

U.S. SENATOR PATRICK LEAHY

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**Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Judicial Nominations Hearing
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Today the Judiciary Committee meets in an extraordinary session to consider six important nominees for lifetime appointments to the federal bench. During the last four years of the Clinton Administration, this Committee refused to hold hearings and Committee votes on qualified nominees to the D.C. Circuit and the Sixth Circuit. Today, in sharp contrast, this Committee is being required to proceed on three controversial nominations to those circuit courts -- simultaneously. This can only be seen as part of a concerted and partisan effort to pack the courts and tilt them sharply out of balance.

In contrast to the President's circuit court nominees, the district court nominees to vacancies in California, Texas and Ohio seem to be more moderate and bipartisan. Today we will hear from Judge Otero, nominated to the U.S. District Court for the Central District of California, who was unanimously approved by California's bipartisan Judicial Advisory Committee, established through an agreement Senator Feinstein and Senator Boxer reached with the White House. We urge the White House to proceed without further delay to nominate another qualified, consensus nominee, like Judge Otero, for the remaining vacancy in California as recommended by that bipartisan panel. Too often in the last two years we have seen the recommendations of such bipartisan panels rejected or stalled at the White House. I note that Judge Otero has contributed to the community, working on a *pro bono* project for the Mexican Legal Defense and Education Fund and serving as a member of the Mexican Bar Association, the Stanford Chicano Alumni Association, and the California Latino Judges Association, among others.

We will also hear from Robert Junell, nominated to the U.S. District Court for the Western District of Texas. He is another consensus nominee who has had a varied career as a litigator and a member of the Texas House of Representatives, and who has worked to help numerous disadvantaged individuals. A life member of the NAACP, Mr. Junell is also a former member of the board of directors of the La Esperanza clinic. I spoke earlier this week to Representative Charlie Stenholm who is a strong supporter of Mr. Junell's, and I look forward to hearing from him.

Finally, Judge Adams, nominated to the U.S. District Court for the Northern District of Ohio, is a lifelong member of the NAACP and has served as a member of a number of civic organizations, such as the Summit County Mental Health Association.

I am very disappointed that the Chairman has unilaterally chosen to pack so many circuit court nominees onto the docket of a single hearing. This is unprecedented in his tenure and simply no

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way to consider the controversial and division nominations he has selected for a single hearing. This is no way for us to discharge our constitutional duty to advise and consent to the President's nominees.

While I was Chairman over 17 months we reformed the process of judicial nominations hearings. We made tangible progress in repairing the damage done to the process in the previous six years. We showed how nominations of a Republican president could be considered twice as quickly as Republicans had considered President Clinton's nominees. We added new accountability by making the positions of home-state Senators public for the first time and we did away with the previous Republican practice of anonymous holds on nominations.

We made significant progress in helping to fill judgeships in the last Congress. The number of vacancies on the courts was slashed from 110 to 59, despite an additional 50 new vacancies that arose during our watch. Chairman Hatch wrote in September 1997 that 103 vacancies (during the Clinton Administration) did not constitute a "vacancy crisis." He also stated his position on numerous occasions that 67 vacancies meant "full employment" on the federal courts. Even with the two additional vacancies that have arisen since the beginning of this year, there are now 61 vacancies on the district and circuit courts. This is well below the level that Chairman Hatch used to consider acceptable and the federal courts have more judges than when Chairman Hatch proclaimed them in "full employment."

We made the extraordinary progress we did by holding hearings on consensus nominees with widespread support and moving them quickly, but by also recognizing that this President's more divisive judicial nominations would take time. We urged the White House to consult in a bipartisan way and to keep the courts out of politics and partisan ideology. We urged the President to be a uniter, not a divider, when it came to our federal courts. All Americans need to be able to have confidence in the courts and judges need to maintain the independence necessary to rule fairly on the laws and the rights of the American people to be free from discrimination and to have our environmental and consumer protection laws upheld.

Under Democratic leadership the Senate confirmed 100 of President Bush's nominees within 17 months. Two were rejected by majority votes of the Judiciary Committee. Several others were controversial but confirmed despite negative votes. Given all of the competing responsibilities of the Committee and the Senate in these times of great challenges to our Nation -- especially the attacks of September 11 and later also the anthrax attacks directed at Senator Daschle and at me that killed several people and disrupted the operations of the Senate itself -- hearings for 103 judicial nominees, voting on 102, and favorably reporting 100 is a record of which the Judiciary Committee and the Senate can be proud. During the 107th Congress, the Committee voted on 102 of the 103 judicial nominees eligible for votes -- 99 percent. Of those voted upon, 98 percent were reported favorably to the Senate. Of those 100 reported favorably to the Senate, 100, all of them, were confirmed.

It is true that we could not hold hearings on every nominee, including the scores of controversial nominees selected by this White House, during those 17 months. We did proceed on 94 percent of those whose files were completed. We did proceed on a record 103 in 17 months -- in contrast to the less than 40 a year our Republican predecessors averaged. Indeed, Republicans

failed to proceed on 79 of President Clinton's judicial nominees in the two-year Congress in which they were nominated and delayed several three years and four years and more. More than 50 of those nominees were never accorded Committee consideration.

We transcended the relative inaction of the prior six and one-half years of Republican control by moving forward on judicial nominees twice as quickly as our predecessors did. Indeed, the Senate confirmed more judicial nominees in 17 months than the Republican-controlled Senate did during its last 30 months. More achieved, and in half the time, but achieved responsibly.

We showed how steady progress could be made without sacrificing fairness and thoroughness. In contrast, this hearing portends real dangers to the process and to the results — all to the detriment of our courts and to the protections they are intended to afford to the American people. The Senate in this instance, and the Congress in many others, is supposed to act as a check on the Executive and add balance to the process. Proceeding as the majority has unilaterally chosen to today is unprecedented and wrong. It undercuts the ability of the Committee and the Senate to provide that balance.

Today, the Chairman has scheduled these three controversial circuit nominations of a Republican president for a single hearing -- something he never did for the moderate and relatively noncontroversial nominees of a Democratic President just a few years ago. It seems part of a headlong effort to pack the courts. Despite all of the efforts of the Democratic leadership not to repeat the Republican obstructionism and to proceed fairly on President Bush's judicial nominees, the White House and Republicans have continued to play partisan politics on these matters.

I cannot recall a time when three such controversial circuit nominees were listed simultaneously. Jeffrey Sutton's nomination has generated significant controversy and opposition. I have questions about his efforts to challenge and weaken, among other laws, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Violence Against Women Act, and his perceived general antipathy to federal protection for State workers. I am concerned that more than 500 disability rights groups, civil rights groups, and women's groups are opposed to his confirmation because they feel he will act against their interests and not protect their rights. I am concerned about a reputation among observers of the legal community that he is a "leading advocate for the states' rights' revival." This is a nomination that deserves serious scrutiny, and which ought to be considered, as has been the practice in the past decades, as the only circuit court nomination in a hearing. The process imposed by the majority is cheating the American people of the scrutiny these nominees should be accorded.

Unfortunately, we are also being asked to simultaneously consider the nomination of Deborah Cook. Justice Cook, one of the most active dissenters on the Ohio Supreme Court, comes to the Committee with a judicial record deserving of some scrutiny. I intend to ask her about some of her opinions and legal analysis in hopes of gaining a better understanding of her judicial philosophy and abilities. This nomination has generated a good deal of controversy and opposition as well, both inside and outside of Ohio and the Sixth Circuit.

I note that these two difficult nominations are both to judgeships on the Sixth Circuit Court of Appeals, a court to which President Clinton had a much harder time getting his nominees considered. Republicans fail to acknowledge that most of the vacancies that have plagued the Sixth Circuit arose during the Clinton Administration. During that time Republicans closed the gates and refused to consider any of the three highly qualified and moderate nominees President Clinton sent to the Senate for those vacancies. Not one of the Clinton nominees to those current vacancies on the Sixth Circuit received a hearing by the Judiciary Committee under Republican leadership from 1997 through June 2001. In spite of that recent history, Democrats proceeded to hold hearings, give Committee consideration and confirm two of President Bush's conservative nominees to that court last year. With the confirmations of Judge Julia Smith Gibbons of Tennessee and Professor John Marshall Rogers of Kentucky, Democrats confirmed the only two new judges to the Sixth Circuit in the past five years. Regrettably, despite my best efforts, the White House rejected all suggestions to address the legitimate concerns of Senators in that circuit that qualified, moderate nominees were blocked by Republicans during the previous administration.

The Sixth Circuit vacancies are a prime and unfortunate legacy of the past partisan obstructionist practices under Republican leadership. Vacancies on the Sixth Circuit were perpetuated during the last several years of the Clinton Administration when the Republican majority refused to hold hearings on the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to vacancies in the Sixth Circuit from Michigan and Ohio.

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 2001. Judge White's nomination may have set an unfortunate but unforgettable record. Her nomination was pending without a hearing for more than four years – 51 months, in fact. She was first nominated in January 1997 and was one of the 79 Clinton judicial nominees who did not get a hearing during the Congress in which she was first nominated. Unfortunately, she was also denied a hearing after being renominated a number of times including in January 2001.

Under Republican control, the Committee averaged hearings on only about eight Courts of Appeals nominees a year and, in 2000, held only five hearings on Courts of Appeals nominees all year. Today, by contrast, the Committee is seeking to hold hearings on three Courts or Appeals nominees in one sitting.

Likewise, Kathleen McCree Lewis, a distinguished African American lawyer from a prestigious Michigan law firm was also never accorded a hearing on her 1999 nomination to the Sixth Circuit. That nomination was withdrawn by President Bush in March 2001 without ever having been considered by this Committee.

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. While Professor Markus' nomination was pending, his confirmation was supported by individuals of every political stripe, including 14

past presidents of the Ohio State Bar Association and more than 80 Ohio law school deans and professors.

Others who supported Professor Markus include prominent Ohio Republicans, including Ohio Supreme Court Chief Justice Thomas Moyer, Ohio Supreme Court Justice Evelyn Stratton, Congresswoman Deborah Pryce, and Congressman David Hobson, the National District Attorneys Association, and virtually every major newspaper in the State.

In testimony at a hearing in May 2001, Professor Markus summarized his experience as a federal judicial nominee, demonstrating how the "history regarding the current vacancy backlog is being obscured by some." Here are some of the things he said:

"On February 9, 2000, I was the President's first judicial nominee in that calendar year. And then the waiting began. . . .

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. . . . 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[.] 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. . . .

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."

As Professor Markus identified, some on the other side of the aisle held these seats open for years for a Republican President to fill instead of proceeding fairly on the consensus nominees pending before the Senate. They 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 so many vacancies on the Sixth Circuit.

Had Republicans not blocked President Clinton's nominees to the Sixth Circuit, if the three Democratic nominees had been confirmed and President Bush appointed the judges to the other vacancies on the Sixth Circuit, that court would be almost evenly balanced between judges appointed by Republican and Democratic Presidents. That is what Republican obstruction was designed to prevent -- balance. The same is true of a number of other circuits, with Republicans benefiting from their obstructionist practices of the preceding six and a half years. This,

combined with President Bush's refusal to consult with Democratic Senators about these matters, is particularly troubling.

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 President Clinton's distinguished and moderate Sixth Circuit nominees hearings. Those requests, made 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.

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.”

However, no Sixth Circuit hearings were held in the last three full years of the Clinton Administration (almost his entire second presidential term), despite these pleas. Not one. The situation was exacerbated further as two additional vacancies arose.

When I scheduled the April 2001 hearing on the nomination of Judge Gibbons to the Sixth Circuit, it was the first hearing on a Sixth Circuit nomination in almost five years, even though three outstanding, fair-minded individuals were nominated to the Sixth Circuit by President Clinton and pending before the Committee for anywhere from one year to over four years. Judge Gibbons was confirmed by the Senate on July 29, 2002, by a vote of 95 to 0. We did not stop there, but proceeded to hold a hearing on a second Sixth Circuit nominee, Professor Rogers, just a few short months later in June. He, too, was confirmed last year.

Another important court to which President Clinton was denied confirmations for his nominees for years is the District of Columbia Circuit, the court to which another of today's nominees, John Roberts, is nominated. This appellate court is also known as the Nation's circuit court because it plays a uniquely significant role evaluating certain decisions of federal agencies, such as the Environmental Protection Agency (EPA) that protects our environment, the Occupational Safety and Health Administration (OSHA), and the National Labor Relations Board (NLRB), among others.

Last year I kept my commitment to hold a hearing on Miguel Estrada, another controversial nominee to a vacancy on the D.C. Circuit. I had hoped that the White House would see fit to work with us to ensure balance on that important court rather than insist on its initial court-packing scheme. Again, in the last four years of the Clinton Administration, Republicans obstructed Senate action on any of the highly-qualified nominees to vacancies on that court in order to preserve them for a Republican President.

Allen Snyder was a law partner of Mr. Roberts and a former clerk to Chief Justice Rehnquist. While he was allowed a hearing in May 2000, any hopes he might have had for Committee consideration or a Senate vote were obstructed and he was never accorded a Committee vote. Republicans refused to give Professor Elena Kagan, another D.C. Circuit nominee, a hearing during the 18 months her nomination was pending. Republicans refused to consider any and all nominees to the D.C. Circuit since 1997.

Today's nominee to the D.C. Circuit, John Roberts, worked in the Reagan Justice Department and in the Reagan White House and was an associate of former Solicitor General Kenneth Starr. It is apparent that Republicans feel some confidence that he will help accomplish their court-packing scheme to control the D.C. Circuit.

When the results of rushing can be the rolling back of hard-won rights of workers, women, consumers and minorities, and when the positions being filled are for a lifetime and cannot be undone at the polls, the American people expect us to act carefully, and better to err on the side of caution than to give the public's interest short shrift.

To proceed as they have chosen, Republicans are rewriting the rules or simply breaking them. This is the first judicial nominations hearing I have ever seen where the Committee has not even taken the step of formally consulting home-state Senators. As far as we have been informed, no "blue slips" have been received on these particular nominations. Indeed, we understand that they have not even been sent out by the Committee. Today's majority, when they were yesterday's majority, respected objections from Republican Senators to President Clinton's judicial nominees within their States, within their circuits and sometimes clear across the country. Their ability to pivot on a dime on these matters is breathtaking and unfortunate.

Treating the vetting of appointments to some of the highest courts in the land with little more attention and scrutiny than we would pay to appointees for a temporary federal commission on this or that is a disservice to the citizens of these circuits and to all Americans.

The American people can be excused for sensing that there's the *smell* of an inkpad in the air, and that the rubber stamp is already out of the drawer.

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