

Testimony of  
**Mr. Kent Markus**

May 9, 2002

Good morning Mr. Chairman, Sen. Sessions and members of the Subcommittee. My name is Kent Markus. I'm a professor at Capital University Law School in Columbus, Ohio where I also serve as the Director of the Dave Thomas Center for Adoption Law, a nationally unique institution aimed at improving child welfare and adoption systems.

In the past when I've testified at Congressional Hearings, I've always thanked the Chair for inviting me. And while I am grateful for the opportunity to talk with you about the confirmation process for federal judges, this isn't quite the Senate Judiciary Committee hearing that I had once longed for.

I'm here today because I concur with President Bush that we need to find a way to consider federal judicial nominations without undue delay. But I'm also here today because I believe that the history regarding the current vacancy backlog is being obscured by some - and I believe that this historical revisionism is exacerbating the negative political dynamic surrounding judicial confirmations. I don't think that we'll ever stop the retaliatory, tit-for-tat cycle of judicial confirmation delay unless both political parties agree to compromises - a topic I'll address at the end of my testimony.

#### My Experience as a Federal Judicial Nominee

In the summer of 1999, I was contacted by friends at the Department of Justice. They informed me that Judge David Nelson of the 6th Circuit had notified the White House that he would take senior status on October 1st of that year. They asked if I wanted to be considered for the seat. I told them that I most assuredly did.

To confirm my interest, I immediately wrote to the then White House Counsel Chuck Ruff. My letter, in part, stated as follows:

I write to express my deep interest in appointment to the vacancy on the 6th Circuit resulting from Judge David Nelson's decision to leave active status. I believe that the range and breadth of my professional experience have prepared me for such a position and I am confident that I would serve in a manner that would bring credit to the President and others involved in selecting me.

At different points in my professional life, I have worked in the legislative, executive and judicial branches of the federal government. I am presently a law professor and have also been a private practice litigator and the manager of two private, non-profit organizations. I have been consistently involved in making, implementing and interpreting federal (as well as state) law. If appointed, I believe that the unusual breadth of my career would help me to decide cases through a blending of rigorous legal analysis with common sense practicality. \*\*\*

In addition to intellect, I believe that a key aspect of performing well as a judge is attitude. I believe in the importance of presenting timely, clear and cogent rulings. I believe that judges should interpret the law and that legislators should make the law. I believe that government service - and particularly service in the judiciary - is a public trust that requires a commitment to

show neither bias nor prejudice to any party. As an appeals court judge, I would expect to live by these principles and bring energy, commitment, common sense, good humor and humility to the courthouse everyday.

Throughout that fall, the White House reviewed possible nominees for Judge Nelson's seat. As the result of a strong and cordial working relationship with Senator DeWine, I was able to represent to the White House that I was confident Senator DeWine would advise them that he would have no objection to my nomination. Shortly thereafter, the White House nominations counsel informed me that he had conferred with Senator DeWine about my possible nomination. He reported to me that he had been pleased by the Senator's decidedly favorable response. In December, I was informed that the President had tentatively selected me as the nominee for the vacancy. I was instructed to provide the voluminous documentation required of nominees by the White House, the Justice Department, the FBI, the Senate, and the Administrative Office of the Courts so that ABA and FBI background checks could commence.

Since I had left the Justice Department with a high level security clearance just a little more than a year before, the FBI was able to complete its update check relatively easily. The ABA also moved swiftly. On February 9, 2000, I was the President's first judicial nominee in that calendar year.

And then the waiting began.

On the day of my nomination, in an interview with the Cleveland Plain Dealer, Senator DeWine declared me to be "well-qualified" for the position. Not long after, both Senators DeWine and Voinovich returned their "blue-slips" indicating that they had no objection to my nomination receiving a hearing.

At the time, the 6th Circuit was operating at three-quarters strength, with four of its sixteen seats vacant. It was apparent that the 6th Circuit nominees from Michigan were being held up and it seemed that if there were any chance for relief for the Circuit, it would come from my confirmation.

While my nomination was pending, my confirmation was supported by, among others:

- Fourteen past presidents of the Ohio State Bar Association - representing individuals of every political stripe

- More than 80 Ohio law school deans and professors, again, coming from every point on the political and ideological spectrum

- Prominent Ohio Republicans, including Ohio Supreme Court Chief Justice Thomas Moyer, Ohio Supreme Court Justice Evelyn Stratton, Congresswoman Deborah Pryce, Congressman David Hobson, State Auditor Jim Petro, former Columbus Mayor Greg Lashutka, and former Franklin County Prosecutor Mike Miller.

- The National District Attorneys Association and the National Fraternal Order of Police

- Virtually every major newspaper in the state, including two editorials by the generally conservative Columbus Dispatch

As a result of the vacancies on the court - one stemming back to 1995 that is still open today - the 6th Circuit became the slowest appellate court in the nation. Then Chief Judge Martin told me that the average time for a case to move from filing to decision was two years - a period five and half to six months slower than the next slowest circuit. Friends on mine on the District Court

informed me that a request for them to sit by assignment on the Circuit Court - traditionally an honor for District Court judges - had become so routine and onerous given busy dockets of their own that some district judges had begun to refuse the previously prestigious assignment. It was also evident at that time that more 6th Circuit vacancies were on the way - of the twelve members of the court at that time, five were to be eligible for senior status in 2000 or 2001. The possibility that the court would be half-empty before any reinforcements arrived is the reality we face today.

At the time my nomination was pending, despite lower vacancy rates than the 6th Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the 3rd, 9th and Federal Circuits and afforded hearings to nominees from the 8th and DC Circuits. No 6th circuit nominee had been afforded a hearing in the prior two years. Of the nominees awaiting a Judiciary Committee hearing, there was no circuit with more nominees than the 6th Circuit.

With high vacancies already impacting the 6th Circuit's performance, and more vacancies on the way, why, then, did my nomination expire without even a hearing? To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me. Over and over again they told me two things:

- 1) There will be no more confirmations to the 6th Circuit during the Clinton Administration, and
- 2) This has nothing to do with you; don't take it personally - it doesn't matter who the nominee is, what credentials they may have or what support they may have - see item number 1.

While I never had the opportunity to discuss the matter personally with Senator Hatch, with whom I had an excellent relationship during my tenure at the Justice Department, it was my strong sense that he and Senator DeWine were not at all comfortable with this state of affairs. On one occasion, Senator DeWine told me "This is bigger than you and it's bigger than me." Senator Kohl, who had kindly agreed to champion my nomination within the Judiciary Committee, encountered a similar brick wall.

The fact was, a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees.

Although I had hoped to be serving on the Federal Bench over the course of the last several years, I have certainly enjoyed the teaching career the Senate's inaction has afforded me. I do talk a little bit about my experience in my Legislation class and greatly enjoy my Adoption Center work on behalf of kids - especially kids who have been abused or neglected - in need of a safe, permanent home. I'm particularly grateful to Senator DeWine for his continued leadership in the area and was proud that my Center recognized him with our highest award this year, The Dave Thomas Award.

Still, it's my sincere hope that we can find a way to allow federal judicial nominees to receive timely consideration without undue delay. The current system is simply unfair to good and talented people from across the political and legal spectrum who are eager to lend their talents to the nation's well-being as members of the federal judiciary.

A Solution?

Since I teach Legislation to law students, I've tried to apply some of the lessons I discuss with my students to looking for a resolution to this problem. As an academic, here's how I see things.

A great many pending vacancies stem from the refusal of the Republican controlled Senate to confirm, or even provide a hearing to, well-qualified Clinton nominees. Other vacancies stem from the normal course of judicial retirements that have occurred during the Bush Administration.

It seems clear that as long as the Democrats control the Senate, they will seek to ensure that their Republican colleagues do not benefit from their failure to process Clinton nominees and are denied the ill-gotten gain of a super-abundance of judicial appointments. Senate Democrats will insist that the White House should not be able to put conservative judges in seats that the Democrats believe would not be vacant but for stall tactics employed for several years by their Republican colleagues.

Ironically, Republican Senators, on the other hand, will now insist that whatever the reasons for the vacancy, the courts are problematically backlogged and nominees are being ill-treated. They will insist that as long as a nominee is intellectually, temperamentally, and experientially well-prepared for service on the bench, confirmation hearings should be scheduled, post haste, with the treatment of Clinton nominees forgotten and forgiven.

One promising development with respect to the consideration of judicial nominees is greater transparency in the process. Anonymous holds are gone. More candid and open discussion about nominees -- at timely nomination hearings - will reflect well on the entire Senate and will remove the frustrating mystery confronted by past nominees.

If the two parties wish to break the judicial nominations logjam, each will have to pay some deference to the other side's view. The Democrats will have to acknowledge that, in the end, the country is not well-served if the judicial branch is forced to operate at a level substantially less than full strength. The Republicans will have to accept that it is particularly galling to their Democratic colleagues to allow an extremely conservative individual fill a seat for which a Clinton nominee was left languishing without even a hearing. And the White House will simply have to confer more earnestly and completely with Democrats in the Senate about the acceptability of nominees and may need to withdraw some that are pending in the spirit of that increased consultation.

If both parties will take the first step together, it's possible that we can stop the downward spiral plaguing the consideration of federal judicial nominations. I'm eager to see what happens and discuss it with my class - and of course I'd be pleased to answer any questions members of the Subcommittee may have.