

in law enforcement matters, that could result in dismissal of charges or other kinds of sanctions.

Senator FEINGOLD. Thank you, Mr. Chertoff.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Craig first. Excuse me. Senator Craig, excuse me. The distinguished Democrat leader is here, and he would like to make a statement, and I would like to give him that time.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR  
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman, and I welcome all of the nominees.

This is the ninth hearing for judicial nominees we have had this year. As of today the Committee will have held hearings for 37 judicial nominees and 10 circuit court nominees. It is interesting that we are in May. I know in 1996, of course it was a different President, we only held six hearings. Those hearings were for five circuit court judges, so it shows how quickly we can act I guess with a different President, not that there be any suggestion of partisanship there, nor is that a question for either one of you. I will put my full statement in the record.

Chairman HATCH. Without objection.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator LEAHY. But I would also note that both Judge Callahan and Mr. Chertoff come to us with the support of their home State Senators, and I have a great deal of respect for them, and I think that that helps a lot. I would urge again, knowing that this will fall on deaf ears on the other end of Pennsylvania Avenue, but I wish the White House would spend more time in looking for nominees where there is such a consensus, because they can move far quicker when that happens.

I wonder, Mr. Chairman, if I could ask Mr. Chertoff a couple questions at this point?

Chairman HATCH. Sure.

Senator LEAHY. Mr. Chertoff, I am not going to ask you questions about the racial profiling. Senator Feingold has. We keep reading reports in the paper about a sequel to the U.S. PATRIOT Act on review by the Executive Branch. In fact, copies have been printed. What is the status of this bill?

Mr. CHERTOFF. Senator, first, it is again a pleasure to appear before you again.

I guess let me answer the question in this way. I'm here today in a capacity which is different than that in which I have appeared previously. I am appearing in my personal capacity. I'm not authorized to speak to when or if something will emerge from the Justice Department as a proposal. So I think that it is not a subject I can address except to make the general observation that at any given point in time a lot of proposals circulate around the Department, and the graveyard of discarded ideas has many bones in it. So I think in due course the Department will produce what it is going to produce, and they will pick the appropriate spokesperson for it.

Senator LEAHY. Let me ask you this. We do have the sworn testimony of the Attorney General that there is no such proposal, and we have your testimony that you cannot answer whether there is or not, and that is fair. I accept that, just as I assume even though it is printed in the press at great length, that the Attorney General, in his testimony before this, has been telling the truth, that there is no such proposal anywhere in the Justice Department because he would certainly not mislead us, I am sure.

In February there was a 2-year Freedom of Information court battle that ended. The Syracuse University's transactional records access clearinghouse released data of Federal prosecutions of terrorism cases, showed that while the number of prosecutions have increased, half those prosecutions were initiated by INS and Social Security Administration for minor offenses resulting in medium terms of one to 2 months. It also found that terrorism related prosecutions count for about 1.3 percent of all Federal criminal cases in 2002, the first full year after September 11th. And it says that, it raises the question of whether resources are being tied up on minor cases that have nothing to do with terrorism. Now, this report was based on Department data, brought under FOIA. So I ask you this question because this does relate to what you have been doing. What do you think about that report?

Mr. CHERTOFF. Well, I have seen—

Senator LEAHY. Are there too many minor things that are being listed sort of as terrorism to make us look like we are doing good things, but not? And I remember the days of J. Edgar Hoover, where he was desperate to have his FBI agents out to be involved in minor stolen car cases. I remember when I was a prosecutor, if the sheriff recovered a stolen car, within two minutes there would be an FBI agent there saying, "We will take over this case now," no matter what condition, the car is listed as full value. This had been recovered for the taxpayers and Mr. Hoover would then use those statistics. Are we doing something similar now?

Mr. CHERTOFF. I don't think so, Senator. I've read reports about that study. Obviously, of course, the cases we have brought under the Material Aid to Terrorism Statute, where people have been charged or pled guilty were matters of public record, and there have not been an enormous number of those. There is a second category of cases where we may investigate people who we have some basis to believe are involved with terrorism or may have aided and abetted terrorists, or may be connected to terrorists, but at the end of the day the charge that is available is a charge involving what would seem to be a lesser offense.

In addition, part of our program, based on analyzing what happened prior to 9/11 is to recognize that many offenses which we previously treated as really low priority actually are important to prosecute in order to prevent the kinds of networks in illegal trafficking, in documents and licenses that terrorists are capable of exploiting as they did in 9/11. That's not to say that everybody who traffics in these items is a terrorist or wants to help terrorists, but the availability, ready availability, for example, of phony ID or phony driver's licenses, is a circumstance that terrorists can exploit, and so our use of antiterrorism resources to pursue those

cases and dry up those networks actually has I think a real disruptive effect.

The final observation I would make about all of these kinds of statistical studies is it's very hard, as you know from your own experience as a prosecutor, to break a complicated case down into a statistical analysis. Sometimes a case may begin as a terrorist case, for example, and it may wash out. Sometimes a terrorist may ultimately be prosecuted under a statute that is not listed as a quote, "terrorist statute." For example, we might prosecute a terrorist ultimately under a narcotics statute. We've indicted, for example, I think individuals from the FARC, the Colombian left-wing terrorist group, for narcotics trafficking. We could consider that a terrorist case because that organization has been identified as a foreign terrorist organization, but the charge itself is not a terrorist charge, it's a narcotics charge.

so I guess I would say that these kinds of statistical studies, while sometimes provocative, I think are a one or two-dimensional way of looking at the three-dimensional analysis.

Senator LEAHY. As aside to this, insofar as FARC is now apparently acquiring shoulder-fired missiles, I think I would be very concerned of what is happening with them.

I understand that Syracuse has been blocked now from gathering statistics. Do you agree with that?

Mr. CHERTOFF. I have no—I don't do the FOIA activities. I have no idea what the situation with Syracuse is. I assume they stand like anybody else in terms of their ability to use FOIA to get statistics, so I would be guessing about what's going on.

Senator LEAHY. In an article in the New Jersey Law Journal in 1992, you are quoted as saying, quote, "My experience has led me to respect most people, but I also know there's a minority of people who do not deserve respect because they will not conform to the natural order of things, and I want to lock them up," close quote.

Now, I think back what Senator Thurmond used to say when he used to chair this committee. He would ask judicial nominees if they promised to be courteous if confirmed as a judge. He made it very clear that a lot of people, the only involvement really they have with the Federal Government, direct involvement, is in a Federal courtroom, and he said that is very easy for a judge with all the power and everybody standing and rising, bowing and scraping and so on, they might forget to treat people with respect and patience, something that can be said to all of us, I suppose, but especially those lifetime jobs.

How are you going to instill such public confidence in the Federal Government and our judicial system, that it truly is that it makes no difference whether you are a Republican or a Democrat, coming in there, whether you are white, black, plaintiff, defendant, rich, poor, whatever you might be? How do you instill that? You have been involved in some very partisan things, the Clinton impeachment, things like that. As you know, I voted for you confirmation before. But on this, on this lifetime thing, how are you going to convince us—and that will be my last question—but how do you convince us that when somebody comes into your courtroom, they are not going to see a Judge Chertoff the partisan, or Judge Chertoff

the prosecutor, or defense attorney, but Judge Chertoff, the fair arbitrator of the matters before him?

Mr. CHERTOFF. Senator, when I took the oath in 1990 as United States Attorney for New Jersey, I think the one pledge I made was that in the exercise of my power as United States Attorney, I would treat rich, poor, white, black, Republican, Democrat, all people the same and hold them to one standard, and I think I applied that and I lived up to that pledge.

I've been lucky in that the course of my legal career has given me an opportunity to experience the courts from a number of different perspectives. I have been a prosecutor, but I've also been a defense attorney. I have represented some very powerful people in institutions and I've also represented some people who were not powerful and who were poor. And I've had the benefit of developing a lot of perspectives on the process, so that I think anyone looking at my background can be very confident that I come to the job of a judge, if I'm confirmed, as one who has an appreciation for all sides of what is involved in the legal process, a belief that all sides deserve a fair hearing, and a commitment to making sure that the public face of justice is one that all citizens draw a lot of comfort from.

Senator LEAHY. Well, I would urge you to think about that, because I suspect you will be confirmed, but I would urge you to every so often just stop and think, "Am I doing this?" And I am not saying this for you individually. I say the same thing to Justice Callahan, to Judge Coogler, because there is no place—and Senator Thurmond was absolutely right in asking this question, and I have asked it of just about everybody—there is no place where it is so easy to get out of touch with reality and out of touch with fairness than in the Federal Court system, and no place where it is more important to stay in touch.

Thank you, Mr. Chairman.

Senator KYL. [Presiding] Thank you, Senator Leahy.

If Mr. Chertoff is confirmed then, he can forever be known as "Chertoff the Fair," per you. Is that—

Senator LEAHY. I am saying I am urging him to be.

Senator KYL. We understand.

Senator Sessions?

Senator SESSIONS. Thank you, Senator Kyl.

Judge Coogler, one of the things that are important I think in a judge is being able to manage and make decisions promptly when the time is right to make them, do not let them dawdle, do not leave litigants hanging out there for months. I understand from some of my inquiries that you have worked on that in your court. Would you explain how you work with the caseload that you inherited, how it is doing now, and your philosophy about moving cases in an expeditious manner?

Judge COOGLER. Yes, Senator. When I took the position as circuit judge, and circuit judge, the position I'm in, handle both criminal and civil cases, basically the same type of cases, felony, as the Federal District position would handle. And when I took the job there was approximately 1,100 and some odd cases that had not make it to plea stage yet at that particular court, assigned to me, and I don't know any way how they got there. But in my circuit each

particular judge gets about 60 cases, criminal cases a month, and about 40 to 50 civil cases a month.

When I got there I noticed that I had people who had been waiting for their trials for three and 4 years and had gotten numerous other offenses charged to them when they were waiting. And we simply started managing the cases effectively, bringing the cases up for trial, implementing some rules that were always available and were able to move the cases up for trial. We met with both the prosecution and the defense attorneys to orchestrate and manage dockets that would not conflict with other settings so that we could handle the big dockets. Gave notice to law enforcement so that officers would be available and wouldn't be in training, and wouldn't have those conflicts. And then we moved the cases through in an orderly fashion, being fair to everybody.

Now my average caseload is about 250 cases. I think since this procedure started it's actually gone up a little bit because I'm having to do other things as well, but I keep about 250 criminal cases pending at any one time, down from about 1,000, and civil cases are also about that same level. The criminal cases are moving and that's about an average of three to 4 months from indictment to disposition, which we feel like is a good number and a good point to be at.

Senator SESSIONS. Well, you are going to a court that has one of the Nation's best records of moving criminal cases, the Northern District of Alabama, and I know that the caseload is heavy there. They have one of the highest caseloads in America, so your management skills and work ethic will be important for sure.

With regard to your general philosophy of the law, how would you distinguish between a district judge's personal, political, legal views and how he or she sees the law as it is written?

Judge COOGLER. Well, there is really no position for a personal view in a judge, and that is the same with a circuit trial bench as well as a Federal District bench. The law is the law, and when people are trying to follow the law, they have to be able to read it and understand it. So a judge has to also be able to read and apply the law as it is written. We also follow precedent, other cases which are binding upon us. When we do that and follow the law, rather than attempting to decide what would we like to happen, and then try to interpret the law into what we would want to be the result, if we do that, we are getting into difficulties. We are not doing our job. A judge should simply take the law, apply it fairly to everybody that is properly before the court, and make a decision. That way people can orchestrate their lives and get through life and get through the system, the justice system, feeling like they've been fairly treated. They might not win their case. They might lose their case, but they know that the judge has followed the law, and they won't think that they have been mistreated.

Senator SESSIONS. Well, I think you stated that very, very well, and the reputation you have gained through good hard work, both as a practitioner and as a judge, form a good basis for the American Bar Association to give you their highest rating. I am real proud of you for that. I am confident that you have the determination and skill that is needed to meet the big challenge in the Northern District of Alabama. They have got a great court and a

series of great judges, and I am confident that you will be one of those.

Judge COOGLER. Thank you, sir.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator KYL. Senator Durbin.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR  
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you very much, Mr. Chairman. Let me say at the outset what a refreshing hearing this is. These are three extraordinarily good nominees. Maybe I am tipping my hand on how I might vote, but we have been so often sent nominees that are embroiled in political controversy, questionable pedigrees, controversial statements in their background, questionable qualifications, and it has led to a lot of pain in this Committee. This panel does not represent any of those things. Quite the opposite is true. I want to just salute all three of you for your willingness to stand before this process, because some who have gone before you have had their hands full, but you will not, none of you. I think each of you brings strong bipartisan support to his, as well as strong academic, legal and personal credentials.

And, Judge Coogler, I was wondering, when I looked at your financial statements, why they were so good and done so well, and then I checked out who your CPA is. I believe she is sitting behind you.

Judge COOGLER. Yes, my wife.

Senator DURBIN. I just want to give high marks to you in that regard as well.

If I could ask a few questions, let me start with Mr. Chertoff. In the course of American history when we have been confronted with times of national security crises, we try to respond with all of our skill to protect America and decisions are often made which do not survive history in terms of a positive judgment—Abraham Lincoln, from my State of Illinois, suspending habeas corpus during the Civil War, the Alien and Sedition Acts of World War I, the Japanese internment camps of the Second World War, the McCarthy hearings of the Cold War, some of the efforts by J. Edgar Hoover and the FBI during the Vietnam War. All of these things, as we reflect on them, were evidence of a perhaps over-zealous effort to protect America.

We are still, I think, in the swirl of 9/11. We don't have the historical perspective, but can you step back from your time of service here and point to areas where you think we went too far in terms of trying to protect the security of America, perhaps at the expense of liberties and rights which are so dear to us?

Mr. CHERTOFF. Well, Senator, I agree. I mean, in the wake of 9/11, as in the wake of other crises that the country has faced, it is very difficult sometimes to strike the appropriate balance. And that is, of course, largely because it is only with the benefit of history that we have the hindsight to know how things turn out. And we can never really know whether, if we had done something differently, it would have not made a difference or whether it might have resulted in, in fact, a greater catastrophe.