

Testimony of
The Honorable Patrick Leahy

April 25, 2002

I would like to welcome the nominees to today's hearing. The nominees before us represent a number of states across our nation. Many of the nominees' family members have made the long journey with them, and I extend the welcome of this Committee to the friends and families in attendance. I am especially grateful to Senator Edwards for volunteering to chair this important hearing on behalf of the Committee.

Today, we are holding the confirmation hearing for Judge Julia Smith Gibbons, nominated to the Court of Appeals for the Sixth Circuit, Justice Leonard E. Davis, nominated to the District Court for the Eastern District of Texas, Judge David C. Godbey, nominated to the District Court for the Northern District of Texas, Andrew S. Hanen, nominated to the District Court for the Southern District of Texas, Samuel H. (Hardy) Mays, Jr., nominated to the District Court for the Western District of Tennessee, and Judge Thomas M. Rose, nominated to the District Court for the Southern District of Ohio.

With today's hearing, in little less than 10 months, the Senate Judiciary Committee will have held 17 hearings involving a total 61 judicial nominations. 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 perpetuated longstanding vacancies into this year.

I am pleased to include Judge Gibbons on the hearing today at Senator Fred Thompson's request. Of the six Court of Appeals nominees who have received hearings in 2002 by the Committee, all have been at the request of Republican Senators. By including Judge Gibbons on this hearing, we hope to provide some much needed relief to the Sixth Circuit, which has eight vacancies. Six of those vacancies arose before the Judiciary Committee was permitted to reorganize after the change in majority last summer.

The Sixth Circuit vacancies are a prime and unfortunate legacy of these recent partisan obstructionist practices. Half of the seats on the Sixth Circuit are vacant. Most of those vacancies arose during the Clinton Administration and before the change in majority last summer. None, zero, not one of the Clinton nominees to those vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership.

One of those seats has been vacant since 1995, the first term of President Clinton. Judge Helene White of the Michigan Court of Appeals was nominated in January 1997 and did not receive a hearing on her nomination during the more than 1,500 days before her nomination was withdrawn by President Bush in March of last year. Kathleen McCree Lewis, a distinguished lawyer from a prestigious Michigan law firm, also did not receive a hearing on her 1999 nomination to the Sixth Circuit during the years it was pending before it was withdraw by President Bush in March 2001. Professor Kent Markus, another outstanding nominee to a vacancy on the Sixth Circuit that arose in 1999, never received a hearing on his nomination before his nomination was returned to President Clinton without action in December 2000. Some on the other side of the aisle held these seats open for years for another President to fill,

instead of proceeding fairly on those consensus nominees. Some were unwilling to move forward knowing that retirements and attrition would create four additional seats that would arise naturally for the next President. That is why there are now eight vacancies on the Sixth Circuit, why it is half empty or half full.

Long before some of the recent voices of concern were raised about the vacancies on that court, Democratic Senators in 1997, 1998, 1999, and 2000 implored the Republican majority to give the 6th Circuit nominees hearings. Those requests, not just for the sake of the nominees but for the sake of the public's business before the court, were ignored. Numerous articles and editorials urged the Republican leadership to act on those nominations. Fourteen former presidents of the Michigan State Bar pleaded for hearings on those nominations.

The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask that the nominees get hearings and that the vacancies be filled. The Chief Judge noted that, with four vacancies - the four vacancies that arose in the Clinton Administration - the Sixth Circuit "is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court." He predicted: "By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them."

Nonetheless, no Sixth Circuit hearings were held in the last three years of the Clinton Administration, despite these pleas. Not one. Since the shift in majority the situation has been exacerbated further as two additional vacancies have arisen.

When Senator Edwards convenes our hearing this afternoon on the nomination of Judge Gibbons to the 6th Circuit, a hearing we announced last week, it will be the first hearing on a 6th Circuit nomination in almost 5 years. Similarly, the hearing we held on the nomination of Judge Edith Clement to the 5th Circuit last year was the first on a 5th Circuit nominee in 7 years and she was the first new appellate judge confirmed to that Court in 6 years. When we held a hearing on the nomination of Judge Harris Hartz to the 10th Circuit last year, it was the first hearing on a 10th Circuit nominee in 6 years and he was the first new appellate judge confirmed to that Court in 6 years. When we held the hearing on the nomination of Judge Roger Gregory to the 4th Circuit last year, it was the first hearing on a 4th Circuit nominee in 3 years and he was the first appellate judge confirmed in 3 years.

Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half - 56 percent - of President Clinton's Courts of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session. From the time the Republicans took over majority control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than doubling.

Democrats have broken with that recent history of inaction. Nine nominees have been confirmed to the Courts of Appeals in less than 10 months. Judge Gibbons is the 12th nominee to a Circuit Court to receive a hearing in less than 10 months.

I would like to welcome Mr. Hardy Mays of Tennessee to today's hearing. Mr. Mays is a partner at Baker, Donelson, Bearman & Caldwell in Memphis, Tennessee, and he graduated from Yale Law School in 1973. Several lawyers have written to the Senate expressing strong support for Mr. Mays' confirmation due to his intelligence, fairness, and good temperament, including J.

Houston Gordon, the former Chairman of the Tennessee Democratic Party.

Mr. Mays has spent most of his legal career in private practice, but he also served for five years legal counsel and then Chief of Staff to Tennessee Governor Don Sundquist, a Republican. Mr. Mays has been involved in more than 50 political campaigns, including some fund raising, on behalf of Republican candidates for President, Senate, Governor and local offices. He is member of the Republican National Lawyers Association. He was a delegate to the Republican National Convention in 2000, and he was on the Executive Committee of the Tennessee Republican Party from 1986 through 1990. Thus, it would be wrong to claim that we will not consider President George W. Bush's nominees with conservative credentials. We have done so repeatedly.

For example, Judge Rose was previously active in Republican politics in Ohio. I would like to welcome Judge Rose of the Greene County Common Pleas Court in Ohio to this hearing. Judge Rose is strongly supported by both of his home-State Senators. A former assistant prosecutor and private practitioner, Judge Rose was appointed to the state bench over a decade ago by then-Governor, now Senator, George Voinovich.

We also have three nominees to the District Courts of Texas who I would like to welcome today. In 2000, Justice Davis was appointed by then-Governor George W. Bush to the position of Chief Justice of the Court of Appeals in Tyler, Texas. Justice Davis has extensive experience practicing as a litigator before state and federal court. He has been nominated by President Bush to the U.S. District Court for the Eastern District of Texas. Judge Godbey is a Dallas County District Court Judge who has been nominated to the federal district court in the Northern District of Texas. He is a former litigator who represented corporate entities in civil and commercial litigation in state and federal trial and appellate courts in Texas and around the country. He has also briefed three cases before the United States Supreme Court, including two cases involving the application of the Voting Rights Act in Texas. Mr. Hanen is nominated to the U.S. District Court for the Southern District of Texas. He has significant legal experience working as a civil trial attorney in private practice for over twenty years, and has been a leader in establishing programs to serve the needs of the disadvantaged. Mr. Hanen appears well-supported by his colleagues in the Houston legal community, and has received bipartisan support.

I would note that Mr. Hanen was nominated to fill the vacancy created by the retirement of Judge Filemon Vela in May 2000. I also recall just two years ago when Ricardo Morado, who has served as Mayor of San Benito, Texas, and was nominated for a vacancy in the Southern District of Texas, never got a hearing and was never acted upon. President Clinton nominated Ricardo Morado on May 11, 2000 and his nomination was returned to President Clinton without any action on December 15, 2000.

It was not long ago when the Senate was under Republican control, that it took 943 days to confirm Judge Hilda Tagle to the United States District Court for the Southern District of Texas. She was first nominated in August 1995, but not confirmed until March 1998. When the final vote came, she was confirmed by unanimous consent and without a single negative vote, after having been stalled for almost three years. I recall the nomination of Michael Schattman to a vacancy on the Northern District of Texas. He never got a hearing and was never acted upon, while his nomination languished for over two years.

These are district court nominations that could have helped respond to increased filings in the federal courts in Texas if acted upon by the Senate over the last several years. With today's hearing on these three Texas nominees, the Committee will have considered five nominees from Texas in less than ten months and 11 nominees for positions on the trial or appellate court level in the Fifth Circuit, including the first new judge for the Fifth Circuit in seven years. In fact, it

was this Senate's confirmation of Judge Edith Brown Clement last fall that created the vacancy to which Justice Davis is nominated.

In the past few months, the Senate has also confirmed Judge Philip Martinez to fill a vacancy on the District Court for the Western District of Texas and Judge Randy Crane to fill a vacancy on the District Court for the Southern District of Texas. The Senate has confirmed Judge Kurt Engelhardt and Judge Jay Zainey to fill vacancies on the District Court for the Eastern District of Louisiana. The Senate has also confirmed Judge Michael Mills to fill a vacancy on the District Court for the Northern District of Mississippi.

Of course many of the vacancies in the Fifth Circuit are longstanding. Judge Clement was confirmed to fill a judicial emergency on the Fifth Circuit. Judge Martinez and Judge Crane likewise filled what had been judicial emergencies. These many vacancies and emergencies are the legacy of the years of inaction.

For example, despite the fact that President Clinton nominated Jorge Rangel, a distinguished Hispanic attorney, to fill a Fifth Circuit vacancy in July 1997, Mr. Rangel never received a hearing and his nomination was returned to the President without Senate action at the end of 1998. On September 16, 1999, President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, to fill a vacancy on the Fifth Circuit but that nominee never received a hearing either. When President Bush took office last January, he withdrew the nomination of Enrique Moreno to the Fifth Circuit. The Senate has moved quickly to confirm Judge Armijo in New Mexico and Judges Martinez and Crane in Texas, who were among the very few Hispanic judicial nominees sent so far by this Administration to us.

In contrast, the Judiciary Committee is moving fairly and expeditiously on judicial nominations. Looking at the number of confirmations in similar periods shows that we are confirming President Bush's judicial nominees at a faster pace than the nominees of prior presidents, despite absurd assertions to the contrary.

After all of the floor votes on judicial nominees today, the Senate will have confirmed 50 judges in less than ten months of Democratic leadership of the Senate. The record shows that 48 nominees were confirmed over the first 15 months of the Clinton Administration, a pace on average of 3.1 per month. In the first 15 months of the first Bush Administration, 27 judges were confirmed, a pace of 1.8 judges confirmed per month. Likewise, in President Reagan's first 15 months in office, 54 judges were confirmed, a pace of 3.6 per month. In contrast, in nearly 10 months with a Democratic majority, President George W. Bush's judicial nominees have been confirmed at a rate of 5 per month, a faster pace than for any of the past three Presidents, even those some were working with a Senate majority of the same political party. The number of judicial confirmations in less than 10 months - 50 - exceeds the number confirmed during all of 2000, 1999, 1997 and 1996, four out of six full years under Republican leadership.

I commend my colleagues for their efforts to consider the almost five dozen nominees we have had hearings for thus far. Thank you.