Withdrawn/Redacted Material
The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Letter] - To: Patrick Leahy - From: Katheryn Conner	1	04/10/2002	P6/b6;
002	Letter	[Letter] - To: Patrick Leahy - From: Jeffrey Pascoe	1	03/11/2002	P6/b6;
003	Report	[Article] [Page 1] - From: Jennifer Braceras	1	N.D.	P6/b6;
004	Report	Ending the Game of Nominations Keep-Away [Page 1]	1	05/09/2002	P6/b6;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Binder - Grassroots Campaign for Judicial Nominations [2]

FRC ID:
9598

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

6th CIRCUIT

NAME	ORGANIZATION	DATE of LETTER
Jeffrey McQuiston	President Elect - Dayton Bar Association	February 14, 2002
James R. Jeffery	Spengler Nathanson	February 21, 2002
James E. Roberts, Esq.	Roth, Blair, Roberts, Strasfeld & Lodge	March 5, 2002
J. Gregory Grisham	Weintraub, Stock & Grisham	March 6, 2002
Jack Morrison, Jr.	Amer Cunningham Co.	March 12, 2002
David Mantz	KY attorney	March 21, 2002
Joseph E. Lambert	Supreme Court of Kentucky	April 3, 2002
Donald L. Crain	Butler County Bar Association	May 10, 2002
William Weigl	Miami County Bar Assocation	May 13, 2002
Peter D. Short	Plassman, Rupp, Hensal & Short	May 23, 2002
Thomas D. Heekin	Taft, Stettinius & Hollister	May 30, 2002
Norman J. Ogilvie	Dagger Johnston Miller Ogilvie & Hampson	June 6, 2002
Ralph F. Dublikar	Baker, Dublikar, Beck, Wiley @ Matthews	June 17, 2002
Shelia Markley Black	Day Ketterer	June 18, 2002

SKELTON, McQUISTON & GOUNARIS

ATTORNEYS AT LAW
FIRST NATIONAL PLAZA
130 WEST SECOND STREET SUITE 450
DAYTON, OHIO 45402

RICHARD S. SKELTON
JEFFREY R. McQUISTON
NICHOLAS G. GOUNARIS

(937) 226-1212
FAX (937) 226-1224

February 14, 2001

Senator Patrick Leahy
U.S. Senate
443 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I am writing to express my concern and alarm at the large numbers of vacancies in the federal judiciary. The very integrity of the American legal system is being compromised as a result. This is not my view alone. As the incoming President of the Dayton Bar Association, I have contact with colleagues throughout the region, and many share my concern.

One year ago there were just over eighty judicial vacancies in the Federal system. Now there are 100. Of those vacancies, the Judicial Conference of the United States classifies 37 of them as "judicial emergencies" due to the lengthy delays and legal compromises that result from the shortage of judges. Clearly the confirmation process is not working.

The nominations are there. President Bush has nominated 66 judges in his first year in office, more than a third again as many as the past three presidents in their first year. The delay is in Congress. The Senate has only got around to voting on 28 of these nominees. The logjam is the Senate Judiciary Committee, which is holding hearings at a glacial pace.

Of the first eleven Bush nominees only three have thus far received hearings - this despite the fact that all eleven received a "well qualified" or "qualified" ABA rating. Even the Washington Post editorialized on this issue, questioning whether there was any reasonable justification for delaying these nominations.

While I understand there are some partisan issues involved, I ask that Congress look beyond the smaller political bickerings and understand the damage the situation is

causing to our American legal system. And while the leadership of the Judiciary Committee may have reservations about the ideology of the nominees, their duty as Senators is to provide a fair and prompt hearing and then a vote. Whether the nominee is confirmed or not, the process needs to be moved forward.

I ask not that Congress compromise its duties or values, but that it carry them out in a timely manner. No one benefits from a legal system hamstrung by absent judges. For the sake of American justice, I urge you to do what you can to address this problem.

Very truly yours,

Jeffrey R. McQuiston
President Elect
Dayton Bar Association

JRM/cvc
cc: Senator Mike DeWine
Senator George Voinovich

SPENGLER NATHANSON P.L.L.

JAMES R. JEFFERY
NORMAN J. RUBINOFF
B. GARY McBRIDE***
DAVID G. WISP*
THEODORE M. BOWEN
GARY D. SICKEMA*
TRUMAN A. GREENWOOD
CHERYL R. WOLFF
LOUISE A. JACKSON
RICHARD R. WOLFF
BYRON S. CHOKA
JAMES C. ANDERSON
SUSAN B. NELSON
LISA B. PIZZA
JOAN C. SZUBERLA
TERESA L. GRIGSBY
MICHAEL W. BRAGG
THOMAS A. LUPICA
TRAVIS W. BRANT**
JAMES P. SILK, JR.

ATTORNEYS AT LAW

MAILING ADDRESS:
P.O. BOX 2027
TOLEDO, OHIO 43603-2027
(419) 241-2201 • FACSIMILE (419) 241-8599

608 MADISON AVENUE, SUITE 1000
TOLEDO, OHIO 43604-1169

www.SpenglerNathanson.com

WRITER'S DIRECT DIAL NUMBER

(419) 252-6226
JJeffery@SpenglerNathanson.com

DOUGLAS A. SPIDEL
ANASTASIA K. HANSON
PATRICIA HAYDEN KURT
JOHN P. HAYWARD*
RANDY L. MEYER

OF COUNSEL
JOEL A. LEVIN‡
JAMES P. SILK, SR.

ANDREW E. ANDERSON
RICHARD A. ENTENMANN
LOUIS J. HATTNER
RALPH SHAGG
JOSEPH S. HEYMAN
(RETIRED 1998)
BENJAMIN B. DURFEE
(1919-2000)
FRANK T. PIZZA
(1925-2000)

*ALSO ADMITTED IN MICHIGAN
**ALSO ADMITTED IN INDIANA
***ALSO ADMITTED IN OREGON

February 21, 2002

Senator Patrick Leahy
United States Senate
4433 Russell Senate Office Bldg.
Washington, DC 20510

Re: The Honorable Deborah Cook
Sixth Circuit Court of Appeals

Dear Senator Leahy:

I am writing to you as a private attorney who served as President both of the Toledo Bar Association and the Ohio State Bar Association regarding the delay faced by Justice Cook in the confirmation hearings necessary to complete her appointment to the Sixth Circuit Court of Appeals. Justice Cook has compiled an outstanding record of service as a Justice of the Ohio Supreme Court and is a person of the highest qualifications for appointment to the Federal bench. There can be no question of her integrity and character and she should have been confirmed before now.

I understand there are almost one hundred such vacancies throughout the country which, apparently, had been mired in a political thicket which exists regarding these matters in the United States Senate. I suppose partisanship has nothing to do with it or everything to do with it. Regardless, it obviously serves the purposes of both political parties to provide a fair and prompt hearing regarding every nominee to the federal judiciary. This should be the case no matter who happens to control the Senate at any given time. I respectfully request that the delay regarding Justice Cook be ended and that the Senate proceed to a hearing regarding her confirmation. It is truly the only honorable and fair course of action to be taken.

Very truly yours,

COPY

James R. Jeffery

JRJ\lcr
cc: Senator George Vionovich
Senator Mike DeWine
Darrin Klinger via Facsimile (614) 222-8499
n:\JRJ\st\LeahyB2a.ltr.wpd

ROTH, BLAIR, ROBERTS, STRASFELD & LODGE

A LEGAL PROFESSIONAL ASSOCIATION

DANIEL B. ROTH
RICHARD B. BLAIR
JAMES E. "TED" ROBERTS
STUART A. STRASFELD
THOMAS J. LODGE
DAVID S. BARBEE
CHRISTOPHER P. LACICH*
SCOTT R. DeBONIS
JOSEPH C. BISHARA**
DAVID M. MOORE
WAYNE P. REID*

*ALSO LICENSED TO PRACTICE IN PA
**ALSO LICENSED TO PRACTICE IN FL

CITY CENTRE ONE
100 FEDERAL PLAZA EAST, SUITE 600
YOUNGSTOWN, OHIO 44503-1893
TELEPHONE (330) 744-5211
FACSIMILE (330) 744-3184

OSCAR A. STEPHENS
1888-1975
BENJAMIN F. ROTH
1894-1978
OF COUNSEL:
HERBERT H. PRIDHAM
RETIRED:
EDWARD ROBERTS
JERRY O. STEPHENS

COLUMBIANA COUNTY OFFICE
11 SOUTH MAIN STREET
COLUMBIANA, OHIO 44408-1306
TELEPHONE (330) 482-0208

March 5, 2002

Senator Patrick Leahy
U.S. Senate
443 Russell Senate Office Building
Washington, D.C. 20510

Re: Judicial Vacancies

Dear Senator Leahy:

Justice delayed is justice denied. By the Senate stalling the confirmation process of judicial appointments made by the President, the Senate effectively is denying justice to litigants throughout the nation.

As President of the Mahoning County Bar Association in Youngstown, Ohio, and as a practicing lawyer, I urge you to reinvigorate the confirmation process so that vacancies may be filled.

Respectfully submitted,

ROTH, BLAIR, ROBERTS, STRASFELD & LODGE

James E. Roberts, Esq.

Cc: Senator Mike DeWine
Senator George Voinovich

JER:mk

WEINTRAUB, STOCK & GRISHAM, P. C.

JEFF WEINTRAUB
JAMES H. STOCK, JR.
J. GREGORY GRISHAM
JAMES FRANCIS BARNA*
KEITH B. THOMAS
KENNETH O. COOPER*
MARY H. BEARD
JULIE Y. McLAUGHLIN**

*Also Licensed in Mississippi
**Also Licensed in Arkansas

ATTORNEYS AT LAW

RENAISSANCE CENTER
1715 AARON BRENNER DRIVE, SUITE 512
MEMPHIS, TENNESSEE 38120
(901) 526-0431
FAX (901) 526-8183
E-mail: office@weintraubstock.com

SAMUEL J. WEINTRAUB
(1917 - 1985)
EARL W. DEHART
(1933 - 1977)

OF COUNSEL
JAY B. ROBINSON
RICHARD D. BENNETT

March 6, 2002

Senator Patrick J. Leahy
United States Senate Committee on the Judiciary
433 Russell Senate Office Bldg
Washington, DC 20510

Dear Senator Leahy:

I am writing to express my concern and alarm at the large number of vacancies in the federal judiciary. The integrity of the American legal system is being compromised as a result.

One year ago there were just over eighty judicial vacancies in the Federal system. Now there are over 100. Of those vacancies, the Judicial Conference of the United States classifies 37 of them as "judicial emergencies" due to the lengthy delays and legal compromises that result from the shortage of judges. Clearly the confirmation process is not working.

President Bush nominated 66 judges in his first year in office, more than a third again as many as the past three presidents in their first year. The Senate has only gotten around to voting on 28 of these nominees. The logjam is the Senate Judiciary Committee, which is holding hearings at a glacial pace.

Of the first eleven Bush nominees, only three have thus far received hearings—this despite the fact that all eleven received a "well qualified" or "qualified" ABA rating. Even the Washington Post editorialized on this issue, questioning whether there was any reasonable justification for delaying these nominations.

While I understand there are partisan issues involved, I ask that the Senate look beyond the smaller political bickerings and understand the damage the situation is causing to our American legal system. And while the leadership of the Judiciary Committee may have reservations about the ideology of some of the President's nominees, their duty as Senators is to provide a fair and prompt hearing and then a vote. Whether the nominee is confirmed or not, the process needs to be moved forward. The Senate Judiciary Committee's failure to take action on the President's nominees amounts to abdication of the Senate's responsibility to all Americans.

I ask not that the Senate compromise its duties or values, I ask only that they carry out their responsibilities in a timely manner. No one benefits from a legal system hamstrung by absent judges, since "justice delayed is justice denied," I urge you to do what you can to address this problem.

Sincerely,

By: .....
J. Gregory Grisham

JGG:jl

AMER CUNNINGHAM CO., L.P.A.
ATTORNEYS AND COUNSELLORS AT LAW
SIXTH FLOOR, KEY BUILDING
159 SOUTH MAIN STREET
AKRON, OHIO 44308-1322

JACK MORRISON, JR.
330/996-0209
E-Mail: Morrison@AmerLaw.com

NBTA Board Certified
Civil Trial Lawyer

TELEPHONE 330/762-2411
TELECOPIER 330/762-9918

ERNEST L. CUNNINGHAM
(1897-1971)

BERNARD J. AMER
(1888-1985)

JOSEPH F. COOK, SR.
(1926-1998)

March 12, 2002

Senator George Voinovich
U.S. Senate
317 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Voinovich:

I very much enjoyed speaking with you and your wife this past Wednesday, March 6, 2002, at the Ohio Birthday Party in Washington, D.C. It was a great gathering of leaders from Ohio supporting common goals.

My purpose in sending you this letter is to remind you of the pending nominations for Judge John Adams to the United States District Court and Justice Deborah Cook to the Sixth Circuit Court of Appeals. As a practicing lawyer, as well as the immediate Past President of the Akron Bar Association and the Chair of the Akron Bar Association's Civil Justice Commission, I am quite familiar with the problems associated with overcrowded dockets and/or the unavailability of judges to hear cases and render decisions. It reminds me of the old cliché, "Justice delayed is Justice denied".

I certainly am not critical of your efforts as I know you have been a champion for the people of Ohio. I am asking that you do whatever is within your power to move the nominating process forward. I do understand the "politics" associated with the process and the fact the process can be rather lengthy. I am only hopeful that through your efforts and the efforts of others that this process can be accelerated so the vacancies currently existing can be filled and justice will not be delayed.

With regard to both Judge Adams and Justice Cook, I can tell you I have known both of them for many, many years and they are indeed worthy of their nomination to their respective positions.

I want to thank you for all of the support you have given to the Summit County community and to the State of Ohio and would only ask that you continue your strong leadership and press forward the nominating process.

If you have any questions or need additional information from me, please feel free to call.

Very truly yours,

Jack Morrison, Jr.
JMJ:dei
p:\4500\4514\4514 ltr to voinovich re admins.doc

P O Box 255
Hebron, KY 41048
(859) 655-9068

March 21, 2002

Honorable Patrick Leahy
United States Senate
443 Russell Senate Office Building
Washington, DC 20510

Dear Senator:

I am concerned over the vacancies within the bench of the 6th Circuit Court of Appeals which impacts me primarily in Northern and Eastern Kentucky. Denying federal representation through inaction through the judicial process to a region of the nation which is predominantly poor and disadvantaged to me seems unconscionable and denies us justice.

You stated in 2000 publicly that you had full intentions to demonstrate your leadership to usher along your duties to open the way to fill nominations which if left unfilled as they are today "disadvantage Americans" as reported:

"Senate Judiciary Committee Chairman Patrick Leahy, D-Vermont, urged the Senate to **"redouble (its) efforts to work with the president to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility."**

Please anti up on your leadership responsibilities and help all of us who live in a region who lack federal judicial leadership on the bench and ensure that confirmation processes flow as good justice should to areas where Americans are disadvantaged most like Eastern Kentucky.

Sincerely,

David Mantz

SUPREME COURT OF KENTUCKY
CHAMBERS, STATE CAPITOL, FRANKFORT 40601

JOSEPH E. LAMBERT
CHIEF JUSTICE

(502) 564-4162

April 3, 2002

Honorable Patrick Leahy
Chair, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

I am writing to encourage the Senate Judiciary Committee to act promptly to confirm nominees to judicial vacancies in the Federal Court system. The existence of more than 100 vacancies is at the point of compromising the American judicial system, particularly at the appellate level

I am always concerned by circumstances and events that may diminish public trust and confidence in the judiciary. The persistence of judicial vacancies will inevitably cause American citizens to question the reliability of our court system.

It is impossible for the American system of justice to function without judges, and the longer vacancies are unfilled, the greater the backlog that will be created. This is a critical situation over which the Senate Judiciary Committee has control. I would ask you and your colleagues, without compromising your duties or values, to bring these nominees to the Senate for vote as promptly as possible.

Respectfully,

Joseph E. Lambert

JEL:dsr

cc: Senator Mitch McConnell
Senator Jim Bunning

BUTLER COUNTY BAR ASSOCIATION Incorporated 1889

Donald L. Crain
President
Gerald L. Pater
1st Vice President
Bennett A. Manning
2nd Vice President
Cassandra E. Kiesey
Secretary/Treasurer
Lawrence P. Fiehrer
Immediate Past President

Barbara M. Infantino
Trustee
William C. Keck
Trustee
Stephen C. Lane
Trustee
Kathleen D. Romans
Trustee
Elizabeth A. Yauch
Trustee

118 S. Second Street
Hamilton, Ohio 45011
www.butlercountybar.org

Telephone - (513) 896-6671
Toll Free - 1-800-543-0846
Fax - (513) 868-7022
E-mail: bcbarassn@aol.com

Mary Lou Kusel
Executive Director

May 10, 2002

Senator Patrick Leahy
United States Senate
443 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

As a practicing attorney and an active member of the Bar Association, I am writing to voice my concern over the large numbers of vacancies in the federal judiciary. As an Ohioan, I am specifically urging the Senate Judiciary Committee to move forward with confirmation hearings for nominees in the Sixth Circuit Court of Appeals.

As of today, 8 of the 16 seats on the Sixth Circuit Court of Appeals are vacant. The lengthy delays in the conformation process have created a heavy burden on the other judges in this Circuit and long delays in the justice system.

It is my understanding that there have been many qualified individuals nominated to fill these vacancies. While the leadership of the Judiciary Committee may have reservations about the ideology of the nominees, their duty as Senators is to provide a fair and prompt hearing and then a vote. Whether the nominee is confirmed or not, the process needs to move forward.

I appreciate your time and urge you to avoid further delay.

Sincerely,

Donald L. Crain

DLC:bls
bcc: Mr. Chris Baldwin
106946.1

WILLIAM WEIGL
REGISTERED PATENT ATTORNEY

May 13, 2002

Senator Patrick Leahy
433 Russell Senate Office Bldg.,
Washington, DC 20510

Subject: Federal Judiciary

Speaking for myself as the President of the 130-member Miami County Bar Association (Ohio), as a 46-year patent practitioner in the federal court system and as a court-appointed mediator for the past nine years in the Common Pleas Courts of two Ohio counties, I feel I can speak with a fair measure of knowledge about the federal and state courts of this country.

I must say that I view with some dismay the Judiciary Committee of the United States Senate sitting on its hands when it comes to filling much-needed vacancies in federal judgeships. Litigants and the general public are being held hostage by politicians of both parties in their power plays for political advantage. I have witnessed first-hand numerous situations where a member of Congress held hostage a political appointment, release of funds or withheld a vote on a matter until he achieved a vote or favor for his own personal aggrandizement. Frankly, I find that repugnant regardless of the political persuasion of the hostage taker. It appears that the "public be damned" might well be their motto. I'm not alone in this view. It is a frequent topic of conversation at the luncheon tables of our monthly bar meetings.

Please, please, fulfill the objectives of those that elected you and get on with the business of enabling the full Senate to vote on the President's judicial appointees.

Very truly yours,

William Weigl

Copies:

Senator Mike Dewine
Senator George Voinovich

1805 CONWOOD DRIVE • TROY, OHIO 45373 • (937) 339-1180 • FAX (937) 339-6531

p.4

LAW OFFICES OF
PLASSMAN, RUPP, HENSAL & SHORT
302 NORTH DEFIANCE STREET
P.O. BOX 178
ARCHBOLD, OHIO 43502-0178
TELEPHONE 419-445-8815
TELECOPIER 419-445-1080

HAROLD H. PLASSMAN
DAVID P. RUPP, JR.
JAMES HENSAL
PETER D. SHORT
MARK D. HAGANS

OWEN RICE
(1900-78)

E-MAIL prhs@bright.net

May 23, 2002

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Hon. Senator Leahy:

The undersigned is a full time practicing attorney in the Village of Archbold, Ohio. I am also the President of the Fulton County Bar Association of Fulton County, Ohio, as well as the Mayor of the Village of Archbold, Ohio. However this letter is being written in my individual capacity as a practicing attorney at law in the State of Ohio.

It has come to my attention that there is currently a crisis in the federal judiciary due to the high number of federal judgeships that are presently vacant. In particular I am extremely alarmed by the vacancy status of the Sixth Circuit Court of Appeals, where eight of sixteen seats are currently empty. I understand that your committee, over which you are chairman, is the initial screening committee for the appointment of these judges. The problem I perceive is that these Judges are not receiving hearings before your committee to facilitate their being voted on by the full Senate. I can understand that your committee may not necessarily approve all the nominees and send them on for a vote, however, their failure to receive a hearing is quite disturbing.

I would impress upon you the need to expedite the appointment of these judges and at a minimum afford all of President Bush's nominees a hearing before your committee. I feel that most, if not all, of the nominees sent to the Senate by President Bush could receive more than fifty-one votes in the U. S. Senate but they are being denied this opportunity by your committee. The fact that they are even denied a hearing is a 'travesty of justice' and I would urge you to reverse this trend by affording these individuals a hearing before your committee.

Thank you for your consideration in this matter and I trust that my concern for the crisis in the federal judiciary will not go unheeded.

Very truly yours,

PLASSMAN, RUPP, HENSAL, SHORT & HAGANS

Peter D. Short

Peter D. Short

PDS:res
cc: Senator Mike DeWine
Senator George Voinovich

1 of 1

TAFT, STETTINIUS & HOLLISTER LLP

425 WALNUT STREET, SUITE 1800
CINCINNATI, OHIO 45202-3957
513-381-2838
FAX: 513-381-0205
www.taftlaw.com

COLUMBUS, OHIO OFFICE
TWELFTH FLOOR
21 EAST STATE STREET
COLUMBUS, OHIO 43215-4221
614-221-2838
FAX: 614-221-2007

NORTHERN KENTUCKY OFFICE
SUITE 340
1717 DIXIE HIGHWAY
COVINGTON, KENTUCKY 41011-4704
859-331-2838
513-381-2838
FAX: 513-381-6613

CLEVELAND, OHIO OFFICE
3500 BP TOWER
200 PUBLIC SQUARE
CLEVELAND, OHIO 44114-2302
216-241-2838
FAX: 216-241-3707

THOMAS D. HEEKIN
(513) 357-9310
heekin@taftlaw.com

May 30, 2002

Senator Patrick Leahy
U.S. Senate
443 Russell Senate Office Building
Washington, D.C. 20510

Dear Senate Leahy:

In 1998, when there was a need for 50 federal judges, you called it "a judicial vacancy crisis." Now, there are almost double that number of vacancies. In a crisis of this magnitude, the President and the Senate have no alternative but to act promptly and effectively. The President has done his job by nominating Article III judges at a record pace. The Senate, however, has dropped the ball. What is most disheartening is the failure by the Senate even to consider the President's nominations although the crisis which you described in 1998 has worsened appreciably. For example, at last reading, the Judicial Conference of the United States had classified 32 of the current vacancies as "judicial emergencies." The President has nominated 20 individuals to fill a seat designated as a judicial emergency. These individuals have yet to have a hearing.

The twelve regional Circuit Courts of Appeals, the courts of last resort in the vast majority of federal cases, face a particular crisis. Nowhere is this more true than with the Sixth Circuit Court of Appeals which serves Kentucky, Michigan, Ohio and Tennessee, and which is headquartered here in Cincinnati. Our court is operating at only half strength, with eight vacancies on a sixteen judge court. The effect of this shortage is felt by the public, litigants and lawyers in four states. The President has seven nominees pending to the Sixth Circuit, several of which have been waiting a year for a hearing. All nominees, particularly judicial nominees who often are already sitting judges in your fellow branch of government, deserve a hearing. When there is a prompt, fair hearing, that focuses on professional merit, and is not riddled with politics and partisan bickering, candidates and the public can live with the outcome. It is far more difficult to live with the inaction.

I join many others in requesting the Judiciary Committee to get on with the important task of considering the President's nominations. I have great respect for our governmental

institutions and want to see them held in the highest esteem. In the final analysis, however, it is the institutions themselves that can do the most to enhance, or degrade, the regard of their fellow citizens. Please get on with the task at hand and do so in a way that will make all of us proud.

Sincerely,

Thomas D. Heekin

TDH:dao

cc: Senator Mike DeWine
Senator George Voinovich

NORMAN J. OGILVIE, JR.

njogilvie@djmoh.com

DAGGER
JOHNSTON
MILLER
OGILVIE &
HAMPSON LLP
ATTORNEYS AT LAW

144 E. Main Street
P.O. Box 667
Lancaster, Ohio
43130-0667

740/653-8464
Fax 740/653-8522

June 6, 2002

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Senator Leahy:

As a practicing attorney and an active member of the Bar Association, I am writing to voice my concern over the large numbers of vacancies in the federal judiciary. As an Ohioan, I am specifically urging the Senate Judiciary Committee to move forward with confirmation hearings for nominees in the Sixth Circuit Court of Appeals.

As of today 8 of the 16 seats on the Sixth Circuit Court of Appeals are vacant. The lengthy delays in the conformation process have created a heavy burden on the other judges in this Circuit and long delays in the justice system.

It is my understanding that there have been many qualified individuals nominated to fill these vacancies. And while the leadership of the Judiciary Committee may have reservations about the ideology of the nominees, their duty as Senators is to provide a fair and prompt hearing process and then a vote. Whether the nominee is confirmed or not, the process needs to move forward.

I appreciate your time and urge you to avoid further delay.

Sincerely,

Norman J. Ogilvie

NJO/slm

BAKER, DUBLIKAR, BECK, WILEY & MATHEWS

ATTORNEYS AT LAW

400 SOUTH MAIN STREET
NORTH CANTON, OHIO 44720

AREA CODE (330)
TELECOPIER: 499-6423
TELEPHONE: 499-6000

JACK R. BAKER
RALPH F. DUBLIKAR
GREGORY A. BECK
DONALD P. WILEY
JAMES F. MATHEWS
MEL L. LUTE, JR.
DANIEL J. FUNK

JOHN B. LINDAMOOD
JAMES P. HANRATTY
KIMBERLY K. WYSS
DANIEL E. CLEVENGER, II
ANDREA K. ZIARKO

E-mail:dublikar@bakerfirm.com

June 17, 2002

The Honorable Patrick Leahy
U.S. Senate
443 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I am writing to you as Chairman of the Senate Judiciary Committee on the subject of the shortage of federal judges and the pace at which judicial nominations are being handled in the Senate. As current President of the Stark County Bar Association, and as a former law clerk to a federal district judge in the Southern District of Ohio, I am concerned that the federal courts and federal judges are significantly overextended and unable to decide cases and administer justice on a timely and fair basis. We have all heard the old saying, "justice delayed is justice denied."

I have read the statistics concerning the increase in lawsuits being filed in federal district courts and the significant increase in appeals to the circuit courts. I am certain that you are well familiar with these numbers. I am also very much aware, as you are, of the number of judicial vacancies in the courts and the accompanying shortage of federal judges. President Bush has nominated numerous individuals to fill these positions, most of whom have received ratings of "well-qualified" by the American Bar Association. Unfortunately, not only have very few of these nominations been confirmed, but many of these qualified judicial nominees have not even received the courtesy of a hearing or a vote. These facts are simply not in dispute and have been well publicized and documented.

I have had the opportunity to watch you and other Senate leaders interviewed on various T.V. news programs. When questioned about the refusal to hold hearings or to vote on nominations, you and other Senate leaders have not denied the obvious facts, nor have you offered any valid reason for the delay. Unfortunately, your only response to these questions

has been to quote statistics designed to suggest that "the Republicans were worse". It seems to me that such a response is typical of the political climate in Washington. Even though everyone agrees there is a problem that needs a solution, those in Congress choose to spend time pointing fingers and making political accusations rather than addressing and solving the problem. Those in Congress need to know and recognize that everyday Americans expect more than that from our elected leaders.

I would respectfully request that you, as Chairman of the Judiciary Committee, do what needs to be done to hold hearings and permit judicial nominees to be voted on and either confirmed or denied. If a senator has a particular problem with a nominee, he or she can vote accordingly. However, to deny or delay hearings, and to deny or delay votes, not only adversely affects the federal courts but also adversely affects the citizens of this country who seek access to the federal courts. In addition, this only perpetuates what is becoming the consensus of opinion, that Congress is more concerned with politics and retribution than with what is in the best interests of the American people.

In July of 1998, you were quoted as follows:

> Those who delay or prevent the filling of these (judicial) vacancies must understand that they are delaying and preventing the administration of justice.

Your statement was appropriate in 1998, and it is even more appropriate today. I would again request that you remedy this situation, which is within your power to do.

Thank you very much for your attention to this most pressing matter.

Sincerely,

Ralph F. Dublikar

RFD/sjh

cc: Sen. Mike DeWine
Sen. George Voinovich

DAY KETTERER
ATTORNEYS at LAW
Integrity • Commitment • Innovation
Since 1872

Day, Ketterer, Raley, Wright & Rybolt, Ltd.
Millennium Centre • Suite 300
200 Market Avenue North
P.O. Box 24213
Canton, OH 44701-4213

Telephone: (330) 455-0173
Facsimile: (330) 455-2633

Sheila Markley Black
Managing Attorney
(330) 458-2142– Direct Dial
smblack@day-ketterer.com

Post-it™ Fax Note 7671	Date 6-18-02	# of pages ▶ 2
To Darrin Klinger	From Sheila Markley Black	
Co./Dept.	Co.	
Phone #	Phone # 330-458-2142	
Fax # 614-222-8499	Fax #	

18 June 2002

The Honorable Patrick Leahy
United States Senate
443 Russell Senate Building
Washington, D.C. 20510

Dear Senator Leahy:

The large number of vacancies in the federal judiciary continues to concern me as practitioner and as a citizen. I believe that the failure of Congress to move on judicial appointments is slowly but surely eviscerating the third branch of the federal government.

It is my understanding that there are now over 100 judicial vacancies in the federal system. This is up from just over 80 judicial vacancies a year ago. Some of the federal courts are operating at substantially below full manpower because of the failure of the Senate to act on nominations. For example, the Sixth Circuit Court of Appeals, which covers Kentucky, Michigan, Ohio, and Tennessee, is operating at only half strength with eight vacancies on a sixteen-judge court. This high number of vacancies affects the workload of each individual judge and potentially delays justice for individuals and entities in that four-state area.

Something is clearly wrong with the confirmation process. President Bush nominated 66 judges in his first year in office, so that the nominations are there for Congress to act on. However, the Senate has only voted on 28 of the nominees. The logjam is in the Senate Judiciary Committee, which appears to be doing nothing with respect to these nominations, or to be doing it at a rate that would make a snail proud.

While I understand that there are always going to be political issues involved when the Presidency and the Senate are controlled by different political parties, the real question that should be addressed is the damage that this bickering is causing to the American legal system. Even if members of the Senate Judiciary Committee personally disagree with the political and judicial beliefs of a nominee, it is still their responsibility under the Constitution to give nominees a fair and prompt hearing and then a vote.

The system, as it is currently operating, is unfair to sitting judges who are carrying very heavy workloads, to individuals who have been nominated for federal judicial positions as they wait for hearings that never happen, and to the American public, waiting for courts to decide matters that deeply affect them personally and economically. Justice delayed is justice denied. For the sake of our American judicial system, I urge you to do what you can to resolve this problem, by speeding up the process of confirming judges to the federal judiciary.

Very truly yours,

Sheila Markley Black

/jlb

pc: Senator Michael DeWine
Senator George Voinovich

h:\smb\misc\senator leahy ltr re judicial appts.doc

JOHN ROBERTS

NAME	ORGANIZATION	DATE of LETTER
Lester S. Hyman	Swidler Berlin Shereff Friedman	June 6, 2001
Lawrence S. Robbins	Robbins, Russell, Englert, Orseck & Untereiner	June 25, 2001
Michael Lazerwitz	Cleary, Gottlieb, Steen & Hamilton	June 25, 2001
Christopher Wright	Harris, Wiltshire & Grannis	June 25, 2001
Alan Horowitz	Miller & Chevalier	June 25, 2001
Maureen Mahoney	Latham & Watkins	June 25, 2001
Stephen Marzen	Shearman & Sterling	June 25, 2001
Stephen Nightingale	ING	June 25, 2001
William Kelley	Notre Dame Law School	June 25, 2001
Richard Seamon	University of South Carolina School of Law	June 25, 2001
Thomas Hungar	Gibson, Dunn & Crutcher	June 25, 2001
David Shapiro	Harvard University Law School	June 25, 2001
Thomas W. Merrill	Northwestern University Law School	June 25, 2001
John F. Manning	Columbia University School of Law	June 25, 2001
Judith Mintel	State Farm Mutual Automobile Insurance Co.	December 27, 2001
Neal Katyal	Yale Law School, Professor	February 22, 2002

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

LESTER S. HYMAN
SENIOR OF COUNSEL
DIRECT DIAL (202) 424-7509
LSHYMAN@SWIDLAW.COM

6 June 2001

Dear Pat —

Just a brief note to tell you that courts nominee John Roberts is an old friend of mine and one of the finest lawyers in this country. His legal background and experience are impeccable.

Although John and I share differing political views on some subjects I can assure you that, as a judge, he will always respect the law and act in a responsible and measured way — never as a knee-jerk ideologue. I hope you'll find it possible to support John Roberts' nomination. Many thanks —

LSH

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K STREET, N.W., SUITE 411
WASHINGTON, D.C. 20006
PHONE (202) 775-4500
FAX (202) 775-4510

June 25, 2001

The Honorable Patrick Leahy
United States Senator
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Re: Nomination of John G. Roberts, Jr.

Dear Senator Leahy:

We write to support the nomination of John Roberts to the United States Court of Appeals for the District of Columbia Circuit. Each of us served with Mr. Roberts in the Office of the Solicitor General during the time that he was Deputy Solicitor General. Although we are of diverse political parties and persuasions, each of us is firmly convinced that Mr. Roberts would be a truly superb addition to the federal court of appeals.

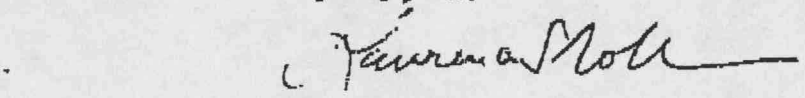
As the Committee will doubtless hear from many quarters, John is an incomparable appellate lawyer. Indeed, it is fair to say that he is one of the foremost appellate lawyers in the country. But we know him best in his capacity as Deputy Solicitor General – and in that capacity, he served his country and the Office of the Solicitor General with great distinction. The Office then, as now, comprised lawyers of every political affiliation – Democrats, Republicans, and Independents. Mr. Roberts was attentive to and respectful of all views, and he represented the United States zealously but fairly. He had the deepest respect for legal principles and legal precedent – instincts that will serve him well as a court of appeals judge.

In recent days, the suggestion has surfaced in press accounts that Mr. Roberts may be expected to vote in particular cases along the lines intimated in briefs he filed while in the Office of the Solicitor General. As lawyers who served in that Office, we emphatically dispute that assumption. Perhaps uniquely in our society, lawyers are called upon to advance legal arguments

for clients with whom they may, in their private capacities, disagree. It is not unusual for an individual lawyer to disagree with a client, while at the same time fulfilling the ethical duty to provide zealous representation within the bounds of law. And government lawyers, including those who serve in the Solicitor General's Office, are no different. They too have clients – federal agencies and officers, with a broad and diverse array of policies and interests. Moreover, the Solicitor General, unlike a private lawyer, does not have the option of declining a representation and telling a federal agency to find another lawyer.

We hope the foregoing is of assistance to the Committee in its consideration of Mr. Roberts's nomination. He is a superbly qualified nominee.

Very truly yours,



Lawrence S. Robbins
Robbins, Russell, Englert, Orseck
& Untereiner LLP*
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006

Michael Lazerwitz
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Christopher Wright
Harris, Wiltshire & Grannis
1200 18th Street, N.W.
Washington, D.C. 20036

Alan Morowitz
Miller & Chevalier
655 15th Street, N.W.
Suite 900
Washington, D.C. 20005-5701

* All references to institutions are for identification purposes only.

Maureen Mahoney
Latham & Watkins
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

Stephen Marzen
Shearman & Sterling
801 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004-2604

Stephen Nightingale
Counsel
ING North America Insurance Corporation
151 Farmington Avenue, TS31
Hartford, CT 06156-8975

William Kelley
Notre Dame Law School
Notre Dame, IN 46556

Richard Seamon
University of South Carolina
School of Law
Main & Greene Streets – Room 301
Columbia, SC 29208

Thomas Hungar
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP

David Shapiro
Harvard University Law School
Cambridge, MA 02138

Thomas W. Merrill
John Paul Stevens Professor of Law
Northwestern University Law School
357 East Chicago Avenue
Chicago, IL 60611

John F. Manning
Columbia University School of Law
435 W. 116th Street
New York, NY 10027

State Farm Mutual Automobile Insurance Company

ONE STATE FARM PLAZA
BLOOMINGTON, ILLINOIS 61710-0001

JUDITH MINTEL
ASSOCIATE GENERAL COUNSEL
(309) 766-2520
FAX: (309) 735-8294

December 27, 2001

Senator Dick Durbin
U. S. Senate
444 N. Capitol Street, NW, #240
Washington, DC 20001

Re: Nomination of John Roberts to Federal Court of Appeals

Dear Senator Durbin:

I am writing to urge you to use your influence in the Senate to hold a hearing on the nomination of John Roberts to the Federal Court of Appeals for the District of Columbia.

I was delighted to hear that John Roberts had been nominated to the Federal bench, oh so many months ago, when it was first announced. John is a lawyer of immense talent and great learning. I think he will make one of the greatest judges of his generation. I expect to see him elevated to the U. S. Supreme Court in the next few years. I am a friend and client of John Roberts. John and I have jointly represented the same client in a number of cases pending before the U. S. Supreme Court and I have found his legal insights and abilities to be awe inspiring. I learned so much from him about how to be a better lawyer.

I am uncertain of why the Senate has not scheduled a hearing on John Roberts' nomination. The editorials in the newspaper indicate that politics may be involved. Whatever is the case, I am urging you to do what you can to help John get a hearing so that he may receive confirmation and begin his important work. If I may be of help in any way to you in this endeavor, please let me know.

Very truly yours,

Judith Mintel

mm

c: Senator Pete Fitzgerald
John Roberts

Sheila
for
Judge file.
re
Roberts

Yale Law School

NEAL KUMAR KATYAL
Visiting Professor of Law

February 22, 2002

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC

Dear Senator Leahy:

I am writing to urge the confirmation of John G. Roberts as a Judge on the United States Court of Appeals for the District of Columbia. I have had the privilege of having some firsthand experience with Mr. Roberts that may shed light on his nomination. I believe him to be the very finest advocate I have ever seen before the Court, and a man of the highest integrity.

I know Mr. Roberts quite well because I worked with him for three months on a daily basis after I graduated from law school. Before accepting employment with his law firm, Hogan & Hartson, I asked Mr. Roberts whether he would be comfortable taking me–a Democratic young lawyer–under his wing. His response: "Not only would I be comfortable with it, I want you here because I want to learn what others who may at times see the world differently than I think." Over the years, I have often come back in my mind to Mr. Roberts' response, as an aspiration for me to strive towards and as an example for my students. It was evident to me when he said it, and clear in the subsequent months, that his statement was sincerely heartfelt. Over those months, I was treated with respect and care as we worked through several extraordinarily complicated legal issues together. Mr. Roberts has always sought out different points of view, and has avoided the trap that most of us at one time or another fall into, of just talking to those with whom we feel most comfortable. These skills, among others, make him, quite simply, the most talented lawyer with whom I have ever worked. He is careful and honest, a beautiful writer and a kind manager to boot.

In the 100 or so Supreme Court arguments I have seen, John has been the best advocate I have ever come across. The reason why is simple: he is remarkably honest with the Court. He does not try to hide the caselaw on the other side of his position, rather, he confronts it directly and with skill. I believe very strongly that he would act no differently as a lower court judge, and that he would approach judicial precedent with the honesty and the care with which it is due. For the above reasons, I would have no hesitation whatsoever in recommending any student of mine – liberal or conservative – to clerk for him. He would quite simply be one of the top handful of judges in the country, not simply in terms of sheer intelligence, but also in terms of disposition.

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4825 · FACSIMILE 203 432-1040
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511 · EMAIL NEAL.KATYAL@YALE.EDU

In short, I believe that John Roberts has the integrity, temperament, and brilliance to be one of the finest judges to have ever served on the United States Court of Appeals for the District of Columbia. I urge you to begin the process of confirming him.

Sincerely,

Neal Katyal

Notes

CHARLES PICKERING

NAME	AFFILIATION	DATE of LETTER
Katheryn W. Conner	VT resident	April 10, 2002
Paul T. Carroccio	VT resident	April 10, 2002
Jeffrey P. Pascoe	VT resident	April 10, 2002
Darcie Johnston	VT resident	April 10, 2002

Katheryn W. Conner

(b)(6)

April 10, 2002

The Honorable Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

I am very disappointed by your recent actions as Chairman of the Judiciary Committee regarding Judge Pickering. Whether you were in favor of his nomination or not, in light of Judge Pickering's long and distinguished career, I strongly believe he should have had a fair vote by the entire United States Senate.

In the past, you have been a strong critic of the way judicial nominees were being considered. Now, with many of our district and circuit courts in a state of judicial crisis, it is only fair to the American people that nominees receive the treatment our Constitution calls for.

I'm sure you are aware that there have been nearly 100 judicial nominees from across the country and your Committee has gotten so little done that more than half of them have not even had a hearing yet.

I'm beginning to wonder if the judicial nominating process is being hijacked or perhaps you are playing politics; either way, the losers are the good citizens of the United States. I hope this is not the case, Mr. Leahy.

Sincerely,

Katheryn W. Conner

April 10, 2002

The Honorable Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

Your recent actions as Chairman of the Judiciary Committee regarding the nomination of Judge Pickering are clearly partisan and not in keeping with good leadership. Depriving Judge Pickering of a full Senate hearing is not in the best interest of the Senate nor the country. Nominations such as these should not be determined by strictly partisan committee voting as it was in this case. I cannot emphasize enough how this action, led by you, is wrong and smacks of "getting even". Judge Pickering should have been able to testify before and then subject to a vote by the entire United States Senate.

If my memory serves me right, in the past you have often and vocally criticized the way judicial nominees were being considered. As Chairman of the Judiciary Committee, it is incumbent on you to help relieve the many district and circuit courts that are in a state of judicial emergency. All nominees deserve the treatment called for in our Constitution. While our own state of Vermont is currently fortunate to have no vacancies in the judiciary, I am sure that you are aware that there have been nearly 100 nominees across the country with your Committee acting on so few that over half of them have not even had a hearing before the Senate.

Play politics when issues are not so crucial, play fair when our judicial process is at stake. As a Vermonter, you know that we are an independent lot and your actions stray too far in the direction of partisan politics. Get a move on Senator Leahy and let the Senate decide who will make a good judge.

Very truly yours,

Paul T. Carroccio
Winhall, Vermont

WASHINGTON, DC 20510-4502

March 11,2002

Dr. Jeffrey P. Pascoe

(b)(6)

Dear Dr. Pascoe:

Thank you for contacting me regarding the nomination of Charles Pickering, Sr. to the

United States Circuit Court of Appeals for the Fifth Circuit.

The Senate Judiciary Committee held a hearing on this nominee on February 7, 2002.

Judicial nominations should not be made to advance any political or ideological goal. That undermines the integrity and independence of our judicial branch of government. Consideration of the fitness of a nominee for a lifetime judicial position should be focused on the nominee's adherence to the law, including constitutional principles and protections.

I consider each nominee carefully. What has been most important to me in voting on judicial nominations is whether the nominee will be a judge who every litigant will feel has been fair and impartial.

Thank you again for contacting me. Please keep in touch.

Sincerely,

PATRICK LEAHY
United States Senator

PJL/esd

VERMC)NT OFFICES COURT HOUSE PLAZA 159 MAJI, STREET RJ RI 001(10 002 ALP 2S21
PE DEPT. 0111 DINO, ROOM 338, MON FEE L,LLI 11112 229 0110
OR DIAL CI FREE 6011664< 3193

SE NA TOP II-Ok, [P ALLY SF NATE

IP 1~ I-II. ,14 REID i [CII n

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

WASHINGTON, DC 20510–4502

March 15, 2002

Ms. Darcy Johnston
139 Main Street
Montpelier, Vermont 05602-2909

Dear Ms. Johnston:

Thank you for contacting me regarding the nomination of Charles Pickering, Sr. to the United States Circuit Court of Appeals for the Fifth Circuit.

The Senate Judiciary Committee held a hearing on this nominee on February 7, 2002.

Judicial nominations should not be made to advance any political or ideological goal. That undermines the integrity and independence of our judicial branch of government. Consideration of the fitness of a nominee for a lifetime judicial position should be focused on the nominee's adherence to the law, including constitutional principles and protections.

I consider each nominee carefully. What has been most important to me in voting on judicial nominations is whether the nominee will be a judge who every litigant will feel has been fair and impartial.

Thank you again for contacting me. Please keep in touch.

Sincerely,

Patrick Leahy

PATRICK LEAHY
United States Senator

PJL/esd

VERMONT OFFICES: COURT HOUSE PLAZA, 199 MAIN STREET, BURLINGTON 802/863-2525
FEDERAL BUILDING, ROOM 338, MONTPELIER 802/229-0569
OR DIAL TOLL FREE 1-800/642-3193
SENATOR_LEAHY@LEAHY.SENATE.GOV
PRINTED ON RECYCLED PAPER

Notes

WISCONSIN

NAME	ORGANIZATION	DATE of LETTER
Jon P. Axelrod	DeWitt Ross & Stevens	August 31, 2002
John Robert Behling	Weld, Riley, Prenn & Ricci	September 3, 2002
Stephen L. Weld	Weld, Riley, Prenn & Ricci	September 3, 2002
George K. Steil, Sr.	Brennan, Steil, Basting & MacDougall	September 9, 2002
Robert M. Berg	Brennan, Steil, Basting & MacDougall	September 9, 2002
Michael E. Grubb	Brennan, Steil, Basting & MacDougall	September 9, 2002
William B. Vogt	Brennan, Steil, Basting & MacDougall	September 9, 2002
Thomas S. Hornig	Brennan, Steil, Basting & MacDougall	September 9, 2002
Duffy T. Dillon	Brennan, Steil, Basting & MacDougall	September 9, 2002
George K. Steil, Jr.	Brennan, Steil, Basting & MacDougall	September 9, 2002
Lynn Galbraith-Wilson	Brennan, Steil, Basting & MacDougall	September 9, 2002
John R. Steil	Brennan, Steil, Basting & MacDougall	September 9, 2002
Marc T. McCrory	Brennan, Steil, Basting & MacDougall	September 9, 2002
Jonathan W. Groessl	Brennan, Steil, Basting & MacDougall	September 9, 2002
Nancy B. Johnson	Brennan, Steil, Basting & MacDougall	September 9, 2002

DEWITT ROSS & STEVENS S.C.
LAW FIRM

Capitol Square Office
Two East Mifflin Street
Suite 600
Madison, WI 53703-2865
Fax 608-252-9243
Tel 608-255-8891

West Office
Firstar Financial Centre
8000 Excelsior Drive, Suite 401
Madison, WI 53717-1914
Fax 608-831-2106
Tel 608-831-2100

Please respond to: Capitol Square Office
Email: jpa@dewittross.com

August 21, 2002

VIA FACSIMILE: 202-224-2725

The Honorable Russell D. Feingold
United States Senator
506 Hart Senate Office Bldg.
Washington, D.C. 20510-4904

RE: Nominations to the United States Court of Appeals

Dear Senator Feingold: Russ:

I am writing to you in your capacity as a member of the Senate Judiciary Committee to request that the Committee act on all pending nominations to the federal courts and particularly to the circuit courts of appeal where 17% of Congressionally-mandated seats are currently vacant.

The recent article in the New York Times Magazine entitled "Obstruction of Judges" makes a compelling case that the confirmation process is in a meltdown and that the public interest is being hurt.

This is not to suggest that unqualified or unsuitable nominees should be routinely confirmed. Instead, the issue is one of process where all nominees should be subjected to critical scrutiny by the Committee after which Senators would vote their consciences to approve or reject the nominee.

I recognize that during the last administration, when a different party controlled the Senate, similar opinions to those which I now express were made.

Thus, I believe that the time has come for a precedent to be set for the future so that all judicial nominees, irrespective of who is President and irrespective as to which party is in control of the Senate, will receive a fair and prompt hearing and a vote as soon as possible after the hearing.

DEWITT
ROSS & STEVENS S.C.
LAW FIRM

Thank you for your time and consideration. It is much appreciated.

Sincerely yours,

DEWITT ROSS & STEVENS S.C.

Jon P. Axelrod

JPA:lmb

cc: The Honorable Russell D. Feingold
United States Senator
1600 Aspen Commons
Middleton, WI 53562-3506 (*via first class mail*)

Weld, Riley, Prenn & Ricci sc

Attorneys At Law

Joel L. Aberg*
John Robert Behling
Christopher R. Bloom
Richard D. Duplessie
Frederick W. (Ted) Fischer
Christine A. Gimbel*
Thomas J. Graham, Jr.
Jeffrey W. Hart**
Donald R. Marjala
Thomas J. Misfeldt
G. Scott Nicastro
Jack A. Postlewaite
Kathryn J. Prenn
Richard J. Ricci
Thomas B. Rusboldt
Victoria L. Seltun*
Cindy S. Semrau
William G. Thiel
James M. Ward
Paul H. Woinke
Stephen L. Weld
William J. Westerlund

Of Counsel:
Geo. Michael Carroll

Stevens L. Riley, 1932-2000

September 3, 2002

Senator Herbert H. Kohl
330 Hart Senate Office Building
Washington, D.C. 20510-4903

Senator Russell D. Feingold
506 Hart Senate Office Building
Washington, D.C. 20510-4903

Dear Senators Kohl and Feingold:

We are writing to urge you as members of the Senate Judiciary Committee to urge your committee to take action on President Bush's judicial nominees.

Judicial circuits in other parts of the country are facing what has been termed a vacancy crisis. For example, half of the seats allocated for the Sixth Circuit Court of Appeals (Kentucky, Michigan, Ohio and Tennessee) are vacant. The result: the Sixth Circuit takes over 40 percent longer than the national average to process a case.

Vacancies such as these present a burden to our courts and to our system of justice. An understaffed court system cannot possibly carry out its responsibilities effectively.

There are a number of vacancies that could soon occur here in Wisconsin. If there is a similar delay in filling those vacancies, the citizens of Wisconsin will surely learn that "justice delayed is justice denied."

The Judiciary Committee should do its job and start helping to fill the many currently vacant judgeships and upcoming vacancies in Wisconsin. We look to your leadership to help ensure that happens.

Respectfully,

John Robert Behling

/db
F:\Docs\AttyUrb\Judicial Ltr.wpd

Weld, Riley,
Prenn & Ricci, S.C.

A Wisconsin Limited
Liability Entity

3624 Oakwood Hills Pkwy.
P.O. Box 1030
Eau Claire, WI 54702-1030
715-839-7786
FAX 715-839-8609
Durand: 715-672-5600
Mondovi: 715-926-5533

www.wrpr.com

*Also licensed to practice in Minnesota
**Certified Public Accountant

Weld, Riley, Prenn & Ricci sc

Attorneys At Law

Joel L. Aberg*
John Robert Behling
Christopher R. Bloom
Richard D. Duplessie
Frederick W. (Ted) Fischer
Christine A. Ginber*
Thomas J. Graham, Jr.
Jeffrey W. Hart**
Donald R. Marjala
Thomas J. Misfeldt
G. Scott Nicastro
Jack A. Postlewaite
Kathryn J. Prenn
Richard J. Ricci
Thomas B. Rusboldt
Victoria L. Seitun*
Cindy S. Semrau
William G. Thiel
James M. Ward
Paul H. Weinke
Stephen L. Weld
William J. Westerlund

Of Counsel:
Greg. Michael Carroll

Stevens L. Riley, 1932-2000

September 3, 2002

Senator Herbert H. Kohl
330 Hart Senate Office Building
Washington, D.C. 20510-4903

Senator Russell D. Feingold
506 Hart Senate Office Building
Washington, D.C. 20510-4903

Dear Senators Kohl and Feingold:

We are writing to urge you as members of the Senate Judiciary Committee to urge your committee to take action on President Bush's judicial nominees.

Judicial circuits in other parts of the country are facing what has been termed a vacancy crisis. For example, half of the seats allocated for the Sixth Circuit Court of Appeals (Kentucky, Michigan, Ohio and Tennessee) are vacant. The result: the Sixth Circuit takes over 40 percent longer than the national average to process a case.

Vacancies such as these present a burden to our courts and to our system of justice. An understaffed court system cannot possibly carry out its responsibilities effectively.

There are a number of vacancies that could soon occur here in Wisconsin. If there is a similar delay in filling those vacancies, the citizens of Wisconsin will surely learn that "justice delayed is justice denied."

The Judiciary Committee should do its job and start helping to fill the many currently vacant judgeships and upcoming vacancies in Wisconsin. We look to your leadership to help ensure that happens.

Respectfully,

Stephen L. Weld

/db
F:\Docs\Atty\Jrb\Judicial Ltr-SW.wpd

Weld, Riley,
Prenn & Ricci, S.C.

A Wisconsin Limited
Liability Entity

3624 Oakwood Hills Pkwy.
P.O. Box 1030
Eau Claire, WI 54702-1030
715-839-7785
FAX 715-839-8609
Durand: 715-672-5600
Mondovi: 715-926-5533

www.wrpr.com

*Also licensed to practice in Minnesota
**Certified Public Accountant

BRENNAN, STEIL, BASTING & MACDOUGALL, S.C.

Attorneys At Law
A Limited Liability Organization

GEORGE K. STEIL, SR.
THOMAS J. BASTING, SR.
DAVID J. MACDOUGALL
THOMAS S. HORNIG
JAMES E. HARTWIG
GEORGE K. STEIL, JR.
JOHN R. STEIL
WILLIAM B. VOGT
MICHAEL E. GRUBB
DENNIS M. WHITE
PETER B. KELLY
MICHAEL R. FITZPATRICK
CLARENCE F. ASMUS
MARC T. McGRORY
BRYAN D. WOODS
MARGERY MEBANE TIBBETTS
JONATHAN W. GROESSL
EDWARD A. CORCORAN
HOWARD GOLDBERG
DAVID B. WILLIAMS
TERRY J. SINMAN-PINCE
DENNIS E. ROBERTSON
NANCY B. JOHNSON
DALE L. THORPE
SCOTT T. CHRISTIAN
BETH EYSTER SHORE
JOHN A. KASSNER
LYNN M. GALBRAITH-WILSON
JOHN T. PAYETTE
KELLY C. NICKEL
JEFFREY R. COOKE
OF COUNSEL:
ROBERT M. BERG
ADMINISTRATOR:
PATRICIA A. CAMERON

ONE EAST MILWAUKEE STREET (53545)
P. O. BOX 1148
JANESVILLE, WISCONSIN 53547-1148
FACSIMILE (608) 756-9000
TELEPHONE (608) 756-4141

JANESVILLE
MADISON
MONROE
DELAVAN

September 9, 2002

COPY

Senator Herbert H. Kohl
330 Hart Senate Office Building
Washington, D. C. 20510-4903

Senator Russell D. Feingold
506 Hart Senate Office Building
Washington, D.C. 20510-4903

Dear Senators Kohl and Feingold:

We are writing to urge you, as members of the Senate Judiciary Committee, to urge your committee to take action on President Bush's judicial nominees.

Judicial circuits in other parts of the country are facing what has been termed a vacancy crisis. For example, half of the seats allocated for the Sixth Circuit Court of Appeals (Kentucky, Michigan, Ohio and Tennessee) are vacant. The result: the Sixth Circuit takes over 40% longer than the national average to process a case.

Vacancies such as these present a burden to our courts and to our system of justice. An understaffed court system cannot possibly carry out its responsibilities effectively.

There are a number of vacancies that could soon occur here in Wisconsin. If there is a similar delay in filling those vacancies, the citizens of Wisconsin will surely learn that "justice delayed is justice denied."

The Judiciary Committee should do its job and start helping to fill the many currently vacant judgeships and upcoming vacancies in Wisconsin. We look to your leadership to help ensure that happens.

Respectfully,

Geo. K. Steil, Sr.

BRENNAN, STEIL,
BASTING &
MACDOUGALL, S.C.
Attorneys At Law

Robert M. Berg

Robert M. Berg

Michael E. Grubb

William B. Vogt

Thomas S. Hornig

Duffy T. Dillon

George K. Steil, Jr.

Lynn Galbraith-Wilson

Lynn Galbraith-Wilson

John R. Steil

Marc T. McCrory

Jonathan W. Groessl

Nancy B. Johnson

mlb
00039247.WPD

DISTRICT NOMINEES

NAME	ORGANIZATION	DATE of LETTER	NOMINEE
Michael W. Gibson	Hawaii State Bar Association	February 27, 2002	Richard Clifton - HI
Charles F. Abernathy	Georgetown University Law Center	March 25, 2002	Paul Cassell - UT

HSBA
Hawaii State Bar Association

February 27, 2002

Honorable Patrick J. Leahy
Chair, Committee on the Judiciary
United States Senate
224 Dirkson Senate Office Building
Washington, D.C. 20510- 6275

Re: Nomination of Frederick W. Rohlfing III to U.S. District Court in Hawaii

Dear Senator Leahy:

The Board of Directors of the Hawaii State Bar Association (HSBA) has found Frederick W. Rohlfing III to be highly qualified for the position of U.S. District Court Judge in Hawaii, and he therefore meets our very highest level of standards for recommendation to the Bench.

As part of the HSBA Board's procedures for taking a position on judicial appointments, the candidate is requested to submit a resume and/or respond to a questionnaire and to appear before the Board, which Mr. Rohlfing has done. The HSBA Board utilizes a modified version of the American Bar Association Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. These Guidelines include the following criteria for judicial positions: integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, financial responsibility, public service, collegiality, and writing ability.

The HSBA Board's rating system includes the categories of "highly qualified," "qualified," or "not qualified."

The qualifications of Mr. Rohlfing for the position of U.S. District Court Judge in Hawaii were reviewed in this manner and the HSBA Board determined that he is highly qualified.

Please contact me if you have any questions about our position on this matter.

Sincerely,

Michael W. Gibson, President
Hawaii State Bar Association

cc: HSBA Board of Directors
Coralie Chun Matayoshi, HSBA Executive Director

OFFICERS
Michael W. Gibson, President
Douglas A. Crosier, President-Elect
Unnel T. Nishioka, Secretary
Jeffrey H.K. Sia, Treasurer

DIRECTORS
Steven J.T. Chow
John P. Gillmor
Paul K. Hamano (East Hawaii)
Hugh R. Jones
David M. Jorgensen (Maui)
Ronette M. Kawakami
Faye M. Koyanagi
Carol Mon Lee
Carol K. Muranaka
Christiane L. Nakea (Kauai)
Wayne D. Parsons
Trudy Burns Stone
Elizabeth A. Strance (West Hawaii)
Suzanne T. Terada
Andrew S. Winer

YLD PRESIDENT
Jodi L. Kimura

HSBA/ABA DELEGATE
James A. Kawachika

EXECUTIVE DIRECTOR
Coralie Chun Matayoshi

GEORGETOWN UNIVERSITY LAW CENTER

Charles F. Abernathy
Professor of Law

March 25, 2002

Senator Patrick Leahy
433 Russell Senate Office Bldg
United States Senate
Washington, DC 20510
via fax (202) 224-9516

Senator Orrin Hatch
104 Hart Office Building
United States Senate
Washington, D.C. 20510
via fax (202) 224-6331

RE: Judicial Nominee Paul Cassell (U.S. District Court, District of Utah)

Dear Senator Leahy and Senator Hatch:

I understand that my colleague in teaching, Professor Paul Cassell of the University of Utah Law School, has been nominated by President George W. Bush to serve as a United States District Judge for the District of Utah. I know Paul very well, and I recommend him enthusiastically. (I write in my personal capacity as a professor of civil rights law at Georgetown University Law Center for the past twenty-seven years. I have previously been privileged to contribute to the work of the Senate Judiciary Committee by consulting with or advising Senators from both parties, including Senator Joseph Biden of Delaware regarding judicial nominations, Senator Orrin Hatch of Utah concerning technical perfections to a civil rights act, and Senator Charles McC. Mathias of Maryland concerning substantive provisions of several proposed bills expanding civil rights. I write this letter at my own initiative after seeing Professor Cassell by chance last week and learning of his then-pending hearing. I am sending a courtesy copy of this letter to my former colleague Professor Viet Dinh, now Assistant Attorney General.)

I have known Paul Cassell for over twelve years. I met him after he married one of my former students, Georgetown University Law Center graduate Patricia Cassell. Because he and I are both interested in constitutional law and civil rights, I have followed his academic work for many years, including his writing concerning the *Miranda* case and other related issues in criminal law. Although Paul's academic work has engendered some political criticism because it challenges a hallmark case from the Warren era, it is wholly and completely within the mainstream of American academic discourse. Paul's arguments have been challenging, well-reasoned, and broadly judicious in their

criticism of the established order. His writings have not been narrowly focused on political considerations but have considered what works best for society and the legal order (such as whether *Miranda* actually protects society's victims), in the best tradition of American legal scholarship. It is true that Paul's work calls for the disestablishment of a court-declared "constitutional right," but the same was true of attacks on *The Dred Scott Case*, which recognized a constitutional right to hold slaves, and *Lochner v. New York*, which recognized a right to be free of government regulation of the employment contracts of workers. I disagree with some positions Paul has taken, including his distrust of the *Miranda* decision itself, but disagreement with the courts' declarations of "rights" is a part of the job of every American law professor, and Paul has handled his part of that discussion with rectitude and complete fidelity to our academic tradition and to the rule of law.

I also respect Paul quite highly because, though he fits within the broad academic mainstream, he has shown independence and has resisted pressure to conform for conformity's sake, especially regarding currently prevailing majority positions that strongly favor the criminal-law decisions of the 1960's. In my view this shows an independent mind that is very desirable in a federal judge, especially one sitting at the district level where conformist local pressure may often make it difficult to rule on contentious subjects. Yet even with his independent thinking, Paul's emphasis in public discussions has also been marked by a desire to bring balance to the public debate, such as by recognizing the interests of victims of crime as well as defendants charged with crimes. The ability to see countervailing values, and to listen to them, is a valuable asset for any judge, especially a federal judge sitting with life tenure. In all my dealings with Paul, airing many difficult issues of public policy, I have never heard him raise his voice or denigrate the personal commitment or integrity of an opponent. His personality and temperament are ideal for a federal district judge.

I have been privileged to attend an academic workshop with Paul and to meet his family and children on several occasions, and even skied with him and his family on one occasion when my family vacationed in Utah. He is a wonderfully kind and generous person, completely unpretentious and unaffected despite his high standing in his community and his nationwide renown in academia. He commands strong respect from his colleagues at the University of Utah and elsewhere. He leads a balanced life that includes much pro bono work for the public interest and other community activities. Far from being an ideologue or a single-issue activist, Paul is a multi-dimensional person with solid American values and an admirable commitment to making life better for all Americans.

Finally, I realize that there has been some criticism of Paul for his critical views on the *Miranda* case, especially his representation of the Fourth Circuit and Congress in a Supreme Court case challenging the *Miranda* rule. But Paul's role in that case showed his usual fidelity to the rule of law, not a challenge to it. In all my years of knowing Paul, I have never seen an indication that he would try to subvert the system to achieve his goals; his work has always been entirely open and direct, using the traditional methods of persuasion and openness that characterize both honest

professors and honest judges. Most pertinently for potential future trial-court judges, I have complete confidence that Paul would never intentionally mis-find facts to protect his rulings from the bench or otherwise manipulate the process to accomplish personal goals. My narrow disagreement with Paul on *Miranda* does not alter one essential point: if my rights were at stake, or the rights of any of my traditional civil-rights clients when I practiced many years ago, I would affirmatively want Paul Cassell to judge the facts and the law of my case. His confirmation and appointment could do nothing but strengthen my trust in the American judiciary.

With much respect and admiration, I remain

Yours truly,

Charles F. Abernathy

CFA/personally prepared
cc Professor Viet Dinh
via fax (202) 514-2424

Notes

PFA worked closely with a number of prominent legal professionals to develop a "war-chest" of opinion editorials for placement in newspapers nationwide. A brief byline of each author follows.

Thomas D. Morgan
Professor, The George Washington University Law School

Stephen B. Presser
Professor, Northwestern University School of Law; Witness before a Senate Judiciary Committee hearing on "judicial ideology."

Charles Fried
Former U.S. Solicitor General; Harvard University Law Professor

Richard W. Painter
Professor of Law, University of Illinois

Todd J. Zywicki
Associate Professor, George Mason University School of Law; Visiting Professor (Spring 2002), Boston College Law School

Sai Prakash
Professor, San Diego University

Ronald A. Cass
Dean and Professor of Law, Boston University School of Law; Author of *"The Rule of Law in America"*

Stephen R. McAllister
Dean and Professor of Law, University of Kansas Law School; Law Clerk to Hon. Byron R. White, Supreme Court of the U.S. 1989-1991

Lillian R. BeVier
Professor and Class of 1963 Research Professor, University of VA Law School; former nominee to US Court of Appeals, 4th Circuit

Ronald D. Rotunda
Professor of Law, University of Illinois College of Law

Jennifer C. Braceras
Fellow in Law at Harvard Law School; Senior Fellow with the Independent Women's Forum

Michael I. Krauss
Professor of Law, George Mason University

John C. Eastman
Professor of Law, Chapman University School of Law; Director, Claremont Institute Center for Constitutional Jurisprudence

Marci Hamilton
Professor and Director of the Intellectual Property Law Program at the Benjamin N. Cardozo School of Law, Yeshiva University

Gail Heriot
Professor of Law, University of San Diego; former counsel to Senate Judiciary Committee

Nelson Lund
Professor, George Mason University School of Law

Raquel A. Rodriguez
Lawyer who practices law in Miami, FL

Trey Grayson
Lawyer who practices law in Cincinnati, OH

Should We Be Wary of Judges Who Attend Educational Seminars?

Professor Thomas D. Morgan
The George Washington University Law School

In the current debates over confirmation of President Bush's nominees to be federal judges, critics sometimes charge that a judge has attended one or more "corporate-sponsored, ideological" seminars at "luxury resorts." The implicit message is that attendance at such programs renders the judge unethical, intellectually corrupted, or both.

The seminars to which critics typically point deal with the interplay between law and economics. Far from being ideological in character, they are university-based programs, taught by prominent professors in a graduate school setting, albeit typically at hotels rather than campuses.

The oldest of these programs, the Economics Institute for Federal Judges began at the University of Miami in 1976, moved to Emory University in 1980 and is now centered at George Mason University. Program lecturers have been a diverse group and have never been limited to faculty of the sponsoring institutions. Early in the program's history, judges learned from such nationally-known economists as Professors Paul Samuelson of M.I.T. and Harold Demsetz of U.C.L.A.. The program now uses similarly-distinguished lecturers such as Professors Charles Goetz of the University of Virginia, Kip Viscusi of Harvard and George Priest of Yale. The Foundation for Research on Economics and the Environment, sponsor of another set of seminars, has used faculty of the Harvard Center for Risk Assessment and its School of Public Health.

Anyone who has attended these programs knows them to be balanced and academically rigorous. Even so, however, some might fear that judges will later reward their corporate hosts with favorable decisions. However, there are simply no corporate hosts to reward. Sponsoring

universities consistently take care to avoid direct use of corporate contributions to finance judicial seminars. Some corporations certainly contribute to the general endowment and programs of the sponsoring universities, as well as universities without such programs, but such universities also receive gifts from persons with a wide variety of political preferences. There is simply no factual basis, then, to the charge that seminars for federal judges are improperly "corporate sponsored."

What seems to bother others about such seminars is a sense that judges are expected to rule in cases only on the basis of what they hear in the courtroom. What judges hear outside the courtroom – whether at an economics seminar for which a university and its donors pay, or in a course for which the judges themselves pay – seems to some to be inherently suspect.

What that argument ignores, however, is the distinction between the particular facts of a given case and general background about how the world works. If we took the courtroom-only approach literally, judges could never go to a movie, watch television news, or attend church. In all those settings, judges hear ideas and arguments that theoretically could one day influence a decision. In short, we could not prevent a judge's contact with the outside world even if we wanted to do so, and the fact is that such contact is essential to any judge's growth in wisdom and understanding.

Seminars for judges, then, are a structured way for judges to get balanced information about important non-legal subjects in a setting unrelated to any particular case. The ideas thus heard can be and are vigorously challenged in a classroom full of other judges, all properly skeptical of what they are told unless their experience confirms its truth. At the end of each seminar, the judge takes home only the insights he or she thinks sound and the public benefits from having the judges' having and taking part in such educational opportunities.

Attendance at judicial seminars is no secret. Each year, each federal judge must disclose his or her attendance and report the financial value of the programs.

Nor is attendance unusual and thus a cause for suspicion. A recent report of the George Mason University Law & Economic Center says that over 600 judges have attended its programs. These include hundreds of federal district judges of all political backgrounds, multiple judges from each United States Court of Appeals and two justices of the United States Supreme Court.

If such programs were unethical, authorities would have condemned attendance long ago. Instead, in 1980 and again in 1998, after thorough investigations, the Committee on Codes of Conduct of the U.S. Judicial Conference have ruled that: "The education of judges in various academic disciplines serves the public interest. * * * Judges are continually exposed to competing views and arguments and are trained to weigh them."

Similarly, Chief Justice Rehnquist recently told the American Law Institute: "The notion that judges should not attend private seminars unless they have been vetted and approved by a government board is a bad idea. It is contrary to the public interest in encouraging an informed and educated judiciary, and contrary to the American belief in unfettered access to ideas."

Persons and groups who want to defeat a judicial nomination often demonstrate little self-restraint in choosing the mud they will throw. They use terms like "corporate-sponsored" and "ideological" to suggest an ethical issue where none exists. A judge's attendance at seminars on economics and other subjects should be viewed as a positive sign of the judge's willingness to broaden his or her understanding and certainly not as a bar to higher judicial office.

Time to Bury Borking

By Stephen B. Presser

For the second time, in a naked exercise of political power that goes right to the edge of abusing the United States Constitution, the 10-person Democratic majority on the Senate Judiciary Committee, in a strict party-line vote, has refused to send a highly-qualified judicial nominee's name on to the floor of the Senate. The majority's failure to allow the Senate a vote on two Bush nominees to the United States Court of Appeals for the Fifth Circuit, U.S. District Court Judge Charles Pickering and Texas Supreme Court Justice Priscilla Owen, was apparently done because these nominees would have been able to win a vote in the full Senate. The Democrats on the Judiciary Committee, lobbied hard by feminist and liberal public interest groups, killed the nominations for fear that these individuals, if confirmed, might weaken Constitutional doctrines allowing abortion upon demand, affirmative action, or the banishment of religion from the public square. The excuse of the Ten was that, in Pickering's case he was insensitive on racial issues (if not a racist), and in Owen's case that she was hostile to abortion rights and pro-business, positions dictated by her personal rather than legal views.

In the case of both these blocked nominations these excuses were totally unwarranted character smears; conduct that now goes by the name of "Borking," as the same thing had been done to then United States Court of Appeals Judge Robert H. Bork when his name had been proposed for the United States Supreme Court. In Judge Bork's case his nomination actually did make it to the Senate floor, but the lies told about his jurisprudence managed to turn a majority of the Senate against him. Fair criticism of a nominee's judicial philosophy certainly ought to be allowed, but the essence of Borking is that fabricated charges of judicial Neanderthalism on the part of judicial conservatives are repeated incessantly and loudly to such an extent that they become almost impossible to rebut. Now that the technique has been perfected with the ability of a majority of liberal Senators able to block hearings by the full Senate, nothing short of the Republicans retaking the Senate will be able to stop the practice.

Pickering was no racist, as testified by the minority members from his home state of Mississippi who knew him best, and Owen was not out of the judicial mainstream, since her view on abortion (parental consent laws are permissible) was also the view of many other federal courts, and the same was true of her allegedly "pro-business" decisions. Democrat opponents of Ms. Owen sought to paint her as some sort of judicial radical, but the truth was that 90% of the time Ms. Owen's opinions coincided with that of the majorities in the cases in which she sat, which is quite a respectable figure. Owen was even given a "highly qualified" rating by the American Bar Association, hardly a bastion of judicial conservatism.

What then, leads the Senate Democrats on the committee to engage in these lamentable misrepresentations? They are lamentable, of course, not only because they are untrue, but also because, by denying full Senate votes, they usurp the role of the full Senate in confirming nominees, and thus fly in the face of the Constitutional requirement that the Senate itself advise and consent with regard to nominees. There is an old lawyers' saw about how if you have a good case you argue from principle, if you have a

case not quite as good you argue from practicalities, and if you have no case at all you seek to ridicule and abuse your opponent. This seems to be what is going on.

The Democrats on the Senate Judiciary Committee, some of whom have recently made much of the "judicial ideology" of the Bush nominees, are, in effect, trying to defend the practice of the Warren and Burger courts of making up Constitutional law out of whole cloth. They like the results of that practice in the areas of race, religion, and abortion, and do not want to see them overturned. The Bush nominees would have followed a jurisprudence which requires that judges not make law, and that they defer to the other branches of government in their assigned roles. They would have been more likely to rule in accordance with the notions of a "color blind constitution," in a manner that permitted law to be grounded in traditional morality, and in a manner that balanced the purported "right to privacy" against the traditional ability of the state and local governments to legislate with regard to domestic matters.

None of this should have been cause for alarm, but one could certainly debate the wisdom of such legal rulings and the traditional jurisprudence which would have resulted in them. This is what should have happened, rather than the character assassination that took place. There ought to be a national debate over the nature of constitutional jurisprudence, and the proper role of the Senate in exercising its constitutional duties. The only positive aspect of the actions of the 10 person Democrat majority on the Senate Judiciary Committee is that this debate is now more likely to take place in the Senate races that are now underway (one of which is in Texas, Ms. Owen's home state). It was the fear of just such a debate's leading to a Republican Senate victory in Texas that led some to urge the Democrats on the Judiciary Committee to let Ms. Owen's nomination reach the floor. Having ignored these pleas, the Committee's current majority will have only themselves to blame if their abuse of power results in a shift of control of the Senate. I, for one, hope that it does. It will be good for the Senate, and for the country, if the noxious practice of Borking is buried.

Stephen B. Presser is the Raoul Berger Professsor of Legal History at Northwestern University's School of law and was recently an invited witness before a subcommittee of the Senate Judiciary Committee holding hearings on "judicial ideology."

The Rule of Law at Risk

By Stephen B. Presser

The Senate Judiciary Committee's recent rejection of Judge Pickering's nomination to the United States Court of Appeals, on a straight party-line vote, and the Committee's refusal to send the nomination on to the floor of the Senate is a gauntlet thrown down in a battle over the rule of law in our republic.

President Bush has made it clear that he favors judges cut from the same mold as Supreme Court Justices Clarence Thomas and Antonin Scalia, the two Justices most closely associated with the philosophy that the Constitution should be interpreted only in accordance with its original understanding. The opposite notion, embraced by the Democrats on the Senate Judiciary Committee, is a very different one. They believe that judges should be picked, or at least denied Senate confirmation, not because of adherence to any particular views with regard to the judicial process, but instead on the basis of their ideological preference for particular outcomes in constitutional cases. In short, the message of the Pickering hearing is that judges nominated for the prestigious federal Courts of Appeals who do not share the judiciary committee's Democratic Committee members' preferences for abortion rights, affirmative action, and complete separation of religion and the state, are unlikely to be confirmed. Some testimony in one of Senator Schumer's hearings on "judicial ideology" held last June did suggest that the Democrats might be prepared to allow some judges to get confirmed who did not share this ideology, but only if an equal number of nominees with the preferred ideology were put forward by the White House.

All of this is an outrageous attempt to transform the nature of Senate Confirmation hearings, as well as an attempt to usurp the President's Constitutional assignment of making appointments to the judiciary. It is certainly a power play on the part of the judiciary committee, to deny a full Senate vote to nominees it does not like. This flies in the face of the Constitutional provision requiring the Senate itself to advise and consent on nominees. More seriously, as happened with Judge Pickering, it invites "Borking," the practice of manufacturing spurious charges of judicial ineptitude, as a cover for naked power politics. Judge Pickering received the highest rating that the ABA bestows on nominees, he had strong support from the minority community in Mississippi as well as bipartisan support from those who knew him best in his state, and he was still smeared as insensitive on racial issues and out of the mainstream with regard to his judging.

Those who care about the rule of law in this country, should be appalled by what is now happening in the Senate Judiciary Committee. It has to be said that this is not the first time the Senate Judiciary Committee, for political reasons, has rejected nominees, nor has it been unheard of for Republicans to seek to frustrate the efforts of Democratic Presidents to stack the bench with those who shared their politics. Still, the naked attempt to make judging a matter of preferred ideology, the thrust now of repeated hearings of the Judiciary Committee and Senator Schumer's subcommittee, is something new. Alexander Hamilton and James Madison, writing in the *Federalist*, made clear that the Senate's role in advising and consenting on judicial nominees was to examine their character and fitness, and ensure that they were not proposed by the

President as a result of family connections or similarly compromised reasons. The *Federalist,* also makes clear that federal judges ought to exhibit impartiality, and reach judicial decisions only in accordance with the original understanding of the Constitution. In short, judges are to interpret law, not to make it. President Bush has announced that is the only acceptable philosophy for his nominees, and he has history and the rule of law on his side. What the majority of the Senate judiciary committee seems now to be engaged in is an effort to compromise that view, to turn judging into an adjunct of politics. This is unprecedented in its audacity, and cannot but eventually erode faith in the impartiality of the judiciary, perhaps our greatest glory as a nation. The President and the friends of the rule of law must summon the courage to call this what it is, and put a stop to it.

Stephen B. Presser is a Professor of Law at Northwestern University, and was a witness before Senator Schumer's subcommittee hearings on Judicial Ideology.

JUDICIAL NOMINATIONS: EVERYONE DOESN'T DO IT

CHARLES FRIED

It is one year now since President Bush made his first eleven nominations to the federal courts of appeals. And to date only three of those nominees have received a hearing and been confirmed. One of those, Judge Roger Gregory, who had received a recess appointment from President Clinton, had been included in the group as a gesture of good will. To say that the President has had his pocket picked would be wrong only because there has been nothing stealthy about the process: it has been open, notorious and shameless. Now it might be said that this is simply the flexing of political muscle, and that everybody does it if they get the chance. Look at Senator Helms's treatment of Bill Weld, who was nominated to be Ambassador to Mexico. That's a fair point, but I would point out that Senator Helms is an unembarrassed rascal, while Senators Daschle and Leahy cloak their maneuvers in protestations that they act only in furtherance of the virtues of fairness and deliberation. As Rochefoucauld has said, hypocrisy is the homage that vice pays to virtue, and at least Jesse Helms is no hypocrite.

It is surely no accident that one of the few Bush nominees to have even had a hearing, Judge Charles Pickering, was also the most vulnerable. Against none of the remaining nominees could the kind of charges—fair or not—brought against Judge Pickering have plausibly been made. The nominees held hostage by the Senate Judiciary Committee are men and women who enjoy wide support in the bar. They are respected and in some cases distinguished jurists. They have bullet-proof reputations. That is why Senator Leahy won't give them a hearing. Take Professor Michael McConnell,

nominated to the Tenth Circuit from Utah. He was a law clerk to Skelly Wright and William Brennan, a law professor at the University of Chicago and now at the University of Utah, who has been invited to join the Harvard Law School faculty. He is a leading scholar on issues of church and state and has argued (and won) several major cases in the Supreme Court. And he is sufficiently independent-minded that he wrote an op-ed piece in the Wall Street Journal criticizing the Supreme Court's decision in Bush v. Gore. His nomination is supported by the likes of such prominent liberal scholars as Cass Sunstein of the University of Chicago and Sandy Levinson of the University of Texas. So why do Senator Leahy and the special interest groups to whom he listens deny Professor McConnell a hearing: because he has expressed doubts about the correctness of the Supreme Court's decision in Roe v. Wade. But then so have such scholars as Paul Freund, Archibald Cox and John Ely—who have been longstanding icons of the Left.

Or take Judge Carolyn Kuhl of the California Superior Court. She is not a teacher or scholar. Rather she is a former practitioner who as a trial judge has won the respect of minority groups and plaintiffs' lawyers for her fair-mindedness and rigorous adherence to the law, which in California is very favorable to both groups. What is her sin? That as a young lawyer she worked in the Reagan Justice Department and accepted the responsibilities that came her way in that capacity. She was also my Deputy when I was Solicitor General, and what I remember her for with the deepest gratitude was her tact and skill in helping me negotiate the ideological cross-currents that gripped us at that time. I can understand why she is so respected by the bar: because she is a smart, good humored, realistic person, who tries to solve problems rather than create them.

And that is just two of the President's nominees to whom Senator Leahy is afraid to give a hearing. Similar tales could be told about the others. What they have in common is that they are what is, in journalistic parlance, called "conservatives." That is, they are not "liberals." Well, when Republican Senators supported such equally fine liberal Clinton nominees—now serving with distinction—as Merrick Garland and David Tatel, the same interest groups pressing to block the Bush nominees and the same journalists who today are silent about the outrageous Leahy power play, did not think this was an act of magnanimity or bi-partisanship. No, this was just their due. And that is the problem. For groups like the Alliance for Justice and People for the American Way, to whom Senator Leahy listens, to be liberal is to be mainstream. To be conservative is to be a wide-eyed ideologue. But that is not where the country is. It is not where the bar is. It is not where the law is. Holding these men and women, who represent the best traditions of the bench and the bar—as do Republican supported, Democrat-nominated candidates like Tatel, Garland, and Justice Stephen Breyer—is an insult to the bar and an injury to the country. It is a misuse of power. At the very least, Senator Leahy, give these people a hearing and let the chips fall where they may! I think you know where they will fall.

Charles Fried is a law professor at Harvard University Law School and former United States Solicitor General.

Confirming Judges Should be About People not Politics
by Richard W. Painter
Professor of Law, University of Illinois

Perhaps someday a scientist will design a computer program that decides cases in the appellate courts. If so, federal circuit judges, now struggling with unfilled vacancies and a crushing backlog of cases, could breeze through their docket by inputting relevant facts into a computer and then entering whatever order the computer directs them to.

The computer program could be agreed upon by judges in each circuit, a daunting task given the wide range of legal philosophies represented on most circuits. Alternatively, the President could propose the program, which would then be "confirmed" by the Senate. Bruising battles and delays that now dominate the confirmation process would then only occur when the President proposed to change the program. We would also be spared the spectacle of character assassination in confirmation hearings – few would accuse a computer program of racial bigotry, sexual harassment, or some other disqualifying flaw.

As superficially appealing as such a computerized judiciary might sound, at least in its efficiency, few of us would want it. Law is about people, not just the legal rules that could be processed by a computer. When law affects people's lives, legal decisions should be made by people we entrust with applying the law. These people should be intelligent, honest, diligent, fair and free of racial bias. These people should be worthy of being called judges.

The Senate Judiciary Committee apparently finds such people very hard to come by these days. Of 11 nominees sent to the Senate by President Bush in his first round of nominees, only 3 have been confirmed. Forty-eight of the President's nominees have not even been scheduled for a hearing. It is always possible for a President to nominate a high number of unworthy persons for judgeships. Such is not the case here, however, as shown by the extraordinarily broad support for the President's nominees among the lawyers, judges and legal academics who know them as people, rather than as pieces on a political chess board.

Another very real possibility is that the Senate Judiciary Committee is playing politics with the President's nominations. If so, the Committee is playing politics not just with the lives of the nominees themselves, but with the lives of litigants (from death row inmates to defrauded investors) whose cases are waiting to be heard. A judicial system that relies on people rather than machines for its implementation, requires that politics – always present when people interact with each other – not prevent qualified people from becoming judges.

A few ground rules for the confirmation process might go a long way toward filling vacancies in the federal courts and preserving the integrity of the Senate Judiciary Committee.

First, there is no excuse for not scheduling a hearing for a nominee right after the nomination is made. Senators who have time to schedule frequent trips to schmooze wealthy donors, and time for dozens of hearings on Enron and other matters that lend themselves to political grandstanding with little or no resulting legislation, also have time to do their job on the Judiciary Committee.

Part of this job is promptly to hold hearings and decide on judicial nominees.

Second, the Judiciary Committee should be wary of unfounded ethics allegations against nominees. Whether it be the ethics allegations of the Boston bar against Louis Brandeis in 1916, or the allegations leveled against Judge Charles Pickering in 2002, the pattern has changed little in the past century: When ideological opponents of a nominee fear they may lack the votes to defeat the nomination, they accuse the nominee of violating ethics rules that do not exist or of conduct that others engage in without criticism. Common practices, whether soliciting support for one's own nomination or accepting campaign contributions from corporations in state judicial elections, become unpardonable sins. Senators then self servingly deliberate over whether the nominee's alleged conduct meets their own high standards of ethics, and then, in a tell tale sign that the ethics allegations are really about politics, vote on the nomination largely along party lines. Whether or not the nominee is confirmed, the attempt to slander a professional reputation tarnishes only the reputation of the Senate and of persons who mischaracterize the nominee's ethics in order to accomplish political objectives of their own.

Third, in deciding whether a nominee's judicial philosophy lies within the wide range of jurisprudential viewpoints acceptable of a judge, Senators should consider the nominee as a whole person, not simply the nominee's views on a few issues. Some issues (such as abortion, the death penalty and gun control) are issues on which intelligent persons of sound judgment can disagree. Disagreeing on these issues with a Senator does not make a person unworthy of being a judge (indeed, on many such issues the voters who elect Senators are themselves closely divided). The important consideration is not what the nominee believes the law should be on these issues, but whether the nominee is willing to faithfully apply the law as it is (whether in the Constitution and acts of Congress or as interpreted by the Supreme Court).

Fourth, compassion in a judge is a virtue not a moral weakness. Compassion on a convicted criminal does not mean that the judge approves of the crime. Granting a stay of execution to a murderer does not make a judge a murderer, and reducing the sentence of a cross burner (as Judge Pickering did when the least culpable of three young vandals was going to get the harshest sentence) does not make the judge a racist. Accusations of this sort have no place in a country where judges, when making decisions that affect the lives of other people, are expected to act like human beings.

Finally, the allegation that President Clinton's nominees were not confirmed by the Senate quickly enough is no excuse for further delay. Of President Clinton's 443 nominees to the lower federal courts, 368 were confirmed by the Senate. His nominees make up 44% of the 862 member federal judiciary. Now it is President Bush's turn to name judges, and it is still the Senate's responsibility to confirm them. President Clinton saw 83% of his nominees confirmed by the Senate. By contrast, during the first Bush Administration, the Senate confirmed only 77% of the President's nominees.

Justice in our legal system requires judges. It is the responsibility of the President to nominate qualified persons for federal judgeships. President Bush has done so. It is now the long overdue responsibility of the Senate to schedule hearings on these nominees, to treat them fairly, to

understand that they may not agree with every Senator on every issue, and not to condemn them for the very human characteristics that we expect of a judge. It is time to fill vacancies on the federal courts that have remained open and compromised justice in this country for too long.

Is there anything to fear from a conservative court?
By Todd J. Zywicki, George Mason University School of Law

The failed nomination of Judge Charles Pickering to the United States Court of Appeals for the Fifth Circuit opens a new era in the debate over the Senate's role in the confirmation of federal judges. Vacancies abound, and the Judiciary Committee's rejection of Pickering reflects a willingness of Senate Democrats to reject a nominee on the basis that the judge holds a conservative philosophy of judging. Although Senate Democrats would have the public believe that there is something menacing about a conservative judicial philosophy, it is evident that America has little to fear—and much to cheer—about a moderately conservative federal judiciary.

The core value of a conservative judicial philosophy is the belief that the purpose of the American Constitution is to empower individuals by expanding individual liberty, empowering communities through decentralization of power, and constrain arbitrary governmental behavior by making use of the accountability mechanisms constructed by the Constitution.

Conservative judges seek to empower individuals to envision and pursue their own particular visions of the "good life," such as through protection of private property and freedom of religion. Protection of property through enforcement of the Takings Clause of the Fifth Amendment of the Constitution and restrictions on arbitrary governmental regulation of property unleashes the power of individual creativity and entrepreneurship by allowing individuals to save, invest, and pursue their dreams of a better life. Private property also provides a cornerstone of a healthy private sphere for human interaction, by placing limits appropriate limits on governmental overreaching. So

too, with the conservative respect for freedom of religion. Millions of Americans who place their faith at the center of their personal and family lives have found themselves marginalized through judicial hostility to religion. Religion should not be subsidized by the government; but it also should not be penalized and marginalized by judges seeking to drive all trace of religious faith from the public square.

A conservative judicial philosophy also seeks to empower individuals by seeking to decentralize power to local communities through the enforcement of the Constitution's plan of federalism. As the Presidential election made abundantly clear, there is a great diversity of opinion across the country on major issues of American life, such as gun ownership, governmental regulation, and a variety of social issues. Voters in Mississippi and voters in San Francisco are likely to disagree on many of these issues. The Framers of the American Constitution recognized that such divisions would be likely to occur in American life and responded by constructing a system of constitutional federalism that contemplates a decentralization of such issues to local governments to resolve such issues, leaving the federal government free to concentrate on matters of truly national importance. Decentralization through constitutional federalism places political power in local communities, thereby empowering individuals, families, and neighborhoods to take an active role in citizenship and keeping political actors accountable to the people.

A conservative judicial philosophy also seeks to use the accountability mechanisms built into the Constitution to constrain arbitrary governmental action. Conservatives clearly contemplate an important role for the government in carrying out its duties. Nonetheless, they share the healthy skepticism of the Founders about the vast coercive power of the government, as well as a profound respect for the accountability

mechanisms the Founders built into the Constitution so as to protect the people from arbitrary governmental action or political overreaching. Thus, conservatives are skeptical of restrictions on political speech, such as so-called campaign finance reform. Incumbents are always prone to confusing their self-interest with the public interest; recognizing this, the Framers placed political speech at the core of the protected speech of the First Amendment. The Framers also sought to protect individual liberty by guarding against a concentration of political power in any single branch of the government through a system of separation of powers and checks and balances. Conservative judges tend to share this appreciation for these constitutional structures and have stood at the forefront of efforts to try to maintain governmental accountability and short-circuiting of these protections in the name of short-term political expediency.

A conservative judicial philosophy, therefore, is one of individual empowerment, decentralization of political power to local communities, and a healthy respect for the mechanisms of governmental accountability built into the Constitution. These are the values embedded in the Constitution and shared by most Americans. We can disagree on where these lines should be drawn in any given case, but it is evident that these values are well within the mainstream of the American constitutional tradition.

Todd Zywicki is an Associate Professor at George Mason University School of Law, and was a visiting professor at Boston College Law School during the Spring of 2002.

Nominee Purgatory

By: Sai Prakash
San Diego University

Pity President Bush's nominees to the nation's court of appeals. When each agreed to be considered by the White House (some by President Clinton's White House), they hardly could have foreseen that more than a year after being nominated, their nominations would still be languishing before a Senate Judiciary Committee that proceeds slower than a snail's pace. Most of the President's early nominees have not even had a committee hearing, let alone a committee vote. Their lives on hold and their families on tenterhooks, many of these nominees must be wondering whether serving as a federal judge could possible be worth the misery of the interminable wait.

Though one might assume that the delay has something to do with their qualifications or some scandal in their pasts, nothing could be further than the truth. The President has nominated judges of unquestioned merit and integrity, each of whom the American Bar Association has rated as well-qualified or qualified. Nor has the White House been responsible for the delays. It has promptly responded to requests for information about the nominees and has made the nominees available for visits with Senators.

The problem lies with the troubling practices of the Senate and the Senate Judiciary Committee. Stalling is now the norm. This time the delays can be laid at the doorsteps of the Democrats on the Judiciary Committee. Similar problems arose for Clinton Administration nominees, when Republican gummed up the works. It seems that the Senate and the members of the Judiciary Committee have a recent tradition of making nominees (and Presidents) cool their heels.

Before the cycle of retaliation and counter-retaliation spirals out of control, the Senate ought to reassert itself and reign in its obstructionist elements. By Senate rule, the Senate should pledge to having a floor vote on every judicial nominee no more than six months after presidential nomination. This commitment to expeditious consideration of nominees would ensure that judicial nominees are not in limbo for years on end as Senators from either party use stalling tactics to delay consideration. As should be obvious, no nominee would be guaranteed confirmation. Rather, the Senate merely would be committing to take a vote on the President's judicial nominees.

Under such a system, the Senate Judiciary Committee would no longer serve as a formal gatekeeper for nominees. Instead, the Senators on the Judiciary Committee would serve as a set of very-informed Senators who could ferret out useful information about nominees and whose opinions undoubtedly would be valued by other Senators. Their influence and power would no longer come from merely sitting on a committee but from their expertise and the resulting deference that others might show. Moreover, individual Senators would no longer be able to block nominees. If an individual Senator exercised such influence it only would be because a

majority of the Senate decided to reject a nomination out of deference to a Senator.

Several objections to this needed reform come to mind. First, some might complain that both the Senate Judiciary Committee and individual Senators would have diminished influence under this scheme. It is true that the Judiciary Committee might well play a more circumscribed role. Likewise, individual Senators who have in the past effectively blackballed nominees also might see their influence curbed. But any diminution in Judiciary Committee influence would occur only if Senators not serving on the Committee choose not to follow a Committee recommendation. Likewise, individual Senators would have less power only if the Senate as a whole chose not to heed their views. The Senate Judiciary Committee is not constitutionally or legally entitled to disproportionate influence over judicial nominations. Nor are individual Senators entitled to extra sway over particular nominations. The Constitution grants the Senate as a whole the authority to consent to nominations. If the Senate correctly concludes that the current system is broken it is constitutionally empowered to fix it.

Some might object that the proposal shifts influence from the Senate Judiciary Committee and individual Senators to an already imperial President. After all, the Senate might confirm more presidential nominees as a result of the suggested reform. However, any increase in Senate confirmations would reflect the views of the Senate. If the Senate concludes that more nominees ought to be confirmed than are presently being confirmed, no one has cause for complaint because the entity constitutionally charged with reviewing nominations would have exercised its authority.

The White House would continue to have every incentive to be as forthcoming and helpful as they are now. If the Administration fails to respond adequately to questions and information requests, it runs the risk that the Senate will reject nominees. Likewise if a witless nominee chose to delay answering Senator's questions or to be less cooperative in confirmation hearings, Senators certainly could take that into account when deciding how to vote. Every party to the process would understand that a guaranteed floor vote for judicial nominations hardly guarantees that any particular nominee will garner the Senate's assent. By ensuring a floor vote, the Senate hardly cedes its constitutional leverage over the process.

To prevent nominees from being held hostage to delaying tactics, the Senate ought to commit to floor consideration for each nominee. Although being nominated for a judgeship is undoubtedly an honor, the Senate must realize that many excellent, highly qualified individuals will not be willing to go through a frustrating process that often seems to have no end in sight. Nominees and their families typically come from comfortable backgrounds and may just decide that given the real chance of a long, vexing, intrusive process, the candle is just not worth it. Then the rest of us would be the worse for it.

Of course, any reform would take time to implement. In the meantime, the Senate should rescue the President's nominees from the senatorial equivalent of purgatory by voting on their nominations. The President has nominated worthy individuals to judgeships created by law and it is time for the Senate to fulfill its constitution function of advise and consent.

Federal Judges and the Rule of Law

By Ronald A. Cass

BOSTON

Here we go again. Another President's nominees to be federal judges are caught in the crossfire. Democrats, still angry over in *Bush v. Gore*, complain that President Bush is stocking the judiciary with conservatives in an effort to re-make the law. Republicans, seeing this as a replay of the confirmation battle over Robert Bork, argue that opponents want to entrench judges committed to (unsupportable) liberal views of the law. And this is just the first set of judicial nominees.

As you watch the political fight, keep two lessons in mind.

First, no matter who is in the White House and who is in Congress – Democrat or Republican, liberal or conservative – there is going to be much more constancy than change in the courts. Who is selected and confirmed to the bench matters, but matters a great deal less than politicians and pundits would have you believe.

Most legal actions – about 1.2 million in federal courts each year – are settled by the parties without a judge's decision. Judges' decisions tend to be predictable and precious few are controversial. Almost 80 percent of the cases decided at the Court of Appeals (the level just below the Supreme Court) are disposed of without published opinion, indicating agreement that these are fairly simple decisions.

The Supreme Court decides only 70-100 cases each year – the most difficult, least readily decided by established law. Even here, at the very tip of the litigation iceberg, the justices tend to agree – typically, two-thirds to three-quarters of the decisions will be unanimous or will have two or fewer justices in dissent.

The fact is that our judges decide the lion's share of cases on the basis of law and generally feel constrained by the law to decide the same way, no matter who they are, no matter what political party they belong to, no matter who nominated them to the court. Claims to the contrary almost always are exaggerations, based on a few highly unusual cases or a few highly unusual judges.

Second, despite the attacks on President Bush's conservative nominees, they are likely to behave as judges in ways that virtually all Americans should find appealing. They will be apt to embrace the dominant commitment to be ruled by law; and the slight differences they are going to make in our body of legal precedents – and each new group of judges inevitably makes *some* difference, though not nearly so great as the debates suggest – should serve our long-term interests. I do not mean that anyone will be happy with

everything these judges do or that everyone will applaud the direction of any change. I *do* mean that the basic tenets that guide conservative judges are salutary for the nation – not merely for other conservatives here and now, but for our general welfare and our future.

The two, main hallmarks of conservative judges are these: respect for legal authority and respect for constitutional structure. They are related and reinforcing.

The first tenet is respect for legal authority, especially for the most basic and binding legal authority of constitutional and statutory text. Not for text as springboard – as an invitation to see how creative the judge can be – but as instruction. Of course, instructions can be ambiguous, and at times judges must decide on the basis of fairly thin evidence what unclear terms were understood to mean by those exercising the constitutionally granted authority to bind other citizens. There is no magic formula for such decisions. But judges who understand their task as a narrow one will exercise the awesome power of judges – the power to impose burdens retrospectively – carefully and sparingly. That means that the rules citizens live by will be more stable and more predictable

A second tenet for conservative judges is respect for the basic commitment of our constitutional structure to limited government, to government by elected officials, and to government primarily by state and local – not national – officials. Each aspect of this commitment makes it less likely that our liberties will be infringed without strong justification. It makes government more directly answerable to those whose lives are affected. And it reflects former Attorney General Edward Levi's insight that it is better for legislators to act judiciously than for judges to act legislatively.

These tenets are not self-enforcing. Reasonable people can disagree about how to implement them, generally and in specific cases. They are not to everyone's taste. Some people prefer broader judicial power, broader government power, and broader national power than these tenets allow. Almost everyone prefers some measure of broader power in particular instances, power that can be applied to produce a specially favored result. But these tenets do a good job at preserving our liberties, preserving our constitutional order, and maintaining the rule of law that has allowed our nation to thrive. While his judicial picks are unlikely to make a striking difference in our law, President Bush could do much worse than to appoint judges who share these precepts.

Ronald A. Cass is Dean and Bigelow Professor at Boston University School of Law. His book, "The Rule of Law in America," will be published this summer by Johns Hopkins University Press.

Confirming Justice White

by Stephen R. McAllister[1]

Some current United States Senators have expressed support for inquiring into federal judicial nominees' views on specific and controversial issues such as campaign finance, gun control, and privacy. Such statements suggest that some Senators may intend to apply "litmus" tests of various sorts for federal judicial nominees.

But are "litmus" tests for judges in the country's best interests? Will their use strengthen our federal bench, or detract from it? Consider the case of Byron White, a former Supreme Court Justice who recently passed away.

Byron White was a remarkable American. He was an All American football player, the highest paid player in the NFL his rookie season, Rhodes Scholar, World War II hero, top graduate of the Yale Law School, law clerk to Supreme Court Chief Justice Fred Vinson, highly respected Denver lawyer, and Deputy Attorney General of the United States,

Then he became Justice Byron White (he was nominated and confirmed within a two week period!), a role in which he served for 31 years, from 1962-1993. But would White would have been confirmed under the "litmus" tests currently being suggested by some Senators?

Justice White strongly disfavored judicially created constitutional rights of privacy. Indeed, White dissented from the Court's holding in Roe v. Wade and during the next 20 years *always* voted to uphold state regulation of abortion, and he would have joined in overruling Roe. White also wrote the decision in Bowers v. Hardwick rejecting the claim that homosexual sodomy is constitutionally protected. These votes reflected Justice White's view that the constitutional doctrine of "substantive due process" generally should not be invoked to permit judges to override the expressed views of legislative bodies on controversial privacy issues.

Nor was White necessarily solicitous of freedom of speech, press, or religion claims. He more than once rejected press claims that the First Amendment protected their activities. He voted to compel a reporter to disclose information regarding a crime, and he held the press accountable in a civil suit when it revealed to the public the identity of a source to whom the press had promised anonymity. Justice White believed that the press usually had to play by the same rules as everyone else.

On the other hand, White generally was protective of the power of Congress. He had a great respect for federal legislative power, and often displayed a willingness to defer to the judgements of Congress. Indeed, though he voted to strike down state and local affirmative action efforts, White voted to uphold such programs when enacted or approved by Congress. White also voted to uphold many federal civil rights laws, though he sometimes interpreted those laws more narrowly than others.

And Justice White often voted in favor of the state with respect to criminal law and procedure. He dissented from the Court's Miranda decision requiring the now famous warnings from police to criminal suspects. And he in general viewed capital punishment as constitutional.

Importantly, however, Justice White was rarely a certain vote, regardless of the area of law that a particular case raised. He more than once voted to reverse death sentences in

---

[1]Dean and Professor of Law, University of Kansas School of Law. Law Clerk to The Hon. Byron R. White, Supreme Court of the United States, 1989 - 1991.

particular circumstances, voted to uphold claims of free speech, press, or religion, voted to reject assertions of federal legislative and executive power, and indeed eventually accepted even the holding of Miranda, applying its holding in subsequent cases.

Would Justice White be confirmed today? Probably not if the Senate applies a "litmus" test requiring support of constitutional privacy rights. Probably not if unqualified support for affirmative action programs is required. Probably not if absolute protection of First Amendment speech, press and religion interests is necessary. Probably not if opposition to capital punishment is part of the test.

Was Justice White a great judge? History will decide that, though there can be no doubt that White was a great American and nobly served the Supreme Court and this country for over 30 years as a Justice. Nor can there be any doubt that–like his colleagues and friends Justices Lewis Powell and Potter Stewart–Justice White was conscientious, fair and open-minded..

Although litmus tests may be suggested as a means of ensuring that our federal judges have "balanced" views, they accomplish just the opposite. "Balance" is in the eye of the beholder. What the country needs is capable, conscientious, and fair federal judges–not judges who have been approved because they hold the "correct" views on specific issues.

Op-ed Submission By Lillian R. BeVier
Doherty Charitable Foundation Professor and Class of 1963 Research Professor
University of Virginia Law School
May 17, 2002

Since entering office, President Bush has nominated over thirty distinguished individuals to become United States Circuit Court judges. Their nominations reflected the President's judgment that each was a person of excellent character, a depth of legal experience, and powerful intellect. And the President's judgment is widely shared in the legal community, even by Democrats. For example, Professor Walter Dellinger, who served as acting Solicitor General in President Clinton's administration, said of the President's selections that they represented "a very strong list in terms of professional qualifications." Indeed, each of the nominees has substantial bipartisan support and each has been rated "qualified" or "well-qualified" by the American Bar Association. Yet only about 30 percent or so of the president's nominees, and only three of the first eleven nominated more than a year ago have been confirmed to date, and two of those were originally Clinton nominees whose names President Bush re-submitted. Senate Judiciary Committee Chairman Patrick Leahy has refused even to schedule hearings for the other eight.

A closer look at the records of some of the candidates to whom Senator Leahy has not granted hearings confirms one's suspicions that the refusal has everything to do with politics and nothing to do with a concern that they lack the qualifications for judicial office. Consider, for example, nominee John Roberts, a Washington lawyer who has argued 37 cases before the Supreme Court and served as Deputy Solicitor General. A veteran attorney in the Solicitor General's office has said that Roberts is "possibly the foremost appellate lawyer of his generation." Consider for another example nominee Miguel Estrada, who came to America as a teenager speaking virtually no English and went on to graduate from Harvard Law School with high honors and serve as Assistant to the Solicitor General in the first Bush and the Clinton administrations. Ron Klain, Counsel to Vice President Al Gore, has "no doubt that [Estrada] will faithfully apply the precedents of his court, and the Supreme Court, without regard to his personal views or his political perspectives. His belief in the rule of law, in a limited judiciary and in the separation of powers is too strong for him to act otherwise." Consider, for a final example, nominee Michael McConnell, a University of Utah law professor and one of the nation's most eminent constitutional scholars. He has garnered the support of hundreds of Democratic law professors across the country, and the Legal Times has characterized him as, quite simply, "brilliant."

None of this is news to anyone who has been following the story of the political battle over the judicial confirmation process. And the obvious cost of the confirmation delays to the efficient administration of justice are also well understood: there are more judicial vacancies today than when President Bush took office, and judicial vacancies inevitably spell delay for those seeking their day in court. But denying hearings to judicial candidates imposes significant additional costs as well, costs no less real for being seldom acknowledged. I speak of the costs to the individual candidates, whose legal careers remain in uneasy limbo while the politicians and the interest groups recklessly take aim at their professional reputations and, with supreme indifference either to fairness to or the merits of individual nominees, put the nominees' future

careers on hold. Having once myself been in the nominees' position, I can attest to their helplessness in the face of a confirmation process which transforms them from the distinguished lawyers, lower court judges, or professors they once were into pawns of other people's political agendas.

On a bright Friday afternoon in October 1991, President Bush nominated me to the Fourth Circuit Court of Appeals. Since I had been identified as a potential candidate in November of 1990, I had already filled in innumerable forms, and passed ABA and FBI inspection. I had the support of both my home state senators. After the White House sent my nomination to the Senate, I waited expectantly for a hearing date to be set by the Judiciary Committee, then chaired by Senator Biden. And I waited. And waited. And in silence I waited. I stopped waiting only when President Clinton was elected and my nomination lapsed. This is not a story of the political maneuvering that took place in the thirteen months between my nomination and President Clinton's election, nor is it a complaint about personal frustration during that time. I was far from being the only nominee to have been denied a hearing: more than 50 judicial nominations remained pending at the time of the 1992 election and each of them experienced similar disappointment.

My point is that, because the Judiciary Committee hearing is the only forum in which nominees have an opportunity to present themselves and to answer whatever questions may have been raised about them, and because none of us was granted a hearing, each of us necessarily stood mute. Judicial nominees don't hold press conferences, they don't lobby the Judiciary Committee, they don't appear on the Sunday talk shows. Thus, unless the Judiciary Committee grants them a hearing, they cannot answer their critics and must permit whatever half-truths or misleading allegations that their opponents have broadcast about them to go unchallenged. And it is certain that their opponents will have at the very least insinuated that reasons exist to be suspicious about them. If one is needed, an example of such insinuations is People for the American Way President Ralph Neas' misguided accusation, clearly intended to tarnish each of President Bush's nominees, that "the top priority of the right is to pack the federal judiciary with right-wing ideologues." Unless they are granted a hearing, none of the current nominees will have a chance personally to dispel the cloud that accusations such as this cast on his reputation.

The politicization of the judicial confirmation process is a grave misfortune for the country. Both major parties share blame for a gradual escalation of retributive hearing denials. If the denials continue, the political independence of the federal judiciary will be eviscerated and the separation of powers on which the foundation of our constitutional system rests will be compromised. Worse, this would be accomplished not by open debate but in the shadow of calumny and innuendo in which maximum damage is caused to those who would serve their country. The situation cries out for leadership which, at this point, the Democrats on the Judiciary Committee are positioned to provide. Senator Leahy, heed the call of duty.

WORDS: 985

CHOOSING FEDERAL JUDGES OR CHOOSING FEDERAL LEGISLATORS

by
Ronald D. Rotunda
Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law.

Over a year ago, on May 2, 2001, a Washington Post editorial advised: "Nominees deserve respectful and timely consideration; the vacancy rate on the bench — particularly on certain courts — is an impediment." Seven days after that editorial, President Bush nominated 11 circuit court judges (including two that President Clinton had already nominated). Now, a year later, only three out of those 11 have even had a hearing before the Senate Judiciary Committee (and two of those were Clinton nominees).

There appeared to have been a slow-down in the confirmation process. Some people have argued that Republicans hindered President Clinton's appointments of federal judges, and this is pay-back time. Even if that charge is true — and I'm sure some people sincerely believe it — President Bush is hardly to blame. He was in Texas attending to state business at the time. We can all work to change the tone in Washington, and we can begin now. Our federal judiciary deserves it.

What is the main objection to President Bush exercising his constitutional power to nominate federal judges? The most recent issue of the American Bar Association Journal reports: "'The top priority of the right is to pack the federal judiciary with right-wing ideologues,' says Ralph G. Neas, who is president of the liberal People for the American Way." Note that the ABA does not make that charge; it merely reports it. But that accusation does not ring true when we realize that many liberal Democratic law professors and Democratic Senators support these nominees. Let us look at some of the people whom the President has nominated nearly a year ago, and who are still waiting for a hearing.

One of the nominees is John Roberts, a Washington lawyer, Supreme Court practitioner, and former Deputy Solicitor General. Another is Michael McConnell, a distinguished University

of Utah law professor who earlier clerked for Justice Brennan on the U.S. Supreme Court. After nearly a year, neither has received any hearing. Walter Dellinger, the acting solicitor general in President Clinton's administration, said last May, when President Bush announced the 11 nominees, that the President has nominated "a very strong list in terms of professional qualifications." Then he singled these two by name, as particularly well-qualified. Professor Larry Tribe, another well-known Democratic law professor, supports Professor McConnell, who also has not had a hearing. When nominees secure this backing, it is hard to argue that they are out of the mainstream, "right-wing ideologues."

Nearly a year ago, President Bush also nominated Miguel Angel Estrada, the first Hispanic nominate to the D.C. Circuit. He was born in Honduras and came to America as a teenager, speaking little English. He worked hard, graduated with high honors from Harvard Law School, and served as Assistant to the Solicitor General during the Clinton Administration. The Associated Press reported that Mr. Estrada "has a long list of admirers who call him one of the smartest and ethically rigorous lawyers they know." He hasn't had a hearing yet either.

Consider Justice Priscilla Owen, now on the Texas Supreme Court. President Bush has nominated her to the Fifth Circuit. She graduated from Baylor Law School at 23, and achieved the highest score on the Texas Bar examination in 1977. In 1994 she became the second woman ever elected to the Texas Supreme Court. Six years later, she was reelected, the first time anyone has sought election to a full term on the Texas Supreme Court without a challenge from either major political party. With that kind of support, how can one claim that she is yet another "right-wing ideologue"?

Last May, President Bush nominated Lavenski Smith, a former Justice on the Arkansas Supreme Court. Smith, who would be the first African-American to sit on the Eight Circuit, also has not yet had a hearing, although supporters include Senator Blanche Lincoln, Democratic from Arkansas. Is she backing another "right-wing ideologue"?

Last August, the headline of an article in the National Law Journal read, "ABA Panel Gives High Ratings To Bush's Picks: Not One Of The 11 Circuit Court Nominees Received A

'Not Qualified' Rating." One would think that would be the end of the matter. Senator Leahy, the Chairmen of the Senate Judiciary Committee has called the ABA "well qualified" rating the "gold standard." Yet, many of these nominees have not yet had a hearing, much less confirmation. And the situation is getting worse: when President Clinton left office, there were 67 judgeships vacant; now there are nearly 90.

Given that the Democrats control the Senate, we know that no one can be confirmed without Democratic support, but these Democratic Senators cannot vote for a nominee until the Judiciary Committee holds a hearing and votes out the nominee. Given the credentials and bipartisan support that these nominees have garnered, we should not be surprised if the Senate confirmed all or most of them. But that can't happen until they have hearing. The Senate Judiciary Committee should grant prompt hearings, rule on the merits of each nominee, and send the nominee to the full Senate for confirmation or rejection.

The Senate should not impose unnecessary roadblocks to confirmation. This principle should not be controversial but lately there has been a lot of political commentary claiming all our rights will be lost by "right-wing fanatics." Like whom? Justice O'Connor? Nominees that prominent Democratic professors support? Nominees that prominent Democratic Senators support? During the 2000 campaign, President Bush called on the Senate to vote on the next President's nominations within 60 days, whoever won the election. Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee, endorsed that idea on the Senate floor: "Although we are different parties, I have agreed with Gov. George Bush." Chairman Leahy is right: now is the time for the Senate to act.

Race, Gender, and Judicial Politics

By Jennifer C. Braceras

Jennifer C. Braceras is the John M. Olin Fellow in Law at Harvard Law School and a Senior Fellow with the Independent Women's Forum.

For more than two decades, liberal activists have consistently preached the "diversity" gospel – pressuring employers, government officials, and university administrators to consider demographic balance when making personnel and student admission decisions. In recent years, activists have focused their efforts on the courts, arguing for the appointment of more women and minorities to the federal bench. Given their professed desire for a judiciary that "looks like America," diversity activists should have applauded President George W. Bush's first group of judicial nominations, announced one year ago. The group consisted of eleven superbly qualified nominees, three of whom are women and three of whom are minority men (including the first ever Hispanic nominee to the prestigious U.S. Court of Appeals for the District of Columbia Circuit). But, rather than cheer the selection of a diverse and highly-esteemed group of judicial candidates, liberals lambasted the president's choices and pressured Senate Democrats to forestall hearings and votes on eight of the eleven nominees.

The behavior of the special interest groups and their Democratic allies reveal this simple truth: most diversity activists care about the race and gender of federal appointees only when these factors serve as proxies for left-wing politics. When these descriptors do not coincide with liberal views, the activists drop the "diversity" mantra like a hot potato.

Consider, for example, Pricilla Owen and Miguel Estrada – two of the candidates nominated by the president last May to federal judgeships. Both Owen and Estrada are eminently qualified for the federal bench. Owen is currently in her second term as a Justice of the Texas Supreme Court. Before joining the state court bench, she was a partner in the law firm Andrews & Kurth, where she practiced commercial litigation for 17 years. She is highly regarded by her colleagues and former adversaries in the Texas Bar and was rated well qualified by the American Bar Association.

If confirmed to the D.C. Circuit, Miguel Estrada would be the first Latino judge to sit on that court. Estrada, a partner in the law firm Gibson, Dunn & Crutcher, personifies the American dream. An immigrant from Honduras who arrived in this country speaking little English, Estrada graduated with honors from both Columbia College and Harvard Law School. He clerked on the United States Supreme Court and served the administrations of both George H.W. Bush and Bill Clinton as a deputy in the U.S. Solicitor General's office, the most prestigious appellate litigation group in the country. Estrada has argued more than a dozen cases before the Supreme Court. It is therefore unsurprising that the ABA has given Estrada the designation of "well-qualified," the organization's highest rating.

It is precisely because Owen's and Estrada's credentials are so impeccable that Senate Democrats have refused for over a year to schedule hearings on their nominations – most Senators would be hard pressed to vote against these nominees on the merits. So the Senate has decided to stonewall.

Why do Senate Democrats fear the confirmation of Owen and Estrada? Opposition to Justice Owen stems from charges by feminist groups that Owen "exemplifies the most extreme hostility to reproductive rights of any of the nominees that President Bush has named." The charge, which is based on Justice Owen's deference to state legislative policy choices in cases involving parental notification laws, holds little weight. But Senate Democrats, beholden to feminist special interest groups, have little interest in the facts.

Estrada's case is more complicated. Opposition to his nomination is based partially on the fact that he is a judicial conservative -- meaning that he believes the role of a judge is to interpret the law, not make law. This worries liberal special interest groups who have grown accustomed seeking enactment of their political agenda in court. More significantly, however, Estrada's compelling personal story threatens to undermine the liberal argument for racial and ethnic quotas. Like Justice Clarence Thomas, who fought his way out of rural poverty in Pinpoint, Georgia, Estrada is a model of self-reliance and hard work. As in the case of Thomas, it is Estrada's very authenticity that liberals find so infuriating and threatening.

The Estrada nomination is problematic for another, related reason. If confirmed to the D.C. Circuit, Estrada will immediately become a front-runner to fill any vacancy on the United States Supreme Court. No Hispanic has ever served on the High Court, and the party responsible for the first such appointment can expect to reap large returns at the ballot box from Latino voters. Recognizing this, and not wanting to hand President Bush a major political victory, the Democrats and their special interest group allies are determined to stop Estrada now.

Estrada's credentials are so stellar, however -- and his support so broad -- that his opponents have little rope to hang him with. As a result, liberal special interest groups have begun a whispering campaign that Estrada lacks the proper judicial "temperment." According to the Wall Street Journal, for example, Puerto Rican Legal Defense Fund President Juan Figueroa has refused to endorse Estrada because he has received "reports" that Estrada is "insensitive" to the concerns of Hispanics and other minorities. And the left-wing Alliance for Justice has claimed that "some who know Estrada" are "concerned" about his ability to decide cases fairly. No one has yet to come forward with a shred of evidence to substantiate these vague and baseless allegations.

Of course, the unleashing of political venom upon conservative women and minorities is nothing new. Linda Chavez and Clarence Thomas, to name just two, long ago experienced first hand the wrath of liberals whose agenda is threatened by the emergence of independent women and minorities. But the Left's reaction to the Owen and Estrada nominations further exposes the moral bankruptcy of the diversity movement

and provides further evidence – if, indeed, more is needed -- that race-and-gender liberals care less about equal opportunity for women and minorities than they do about political hegemony.

Jennifer C. Braceras

(b)(6)

Jennifer C. Braceras is the John M. Olin Fellow in Law at Harvard Law School and a Senior Fellow of the Independent Women's Forum.

Time for a pop quiz. Which well-known politician uttered the following statement: "The Nation cannot afford to continue to see cases delayed and backlogs grow due to judicial vacancies that could be filled if [Senators] would stop seeking to delay or block well-qualified and capable judges." Was it: (a) George W. Bush; (b) Bill Clinton; (c) Senator Tom Daschle (D-SD); or (d) Senator Orrin Hatch (R-UT)? If you guessed "c", Tom Daschle, you win. The year was 1997. Bill Clinton was president. And Daschle was referring to the failure of Senate Republicans to schedule hearings and floor votes on President Clinton's nominees to the federal bench.

Let's try another one: "Judges delayed means justice denied. Without judges, courts cannot try cases, sentence the guilty, or resolve civil disputes. Partisan and narrow ideological efforts to impose political litmus tests on judicial nominees and to shut down the judiciary must stop." Were these words spoken by: (a) Senator Trent Lott (R-MS); (b) Attorney General Janet Reno; (c) Attorney General John Ashcroft; or (d) Senator Patrick Leahy? If you guessed "d", Patrick Leahy, you win again. The year was 1998.

What a difference an election makes. Today, the Republicans control the White House. Daschle and Leahy are no longer in the minority party in the Senate – Daschle is now Majority Leader and Leahy is Chairman of the Senate Judiciary Committee, the committee charged with screening judicial nominees. And today, it appears that Daschle and Leahy no longer care about filling judicial vacancies with all deliberate speed.

Indeed, there are today close to 90 vacancies in the federal courts – far more than the 75 judicial vacancies that existed when Senator Daschle complained of the backlog threatening our system of justice, or the 82 vacancies that existed when Senator Leahy spoke of the need to put partisanship aside when considering nominees to the federal bench. President Bush has acted decisively to fill judicial vacancies, nominating approximately 100 men and women to the federal bench in less than a year. Yet, despite the President's record pace of judicial nominations, there are today more vacant seats than there were when the Bush took office in January 2001.

The Senate currently has pending before it 48 nominations, 21 of which are nominees to the United States Courts of Appeals. Most concerning, the Senate has confirmed only 9 of the President's 30 nominees to the Circuit Courts of Appeal, the courts of last resort in most cases. Unfortunately, the Senate has chosen to hold many of these men and women hostage to partisan politics, subjecting the nominees to rigid

ideological litmus tests, rather than a careful consideration of their qualifications and ethics.

Particularly galling is the Senate's refusal to act on the nominations of 8 men and women who were among the first group of nominees announced one year ago. Terry Boyle, Deborah Cook, Miguel Estrada, Michael McConnell, Pricilla Owen, John Roberts, Dennis Shed, and Jeffrey Sutton were among the 11 nominations announced on May 9, 2001. For a full year, their nominations have remained in limbo. None of the eight has been granted a Senate hearing (let alone a vote). It is not hard to understand why. The eight are a diverse group of esteemed lawyers and judges who share the president's commitment to the Constitution, the administration of justice, and the rule of law. All have been rated "qualified" or "well-qualified" by the American Bar Association. It is precisely because these nominees are so highly regarded that Senate Democrats have refused to schedule hearings and votes – Senators will find it difficult to justify a vote against any of these nominees on the merits.

Unfortunately, the Senate seems indifferent to the fact that, six of the twelve U.S. Courts of Appeal suffer from overburdened caseloads and are facing what the Administrative Office of the Courts calls "judicial emergencies." For example, the U.S. Court of Appeals for the Sixth Circuit is currently operating with eight of its sixteen seats vacant. Yet two nominees to the Sixth Circuit are among those who have waited a year without a Senate hearing.

The words of Senators Daschle and Leahy are as true today as they were when Bill Clinton was president. Senate intransigence on judicial confirmations entrenches the backlog in the administration of justice, thus increasing the chance that justice will be denied or that the law will not be enforced. For the sake of the country, Senate Democrats should put partisan politics aside and vote up or down on the judges.

Senate Democrats are Destroying the Rule of Law

By Michael I. Krauss
Professor of Law
George Mason University
703-993-8024
Arlington, Virginia mkrauss@gmu.edu

I am an academic. I am not a polemicist. I am rarely pressed to anger -- even more rarely does anger motivate my editorials. When I write for newspapers or magazines, I tend to emphasize arguments on both sides of issues, and encourage reflective and pondered decision-making.

But I am angry today. I have carefully examined the debate over judicial appointments, and have concluded that one side to this debate, represented by the President, is *totally* justified. The other side, the Senate Democrats, has exploited its constitutional prerogatives. Access to justice, essential to the Rule of Law upon which we pride ourselves, is the principal casualty of the Democrats' abusive behavior. Every single American voter should consider this abuse when he or she goes to the polls in November.

Before raising one case of delayed nomination that is particularly galling, it is useful to dispel a myth about the process that many in the mainstream media have disseminated. That myth is that the current Judiciary Committee has moved much more rapidly on judicial confirmations in the last nine months than was the case in the previous 6 years. This is hogwash. There are now 95 vacancies on the Federal bench, while there were only 67 vacancies at the end of the 106th Congress. This means the Senate is not even keeping pace with the rate of attrition in the federal judiciary. By comparison, the highest vacancy total in the first two years of Republican control of the Senate under President Clinton was 63. The Democrats have already denied one nominee, Charles Pickering, the chance to even have a Senate vote by preventing his nomination from reaching the floor, where it likely would have been confirmed. That unfair treatment of a nominee *never once* occurred during the entire eight-year Clinton presidency. Nor can the Democrats' intransigence be justified by the quality of the President's nominations. There are 14 Circuit Court nominees alone (in addition to more numerous District Court candidates) with both a "Qualified" or "Well-Qualified" rating from the American Bar Association and support from their home-state senators (including two D.C. Circuit nominees who have no home-state senators) *who have not received a hearing*. This number includes 7 of the first 11 nominees announced by President Bush over one year ago, on May 9, 2001. Chairman Patrick Leahy (D., Vt.) has called the ABA rating his "gold standard" for evaluating nominees. What is Leahy waiting for?

On a personal note, the treatment meted out to a fellow law professor, Michael McConnell of the University of Utah is most demoralizing. Professor McConnell is widely regarded as one of the country's most distinguished constitutional lawyers. The courts have frequently cited his First Amendment writings. He has argued eleven cases before the United States Supreme Court. He is rated "well qualified" by the ABA. He

clerked for Chief Judge Wright of the D.C. Circuit Court and for Supreme Court Justice William J. Brennan, Jr., two of the most liberal judges in recent history. He has been nominated to the 10th Circuit, which is 25% vacant and desperately overloaded. Over 300 faculty members from law schools across the country have signed a letter urging speedy hearings for Professor McConnell. Did I mention he is a devout Christian? Perhaps this disqualifies him in the eyes of some Senators – but not in the eyes of this observant Jew, who notes with pride that he sent his children to a Jewish Day School when he taught at the University of Chicago.

Senator Leahy must prefer a 10th Circuit that is 25% vacant. He must prefer a 6th Circuit that is over 50% vacant. His party's conduct is a travesty, a politicization of the "advise and consent" power that has never before been seen in 225 years of our nation's history. Americans who care about our legal system, regardless of their party affiliation, should use these off-year elections to punish Democrats for their outrageous behavior.

The time for pondered criticism is gone – the time to shout, loudly and clearly, that Democrats will lose their jobs if the Senate refuses to hold hearings on President Bush's judicial nominees, has come.

Puppets on a String
By John C. Eastman
1019 Words

The United States Senate has been called the greatest deliberative body ever designed, but after the recent refusal of the Senate's Judiciary Committee to report the nomination of Judge Charles Pickering to the full Senate, a new characterization is probably more apt—that of puppets dancing at the ends of strings controlled by leaders of the radical left, particularly grand master puppeteer Ralph Neas, former head of the Lawyers Committee on Civil Rights and current President of People for the American Way. As Senator Orin Hatch aptly noted, the character assassination of Judge Pickering was "engineered by extreme-left Washington special-interest groups" who had "lynched" Judge Pickering.

Let us put the rejection—or rather non-action—on Judge Pickering in context. There are currently 95 vacancies on the federal courts. Half of the 16 seats on the Sixth Circuit Court of Appeals are vacant. Chief Justice William Rehnquist has called it a judicial "crisis," but he's not the only one. Back in 1996, when the number of vacancies was roughly 2/3 of what it is now, Senator Patrick Leahy—who now serves as Chairman of the Senate Judiciary Committee—described that much-lower number of vacancies as a judicial emergency. And in 1997, he declared: "Those who delay or prevent the filling of [judicial] vacancies must understand that they are delaying or preventing the administration of justice."

Under our Constitution, the primary responsibility for filling judicial vacancy lies with the President, of course, and President Bush acted swiftly to nominate individuals that the American Bar Association has almost uniformly rated as qualified or well qualified. Indeed, among President Bush's nominees are some of the most highly-regarded Supreme Court practitioners and legal scholars in the country.

But the Constitution does not assign the entire power for judicial nominations to the President. Article II also requires "the advice and consent of the Senate," a requirement that our nation's founders adopted in order to serve as a check lest the President succumb to pressures of nepotism. By refusing even to schedule hearings for most of the President's Circuit Court nominees, the Senate has abused that power, relegating some of the most well-qualified lawyers and jurists in the country to nomination limbo.

Miguel Estrada—nominated back in May 2001, almost a full year ago—is a former federal prosecutor who has argued 15 cases before the U.S. Supreme Court. He would be the first Hispanic judge ever to serve on the prestigious Court of Appeals for the D.C. Circuit, yet he has not even had a hearing in the ten months since his nomination. John Roberts, one of the nation's premier appellate lawyers, with 36 Supreme Court arguments under his belt, has also been languishing since May without a hearing on his nomination to the D.C. Circuit. Michael McConnell, widely regarded by conservatives and liberals alike as one of the foremost constitutional law scholars in the

land, has also watched his nomination to the 10th Circuit Court of Appeals held in abeyance for more than 10 months. Same with Lavenski Smith, who would be the first African-American from Arkansas ever to sit on the Eighth Circuit Court of Appeals. And Priscilla Owen of the Texas Supreme Court; Deborah Cook of the Ohio Supreme Court; Julia Gibbons of the U.S. District Court in Tennessee; Susan Nielson of the Michigan Circuit Court; and Carolyn Kuhl of the California Superior Court—five women who have distinguished themselves as district court judges yet whose nominations for the Circuit Courts have gone a combined total of 38 months without hearings before the Senate Judiciary Committee. Only 7 of the President's 29 nominees to the Courts of Appeals have been confirmed; twenty have not even had a hearing.

This is not deliberation, but a modern form of the old black-ball technique. And the people with the ultimate veto are not even elected members of the Senate, but their interest-group allies who are really calling the shots.

No one disputes that most or all of these individuals are well qualified to serve on the federal appellate bench, nor even that they would be confirmed if the full Senate was given the opportunity to vote on the nominations. For those who need to be reminded, it is the full Senate, not an individual committee, who has the constitutional responsibility to give its advice and consent on judicial nominations. Senator Joseph Biden made that point in 1997, and the Republican Senate responded by reporting out President Clinton's nominees for a full Senate vote; but Senator Biden is singing a different tune now.

As egregious as these delays are, though, they are not the most troubling aspect of the strategy being employed by the Senate Judiciary Committee and, more significantly, by its behind-the-scenes puppeteers. The delays seem calculated to allow the dirt-mongers of American politics time to find anything in a nominee's lengthy career that might be distorted to demonstrate that the nominee is sufficiently "outside the mainstream" to warrant rejection. In some ways, the lengthy delays are therefore proof of the high caliber of individuals who have been nominated by the President—ten months and counting and still not enough dirt to derail most of the President's nominees. But that's why the Charles Pickering battle is so significant. Real dirt no longer matters. Made-up dirt will do just as well; in fact, it is better, because it sends a signal to well-qualified individuals that no matter how pristine their reputation, their records will be distorted by the high priests of the reigning orthodoxy. And it sends a signal to the President himself—"give us nominees who will use the bench to make law rather than interpret it, mandating policies that no democratically-elected legislature would ever dare enact, or we will prevent you from fulfilling your constitutional obligation at every turn."

That threatens not just the dozens of nominees awaiting their chance to serve, but the very nature of our democratic republic. It is time for Senators to start acting like Senators, and cut those puppet strings before then entangle us all in a knotty mess from which we may never be able to extricate ourselves.

Dr. Eastman is a professor of constitutional law at Chapman University School of Law and the Director of the Claremont Institute Center for Constitutional Jurisprudence. "First Principles" is a monthly column that addresses current legal issues in light of the principles of the American founding.

ENDING THE GAME OF NOMINATIONS KEEP-AWAY:
Why We Must Confirm Judicial Nominees And Restore The Courts To Good Health

By MARCI HAMILTON

(b)(6)

Thursday, May. 09, 2002

Remember when you were a kid, and you never wanted the game you were playing to end? You were having so much fun, and the only reason you had to stop was because some annoying adult said you had to do your homework, or simply announced, "That is enough." It was never enough if it was fun!

Now fast forward to a more adult context - that of the Senate Judiciary Committee, where another exciting game is being played non-stop. Since the late 1980's, the Committee--whether controlled by the Republicans or Democrats--has been playing a game of nomination keep-away. It's great fun for the players, but a disaster for the judiciary, and the rest of us.

Here is how the game is played, and why it must end.

The Rules of Nomination Keep-Away

First, every player must choose a political party to which he or she will be faithful, regardless of what's right. (It's just a game, so don't worry that this may be an unwholesome example for your children.)

Second, the President nominates qualified names for judicial appointments. (Unqualified candidates can be thrown out of the game at any time by any player.) In this game, hardly anyone wants to play the President, because after you make your nominations all you get to do is sit around and watch - which makes you look irrelevant, powerless, or both.

Third, the Chairman of the Senate Judiciary Committee (everyone fights to be this guy) puts the names on playing cards and makes two stacks: "nominees I don't mind," and "nominees who make me sick." "Nominees I don't mind" usually are in the party of the Chairman or have no paper trail. In contrast, "nominees who make me sick" are in the other party and have a paper trail of judicial decisions or law review articles.

The point of the game is to let the "nominees I don't mind" be confirmed, and ensure that consideration of the "nominees who make me sick" is delayed so long that the candidate is either no longer interested or dead. The other players can make their own playing cards, too, and do some swapping, but the Chairman's cards trump those of a mere committee member.

Now here comes the really fun part--the committee members in the majority, with help from the Chairman, get to make up the game as they go along. For example, they can decide to let everyone veto a nominee they particularly do not like from their own state - or even veto *any* nominee they do not like. Plus, they have unlimited time to come up with rules that will make it harder for the nominees they don't like to make it through.

Patrick Leahy: Winner and Still Champion at the Keep-Away Game

So far, the all-time winner in the nomination keep-away game is the current Senate Judiciary Committee Chairman, Patrick Leahy. Here are his stats:

There are 89 vacancies in the federal courts. President Bush has nominated a total of 100 nominees, but the Committee has only confirmed 52, most of them on the federal district courts, rather than on the more powerful and influential appeals courts.

By contrast, at the same point in the Clinton Administration, the Committee had confirmed 66% of President Clinton's nominees. This shows that Senator Leahy is doing very well in the game as compared to Senator Biden. (Indeed one might say Leahy's performance puts Biden's to shame, except that the shame is really Leahy's.)

The judicial vacancy problem is worst in the courts of appeals, where only 9 of President Bush's 30 nominees have been confirmed (less than a 30% confirmation rate). Indeed, since President Bush first announced his initial judicial nominations a year ago, only 3 of the 11 appellate nominees have been confirmed. No hearings are scheduled for any others.

Some circuit courts of appeal have an egregious shortfall. The Sixth Circuit, for example, is half empty, with only 8 out of 16 judges. Sadly, this situation persists despite the fact that the understaffed courts' workload rose 5% last year.

Again, by contrast, at the same time in the Clinton Administration, 8 out of 14 appeals court vacancies had been filled - a 57% confirmation rate for Biden's Committee as compared to Leahy's 30%. The comparison once again shows Senator Leahy to be a champion nomination squelcher.

Why the Game, Though Fun For Players, Needs to End Now

The game has become so consuming that no player seems capable of making the game stop. There is no senatorial Mom to make them stop, so it's time for the Senators to stop the game themselves - even at the peak of their game. It's long past time for the kids to quit playing and to do their homework.

Unless you are a judge, a lawyer, or a litigant, you are probably not particularly concerned about the federal courts' problems, but the federal courts affect everyone. When their benches are not full, cases take far longer to conclude- which means deserving plaintiffs are put off from receiving the awards they deserve, and criminal trials are far from the "speedy" trials the Constitution requires. Meanwhile, an overly heavy caseload pushes more cases that perhaps should have gone to trial into settlement negotiations, because the parties get tired of waiting. In too many circumstances, justice delayed is justice denied.

There is another unintended consequence to this contentious, slow-moving process, despite all the fun in Committee. Judicial candidates are less likely to want to be judges.

No one wants to be in limbo for months or years at a time, especially the litigator who must consider the future as he takes on new clients, wary to avoid potential conflicts of interest and concerned about the effect of his going on the bench in the middle of a case. Nor does anyone want to be raked over the coals in a political free-for-all, especially the person who is interested in a judicial appointment, which is--after all--a position that is supposed to be nonpolitical.

Perhaps most important, no one wants to take on the work of two or three or four judges simply because the Senate Judiciary Committee cannot bring itself to stop playing the keep-away nominations game. It is already the case that a law firm partner may well sacrifice hundreds of thousands, or even millions, to become a judge; it is not fair to also ask the same person for every single hour of free time.

If life were different, the game could go on forever, but life is tough and we all must grow up someday. For the sake of the people, the courts, and justice, it is time for the Senate Judiciary

Committee to shut down the nominations keep-away game, as fun as it has been, and to turn to its first and highest obligation: serving the needs of this country.

"Earth to the Senate"

Gail Heriot
May 9, 2002

It's now been exactly one year since President Bush sent his first batch of judicial nominations to the Senate. Overwhelmingly, they have been met with stony silence. Senate Republicans are so frustrated that some have threatened a work stoppage to mark the anniversary.

Among the original nominees are:

* Michael McConnell, the Presidential Professor of Law at the University of Utah. McConnell is one of the nation's leading constitutional law scholars and perhaps *the* leading scholar on freedom of religion.

* John Roberts, one of the country's most distinguished appellate attorneys. As Principal Deputy Solicitor General during the previous Bush administration and as an attorney at Hogan & Hartson, one of the nation's premiere law firms, he has argued 36 cases before the Supreme Court.

* Miguel Estrada, a former federal prosecutor who has argued 15 cases before the Supreme Court. If confirmed, he will be the first Hispanic judge on the D.C. Circuit Court of Appeals.

These nominees and others that followed them have hit a brick wall. Only three of the original 11 have even received a hearing. Of the 101 nominations Bush has made, only 50 have been confirmed. Confirmation of nominations for the Courts of Appeals have been especially slow; only seven of 29 have been confirmed. As a result, the number of vacancies on the federal bench is at an all-time high–a situation Chief Justice William Rehnquist has called "alarming."

Democratic leaders in the Senate respond–correctly–that whenever the Presidency and the Senate are held by different parties, the confirmation process is slowed down. It is understandable that, in discharging their constitutional duty to advise and consent, Senators who are not from the President's party will be less deferential towards his judgments.

But enough is enough. In the Spring of his second year in office, President Clinton has a 58% confirmation rate on his nominations. At the same point, President Bush's confirmation rate stood at 43%. For whatever reason, the Committee on the Judiciary under the leadership of the irascible Senator Patrick Leahy has not only failed to keep pace with Bush's nominations, it has, in some ways, failed to keep pace with previous Committees under the leadership of more conciliatory chairmen like Republican Orrin Hatch and Democrat Joseph Biden. It's time to crank it up.

Leahy tries to blame President Bush for the problem, arguing that Bush's nominations are "controversial" and that he should choose nominees "for their ability instead of their ideology."

But this is hogwash. Professor McConnell, for example, is supported by hundreds of Democratic law professors, including well-known liberals like Lawrence H. Tribe. Yet he has not even received a hearing.

Moreover, Leahy's strategy has not been to speed up the uncontroversial nominees and take time to ponder the more controversial ones. It's been just the opposite: When nearly half-century-old statements written by then-law-student Charles Pickering were brought to light and pronounced "racially insensitive" by liberal groups, Pickering's nomination hearing was leap-frogged over the others. Leahy hoped to score some points on the nightly news and he succeeded–at the expense of a nominee who was strongly supported in his home state by people of every political stripe.

Contrary to Leahy's assertions, none of Bush's nominees is out of the political mainstream. It's true that they are mainly Republicans and conservatives–just as most of Clinton's were Democrats and liberals–but that's hardly a ground for rejection. Bush ran on a platform of appointing such judges. It would be a violation of his campaign promise not to do so.

Perhaps the real reason for the slow pace on Capital Hill was argued recently by Clinton White House operative Paul Begala. According to Begala, Senate Democrats have a duty to drag their feet on judicial nominations. "The issue is legitimacy," he declared on CNN's Crossfire, pointing out that "the president did not get the majority of votes."

This late in the game, Bush's argument sounds almost quaint. But quaint or not, it continues to be fashionable among inside the beltway types, looking hard for a reason to justify obstructionist tactics. It is whispered in the corridors of Capital Hill by staff members who would do better back at their desks working on judicial confirmations. So let me respond to it one more time:

George W. Bush is the duly elected President of the United States under every vote count that has ever been made, official and unofficial. Some may not like the Electoral College system, but it is our system, and the presidential campaigns of all candidates were carried out with that in mind. And while it's true that Bush did not receive a majority of the popular vote, it is worth pointing out that he did better than Clinton who received only 43% of the vote in 1992.

Moreover, the legitimacy of the Democratic majority in the Senate is every bit as questionable. No doubt Republican voters in Vermont backed Senator Jim Jeffords precisely because they wanted to preserve the Republican majority in the Senate. If they had known he would jump ship a few months into his elected term, they never would have nominated him. But that's our system–a Senator may switch parties for good reason, bad reason or no reason at all. Anyone who doesn't like it is free to call for a change in the rules. Until such changes are made, George W. Bush is the legitimate President of the United States and Patrick Leahy is the legitimate chairman of the Senate Committee of the Judiciary.

Meanwhile, back here on Earth, there's work to be done. Ordinary criminal prosecutions must be tried in court. Civil lawsuits must be decided. Judicial vacancies mean judicial delays.

And justice delayed, as always, means justice denied. Nominees like McConnell, Roberts, Estrada and the scores of men and women now pending before the Committee deserve a hearing. It's time to roll.
Gail Heriot

Heriot is a Professor of Law at the University of San Diego and a former counsel to the Senate Committee on the Judiciary

President Bush and the Judicial Mainstream

Nelson Lund
George Mason University School of Law

Have you seen the judicial mainstream lately? During the controversy over the nomination of Charles Pickering to a federal appellate court, Sen. Dianne Feinstein (D.-Cal.) said: "President Bush did not have a large mandate. There is no mandate, in my view, to skew the courts to the right. And so I think you're going to see a Judiciary Committee that's really going to be looking for mainstream judges. . . There are points that many of us feel passionately about, one of them being *Roe v. Wade*."

One can hear in these words a muted echo of Professor Bruce Ackerman's outrageous suggestion that the Senate should refuse to confirm *anyone* nominated to the Supreme Court by President Bush because he was illegitimately installed in office by a conspiracy of right-wing Justices in *Bush v. Gore*, the decision that stopped the controversial Florida recount.

There is a real connection between *Roe v. Wade* and *Bush v. Gore*. It's common knowledge that abortion politics has played a huge role in judicial selection battles for many years. Justice Byron White (appointed by President Kennedy) could not be nominated by a Democrat today, for he called *Roe* an improvident and extravagant exercise of raw judicial power. It's less well-known that much of the academic legal establishment is making a determined effort to discredit *Bush v. Gore* and to vilify the five Justices who joined the majority opinion. The demand for blind obeisance to *Roe* and the assault on *Bush* are both are part of an Orwellian project: To recast judicial fidelity to the law as right-wing partisan politics. And to define extreme forms of judicial activism as the "mainstream."

The stakes in the battle over judicial selection are high. They go beyond the fate of any one nominee. And they go beyond the issue of abortion. The real question is whether we will get judges committed to applying the law, or judges who treat the law as a game where the winner gets his policy views enacted into judicial decrees. If Senator Feinstein's views prevail, judicially-created abortion rights will certainly be safe for the moment, but no rights and no law will long be secure from cynical judicial manipulation.

Bush v. Gore provides an illustration. The majority opinion applied well-settled precedents from the Warren Court in a perfectly straightforward fashion. None of the dissenters could explain why those precedents were inapplicable, and none even tried to do so. Instead, the dissenters criticized the majority on *political* grounds. Justice Breyer, for example, admitted that the Florida recount was unconstitutional, but argued that the U.S. Supreme Court should have let it proceed anyway. And why? According to Breyer: "*Above all*, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."

Justice Breyer's attitude should not be confused with judicial restraint. Just a few months before *Bush v. Gore*, for example, Breyer himself had authored an opinion in which the Court considered an effort by Nebraska to ban "partial birth abortions" without violating the dictates of *Roe v. Wade*. Thirty states and both houses of Congress had passed similar laws because millions of American citizens (including the likes

of Daniel Patrick Moynihan) regard this practice as verging on infanticide. Breyer and four of his colleagues frustrated their efforts by adopting an interpretation of the statute that had been rejected by Nebraska's attorney general and never adopted by its courts. Using this far-fetched interpretation, the Court manufactured a phony conflict between Nebraska's law and *Roe v. Wade*. Presto! Partial birth abortion was protected, and the judicial "mainstream" took another lurch toward the outer limits of American society.

Justice Breyer's approach arises from a theory deeply embedded among sophisticated legal elites. That theory essentially holds that the law is whatever the judges say it is, and that judges should "improve" the laws that have actually been adopted in the Constitution and the statutes enacted by our elected representatives. This idea that the merit of judicial decisions depends on the merit of the policy outcomes to which they lead is already the "mainstream" view in American law schools.

Dianne Feinstein and others in the Senate appear determined to make sure it becomes the mainstream view among American judges as well. If the Senate stops President Bush from what Sen. Feinstein calls "skewing the courts to the right," they will stop being courts in anything but name. At that point, we should really start asking why these politicians in robes should enjoy life tenure, and why they should get the last word on so many important policy issues.

"Anything But Fair"
By: Raquel A. Rodríguez

In reading Professor Rodolfo F. Acuña's diatribe (The Miami Herald, April 26, 2002) against Miguel Estrada, President George W. Bush's nominee for the United States Court of Appeals for the District of Columbia, my feelings alternated between anger and pity. My anger was most certainly directed at Professor Acuña. However, my pity was not for Miguel Estrada but for Professor Acuña and all those who profess to be for democracy, equality and freedom but who in fact practice the kind of ethnic totalitarianism and intellectual intolerance that are inimical to the values that we all hold dear. Professor Acuña's self-appointment as chief prosecutor, judge and jury is more reminiscent of the Spanish Inquisition than of careful scholarly reflection. His tactics are anything but fair.

It is clear that Professor Acuña had nothing he could say against Miguel Estrada's professional or ethical qualifications to serve on one of our nation's highest courts. Nor could he. Mr. Estrada has been rated "Well Qualified" by the American Bar Association (ABA), one of the most respected organizations of lawyers in the world. The ABA is on record as being committed to the quality and diversity of our judiciary; it has taken positions in favor of affirmative action and minorities that I am sure Professor Acuña would applaud.

Instead, Professor Acuña has resorted to spurious attacks on Mr. Estrada. The total lack of foundation for any of Professor Acuña's accusations would embarrass even a college freshman writing his or her first term paper.

Let's take each of these accusations in turn.

Accusation No. 1: "Estrada does not identify with the struggles or aspirations of most U.S. Latinos. He appears not to have experienced discrimination or unequal educational experiences." Apparently, Professor Acuña takes offense at the fact that Miguel Estrada is clearly a brilliant guy. Miguel Estrada came to this country from his native Honduras as a teenager who spoke virtually no English. After graduating from Columbia University (*magna cum laude*; Phi Beta Kappa) and from Harvard Law School (*magna cum laude*), where he was an editor of its famed Law Review, he eventually clerked for the Honorable Anthony M. Kennedy of the U.S. Supreme Court and is now a partner at one of this country's most prestigious law firms, from which our current Solicitor General also hails. Mr. Estrada is the embodiment of that to which all immigrant parents from Latin America (and indeed all parents) aspire for their children. I am sure he identifies plenty with the struggles of coming to a strange country, learning a new language, adopting to a different culture and studying day and night in order to make his parents proud. How is that not representative of Hispanics in the United States? In order to pass Professor Acuña's "Latino Litmus Test", does Mr. Estrada have to fit into some pigeon-hole by which "Latin-ness" is measured? I never knew we had to pass a test.

Accusation No. 2: "He has opposed affirmative action and sided with large corporate interests." So now Professor Acuña tells us that one cannot be for Hispanics if one opposes affirmative action and has represented large corporate clients. A lot of Hispanics think he would make a good judge; ask the Hispanic Chamber of Commerce and the League of United Latin American Citizens, both of which support Mr. Estrada's

nomination. In respect of his corporate representation in private practice, Mr. Estrada has been doing what the one million lawyers in this country do every day: representing his clients to the best of his ability. Professor Acuña conveniently omits to tell us that from 1992-1997, which encompassed virtually the entire first term of the Clinton Administration, Mr. Estrada was Assistant to the Solicitor General of the United States. This means that for several years of his professional life as a lawyer, he was representing the positions of the Democratic Clinton Administration before the US Supreme Court (including the *United Mine Workers v. Bagwell* case, for which Professor Acuña attempts to crucify him). The good professor also fails to mention that Mr. Estrada filed an *amicus* brief on behalf of the Clinton Administration siding with the National Organization for Women in *NOW v. Scheidler*, where the Supreme Court unanimously upheld the government's position that a law prohibiting the use of violence to deny individuals their civil rights could be applied to anti-abortion protestors. Mr. Estrada also has devoted his time to arguing *pro bono* (no fees) on behalf of a Virginia death row inmate, Tommy David Strickler. So much for the intellectual honesty of his accuser in chief.

Accusation No. 3: "Estrada is a member of the Federalist Society." This fact is true, but hardly proof that he is guilty of anything other than supporting conservative and libertarian ideals. One would expect a Bush nominee to be politically and philosophically conservative. Obviously, this little factoid has not prevented Ron Klain, Counsel to former Vice President Al Gore, and Randolph D. Moss, a Clinton Administration Justice Department Official, from endorsing Mr. Estrada's nomination to the court.

Accusation No. 4: "Also, Estrada has no judicial experience or the temperament to be a good judge." How many judges do you know who have argued 15 cases before the US Supreme Court? Obviously, the ABA believes that Mr. Estrada has the proper qualifications and temperament; otherwise, it would not have rated him "Well Qualified". Democrats have called the ABA judicial qualifications ratings the "Gold Standard". Is there now one standard for Hispanics and one for everyone else?

Far from being a "step backward for Latinos", the confirmation of Mr. Estrada to the Court of Appeals should be celebrated by all of us (whether we call ourselves "Latinos" or "Hispanics" or "Americans"). Here we have a man who has worked his way to the top of his profession, who has earned the respect of friends and political foes alike and who has achieved the American Dream. Judging Miguel Estrada by any standard other than his professional excellence and his personal integrity truly would be a step backward for us all. The Senate should confirm Mr. Estrada without any further delay and pray that there are more like him back home.

Raquel A. Rodriguez is a lawyer who practices law in Miami.

SENATE NEEDS TO ADDRESS GROWING CRISIS IN FEDERAL JUDICIARY

BY TREY GRAYSON

While most of our nation's attention has been focused on national security issues and the economy, another crisis threatens our nation – the large and growing number of vacancies in the federal judiciary.

One year ago, there were over 80 vacancies in the Federal system. Now there are 100, 37 of which are considered "judicial emergencies" by the Administrative Office of the U.S. Courts.

As an attorney licensed in both Ohio and Kentucky, I can tell you that these delays are having a huge impact on the administration of our judicial system. Dockets are crowded. Judges are overburdened. Courts are understaffed. As Chief Justice William Rehnquist observed in his 1997 annual report on the federal judiciary, these vacancies are threatening the "quality of justice that traditionally has been associated with the federal judiciary."

Attorneys across America have joined the Chief Justice in urging the Senate to speed up the confirmation process. Indeed, Senate Judiciary Committee Chair, Patrick Leahy (D-Vermont) urged the Senate to "redouble [its] efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility."

Unfortunately, Senator Leahy made those comments back in February 2000 when Bill Clinton was President, the Republicans controlled the Senate Judiciary Committee, and there were approximately 60 vacancies on the federal bench. Yet since becoming the Chair of the Senate Judiciary Committee, Senator Leahy has done virtually nothing to remedy the crisis and fulfill his self-proclaimed "constitutional responsibility".

The problem is not a lack of nominations -- the Bush administration made more first-year nominations than his last three predecessors, 89 overall. The problem is the confirmation process -- only 39 of these nominees have been confirmed by the full Senate.

Nowhere is this crisis more acute than our own Sixth Circuit Court of Appeals which consists of the states of Michigan, Ohio, Kentucky and Tennessee. The Sixth Circuit currently has 8 sitting judges and 8 vacancies — a 50% vacancy rate. In addition, 4 of these vacancies are considered "judicial emergencies".

In March 2000, when the Sixth Circuit had only four vacancies, its chief judge stated that it was "hurting badly and will not be able to keep up with its work load." Now the number of vacancies has doubled. As a result of these vacancies, the Sixth Circuit averages 15.3 months to resolve cases compared with the national average of 10.9 months, according to the Administrative Office of the U.S. Courts.

A little over a year into his term, President Bush has submitted 6 nominations for the Sixth Circuit, yet none of the 6 has even been given a hearing before the Senate

Judiciary Committee. Two of these nominees, including Ohio Supreme Court Justice Deborah L. Cook, have been waiting since May of last year for a hearing.

Some might argue that this is how our system of government normally works or that the Democrats are merely paying back the Republican for how they treated then President Clinton's nominees. However, the facts show otherwise.

In each of the previous three administrations, almost all judicial nominations submitted before the first August recess were confirmed by the end of the year. This year President Bush nominated 44 before the August recess yet only 28 were confirmed before the end of the year.

Confirming judicial nominees is one of the most important tasks of the Senate. Senator Leahy knew this back in 2000, and he knows it today. That's why he should fulfill his constitutional responsibility by using his authority as Chair of the Senate Judiciary Committee to expedite the confirmation process. If he has problems with the ideology or competence of any of President Bush's nominees, he should at least schedule a timely hearing on the nominee followed shortly thereafter by a vote.

The Sixth Circuit and the rest of the federal judiciary deserve better than to be held hostage by this brand of partisan politics.

Mr. Grayson is a Park Hills, Kentucky resident, and is an associate with the Cincinnati law firm of Keating, Muething & Klekamp, P.L.L.