

Testimony of
The Honorable Patrick Leahy

April 11, 2002

Today, I hope that we will be able to consider and report 15 more of President Bush's nominees, including another Court of Appeals nominee, two more District Court nominees, five U.S. Attorney nominees, three U.S. Marshal nominees and five other Executive Branch nominees. We also have several items of important legislative business.

The Committee has before it the nomination of Judge Terrence O'Brien, a former Wyoming state district court judge who is nominated to the Tenth Circuit. He has more than 20 years of experience as a State court judge, has served on his home State's judicial ethics commission, and has a record of community service with organizations such as the United Way and the Rotary Club. This will be the 9th Court of Appeals nominee considered by the Committee in little more than nine months.

Another of the nominees scheduled for a Committee vote today also serves as a stark example of the progress being made. Judge Legrome Davis was first nominated to the position of U.S. District Court Judge for the Eastern District of Pennsylvania by President Clinton on July 30, 1998. The Senate took no action on his nomination and it was returned to the President on October 21, 1998. On January 26, 1999, President Clinton renominated Judge Davis for the position. The Senate again failed to hold a hearing for Judge Davis and his nomination was returned to the President on December 15, 2000. Under Republican leadership, Judge Davis languished before the Committee for 868 days without a hearing.

In contrast, we are moving expeditiously to consider Judge Davis. Judge Davis was nominated by President Bush on January 23, 2002, and is today receiving a Committee vote -- less than three months after his nomination. Judge Davis has served as a judge for the Court of Common Pleas in the First Judicial District in Pennsylvania for more than 13 years. Prior to serving as a judge, he had an extensive career litigating criminal cases in State courts. He has participated in numerous task forces and a variety of pro bono projects aimed to improve the judicial system. He is well-qualified and has broad bipartisan support. As our action today demonstrates, again, we are moving ahead to fill judicial vacancies with nominees who have strong bipartisan support. Today, the Committee is also scheduled to vote on U.S. Magistrate Judge Lance Africk. By the time the Committee was permitted to reorganize in July, the number of vacancies in the Fifth Circuit had risen to 12. We have been working to fill those vacancies, many of which were not allowed to be filled by the former President. Since July, the Senate has confirmed three judges for these 12 vacancies, including the first new judge for the Court of Appeals in six years.

The Senate received Lance Africk's nomination the last week in January and his paperwork was complete in March. Judge Africk was scheduled for the very next confirmation hearing on March 19. He has been sitting as a federal magistrate in the Eastern District of Louisiana for more than a decade. Judge Africk, like many of the nominees this Committee has reported favorably is

conservative, a registered Republican and a member of the Federalist Society. I expect he will be reported favorably today.

If we are successful this morning, by noon the Committee will have favorably reported 45 judicial nominations since the shift in majority last July, including eight nominations to the Courts of Appeals.

The Committee is scheduled to vote on five more U.S. Attorney nominees. Unfortunately, the Bush Administration was slow to nominate U.S. Attorneys and has still not submitted nominations for almost one-quarter of the districts in our States across the country. Today, we have the opportunity to report three more U.S. Marshal nominees. It is most unfortunate that after nearly 16 months in office the Bush Administration has not made nominations to almost one-half of the vacancies for these top law enforcement positions.

If we are successful this morning, by noon the Committee will have reported 70 U.S. Attorneys since last September and 35 U.S. Marshal nominees since December. All together, the Committee will have considered and reported 129 Executive Branch nominees since last July.

Latter today Senator Kohl will be chairing our 16th hearing involving judicial nominees since last July. At Senator Bob Smith's request we have included Jeffrey Howard, a nominee to the First Circuit, and a number of District Court nominees from around the country. A shared characteristic of the District Court nominees from California and Wisconsin is that they are the product of a bipartisan selection process.

The Judiciary Committee is moving fairly and expeditiously on judicial nominations. Since July, the Committee has made significant bipartisan progress. The Senate has confirmed more judges, 42, in the last nine months than were confirmed during all 12 months in each of 2000, 1999, 1997, and 1996. The Democratic pace of confirmations, 42 in nine months, already exceeds the pace during the six and one-half years of Republican control of the Senate, when judicial confirmations averaged 38 per year. These are not statistical games; they are the facts.

The Senate is on pace to confirm more judges in the first year of Democratic control than were confirmed in any year of the six and one-half preceding years under the Republican majority. Just between January and March of this year, the Senate has already confirmed 14 judges this session, which compares favorably to the 7 years in which a Republican majority never confirmed that many Circuit and District judges by March, and confirmed no judges by the end of March in three of those years. Indeed, in the 1996 session, the second year in the period of the Republican majority, the Senate only confirmed 17 judges the entire session and refused to confirm even a single judge to the Courts of Appeals.

Since July we have helped fill longstanding Court of Appeals vacancies and we have been working hard to lower the number of vacancies in the Courts of Appeals and been doing so. When this Committee was assigned new members on July 10, 2001, there were 33 vacancies on the Courts of Appeals. It had almost doubled from the 17 vacancies that existed on January 5, 1995, when the Republican majority assumed control of the Senate. In fewer than 10 months since the change in majority, the Senate has confirmed seven judges to the Courts of Appeals and held hearings on three others.

Judge Howard will be the 11th nominee to the Courts of Appeals on whom we have held a hearing in the last 10 months. In spite of the five additional vacancies on the Courts of Appeals that have arisen during the last 10 months, we have been able to keep up with attrition and reduce the number of vacancies.

It is interesting to hear those who contended during the years of Republican majority control that there was no judicial vacancies crisis that they have now discovered one. Assertions that the Democrats have caused a vacancy crisis in the federal courts ignore the facts, however. Under Republican control from 1995 through 2001, vacancies on the Courts of Appeals almost doubled, increasing from 17 to 33. Vacancies on our federal courts overall went from 63 to 110 during that same period, increasing overall by almost 75 percent.

Vacancies continue to exist on the Courts of Appeals in part because a Republican majority was not willing to hold hearings or vote on more than half - 56 percent - of President Clinton's Court of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Court of Appeals during the entire 1996 session. By the time the Senate was permitted to reorganize in July 2001, 33 vacancies already existed on the Courts of Appeal. Since the shift in majority last summer, five additional vacancies have arisen on the Courts of Appeals. In spite of this, the Senate has kept up with the high rate of attrition and lowered appellate court vacancies by confirming seven judges to the circuit courts. In particular, we have made significant contributions in the 5th, 10th and 8th Circuits. We are doing much better and have the confirmation numbers and vacancy numbers both headed in the right directions.

I am extremely proud of the work this Committee has done since the change in the majority. I am proud of the way we have considered nominees fairly and expeditiously and the way we have been able to report to the Senate so many qualified, non-ideological, consensus nominees to the Senate. During the last 10 months the Judiciary Committee has restored steady progress to the judicial confirmation process. The Senate Judiciary Committee is holding regular hearings on judicial nominees and giving nominees a vote in Committee, in contrast to the practice of anonymous holds and other obstructionist tactics employed by some during the period of Republican control.

I noticed the first hearing on judicial nominations within 10 minutes of the reorganization of the Senate and held that hearing on the first day after the Committee was assigned new members. I also held unprecedented hearings for judicial nominees during the August recess.

In fewer than 10 months, the Senate Judiciary Committee has already held 15 hearings involving 48 judicial nominations, and will hold another hearing this week for seven more nominees. That is more hearings on judges than the Republican majority held in any year of its control of the Senate. In contrast, one-sixth of President Clinton's judicial nominees - more than 50 - never got a Committee hearing and Committee vote from the Republican majority, which served to perpetuate longstanding vacancies into this year.

Rather than engaging in "payback" for these obstructionist tactics, we have worked hard to confirm in nine months more judicial nominees than were confirmed in four of the six full years of Republican control of the Senate. Despite these extraordinary efforts to treat the judicial nominees of this President more fairly than those of the prior President, we have heard little but

criticism and harsh rhetoric from the other side of the aisle and from the Administration.

The Committee has focused on consensus nominees for all Senators. In order to respond to what Vice President Cheney and Senator Hatch now call a vacancy crisis, the Committee has focused on consensus nominees. This will help end the crisis caused by years of delay and obstruction by confirming as many of the President's judicial nominees as quickly as possible.

More controversial nominees obviously require greater review. This process of careful review is part of our democratic process. It is a critical part of the checks and balances of our system of government that does not give the power to make lifetime appointments to one person alone to remake the courts along narrow ideological lines, to pack the courts with judges whose views are outside of the mainstream of legal thought, whose decisions would further divide our nation.

The Committee continues to try to accommodate Senators from both sides of the aisle. The Court of Appeals nominees included at hearings so far this year have been at the request of Senator Grassley, Senator Lott, Senator Specter, Senator Enzi and Senator Smith from New Hampshire - five Republican Senators who each sought a prompt hearing on a Court of Appeals nominee who was not among those initially sent to the Senate in May 2001. We have worked hard to remedy the problems we inherited from the past.

I have also tried to propose constructive ways to move ahead. We are restoring steadiness in the hearing process. The Committee is holding regular hearings at a pace that is exceeding the pace of the previous six and one-half years. The Senate is confirming judges at a pace that exceeds that of the previous six and one-half years. We have made blue slips public for the first time. We have made suggestions to the Administration on how to fill even more vacancies even more quickly by expediting ABA peer reviews and consulting on consensus nominees.

Recent assertions that the Democratic Members of the Senate Judiciary Committee are in any way "anti-Hispanic" because one nominee, who was born in Honduras, has not yet been scheduled for a hearing is preposterous on its face - all the more so considering the record of the Republican-led Senate in the immediate past. Democratic-led Senate has treated all nominees fairly, including Hispanic Americans. Indeed, I have already indicated that we intend to move forward with a hearing on that nominee.

President George W. Bush has nominated five Hispanic Americans to the federal courts, and so far three of them have been swiftly confirmed. Christina Armijo, nominated to the District Court in New Mexico, had her hearing only six days after her ABA peer review was received (on a day complicated by the fact that the Senate office buildings were all closed due to the anthrax outbreak), and she was confirmed only 19 days later.

Phillip Martinez, nominated to the federal bench in the Western District of Texas, also was swiftly confirmed. His peer review rating from the ABA arrived in November, his hearing was in December, and he was confirmed soon after the Senate's return in 2002.

Randy Crane, nominated to the District Court for the Southern District of Texas, received his ABA peer review in mid-November and had his hearing shortly after the Senate came back into session in 2002. He was confirmed less than a month later by a unanimous Senate.

In contrast, many Hispanic nominees - and many, many others - were treated poorly by the Republican-controlled Senate. For example, Richard Paez, a Mexican-American nominee to the Ninth Circuit Court of Appeals, received particularly poor treatment. A sitting U.S. District Court judge at the time of his nomination, Paez waited longer than any other Clinton appointee to be confirmed. It took the Republican-controlled Senate 1,520 days -- more than four years -- to process his nomination. Judge Paez was subjected to wide-ranging requests, a re-hearing for no substantive reason, and unconscionable delays.

Even with the years of waiting for action on his nomination, Judge Paez is one of the fortunate ones, considering what happened to five other Hispanic nominees sent to the Senate by President Clinton. Jorge Rangel and Enrique Moreno, both nominated to the Fifth Circuit Court of Appeals from Texas, were not afforded hearings. Other Hispanic Americans never granted hearings under Republican control include Christine Arguello, nominated to the Tenth Circuit Court of Appeals from Colorado; and Ricardo Morado, nominated to the District Court in Texas. Anabelle Rodriguez, nominated twice to the District Court in Puerto Rico, was given a hearing in 1998 -- more than a year after her initial nomination -- and returned to the President with no vote after two and one-half years of waiting.

I hope that the Administration will join with a broad cross-section of people, including the Congressional Hispanic Caucus, to consult on its judicial nominations in the selection process. That would be a good development that should lead to increasing the nomination and confirmation of qualified, consensus Hispanic judges.

In order to make more progress, we need the cooperation of the White House, as I have been urging since the shift in majority. That is what I called for when I addressed the Senate on January 25. Yet, the requested cooperation has not been forthcoming. In fact, too many from the other side of the aisle have opted for partisanship, unjustifiably attacking the Committee process and the Democratic members personally for our efforts to fulfil our constitutional responsibilities. We will make the most progress most quickly if the White House would begin working with home-state Senators to identify more fair-minded, moderate, consensus nominees to fill the vacancies in the many federal courts. One of the reasons that the Committee has been able to work as quickly as it has and the Senate has been able to confirm 42 judges in the last eight months, is because many of those nominations were supported by home-state Senators and constituents from across the political spectrum as consensus nominees.

I have heard of too many situations in too many States, involving many moderate home-state Senators, in which the White House has demonstrated no willingness to work with these Senators to fill the judicial vacancies. As we move forward, I continue to urge that the White House show a greater spirit of inclusiveness and flexibility so that the nomination process becomes a truly bipartisan enterprise. Logjams exist in a number of settings. To repair the damage that has been done over previous years, and to build bridges with the Democratic majority, there is much the White House can do in terms of cooperation with all home-state Senators, including Democratic Senators. As the Administration proceeds to make nominations to the 38 vacancies without a nominee, including 18 judicial emergency vacancies, I hope that it will work with us and with all Senators to help fill these judicial vacancies.