering. Remember, in the 106th Congress alone, more than half of President Clinton's Circuit Court nominees in the 106th Congress were defeated through the operation of the blue slip or other such partisan obstruction.

Perhaps the most vivid is the story of the United States Court of Appeals for the Fourth Circuit, where Senator Helms was permitted by this Committee to resist President Clinton's nominees for six years. James Beaty was first nominated to the Fourth Circuit from North Carolina by

President Clinton in 1995, but no further action was taken on his nomination in 1995, 1996, 1997, or 1998. Another Fourth Circuit nominee from North Carolina, Rich Leonard, was nominated in 1995, but no further action was taken on his nomination either in 1995 or 1996. James Wynn, again a North Carolina nominee to the Fourth Circuit, sent to the Senate by President Clinton in 1999, sat without action in 1999, 2000, and early 2001, until President Bush withdrew his nomination.

Why? Because one senator from the nominees' home state objected to their moving forward. Was this right or wrong? That is a question for another day and another history lesson.

But it was done by a Republican Senate to the nominee of a Democratic President, and done by the same Chairman who today sees fit to ignore the protests, for very real and substantive reasons, of a Democratic Senator to the nominee of a Republican President.

As for the red herring of consultation, again the facts speak for themselves.

No doubt we will hear today that during the Clinton Administration blue slip objections had to be honored because of what will now be called, in a bit of revisionism fit for study by Sovietologists, insufficient consultation with home-state Senators. But those of us who were here then know differently. We know that the Clinton White House bent over backwards to work with Republican Senators and seek their advice on appointments to both Circuit and District Court vacancies.

There were many times when the White House made nominations at the direct suggestion of Republican Senators, and there are judges sitting today on the Ninth Circuit and the Fourth Circuit, in the District Courts in Arizona, Utah, Mississippi, and many other places only because the voices of Senators in the opposite party were heeded.

In contrast, since the beginning of its time in the White House, this Bush Administration has sought to overturn traditions of bipartisan nominating commissions and to run roughshod over the advice of Democratic Senators.

They changed the systems in Wisconsin, Washington, and Florida that had worked so well for so many years. They ignored the protests of Senators like Barbara Boxer and John Edwards who not only objected to the nominee proposed by the White House, but who, in attempts to reach a true compromise, also suggested their own Republican alternatives. But those overtures were flatly rejected, and today what we see is just another facet of that unfortunate policy.

Ignoring bipartisan judicial nominating commissions is just another step in the march to entirely politicizing the federal judiciary, and that is exactly what the Bush White House did to the State of Florida. Last year Senators Graham and Nelson were compelled to write in protest to the White House Counsel's flaunting of the time-honored procedures for choosing qualified

candidates for the bench. A process that had worked to fill 29 District Court vacancies over ten years was bypassed by this President.

I am pleased that the White House has finally agreed to the Florida Senators' proposals so that we can get on with processing the nomination of Cecilia Altonaga. I hope the White House will move to cooperate with other Democratic Senators and increase the almost non-existent level of consultation. We look forward to hearing from Judge Altonaga and Judge Minaldi today, and we welcome and congratulate them and their families.

And, although I object to this hearing being held, I will participate in the questioning of Judge Kuhl, whose nomination rightly raises concerns.

Her past advocacy for aiding educational institutions which discriminate on the basis of race, as well as her work on cases involving fundamental constitutional rights, including the right to privacy, give me great concern about her willingness to follow the law, and about the extremism that is evident in her record. I look forward to hearing her answers today.

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