

Statement of

The Honorable Patrick Leahy

United States Senator

Vermont

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OPENING STATEMENT OF SENATOR PATRICK LEAHY

CHAIRMAN, SENATE JUDICIARY COMMITTEE

OPENING STATEMENT

EXECUTIVE BUSINESS MEETING

JUNE 12, 2008

We held a hearing last week on detainee policy and Senator Feinstein chaired another related hearing earlier this week on interrogation methods. I thank those Members who participated in these forward looking hearings.

I was disappointed last week to see the failure of the Bush administration to provide access to proceedings for the victims of 9/11 in line with the victims rights legislation I joined with Senator Feinstein and Senator Kyl to pass some years ago. I have written to Attorney General Mukasey and Secretary Gates on this matter and will work, as I did on behalf of the Oklahoma City bombing victims, to see that the 9/11 victims and their families are respected and have the greatest possible access to these proceedings.

We held another important hearing yesterday on how Americans' interests are being short-changed by activist court decisions made by the conservative Supreme Court. I was critical of activist justices who have hijacked statutes intended by Congress to protect Americans and misconstrued those laws, then made matters worse by then finding that their cramped version of the Federal law preempted the States and denied access to our state court juries, which have been the backbone of civil justice since being written into the Seventh Amendment to the Constitution.

This morning, I want to commend the Second Circuit and the unanimous panel of judges from that court for their decision reversing the Bush-Cheney administration's position in three cases of women from Guinea who were callously denied asylum even though they had been subjected to female genital

mutilation. In April, I joined with a bipartisan group of Senators led by Senator Cardin in writing to Attorney General Mukasey, urging him to review the matter. I am glad the Second Circuit got it right --, right on the law, right on the facts and right on what U.S. policy is and should be.

Yesterday afternoon, Senator Schumer chaired a hearing on additional judicial nominees to vacancies in New York. This hearing was the culmination of extensive consultation. It was our eighth nominations hearing this year.

Republicans objected to Senator Feinstein completing her hearing on coercive interrogation techniques and the recent Inspector General report on the role of the FBI. It was a good hearing and an important hearing. It was conducted fairly and led to important testimony and helpful analysis. It would have been cut short had not the Majority Leader taken action and extended the lunch recess of the Senate briefly so that we could complete it.

Yesterday the now all too familiar pattern was repeated. The Judiciary Committee was holding a hearing on the impact on real people - on all Americans - of Supreme Court decisions that have stripped protections for American consumers and workers. The hearing began with the Ranking Republican Member noting how important it is that we discuss these issues, and he was right. In recent decisions, the Supreme Court has misconstrued our laws, ignored the intent of Congress, and ultimately prevented state court juries from providing redress for misconduct that has harmed ordinary Americans.

Then an anonymous Republican, without warning, objected to the hearing being completed and prematurely shut it down in the middle of Senator Whitehouse's questions. As Senator Whitehouse properly observed, it was a shame given that the women who had traveled to Washington to testify had already been victimized by insurers, medical device manufacturers and the courts and were then today cut short by an anonymous Senate Republican. Republicans in the Senate earlier this year blocked Senate action on a bill to remedy one of these egregious Supreme Court decisions, that involving Lilly Ledbetter, and now they will not even listen to ordinary Americans who have been hurt.

This week's agenda includes bills to rectify another excess of the law by which anyone associated with what the administration determines to be a "terrorist" group or anyone who has given what is deemed to be material support to a group is barred from entering the country. I have worked long and hard to fix the "material support" prohibition and to make it more targeting and focused to those we should actually be trying to deny access.

The bills before us today have to do with the African National Congress, but they could as easily be others who resisted Sadaam Hussein or the Taliban or even Castro, or individuals forced at the point of a

gun and under extreme duress to be child soldiers or others who have been caught up in the material support bar.

How ridiculous is it that the law as interpreted by this administration could bar Nelson Mandela or other members of the ANC from entering the United States? These bills do not do all that we should, but Senator Kerry's bill and that sent to us from the House take a step in the right direction by exempting the African National Congress, the party that helped end apartheid and now leads our democratic ally South Africa, from the sanctions of the law. Secretary Rice has called this law an embarrassment. Today we can take a step toward fixing it.

We also have the bill I introduced with Senator Grassley to extend the statutes of limitations on crimes that have been committed in the war zones of Iraq and Afghanistan. This is consistent with actions Congress took in World War II and other wars to ensure that those who commit offenses not escape accountability because their actions cannot be investigated and prosecuted during armed combat.

I have also listed the judicial nominations from Michigan on which I chaired a hearing on May 7. We have now received the updated ABA ratings, having received Mr. Murphy's last week. To no one's surprise Judge Helene White is rated well qualified. My efforts to expedite Committee action on this group of nominees were not as successful as I had hoped last month. I trust we will be able to make progress today.

I understand the Supreme Court has handed down a decision recognizing habeas rights of those held at Guantanamo and we'll take a close look at that decision. I've joined with Senator Specter on numerous occasions to try to clarify this fundamental and important matter, but this news account is encouraging. I want to read the decision because the last thing we should ever do is just do away with our basic habeas rights. There is nothing more critical as a right in this country than the right of habeas corpus.

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Statement of Chairman Patrick Leahy

On Judicial Nominations

Executive Business Meeting

June 12, 2008

It is ironic that week after week, as the Senate continues to make progress on filling judicial vacancies, we hear a steady stream of grumbling from Republicans. On Tuesday, we confirmed three more lifetime appointments to Federal courts. None were confirmed by this time in the 1996 session when a Republican majority ran the Senate.

Yesterday, Senator Schumer chaired a hearing for four more nominees for lifetime appointments to Federal district courts, and I thank him for that. Today we consider two of President Bush's nominations to our nation's important Federal circuit courts - Judge Helene White and Raymond Kethledge, both of Michigan, to the Sixth Circuit - as well as Stephen Murphy's nomination to the Eastern District of Michigan. Yet the grumbling continues.

It is perhaps the ultimate irony that here, as we take the extraordinary step of moving two of President Bush's circuit court nominees in June of a presidential election year, we are criticized for, of all things, moving too quickly. The other side of the aisle is up in arms claiming that we are moving the "wrong" Bush nominees. Never mind that these Sixth Circuit nominations break a decade-long impasse and would fill the last two vacancies on that circuit--compared to the four vacancies the Republican majority left by failing to move President Clinton's nominees for three years. When, as chairman, I scheduled a hearing and vote for Judge Julia Smith Gibbons of Tennessee, and then for Judge John Marshall Rogers of Kentucky, we were able to break an impasse on the Sixth Circuit that had extended for five years. Confirmation of Judge White and Mr. Kethledge of Michigan would complete the process by filling the two remaining vacancies on the Sixth Circuit.

Allowing the Committee even to consider these nominations by President Bush stands in sharp contrast to the actions of Senate Republicans who refused to consider any of the highly-qualified nominations to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Those nominees included Judge White, herself; Kathleen McCree Lewis, an accomplished attorney and the daughter of former Solicitor General of the United States and former Sixth Circuit Judge Wade McCree; and Professor Kent Markus of Ohio, who was supported by his home state Senators, both Republicans.

When Republicans discuss the pace at which we are considering judicial nominations, something is always wrong. When I schedule hearings and proceed to consider the nominees of this President - President Bush - for lifetime appointments to the Federal bench, I am criticized for moving too quickly or too slowly. It is like the story of Goldilocks - the porridge is always too hot or too cold. But Goldilocks is a children's story. We should not be playing children's games with something as important as judicial nominations.

I regret to report that when I tried to expedite consideration of the three nominees on the agenda today, I encountered only criticism from the Republican side of the aisle. Sadly, Judge White bore the brunt of the unfair criticism at the hearing. Last month, Senator Brownback publicly apologized for his

actions at the hearing, and I commended him for doing so. Now that the nominees have answered the scores of time-consuming questions Republicans sent to them, and we have the updated ABA ratings so much emphasized by Republicans in connection with these nominations, we can move forward.

At the May 7 hearing for these nominations, we heard a good deal of criticism about our willingness to proceed based on Judge White's earlier ABA rating, although we heard nothing about the fact that Mr. Murphy had been renominated for a different judicial position and needed a new ABA review and rating. Of course, I was endeavoring to expedite our proceedings in light of the discussion between the Majority Leader and Republican leader and in light of what I thought was the Republicans' interest in confirming three additional circuit court nominees by Memorial Day. Judge White's updated ABA rating of "well qualified" vindicates our actions. I hope that after more than a month of questioning and consideration, we will not hear any more talk about a rush to judgment.

Judge White has been now been nominated by Presidents from both parties, by a Democratic President and by a Republican President. She has served as a Michigan state court judge for more than 25 years. In addition, she has been active as a member of the legal community and of community organizations including COTS (Coalition on Temporary Shelter), JVS (Jewish vocational services), and the Metropolitan Detroit Young Women's Christian Association. When the most partisan President in modern history, one responsible for sending us so many divisive judicial nominations, nominates a Clinton judicial nominee, it should send a signal. This nomination should allow us to make further progress in our efforts to remove judicial nominations from partisan politics. She should be a consensus confirmation. I hope that Republican and Democratic Senators will join together to support her nomination and the entire package of Michigan nominations that President Bush has sent to us after consultation with Senators Levin and Stabenow.

Judge Helene White has served on the Michigan Court of Appeals for the past 15 years, having been elected by the people of Michigan in 1992. Before that she served for a dozen years on the Wayne County Circuit Court, the Common Pleas Court for the City of Detroit, and the 36th District Court of Michigan. She is described on the Bush White House website as "an experienced and highly qualified judge, who is known for her intellect, work ethic, and demeanor." I could not agree more.

As of today, Republicans who opposed Judge White's nomination back in 1997, 1998, 1999 and 2000 have yet to explain, justify or even acknowledge their treatment of her. It has been more than 11 years since her initial nomination. As this Committee finally considers her nomination, I will be interested to see if Republican Senators are willing to explain their inaction for the entire last four-year term of President Clinton's second term, while vacancies on the Sixth Circuit rose to four. It will be interesting to see if those who oppose her today will do so on the basis of decisions she rendered and actions she took in those years.

Oddly, Republican attacks on Judge White have focused in part on what they term a lack of experience. Somehow, someone who has been an appellate judge for 15 years - longer than Ray Kethledge has practiced law - and who has served as a judge for well over two decades is now not experienced enough to be a Federal appellate court judge.

Some Senators suggested that her lack of experience with specific Federal issues that never come before even the most experienced state judge was a problem. They ignore the fact that judges always have to learn new areas of the law as new cases come before them, and no one is better prepared to do that than an experienced jurist like Judge White. Indeed, Mr. Kethledge was gracious enough to concede at the hearing that he too lacked experience in the same specific areas of Federal law, and yet his qualifications have not been called into question.

Should we conclude from the Republican attacks that no state court judge can be confirmed to sit on a Federal court? Certainly Jennifer Elrod, a state court judge with far less experience than Judge White, whom we confirmed to the Fifth Circuit earlier this year, was not held to that standard by the Republicans. Indeed, I recall what Senator Cornyn said about her nomination: "I would point out that when it comes to experience, most of us, when we apply for a new job, or a nominee, have rarely done that job before. So the question is not whether you have actually done that job before, it's whether you are likely to do a good job, if confirmed."

Others have pointed to a few cases in which Judge White was reversed. Of course, these were cases in which Judge White joined a unanimous panel of her court, or in one instance, where she agreed with the rest of the court on the law and differed only on the facts. More to the point, they were cases of such limited precedential value that the decisions were not even published. I hope that in a long career spanning thousands of decisions, she will not be judged by a few unremarkable cases. Republicans have certainly asked us not to focus on a small handful of cases even when the cases in question were far more noteworthy.

Republicans have simply not been able to point to anything in Judge White's long and distinguished career that should give us pause. So I hope consideration of her nomination does not turn instead on speeding tickets or some of the other curious topics alluded to in her hearing. If that becomes the standard, I fear we will not have any judges or, for that matter, any Senators qualified to serve. I fail to understand why Republicans seem to be trying so hard to find reasons not to support a nominee selected and supported by President Bush.

Republicans contended, in connection with Judge White's nomination, that the ABA rating was of great importance. I hope then that they will find persuasive the ABA's determination that she is well qualified to serve as a Federal circuit court judge. As I said that I would, I have ensured that we are proceeding in an orderly fashion, that all Senators have had a fair opportunity to question the nominees and that we

have all the materials we need in order fairly to consider these nominations, including the updated ABA ratings for Judge White and the one received just last week for Mr. Murphy.

Our second Sixth Circuit nominee is Raymond M. Kethledge, a young man who has had a promising if brief legal career. I am glad to see that he has performed pro bono legal services, something I have always thought lawyers should do.

The Michigan vacancies on the Sixth Circuit have proven a great challenge. I want to commend Senator Levin and Senator Stabenow for working to end years of impasse. I have urged the President to work with the Michigan Senators and, after seven years, he finally has. We have come a long way since I became Chairman in 2001 when the Sixth Circuit was in turmoil and nominations had been road blocked for years. At that point there were four vacancies on the Sixth Circuit.

Judge White was first nominated by President Clinton to a vacancy on the Sixth Circuit more than 11 years ago, but the Republican-led Senate refused to act on her nomination. She waited in vain for 1,454 days for a hearing, before President Bush withdrew her nomination in March 2001. Hers was one of the scores of qualified judicial nominees pocket filibustered by Republicans. This year, President Bush reconsidered, and renominated her. I hope the Senate will follow his example and confirm Judge White and Mr. Kethledge to the last two vacancies on the Sixth Circuit.

One thing that has been apparent from the outset of the year is that Republicans hope, by ignoring their history of pocket filibustering more than 60 of President Clinton's judicial nominations while they were in the majority of this Chamber, to simply erase their history. The history is clear. With respect to circuit court vacancies, Democrats have reversed course from the days during which the Republican Senate majority more than doubled them. We have lowered the 32 circuit court vacancies that existed when I became Chairman of the Judiciary Committee in the summer of 2001 to 11. Circuit vacancies have not been this low since 1996, when the Republican tactics of slowing judicial confirmations began in earnest. If we can confirm Judge White and Mr. Kethledge, we can reduce circuit court vacancies to single digits for the first time in decades.

I am sure there are some who prefer partisan fights designed to energize a political base during an election year, but I do not. I saw the story in Wednesday's Roll Call that includes the headline "Divided GOP Settles on a Fight Over Judges" with all the discussion by Republican Senators of the politics that fuels their efforts to appeal to "conservative activists" and "ignite base voters" and find an issue that "serves as a rare unifier for Senate Republicans" and their presidential nominee.

The American people do not want judicial nominations rooted in partisan politics. They want federal judges who understand the importance of an independent judiciary. Our independent courts are a

source of America's strength, endurance and stability. Our judicial system has been the envy of the world. The American people expect the Federal courts to be impartial forums where justice is dispensed without favor to the right or the left or to any political party or faction.

The only lifetime appointments in our government, these nominations matter a great deal. The Federal judiciary is the one arm of our government that should never be political or politicized, regardless of who sits in the White House. I will continue in this Congress, and with a new President in the next Congress, to work with Senators from both sides of the aisle to ensure that the Federal judiciary remains independent, and able to provide justice to all Americans, without fear or favor.

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