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Senate

Statement of Senator Dianne Feinstein

"On Changing Practices for Judicial Nominations"

Mrs. FEINSTEIN: Thank you very much, Mr. President.

Mr. President, I have served as a member of the Judiciary Committee since I came to the Senate. I take the job very seriously. I try to do my homework in looking at these judges. I very deeply believe that this election provided no mandate to skew the courts to the right.

I deeply believe that judges should be in the mainstream of American legal thinking, that they should have the temperament and the wisdom and the intellect to represent us well on the highest courts of our land. I would like to talk about how, in my time on the Judiciary Committee, I've seen the rules and procedures of the committee change.

Those changes have not been good. They have served to divide the committee more. They begin with changing the American Bar Association's 50-year tradition of rating the qualifications of potential nominees before the president nominates them to after the president nominates them. There have been changes made in the so-called blue-slip policy so that concerns senators from a nominee's home state no longer are given any consideration. There's been a reinterpretation of a long-standing Committee Rule, Rule 4, prohibiting the majority from prematurely cutting off debate over a nominee in committee. There's been

the elimination of the tradition of holding a hearing on only one controversial nominee for appellate vacancies at one time. There have been changes to committee practices.

Let me first talk about the blue slip policy.

Under the Clinton administration, nominees were often blocked not only by home State Senators but by any single Republican Senator. At the very least throughout the years preceding the Bush administration, a home State Senator's objection to a nominee would effectively stop that nominee from moving forward.

Let me show a copy of a blue slip used during the Clinton administration, starting in January of 1999, and sent to each home State Senator. The document itself specifically states that no proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home State Senators.

That policy was followed without fail and without question. Even before 1999, during the Clinton Presidency, the blue slip said ``unless a reply is received from you within a week from this date, it will be assumed that you have no objection to this nomination."

But still, if there was an objection

from a home State Senator, that nominee simply did not move, did not get a hearing, did not get a vote, did not get confirmed. It was, in fact, a filibuster of one.

Today, there is a new blue slip policy, one in which the objections of one or even both of the home State Senators is no longer dispositive. That is part of the problem. This keeps changing, dependent on who is President. This latest policy puts Democrats on the Committee and in the Senate in a difficult position.

In the past, if a home State Senator objected to a nominee, that nominee did not proceed; there would be no committee vote and no filibuster on the floor. Fifty-five Clinton nominees did not receive a hearing. This well could have been a filibuster of one. A hold is secret; nobody knows who is behind it.

Let me name some of the Clinton nominees who were filibustered by one or two members of the Senate.

- Elena Kagen, nominated to the District of Columbia Circuit by President Clinton on June 17, 1999. The nomination was returned December 15, 2000. She waited 547 days without getting a hearing or a vote in the Judiciary Committee. She is

currently the dean of Harvard Law School.

- Lynette Norton, nominated for the District Court for the Western District of Pennsylvania. She was nominated by President Clinton on April 28, 1998, in the 105th Congress. Her nomination, which was submitted to the 105th and 106th Congresses, was returned both times without a hearing. She waited 961 days without a hearing or a vote in the Judiciary Committee. Again, a successful filibuster by one or two Senators, in secret.
- Barry Goode, nominated for the Ninth Circuit. Goode was nominated by President Clinton on June 24, 1998. After 3 years of inaction, President Bush withdrew his nomination, on March 19, 2001. Mr. Goode waited 998 days without ever getting either a hearing or a vote in the Judiciary Committee. A filibuster of one or two, in secret--no hearing, no opportunity to read a transcript, no opportunity to go back and read writings, speeches, or look into a nominee's background. Just because of one or two Senators, a hearing is denied; the filibuster is complete.
- H. Alston Johnson, nominated for the Fifth Circuit, a Louisiana slot. President Clinton nominated Johnson on April 22, 1999. His nomination was returned December 15, 2000. He waited almost 697 days without getting a hearing or a vote in the Judiciary Committee.

This goes on and on and on.

Now, the nominees before us today had hearings. There was a markup. There was a debate at the mark-up. There was a vote. We did read their background. And based on knowledge, the minority of this body made a decision that we do not wish to proceed to affirm them. We have over 40 votes to do so. This is not the vote of one person in secret preventing a hearing from taking place. Now that is as much a filibuster as this is.

So my point is that much of what has been happening in the Judiciary Committee has been to make it more confrontational.

The blue slips are an excellent case in point. Changing when the American Bar Association conducts its review of nominees is a good point.

I remember during the Clinton administration when the ratings were done earlier and I had to call a nominee and tell him that because he had left the practice of law for a period of time, he was found unqualified by the American Bar Association and the President was not going to move his nomination. So without embarrassment to the individual, that nomination was withdrawn.

Today, you do not get the American Bar Association's qualified or partially qualified or unqualified rating until after the nominee is on the Hill.

Now there are those who do not think the American Bar Association's evaluation is worth anything. There are those on the committee who believe it is. So there is a difference in point of view. But at least have the qualification or nonqualification done early enough so that it can save the individual humiliation and

also play a major role.

Let me talk for a minute about rule IV because I think rule IV again divided our committee in a way that did not have to be. Rule IV has been a Senate tradition. It is a hard and fast rule. It prevents closing off debate on a nominee unless at least one member of the minority agrees to do so. Twice this rule has been reinterpreted, really violated, and votes have been forced on nominees well before debate has ended. The committee's rule in question contains the following language:

The chairman shall entertain a nondebatable motion to bring a matter before the Committee to a vote. If there is objection to bringing the matter to a vote without further debate, a rollcall of the committee shall be taken and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with 10 votes in the affirmative, 1 of which must be cast by the minority.

That enables the minority to delay a matter. It is in the rules of the committee to give it more time. This rule is not being followed.

This is one of the only protections the minority party has in the Judiciary Committee. Without it, there might never be debate at all. A chairman could convene a markup, demand a vote, and the entire process would take 2 minutes. This is not how a deliberative body should function. More importantly, it is contrary to our rules. That is one of the reasons we are where we are today.

This rule was first instituted in 1979 when Senator Kennedy was chairman of the Judiciary Committee. It has been followed to the letter until very recently.

This is a nation of laws. We expect these laws to be obeyed even if they

are just Judiciary Committee rules.

floor.

Let me give another example of how this administration is willing to simply change the playing field if it does not like the result — and that is ignoring traditional State vacancies. Fourth Circuit nominee Claude Allen is one such instance. He is from Virginia. He has been nominated for a position that has traditionally been filled from Maryland. Why? Because President Bush became frustrated that Maryland's two Democratic Senators would not sign off on the nominees he wanted for that position.

So he decided to simply go where he could find more friendly company-- Virginia's two Republican Senators.

This stark determination to simply fill the bench with conservative jurists at all costs is what gives the minority in the Senate pause when considering whether to simply approve every Bush judge who comes our way or make a stand on some. We have chosen to make a stand on some. There are other attempts to ignore the minority. There are little things as well, things that add up over time to give the clear impression that the majority does not care about the needs or the will of the minority. That simply serves to create, increasingly, a bunker mentality among Democrats in today's Senate.

For instance, earlier this session, the Judiciary Committee scheduled a hearing with three very controversial circuit court nominees on a single panel for an appellate court.

The point is, these were all controversial nominees. A controversial nominee's hearing can run 8 hours. If you schedule three, you truncate the hearing for each, and you do not allow the minority to do their due diligence in terms of their homework.

I thank the Chair and I yield the