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CONGRESSIONAL RECORD -- SENATE
Tuesday, February 3, 1998
105th Congress, 2nd Session
144 Cong Rec S 292

REFERENCE: Vol. 144, No. 5

TITLE: NOMINATIONS OF CARLOS R. MORENO, OF CALIFORNIA, TO BE UNITED STATES DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA AND CHRISTINE O. C. MILLER, OF THE DISTRICT OF COLUMBIA, TO BE A JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

SPEAKER: Mr. HATCH; Mr. LEAHY; Mrs. FEINSTEIN; Mr. KENNEDY; Mr. NICKLES; Mr. FORD

TEXT: [*S292]

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to consider two nominations which the clerk will report.

The assistant legislative clerk read the nominations of Carlos R. Moreno, of California, to be United States District Judge for the Central District of California and Christine O. C. Miller, of the District of Columbia, to be a judge of the United States Court of Federal Claims.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Madam President, I rise today to support the nominations of Carlos Moreno to the Federal district bench in the Central District of California and Christine O. Miller to the Court of Federal Claims.

I plan to discuss in greater detail why I intend to support these

judges' nominations, but first I would like to address some of the concerns that have been expressed with respect to the Senate's role in the confirmation of Federal judges.

As chairman of the Senate Judiciary Committee, one of the most important duties I hold or fulfill is in screening judicial nominees. Indeed, the Constitution itself obligates the Senate to provide the President with advice concerning his nominees and to consent to their ultimate confirmation. Although some have complained about the pace at which the Senate has moved on judicial nominees, I would note that this body has undertaken its constitutional obligation in a wholly appropriate fashion.

Indeed, the first matter to come before the Senate this session was confirmation of three of President Clinton's judicial nominees. Senator Lott is to be commended for giving these nominees early attention. As well, the Judiciary Committee has announced judicial confirmation hearings for February 4 and February 25.

In 1997, the first session of the 105th Congress, the Senate confirmed 36 judges. This is only slightly behind the historical average of 41 judges confirmed during the first sessions in each of the last five Congresses. And I would note the Judiciary Committee itself processed 47 nominees, including the two judges we are considering today.

Currently, there are 88 judicial vacancies in the judiciary, 85 if the three nominees confirmed last week are included. In May 1992, however, when a Republican occupied the White House and the Democrats controlled the Senate, there were 117 vacancies on the Federal bench.

In fact, there are more sitting Federal judges today than there were through virtually all of the Reagan and Bush administrations. As of today, there are 756 active Federal judges. In addition, there are 432 senior judges who must, by law, hear cases, albeit with a reduced load. Ordinarily, when a judge decides to leave the bench, he or she does not completely retire, but instead takes senior status. A judge who takes senior status, as opposed to a judge who completely retires, must hear a certain number of cases each year. Thus, when a judge leaves the bench, he or she does not stop working altogether, he or she merely takes a somewhat reduced caseload.

Even in the ninth circuit, which has 10 vacancies, only one judge has actually stopped hearing cases. The others have all taken senior status and are still hearing cases. The total pool of Federal judges available to hear cases is 1,188, a record number of Federal judges.

The Republican Senate has confirmed the vast majority of President Clinton's judicial nominees, and if the President continues to send us qualified nominees, I am sure that trend will continue. Let me say, however, that I will not vote to confirm judges who refuse to abide by the rule of law. In my view, that is the absolute minimal qualification an individual must have to serve as one of our lifetime-appointed Federal judges.

Last year, I sought to steer the confirmation process in a way that kept it a fair and principled one, and exercised what I felt was the appropriate degree of deference to the President's judicial nominees. It is in this spirit of fairness that I will vote to confirm Judge Miller and Judge Moreno.

Judge Moreno is currently a Los Angeles superior court judge. He was appointed to that position in 1993 by Governor Wilson. Prior to his current appointment, Judge Moreno served as a municipal court judge, worked as an associate in the L.A. firm of Kelley, Drye & Warren, and served as deputy city attorney in Los Angeles.

Judge Miller currently serves on the Court of Federal Claims. She was appointed to that position in 1983 by President Ronald Reagan. Judge Miller, before her judicial appointment, worked at the law firms of Shack & Kimball, and then Hogan & Hartson. She also had the honor, after graduating from the Utah College of Law, of clerking for the Honorable David Lewis, a Tenth Circuit Court of Appeals judge.

I think both these individuals will serve the Federal bench well and, therefore, urge my colleagues to support them. I also would like to submit for the Record an editorial written by our leader, Senator Trent Lott, which appeared on February 2 in the Washington Post, also a letter I wrote to the ABA discussing the Senate's work in confirming nominees. I ask unanimous consent that both those documents be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

From the Washington Post, Feb. 2, 1998

Rehnquist's Rush to Judgment

(By Trent Lott)

Chief Justice Rehnquist's 1997 year-end report has drawn considerable press attention to the Senate's role in the confirmation and appointment of federal judges. Good. It's about time proper attention was given to these unique government officials, who are appointed for life, paid salaries that can run to nearly \$145,000 and are provided facilities and staff costing American taxpayers many millions of dollars annually.

And if the cost of these judgeships and the judiciary bureaucracy isn't enough to cause concern, consider the fact that many such lifetime-appointed judges actually attempt to make law from the bench. This is especially troubling when federal judges seek to impose taxes on the public or turn criminals loose on society.

The chief justice contends that federal judges are underpaid and overworked and that the "quality of justice" administered by the federal judiciary is in peril. He also attempts to make an argument for more judges based on statistics regarding, for example, the total caseload of all district and circuit courts and the number of judicial vacancies.

Interestingly, Rehnquist chooses to omit statistics that hurt his case. In his report, he notes that the "Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994."

True, the 17 judges confirmed in 1996 were certainly low as compared with most other years. But in 1989, the Democrat-

controlled Senate confirmed 15 of President George Bush's nominees. Moreover, the chief justice's reference to 1994 and the confirmation of 101 judges that year is inappropriate, because the Democrats controlled the Senate and the presidency that year. Historically, the number and pace of confirmations lessen when one party holds the White House and the other the Senate. The large number of vacancies on the bench in 1994 allowed Clinton to nominate many more judges than in an average year, which accounts for the large number of confirmations.

The chief justice also neglected to point out that Congress has authorized an additional 250 judgeships since 1978 (now totaling 849). Further, rather than retiring, many judges take "senior" status, in which they continue to be paid, have staff and decide cases. There are approximately 274 district and 82 circuit judges on "senior" status, contributing to the reduction of the workload of "active" judges.

Almost every year, Congress receives a request from the judiciary to add new judgeships to meet caseload increases. The Committee on Long Range Planning of the Judicial Conference projects that we will need 1,370 federal judges by the year 2000, 2,350 judges by 2010 and 4,110 by 2020. Clearly, the problems of caseload will have to be addressed over the coming years. But merely creating new judgeships will not provide solutions to such issues.

The chief justice also focused on the number of vacancies--83--in the district and circuit courts. This number pales in comparison with the 125 vacancies that occurred in 1993

during President Clinton's first year, when the Democrats controlled the Senate. The chief also failed to mention that President Clinton has not submitted nominees to the Senate for 41 of these vacancies.

Of the 13 nominees for circuit court judgeships, five were sent to the Senate less than 30 days from adjournment. Of the 28 district court nominees, three were sent to the Senate within 30 days of adjournment, another three within 45 days and one within 60 days of adjournment. Even the most partial observers of the confirmation process recognize that more than 60 days is required for investigation of a nominee's education, experience and potential judicial temperament.

As noted by the chief justice, the judiciary characterizes 26 of the current 83 vacancies that have existed for more than 18 months as "judicial emergencies." There appears to be no basis for this characterization other than the length of time the position has been vacant and the notion that every authorized position urgently needs to be filled. In fact, one vacant position in the 4th Circuit, authorized in 1990, has never been filled, and President Clinton has not nominated anyone to it. By the same token, he submitted nominees just last year for two Texas district court positions vacant since being authorized in 1990.

Clearly, the president did not view vacancies in any of those positions as "emergencies." In all, of the 26 "emergencies," only 12 apparently are deemed important enough that the president has submitted nominations fill them.

The pace of confirmation hasn't changed much in the Senate since 1987. That was the year Democrats regained control of the Senate and slowed the process of confirming Reagan nominees. District court confirmations averaged 129 days and circuit court confirmations 113 days in 1987. This pace continued during the Bush administration, when Democrats controlled the Senate. The experience of the Robert Bork, Douglas Ginsberg and Clarence Thomas nominations to the Supreme Court did much to further politicize an already labor-intensive and time-consuming review process.

The pace quickened in 1993 and '94, when President Clinton's district court nominees were confirmed on average within 74 days of referral to the Democrat-controlled Senate. The pace naturally slowed again when Republicans regained control of the Senate.

The chief justice's dismal assessment of the judiciary is not warranted. Congress will continue to closely monitor the needs of the judiciary to fulfill its function as a separate and equal branch of government. As a part of this process, Congress will create and maintain such judgeships as are necessary to empower the judiciary to accomplish the fair and equal application of justice through the interpretation and application of our laws.

U.S. Senate,

Committee on the Judiciary,

Washington, DC, February 3, 1998.

Mr. Jerome Shestack,

President, American Bar Association, Philadelphia, PA.

Dear President Shestack: I am sorry that I could not attend the American Bar Association's annual convention this year, as I am at the World Economic Summit. I understand, however, that Senator Patrick Leahy ably represents the Judiciary Committee. Nevertheless, I thought it prudent to make you aware of my views regarding the so-called judicial vacancies issue, in which, I am sure, the ABA has great interest.

As you are doubtless aware, Chief Justice William Rehnquist recently released his annual report on the federal judiciary. In that report, he noted, among other things, the need expeditiously to fill vacancies on the federal bench. The Chief Justice's comments were very similar to those made over the years, including 1992, when he urged the Senate to confirm more of President Bush's judicial nominees. Interestingly, 117 vacancies existed May 1992, compared with the 88 we have today.

In 1997, the Senate confirmed 36 judges, only slightly behind the historical average of 41 judges confirmed during the first sessions in each of the last five Congresses. And the Judiciary Committee itself processed 47 nominees during the past session. There are currently more sitting judges than there were throughout virtually all the Reagan and Bush administrations. As of today, there are approximately 756 active federal judges. In addition, there are 432 senior judges who must continue to hear cases, albeit with a reduced

workload. That brings the total pool of federal judges available to hear cases up to 1,188.

Despite claims to the contrary, the Senate has confirmed the vast majority of President Clinton's nominees, and I am confident that we will continue on a steady course this session. I am basically pleased with the pace at which the Judiciary Committee and the Senate have acted on the President's nominees. Indeed, one of the Senate's first items of business this session was to confirm three judicial nominees, including Ann Aiken, a controversial nominee whom I supported. We can, of course, always improve. I am hoping that the Committee will establish a good working relationship with the White House in this new year.

Such a relationship, however, does not mean that the President has carte blanche to appoint judges. The Constitution obligates the Senate to give advice to the President on his nominees and ultimately to consent to them. Under my stewardship, the Judiciary Committee will not simply push nominees through just for the sake of filling vacancies. Only recently, after the Judiciary Committee had expeditiously reviewed and held hearings on two nominees, did information surface that caused one of those nominees to withdraw and that places the other's confirmation prospects in question. If the Committee were blindly to follow some sort of a timetable in processing nominees, the federal bench would have been adversely affected. Indeed, such a specific timetable could encourage nominees to withhold relevant information from the Committee in

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the hope of forcing a vote. There is a good deal of background research that must be done by the Committee before it can send a nominee to the floor. If the Committee fails to do its groundwork, it fails the Senate, and thus prevents that body from fulfilling its constitutional duty. I do not hold the President to any sort of a timetable in selecting nominees; nor would I expect others to place such burdens upon the Senate.

I would further note that the Chief Justice's report did not focus solely on judicial vacancies. In fact, the primary focus of his remarks was the increase in the federal judiciary's workload. The Chief Justice complimented Congress on its efforts to reform federal habeas corpus procedures and to streamline prison litigation suits--two measures that he indicated would be of great benefit to the judiciary. As I recall, these were legislative measures the ABA opposed. Nevertheless, I am hopeful that the ABA will be supportive of further efforts to improve the judicial process.

In a similar vein, the Chief Justice expressed concern about the expansion of federal jurisdiction. I hope in the coming months to review the current status of federal jurisdiction and to search for recommendations on how federal courts might be freed from hearing cases more properly brought in state courts. I think we must be vigilant in searching for ways to utilize properly the federal courts' limited resources.

Last year, I sought to steer the confirmation process in a

way that kept it a fair and principled one, and exercised what I felt was the appropriate degree of deference to the President's judicial nominees. Yet, the solution to an increased judicial workload should not be simply to add more judges or for the Senate to be held to some sort of a confirmation timetable. I am confident that the Committee will stay the course and continue to exercise its constitutional duty in an appropriate manner. Thank you for considering my views.

Sincerely,

Orrin G. Hatch,

Chairman.

Mr. HATCH. I thank the Chair, and I yield the floor.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I am glad to be here with my good friend from Utah and welcome him back from a productive weekend.

Last week, I commended the chairman of the Judiciary Committee for scheduling the judicial confirmation hearing, the first of this year, for tomorrow afternoon, and I commend the chairman again. I note that he is following through on his earlier statement by including both Margaret McKeown of Washington State and Susan Oki Mollway of Hawaii at that hearing. They have each been pending for over 18 months, and it will be good to have their confirmation hearing.

I hope we will maintain pace this year that was established during the last 9 weeks of the last session. In order to do that, I hope that in addition to these nominees we can proceed to confirm additional nominees for article III judicial vacancies before the end of the week.

I am delighted the Senate is getting the opportunity to consider the nomination of Judge Carlos Moreno to the United States District Court for the Central District of California. He has been strongly supported by both Senators Feinstein and Boxer. They have both spoken to me about him and strongly support him.

I have spoken often about the District Court of the Central District of California, its workload and the need to confirm qualified nominees for the judicial vacancies that persist and are arising on that Court. I have spoken most often about that Court in connection with the longstanding nomination of Margaret Morrow. It is my expectation that the Senate will fulfill the commitment it made last year and proceed to that nomination by the end of next week.

Judge Moreno received his undergraduate education at Yale College and his law degree from Stanford Law School. He was a deputy city attorney in Los Angeles, as well as a municipal court judge before joining the Los Angeles Superior Court in 1993. Judge Moreno is currently serving the people of California as a Judge of the California Superior Court. He received high remarks from the American Bar Association and was reported by the Judiciary Committee on November 13, 1997, unanimously. I thank both the majority leader and my good friend from Utah for bringing him up this morning.

Along with Judge Moreno currently pending on the Senate calendar are Ms. Morrow, two nominees for long-vacant judgeships in Illinois and a

Pennsylvania State court judge. I hope that we have a strong bipartisan vote in his favor.

I also expect that today the Senate will confirm the President's judgment in nominating and reappointing Judge Christine Miller to the Court of Claims. The President's nomination of Judge Miller was received last year before her first term expired, but the Senate failed to act on it before adjournment last fall.

The President used his recess appointment power to reappoint Judge Miller and resubmitted her nomination. Today the Senate will reaffirm the President's action and confirm her to a full term.

The Court of Claims is an important court. It is established by Congress under article I of the Constitution. No less than the Federal judiciary that is appointed to fill vacancies in the article III courts that we speak about so often, the vacancies on the Court of Claims should be filled and filled without delay.

Madam President, I hope that the distinguished Senator from Utah and I will be allowed by our caucuses to move forward on judges as quickly as possible. I know there is support in mine to do that.

Madam President, I see the distinguished Senator from California on the floor and yield to her.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. FEINSTEIN. Madam President, I thank the ranking member, and I thank the Presiding Officer. I also would like to begin by thanking the distinguished chairman of the Judiciary Committee for what was, by and

large, a rapid and prompt processing of Carlos Moreno. I submitted the name of Carlos Moreno to the President for appointment to the District Court from the Central District of California. In a sense, Madam President, I believe he is prototypical of really what a good Federal judge should bring to that office. I would like to just quickly go over what is an amazing success story.

Judge Moreno was born in East L.A., just 2 miles from the Federal courthouse where he will be serving. He has earned the respect and admiration of both the legal and the law community, and he has had 13 years of service on the State courts. He has strong bipartisan support, including the endorsements of the former Governor George Deukmejian and Los Angeles County Sheriff Sherman Block.

As the chairman of the committee pointed out, he obtained his bachelor's degree from Yale in 1970 and his J.D. from Stanford in 1975. He began his legal career in the City Attorney's Office of Los Angeles where he worked for 4 years, from 1975 to 1979.

He prosecuted numerous jury trials, misdemeanor prosecutions, and criminal and civil consumer protection cases. He worked as a litigation attorney for 7 years, handling commercial litigation in State and Federal courts. So he has experience in both the civil as well as the criminal law. His caseload there included bankruptcy, wrongful termination, banking, real estate, and antitrust.

In 1986 the Governor of California, George Deukmejian, appointed him to the municipal court. He served there for 7 years, handling 40 civil jury trials in addition to a regular criminal trial workload.

In 1993, Governor Wilson elevated him to the California Superior

Court where he served for the past 4 years. He averaged approximately 2 dozen jury trials a year, at least a third of which have been homicides. The remainder have consisted of a broad range of felonies and he has presided over about a dozen bench trials per year.

So, 13 years as a municipal and superior court judge. This year he was selected as the superior court judge of the year by the criminal law section of the Los Angeles County Bar Association and was described as one who earns praise from both prosecutors and defense attorneys for his fair, even-tempered handling of a high-volume calendar of criminal cases. The large number of court trials he handles in which both sides, both sides, waive the jury and try the case before him is an indicator, I believe, of the trust he has received from opposing counsels.

Madam President, I ask unanimous consent to have printed in the Record letters of support by George

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Deukmejian, former Governor; a letter from the District Attorney of Los Angeles County; and a letter from the Sheriff of Los Angeles County.

There being no objection, the material was ordered to be printed in the Record, as follows:

Los Angeles, CA,

October 6, 1997.

Re Judge Carlos R. Moreno.

Hon. Orrin Hatch,
Chairman, Committee on Judiciary, U.S. Senate, Washington,
DC.

Dear Senator Hatch: It has come to my attention that Judge
Carlos Moreno has been nominated for an appointment to the
U.S. District Court, Central District of California.

In 1986, it was my pleasure to appoint him to the Compton
Municipal Court and in 1993 he was appointed by Governor Pete
Wilson to the Los Angeles Superior Court.

It is my understanding that he has performed in an
exemplary manner as a Municipal and Superior Court Judge and
has a clear perception of the importance of maintaining a
judicial system that insures fairness and social order.

Judge Moreno is well suited for this position. I am
confident that he has the appropriate judicial skills and in
light of his qualifications, I hope you will give him every
consideration for appointment to the U.S. District Court.

Most cordially,

George Deukmejian,
35th Governor of California.

Los Angeles County

District Attorney,

Los Angeles, CA, May 2, 1997.

Hon. Dianne Feinstein,
U.S. Senator, San Francisco, CA.

Dear Dianne: Superior Court Judge Carlos R. Moreno has informed me that he is seeking an appointment to the U.S. District Court for the Central District of California, and I am writing to strongly recommend his nomination and confirmation.

Although Judge Moreno is not a personal acquaintance of mine, I have had the opportunity to personally interview him and to speak with several of my colleagues who have appeared before him on many occasions. All of the persons I contacted were effusive in their praise of the professional attributes that Judge Moreno brings to the bench as a Superior Court trial judge: he is fair, bright, willing to read with care the lawyers' written motions, control his courtroom, and give both sides fair hearings in his court. In addition, he apparently relishes legal research and thoroughly familiarizes himself with the issues of a case before he gives a decision--a quality which would serve him well on the Federal bench.

I do not make recommendations on behalf of those seeking appointments lightly, and in fact, I turn down most requests. However, the level of support and enthusiasm expressed by my colleagues on behalf of Judge Moreno prompted me to agree to interview him, and I found him during the interview to have the personal attributes that I had been told he displays on a daily basis in his court. I am confident Carlos Moreno would serve as a District Court judge with distinction, and I

believe his appointment would be beneficial to the citizens of California.

Very truly yours,

Gil Garcetti,

District Attorney.

County of Los Angeles,

Monterey Park, CA, April 23, 1997.

Hon. Dianne Feinstein,

U.S. Senate,

San Francisco, CA.

Dear Dianne: It has come to my attention that Los Angeles County Superior Court Judge Carlos R. Moreno has indicated his desire to be appointed a United States District Court Judge for the Central District of California. I am pleased and honored to give him my personal endorsement.

Judge Moreno has an extensive criminal justice background. He has been a Judge of the Superior Court of Los Angeles County since November of 1993. Prior to that, Judge Moreno was a City Attorney with the City of Los Angeles from 1975 to 1979 where he handled criminal and civil consumer protection prosecutions and legislative and politically sensitive matters. He was a member of the law firm of Kelley, Drye & Warren from 1979 to 1986, and in October 1986 Judge Moreno was elected Judge of the Municipal Court. He held that seat

until his appointment to the Superior Court in 1993. Throughout his tenure on the bench, he has continually demonstrated the prerequisite abilities necessary to be a fair, impartial, and knowledgeable jurist.

Judge Moreno is an extremely hard working individual of impeccable character and integrity. His list of credits, both professionally and within the community, is extensive.

I would like to recommend that you favorably consider his appointment. I have no doubt that he would be a distinguished addition to the United States District Court.

Sincerely,

Sherman Block,

Sheriff.

Mrs. FEINSTEIN. Madam President, to sum it up, I believe we have a man among men, a fine jurist, a fine attorney, skilled and knowledgeable in both criminal and civil law. This is the reason I respectfully submit him as someone who is really prototypical of the kind and type of background that one might bring to the Federal district court.

I thank the ranking member and I thank the chairman for the rapid processing of this distinguished nominee.

I yield the floor.

Mr. KENNEDY. Madam President, I strongly support the nominations of

Carlos Moreno and Christine Miller to serve as federal judges.

Judge Moreno is superbly qualified to serve as a federal judge in the Central District of California. He is a graduate of Yale University, Harvard Business School, and Stanford Law School. Currently, he is a judge on the Los Angeles Superior Court. As a member of that court's Trial Delay Reduction Committee he was instrumental in establishing and enforcing policies that successfully reduced trial backlogs in Los Angeles County. At a time when lengthy backlogs are also plaguing the federal courts, Judge Moreno's experience will be an important asset for California's Central District Court.

Judge Miller is also well qualified to continue her service on the United States Court of Federal Claims. She has served on that court for the past fifteen years, and President Clinton's nomination of her for a second fifteen-year term is a tribute to her ability and leadership.

I also want to take this opportunity to express my concern that the Senate has still not had a chance to vote on the nomination of Margaret Morrow to the federal district court for the Central District of California. Ms. Morrow was first nominated in May 1996. She was approved by the Judiciary Committee in June last year, and it is long past time for the Senate to vote on her nomination.

On average, it is taking twice as long for Senate Republicans to confirm President Clinton's nominees as it took for Democrats to act on President Bush's nominations. But I am especially concerned about the Republicans' record of subjecting women who are nominated for federal judgeships to far greater delays than men.

Women nominated to the federal courts are four times--four times--more likely than men to be held up by the Republican Senate for more

than a year.

Last year, the Senate confirmed 30 men, but only 6 women. And, by confirming only 36 judges, the Senate condemned many of our nation's busiest courts to even lengthier delays in processing their civil cases.

There is no question that Margaret Morrow possesses the necessary qualifications to be confirmed. She is a Harvard-educated attorney and a partner in a prestigious California law firm. She is the first woman to serve as the president of the California Bar Association. She is a well-respected attorney and a role model for women in the legal profession.

Yet action on her nomination has been delayed--like nine other nominees who have been waiting for more than 18 months--because the Republicans are playing politics and preventing needed judicial positions from being filled.

When even a Republican Chief Justice criticizes the Republican Congress for refusing to move more quickly to confirm judges, you know something's wrong. The Chief Justice is deeply concerned about the large number of judicial vacancies on the federal courts. There are too few judges to handle the workload.

The bottleneck in the Senate is jeopardizing the court system and undermining the quality of justice. Fewer than half of President Clinton's nominees have been confirmed.

~~We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them.~~

~~But give them a vote.~~

The distinguished majority leader has rightly noted that the process of confirming judges is time-consuming. The Senate should take care to ensure that only individuals acceptable to both the President and the Senate are confirmed. The President and the Senate do not always agree. But it should not take longer to consider women than it does to consider men.

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Some Republicans claim they have slowed the confirmation process to protect the federal courts from "judicial activism." But this argument is a smokescreen. If President Clinton is actually nominating judicial activists, then why is it that these nominees are approved overwhelmingly when the Senate is finally allowed to vote on them? The closest vote that we have had on any nominee in this Congress was the 76 to 30 vote in favor of Ann Aiken last week.

The claim that Clinton judges are activist judges is a transparent ruse being used to slow down the confirmation process. The reason is obvious. The Republican majority in Congress is doing all it can to prevent a Democratic President from naming judges to the federal courts. The courts are suffering, and so is the nation.

In some areas of the country, people have to wait years to have their cases even heard in court. And then they have to wait years more for overburdened judges to find time to issue their decisions. Families, workers, small businesses, women and minorities have traditionally looked to the courts to resolve disputes. The lack of federal judges makes the swift resolution of their cases impossible.

**President Bush's Plan for Timely Consideration of Judicial Nominees
(Applied State by State to the 18 Pending Court of Appeals Nominees)**

District of Columbia

John Roberts and Miguel Estrada were nominated to the U.S. Court of Appeals for the District of Columbia Circuit by President Bush on May 9, 2001. Mr. Roberts is a former Deputy Solicitor General who is widely regarded as one of the best Supreme Court lawyers in America. Mr. Estrada has served as a federal prosecutor and Assistant to the Solicitor General under Presidents of both parties. Both are highly qualified and have strong bipartisan support, including from many top lawyers in the Clinton Administration such as Ron Klain and Seth Waxman. Despite the passage of time since their nominations, Mr. Roberts has not received even a Senate Judiciary Committee hearing, and neither Mr. Roberts nor Mr. Estrada has received a Senate vote.

Under the President's plan, both Mr. Roberts and Mr. Estrada would have received Committee hearings and up-or-down Senate floor votes by now.

Alabama

Judge William Steele was nominated to the U.S. Court of Appeals for the Eleventh Circuit on October 9, 2001. He was a Marine pilot and state and federal prosecutor who currently serves as a U.S. Magistrate Judge. He is highly qualified and has strong bipartisan support in Alabama. Despite the passage of time since his nomination, he still has not received even a Senate Judiciary Committee hearing.

Under the President's plan, Judge Steele would have received a Committee hearing and an up-or-down Senate floor vote by now.

California

Judge Carolyn Kuhl was nominated to the U.S. Court of Appeals for the Ninth Circuit by President Bush on June 22, 2001. Judge Kuhl has served on the state Superior Court in Los Angeles since 1995, is superbly qualified, and has strong bipartisan support in California. Her supporters include Vilma Martinez, the former head of the Mexican American Legal Defense and Educational Fund. Despite the passage of time since her nomination, she still has not received even a Senate Judiciary Committee hearing.

Under the President's plan, Judge Kuhl would have received a Committee hearing and an up-or-down Senate floor vote by now.

Colorado

Tim Tymkovich was nominated to the U.S. Court of Appeals for the Tenth Circuit by President Bush on May 25, 2001. Mr. Tymkovich has served as Solicitor General of Colorado, is highly

qualified for the Tenth Circuit, and has strong bipartisan support in Colorado including from Democrat Attorney General Ken Salazar. Despite the passage of time since his nomination, Mr. Tymkovich still has not received even a Senate Judiciary Committee hearing.

Under the President's plan, Mr. Tymkovich would have received a Committee hearing and an up-or-down Senate floor vote by now.

Kentucky

John Rogers of Kentucky was nominated to the Sixth Circuit Court of Appeals by President Bush on December 19, 2001. He is a Professor at the University of Kentucky College of Law, where he has taught since 1978. Professor Rogers is highly qualified and has strong bipartisan support. He still has not received a Senate vote notwithstanding the passage of time since his nomination and the serious vacancy crisis in the Sixth Circuit.

The Sixth Circuit, which covers Ohio, Michigan, Kentucky, and Tennessee, is nearly half-empty with 9 judges sitting on a court with 16 authorized judgeships. In March 2000, at a time there were only 4 vacancies on the Sixth Circuit, Chief Judge Merritt of the Sixth Circuit wrote to the Senate Judiciary Committee about the crisis: "The Court is hurting badly and will not be able to keep up with its work load. . . . Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. . . . The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant."

Under the President's plan, Professor Rogers would have received an up-or-down Senate floor vote by now. In all, the President has submitted 7 nominees to the Sixth Circuit who are pending before the Senate. Under the President's plan, all 7 pending Sixth Circuit nominees would have received their Committee hearings by now, and 6 of the 7 would have received up-or-down Senate floor votes by now.

Michigan

Michigan has a serious vacancy problem on the federal court of appeals and is a prime example of what President Bush's plan will address. The President has submitted 4 nominees to the Sixth Circuit Court of Appeals from Michigan (three in November 2001 and one more in June 2002). The nominees are Susan Neilson, Henry Saad, David McKeague, and Richard Griffin. All four are highly qualified and have strong bipartisan support in Michigan. None of the four has received even a Senate Judiciary Committee hearing notwithstanding the passage of time since their nominations and the vacancy crisis in the Sixth Circuit.

The Sixth Circuit, which covers Ohio, Michigan, Kentucky, and Tennessee, is nearly half-empty with 9 judges sitting on a court with 16 authorized judgeships. In March 2000, at a time there were only 4 vacancies on the Sixth Circuit, Chief Judge Merritt of the Sixth Circuit wrote to the Senate Judiciary Committee about the crisis: "The Court is hurting badly and will not be able to keep up with its work load. . . . Our Court should not be treated in this fashion. The public's

business should not be treated this way. The litigants in the federal courts should not be treated this way. . . . The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant.”

Under the President's plan, all 4 nominees would have received Committee hearings by now, and 3 of the 4 nominees would have received up-or-down Senate floor votes by now. In all, the President has submitted 7 nominees to the Sixth Circuit who are pending before the Senate. Under the President's plan, all 7 pending Sixth Circuit nominees would have received their Committee hearings by now, and 6 of the 7 would have received up-or-down Senate floor votes by now.

Mississippi

Judge Charles Pickering was nominated to the U.S. Court of Appeals for the Fifth Circuit by President Bush on May 25, 2001. Judge Pickering has been a federal district judge since 1990 sitting on the United States District Court for the Southern District of Mississippi. Judge Pickering's nomination was blocked in the Senate Judiciary Committee. Despite the passage of time since his nomination, Judge Pickering still has not received a vote in the full Senate.

Under the President's plan, Judge Pickering would have received an up-or-down Senate floor vote by now, and we know that he would have been confirmed based on Senators' stated views.

Nevada

Jay Bybee was nominated to the U.S. Court of Appeals for the Ninth Circuit on May 22, 2002. Mr. Bybee currently serves as Assistant Attorney General for the Office of Legal Counsel at the Department of Justice. He is highly qualified and has the support of Republican Senator John Ensign and Democrat Senator Harry Reid. Despite the passage of time since his nomination, Mr. Bybee still has not received even a Senate Judiciary Committee hearing.

Under the President's plan, Mr. Bybee would have received a Committee hearing by now, and he would receive an up-or-down Senate floor vote no later than November 2002.

North Carolina

Judge Terry Boyle was nominated to the U.S. Court of Appeals for the Fourth Circuit by President Bush on May 9, 2001. He has been a federal district judge since 1984 sitting on the United States District Court for the Eastern District of North Carolina. He is highly qualified and has strong bipartisan support in North Carolina. Judge Boyle still has not received a hearing before the Judiciary Committee despite the passage of time since his nomination.

Under the President's plan, Judge Boyle would have received a Committee hearing and up-or-down Senate floor vote by now.

Ohio

Justice Deborah Cook of the Ohio Supreme Court and Jeffrey Sutton, a widely respected constitutional lawyer in Columbus, were nominated to the Sixth Circuit Court of Appeals by President Bush on May 9, 2001. Both are highly qualified and have strong bipartisan support in Ohio. Neither Justice Cook nor Mr. Sutton has received even a hearing notwithstanding the passage of time since their nominations and the vacancy crisis in the Sixth Circuit.

The Sixth Circuit, which covers Ohio, Michigan, Kentucky, and Tennessee, is nearly half-empty with 9 judges sitting on a court with 16 authorized judgeships. In March 2000, at a time there were 4 vacancies on the Sixth Circuit, Chief Judge Merritt of the Sixth Circuit wrote to the Senate Judiciary Committee about the crisis: "The Court is hurting badly and will not be able to keep up with its work load. . . . Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. . . . The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant."

Under the President's plan, Justice Cook and Mr. Sutton would have received Committee hearings and up-or-down Senate floor votes by now. In all, the President has submitted 7 nominees to the Sixth Circuit who are pending before the Senate. Under the President's plan, all 7 pending Sixth Circuit nominees would have received their Committee hearings by now, and 6 of the 7 would have received up-or-down Senate floor votes by now.

South Carolina

Judge Dennis Shedd was nominated to the U.S. Court of Appeals for the Fourth Circuit by President Bush on May 9, 2001. He has been a federal district judge since 1990 sitting on the United States District Court for the District of South Carolina. Judge Shedd is supported by Republican Senator Thurmond and Democrat Senator Hollings. Judge Shedd still has not received a vote in the full Senate despite the passage of time since his nomination.

Under the President's plan, Judge Shedd would have received an up-or-down Senate floor vote by now.

Tennessee (no pending nominee but in Sixth Circuit)

There is a serious vacancy crisis in the Sixth Circuit, which covers Ohio, Michigan, Kentucky, and Tennessee. The court is nearly half-empty with 9 judges sitting on a court with 16 authorized judgeships. In March 2000, at a time there were just 4 vacancies on the Sixth Circuit, Chief Judge Merritt of the Sixth Circuit in Nashville wrote to the Senate Judiciary Committee about the crisis: "The Court is hurting badly and will not be able to keep up with its work load. . . . Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. . . . The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant."

The President has submitted 7 nominees to the Sixth Circuit who are pending before the Senate. Under the President's plan, all 7 pending Sixth Circuit nominees would have received their Committee hearings by now, and 6 of the 7 would have received up-or-down Senate floor votes by now.

Texas

Justice Priscilla Owen was nominated to the U.S. Court of Appeals for the Fifth Circuit by President Bush on May 9, 2001. She has served on the Texas Supreme Court since 1995. She is supported by three former Democrat Justices on that court and a bipartisan group of 15 past Presidents of the State Bar of Texas, among others. She has been blocked in the Judiciary Committee and, despite the passage of time since her nomination, still has not received a vote in full Senate.

Under the President's plan, Justice Owen would have received an up-or-down Senate floor vote by now, and we know that she would have been confirmed based on Senators' stated views.

Utah

Professor Michael McConnell was nominated to the U.S. Court of Appeals for the Tenth Circuit by President Bush on May 9, 2001. He is a Professor of Law at the University of Utah and is widely respected for his experience and integrity. A bipartisan group of over 300 law professors have written in support on his nomination. Despite the passage of time since his nomination, Professor McConnell still has not received a Senate vote.

Under the President's plan, Professor McConnell would have received an up-or-down Senate floor vote by now.

11/07/02 10:30 PM

THE WHITE HOUSE

WASHINGTON

November 7, 2002

Dear Senator Daschle, Senator Lott, Senator Leahy, and Senator Hatch:

On October 30, 2002, as you know, President Bush announced a proposal for timely consideration of judicial nominees. I write regarding the President's proposal and to suggest that we meet at your convenience to discuss it further.

The proposal is designed to resolve the judicial vacancy crisis and to improve the judicial nomination and confirmation process, both now and in the future no matter who is President or which party controls the Senate. The proposal involves all three Branches of the Federal Government. It calls on federal court of appeals and district court judges to provide advance notice of one year if possible before retirement, which builds on existing Judicial Conference policy. The proposal calls on Presidents to submit nominations within 180 days of a vacancy or announced future retirement. (President Bush will abide by this deadline for pending and future vacancies, including for the new judgeships recently created by H.R. 2215. The President thus intends, for example, to submit nominees for all currently known vacancies for which no nominee is pending no later than April 25, 2003.) The proposal further provides that the Senate Judiciary Committee should hold a hearing for each nominee within 90 days of a nomination, and the full Senate should hold an up-or-down floor vote on each nominee within 180 days after nomination.

The President's proposal builds upon statements that he made during the 2000 Presidential campaign and again in 2001 when announcing his first 11 judicial nominees. On June 8, 2000, then-Governor Bush stated that the Senate confirmation process "does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation. . . . The President must be prompt in submitting his nominations, and the Senate prompt in acting upon them." At that time, Governor Bush proposed a timely standard for the Senate to meet in voting on all Presidential nominations, including nominations to the Judiciary. He stated that he would "ask Republicans and Democrats in the Senate to follow this standard regardless of who may be elected next November." When asked directly whether his standard should apply to President Clinton's pending judicial nominees, Governor Bush stated that he "would hope that Republicans would hear my call" and added: "[I]f it's good enough for me, it's good enough for . . . President [Clinton]."

On May 9, 2001, when announcing his first judicial nominees, President Bush similarly stated: "Over the years, we have seen how the confirmation process can be turned to other ends. . . . This is not good for the Senate, for our courts or for the country. . . . I urge Senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house, and no matter who controls the Senate. I ask for the return of civility and dignity to the confirmation process."

The President's October 30, 2002, proposal builds upon his prior statements, and also upon the past statements of Senators of both parties who have advocated a timely hearing and timely up-or-down floor vote for every judicial nominee. The proposal also is consistent with

Page Two
November 7, 2002

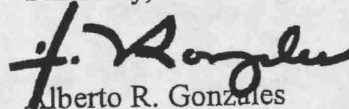
recommendations of the Chief Justice (as representative of the Federal Judiciary), the American Bar Association, the bipartisan Citizens for Independent Courts, and the bipartisan Miller Commission.

In response to the President's call for a timely hearing and up-or-down floor vote, some have argued that certain appeals court nominees of President Clinton were mistreated, while others have contended that certain appeals court nominees of President George H.W. Bush in 1991 and 1992 were mistreated. In fact, at the end of those two Administrations, the records of the 106th Congress (in 1999-2000) and the 102nd Congress (in 1991-92) were similar. In 1999-2000, of the 30 court of appeals nominees President Clinton submitted more than 180 days before the end of his Presidency, only 15 received an up-or-down Senate floor vote. (President Bush re-nominated one of those 15 appeals court nominees who did not receive an up-or-down floor vote, Roger Gregory.) In 1991-92, of the 29 court of appeals nominees President George H.W. Bush submitted more than 180 days before the end of his Presidency, only 19 received an up-or-down floor vote. The record of the Senate in those years does not meet the standard that President Bush has proposed. As the President has stated, however, we will not be able to solve the vacancy crisis and improve the judicial nomination and confirmation process with an endless cycle of blame and bitterness.

The President believes we all must look forward and ensure a process that is fair and predictable from the day a vacancy is announced to the day a new judge is sworn, no matter who is President or which party controls the Senate. As he said when announcing the proposal, the President wants to work with the other Branches to ensure a system that is fair and effective for the Judiciary, Senators, Presidents, and nominees -- and for the American people who depend on the federal courts to dispense justice fairly and promptly.

Thank you very much for your continued work on this issue and for considering the President's proposal to improve the judicial nomination and confirmation process on a bipartisan basis. I look forward to meeting with you at your convenience to discuss the proposal further.

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable Thomas A. Daschle
The Honorable Trent Lott
The Honorable Patrick J. Leahy
The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Copy: The Honorable William H. Rehnquist

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*146 Cong Rec S 9657, **

CONGRESSIONAL RECORD -- **SENATE**

Tuesday, October 3, 2000

106th Congress, 2nd Session

146 Cong Rec S 9657

REFERENCE: Vol. 146, No. 121

TITLE: EXECUTIVE SESSION - NOMINATIONS OF MICHAEL J. REAGAN, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS; SUSAN RITCHIE BOLTON, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA; MARY H. MURGUIA, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

SPEAKER: Mr. HATCH. Mr. DURBIN. Mr. ROBB. Mr. LEVIN. Mr. HARKIN. Mr. LEAHY.

BILL NUMBER:

S. Res. 364

- ◆ [Retrieve Bill Tracking Report](#)
- ◆ [Retrieve full text of bill](#)

TEXT: [***S9657**]

The PRESIDING OFFICER. Under the previous order, the **Senate** will now go into executive session and proceed to the consideration en bloc of Executive Calendar Nos. 652, 654, and 655, which the clerk will report.

The assistant legislative clerk read the nominations of Michael J. Reagan, of Illinois, to be U.S. District Judge for the Southern District of Illinois;

Susan Ritchie Bolton, of Arizona, to be U.S. District Judge for the District of Arizona;

Mary H. Murguia, of Arizona, to be U.S. District Judge for the District of Arizona.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, we are here today in the crunch of end-of-session business to debate and take time on four noncontroversial judicial nominees. This debate today was demanded by **Senate** Democrats who, ironically, have stood in the way of these nominations made by President Clinton, their own President. These are Clinton nominees the Democrats are holding up, Clinton nominees whom Democrats are insisting we take precious time to debate.

For the past few years, **Senate** Democrats have threatened shutdowns, claimed the existence of a so-called judicial vacancy crisis, and complained of race and sex bias in order to push through President Clinton's judicial nominees. These allegations are false.

First, there is and has been no judicial vacancy crisis. consider, for example, the Clinton administration's statements on this issue. At the end of the 1994 **Senate** session, the Clinton administration in a press release entitled "Record Number of Federal Judges Confirmed" took credit for having achieved a low vacancy rate. At that time, there were 63 vacancies and a 7.4 percent vacancy rate. The Clinton administration's press release declared: "This is equivalent to full employment' in the... federal judiciary." Today, there are 67 vacancies--after the votes today there will be only 63 vacancies, the same as in the 1994. Instead of declaring the judiciary fully employed as they did in 1994. Democrats claim that there is a vacancy crisis.

In fact, the **Senate** has confirmed President Clinton's nominees at almost the same rate as it confirmed those of Presidents Reagan and **Bush**. President Reagan appointed 382 Article III judges. Thus far, the **Senate** has confirmed 373 of President Clinton's nominees and, after the votes today, will have confirmed four more. During President Reagan's two terms, the **Senate** confirmed an average of 191 judges. During President **Bush's** one term, the **Senate** confirmed 193 judges. After these four judges are confirmed today, the **Senate** will have confirmed an average of 189 judges during each of President Clinton's two terms.

Second, there has not been a confirmation slowdown this year. Comparing like to like, this year should be compared to prior election years during times of divided government. In 1988, the Democrat-controlled **Senate** confirmed 41 Reagan judicial nominees. After these four nominees are confirmed today, the **Republican Senate** this year will have confirmed 39 of President Clinton's nominees--a nearly identical number.

In May, at a Judiciary Committee hearing, Senator Biden, the former chairman of the Judiciary Committee, said: "I have told everyone, and I want to tell the press, if the **Republican** Party lets through more than 30 judges

[*S9658]

this year, I will buy you all dinner." When he said this, Senator

Biden apparently believed that the confirmation this year of more than 30 judges would be fair. Well Senator Biden owes some people some dinners, maybe everybody in the press. After the votes today, the **Senate** this year will have confirmed 39 judicial nominees.

The 1992 election year requires a bit more analysis.

The Democrat-controlled **Senate** did confirm 64 **Bush** nominees that year, but this high number was due to the fact that Congress had recently created 85 new judgeships. Examining the percentage of nominees confirmed shows that compared to 1992, there is no slowdown this year. In 1992, the Democrat-controlled **Senate** confirmed 33 of 73 individuals nominated that year--or 45 percent. This year, the **Senate** will confirm 25 of 44 individuals nominated in 2000--or 57 percent. Those who cite the 1992 high of 64 confirmations as evidence of an election-year slowdown do not mention these details. Nor do they mention that despite those 64 confirmations, the Democrat-controlled **Senate** left vacant 115 judgeships when President **Bush** left office--nearly double the current number of vacancies.

Senate Democrats often cite Chief Justice Rehnquist's 1997 remarks as evidence of a **Republican** slowdown. Referring to the 82 vacancies then existing, the Chief Justice said: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal Judiciary." Senators who cite this statement, however, do not also cite the Chief Justice's similar statement in 1993, when the Democrats controlled both the White House and the **Senate**: "There is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem." As the head of the judicial branch, the Chief Justice has continued to maintain pressure on the President and **Senate** to speedily confirm judges. He has not singled out the **Republican Senate**, however. Selective use of his statements to imply that he has is inappropriate.

The Chief Justice made additional comments in 1997, which also undermine the claim of a vacancy crisis. After calling attention to the existing vacancies, he wrote: "Fortunately for the Judiciary, a dependable corps of senior judges has contributed significantly to easing the impact of unfilled judgeships." The 67 current vacancies, in other words, are not truly vacant. There are 363 senior judges presently serving in the federal judiciary. Although these judges' seats are technically counted as vacant, they continue to hear cases at reduced workload. Assuming that they maintain a 25 percent workload (the minimum required by law), the true number of vacancies is less than zero.

Third, allegations of race or sex bias in the confirmation process are absolutely false. Just this month, for example, President Clinton issued a statement alleging bias by the **Senate**. He said: "The quality of justice suffers when highly qualified women and minority candidates are denied an opportunity to serve in the judiciary." The White House,

though, also issued a statement boasting of the high number of women and minorities that Clinton has appointed to the federal courts: "The President's record of appointing women and minority judges is unmatched by any President in history. Almost half of President Clinton's judicial appointees have been women or minorities." The **Senate**, obviously, confirmed this record number of women and minorities. That is hardly evidence of systemic bias--or any bias at all.

Last November, Senator Joseph Biden, former chairman of the Judiciary Committee, stated:

There has been argumentation occasionally made... that the Judiciary Committee... has been reluctant to move on certain people based upon gender or ethnicity or race.... There is absolutely no distinction made on these grounds Whether or not a nominee moves has not a single thing to do with gender or race.... I realize I will get political heat for saying that, but it happens to be true.

I personally appreciated Senator Biden's comments on that, while others were trying to play politics with these issues. He knows how difficult it is under the circumstances to please both sides on these matters. The chairman takes pain from both sides on these matters. There is no question there are some on our side who have wanted to slow down this process, and others on the other side have wanted to speed up the process. The important thing is that we do a good process. That is what we have tried to do.

The statistics confirm Senator Biden's position. Data comparing the median time required for **Senate** action on male versus female and minority versus non-minority nominees shows only minor differences. During President **Bush's** final two years in office, the Democrat-controlled **Senate** took 16 days longer to confirm female nominees compared with males. This differential decreased to only 4 days when **Republicans** gained control of the **Senate** in 1994. During the subsequent 105th and 106th Congresses, it increased.

The data concerning minority nominees likewise shows no clear trend. When **Republicans** gained control in 1994, it took 28 days longer to confirm minority nominees as compared to non-minority nominees. This difference decreased markedly during the 105th Congress so that minorities were confirmed 10 days faster than non-minorities. The present 106th Congress is taking only 11 days longer to confirm a minority nominees than it is to confirm non-minority nominees.

These minor differences are a matter of happenstance. They show no clear trend. And even if there were actual differences, a differential of a week or two is insignificant compared to the average time that it takes to select and confirm a nominee. On average, the Clinton White House spends an average of 315 days to select a nominee while the **Senate** requires an average of 144 days to confirm.

Under my stewardship, the Judiciary Committee has considered President Clinton's judicial nominees more carefully than the Democratic **Senate** did in 1993 and 1994. Some individuals confirmed by the **Senate** then likely would not clear the committee today. The **Senate's** power of advice and consent, after all, is not a rubber stamp.

But there is no evidence of bias or of a confirmation slowdown. **Senate** Democrats claim that **Republicans** have politicized the confirmation process. **Republicans**, though, have not levied false charges or used petty parliamentary games.

In conclusion, it always is the case that some nominations die at the end of the Congress. In 1992, when Democrats controlled the **Senate**, Congress adjourned without having acted on 53 **Bush** nominations. Currently there are only 38 Clinton nominations that are pending before the Judiciary Committee.

It is not the end of the line for nominees that do not get confirmed this year. **Republican** nominees who failed to get confirmed have gone on to great careers, both in public service and the private sector. Senator Jeff Sessions, Governor Frank Keating, Washington attorney John Roberts, and law professor Lillian BeVier are just a few examples. Lillian BeVier and a number of other women are prime examples of those who were denied the opportunity of being on the court for one reason or another back in those days.

I bitterly resent anybody trying to play politics with this issue. I stand ready to defend our position on the Judiciary Committee, and I look forward to confirming these last four nominees today. And, of course, once we have done that, we will have matched what was done back in 1994, when the President said we had a full judiciary, with a vacancy of 7.4 percent.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. DURBIN. It is my understanding that under the unanimous consent request, I have 10 minutes to speak.

The PRESIDING OFFICER. Correct.

Mr. DURBIN. Mr. President, I have spoken with the staff of Senator **Leahy** and, if I go beyond 10 minutes, I ask that the additional time be taken from that allocated to Senator **Leahy**.

I thank Senator Hatch for his leadership and friendship on the **Senate** Judiciary Committee. We have our differences. When I served on the committee, we had some profound differences, but I respect him very much, and I respect the job he does.

I thank Senator Hatch personally for the kind attention which he has given to the vacancies in my home State of

[*S9659]

Illinois. I am happy to report that with the nomination and confirmation of Michael Reagan, we will have a full complement of Federal judges in our State, which will make the workload more manageable all across the State. So I thank Senator Hatch and also Senator Fitzgerald. We have been working for the last 2 years, on a very bipartisan basis, toward approving these nominees to have come before the **Senate**.

Before I address the nomination of Michael Reagan, I would like to address a larger issue which involves not only the **Senate** Judiciary Committee but the entire **Senate**, the Congress, and the people of this country because this week marks the opening of the Supreme Court's new term. It is a good moment to reflect on the role of the Supreme Court, its past, and its future.

This brief statement that I present to you represents some of the concerns I have about the Supreme Court, the role it is playing, and the impact of the Presidential election on the future of that Court.

One of the most interesting books ever written about America was written by a French tourist by the name of Alexis de Tocqueville. He came to the United States 165 years ago, traveling around different cities and making observations about this American character. This was a brand new nation. De Tocqueville wrote in his famous work his observations and took them back to Europe.

One might think that a book such as that would be lost in history. It turns out that de Tocqueville's observations were so impressive that 165 years later we still turn to this book, and I think it is nothing short of amazing that his observations turn out to be valid today. De Tocqueville made an observation about America and about all of the important political questions in our country which sooner or later turn out to be judicial questions. This wasn't a criticism. Quite the contrary. De Tocqueville admired the innovations in the American judiciary that granted the courts the independence and clarity of function that were found nowhere else in the world. De Tocqueville believed these observations would mean that America's judicial system would hear, and act on, the most important issues of the day. He couldn't have been more correct.

Think about the "big issues". The issues that the American people have cared about--argued about--most deeply. The issues that spark the most debate--and the most passion. Sooner or later, the battle over these issues comes before the highest court in the land. Slavery. Child labor. Worker safety. Monopolies. Unionization. Freedom of the press. Capital punishment. Segregation. Environmental protection. Voting rights. A woman's right to choose.

The battle always comes to the Supreme Court; always comes before the nine justices who are Constitutionally granted enormous responsibilities, and enormous power.

In just the past year, the Supreme Court has offered important rulings on abortion, school prayer, gay rights, aid to parochial schools, pornography, Miranda rights, violence against women, parental rights--just to name a few. Not all of these decisions have turned out as I would have hoped.

For instance, take the case of U.S. vs. Morrison. The Supreme Court struck down a provision of the Violence Against Women Act that gave victims of rape and domestic violence the right to sue their attackers in federal court. Congress passed this law to give women an additional means of pursuing justice when they are the victims of assault. We passed this law because the States themselves did not always adequately pursue rapists and assailants. And the States acknowledged this!

Thirty-six States had entered this suit on behalf of the woman who had been victimized. They wanted victims of violence against women to retain the right to bring their attackers to court. But the Supreme Court, in a narrow vote, decided otherwise. The vote... five to four.

But this close margin is not unusual on our highest court--it is becoming commonplace. Rarely has the Supreme Court been so narrowly divided for such a long period of time. The replacement of just one judge could drastically change the dynamic of the Court for decades to come.

Chief Justice Rehnquist and Justices Scalia and Thomas--the Court's most conservative members--tend to vote together on hot button social and political issues such as affirmative action and school prayer. Centrist conservatives, Justices O'Connor and Kennedy, usually join them. The dissent is often written by the more liberal justices--Stevens, Souter, Ginsberg and Breyer. Both Ginsberg and Breyer are Clinton appointments.

Many of the Supreme Courts decisions have been made on the basis of a

single vote. Partial birth abortion--five to four. Age discrimination--five to four. Gay rights--five to four. Warrantless police searches--five to four. The federal role in death penalty cases--five to four.

These are not mere academic cases. These are decisions that change people's lives. We all hope that the Supreme Court will act wisely and fairly. But we also all know--history and human nature tell us so--that this is not always the case.

We learned in school about the Dred Scott case. Mr. Scott had lived in my home state of Illinois--where slavery was banned--and sued for his freedom on the basis that he had already lived as a free man, and had the right to continue to do so. The Supreme Court infamously disagreed, finding that Mr. Scott was nothing more than property--"to be Used in Subserviency to the Interests, the Convenience, or the Will, of His Owner", a man "Without Social, Civil, or Political Rights." The decisions of the Supreme Court--and at times, the opinion of just one Justice--can make the difference between having, or losing, a cherished right.

Perhaps that is the reason that my colleague, the senior Senator from Utah, is of the opinion that a President's power to make nominations to the Supreme Court and to the federal bench is--and this is a quote--". ..the single most important issue of this next election."

I think he's right. The next President may have the opportunity to make two or three appointments to the Supreme Court. He may even appoint the next Chief Justice.

In the first two hundred years since the signing of the Constitution, the Supreme Court invalidated 128 laws that had been passed by Congress. About one law every two years, on average. Since 1995, however, the Court has struck down 21 laws, more than four per year. This is an unprecedented assertion of judicial power.

Will the next President try to use the appointment process to further shift the balance of power between the branches of government?

Will the next President of the United States use a litmus test to "pack" the Supreme Court with Justices--Justices whose minds were already made up on important issues?

That is what the far right, members of the Federalist Society, want. They want to turn back the hands of the clock.

So I'm inclined to agree with the distinguished Senator from Utah. This is, indeed, one of the most important issues of the Presidential

campaign.

Imagine a Supreme Court with three Antonin Scalia's--three Clarence Thomases--three radically conservative Justices bent on greatly restricting the authority of the federal government. The philosophical balance of the Court would shift dramatically. One by one the protections that have been built up over the past thirty five years could fall.

If you read the history of the Supreme Court, you will note that up until the time Franklin Roosevelt was President, it was an extremely conservative and somewhat lackluster Court. The Court started to change during Roosevelt's Presidency, and beyond. **Republican** and Democratic Presidents thereafter appointed more activist judges who looked at the problems facing America. One by one, the protections which we built up over that period of time would be in jeopardy.

Protection of the rights of minorities, women, and the handicapped; protection of voting rights, civil rights, worker rights, reproductive rights; protection of the environment; protection from gun violence; and protection of our fundamental freedoms as Americans. One by one, a different court could challenge each of these protections.

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No longer could the federal government require background checks for gun purchases, rein in polluters, or protect the persecuted.

I hope all Americans will give some thought to the type of Supreme Court they feel can best serve the American people. I hope they give it some thought before they go out and vote in November.

In addition to who will be appointed, it's also critical to realize who is not being appointed.

More than any previous president, President Clinton has succeeded in diversifying the bench. Nevertheless, women and minorities are still underrepresented in our Federal courts. It isn't as if some Members of Congress have not tried to address this disparity. But as hard as we try to diversify the bench, we have not been able to produce the record of success that we would like to show.

I wonder how one of the great Justices ever to serve on the Supreme Court, Justice Thurgood Marshall, would have reflected on the treatment of a nominee, Ronnie White for the Federal District Court in Missouri. He is a member of Missouri Supreme Court. He is African American. He was judged qualified and reported by the **Senate** Judiciary Committee. Then he was rejected on the **Senate** floor by a party-line vote. Some

labeled him a "judicial activist." They produced some excuses or reasons for not confirming him, and he was defeated--one of the few times in modern memory that a judge made it to the floor and lost on a recorded vote.

I wonder how Justice Thurgood Marshall, the first black Justice appointed to the Supreme Court 33 years ago, would observe and reflect on what happened to Ronnie White.

I think Justice Marshall would have viewed the current state of judicial nominations differently than the Federalist Society. This conservative group has over 25,000 members plus scores of affiliates, including former Independent Counsel Kenneth Starr; Supreme Court Justices Thomas and Scalia; and University of Chicago's Richard Epstein and Frank Easterbrook, also a federal appellate judge.

And their numbers are growing. The Federalist Society has chapters in 140 out of the 182 accredited law schools. The campus chapter at the University of Illinois College of Law is very active.

I don't have to tell you about the Society's "originalist" approach to the Constitution. Justice Scalia's and Justice Thomas's opinions clearly reflect their point of view.

I don't have to tell you the Federalist Society has been instrumental in influencing the law. They have helped to weaken or rolled back statutes on civil rights and affirmative action; voting rights; women's rights and abortion rights; workers' rights; prisoners' rights; and the rights of consumers, the handicapped and the elderly.

Martin Luther King, Jr., once said, "The moment is always right to do what is right."

I think the moment is right to hold the tobacco industry responsible for the costs incurred by the federal government for the medical treatment of individuals made ill by their deadly products.

I think the moment is right to hold the gun industry accountable for the irresponsible design, manufacture, distribution and marketing of their lethal weapons.

The moment is right to ensure that HMOs and health insurance companies can be held accountable for their wrongdoing that results in the injury or death of American citizens.

The moment may be right to elect a President who will appoint

Justices who reflect that point of view and will protect our civil liberties.

I think the moment is right to remove barriers to the bench so that every citizen--whether man, woman, or whatever ethnic, racial, or religious background--can be adequately represented on our court.

I will say a word on behalf of my nominee who is before the **Senate**, Michael Reagan, the judicial nominee for the U.S. District Court for the Southern District of Illinois. Senator Fitzgerald and I reached an agreement about the selection of these nominees. Michael Reagan is the product of this agreement.

Michael Reagan possesses all the qualities necessary to make a tremendous contribution to the federal bench.

He has strong bipartisan support, as well as, the support of several respected judges, leaders, and organizations including: the National Sheriffs' Association; the Honorable Moses Harrison II, Chief Justice, Illinois Supreme Court; The Most Reverend Wilton D. Gregory, Bishop of the Diocese of Belleville; the Illinois Federation of Teachers; and the Illinois Pharmacists Association.

They have all written letters supporting Michael Reagan's nomination to fill the Southern District of Illinois' judicial vacancy.

Michael Reagan is a full-time public servant who wears several hats. In addition to his private practice, Mr. Reagan serves as a Commissioner of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois. Mr. Reagan has held this position since 1995 and is responsible for supervising the attorney registration and disciplinary system in Illinois, a very important assignment.

In addition, Mr. Reagan serves as Assistant Public Defender in St. Clair County, Illinois. In this capacity, he represents indigent criminal defendants charged with major felonies. Mr. Reagan has served as an Assistant Public Defender since 1996.

Mr. Reagan also serves as an Honorary Deputy Sheriff in St. Clair, a fully commissioned law enforcement position that he has held for the past three years. His background as a police officer certainly qualified him in that capacity. As an Honorary Deputy Sheriff, Mr. Reagan has full arrest powers and is subject to be called to duty in the event of an emergency.

Mr. Reagan began his career in public service as a police officer after graduating with a Bachelor's of Science degree from Bradley

University in 1976, his law degree from St. Louis University in 1980.

Although Mr. Reagan holds many notable positions, the most important roles he plays are that of husband and father. Mr. Reagan has been married to Elaine Catherine Edgar since 1976. They have four boys. I have met them all; they are great kids.

The Reagans will soon be celebrating their 25th anniversary. It is a great family.

I am pleased that the **Senate** will have this opportunity to vote for Michael Reagan. He possesses a rare combination of intelligence, practical experience, temperament, and devotion to public service that makes for a great Federal judge. I look forward to his service on the Federal bench.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ROBB. Mr. President, I join my distinguished colleagues to express my outrage at the treatment of judicial nominees this year. I do so with the same preface as my distinguished friend from Illinois, in saying that I have a good working and personal relationship with the chairman of the committee, but the failure to confirm the nominees at this time is an outrage.

I would like to focus my remarks on our efforts to fill one of the vacancies on the Fourth Circuit Court of Appeals.

The Fourth Circuit Court of Appeals has fifteen seats. Five of those seats are currently vacant.

We have one seat on the Fourth Circuit Court of Appeals that has been vacant for a decade--longer than any other vacancy in the nation.

Filling this vacancy has been deemed a "judicial emergency" by the U.S. Judicial Conference.

On June 30, the President of the United States nominated Roger Gregory, a distinguished lawyer from Virginia, to fill this vacancy. Mr. Gregory graduated summa cum laude from Virginia State University and received his J.D. from the University of Michigan. He has an extensive federal practice, is an accomplished attorney, and was described by Commonwealth Magazine as one of Virginia's "Top 25 Best

and Brightest." And he has bipartisan support. Senators John Warner and Arlen Specter have also written to the Judiciary Committee to seek a hearing for Mr. Gregory.

Despite the well-documented need for another judge on this court, and despite Mr. Gregory's stellar qualifications, the Judiciary Committee has

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stubbornly refused to even grant Mr. Gregory the courtesy of a hearing. In failing to provide Mr. Gregory with a hearing, the Judiciary Committee is abdicating its Constitutional responsibility and is effectively standing in the courthouse door to block this nomination.

Article II of the United States Constitution makes clear that the President is to nominate and the **Senate** is to provide advice and consent on the nomination. It is difficult for the **Senate** to provide advice or give its consent if it won't even allow the nominee to be heard. Many excuses have been offered for why this nominee won't be granted a hearing. One convenient excuse is that this is a presidential election year.

There is nothing in Article II of the United States Constitution, however, that suspends its provisions every four years. We have a constitutional obligation to render our advice and, if appropriate, grant our consent or, if not appropriate, decline to grant our consent. But we cannot just throw up our hands and declare that this provision of the Constitution is rendered meaningless during presidential election years.

The supposed logic that underlies this excuse is that the nominee may not reflect the judicial philosophy of the next Administration. But how can we even question the nominee's judicial philosophy if we never hear from him. So even this excuse argues in favor of granting the nominee a hearing.

The most recent excuse for failing to act on Mr. Gregory's nomination is that five years ago a gentleman from North Carolina was nominated for this seat, and so the argument goes this seat now "belongs" to North Carolina. But five years before that, when this seat and three others were created, a Virginian was arguably nominated to fill this seat--but the **Senate** only acted to fill the other three seats and this one has been vacant ever since.

More importantly, however, seats on Courts of Appeal don't "belong" to any state. As I have already noted, there are only ten judges currently sitting in the Fourth Circuit. Four of these ten judges are filling seats that were previously filled by a candidate judge and then from another state. Finally, it's a little hard for the senior Senator

from North Carolina to complain that the seat belongs to North Carolina when he is the one who has been blocking a North Carolinian from filling the seat.

Rather than hide behind excuses, the **Senate** Judiciary Committee ought to seize the opportunity to right a historical wrong. The Fourth Circuit Court of Appeals has the largest percentage of African-Americans in the nation. Yet, the Fourth Circuit has never been integrated. In fact, it is the only Circuit in the country that has never in history had minority representation. If we were to confirm Roger Gregory--who is African-American--we could knock down yet another barrier that has existed for far too long.

In my view, courts should better reflect the people over whom they pass judgment. We still have time, if only we have the will to act. In 1992, when there was a **Republican** in the White House and the Democrats ran the **Senate**, we confirmed 6 Circuit Court judges later than July: 3 in August 2, in September 1, in October. In fact, its instructive to look at the one nominee who was confirmed in October of 1992. Timothy K. Lewis was nominated to the Third Circuit Court of Appeals on September 17. The Judiciary Committee gave him a hearing on September 24. He was reported out of the Judiciary Committee on October 7, and confirmed by the **Senate** on October 8.

Roger Gregory is an outstanding nominee. Rather than standing in the courthouse door, we ought to throw the door open and desegregate the Fourth Circuit. We ought to end this judicial and moral emergency and we ought to do it now.

Mr. President, I yield the floor and reserve any time remaining for those covered under the unanimous consent order.

The PRESIDING OFFICER (Mr. Enzi). The Chair, in his capacity as a Senator from Wyoming, suggests the absence of a quorum with time to be allocated equally between the sides.

Without objection, the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEVIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. Mr. President, the **Senate** today will vote on the

confirmation of a number of judicial nominees. I not only have no problem with that, I very much favor it. These nominees deserve a vote. The districts in which they will serve surely deserve to have their nominations acted upon. I believe the Nation, as a whole, deserves to have these nominees, and other nominees awaiting hearings and votes acted on by this **Senate** as well.

The Judiciary Committee held hearings for three of the nominees and approved those nominations less than a week after the nominations were received. Other nominees wait in vain for years just for a hearing. That strikes me as being an arbitrary and inexplicable system, unfair to nominees awaiting hearings, awaiting votes, and unfair to the districts or the circuits in which they would serve if confirmed. I believe it is also unfair--perhaps this is most important of all--to the people who await justice in their courts.

Two Michigan nominees to the Sixth Circuit have been waiting unsuccessfully for a hearing for more than 3 1/2 years and 1 year respectively. Two women, highly qualified, nominated from Michigan for the Sixth Circuit where there is a severe shortage of judges and an enormous caseload that sits there pending, while they have been waiting for more than 3 1/2 years and 1 year respectively.

Judge Helene White, who is a court of appeals judge in Michigan, was first nominated in January of 1997. Her nomination to the Sixth Circuit Court of Appeals has never been acted upon. She has never been granted a hearing.

Kathleen McCree Lewis was nominated to the Sixth Circuit over a year ago. It has been pending before the Judiciary Committee for over a year. No hearing, no action.

These are two judicial nominees from my home State of Michigan. Despite there being no objection that I know of to their nominations, and in the absence of any explanation whatsoever, they have been kept in limbo without even a hearing for 3 1/2 years and 1 year respectively. I believe that is truly unconscionable. In the history of the **Senate**, no nominee has waited as long as Judge White for a confirmation hearing. The seat that she has been nominated for has been vacant for 5 1/2 years. It is considered a "judicial emergency" by the Judicial Conference of the United States.

There is no apparent reason for the denial of hearings for these two nominees. No one has questioned their qualifications for the bench. No one that I know of objects to their candidacies. It is well known Judge White and Ms. Lewis are both talented, hard-working nominees.

Each are highly respected for their records which show them to be women of integrity and fairness. Judge White has had a distinguished

career. She was a trial judge for 10 years on the Wayne County Circuit Court bench and in 1992 was elected to the Michigan Court of Appeals where she has served ever since. She also serves on the board of directors of the Michigan Legal Services and the board of governors of the American Jewish Committee.

Kathleen McCree Lewis is a distinguished appellate practitioner at the Detroit law firm of Dykema Gossett, one of the most prestigious law firms in our State. She also served as a commissioner on the Detroit Civil Service Commission and on the Civic Center Commission. She has argued dozens of cases and is a respected appellate lawyer in the very circuit to which she has been nominated. She also happens to be the daughter of the late Wade McCree, a highly respected judge who served on the Sixth Circuit, and was a former Solicitor General of the United States. If confirmed, Kathleen McCree Lewis will be the first African American woman ever to serve on the Sixth Circuit.

Gov. George **Bush has said that the Senate** should act on nominees within 60 days. That deadline passed years ago for Judge White and for Kathleen McCree Lewis. According to Governor **Bush:**

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The Constitution empowers the President to nominate officers of the United States, with the advice and consent of the **Senate**.

Then he said:

That is clear-cut, straightforward language. It does not empower anyone to turn

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the process into a protracted ordeal of unreasonable delay and unrelenting investigation.

To keep these nominees pending for so long without hearings is unfair to the nominees, particularly where there is no known objection and where there is no explanation for the refusal to grant hearings.

Even more important, it is unfair to the citizens served by the court. There is a large backlog of cases in the Sixth Circuit which is a serious concern for not just Michigan but for all the States that are served by that court. Over one-fourth of the judgeships on the Sixth Circuit are currently vacant, and that is among the highest vacancy rate of any circuit court in the country.

Judge Gilbert Merritt, who recently served as chief judge of the Sixth Circuit, wrote in a March 20 letter to Chairman Hatch: The court

is "hurting badly and will not be able to keep up with its workload due to the fact that the **Senate** Judiciary Committee has acted on none of the nominations to our court."

Judge Merritt went on to say the following--and this is the former chief judge who still sits on the court. This is what Judge Merritt said:

Our court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the Federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our court is rapidly deteriorating due to the fact that 25 percent of the judgeships are vacant. Each active judge of our court is now participating in deciding more than 550 cases a year--a caseload that is excessive by any standard. In addition, we will have almost 200 death penalty cases that will be facing us before the end of the next year.

The Founding Fathers certainly intended the **Senate** "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the **Senate**, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider any vote at all, thereby leaving the courts in limbo, understaffed and unable to properly carry out their responsibilities for years.

That is Judge Merritt's letter. In addition to that, the Judiciary Committee chairman, Senator Hatch, received a letter from 14 former presidents of the State bar of Michigan. These include, by the way, Democrats and **Republicans**. That letter pleads for action relative to the situation on the Sixth Circuit.

The Michigan bar presidents wrote in their letter to Senator Hatch that the state of affairs on the Sixth Circuit has "serious adverse effects on the bar and the administration of justice for our clients. We urge you to promptly schedule hearings for, and to pass to the **Senate** floor for a vote, the nominations of Judge Helene White and Kathleen McCree Lewis."

In the last few months, there have also been several articles and editorials in papers around Michigan calling on the **Senate** to confirm the court of appeals nominees for Michigan.

An editorial in the Detroit Free Press said:

The **Senate's** delay in considering President Clinton's

nominations to the Sixth Circuit court is unfair to Michigan, to the nominees, and to anyone whose future might be affected by a decision of this court.

An editorial in the Observer and Eccentric newspapers urged the Judiciary Committee and its members to "give two thoughtful and well-respected Michigan lawyers the courtesy of timely hearings on their nominations to the Federal judiciary that is currently hamstrung in carrying out its work."

An editorial in the Detroit News described the failure to act on Sixth Circuit nominees as "the sort of die-hard intransigence that should be out of bounds."

And a Jewish News editorial called the stall a "travesty of justice."

If Senators have concerns about something in the records of these Michigan candidates--and no one has raised anything to that effect--then Senators should air their concerns in a committee hearing and then let the committee vote. It is unfair to Michigan, it is unfair to the citizens who use this court to keep these judicial nominees endlessly in limbo, despite the absence of any objection that I know of to their nominations and with no explanation forthcoming whatsoever.

A number of us have spent many hours over the last few years trying to get hearings for these Sixth Circuit Court of Appeals nominees from Michigan, and yet two well-qualified candidates, each deserving a hearing and a **Senate** vote, have been left in limbo with no explanation, no stated objection.

What we are doing today in approving these four nominees, it seems to me, is surely our function, totally appropriate, and I believe and hope the nominees will be confirmed.

As we do this, we should also focus on nominees pending in the Judiciary Committee, awaiting hearings or awaiting a vote by the committee after a hearing, who are left there no matter how long they have been waiting, sometimes, again, years in the case of Helene White and Barry Goode. We have others who have been waiting since April of last year, June of last year, August of last year, September of last year. I think we can do better than that. We should rise above that kind of nonaction on the part of our Judiciary Committee.

No plea from me or from others who have worked with me on these nominations has produced hearings, despite the editorials, despite the letters from the bar associations and from Judge Merritt. Despite all these efforts, we have received just silence and statements about

waiting a little longer or "we'll see" or "we'll try."

We should be better than that. The Constitution wants us to be better than that. I will vote to confirm these nominees whose nominations, in many cases, were sent to the **Senate**, heard by the Judiciary Committee, and approved by the Judiciary Committee in less than a week. At the same time, I will be thinking of the vacancies that exist on the Sixth Circuit Court of Appeals that have remained unfilled for years, where there is a judicial emergency, an enormous backlog, and where, despite all the pleas from the bar association, the Sixth Circuit, from indeed the Chief Justice of the United States, to vote on confirmations, we have these two well-qualified women from Michigan sitting there, awaiting a hearing, endlessly in limbo, nothing but silence, no explanation as to why their hearings are refused, no objection being noted or stated to their nominations, only two well-qualified women left in limbo and in silence.

We can do better. We should do better. I hope we find a way some day to do better.

I ask unanimous consent to print in the Record the following letters and editorials.

There being no objection, the materials were ordered to be printed in the Record, as follows:

U.S. Court of Appeals

for the Sixth Circuit,

Nashville, TN, March 20, 2000.

Re: Vacancies on the Sixth Circuit Court of Appeals

Hon. Orrin Hatch,
U.S. **Senate**,
Washington, DC.

Dear Senator Hatch: Several years ago during the period that I was Chairman of the Executive Committee of the United States Judicial Conference, we met from time to time, and you were always concerned that the **Senate** Judiciary Committee do its duty in filling the vacancies on the various Courts of Appeals. I write now to you to request that the Judiciary Committee bring up for a hearing and a vote nominations to the Sixth Circuit Court of Appeals.

I was taken aback to see an alleged statement of Senator Mike DeWine from Ohio that no vote would be taken for a nomination to fill the vacancy currently existing from Ohio. Senator DeWine was quoted as saying that due to partisan considerations there would be no more hearings or votes on vacancies for the Sixth Circuit Court of Appeals. I hope that this was not an accurate quote.

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five per cent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the **Senate** Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the **Senate** has refused to take a vote on any of them.

Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant. Each active judge of our Court is now participating

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in deciding more than 550 cases a year--a case load that is excessive by any standard. In addition, we have almost 200 death penalty cases that will be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the **Senate** "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the **Senate**, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

You and other members of the **Senate** have appeared before

the Judicial Conference and other judges' groups many times and said that you care about the federal courts. I hope that you will now act to help us on the Sixth Circuit Court of Appeals. We need your help and the help of the two Senators from Ohio, the two Senators from Tennessee, the two Senators from Kentucky, and the Senators from Michigan.

Sincerely,
Gilbert S. Merritt.

July 7, 2000.

Re: Vacancies on the Sixth Circuit Court of Appeals.

Hon. Orrin Hatch,
U.S. **Senate**,
Washington, DC.
Hon. Patrick **Leahy**,
U.S. **Senate**,
Washington, DC.

Dear Senators Hatch and **Leahy**: Recently, the former and current presidents of the Ohio State Bar wrote Senators DeWine and Voinovich a letter expressing their deep concern over the present situation in the Court of Appeals for the Sixth Circuit. With four of the sixteen seats vacant, the circuit is in a state of judiciary emergency. Former Chief Judge Gilbert Merritt has said:

"Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way.

* * * * *

"The Founding Fathers certainly intended that the **Senate** "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the **Senate**, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable to properly to carry out their responsibilities for years."

Chief Justice Rehnquist has expressed the same sentiments. Presently three Michigan seats remain open. The President has made two nominations. Judge Helene White was nominated in January 1997, and is the longest pending nominee without a hearing by over a year; Kathleen McCree Lewis was nominated in September, 1999. Senator Abraham returned the "blue slips" for the nominees in April. Joe Davis, a spokesman for Senator Abraham, was quoted as saying that Senator Abraham

wants hearings for these nominees to take place. Still, no hearings have been scheduled.

As former Michigan Bar Presidents, we agree with our Ohio colleagues that the situation has serious adverse affects on the bar and the administration of justice for our clients. We urge you to promptly schedule hearings for, and to pass to the **Senate** floor for a vote, the nominations of Judge Helene White and Kathleen McCree Lewis.

Respectfully,

Honorable Victoria A. Roberts (1996-1997); Honorable Dennis W. Archer (1984-1985); John A. Krsul (1982-1983); George T. Roumell, Jr. (1918-1986); William G. Reamon (1976-1977); Joseph L. Hardig, Jr. (1977-1978); Eugene D. Mossner (1987-1988); Donald Reisig (1988-1989); Robert B. Webster (1989-1990); Fred L. Woodworth (1991-1992); George A. Googasian (1992-1993); Jon R. Muth (1994-1995); Thomas G. Kienbaum (1995-1996); and Edmund M. Brady, Jr. (1997-1998).

From the Detroit Free Press, May 2, 2000

Judges On Hold: **Senate** hurts Justice by Delaying Confirmations

The 6th Circuit Court of Appeals now has four vacancies. Twenty-five percent of the seats... are vacant. The court is hurting badly and will not be able to keep up with its workload due to the fact that the **Senate** Judiciary Committee has acted on none of the nominations to our court."

Those were the words of Judge Gilbert Merritt, former chief judge of the Cincinnati-based circuit, in a letter last month to **Senate** Judiciary Chairman Orrin Hatch, R-Utah, and eight other senators--including **Senates** Carl Levin and Spencer Abraham of Michigan, one of eight states covered by the circuit.

Merritt should not be alone in his outrage. The **Senate's** delay in considering President Bill Clinton's nominations to the court is unfair to Michigan, to the nominees, and to anyone whose future might be affected by a decision of this court.

The judicial confirmation process has bogged down in mean-spirited, petty partisan wrangling between Democrat Clinton and the **Republican**-controlled **Senate**, which seems determined to wait out the lame duck and let his nominations wither.

It's not just the 6th Circuit, either. According to the **Senate** Judiciary Committee, there are 78 vacancies and 10 future vacancies in the federal judiciary. Only seven judges have been confirmed this year. Six nominees are pending on the **Senate** floor, 39 in committee, one nominee has withdrawn.

The 6th Circuit vacancies are for seats vacated by Judges

Damon J. Keith and Cornelia Kennedy. Michigan Appeals Court Judge Helene White was nominated in January 1997 to fill the Keith vacancy. She has never had even a hearing. Nominee Kathleen McCree Lewis has been waiting since September 1999.

This is a disgrace that did not have to happen. Abraham sits on the Judiciary Committee and could move these along. Instead, he stalled consideration for three years, claiming the Clinton administration blindsided him with the White nomination.

It's hard to fathom what that has to do with the efficient, effective administration of justice in reasonable time, with the best interests of citizens in Michigan.

The federal court system should not be treated this way. Neither should the judges who seek to serve it, nor the citizens it is supposed to serve.

From the Michigan Press, June 25, 2000

Is the GOP Playing Politics With Judicial Appointments?

(By Phil Power)

"The presidential appointments process now verges on complete collapse." So concludes Paul C. Light, of the Brookings Institution (usually a liberal Washington think tank) and Virginia L. Thomas, of the Heritage Foundation (usually conservative) in a study of the experiences of 435 cabinet and sub-cabinet officials who served in the Reagan, **Bush** and Clinton administrations.

Some found treatment by the White House appointments people "an ordeal."

Others--35 percent of Reagan administration appointees and 57 percent of Clinton's nominees--were held hostage to the politics of the U.S. **Senate** in waiting for confirmation hearings.

That's one reason a lot of talented people are not about to consider appointment to top government positions.

A perfect instance of this general problem concerns the nominations of two Michigan lawyers to fill vacancies on the U.S. Sixth Circuit Court of Appeals that have been twisting slowly in the wind of the U.S. **Senate** for far too long.

Helene White is presently a member of the Michigan Court of Appeals; nominated by President Clinton in January 1997, Judge White has yet to receive a hearing from the **Senate** Judiciary Committee. Kathleen McCree Lewis, the daughter of former U.S. Solicitor General Wade McCree, is a partner in

the Dykema Gossett law firm in Detroit; her nomination has been pending before the Judiciary Committee since September, 1999.

The Sixth Circuit is authorized to have 16 judges. Currently, the Court has four vacancies, one of which goes back for five years. For the Court to operate at 75 percent efficiency means long delays to the litigants and enormous workloads for the remaining judges (each of whom now has a caseload of 550 cases each year). Authorities now consider the number of vacancies in the federal court system to constitute a "judicial emergency."

What's going on here?

Michigan's Senator Carl Levin, a Democrat and a minority member of the Judiciary Committee, says it's because **Republicans** in the **Senate**, hoping to win the presidency this fall, have decided to hold up judicial nominations from the Clinton White House.

As evidence, he produces a table showing that while the Democrats controlled the **Senate** during the **Bush** Administration, a total of 66 federal judges were confirmed.

However, when the GOP ran the **Senate** during the first term of the Clinton Administration, 17 judges were confirmed.

So far in Clinton's second term, the **Senate** has confirmed only seven judges, with a total of 33 judicial nominees hanging fire before the Judiciary Committee without any hearings scheduled on their nominations. There are at present 81 vacancies in the federal judiciary.

Michigan's other Senator, Spencer Abraham, is also a member of the Judiciary Committee, but as a **Republican** his party controls the committee.

I asked Joe Davis, a spokesman for Senator Abraham, how come it's taken three and a half years (in the case of Judge White) and eight months (in the case of lawyer Lewis) just to get the committee to hold hearings on their nominations.

According to Davis, "Senator Abraham does not know whether or when hearings will take place. He wants them to take place, though."

That's nice. Frankly, I suspect if Senator Abraham really wanted the Judiciary Committee to hold hearings on these nominations, he'd find a way to do it PDQ.

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A member of the Sixth Circuit, Judge Gilbert S. Merit, wrote in March a letter to **Senate** Judiciary Chairman Orrin Hatch: "The Founding Fathers certainly intended that the

Senate advise' as to judicial nominations, i.e., consider, debate and vote up or down.

They surely did not intend that the **Senate**, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, under-staffed and unable properly to carry out their responsibilities for years."

Senator Abraham is running for reelection this fall.

He is stressing his performance as an effective senator in his campaign. Somebody should ask him why he can't get his committee to give two able, thoughtful and well respected Michigan lawyers the courtesy of timely hearings on their nominations to the federal judiciary that is currently hamstrung in carrying out its work.

From the Detroit News, August 13, 2000

Get Judges Out of Limbo

Michigan Court of Appeals Judge Helene White got the welcome word that she had been appointed to the federal bench in January 1997.

That was 43 months, or more than 1,300 days ago. She is still waiting to be approved by the U.S. **Senate** and take her seat with the Sixth Circuit appeals court in Cincinnati, which covers Michigan and several other states. She now has the distinction of being the longest-delayed judicial nominee in American history.

Judge White has been caught in the cross-fire between President Bill Clinton and the **Republican Senate** leadership. So has Detroit attorney Kathleen McRee Lewis, whose nomination to the same court has been held up for nine months.

The **Senate** is angry, and justifiably so, at the president for deliberately bypassing the confirmation process and appointing Bill Lann Lee head of the civil rights division of the Justice Department. President Clinton knew that Mr. Lee did not stand a chance of being confirmed because of his record in backing racial quotas.

Mr. Clinton got around it by the semi-devious route of making a recess appointment. This has infuriated **Senate** Majority Leader Trent Lott. In retaliation, he is holding up 37 judicial appointments.

This is exactly the sort of bitter political obstruction that Texas Gov. George W. **Bush** pledged to end in his convention acceptance speech last week.

"I don't have enemies to fight," he said. "I want to change the tone in Washington to one of civility and respect."

Senate Republicans should listen to their party's nominee. While their anger is understandable. It is the courts, and by extension those who use the federal courts, who are punished because of the resulting shortage of judges.

Sen. Lott hasn't even scheduled hearings for these nominations. And the clock is ticking. If no action is taken by Oct. 6, when the **Senate** adjourns, the nominations will die.

U.S. Sen. Spencer Abraham, the Michigan **Republican**, initially supported the stall by withholding his approval of the nominations on the grounds that he was not properly consulted by the White House. But he has since been mollified, and he has given his go-ahead. His staff says, however, that he will not push for hearings, which would be within his power as a member of the Judiciary Committee. That is for the Democratic nominators to do, his staff argues.

Every nominee deserves, at the least, a hearing within a reasonable time frame. Mr. **Bush** has specifically suggested 60 days.

Certainly, there is ample room for disagreement when the legislative and executive branches of government are in the hands of different parties. But Mr. Lott's pique has outlived any reasonable purpose. It is the sort of die-hard intransigence that should be out of bounds.

Mr. LEVIN. I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. Without objection, the time will be equally divided. The clerk will call the roll.

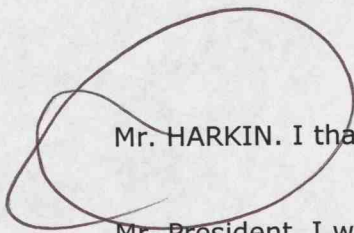
The legislative clerk proceeded to call the roll.

Mr. HARKIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HARKIN. Mr. President, parliamentary inquiry: I understand this Senator has 30 minutes?

The PRESIDING OFFICER. That is correct.



Mr. HARKIN. I thank the Chair.

Mr. President, I will support consideration by the **Senate** of these nominations to fill district judge vacancies in Arizona and Illinois because we are entering a critical stage in the rising number of judicial vacancies in our Federal courts. However, in addition to the district vacancies, there are 22 vacancies in our Federal appeals courts, and pending before the Judiciary Committee are several appeals court nominations who are more than qualified to fill those positions. That, of course, includes a constituent of mine, Bonnie J. Campbell, former attorney general of the State of Iowa and presently the head of the Department of Justice Office of Violence Against Women. Her nomination is for the Eighth Circuit U.S. Court of Appeals.

These positions should be filled with qualified individuals as soon as possible. I urge the **Republican** leadership to take the steps necessary to allow the full **Senate** to vote up or down on these important nominations.

Basically what I have been hearing from the other side of the aisle, the **Republican** leadership, is: This is an election year. Why allow circuit nominees a vote on the floor? Hold it up. Maybe Governor **Bush** will win the election and we will control the **Senate** and the House, and we can have a whole new batch of appointees next year.

That attitude led me to take a look at the history of our judicial nominations. Let's go back to a time when there was a mirror image of what we have here, when there was a **Republican** President in the White House and a Democratic majority in the **Senate**. That year would be 1992. That year, then-President George **Bush** nominated fourteen circuit court judges. From July through October, the Democrat-controlled **Senate** confirmed nine of those judges. This year, a Democratic President nominated seven circuit court judges but with a **Republican**-controlled **Senate**, only one of these nominees has been confirmed. We have several pending, but we see no action. Time is running out. Basically what I have been told is, it is over with. They are not going to report any more of these nominees out for circuit courts.

I have also heard the argument that Bonnie Campbell was not nominated until this year so we shouldn't expect this nominee to go through. Let's take a look at what I am talking about with these charts. This is kind of a busy looking chart, but these are the circuit judges nominated in 1992 by then-President George **Bush**. These were all nominated in 1992. There were 14 nominated. There were 9 who had hearings, 9 who were referred, and 9 who were confirmed, 9 out of 14 who were nominated that year.

There was one nominee--Timothy Lewis--who was nominated in September

of 1992, had his hearing in September of 1992, was referred in October of 1992, and confirmed in October of 1992. If the attitude that prevails among the **Republican** leadership today had prevailed in the Democrat-controlled **Senate** in 1992, we would not have confirmed anyone after July. This year, we have had none since July.

In 1992, we had two in September, two in August, and one in October, despite the fact that it too was late in an election year. This year we have only had one.

It is clear who is playing politics with judgeships. The **Republican** leadership of the **Senate** is playing the most baldfaced politics. It is not alleged that these nominees are not qualified. It is simply that they were nominated by a Democratic President. That is all. I have not heard one person on the **Republican** side tell me that Bonnie Campbell is not qualified to be a circuit court judge.

Some people on the other side may have some differences with her on some of her views. I understand that. I have had differences of view with judges I have voted to confirm. Why? Because I thought they were qualified.

I thought that if the President nominated them, they had a fair hearing, and they were reported out, my only decision was whether or not they were qualified--not whether they were ideologically opposed to me or to how I feel or what I believe. It has been my observation over the last quarter century that oftentimes when judges who have more of a liberal bent get appointed to the court, in many cases they come down on the more conservative side of cases. And I have seen conservative judges appointed to the court come down on the liberal side of cases. You never really know how this will come out, but you know whether or not people are legitimately qualified to serve on the bench.

So the arguments made that Bonnie Campbell wasn't nominated until this year--well, as I said, in 1992, we had nine circuit court judges confirmed that were nominated in that year. A couple of these were quite controversial. This year, we have had one confirmed. We have six more pending for the circuit courts. I know my colleague

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from Vermont, who is ranking member on the Judiciary Committee, stated this last week that when a majority in the **Senate** starts playing these kinds of games, the result is that when the other side becomes the majority they will do the same thing. That is too bad for our democratic system of government, too bad for the judgeships, and for our third branch of Government to have that happen.

I am not naive enough not to know that there are always politics involved in how judges are nominated. I understand that. That is the

system in which we live. But there comes a point where politics ends and responsibility begins. When you have people who have had a hearing, who are qualified, yet they won't be reported out for a vote on the **Senate** floor, that is pure politics and that is the height of irresponsibility. The **Republican** leadership is being totally irresponsible.

Of the judges nominated in 1992, every judge who got a hearing--every single judge who had a hearing in a Democrat-controlled Congress, when a Democrat was the Chair of the Judiciary Committee, when the Democrats controlled the Judiciary Committee, every person who got a hearing was confirmed. Every single one. That is not the case today. Too many political games are being played, I am afraid, on the Judiciary Committee and on the other side.

I would like to mention one other judicial example from 1992. Michael Melloy was nominated for the district court in April of that year. He was a **Bush** nominee, supported by Senator Grassley. As my colleagues know, Senator Grassley and I have a longstanding commitment to support the nominations of individuals from Iowa to our courts. Mr. Melloy is an example of this. He was nominated April 9, 1992, received his hearing on August 4, 1992, reported out of committee on August 12, 1992, and confirmed by the **Senate** that very same day in 1992.

Again, I may have been ideologically opposed to Mr. Melloy. There may have been some things he believed in that I didn't, but there was no question in my mind that Mr. Melloy was fully qualified to be a Federal judge. As long as he was qualified and supported by Senator Grassley and the administration, I supported that nominee, even though it was in the closing days of 1992.

Let's look at the current nominees that we have. Three of the four we are going to be voting on today were nominated, got hearings, and were reported out of the committee within one week. Mr. James Teilborg was nominated on July 21, 2000, got his hearing on July 25, and was reported out of the committee on July 27. Now he stands to be confirmed today. On the other hand, Bonnie Campbell received a hearing by the Judiciary Committee in May--more than 2 months before Mr. Teilborg. Yet she is not here on the floor. Why is it that Mr. Teilborg can come out on the floor today and not Bonnie Campbell? Politics, the rankest form of politics.

The majority is being very inconsistent in their arguments. They say, well, Bonnie Campbell was nominated this year, so it is too late. Mr. Teilborg was nominated this year--nominated, had a hearing, and was reported out all in the same week, and he will be confirmed today. If this year was too late for Bonnie Campbell, why wasn't it too late for James Teilborg?

As I said, nobody has come up and said Bonnie Campbell is not

qualified. I challenge someone to come on the floor and say that. Again, if people want to vote against Bonnie Campbell to be a circuit court judge, that is the right of each Senator--not only a right, but an obligation--if they believe someone is unqualified. We can't do that as long as she is bottled up in the committee.

The Senator from Utah has the power on that committee to report her out. I say to my good friend from Utah, who just appeared on the floor, the Senator from Utah can report Bonnie Campbell's name out here to the floor and we can have a vote on this nominee. That is the way it should be done. Nobody has come up to me to say she is not qualified. She is a former attorney general of the State of Iowa. Since 1995, she has led the implementation of the Violence Against Women Act as the head of that office under the Justice Department. She has broad support on both sides of the aisle. This is a case where a judicial nominee has the support of both the **Republican** Senator from Iowa, Mr. Grassley, and the Democratic Senator from Iowa, me. Yet she has not been reported out of the Judiciary Committee. I say report her out. If people want to vote against her or say something about her qualifications, let them.

I can stand here today and talk about the qualifications of James Teilborg, or the other people; but, quite frankly, I am convinced they are qualified. I may be opposed to the way they think once in a while, but they are qualified. Is the reason Bonnie Campbell is not being reported out because somebody on the other side of the aisle doesn't like the way she thinks, or because she may have a view on an issue contrary to theirs? The rankest form of politics is holding up Bonnie Campbell's nomination. We have a backlog of nominees and we should vote on her.

The Violence Against Women Act expires this year. The Office of Violence Against Women in the Department of Justice has had only one person head it since this bill was first implemented in 1995, and that is Bonnie J. Campbell. The reauthorization of the Violence Against Women Act was voted on in the House of Representatives last week. If I am not mistaken, I think the vote was 415-3. So 415 Members of the House voted to reauthorize the Violence Against Women Act. Now, if the only person to ever head that office had done a bad job in enforcing that law, had not acted responsibly, had not brought honor and acclaim to that office and the administration of that law, do you think that 415 Members of the House would have voted to reauthorize it? No. They would have been on their feet over there, one after the other, talking about how terrible this office has been run and how the person operating that office had done such a bad job in enforcing the law. Not one Member of the House took the floor to so speak.

The one person to head that office is Bonnie J. Campbell. Not one person I have ever run across has said she has done anything less than an exemplary job in running that office. Yet the **Senate** Judiciary Committee will not report her name out for action by the full **Senate**. Yet we will get the Violence Against Women Act here and Senator after Senator will rush up to speak about how great this law is. I will bet

you won't hear one Senator get up and say how badly this law has been administered by the Office of Violence Against Women in the Department of Justice.

That tells you what an outstanding job Bonnie Campbell has done in that office.

If that is the case, why won't the **Senate** Judiciary Committee report her name out? Politics; pure rank politics. That is what is going on in the Judiciary Committee today. I hope it won't be that way if the Democrats take charge of the **Senate**. I am not on the Judiciary Committee, but we tend to get in what I call a "cesspool spiral," like a whirlpool. One side takes over the majority and begins to stall nominations, and then the other side takes over, we keep spiraling down further and further to the point where any nominee for a Federal court will be held up months and perhaps even years while we await the next election. Then our third branch of Government truly becomes a political football.

I hope the Judiciary Committee and the leadership on that side--I say to my friend from Utah--will listen to the words of Texas Governor George **Bush**. He said he would call for a 60-day deadline for judges--once they are nominated, the **Senate** will have 60 days to hold a hearing, to report out of committee and vote on the **Senate** floor.

Bonnie Campbell has been there a lot longer than 60 days and so have some of the other judges.

I say to my friends on the **Republican** side--you are supporting George **Bush** for President. If he said he would call for a 60-day deadline, I ask my friends on the **Republican** side: Why don't we act accordingly?

In this Congress, the judicial nominees who have been confirmed had to wait on average 211 days. Governor **Bush** said they should not wait longer than 60 days. This is not getting better; it is getting worse around here. It is really a shame.

Let's look at the percentages. I am told: This is the same today as it was before--blah, blah, blah. I hear this all the time--nothing has changed.

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It has changed dramatically. For example, in the Reagan years, during the 98th Congress, the **Republicans** were in the majority. They had a **Republican** President. We received 22 circuit court nominations, and 14 were confirmed. This is a **Republican** President and a **Republican Senate**--22 received, and 14 confirmed, for a 63.6-percent confirmation

rate.

Let's look at the 100th Congress. President Reagan was still President, but there was a Democratic **Senate**. Twenty-six circuit court judge nominations were received; 17 were confirmed, for a 65.4-percent confirmation rate.

Think about that. Democrats had a higher confirmation rate under President Reagan--a very conservative President. We had a higher confirmation rate when the Democrats were in charge of the **Senate than when the Republicans** were in charge. We didn't block things when the Democrats were in charge.

Next, the 102d Congress, 1991-1992. President **Bush was the Republican** making nominations and the Democrats were in charge in the **Senate**. We received 31 circuit court nominations. Twenty were confirmed, again, for a 64.5-percent confirmation rate--**Republican** President and a Democratic **Senate**.

Now we move to the 104th Congress. We had a Democratic President, President Clinton, and we had a **Republican Senate**. Twenty circuit court nominations were received; 11 were confirmed. That was a 55-percent confirmation rate.

Now we are in the 106th Congress. We have a Democratic President and a **Republican Senate**. Thirty-one circuit court of appeals nominations have been received; 15 have been confirmed, for a 48.4-percent confirmation rate.

I ask my friend--and he is my friend--the chairman of the Judiciary Committee: How can we live with something like that? How can the Judiciary Committee come to this **Senate** with a straight face and say that a 48-percent confirmation rate is what we did in the past, when the record is clear? The record is in the 60-percent confirmation rate when we had **Republican** Presidents and a Democratic **Senate**. Yet today we are faced with a 48-percent confirmation rate.

I have heard from many judges. I have gotten letters from them saying that it is time we filled the bench. Cases are backing up. We need to get judges on the bench. But I suppose we first have to pay attention to the elections.

This one nominee, Bonnie J. Campbell, should be reported out if for no other reason than we need people on the bench who are sensitive to what is happening in domestic abuse cases and violence against women.

In 1998, American women were the victims of 876,000 acts of domestic

violence. In 5 years--1993 to 1998--domestic violence accounted for 22 percent of the violent crimes against women. During those same years, children under the age of 12 lived in 43 percent of the households where this violence occurred. It is generational. The kids see it, they grow up, and they become abusive parents themselves.

In Iowa, and all across America, prosecutors, victim service organizations, and law enforcement officers are fighting. But they need help. We need to reauthorize the Violence Against Women Act. But there is more we can do to make sure that we have judges who know what is happening from firsthand experience and who can make sure that the law is applied fairly and upheld in courts around the country.

That is why we need someone like Bonnie Campbell on the circuit court of appeals. As I said, she is widely supported. She is supported by me and by Senator Grassley. She has the support of judges, police organizations, women, and domestic violence coalitions. She has strong support in the State of Iowa and on both sides of the aisle.

I ask the chairman of the committee: Why aren't we reporting out Bonnie Campbell? Why? Just one simple question: Why? Is there a member of the majority who thinks she is not qualified? Let them so state. Have specific objections been raised as to her qualifications? If so, we ought to know that so they can be addressed. But all we hear is a deafening silence from the other side. We are left to assume that the reason Bonnie Campbell is being held up is because they are hoping their nominee wins the election. That is their right to hope that. They can work as hard as they can for him. I don't blame them for that. But to hold up a qualified person like Bonnie Campbell who had her hearing 2 months before Mr. Teilborg had his; yet she is being locked up in the committee--all the paperwork is done. Yet politics is holding her up.

Mr. President, I ask unanimous consent the text of an article that appeared in the Des Moines Register the other day regarding the Bonnie Campbell nomination and the text of two editorials, one in the Cedar Rapids Gazette and one in the Des Moines Register, be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

From the Des Moines Register, Oct. 1, 2000

Campbell Issue Aids Democrats' Politics

(By Jane Norman)

If Iowa Democrats needed any more reason to be excited and energized about this year's presidential race in the state,

they probably have found it in the controversy swirling around the stalled nomination of Iowan Bonnie Campbell in the **Republican**-controlled U.S. **Senate**. George W. **Bush**, hello?

Campbell, the director of the Violence Against Women office for the U.S. Justice Department, was nominated in March to be Iowa's new appeals-court judge for the 8th Circuit based in St. Louis. She had a spectacularly sedate hearing before the **Senate** Judiciary Committee in May, but then the nomination process ground to a halt. She's one of 42 judicial nominees pending in the **Senate**.

Campbell has had the support not just of Senator Tom Harkin, but also Senator Charles Grassley, even though it must stick in Grassley's craw. Campbell, who ran for governor of Iowa in 1994 and lost, made remarks during her race about Christian conservatives that riled conservative activists, who appealed to Grassley to kill her bid for the bench. That's fair; whatever you think of the merits of their arguments, it's their right to protest something as significant as a lifetime judicial appointment.

Grassley declined to side with his traditional conservative allies and supported Campbell, saying Democrats did not stand in the way he wanted judicial appointments during the waning days of the **Bush** presidency. While Grassley predicted that Campbell would fall victim to election-year politics, there's no evidence that he has tried to sabotage her behind the scenes.

Campbell's nomination hung around all summer, gaining the support of the bar association and the Iowa Police Association. When Congress returned to work in September, Harkin started turning up the heat. During the past week, he has taken to the floor repeatedly to lambaste majority **Republicans** for holding up the nomination, and he holds forth at length on the Campbell nomination with Iowa reporters.

This has been a masterful strategy by Harkin, who's become such a surrogate for Vice President Al Gore that Harkin was paired with GOP vice-**presidential nominee** Dick Cheney on a Fox News show. Campbell's woes only assist Harkin in making the case for a Democratic presidency, over and over again in media outlets across Iowa.

On Tuesday night, Harkin enlisted the help of Senator Joe Biden, the Delaware Democrat and Judiciary Committee member who's a friend of Campbell. Harkin and Biden formed a mutual admiration society on the floor to praise Campbell, and Biden recalled that he recommended that Campbell be made director of the Violence Against Women office when it was launched.

Biden insisted it was "flat malarkey" that Democrats have held up **Republican** appointments during the last days of **Republican** presidencies, and said he pushed through a flock of qualified Texas judges for Senator Phil Gramm in late

1992. "To be fair about it there were three members of our caucus who ripped me a new ear in the caucus for doing this," said Biden.

Harkin said no **Republican** has ever come to him and explained their opposition to the nomination. "In fact, **Republicans** in Iowa ask me why she is being held up," said Harkin. "Mainstream **Republicans** are asking me that."

Biden said it is a "terrible precedent," and that it is hard on Harkin to see someone so "shabbily treated" from his home state. You hoped there was a box of tissues close at hand.

Then, on Thursday, Harkin revealed to reporters that he had been told by **Senate** Judiciary Committee Chairman Orrin Hatch "in no uncertain terms" that the **Republican** caucus won't budge on the nomination. Harkin said there's not much he can do now other than fume on the floor and ponder holding up **Republican** priorities.

All of this cater-wauling gives Harkin, and Iowa Democrats, a huge opportunity to seize a way to criticize **Republicans** on the selection of judges, an issue where the GOP is somewhat vulnerable, particularly among women and undecided voters.

Texas Governor **Bush** does not sit in the **Senate**, and he is not the one holding up the stop sign. But his party is doing it, ostensibly for his benefit. Is it really wise to have the confirmation of a woman as a judge become a major fuss in a supposedly battleground state in the last month before the presidential election?

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On top of that, many Iowa Democrats are still angry at how Campbell was treated during her race for governor. The prospect that women such as Campbell will be shut out for another four years if **Bush** is elected president is like a booster shot for get-out-the-vote efforts.

Harkin said Thursday that he absolutely would push Campbell to be nominated again if Gore wins the presidency. For the time being, she serves Democrats' purposes just as well if she never dons black robes.

From the Cedar Rapids Gazette, Sept. 26, 2000

Stop Stalling on Judicial Candidate

In three weeks or less, Congress will adjourn before the 2000 elections, and increasingly it appears it will do so before the U.S. **Senate** brings the nomination of Bonnie Campbell to the U.S. Court of Appeals for the Eighth Circuit up for a vote.

It's not as if Campbell, the former attorney general of Iowa, is trying to get in at the last minute--unless you consider a six-month wait the last minute. Campbell was nominated to the job by the Clinton Administration in March. She had a hearing in May.

What's taking so long?

It seems apparent the **Republican**-controlled **Senate** Judiciary Committee is growing content to hold onto this nomination until after the session--and, not coincidentally--until after the November election, when they hope to win the White House. That would mean a **Republican** would more than likely be appointed to the job.

It is not unusual for political parties to try to run out the clock on nominations in the hope the next election will bring them to power. That does not make it right, and in this case it makes no sense to sit on the Campbell nomination.

U.S. Sen. Tom Harkin, D-Iowa, is her sponsor and he pointed out a week ago there are 22 vacancies on the federal appeals court. Campbell has the backing of the American Bar Association and the Iowa State Police Association. She also has the backing of U.S. Sen. Charles Grassley, R-Iowa, who is also a member of the Judiciary Committee. Traditionally, Grassley and Harkin have backed the other's nominees, and if Campbell's nomination fails, we would hate to see that understanding damaged.

Frustrated proponents of the Campbell nomination--as well as several other nominations--have been arguing recently that over the last three years, women and minority candidates have had to wait longer to get through the confirmation process than their white male counterparts.

The chairman of the Judiciary Committee, U.S. Sen. Orrin Hatch, R-Utah, has denied women and minorities are being treated differently in the committee than their white male counterparts. Still, of the 21 candidates for the federal bench who are women or minorities, nine have been waiting for more than a year for a hearing.

Campbell has a lengthy record in private legal practice. Elected in 1990, she was the first woman to serve as Iowa Attorney General. She was appointed in 1995 to be the director of the Violence Against Women Office in the U.S. Justice Department. Her hearing revealed no good reason why she should be denied this position.

The **Senate** leadership should do the right thing in the waning days of this session and let the full **Senate** vote on Campbell. It should set aside whatever reason it has for stalling and move forward. Let the process work and bring this nomination to the floor for a vote.

Mr. HARKIN. I see the distinguished chairman of the Judiciary Committee on the floor. He is a good man. He and I have fought many battles together. I like him personally and I respect him. If he would like to engage in colloquy, I will. He knows how strongly I feel about this nominee, about her qualifications and about the kind of job she has done at the Department of Justice. I am sure he knows I will do everything that is humanly and senatorially possible to try to get her name here. I believe I have a right and an obligation to do that. I will, within the confines of what is right and proper in the **Senate**, not violating any rules, do everything I can to try to get her name out.

We will be here this week and we will be here next week. I ask my friend from Utah, will we be allowed to have a vote on Bonnie Campbell for the Eighth Circuit Court of Appeals?

I yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from Utah.

Mr. HATCH. Mr. President, I will submit a resolution, and after these remarks I will spend some time answering my two dear colleagues, Senator Robb of Virginia and Senator Harkin from Iowa, to the best of my ability.

(The remarks of Mr. Hatch pertaining to the submission of S. Res. 364 are printed in today's Record under "Submission of Concurrent and **Senate** Resolutions.")

Mr. HATCH. Mr. President, I must respond to the remarks of Senator Robb and Senator Harkin.

With regard to the nomination of Roger L. Gregory, the position for which Mr. Gregory has been nominated has been vacant since it was created in 1990. Before nominating Mr. Gregory, the President had not even submitted a name to the **Senate** for this position in almost 5 years. Despite the longstanding vacancy of this judgeship, the work of the Fourth Circuit has not been adversely affected.

Moreover, when the President did submit a name to the **Senate** for disposition almost 5 years ago, he submitted the name of a resident of North Carolina, J. Rich Leonard. In doing so, the President effectively agreed that this seat should be filled by a North Carolinian.

The PRESIDING OFFICER. Without objection, the Senator's previous time consumed on the Olympics will not count against his 7 minutes.

Mr. HATCH. I ask unanimous consent I be able to speak for another 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH. The President effectively agreed this seat should be filled by a North Carolinian. By nominating Roger Gregory, a Virginian, for the seat instead of a North Carolinian, the President sought to avoid the traditional practice of seeking the "advice and consent" of the Senators from the State where the judgeship is located about which local lawyer should be nominated.

It is very late in the session to be considering a circuit court nomination. Some nominations can move through the confirmation process quickly, but only where the White House has dealt with the **Senate** on nominations in good faith. The Arizona nominations we are debating today moved through the confirmation process quickly because the White House did work closely with Senator Kyl and negotiated in good faith over which Arizonans should get these lifetime appointments.

In contrast, the White House has not dealt with the **Senate** on nominations in good faith. During our August recess, the President determined to recess appoint several executive branch officials over the express objections of numerous Senators. Furthermore, Democrats stood in the way of these four nominees we are debating today, the President's nominees, and they threatened to shut down the work of the **Senate**. This is hardly good faith. In fact, it was a Democrat hold--a Democrat hold by the minority leader on these four judges who are put forth by this President in accordance with an agreement worked out--that really caused a lot of angst on our side, plus the fact that these recess appointments that were made without consultation caused a lot of difficulty. Then we have virtually every bill filibustered, even on the motion to proceed. As a matter of fact, the H-1B bill, which just passed 96-1, had three filibusters on it, from the motion to proceed right on up through final passage of 96-1.

I must respond to some of the things Senator Robb said here this morning. He used some pretty incendiary language to imply that the **Senate** majority is biased against Mr. Gregory because he is an African American. Senator Robb said we "are standing in the courthouse door" and are refusing to "integrate" the Fourth Circuit. These allegations of racial bias are beneath the dignity of a Senator in the U.S. **Senate**, and they are offensive and politically motivated. When Democrats blocked the nomination of Lillian BeVier to the Fourth Circuit--which is what they did--the first female nominee to the Fourth Circuit, no one on our side accused them of gender bias.

I am sure Roger Gregory is a fine man. I have no doubt about that. I

have been told that by a number of friends of mine, including former Secretary Coleman. But I have informed my colleagues that because of the atmosphere that has resulted from the President's refusal to consult with the Senators from North Carolina, because of the President's recent recess appointments and disregard of commitments he had made up here, and disregard of the advice and consent because of the petty parliamentary games in which our friends on the other side have engaged, Mr. Gregory's nomination is not going to move forward. And because this is a North Carolina seat. We would have to have somebody nuts, from North Carolina, who would not stand up for a

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North Carolinian in this seat. There is just no question about it. The President knew that, having nominated a North Carolinian before.

I would like to respond to Senator Levin for a few minutes. I don't want to go beyond that. There are other things I could say. But I bitterly resent anybody trying to play racial politics with judges, especially after what we went through in prior administrations.

It had always been my intention as chairman of the Judiciary Committee to hold a hearing on judicial nominations during the month of September. I planned on doing that. At that hearing I was fully prepared to consider the nomination of some of these people, and perhaps even Helene White or Kathleen McCree Lewis to the U.S. Court of Appeals for the Sixth Circuit. A number of my colleagues were pressing very strongly for that. I wanted to try to resolve that if I could.

However, events conspired to prevent that from happening. First, during the August recess, the President determined to recess appoint several executive branch nominees over the express objection of numerous Senators. He did so notwithstanding the agreement to clear such recess appointments with the relevant Senators. We do not have much power around here in some ways against a President of the United States, but we can demand that he consult with us. These Senators are very aggrieved by the way they were treated on these appointments--I think rightly so.

Second, Democrat Senators determined to place holds on the four nominations we are debating today and threatened shutdowns of the **Senate's** committee work, going as far as to invoke the 2-hour rule and forcing the postponement of scheduled committee hearings, including the Wen Ho Lee hearing, which is an important hearing, a bipartisan hearing, for both sides to look at.

Helene White and Kathleen McCree Lewis have only the White House and **Senate** Democrats to blame for the current situation, I might add, because of some of these petty procedural games we have been going through around here with filibusters of almost everything that comes up, or a threat to bring up all kinds of extraneous amendments if we do

happen to bring a bill up that needs to be passed.

It is very late in the session to be considering a circuit court nomination. Some nominations can move through the confirmation process quickly, but only where the White House has dealt with the **Senate**, on nominations, in good faith. The Arizona nominations we are debating today moved through the confirmation process quickly because the White House worked closely with Senator Kyl and others, and myself, and negotiated in good faith over which Arizonans should get these lifetime appointments.

Everybody knows there is a tremendous need along the southern border in Arizona to have these judges. There is a tremendous court docket there that needs these judges. Yet they have been delayed for 2 solid months almost.

In contrast, the White House and **Senate** Democrats have not dealt in good faith, given the President's recess appointments in August of several executive branch nominees over the express objection of numerous Senators and **Senate** Democrats' efforts to hold up these nominees and hold up the work of the **Senate**.

With regard to the nomination of Bonnie J. Campbell, in March, Bonnie Campbell was nominated to the U.S. Court of Appeals for the Eighth Circuit. At the urging of Senator Grassley, the Judiciary Committee held a hearing for Ms. Campbell in May. It had always been my intention for the Judiciary Committee to report Ms. Campbell's nomination. However, events conspired to prevent that from happening.

First, during the August recess, as I have explained, the President determined to recess appoint several executive branch nominees over the express objection of numerous Senators. He did so notwithstanding his agreement to clear such recess appointments with the relevant Senators. By the way, this type of an agreement arose out of Senator Byrd's objections in earlier Congresses. His objections were followed here on the part of people on our side of the aisle, and the President agreed to it and then violated that agreement.

Second, after the August recess, Democrat Senators determined to place holds on the four nominations we are debating today, even though everybody admits--I think everybody admits --that they are important nominations and this arrangement that has been worked out has been fair.

Again, they threatened to shut down the **Senate's** committee work, going as far as to invoke the 2-hour rule and enforce the postponement of scheduled committee hearings. And we went through that because of pique. For these reasons, Bonnie Campbell's nomination has stalled. Ms. Campbell has only the White House and **Senate** Democrats to blame for the

current situation.

I might add, it did not help at all on our side for these petty filibusters on everything. It used to be when I got here, there might be one or two or three filibusters a year at the very most, and then they were on monumental issues that involved a wide disparity of belief. It was not every little motion to proceed, every little bill we were going to pass, like the one we just passed 96-1. To go through three filibuster cloture votes on that bill was beyond belief. But that irritated a lot of people. It made it more difficult to get these judges through.

Mr. Harkin, the Senator from Iowa, claimed that his review of history led him to believe we are "playing politics with the judges." I strongly disagree. In President Reagan's last year, the Democrat-controlled **Senate** confirmed 41 nominees. After the votes today, the **Senate** this year will have confirmed 39 nominees. And there have been some indications there might be some games played with one of the four judges here today. If that is the case, boy, Katie bar the door, after what we have been trying to do here.

The committee worked sincerely to try to get these nominations out, and they have been here for quite a while. Finally, few nominees are confirmed when the White House and **Senate** are controlled by different political parties. From 1987 to 1992, the Democrat-controlled **Senate** confirmed an average of 46 Reagan and **Bush** nominees per year. Things changed when President Clinton was elected. In 1994, the Democrat-controlled **Senate** pushed through 100 Clinton nominees. They could not have done that without cooperation from **Republicans**, but they did that.

In 1992, at the end of the **Bush** administration when Democrats controlled the **Senate**, the vacancy rate stood at 11.5 percent. Now at the end of the Clinton administration the vacancy rate after the votes today will stand at just 7.4 percent.

Also in 1992, Congress adjourned without having acted on 53 **Bush** nominations, or should I say nominees who were sitting there waiting to be confirmed. After the votes today, there will be only 38 Clinton nominations that are pending.

Under both Democrats and **Republicans**, the **Senate** historically confirms 65 to 70 percent of the President's nominees. In his last 2 years, President **Bush** made 176 nominations, and the Democrat-controlled **Senate** confirmed 122 of them, yielding a confirmation rate of 69 percent. During the last 2 years, President Clinton made 112 nominations, and after today's votes, the **Senate** will have confirmed 73 of them. He has a confirmation rate of almost the same, 65 percent.

In May, at a Judiciary Committee hearing, Senator Biden indicated he

did not believe we would do even 30 judges this year. He is wrong. We will have now done, at the end of the day, 39 judicial nominees confirmed by the **Senate**.

There has been much debate today about everything but the four nominees we ostensibly are debating. I fully support these nominees and want to say a few words about them. They are supported by their home State Senators--Senators Kyl, McCain, Fitzgerald, and Durbin.

The nominees we are supposedly debating today are as follows: Susan Ritchie Bolton from Arizona: Ms. Bolton has served as judge in the Maricopa County Superior Court since 1989. Before that, from 1977-89, she worked in private practice at a Phoenix law firm. From 1975-77, she clerked for the Hon. Laurance T. Wren of the Arizona Court of Appeals. Ms. Bolton received her law degree, with high distinction,

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from the University of Iowa Law School in 1975, and her undergraduate degree, with honors, from the University of Iowa in 1973.

Mary H. Murguia: Since 1998, Ms. Murguia has served in the Executive Office of U.S. Attorneys, first as Counsel and then as Director. Before that she served as an Assistant U.S. Attorney in the District of Arizona from 1990-98. From 1985-90, she was an Assistant District Attorney in Wyandotte County, Kansas. She received her law degree from the University of Kansas Law School in 1985, and her undergraduate degree from the University of Kansas in 1982.

Michael J. Reagan: Mr. Reagan has worked in private practice since graduating from law school in 1980; since 1995, he has been a sole practitioner at the Law Office of Michael J. Reagan. In addition, he has served as an Assistant Public Defender (part time) since 1995. He received his law degree from St. Louis University Law School in 1980, and his undergraduate degree from Bradley University in 1976.

James A. Teilborg: Mr. Teilborg has been a partner at the Phoenix law firm of Teilborg Sanders & Parks since 1972; before that he was an associate at another Phoenix firm from 1967-72. He received his law degree from the University of Arizona School of Law in 1966.

Some have complained the Arizona nominations have moved more quickly while others have not. Some nominations can move through the confirmation process quickly, there is no question about that, but only where the White House has dealt with the **Senate** on nominations in good faith. The Arizona nominations we are debating today moved through the confirmation process quickly because the White House worked closely with Senator Kyl and negotiated in good faith over which Arizonans should get these lifetime appointments.

All four are Democrats, all four are supported by the President, all four came through the appropriate committee--the Judiciary Committee--and all four will be voted on today, and I expect all four to be confirmed unanimously. If there are no politics played, they will be confirmed unanimously.

In contrast, the White House and **Senate** Democrats have not dealt in good faith, given the President's recess appointments in August of several executive branch nominees over the express objection of numerous Senators and **Senate** Democrats' efforts to hold up these nominees and obstruct the work of the **Senate**--the filibusters that have occurred on almost everything that comes up here and, of course, the holds that have been placed on these four nominees who are President Clinton's nominees. It does not take long until people on our side know there are too many games being played on judicial nominees.

We have done a good job. President Reagan had the all-time highest confirmation of judges during his 8 years. That was 382 judges. By the end of the day, when we confirm these 4, President Clinton will have the all-time second highest, as far as I know, and that is 377 judges, 5 fewer than President Reagan. Had we not had all these games played, I believe I could have held a hearing in September, which I no longer can hold, and we would have confirmed probably enough to draw President Clinton equal to President Reagan.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HATCH. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY**. Mr. President, I have been scarcely able to hold back the tears listening to my good friend from Utah. I am sure he did not mean to mislead the **Senate**, but those who might not know the numbers could be misled, not by any intent on the part of the senior Senator from Utah.

As he has said himself, we will have confirmed fewer than 40 judges in the last year of President Clinton's term in office. When the Democrats controlled the **Senate**, in the last year of President **Bush's** term in office, we confirmed 66. In fact, we were holding hearings right into September and voting on judges up to the last days of the session, confirming judges for President **Bush**.

The distinguished Senator from Utah feels perhaps some have suggested inappropriately that women, minorities, and others take longer going through this body. I point out that the ones who suggested that have

been independent bipartisan groups outside the **Senate**.

I have stated over and over, I have never seen or heard a statement expressing--I wonder if the Senator from Utah can stay while I speak; I do not want to say this with him off the floor--I have never once heard him express either a racist or a sexist remark. He has been a close and dear friend of mine for over 20 years. Nor have I ever suggested that anybody on the **Senate** Judiciary Committee has taken a racist or sexist position, but I am troubled, as I hope he and others would be troubled, by the fact that women and minorities, if they are nominated for judgeships, have taken longer to go through this **Republican**-controlled **Senate** than others if they are allowed to go through at all.

We talk about Roger Gregory, nominated to the Fourth Circuit. It has been suggested this is a seat that is reserved to North Carolina. That is not so. As pointed out in the Wall Street Journal in a recent letter from the President's Counsel Beth Nolan, this is a vacant seat that has not been allocated to the State of North Carolina and is appropriate for an appointment from Virginia. The distinguished chairman of the committee has said that Senators should work with the White House. In this case, two of the most distinguished Members of the **Senate**--one a **Republican**, one a Democrat, John Warner and Chuck Robb--worked very closely with the White House on this Virginia nomination and both support the nomination of Roger Gregory.

Senator Robb strongly urged the White House to appoint Roger Gregory, a highly distinguished African American. Senator Warner supports him. He has the highest ratings possible from bar associations. But he cannot get confirmed by the **Senate**; he cannot even get a hearing.

I commend what Senator Robb said on the floor today in support of Roger Gregory. I hope all of us will listen to him.

Likewise, I was struck by the remarks of Senator Durbin of Illinois with respect to the Supreme Court and his support for Michael Reagan to a district court judgeship in Illinois. Senator Durbin laid out what I have also heard from **Republicans** and Democrats who support Michael Reagan for that judgeship. Democrats and **Republicans** were at hearings for him. Democrats and **Republicans**, ranging across the political spectrum, have spoken to me in support of Michael Reagan. He is supported by both home state Senators, one a **Republican** and one a Democrat.

Senator Carl Levin, the distinguished senior Senator from Michigan, one of the most respected voices in this body, spoke of his support for Judge Helene White to the Sixth Circuit and Kathleen McCree Lewis to the Sixth Circuit and how he wished they would be considered. They have been held up and blocked by this **Senate**. Is the chairman saying that Judge Helene White and Kathleen McCree Lewis do not have the support of their two Senators from Michigan? If that is the case, we ought to know

that. I understand that they both have that support. If they don't have the support of a home state Senator, then let's say that. Judge Helene White and Kathleen McCree Lewis are extraordinarily well-qualified women. I wish they would get confirmed.

Senator Tom Harkin, was an extraordinary advocate for Bonnie Campbell. I can't add to what he has said. Senator Harkin spoke extremely well about Bonnie Campbell and, of course, Bonnie Campbell should be confirmed. Again, going to the test: Did the President work with the Senators from that State. Are we saying that the two Senators from Iowa do not support Bonnie Campbell? My understanding is both of them support her. Why can't she get Committee consideration and a **Senate** vote?

The **Senate** will move forward on a number of nominees today: Michael Reagan, Susan Ritchie Bolton, Mary Helen Murguia, and James Teilborg. I recommend that all four be confirmed by the **Senate**. It is unfortunate that this **Republican**-controlled **Senate**, is not willing to do for President Bill

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Clinton what a Democratic-controlled **Senate** did for President George **Bush**, and move people forward. We can talk about the numbers that various Presidents have appointed. Recent Presidents have appointed more judges than George Washington did or Thomas Jefferson or Abraham Lincoln or Teddy Roosevelt. But we are also a much bigger country, and we have a lot more cases and need more judges. In fact, if we passed the judgeship bill the distinguished senior Senator from Utah and I have introduced, the vacancy rate would be well into the teens with over 130 vacancies.

We have waited 10 years to authorize new judges, even as this country has expanded over the years and caseloads have grown. The Judicial Conference is asking us to authorize 70 judges. In fact, I strongly urge we pass the judgeship bill before the Presidential election while no one knows who is going to be elected President, and we are looking at what is best for our court system.

I am glad to see the **Senate** moving forward on these three nominees. I expect they will be approved overwhelmingly. They are all well qualified for appointment to the federal courts.

Three judicial nominees on the **Senate** calendar have been cleared by Democrats for action for some time, including two from Arizona and one from Illinois who has been pending the longest of the four.

There were Senators who wanted to be heard and have a chance to debate the lack of hearings and the refusal to give hearings to qualified nominees. They have spoken eloquently on behalf of Roger

Gregory, Bonnie Campbell and Judge Helene White. They are not seeking to filibuster these nominations and each has agreed to a reasonable time for debate before a vote.

The Senator from Arizona is right that there has been a problem with the nomination of James Teilborg, who happens to be a close personal friend of the Senator since their days together back at the University of Arizona Law School. Mr. Teilborg was nominated on July 21 and was afforded a hearing and was reported by the Judiciary Committee within a week.

The frustration that many Senators feel with the lack of attention the Committee has shown long-pending judicial nominees has recently boiled over. They wish to be heard; they seek parity and similar treatment for nominees they support. I understand their frustration and have been urging action for some time. This could all have been easily avoided if we were continuing to move judicial nominations like Democrats did in 1992, when we held hearings in September and confirmed 66 judges that presidential election year.

Michael Reagan, nominated to be a District Court Judge for the Southern District of Illinois, is a distinguished private attorney in Belleville, Illinois. He graduated from Bradley University in 1976, and St. Louis University Law School in 1980. He has been in private practice for over 20 years, and has been an adjunct professor of law at Belleville Area College and St. Louis University. He also presently serves as an Assistant Public Defender in St. Clair County, Illinois. He enjoys the support of both of his home state Senators. When other nominees to the Illinois federal courts were given hearings and confirmed in June, he was held back. He had likewise been nominated in early May. He was finally included in a hearing in late July and reported unanimously by the Judiciary Committee on July 27. He could have been confirmed before the August recess or at any time in September. I am glad that time has finally come.

Judge Susan Ritchie Bolton has presided in the Arizona Superior Court for Maricopa County since 1989. She received her undergraduate degree and law degree from the University of Iowa. Following law school she clerked for the Honorable Laurence T. Wren on the Arizona Court of Appeals. She then went into private practice at Shimmel, Hill, Bishop & Bruender. She enjoys the support of both of her home state Senators and received a well-qualified rating from the American Bar Association. She was nominated on July 21, participated in a confirmation hearing on July 25 and was unanimously reported by the Judiciary committee on July 27. She could have been confirmed before the August recess or at any time in September. I am glad the **Senate** is turning its attention to her nomination and am confident that she will be confirmed to fill the judicial emergency vacancy for which she was nominated.

Mary Murguia currently serves as Director of the Executive Office for U.S. Attorneys. She also serves as an Assistant U.S. Attorney for the

District of Arizona. Prior to that, she served as an Assistant District Attorney for the Wyandotte County District Attorney's Office. She earned her undergraduate and law degrees from the University of Kansas. She enjoys the full support of both of her home state Senators. Like Judge Bolton, she was nominated on July 21, received a hearing on July 25 and was unanimously reported by the Judiciary Committee on July 27. She could have been confirmed before the August recess or at any time in September. I know that the **Senate** will now do the right thing and confirm her to fill the judicial emergency vacancy for which she was nominated.

I thank the Majority Leader and commend the Democratic Leader for scheduling the consideration of these judicial nominations. I wish there were many more being considered to fill the 67 current vacancies and eight on the horizon. I wish that we were making progress on the Hatch-**Leahy** Federal Judgeship Act of 2000, S. 3071, and authorizing the 70 judgeships affected by that legislation as requested by the Judicial Conference.

I heard Senator Hatch argue last week that the vacancies on the federal judiciary are "less than zero". While I marvel at the audacity of such argument, it moves us no closer to fulfilling our constitutional responsibilities to the federal judiciary. Likewise the notion that the refusal by some to waive the **Senate's** 2-hour rule in late September somehow preventing the Committee from holding additional confirmation hearings in early September or now is hardly compelling. I wish the Committee and the **Senate** would have followed the model established in 1992 and continued holding hearings and reporting judicial nominees in August and September. That simply did not happen and despite my requests no additional hearings were held. This year we held about half as many hearings as in 1992. Despite all of our efforts we have been unable to get the Judiciary Committee to consider the nominations of Bonnie Campbell or Allen Snyder or Fred Woocher following their hearings.

The debate on judicial nominations over the last several years has included too much delay with respect to too many nominations. The most prominent current examples of that treatment are Judge Helene White, Bonnie Campbell, Roger Gregory, and Enrique Moreno. With respect to these nominations, the **Senate** has for too long refused to do its constitutional duty and vote. Nominees deserve to be treated with dignity and dispatch--not delayed for two or three or four years. The nomination of Judge White has now been pending for over four years, the longest pending nomination without a hearing in **Senate** history.

Of course it is every Senator's right to vote as he or she sees fit on all matters. But I would hope that in the cases of these long-pending nominations, those who have opposed them will show them the courtesy of using this time to discuss with us any concerns they may have and to explain the basis for their anonymous holds and the **Senate's** refusals to act.

It was only a couple of years ago when the Chief Justice of the United States chastised this **Senate** for refusing to vote up or down on judicial nominations after a reasonable period for review.

This **Senate** continues to reject his wisdom and, in my view, our duty.

It is my hope the **Senate** will confirm all four district court nominees on the **Senate** calendar. I know there are Senators who want a chance to debate the lack of hearings and the refusal to give hearings to qualified nominees. I understand that frustration, and it is justifiable, especially as it is not the way the Democrats acted when they controlled the **Senate** with a **Republican** President.

The nominee from Illinois should have been confirmed some time ago. The nominees from Arizona have zipped through here faster than the **Republican** leadership has allowed most

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judges to go through. When Senators supporting nominations, received months and years before, see newer nominees zip through, they are, of course, frustrated.

The Judiciary Committee has reported only three nominees to the court of appeals all year. We have held hearings without even including a nominee to the court of appeals. We have denied a committee vote to two outstanding nominees who have succeeded in getting hearings; namely, Bonnie Campbell and Allen Snyder. You have to understand the frustration of Senators and those outside the **Senate** who know that Roger Gregory and Helene White and Bonnie Campbell and Kathleen McCree Lewis and others should have been considered by the Judiciary Committee and voted on by the **Senate**.

On September 14, Senators Barbara Mikulski, Barbara Boxer, Blanche Lincoln, Tom Harkin, and Carl Levin and Representative Carolyn Maloney from the other body, highlighted the **Senate's** failure to act on judicial nominations to the Federal bench. They called on the **Senate** leadership to consider qualified women before the Congress adjourned. They also discussed the problems of judicial emergencies, the length of time it takes women and people of color to be confirmed, and how the Federal courts do not currently reflect the diversity of our country. I do not recall them or anybody else ascribing motives to those who are holding up these people. Rather, they were saying in a diverse country such as ours, the Federal court should reflect the diversity of our country.

They focused on the following women who have been waiting more than 60 days for confirmation: Helene White, U.S. Court of Appeals for the Sixth Circuit, has been pending more than 1,360 days; Kathleen McCree

Lewis, U.S. Court of Appeals for the Sixth Circuit, has been pending more than 370 days; Bonnie Campbell, U.S. Court of Appeals for the Eighth Circuit, has been pending more than 215 days; Elena Kagen, U.S. Court of Appeals for the District of Columbia, has been pending for more than 480 days; Lynette Norton, U.S. District Court for the Western District of Pennsylvania, has been pending more than 890 days; Patricia Coan, U.S. District Court for the District of Colorado, has been pending more than 500 days; Dolly Gee, U.S. District Court for the Central District of California, has been pending more than 495 days; Rhonda Fields, U.S. District Court for the District of Columbia, has been pending more than 325 days; and Linda Riegle, U.S. District Court for the District of Nevada, has been pending more than 165 days. That is why these Senators and this Member of Congress made the statement we did.

Mr. President, am I correct in understanding that under the previous order, we are to recess at 12:30?

The PRESIDING OFFICER. The Senator is correct.

Mr. **LEAHY**. Then I yield the floor and withhold the remainder of my time.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. **LEAHY**. Mr. President, I believe I also have an hour under another part of the unanimous consent agreement.

The PRESIDING OFFICER. The Senator is correct.

Mr. **LEAHY**. I will withhold that and yield the floor.

SUBJECT: JUDGES (92%); POLITICS (90%); CAMPAIGNS & ELECTIONS (90%); VOTERS & VOTING (89%); LEGISLATORS (78%); YEAR 2000 ELECTIONS (78%);

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EXECUTIVE SESSION -- (Senate - July 30, 2002)

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NOMINATION OF D. BROOKS SMITH TO BE UNITED STATES CIRCUIT JUDGE

Mr. DASCHLE. Madam President, I now ask that the Senate proceed to executive session, as provided under the previous order.

The PRESIDING OFFICER. The Senate will proceed to executive session, and the clerk will report the nomination.

The assistant legislative clerk read the nomination of D. Brooks Smith, of Pennsylvania, to be United States Circuit Judge for the Third Circuit.

The PRESIDING OFFICER. There are now 4 hours for debate, evenly divided between the chairman and ranking member.

The Senator from Pennsylvania.

Mr. SPECTER. Madam President, it is with considerable pride that I urge my colleagues to vote to confirm a very distinguished Federal judge, D. Brooks Smith, now Chief Judge of the Western District of Pennsylvania, whose nomination is now before the Senate for the Court of Appeals for the Third Circuit.

Judge Smith comes to this position with an outstanding academic background, having received his bachelor's degree from Franklin and Marshall College in 1973, his law degree from Dickinson Law School, and then engaged in the active practice of law for 8 years before becoming district attorney of Blair County, PA, a populous county whose county seat is Altoona.

He then became a judge of the Court of Common Pleas of Blair County in 1984, serving for 4 years until he became a judge for the United States District Court for the Western District of Pennsylvania where he is now the chief judge, and for now almost 14 years has had very distinguished service there.

I came to know Judge Smith when he appeared before the bipartisan nominating panel which had been established by Senator Heinz and myself, and I found him very well qualified and have known him on a continuing basis rather well over the course of the past 14 years. I have talked to him on many occasions and met with him on many occasions, discussing problems of the courts administratively, and issues that may come before the Judiciary Committee. He has been an outstanding jurist.

Judge Smith enjoys a unique reputation among all of the people who know him. During his confirmation hearings, large groups of people who knew him rallied to his defense and came forward to attest to his erudition, his scholarship, his good character, and his judicial temperament.

Certain issues have been raised which had delayed the confirmation. One involved a fishing club in which he was a member, but that club did not practice what is called invidious discrimination because it was a social club only. While in confirmation hearings for the district court, he had said he would resign from the club if they did not change their membership rules. It was later determined in 1992 in an opinion of precedential value that the club did not engage in invidious discrimination, so there was no

reason for him to leave the club.

An issue arose on a case, where he presided for a relatively brief period of time, as to whether there should have been an earlier recusal. The matter was inquired into, investigated at length by former Gov. Dick Thornburgh and former Attorney General of the United States, and in an elaborate statement, he went through the case in detail and found, as I concluded as well, that the judge had made a timely recusal.

Some issues were also raised as to a speech which Judge Smith made on the Violence Against Women Act. He had concluded that there was not Federal jurisdiction for that particular statute.

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I, frankly, disagreed with him about his conclusion on that, as lawyers are wont to do, even lawyers who become judges or lawyers who become Senators. In fact, the Supreme Court of the United States ultimately agreed with Judge Smith on the point.

I mention these issues in passing because I think they are not worth any more comment. The issues were considered at great length by the Judiciary Committee, and in a 12-to-7 vote, the Judiciary Committee recommended Judge Smith's confirmation.

As is well known, Judge Smith's nomination came before the Judiciary Committee at a time of considerable controversy involving the timing and the confirmation of nominees submitted by President Bush.

Senator *Biden*, Senator *Kohl*, and Senator *Edwards* all voted to confirm Judge Smith in an atmosphere where there was, to say the least, at least some element of partisanship.

I only mention those issues. I think they do not bear any more comment than I have given them.

When a man such as D. Brooks Smith undertakes public service in a Federal judgeship, I think it ought to be noted that there is a very considerable personal and financial sacrifice. I thank Judge Smith for serving on the Federal bench, and I thank all the Federal judges for serving on the Federal courts which are the pillars of justice and the pillars of our democratic society.

Judge Smith has undergone a difficult period in this confirmation process which has taken quite a considerable period of time. I compliment him for his steadfastness and for his determination in staying the course and in working through on this confirmation.

There is no doubt of Judge Smith's qualifications--his educational background, temperament, judicial experience, and experience being a district attorney. Judge Smith has a broad range of experience.

The Third Circuit is in desperate need of judges. They are in an emergency situation. I ask unanimous consent that a letter from Chief Judge Edward R. Becker be printed in the **RECORD** at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1)

Mr. SPECTER. I am confident, based on my personal knowledge of Judge Smith and his outstanding record, that he will be a credit to the Court of Appeals for the Third Circuit.

I thank my distinguished colleague from Utah and my distinguished colleague from Vermont for permitting me to speak at this time.

Exhibit 1

U.S. COURT OF APPEALS

FOR THE THIRD CIRCUIT,

Philadelphia, PA, July 15, 2002.

Hon. **ARLEN SPECTER**,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR SPECTER: Because the exercise of my responsibility to assure that efficient administration of justice for over 21 million Americans within the Third Judicial Circuit is being seriously impaired by the current impasse in the Senate over judicial nominations, I feel constrained to cry out. A total of eleven--yes eleven--judges within the Third Circuit, whose presence is desperately needed, would, I believe, have been confirmed and entered on duty but for the impasse.

Let me begin with the United States Court of Appeals for the Third Circuit. But for the impasse, Judge D. Brooks Smith would now be on my Court, which has three vacancies, two of them of long standing. I have scheduled him to sit in the early Fall, and we need him. We "borrow" judges in 45% of our cases, which is too much. But that situation pales in comparison with that of the District Court for the Western District of Pennsylvania. There are five vacant judgeships on that Court; as of September 30, 2002, these judgeships will have been vacant for a total of 161.7 months. If it were not for the impasse, the following judges would likely have entered on duty: Joy Flowers Conti, who I understand has resigned from her law firm partnership, anticipating a July swearing-in-date (and is now without income); David S. Cercone; Terrence F. McVerry; and Arthur J. Schwab. The Western District is in desperate straits. Motions are piling up, and trials are being delayed.

Other courts within the Third Circuit are similarly disadvantaged. Two nominees to the Middle District of Pennsylvania are awaiting floor votes: John E. Jones, III and Christopher C. Conner, both nominated to fill vacancies that are well over a year old. Two nominees to the Eastern District of Pennsylvania, one of the busiest courts in the nation, are also being held up: Timothy J. Savage and James Knoll Gardner. We also have problems in New Jersey where we have five vacancies. Stanley R. Chesler and William J. Martini are awaiting floor votes. There are also putative nominees for the other three vacancies: Jose Linares, Freda Wolfson, and Robert Kugler, whose progress is obviously being slowed by the impasse. Their presence is needed there to take up the slack caused by my assignment of Senior Judge Alfred Wolin, who had a full docket, to handle the mega-asbestos bankruptcy cases in Delaware, one of the nation's most important judicial assignments.

I have always respected the processes of the United States Senate. I came to the bench from politics, and understand the senatorial prerogatives. I have been tempted to speak out before, yet because of my background, held back. But the current impasse is too much even for me, hence this letter. As a judge of over three decades of experience on the federal bench, I understand the weighing and balancing process, and I believe that it is out of all proportion to the exercise of senatorial prerogative that these eleven

nominees (and scores of others) be held up so long. I urge you to press my plea before your colleagues.

Sincerely yours,
EDWARD R. BECKER.

The PRESIDING OFFICER (Mr. *Durbin*). The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I thank the Senator from Utah for yielding me some time, and I also thank the Senator from Vermont for allowing Senator *Specter* and I to speak first on this nominee.

I, too, like Senator *Specter*, am very proud tonight to praise the nomination of Brooks Smith to the Third Circuit Court of Appeals and to congratulate the President on an excellent nominee. I certainly urge all of my colleagues on both sides of the aisle to vote for his confirmation. I truly hope they look at his record of 17 years of judicial service and experience on both the Federal and State level.

He is someone of paramount integrity, someone who is obviously academically qualified, having been confirmed already as a Federal judge some 13 years ago. He has impeccable credentials academically and professionally prior to being a judge, and I think his service on both the trial court level and the common pleas court of Blair County, as well as on the Federal bench of the western district, now serving as chief judge of the western district, has been exemplary.

He is someone who has been a model judge, someone who has steered a course, as most people who have described his nomination, right down the center, someone who follows the law and is very steadfast to what the role of a judge is, which is not to go out and make law but simply to serve in the capacity of meting out justice in a fair and equitable way that meets the expectations of the litigants. He has been highly praised by everyone.

He has gotten a letter of support from almost the entire Pennsylvania congressional delegation, Democrats and Republicans alike. He has been rated well qualified by the ABA and highly recommended by the Allegheny County Bar Association, which is their highest rating. Allegheny County is the bar where the Western District of Pennsylvania is located. He has gotten support from every prior U.S. attorney from Jimmy Carter on through President Clinton's appointments to the U.S. attorney position in the western district. They have all come out in support of him.

His colleagues on the statewide bench from the supreme court, superior court, on down, have written letters of support, both Republicans and Democrats alike, for his nomination.

One of the most disturbing aspects of this nomination was what some on the far left-wing groups have done to try to impeach Judge Smith's integrity. Senator *Specter* reviewed the three things that have been brought up in a 17-year career. Probably the most outrageous of all of them is the fact that Judge Smith belonged--I know this might be shocking to some of my colleagues--to a sportsman club that only has male members. I know that none of my colleagues have ever heard of such a thing, but believe it or not most sportsman clubs in America, I would suggest, have limitations on memberships. If anyone is interested in the opposite, where sportsman clubs limit membership only to women, go to www.womensflyfishing.net, and they will find 60 organizations where only women are permitted to be members.

At this particular club, the Spruce Creek Rod and Gun Club, only men are allowed to be members, but women certainly are allowed on the premises and

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allowed to use the facilities. They simply cannot be members of the club.

This club is a beautiful place. It is right in the heart

of Pennsylvania. It has attracted many people from around the country because of its fabulous fly fishing. One such person who is an annual visitor, according to his own article on the subject, to this limited club is former President Jimmy Carter.

Former President Jimmy Carter goes to this club to which Judge Smith used to belong. When President Carter was President, my colleagues may recall the incident when the rabbit attacked his boat. That was somewhat of a famous incident during the Carter Presidency. That happened at the Spruce Creek Rod and Gun Club. This is purely a social organization.

When Judge Smith was before the Judiciary Committee, it was unclear whether he should continue to belong to such an organization. He was confirmed nonetheless. He promised at that time, when it was unclear whether that membership was unethical in some respects, that he would try to reverse the policy, and if he was unsuccessful he would resign. Subsequent to that, in 1992, the judicial code was changed and, as Senator *Specter* said, this kind of club does not fall into the ethical category of invidious. Therefore, as a result, he was not required under the judicial conduct code to resign.

Nevertheless, he tried for several years. Every year at their meetings, he would try to have women allowed to become members, but he failed. Eventually, I think after 9 or 10 years, he decided he would give up that quest and leave. This was some 5 years ago.

I understand there are a lot of women's groups that are complaining about this. To be candid, the complaint should be not that he resigned too late but that he is not still there trying to change it. That, to me, would be legitimate, to say he should have continued to stay there to try to get women as members. Instead, he gave up the fight, as some might suggest, and decided simply not to belong.

I think they have sort of missed the point, and the point is--this is ridiculous is really the point. The point that he belonged to this club has nothing to do with his ability to be a jurist. Probably the worst aspect of this whole thing is it brought up this tenor that somehow Judge Smith was anti-woman. Well, we had the president of the NOW organization in his home county, Blair County, former Democratic county commissioner, come to the Senate, to the LBJ room. She did a press conference talking about how Judge Smith, when he was a common pleas court judge, did more to help her in her role as county commissioner than anybody else she met in county government, and that he had an excellent record in regard to violence on women, and a variety of other things, as he did as a common pleas court judge.

Then later on, we heard from members of the women's bar association of western Pennsylvania going on at length about how Judge Smith was the best judge they had to deal with, who was the most respectful of women in the courtroom, most accepting of women in the courtroom.

This is the most frustrating part for the judge, and I know Senator *Specter* commented how difficult a process this has been for him, to be attacked for things that are so spurious and tangential to this whole process, and trying to then frame them for something that he has worked all his life to prove that he was not. It was really unfair.

Senator *Specter* went through the other two issues that have been highlighted. One is a case where he

should have recused himself earlier. The trustee in the case, the former Attorney General and Governor, Richard Thornburgh, who said he would have been the aggrieved party in the case, as it turned out, said, no; that Judge Smith handled the case properly and forthrightly. The judge who eventually was assigned the case commented she would have handled the case in the precise manner Judge Smith handled the case. The Securities and Exchange Commission looked at this and stated Judge Smith did nothing improper.

There is absolutely nothing there when it comes to these "improprieties" of Judge Smith on the bench. This is reaching. This is trying to find a reason to oppose someone who has an impeccable record of service in the judicial community of western Pennsylvania, someone who has been outstanding in everything he has attempted. He is an incredibly well-qualified person for this position. He has done nothing but prove that his nomination for the Third Circuit is warranted.

I am very hopeful that my colleagues again on both sides of the aisle--and I thank Senator *Specter*, Senator *Edwards*, Senator *Kohl*, and Senator *Biden* for their support of this nominee in committee--will be joined by many others on the other side of the aisle to confirm, as the ABA said, a well-qualified, very solid candidate, for the Third Circuit Court of Appeals.

Mr. LEAHY. Mr. President, I yield myself such time as I may consume.

I ask consent that following me, the Presiding Officer recognize the senior Senator from Utah; at 7:50 this evening, without using time from either side, the senior Senator from New Jersey be recognized for 10 minutes; and then we revert back to whichever member of the Judiciary Committee sought recognition.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, the Senate is debating the nomination of D. Brooks Smith to the United States Court of Appeals for the Third Circuit. This, incidentally, is the 13th circuit court nominee to be considered by the Senate since the change in Senate majority and reorganization of the Judiciary Committee fewer than 13 months ago. That is an average of one court of appeals judge a month since the Democratic majority has been in place. That does set a record.

We voted and confirmed three judges yesterday, one a circuit court of appeals judge. There are 10 other judicial nominees on the calendar. All have been approved on the Democratic side of the aisle. We have no objection to going forward with votes on them. I commend the Senator from South Dakota, the majority leader, Senator *Daschle*, who worked very hard to overcome the Republican objections so we can vote on President Bush's nominees to the judiciary.

We set a record on the number of courts of appeals nominees who have been given hearings and votes. We have moved forward, including confirming one yesterday, and we will vote on another circuit court nominee tomorrow. That will be 13 in less than 13 months, plus more than 60 other judicial nominees for whom we have held hearings or on whom we have already voted. This seat on the Third Circuit is another example of the different ways in which the Republican majority and Democratic majority have proceeded.

Today's debate is taking place in broad daylight. Under the Democratic majority, Judge Smith received a hearing less than 4 months after receipt of his ABA peer review. In contrast, Judge Cindrich was previously nominated for the same vacancy on the Third Circuit by President Clinton. He sat there

for 10 months. You may wonder what happened at his hearing. He never got a hearing. You may wonder what happened on his vote. He never got a vote. He was never allowed a hearing; he was never allowed a vote. Four months after Judge Smith came up with his ABA papers, we had a hearing.

This is one of the many court of appeals vacancies for which President Clinton nominated qualified and moderate nominees but the Republican majority would not allow a vote--neither a hearing nor a committee vote. Bonnie Campbell, Allen Snyder, and so many others--I am sure they have not been treated as fairly as Judge Smith's nomination.

It is not enough to say some of the Republicans did not want those judicial nominees to be confirmed. I will vote against this nominee. I am the Chairman of the Committee. I could have refused to hold a hearing on Judge Smith. I could have refused to put his nomination on the calendar for a vote in our Committee. I did not. Even though, after the hearing, I made my up my mind to oppose this judge, I allowed the Committee to vote on his nomination and, if he got a majority vote in the Committee, allowed it to come to the Senate floor. That has always been the Democratic practice, and a practice that I follow.

Every Senator, Democrat and Republican, will vote his or her conscience

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about the merits of Judge Smith's promotion to the appellate bench. I do not question the conscience of any Senator in doing that. While the course charted by the Democratic Senate to improve the process and hold judicial nominees is an honorable, difficult and time-consuming course, it is a road not taken in many instances by the Republicans in the recent past.

Some nominees, such as Judge Smith, are a portrait of contradiction. Those on the other side can extol his accomplishments and his popularity, but they omit his failings. They minimize his troubling record on ethical issues and his decisions as a judicial officer. Some, we heard tonight, may belittle the genuine concerns raised by many and shared by some Members of this Senate. I believe they are legitimate concerns.

As I said, I could have refused to allow him to have a hearing. I could have refused to allow him to have a vote in the Committee. I did not. I do have genuine concerns.

Some on the other side may try to castigate or caricature those who express opinions that are in opposition to the confirmation of a nominee. They may even choose to vilify those who dare to vote against a nominee who may be popular but who may be flawed in so many important respects. All of these contrasting views and accusations might cause an outside observer to wonder what exactly is the truth. The fundamental questions are whether this particular nominee should be confirmed, whether he should be promoted to a higher court, and whether his record of conduct on and off the bench warrants promotion. A lifetime appointment to review the decisions of other judges is not a right.

With the Supreme Court hearing fewer than 100 cases per year, it is the circuit courts that are really the courts of last resort for thousands of cases each year. These cases affect the Constitution, as well as statutes intended by Congress to protect the rights of all Americans; for example, the right to equal protection of the laws, the right to privacy, as well as the best opportunity to have clean air and clean water, not only for ourselves but for our future generations.

These courts are where Federal regulations will be upheld or overturned, where reproductive rights

will be retained or lost, and where intrusive Government action will be allowed or curtailed. They are courts where thousands of individuals have their final appeal in matters affecting their financial future, their health, their lives, their liberty. I believe this record does not demonstrate that Judge D. Brooks Smith merits this promotion.

In saying this, I mean no disrespect to the senior Senator from Pennsylvania, Mr. *Specter*, who strongly supported the confirmation of this nominee, nor disrespect to the nominee who is well-liked by many. I genuinely mean no harm to Judge Smith, no matter how we vote tomorrow. He has a lifetime appointment and a lifetime salary as a Federal judge. It is fair to say, however, that this nominee's record is problematic in a number of ways. Among my many concerns is the fact that Judge Smith's action creates an appearance that is too often beholden to special interests. The Federal courts are supposed to be an independent judiciary that is not beholden to anyone--the left, the right, or any economic interests. An independent judiciary is the people's bulwark against the loss of their freedom and rights.

A number of judges and lawyers in Pennsylvania have written to the Senate to support Judge Smith's confirmation. A number of individuals and groups from Pennsylvania and elsewhere in the Third Circuit and throughout the country have written to the Senate, have called and e-mailed our office to express their deep concerns about this nomination.

We have heard from many Americans who are concerned about Judge Smith's record as a judge, including, incidentally, a resolution that was passed by the City Council of the City of Philadelphia. It was sent to us after the vote in the Judiciary Committee. It called for his nomination to be rejected.

I am going to put in the **RECORD** at the end of my statement this City Council resolution, as well as the opinions of two ethics professors.

I am disappointed that Judge Smith's record on and off the bench has resulted in this kind of controversy. As I reviewed his record as a judge, that record raised significant doubts in my mind as well.

The issue for me is whether Judge Smith's record justifies this promotion from the lifetime Federal judgeship he now holds to the higher lifetime Federal judgeship. In this case, it is to a court that is only one step below the Supreme Court. Appellate judges in the circuit courts write opinions that become law, affecting all of us, whether we live in Pennsylvania, Utah, Vermont, or Illinois. I do not believe Judge Smith's record justifies this promotion.

For one thing, he failed to keep his promise to resign from a discriminatory country club. Incidentally, that was not a promise that is something given in a political statement or to somebody in the press in response to an impromptu question. This was a promise Judge Smith made in a sworn statement before the Senate a few years ago. He belonged to a discriminatory club for more than a decade after he swore, after he took an oath, that he would quit if the rules were not changed to allow women to become members, in 1988.

He stood there, he raised his right hand, he swore to tell the truth, and he told us that he would resign if women were not admitted by 1989. He did resign from this Spruce Creek Rod and Gun Club in 1999, 10 years later.

What do you suppose was the thing that finally made him keep his word? A cynic would say that a vacancy had arisen on the court he wanted to be promoted to, and suddenly he thought: Wait a minute. I know I swore to resign by 1989--I had a lifetime judgeship and why do I have to resign from a club I

like--but then suddenly, whoops, I might be promoted to even a higher Federal judgeship, maybe I better dust off that promise. I realize I am 10 years late, but better late than never.

I find that extremely troubling.

We had testimony by his supporters in letters that, well, the Spruce Creek is just a little fishing club, an itty-bitty fishing club of no consequence, kind of like a shack in the woods where a group of male friends might store their gear.

It is not exactly an itty-bitty club. This here is the itty-bitty club.

I have a little farmhouse in Vermont. My house probably would fit in the garage of this itty-bitty club. Look at this stately club. The Republicans may have missed one thing when they previously referred to this itty-bitty clubhouse, this inconsequential clubhouse as "rustic." Maybe they didn't realize that, because it is such a stately and important place, it is on the National Registry of Historic Places.

I bet your home, Mr. Presiding Officer, is not on the National Registry of Historic Places. Mine is not on the National Registry of Historic Places. I will bet the senior Senator from Utah's home is not on the National Registry of Historic Places. But this little no-consequence, little tiny fishing club, the itty-bitty fishing club, is on such a prestigious list.

For nearly a century, this itty-bitty fishing club has been an exclusive recreational sportsmen's club that hosts its members and guests at its beautiful clubhouse. It has dining facilities. This itty-bitty clubhouse has fireplaces. It has bedrooms for overnight guests. It is not just a little bend in the road; it sits on hundreds of acres of prime real estate.

We can joke about it. It is obvious that Judge Smith and his supporters thought we would not actually go and find a picture of the club. I think they probably wish that we would not go back to his sworn testimony in which he promised to resign 10 years before he did. But let us be clear about what this is. The sports club--it does not make a difference whether the sport pursued is fishing or golfing. There are a number of women's fly fishing clubs attesting to the interest of women in that sport, and that is fine.

If men want to go off and go fly fishing themselves, that is fine. If women want to go off and go fly fishing, that is fine. But when they have facilities to conduct business and when businesspeople go there to conduct business and that is how you may be able to get ahead in the business world if you exclude women from it, if you say, women, if you want to be in business, you are not going to be able to

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join the moguls of the business or legal community here, then it is exclusionary.

Women anglers who might have a fly fishing association could not walk into the Spruce Creek clubhouse. They could not fish in the stream called Spruce Creek that runs through the land owned by the club--unless a man, who is a member, condescended to invite them.

Frankly, it does not make any difference whether you exclude women or you exclude African Americans or you exclude people of particular religious faiths--it is still exclusion. That is why it is particularly troublesome that, when Judge Smith was up here the last time before the Senate seeking a lifetime appointment, he swore in sworn testimony to the Judiciary Committee and to the Senate of the United States that he would resign if he could not promptly get the club to change its exclusionary rules.

Judge Smith did not resign within a year, or 2 years, as he had sworn. In fact, he did not resign within the time that the ethical rules that he was sworn to uphold as a judge required. He did not resign until 10 years later and then only when a new position on a higher court for someone from Western Pennsylvania opened up and he hoped to be appointed to it.

There is no reasonable, logical explanation for why he waited for more than 10 years to follow through except that one: There is now a vacancy on a court that he wanted to go to, the Third Circuit from Western Pennsylvania. Claims that the ethical rules changed to allow his continued membership are groundless.

The reason I stress this is that we have judicial nominations hearings, and the distinguished Senator from Utah, the distinguished Senator from Illinois, we have all sat in these hearings. You ask for certain commitments from judicial nominees because once they are confirmed they have a lifetime position.

When a nominee comes before the Senate and makes a commitment, we must rely on his or her word to honor that the promise will be kept. With Federal judges that is especially true. Once confirmed, they have lifetime appointments. Impeachment is not a realistic way to enforce such commitments and, unlike Republicans in the House and Senate a few years ago, I have never suggested impeachment of Federal judges.

If we allow such a promise, whether it is about club membership or some other issue, to be so flagrantly broken with no consequence, then promises and assurances to the United States Senate will mean very little. I think that is a bad precedent. I think that is a bad message to send to future nominees to the courts and to the executive branch: just tell us what we want to hear and then ignore those commitments without any consequence.

I cannot think of another occasion in which a judicial nominee has promised to take specific actions and then been confirmed, after failing to keep his word. It is true that some judicial nominees have been confirmed after resigning from a discriminatory club, but none have ever been confirmed after telling the Senate that they would resign and then failing for years to do so. The closest analogy I recall is the failed nomination of Judge Kenneth Ryskamp to the 11th Circuit, because Judge Ryskamp was on notice that membership in discriminatory clubs was impermissible, but he continued his membership in a discriminatory club anyway.

As a district court nominee of President Reagan in 1986, Judge Ryskamp admitted that he was then a member of the University Club, which had a rule against allowing women as members, and the Riviera Club, which had no race-specific membership rules, but which in practice had no Jewish or African American members. During his 1986 hearing, Senator Simon asked Ryskamp if he thought he should resign from the University Club, and Ryskamp promised the Senate, "I will resign from any club the Committee feels is inappropriate." In 1986, he was not asked specifically about the Riviera Club, which he later said he did not consider to be a discriminatory club. He subsequently resigned from the University Club, but not the Riviera Club.

During his nomination by the first President Bush to the Eleventh Circuit, Judge Ryskamp's two-decade long membership in the Riviera Club was questioned extensively. For example, Senator *Kennedy* noted that the fact that the Senate had not specifically asked Judge Ryskamp to resign from the Riviera Club did not lessen his responsibility to follow the ethical rules anyway and resign. I recall that Judge Ryskamp told me that he resigned shortly before his confirmation hearing in March 1991 because his continued membership created the appearance of impropriety, not because, in his view, the Club discriminated. In April 1992, the motion to report favorably Judge Ryskamp's circuit nomination to the

floor was defeated. The subsequent motion to send the nomination to the floor without recommendation also failed.

Unlike Judge Smith, Judge Ryskamp never promised to resign from the club at issue, although several Senators believed Judge Ryskamp should have done so following his first confirmation. I think it only reasonable that Judge Smith's conduct regarding his previous promise to the Senate would lead a reasonable person to doubt the sincerity of his assurances to the Senate this year in other areas, as well.

Breaking a promise to the Senate, or misleading the Senate into believing that certain action would be taken, is an independent yet unusually strong reason for the rejection of a judicial nominee. I do not think Judge Smith should be given a promotion after failing to keep his word to the Senate. If his statements to the Senate in 1988 were not promises, then he most assuredly misled the Senate into believing he was going to resign, and he did not do so within any period that can be considered reasonable. On this basis alone, I feel I must vote against Judge Smith's confirmation to the Third Circuit.

Spruce Creek invidiously discriminates against women. Prior to his nomination to be promoted to the Third Circuit, Judge Smith never informed the Senate that he did not have to keep his promise to the Senate. He acknowledged in both his 1988 and 2001 Senate Questionnaires that the Club violated the ethical rules against judges belonging to clubs that engage in invidious discrimination. In fact, when Judge Smith finally resigned from the Club in December of 1999, he told the Club's president that the Club's men-only membership rules "continue to be at odds with current expectations of Federal judicial conduct." It is only now that questions have been raised about his very late resignation does he belatedly assert for the first time that the Club is "purely social" and so the rules against discriminatory club membership do not apply. The exception he seeks to create would swallow the rule. His statements on this point really give me pause with respect to how Judge Smith would follow the law as an appellate judge or whether he would seek to bend it to his personal purposes. Public officials should not have to

be told, repeatedly, not to belong to clubs that discriminate.

We have received a letter from Professor Stephen Gillers, the Vice Dean of the New York University School of Law, observing that the ethical rules against discriminatory club membership do not apply to purely private social clubs that do not allow business or professional meetings. However, both Professor Gillers and Professor Monroe Friedman, a distinguished ethics scholar, have noted that if club members can or do sponsor events or meetings at the club that are business or professionally related then the club cannot be called purely private and the club's discrimination against membership for women is "invidious" within the meaning of the Code of Conduct's prohibitions. This is true even if women are allowed, by the men who belong to the club, to attend some or all business and professional meetings hosted by the club's members.

I understand that, in fact, Spruce Creek has always allowed members to host business and professional meetings at its facilities. We know that members have hosted business meetings and gatherings of their professional colleagues at the Club. The President of the Club, who has been a member for decades, told Senate staff that members can use Club facilities for any meetings or occasions they want, without any oversight, but he refused to discuss the specific ways the

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Club is used by members for business meetings.

We also know that the Club's constitution and by-laws do not discourage the members from hosting business, professional or political meetings at the Club. Women, regardless of their standing in the community or in their profession, cannot invite their colleagues to Spruce Creek for business meetings because they are explicitly and intentionally excluded from membership.

Additionally, according to Professor Gillers, Judge Smith had an obligation to make sure that the Club maintained a purely social purpose, if he was going to claim that his membership was exempt from the ethical rules. He could not merely assume that it did. There is no "don't ask, don't tell" exception to the ethical rules. Given his previous assurances to the Senate and his own admissions up to and including his resignation in 1999, he can hardly assert that the Club is "purely social" now, as an after-the-fact justification for his conduct. He has made no showing in support of this belated contention.

Professor Gillers' view of this obligation to inquire is consistent with the guidance in the Judicial Conference's Compendium to the Code of Conduct for United States Judges. Judge Smith also did not follow the Compendium's advice regularly to re-evaluate club membership policies and practices. Judge Smith also did not seek an ethics opinion from his fellow Federal judges about whether the rules against discriminatory club membership somehow exempted this Club to which he so badly wanted to belong.

Judge Smith now says that he did not seek an ethics opinion because it was so clear to him that the ethics rules did not apply to this Club after amendments in 1992 that supposedly let him off the hook. This is another implausible and self-serving assertion. As Professor Gillers noted, the 1992 amendments to the Code of Conduct for United States Judges without a doubt strengthened the prohibition against discriminatory club membership by adopting the language of the ABA code referred to in the Senate Questionnaire that Judge Smith promised to follow when he swore to the Senate that he would resign. The only significant difference is that the rule Judge Smith promised to follow in 1988 allowed judges one year to get discriminatory rules changed or resign, while the 1992 rule gave judges up to two years, from learning of discrimination according to the Code's new, tougher rules, to change the club's practices or resign. Yet, Judge Smith did not resign in 1989, 1990, 1991, 1992, 1993, or 1994. He did not resign until a chance for a higher position in the Federal courts became available in 1999.

I recall that more than a decade ago the Senate Judiciary Committee considered this issue at length. There was testimony from women and men from across the country describing the impact of discriminatory private clubs on the women and people of color excluded. From time to time, I suppose, reminders of these lessons are necessary.

In 1990, 2 years after Judge Smith was confirmed and promised the Senate that he would resign from the mens-only Spruce Creek Club, the Senate Judiciary Committee passed a sense of the Committee resolution on the issue of discriminatory clubs. The resolution stated that discrimination at clubs where business is conducted and which intentionally exclude women and minorities is "invidious" and "conflicts with the appearance of impartiality required of persons who may serve in the federal judiciary." The Committee's resolution that was adopted on August 2, 1990, provides a bright-line rule for public officials. It defines the clubs at issue as those where members bring business clients or professional associates to the club for conferences, meetings, meals, or use of the facilities. Spruce Creek meets this definition. It is

also obviously a place where contacts valuable for business purposes, employment and professional advancement are formed. The Club, by arbitrarily and intentionally excluding women from membership, practices invidious discrimination as defined by the Senate Judiciary Committee. Public officials should not have to be told repeatedly not to belong to clubs that discriminate.

All judges, no matter how popular, have a solemn obligation to "avoid the appearance of impropriety in all activities," under both the Judicial Conference's Code of Conduct for United States Judges and the ABA's model code. That is because, in the words of those codes, "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

This prohibition applies "to both the professional and personal conduct of a judge." The Judiciary Committee's club resolution similarly sets a high standard of conduct for Federal judges in their personal conduct with regard to club memberships and association. Judge Smith has failed in those obligations. He may very well be a nice person and courteous to women litigants in his courtroom, but that does not excuse him from following the ethical rules that govern his conduct as a lifetime appointee to the Federal courts. Ethical rules apply to all judges equally, regardless of popularity.

Judge Smith had an obligation to resign from the Spruce Creek Rod and Gun Club, both by virtue of his promise to the Senate and because of his responsibilities under the ethical codes, and he failed to do so in a timely fashion. His conduct should not be rewarded with a promotion.

I would also like to set the record straight on one final related point. Supporters of Judge Smith have referenced President Jimmy Carter visiting the Club. According to Carter's memoirs, however, one time in the late 1970s President Carter and the First Lady were invited by the "Spruce Creek Hunting and Fishing Club for a day of fishing on a portion of their leased stream." That day, they met the man who actually owned that parcel of land and thereafter they visited and stayed at his farm, not the Club. The chapter in his book called "Spruce Creek" relates to the creek, not the Club. There is no evidence that President Carter has ever endorsed the Club's intentional, invidious discrimination against women.

Judge Smith failed to recuse himself promptly from conflicts of interest. I am also concerned about Judge Smith's late recusal, or disqualification, in two cases involving his substantial financial investments. According to two distinguished professors of legal ethics, Professor Gillers and Professor Friedman, Judge Smith also violated ethical rules due to his late recusal from the Black cases, a 1997 investment fraud case and a related 1999 criminal case. This is because it is undisputably true that Judge Smith and his wife had substantial investments (valued at between \$200,000 and \$500,000 together) in the bank or holding company that faced significant financial liability in those cases and because his wife also worked at the bank.

In one of those cases, Judge Smith waited five months to recuse himself. In the other case, he waited about a week to recuse himself after realizing that the bank was involved, but he issued significant orders in the intervening period. In both cases, Judge Smith revealed only his wife's employment at the bank to the lawyers in the cases. He never disclosed their substantial financial investments to the lawyers in either the civil or the criminal case. Judge Smith contends that he was not required to recuse himself but did so only in "an abundance of caution." He also contends, basically, that nobody was harmed by his late recusal.

In the opinions of two ethics experts, however, Judge Smith was required to recuse himself from any case in which the judge or his spouse has any interest that could be substantially affected by the outcome of the case, in accordance with the rules passed by Congress in 28 U.S.C. § 455 (a) and (b) (4), and with cases of the Supreme Court and Third Circuit. These rules against conflicts of interest, which are intended "to avoid even the appearance of partiality," are largely self-enforcing. Parties may not know that a judge has substantial financial investments affected by the case and may not move to disqualify a judge unless the judge fully discloses such information. Judge Smith, again reading ethical rules

narrowly, did not

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do so. Such facts do not give one confidence in his conduct on the bench.

I do think this Senate should take seriously a lifetime appointee's failure to follow ethical rules, in this area and others, such as discriminatory club membership. It is problematic to confirm someone to the Court of Appeals who would read the ethical obligations so narrowly. This is especially so because, under the structure of the Federal courts, it is the circuit court

judges who preside over ethics complaints against lower federal judges. I do not think those who read such rules narrowly should be elevated and given that special responsibility.

Judge Smith's remarks as a Federal District Court judge: Another troubling area is Judge Smith's insensitive and activist speeches. A number of these remarks call into question Judge Smith's judgment and fairness. For example, as a sitting federal judge he has given speeches in which he calls "legal spam" cases that affect the rights of ordinary Americans, such as cases involving their financial security, social security appeals, pension plan collection cases, and bankruptcy appeals. Such a characterization is shocking for its insensitivity to the importance of such cases to the individuals seeking a fair hearing of their claims in federal court. It calls into question how seriously Judge Smith has taken his oath as judge to administer justice to all persons equally and to "do equal right to the poor and to the rich."

Judge Smith also spoke out in favor of parties being required to pay each other's costs in responding to discovery requests. That idea--like the idea of requiring the loser in a case to pay the winner's expenses, which he also endorsed has been widely rejected because it would impose significant financial burdens on individuals suing corporations, for example, for personal injuries caused by a defective product. Such a rule could make it impossible for individuals to pursue legitimate grievances for which Congress has provided a federal court forum.

Another concern is Judge Smith's speeches to conservative ideological groups in which he basically gives advisory opinions about the constitutionality of federal statutes. For example, in 1993, as a sitting judge, he gave a far-reaching speech to the Federalist Society in which he advised the audience that the proposed Violence Against Women Act (VAWA) was unconstitutional. He said this landmark legislation could not be justified as within the power of the federal government. He was also very critical of Congress's extensive findings of fact in VAWA, calling them a "promiscuous invocation of the Commerce Clause." This lack of deference and respect to the legislative findings of a co-equal branch of government is troubling.

Judge Smith told the Federalist Society his own principles for deciding such cases: "First, ask whether the subject matter is within the power of the national government by express delegation in the text of the [C]onstitution, or impliedly through a historically honest reading of the necessary and proper clause. If not stop!" Such a subjectively narrow reading of the Constitution could ostensibly result in the overturning of many laws intended to protect the rights of individuals. He assured the Senate at his recent hearing that he would not read the Constitution so narrowly if he were promoted, but in 1988 he also assured the Senate that he would resign from a discriminatory club the following year, a promise he did not keep. I am not sure his assurances on the important issue of the scope of Congressional power should be credited now.

Similarly, Judge Smith gave a speech at the 1997 National Convention of the Federalist Society on

"The Federalization of Criminal Law." In it he criticized the invocation of federal jurisdiction via the Commerce Clause in a "routine" car bombing case under 18 U.S.C. § 844, as well as the "rape-shield" amendments to the Federal Rules of Evidence which generally bars evidence of a rape victim's sexual history. Judge Smith took issue with federal intrusion into these areas of the law, stating that using that statute in car bombing cases and rules like the rape-shield rule reflect "elitism: a mind set on the part of Congress and some federal prosecutors that the state court systems can't be trusted to 'get it right' never mind the text of the Constitution." Such statements are unsettling. It seems as though Judge Smith has a deep distrust that Congress does not follow the Constitution, despite the precedent that requires judges to give congressional enactments a presumption of constitutionality.

Judge Smith has also written an article endorsing an idea he calls "benign judicial activism" in which a judge intervenes early in a case to help reach a speedy and just resolution. While this idea has superficial appeal, in practice this approach may not be so benign. In about half of Judge Smith's more than 50 reversals, the Third Circuit reversed his decisions either to grant summary judgment in whole or in part to defendants in civil cases or to dismiss plaintiffs' complaints with prejudice. In a number of such reversals which span his years on the bench the Third Circuit took issue with his early intervention in cases in ways that denied plaintiffs the opportunity to have their cases adjudicated or tried on the merits. Thus, the Court of Appeals to which Judge Smith is now nominated has repeatedly reversed decisions of his which improvidently granted summary judgment or dismissals in favor of civil defendants, often big, corporate defendants. This pattern, combined with his speeches and conduct, raises concern.

Judge Smith's participation in seminars at resorts paid for by special interests is problematic. Another area of concern is that Judge Smith has attended a large number of

educational seminars funded by corporations and groups with an interest in interpreting the law a particular way, in a politically or ideologically conservative way favoring corporate interests. As a sitting federal judge, Judge Smith has spent more than 72 days on junkets at luxury resorts on trips valued at more than \$37,000 which were funded by corporations and conservative special interest groups. Judge Smith has taken three trips to seminars funded by the Foundation for Research on Economics and the Environment (FREE), which promotes "free market environmentalism," opposes environmental regulations, and gives lectures on topics like "Liberty and the Environment: A Case for Principled Judicial Activism." He has also taken nine trips funded by the Law and Economics Center (LEC), which is affiliated with George Mason Law School and which sponsors seminars with anti-regulatory bent on topics like "Misconceptions about Environmental Pollution and Cancer."

My colleague on the Senate Judiciary Committee, Senator *Feingold*, has spent a great deal of time trying to address the problem of these junkets. The current ethical rules do not clearly prohibit such judicial education seminars at luxury resorts paid for by special interests, and it is difficult for outsiders to obtain information about who is really footing the bill. According to one report, however, Judge Smith has presided over at least two dozen cases involving corporations that funded LEC and he is one of the most frequent fliers to such seminars. I do think it is difficult to maintain the appearance of impartiality under such circumstances. It is axiomatic that judges must be perceived as fair and impartial, and actually be so, for our system of justice to work. I am troubled by Judge Smith's insensitivity to such matters.

Judge Smith's reversals for dismissing plaintiffs' claims: I am also concerned about the unsettling anti-plaintiff pattern in Judge Smith's judicial decisions. Judge Smith's published and unpublished decisions reveal numerous instances in which he has been more solicitous to corporations than to plaintiffs and pro se litigants. Judge Smith has been reversed by the Third Circuit dozens of times for denying plaintiffs the opportunity to try the merits of their cases. In cases involving personal injuries, toxic torts,

employee rights, and civil rights claims by prisoners, Judge Smith has been reversed for improvidently granting defendants' motions for summary judgment, prematurely dismissing plaintiffs' complaints, and inappropriately denying motions for injunctive relief without giving the plaintiffs a hearing.

Overall, Judge Smith has been reversed 51 times, including 18 unpublished reversals, in 14 years. In contrast, Judge Pickering was reversed 28 times in 11 years and Judge Barrington Parker, one of President Bush's nominees who was confirmed last fall, was

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reversed nine times in 11 years on the district court bench. The Third Circuit's reversals suggest that Judge Smith's political philosophy greatly influences the outcome in cases before him. Of the many problematic reversals and published, as well as unpublished, decisions of Judge Smith on the district court, three are particularly illustrative of his approach to claims of plaintiffs, but there are many others that raise concerns.

In *Metzgar v. Playskool*, 30 F.3d 459 (3d Cir. 1994), for example, three Reagan appointees reversed Judge Smith's dismissal by summary judgment to the corporate defendant that had been sued for the death of a 15-month-old child who choked on a wooden block marketed without a warning label. Judge Smith granted summary judgment to the corporation on his theory that choking is an obvious danger and therefore no express warning was necessary. The Third Circuit was "troubled" by Judge Smith's analysis and his reliance on flawed statistics. The appellate court concluded that Judge Smith should have given the jury a chance to consider whether the blocks were so obviously dangerous that no specific warning was needed for parents of toddlers.

In *Wicker v. Consolidated Rail Corporation*, 143 F.3d 690 (3d Cir. 1998), Judge Smith was reversed for granting summary judgment to an employer sued under the Federal Employees Liability Act (FELA) for injuries caused by exposure to toxic solvents, degreasers and paints illegally dumped and buried by the employer. Smith granted the corporation's motion for summary judgment on the ground that the workers had signed a release settling prior, unrelated injury claims against the railroad. The Third Circuit reversed and held that FELA was intended to protect workers in these situations and that the releases seized on by Smith were invalid.

In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), Judge Smith improvidently granted summary judgment to a city that refused to allow the plaintiff and his Pentecostal ministry access to tent revival meetings in violation of their rights under the Free Exercise Clause of the First Amendment. The city had intentionally locked a recently-erected gate to impede access to the Christian revival meetings. Judge Smith concluded erroneously that these actions, even if manifesting anti-Christian bias, did not constitute a substantial burden on

the exercise of their religion. The Third Circuit reversed, holding that Judge Smith's analysis was "inappropriate for a free exercise claim involving intentional burdening of religious exercise" because "[a]pplying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immunity from the protection of the First Amendment." The Third Circuit completely disagreed with Judge Smith's hostile decision in which he stated that the plaintiff's "invocation of the First Amendment provisions guaranteeing religious liberty in so glaring a piece of spiteful litigation is insulting to the principles protected by that constitutional amendment." I was shocked by Judge Smith's rough and disrespectful treatment of the legitimate claims of people of faith in this case.

This unsettling pattern created by Judge Smith's judicial decisions, his high level of participation in

right wing, special interest-funded junkets, his activist and insensitive speeches, his late recusal in cases involving his substantial financial interests, and his very belated resignation from a discriminatory club create a very unfavorable impression. Judge Smith's defense to each of these significant problems seems to be that he actually is a fair judge despite the appearance that he is not. I am not convinced that his record warrants a promotion to a higher court.

Judge Smith's cramped and self-serving approach to the ethical rules that are supposed to govern federal judges is particularly troubling. He seems to think he is above the rules. His actual record of conduct on and off the bench creates a negative impression that is not reflected in Judge Smith's apparent popularity among his friends. I have no doubt that Judge Smith is an intelligent and charismatic person. What his record as a whole, not just as a colleague or friend, calls into question is his sensitivity, his fairness, his impartiality and his judgment. It calls into question how seriously he has taken his promises and assurances to the Senate in the past and recently, as well as how seriously he has taken his oath as judge to administer justice to all persons equally and to do equal right to the poor and to the rich. The record Judge Smith's own record of performance as a federal judge over these past 14 years does not merit his promotion to one of the highest courts in the land. Based on that record, I will vote against confirmation.

My good friend from Utah is waiting patiently. I withhold the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, hearing my colleague, one might forget that this is the U.S. Senate rather than some whacky politically correct college campus--Berkeley on the Potomac. The fact is, this judge is one of the most respected judges in all of Pennsylvania. He has virtually everybody in western Pennsylvania on his side. He has served 14 years on the Federal bench and has done a very good job in doing so. He is highly respected and has the highest rating from the American Bar Association--the gold standard, according to our colleagues from the other side. And he did not break his word.

The fact is, the law was different than was explained to him when he appeared before the committee, and it is still different than the distinguished Senator from Vermont has been making out here today.

I often hear my colleagues talk about the Clinton nominees who were left at the end of the 106th Congress, but I rarely hear them mention the 54 nominees who were left at the end of the Democratic-controlled 102nd Congress when George Herbert Walker Bush was President. If we are going to waste our time looking back on nominations past instead of looking ahead, let's not forget the 54 nominees the Democratic-controlled Senate left at the end of the 102nd. That is 13 more than the number of Clinton nominees left at the end of the 106th whom we hear so much about, and about 17 of them didn't have a chance anyway. The rest of them there were for reasons. Some of them, the blue slips weren't returned by Senators. You can't call them up.

I don't really think to talk about past congressional action on nominations in any way furthers the work we have been doing as a committee. However, it is difficult to listen to only a select portion of what has occurred in the past without trying to set the record straight. Those Bush 1 nominees who were never confirmed are just as important as these Clinton nominees who have been complained about, and there were far more of them than there were Clinton nominees left over. It is just a matter of fact. Whoever is President, you have some nominees left over. But there were a lot more left over by Democrats than there were by Republicans.

Let me name some of them: Jay C. Waldman of the Third Circuit, nominated for the Third Circuit;

Franklin Van Antwerpen, Third Circuit; Lillian R. BeVier, Fourth Circuit; Terrence W. Boyle, Fourth Circuit, who has been sitting here for 14 months, nominated again 10 years later; Francis Keating II, current Governor of Oklahoma, the Tenth Circuit; Sidney A. Fitzwater, Fifth Circuit; John G. Roberts, again, nominated by the second Bush 10 years later, sat there all those months in the first Bush, and now he is sitting here for 14 months in this administration; John A. Smietanka, Sixth Circuit; Frederico Moreno, Eleventh Circuit; Justin P. Wilson, Sixth Circuit; James R. McGregor, Western District of Pennsylvania; Edmund Kavanagh, Northern District of New York; Thomas Sholtz, Southern District of Florida; Andrew O'Rourke, Southern District of New York.

There are plenty of names and an awful lot more than were left at the end of the Clinton administration, and with very little justification. They have seldom mentioned that the all-time confirmation champion was Ronald Reagan with 382 judges. He had 6 years of a favorable party Senate. His own party controlled the Senate. He got 382 judges through. President Clinton, with the opposition party controlling the Senate, with me as chairman,

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as a member of the opposition party, got 377 judges through, virtually the same number as the all-time confirmation champion, Ronald Reagan.

Continuing my list of judges: Tony Graham, Northern District of Oklahoma; Carlos Bea, Northern District of California; James Franklin Southern District of Georgia; David Trager, Eastern District of New York; Kenneth Carr, Western District of Texas; James Jackson, Northern District of Ohio; Terral Smith, Western District of Texas; Paul Schechtman, Southern District of New York; Percy Anderson, Central District of California; recently confirmed; Lawrence Davis, Eastern District of Missouri; Andrew Hane, Southern District of Texas; recently confirmed; Russell Lloyd, Southern District of Texas; John Walter, Central District of California; recently confirmed; Gene Vougt, Western District of Missouri; Manuel Quintana, Southern District of New York; Charles Banks, Eastern District of Arkansas; Robert Hunter, Northern District of Alabama; Maureen Mahoney, Eastern District of Virginia; James Mitchell, District of Nebraska; Ronald Leighton, District of Oklahoma; William Quarles, District of Maryland; James McIntyre, Southern District of California; Leonard Davis, Eastern Northern District of Texas; recently confirmed; Douglas Drushal, Northern District of Ohio; Christopher Hagy, Northern District of Georgia; Lewis Leonatti, Eastern District of Missouri; Raymond Finch, Northern District of Vermont; James McMonagle, Northern District of Ohio; Katherine Armentrout, District of Maryland; Larry Hicks, District of Nevada; Richard Casey, Southern District of New York; Edgar Campbell, Middle District of Georgia; Joanna Seyvert, Eastern District of New York; Robert Kostelka, Western Northern District of Louisiana; Richard Dorr, Western District of Missouri; has had a hearing; James Payne, District of Oklahoma, confirmed this congress; Walter Prince, District of Massachusetts; George O'Toole, Jr., District of Massachusetts; William Dimetroulas, Southern District of Florida; Henry Saad, Eastern District of Michigan--not to mention Kenneth Ryskamp, who, like Charles Pickering, was voted down in committee and never received a full Senate vote.

Let me also say I am going to get into this because I didn't think we would get down to the point where we started talking about a 115-member club that is a social club, not a business club, and virtually everybody knows it. To make that the big brouhaha that this is supposed to be is just almost beyond belief to me. I didn't want to have to talk about that, but I will be happy to.

I rise today to express my strong support for Judge D. Brooks Smith whom the President nominated on September 10 of last year for the Third Circuit Court of Appeals to be confirmed today or tomorrow. It has been over 5 months since his committee hearing. It has been over 60 days since the Judiciary Committee reported Judge Smith's nomination favorably to the Senate. I am disappointed, however,

with the treatment Judge Smith is getting from those whose well-funded business it is to oppose President Bush's nominees.

I have warned before of the growing power of the extreme left of mainstream special interest groups upon the judicial confirmation process. Almost all of them are right here in this town. My colleagues know full well that when I was chairman of the Judiciary Committee, I did not welcome conservative groups telling the committee how to vote and what to do.

I told them to get lost. I even directed my staff to refuse briefings from them and even meetings with them. But the evidence indicates a very different relationship now to liberal special interest groups that seem to call the shots.

Newspapers from the Wall Street Journal to the Washington Post have commented on these liberal special interest groups and on their control of this process. But it is not a matter of opinion; here is the evidence. I would like to have printed in the **RECORD** evidence of this unfortunate relationship. First is a fundraising letter from People for the American Way taking credit for the rather shameless defeat of Judge Charles Pickering's nomination; second, a letter from a liberal Hispanic organization telling the committee not to bring up the nomination of Miguel Estrada until August to give them time to prepare a Pickering-like campaign against him. The President nominated Miguel Estrada over 1 full year ago. He would be the first Hispanic to sit on the Nation's second most influential court. But the Democratic leadership refuses to give him a hearing. Now I think we know why.

Lastly, I want to have printed in the **RECORD** a press release from the National Organization For Women, issued just hours after the Judiciary Committee voted to report favorably the nomination of Judge Brooks Smith to the full Senate. It appears that NOW and other radical liberal groups have demanded that the Democrat leadership come to the floor and fight to defeat Judge Smith.

I ask unanimous consent that the documents I have just referenced be printed in the **RECORD**.

There being no objection, the material was ordered to be printed in the **RECORD**, as follows:

PEOPLE FOR THE AMERICAN WAY,

Washington, DC, April 5, 2002.

In the past couple of weeks, the Wall Street Journal's notoriously right-wing editorial board has twice attacked People For the American Way--and me personally--in particularly venomous language. Being called a ``race-card specialist" is not the best way to start the day. (You think I'd be used to it given that the Journal's editorial board has run more than two dozen attacks on me over the years, especially during my tenure at the Leadership Conference on Civil Rights as I chaired the successful coalition battle to keep Robert Bork off the U.S. Supreme Court.)

But there's good news in those unfair and inaccurate poison-pen editorials. As a longtime progressive ally recently reminded me, they don't come after us like that unless they think we're winning.

In this case their fears were well founded. On March 14, the Senate Judiciary Committee voted to reject the nomination of Judge Charles Pickering to a lifetime appointment to the U.S. Circuit Court of Appeals. People For the American Way played a crucial leadership role in the broad progressive coalition effort to defeat this nomination in the face of attacks from the far right, the GOP Senate leadership, and the White House. Even before the vote, the far right had been coming after us with all

the rhetorical fury they can muster. I can only imagine what will happen now that it is clear we won't let them complete their ideological takeover of the federal courts without a fight.

Pat Robertson recently told millions of his television viewers that People For the American Way is "bad news for America. They don't tell the truth, and what they're doing is essentially smearing this man." Robertson's son Gordon, the heir apparent to the evangelist's empire, used the same television platform to accuse People For the American Way of "anti-Christian bigotry," telling viewers we opposed Pickering because he is a Christian. Phyllis Schlafly's Eagle Forum has denounced People For the American Way and our allies as an "Unholy Alliance" while calling Democratic members of the Senate Judiciary Committee the "Tyrannical Ten."

Ultra-conservative senators like Trent Lott, Orrin Hatch and Mitch McConnell have gone after us and other Pickering critics. And right-wing pundits on the Internet are even worse, making totally irresponsible and inflammatory remarks.

The increasing frequency and harshness of the attacks directed against People For the American Way reflect more than anything else our leadership role in the progressive movement and the effectiveness of our work. We've been accused of aiding America's enemies for standing up to Attorney General John Ashcroft and his assaults on the Constitution. We've been attacked as anti-Christian bigots for defending separation of church and state. And now we're being attacked for fighting to preserve the federal courts as a refuge for people seeking to have their civil rights and civil liberties protected.

The recent Judiciary Committee vote was the first victory in what will certainly be a long and fierce struggle over the future of the federal judiciary and the rights and freedoms protected by our Constitution.

I hope that you will take this opportunity to become a member of People For the American Way or to continue your support. At this watershed moment in our history, we would be proud and honored to march forward with you as our partner.

Sincerely,

Ralph G. Neas,
President.

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Mexican American Legal Defense & Educational Fund, National Association of Latino Elected & Appointed Officials, National Council of La Raza, National Puerto Rican Coalition, Puerto Rican Legal Defense & Education Fund,

Washington, DC, May 1, 2002.
Hon. **PATRICK LEAHY**,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As national Latino civil rights organizations, we write on a matter of great importance to U.S. Latinos, and all Americans--the nomination of Miguel Estrada to the D.C. Circuit

Court of Appeals. Although historically we have expressed our views on judicial nominees with different levels of frequency, we are united in our view that all federal judicial appointments are important because they are life-long appointments, because they are positions of great symbolism, and because federal judges interpret the U.S. Constitution and federal laws serving as the balance to the legislative and executive branches of the federal government. While the Supreme Court is the highest court, the appellate courts wield considerable power. During its most recent term, the Supreme Court heard only 83 cases, while the circuit courts decided 57,000 cases. As a practical matter, circuit courts set the precedent in most areas of federal law.

We are united at this time around our belief that Mr. Estrada's nomination deserves full, thoughtful, and deliberate consideration. The President proposes to place Mr. Estrada, who has no judicial experience, on arguably the single most important federal appeals court to decide a myriad of statutory and regulatory issues that directly affect the Latino community. Every appointment to a powerful court is important as we recently witnesses in the Supreme Court's 5-4 decision in Hoffman Plastics that stripped undocumented workers of certain labor law protections. This decision, which inevitably will result in increased exploitation of the undocumented, as well as weaker labor standards for all low-wage workers, underscores the importance of nominations such as this one, not just to Hispanics, but all Americans.

This decision comes on the heels of a series of Supreme Court decisions which, in our view, have unnecessarily and incorrectly narrowed civil rights and other protections for Latinos. While we look to see if judicial nominees meet certain basic requirements such as honesty, integrity, character, temperament, and intellect, we also look for qualities that go beyond the minimum requirements. We look to see if a nominee, regardless of race or ethnicity, has a demonstrated commitment to protecting the rights of ordinary U.S. residents and to preserving and expanding the progress that has been made on civil rights, including rights protected through core provisions in the Constitution, such as the Equal Protection Clause and Due Process Clause, as well as through the statutory provisions that protect our legal rights.

We are aware that some are demanding a commitment from you and the Judiciary Committee to announce a date certain for action on Mr. Estrada's nomination. We agree with the proposition that every nominee deserves timely consideration. For this reason, we urged the Senate to act on the nomination of Judge Richard Paez to the Ninth Circuit Court of Appeals, who was forced to wait for four years before being confirmed. We also believe, however, that if a nominee's record is sparse the Judiciary Committee should allow sufficient time for those interested in evaluating his record, including the U.S. Senate, to complete a thorough and comprehensive review of the nominee's record. We therefore respectfully request that you consider scheduling a hearing no earlier than August, prior to the scheduled recess. This leaves sufficient time for action prior to adjournment if his record is strong enough to receive substantial bipartisan support.

In the interim, we pledge to conduct a fair and thoughtful assessment of Mr. Estrada's record, and to communicate our views on his nomination to you, Ranking Member Hatch, and other Committee members in a timely manner.

Sincerely,

Antonia Hernandez,

President and General Counsel, Mexican American Legal Defense and Educational Fund.

Raul Yzaguirre,

President, National Council of La Raza.

Manuel Mirabal,

President, National Puerto Rican Coalition.

Juan Figueroa,

President and General Counsel, Puerto Rican Legal Defense and Education Fund.

Arturo Vargas,

Executive Director, National Association of Latino Elected and Appointed Officials.

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[From the National Organization for Women, May 23, 2002]

Judiciary Committee Vote Insults Women; NOW Vows Campaign in Full Senate
(By Kim Gandy)

The field of credible Democrats running for President was significantly narrowed today when two rumored candidates insulted every employed woman, every woman in business, and every woman who has been a victim of violence in this country. In casting their votes to promote Judge D. Brooks Smith to the Third Circuit Court of Appeals, only one step below the Supreme Court, rumored candidates Sen. Joseph Biden, D-Del., and Sen. John Edwards, D-N.C., disregarded the extensive evidence of unethical behavior and discriminatory conduct that caused the Washington Post, New York Times and Los Angeles Times to oppose Smith's confirmation.

In an embarrassingly convoluted rationale, Biden expressed disappointment in Smith's strong criticism of the Violence Against Women Act (VAWA), but said it would be a "double standard" to vote against Smith because Supreme Court Chief Justice William Rehnquist held a similar opinion on VAWA. Apparently Biden doesn't recall that his vote for Rehnquist was cast many years before VAWA was even introduced. As for a "double standard," someone should tell Sen. Biden that double nothing is still nothing. Biden's previous leadership on violence against women is just that--previous. He has jettisoned it in favor of friendship--his stated presumption of supporting any nominee sponsored by Sen. Arlen Specter, R-Pa. No doubt the people of Delaware will want to know that they have elected a Republican from Pennsylvania to represent them.

Another Presidential wanna-be, Sen. Edwards, hid out in his office across the hall from the hearing, and didn't even have the courage to cast his "Yes" vote in public. Sen. Herbert Kohl, D-Wis., joined all of the committee Republicans, whose cowardly votes betrayed the women of their states by recommending elevation of a judge whose repeated "ethical lapses" deserve censure, not promotion.

The Senate's reputation as an "Old Boys Club" was reinforced by today's vote, in which both of the women on the Judiciary Committee voted against Smith, but he won anyway because 12 of the 17 men voted in his favor. To promote a judge who will have to decide on cases of discrimination, when that judge has himself cavalierly participated in discrimination and even ruled in favor of discriminatory practices, is the height of irresponsibility by those who are charged with that duty.

NOW commends both of the women who serve on the Judiciary Committee, Senators Dianne Feinstein, D-Calif., and Maria Cantwell, D-Wash., whose votes against confirming Smith spoke volumes, as well as Committee Chair Patrick Leahy, D-Vt., who spoke eloquently about discrimination against women, and Senators Richard Durbin, D-Ill., Russ Feingold, D-Wis., Edward Kennedy, D-Mass., and Charles Schumer, D-N.Y.

NOW intends to seek a filibuster in the Senate against Judge Smith's confirmation, and will urge every Senator to participate who cares about protecting the last 40 years of progress women have made. The Judiciary Committee's vote for D. Brooks Smith made a mockery of judicial standards. Unless the full Senate reverses, it will send a message to women that they can't expect to have civil rights--or ethics--taken seriously by the Senate or the courts.

Mr. HATCH. Referring in the most vitriolic terms to my friends, Senators Biden and Edwards, voting for Judge Smith in committee, NOW begins by saying:

The field of credible Democrats running for President was significantly narrowed today.....

This is simply because these Senators exercised their independent judgment and supported Judge Smith. Honoring the President's prerogative to nominate judges should hardly be a cause to attack my Democrat colleagues or take them out of a potential Presidential candidacy or race.

Rather than speak further about Judge Smith's enemies, I would like to speak about his friends. I think an editorial in the liberal Pittsburgh Post-Gazette put Judge Smith's nomination best when they wrote:

Outside Washington's world of partisan politics, Smith seems to have no enemies, only admirers. Those who have watched him work say an exemplary 14-year record in the Federal bench in Western Pennsylvania is being twisted by political opportunists. His popularity outside the capital extends even to members of the opposing political party, who describe him as fair, hard-working, and respectful to all.

I hope I am not alone in this Senate in finding this home-town report much more reliable and convincing than the hit pieces circulated by the Washington left-wing special interest groups, or for that matter the New York Times, which I read faithfully everyday and respect in many ways--but not in this instance.

But given the bipartisan support Judge Smith enjoys from the people who know him best, and his stellar

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record, I find it most difficult to accept that the opposition to him has centered on his belonging to an all-male, family oriented fishing club where his father first taught him to fly fish--the same rustic club that Jimmy and Roslyn Carter have visited to escape, relax, and fish.

If this is the kind of thing that members of the body use as an excuse for thwarting the President's judicial nominations, then the American people will have a big laugh at our expense. And rightly so.

In fact, there are hundreds of small, family-oriented fishing clubs like the one Judge Smith belonged to all across this country from Washington to North Carolina. I even pointed out the web site called *www.womensflyfishing.net*, which lists the 60 or so women-only fishing clubs across the country.

We are far from those days when prestigious downtown clubs kept women out of their facilities, and in any case that is not the nature of Judge Smith's family-oriented, fly-fishing club. The special interest groups out to get Judge Smith on this count are proving that when the only tool you have is a hammer, everything you see starts looking like a nail.

In fact, there is a rich mosaic of single gender social clubs in this country that are entirely unobjectionable to any reasonable person. You should not be surprised to know, Mr. President, that this country is well-served by over 6,500 women's only clubs of every size.

Are Judge Smith's opponents in this Senate really prepared to say that the members of the important Francesca Club in San Francisco or the powerful Raleigh Women's Club, or the Junior Leagues throughout the South and all over the country, or the Masons, or the Knights of Columbus cannot serve as judges?

Perhaps the reason for this misguided line of attack on Judge Smith lies in the fact that, in his 1988 confirmation hearing before the Judiciary Committee, he stated that he believed the Judicial Code would require him to try to open the club to women, and to resign if he failed. But the fact is that he was wrong in that belief. The Judicial Code does not require resignation from clubs whose principal purpose is social, that do not function as public accommodations serving food to the public, or whose principal purpose is other than business.

Mr. President, the building you saw has a living room, a kitchen, two bathrooms, and six bedrooms on the second floor. It is not a great big building, even though they blew up a picture to make it look like it was. Even if it was, it is used only for social purposes, and then by a membership of 115.

By the way, that club does not have public accommodations. It does not serve food to the public. It does not do business with the public.

No legalistic parsing of words can change this fact, even though any motivated lawyer can certainly confuse the issue, as we have seen in the Judiciary Committee.

It is not surprising, of course, that the Judge Smith's detractors have chosen to disregard the clear constitutional standards articulated by the Supreme Court as well as the letter of the public accommodations law of Pennsylvania. After 1988, when the issue of single gender clubs was at its most heated peak, the Judicial Conference adopted standards pursuant to Supreme Court's decisions. It made clear that there was nothing--absolutely nothing--improper about a judge or nominee belonging to single-gender clubs, which exist in great numbers for both women and men in this country, so long as the association or club exhibits certain attributes of privacy first articulated by the Supreme Court in the 1984 case of *Roberts v. Jaycees*.

Judge Smith was under no obligation to make efforts to open the club to women--as he promised this committee--or to resign from the club. But he did both, even though he had no obligation to do so.

Opposing Judge Smith because he used to belong to a fisher-men's club is most absurd when contrasted with Judge Smith's record. Judge Smith, who currently serves as Chief Judge for the Western District of Pennsylvania, has earned a reputation for competence, fairness, and judicial temperament during 14 years as a Federal judge.

I used to practice law in that district and tried cases in the Federal District Court of Western Pennsylvania.

Judge Smith was appointed to that job at age 36--he was one of the youngest Federal judges in the country--and he came to it with experience as a state court judge, as a prosecutor, and as a private practitioner.

His nomination is supported by lawyers, judges, and public figures from across the political spectrum. The Pittsburgh Post-Gazette, a respected newspaper with a liberal editorial viewpoint, has endorsed his nomination three times.

The accounts of the people who know Brooks Smith best became real to me a few weeks ago when I listened to tremendously moving stories of women lawyers from Pennsylvania who recounted emotionally powerful events where Judge Smith bent over backwards to help them succeed as pregnant women and mothers in the practice of law.

The truth is that Judge Smith is supported in the strongest possible terms by the women leaders and members of the Women's Bar Association of Western Pennsylvania, the Allegheny County Bar Association, and the Blair Bedford Domestic Abuse Advisory Board, to name a few.

The Women's Bar Association gave Judge Smith their Susan B. Anthony Award ``because of his commitment to eradicating gender bias in the court system." That is a remarkable laud. The officers of the Women's Bar have also stated that they ``did not receive a single complaint concerning Judge Smith."

To attempt now to taint Judge Smith as being insensitive to women's rights or interests is really beyond the pale of fairmindedness, if not decency.

Judge Smith, who is currently the Chief Judge for the Western District of Pennsylvania, has earned a reputation for competence, fairness, and judicial temperament during his 13 1/2 years as a Federal judge. He was appointed to that job at age 36--he was one of the youngest Federal judges in the country--and he came to it with experience as a State-court judge, as a prosecutor, and as a private practitioner.

I briefly recount Judge Smith's record because it highlights the nature of the prejudice that occurs when a nominee or any person is judged on a single, private and lawful lifestyle choice. It seems to me that the root of all intolerance begins with just that act: to judge a person's entire worth based on a single characteristic, whether it be how a person exercises his or her freedom or religion or his or her freedom of association, which, like religion, has contributed so much to this Nation's unmatched vitality.

I believe the Senate suffered a great shame when it ruined whole careers in the 1950s by asking a single infamous question intruding into the freedom of association. I was ashamed when the Judiciary Committee echoed this question last year by questioning nominees about the Federalist Society, as

distinguished an association of lawyers as there could be. Now the special interest groups are asking the Senate to deny the President's nominee a confirmation on the basis of a fly fishing club.

I fear the American people, are going to roll their eyes at the Senate with these type of accusations. But the truth of it is that if we disregard the right of lawful association, it will be no laughing matter.

The Supreme Court first recognized the freedom of association in 1958 as an extension of first amendment free speech in NAACP v. Alabama, and most recently it reaffirmed the right in Boy Scouts of America v. Dale.

It is a right, as Justice Thurmond Marshall wrote, "which our system honors" and that encourages "all-white, all-black, all-brown, all-yellow clubs, as well as all-Catholic, all-Jewish as well as all-agnostic clubs to be established." And, it is a right that applies, Mr. President, as Justice Sandra Day O'Connor noted, to clubs whose purposes would be "undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background."

We should be glad that our personal politics are trumped by this American freedom because it has protected groups as diverse as the Communist Party and the Moose Lodge, and from the NAACP to the Boy Scouts of America. The freedom of association has

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protected the thousand points of light that have made this country's public life so vibrant. And it helps to distinguish us from those foreign places where people are shunned or even imprisoned for mere memberships in unpopular associations.

While the constitutional right of association at first related to expressive association and protected unpopular groups, like the NAACP, in 1984, the Supreme Court articulated the right of intimate association concerning clubs such as Judge Smith's small fishing club. It did so while enforcing Minnesota's public accommodations law against a large single gender organization organized principally for business purposes. That is not the case here. The Court described the attributes of such intimate associations that the Constitution honors, including "relative smallness." That is the case here. Judge Smith's former club has only 115 members. It has been around for a lot of years and has had both women and men enjoy the benefits.

An intimate association, said Justice Brennan, writing for the Court, must be protected "as a fundamental element of personal liberty," and "must be secured against undue intrusionbecause of the role of such relationships in safeguarding the individual freedom central to our constitutional scheme." As Justice Brennan explained, such small clubs transmit our culture and "foster diversity." They foster pluralism.

I for one stand by our freedom of association. As Justice Thurmond Marshall pointed out, it is a freedom that has helped make this country great, and a freedom we honor. I hope that all on this Committee do also, and that Judges, or people who might want to be Judges someday, are just as free as anyone else to exercise that right lawfully.

Now, Senators who do not share my reverence for this First Amendment right will be interested to know that the State of Pennsylvania has a law against clubs that discriminate on the basis of gender. Pennsylvania has not sought to regulate the club Judge Smith resigned from--and for a good reason: that club does not violate the law against discrimination.

In fact, Pennsylvania courts have found single-gender clubs to be permissible not on the basis of First Amendment rights, but as a privacy right, citing *Griswold v. Connecticut*. It would certainly be an entertaining footnote to *Griswold* jurisprudence if opponents of Judge Smith, who have seen fit to probe Judge Smith's views on *Griswold*, voted against him for exercising privacy rights emanating from that very case.

The special interest groups that are working to discredit Judge Smith apparently think that President Bush's circuit court nominees deserve to have their records distorted and their reputations dragged through the mud. But I don't think that any judicial nominee deserves such treatment, and that was something I practiced as chairman for 6 of President Clinton's 8 years in office.

I strongly agree with the Washington Post editorial of February 19, 2002, and nobody would suggest the Washington Post is a conservative newspaper, that "opposing a nominee should not mean destroying him." The Post pointed out, "The need on the part of liberal groups and Democratic senators to portray a nominee as a Neanderthal--all the while denying they are doing so--in order to justify voting him down is the latest example of the degradation of the confirmation process."

I continue to hope that my colleagues will be sensitive to the dangers to the judiciary and to the reputation of this body that will certainly result from the repeated practice of degrading honorable and accomplished people who are will to put their talents to work in the public service. I urge my colleagues to examine Judge Smith on his record, and not on superficial and unsubstantiated allegations.

When Judge Smith comes for a vote we will have the opportunity to show that the senate is focused on the merits of President Bush's nominees, and is not out to obstruct them in the name of sensibilities far from the mainstream of the American people. I hope we take it. I hope we vote favorably on a fine judge.

My colleague has made a point in the past that somehow men's clubs are problematic and powerful and that women's clubs are somehow different and poorer. That is not a problem. I have a photo of an all-women's club. This is the Sulgrave Club of Washington. I, for one, believe they have a right to have an all-women's club.

If my colleagues have trouble seeing the club, it is a mansion. It is not just a living room, kitchen, and six bedrooms upstairs. It is the building behind the Jaguar, the Lexis and, of course, the Mercedes. It is not itty-bitty by anybody's stretch of the imagination. And it is probably in a historical landmark situation.

My colleague has also mentioned the ethicists who have written to condemn Judge Smith. Other ethicists have written to support Judge Smith.

One of these Democrat ethicists, by the way, is the one standing on the car. If my colleagues cannot see it because it is a little dark, maybe the camera can come in a little closer. That is one of the ethicists they can get to write almost any opinion they want. This ethicist has argued in favor of introducing false testimony into a trial and argued perjured testimony to a jury.

This is a photograph of another of the regulars who write to denounce President Bush's nominees. I might add, again, he is the one standing on top of the police car. We expect to have a lot of other letters from this particular ethicist.

This is the type of stuff we are putting up with. I think it is time to stop it. I think it is legitimate for

people to differ on a judge's qualification from time to time, but there is little or no reason to differ on this one. This is a good man.

I hold a license in that area. I know the top lawyers in that area. I tried against a number of the top lawyers in that area. I have to say I do not know any of them who are not in favor of Judge Smith, and that ought to count more than some of these bits of calumny that have been thrown his way by some who do not like President Bush's nominees.

Mr. KENNEDY. Mr. President, I will vote against the confirmation of Judge D. Brooks Smith to the United States Court of Appeals for the Third Circuit. While Judge Smith is an intelligent jurist, I believe that his serious ethical lapses, and his record of reversals by the Third Circuit in cases concerning civil rights, and the rights of workers, environmental protection and consumer safety suggest that Smith has not met his burden of showing that he should be elevated to the Third Circuit.

Judge Smith's handling of his membership in the Spruce Creek Rod and Gun club, a club whose by-laws explicitly forbid the admission of women, gives me great concern. I am disturbed by Judge Smith's failure to resign from the Spruce Creek Club in a timely manner despite his sworn oral and explicit written promise to this committee at the time of his 1988 confirmation hearing. Smith promised that if he was unsuccessful in trying to change the club's membership policies he would resign, but he failed to do so for another 11 years, until 1999.

Rather than provide a simple explanation, or an apology, for his failure to fulfill this promise, Judge Smith claimed at his hearing that the Judicial Code of Conduct, the ethical rules governing judges, did not actually require resignation from the club. According to Smith, the Spruce Creek Club is purely a social club and is thus exempt from the rules. This strikes me as disingenuous. Judge Smith's 1999 resignation letter to Spruce Creek made clear that he was resigning from the club because its male-only admissions policies "continue to be at odds with current expectations of Federal judicial conduct," suggesting that he knew the club's membership policy was in conflict with the Judicial Code of Conduct.

Contrary to Judge Smith's representations, it also appears that the Spruce Creek Club is not merely a social club, but a place where business is conducted. Three ethicists, including one who wrote at the behest of the Ranking Minority Member of the Judiciary Committee, have written that if the Spruce Creek Club can be used for business purposes, its exclusion of women would violate the Judicial Code of Conduct. The President of Spruce Creek Club has acknowledged that members of this club are allowed to host a variety of meetings on the premises, and

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the committee has learned that business and political meetings have been held at the club. The Code of Judicial Conduct is clear that exclusion of women, minorities, and others from clubs where business is conducted is prohibited. In addition, in 1990, this committee adopted a resolution stating that membership in organizations that practice invidious discrimination was inappropriate for a judicial nominee. The resolution reflects our belief that because such membership "may be viewed as a tacit endorsement of the discriminatory practices, it conflicts with the appearance of impartiality" that is required of federal judges. We recognized that exclusion of women and racial, ethnic or religious minorities from social clubs that also perform business denies these groups opportunities to make contacts with important members of the community, contacts that are often crucial to professional advancement.

I am also troubled by Judge Smith's approach to cases implicating Federal rights important to victims of discrimination, workers and the disabled, and his disturbing, consistent pattern of favoring business

and employers in these cases. Judge Smith has been reversed 51 times by the Third Circuit, often by panels of conservative judges. In many of these cases, Smith takes a narrow view of the laws protecting plaintiffs against abuses by businesses and employers.

For instance, in *Wicker v. Conrail*, a case brought under the Federal Employer's Liability Act, FELA, Judge Smith was reversed by the Third Circuit for dismissing claims by workers who were exposed to toxic chemicals at their job site. The company knew the job site was contaminated, but the workers did not, yet Smith found that the workers had waived their claims by signing a general release settling prior, unrelated injury claims. The Third Circuit reversed, holding that claims relating to unknown risks cannot be waived under FELA, and emphasized the Supreme Court's directive, ignored by Judge Smith, that FELA be given a "proemployee" construction.

Similarly, in *Ackerman v. Warnaco*, the Third Circuit reversed Smith for granting summary judgment to the company with regard to ERISA claims brought by former employees who were denied promised severance pay after the company, unbeknownst to the workers, changed its written policy to deny severance pay shortly before laying off the workers. Again, in *Unity Real Estate v. Hudson*, Smith ruled against workers in a case concerning the Coal Industry Retiree Health Benefit Act. Amazingly, Smith held that coal act, which Congress passed in 1992 to require companies to enforce collective bargaining agreements promising lifetime health benefits for longtime workers, amounted to an unconstitutional taking. One year later, in a similar case, the Third Circuit effectively overruled Smith's holding on this score, noting that every Court of Appeals to have considered a "takings" challenge to the coal act had rejected it.

In addition, Judge Smith has a disturbing pattern of ruling against plaintiffs in civil rights cases. For instance, in *United States v. Pennsylvania*, Judge Smith ruled that an institution for the mentally disabled, whose violations included serving pest-infested food, improperly confining residents, failing to provide appropriate medical treatment, and overmedicating residents--did not violate the Constitution's due process clause. In another case, *Schaefer v. Board of Public Education*, Judge Smith was reversed by the Third Circuit, for dismissing the sex discrimination claim of a male teacher who claimed that the school board's family leave policy, which entitled women, but not men, to one year of unpaid leave for childbirth or "childrearing" violated Title VII.

Judge Smith's pattern of ruling in favor of business is particularly troubling when coupled with his frequent attendance at seminars funded by pro-business corporations and groups. Judge Smith spent more than 72 days on junkets at luxury resorts. The trips were valued at more than \$37,000 and sponsored by groups that promote "free market environmentalism," and oppose environmental regulations. I am troubled by the appearance of partiality caused by Judge Smith's frequent attendance at such junkets given the pro-business pattern of his rulings.

Judge Smith's narrow view of congressional power to pass legislation under the commerce clause, as expressed in a 1993 speech to the Federalist Society, also gives me great concern. In this speech, Judge Smith criticized the Violence Against Women's Act, which passed both Houses of Congress by overwhelming majorities, as exceeding Congress's power under the commerce clause. Judge Smith advanced a cramped reading of Congress' commerce clause power, stating that "the Framers' primary, if not sole, reason for giving Congress authority over interstate commerce was to permit the national government to eliminate trade barriers." Not only would Judge Smith's reading of the commerce clause render Congress powerless to pass statutes like the Violence Against Women's Act but, under Judge Smith's reasoning, it appears that any Congressional enactment other than those aimed at eliminating trade barriers would be constitutionally suspect, including statutes such as the Fair Labor Standards Act, the Equal Pay Act, the Clean Air Act, and the Clean Water Act.

In sum, I do not believe that Judge Smith has shown he has the integrity and commitment to core constitutional values required to justify his elevation to the Third Circuit. I therefore oppose his nomination.

Mr. HATCH. Mr. President, I ask unanimous consent that I be allowed to speak as in morning business.

The PRESIDING OFFICER (Mr. **SCHUMER**). Without objection, it is so ordered.

(The remarks of Mr. HATCH are printed in today's **RECORD** under ``Morning Business.")

Mr. HATCH. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. **REID**). Without objection, it is so ordered.

Mr. SCHUMER. Mr. President, I will say a word about the nomination of D. Brooks Smith to the Third Circuit. For me, my concerns with Judge Smith are not about ethics but about ideology. My questions are about his record. My worries are about what kind of judge he has been at the trial level and what kind of judge he will be at the appellate level.

Time and time again, the President says he is going to nominate conservatives in the mold of Justices Scalia and Thomas. Every indication is that he is following through with that promise.

At least by my standards, that is not OK. I certainly want legal excellence at the highest order. Diversity ought to be at the highest courts. We ought not have a bench of all like men. But I also want moderation and ideological balance. Unfortunately, as they nominate judge after judge, hard right, out of the mainstream, far further to the right than President Clinton's nominees were to the left, it is clear that this administration is committed to imbalance on the courts. Frankly, that is a strategy I cannot get behind.

When it comes to D. Brooks Smith, there are some red flags raised. As a city district court judge, he gave a speech in which he criticized the constitutionality of the Violence Against Women Act, something I am pretty proud of because I was the author, along with Congresswoman *Louise Slaughter* in the House of Representatives. Senator *Biden* did a great job here in the Senate. Now, this was years before the Supreme Court had addressed the Violence Against Women Act and when there was still a possibility it would come before him as a judge. That is some very unjudge-like behavior.

I asked him some simple, written questions about his views on the law. I asked him about his views on the right to privacy. I asked him to reconcile his views on VAWA with his views on other Federal laws such as the Endangered Species Act. The response I got, I regret to say, was inadequate.

Judge Smith told me what the precedence said, not what he personally believes.

That might be OK if you are a nominee to the district court where you do

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not have as much of a chance to make law. These days when you are nominated to an appellate court, when the Supreme Court takes virtually 75 cases a year, that argument does not fly. So I wrote back to Judge Smith, and again I asked him about his views. I made it clear I wanted to know about his personal views, not what the law was, but what his personal views were because we all know that influences a judge greatly when they make decisions.

This idea that judges are part of an ideological system and read the law in the same way is poppycock.

Why is it judges nominated by Democratic nominees read the law differently than judges nominated by Republican nominees? We know ideology plays a role. There is nothing wrong with that. But we ought to let it into our decisionmaking.

Judge Smith dodged again.

I think I am entitled to know what a nominee thinks. I am not going to go about blindly confirming nominees to lifetime seats on the Federal courts without those answers. I am not going to vote to give the judge a lifetime appointment, tremendous power, the most unaccountable power that our Founding Fathers gave to any single person. I am not going to

give that judge the power to invalidate the laws passed in this legislative, duly elected body; laws that protect privacy, laws that protect working people, laws that protect women, the environment. I am not going to give a judge the power to validate those laws unless I know what they think of our power, the Congress's power as a coequal branch of Government, when it comes to these important issues.

I have an obligation on behalf of the 19 million New Yorkers I represent to learn those views. They want to know if the judge is too far left or too far right. They want to know about things that affect their lives: How much money they are going to make; safety in the workplace; how the environment is going to be treated; and if they are a member of a minority group, how the judge regards civil rights. They want to know this. I want to know.

I am not going to make the mistake that this body made with Clarence Thomas, who came before this body. I was not here then. I was in the House. We don't, of course, vote on judges. He said he had no views on *Roe v. Wade*. I am not making that mistake again. I don't think any Member should. We all know Judge Thomas had strong views on *Roe v. Wade*, but he came here and said he had none, he had never discussed it.

If D. Brooks Smith had given me legitimate answers to my questions, I might have supported him. But his answers were not answers at all.

Now, I understand we cannot ask judges to precommit themselves on issues that come before them, even though that is what Judge Smith did in his VAWA speech. I don't want to put nominees in that position. When it comes to issues already decided, when it comes to discussing their judicial philosophy, when it comes to Supreme Court cases that will never come before this judge, I don't get why we shouldn't know what that judge thinks.

Every semester, first year law students are asked to critique Supreme Court opinions. But someone up

for a Federal judgeship will not tell us what they think about the seminal Supreme Court cases?

On the latest nominee for whom we had a hearing, Judge Owen, I asked her views. She said she doesn't think that way. She was asked to write papers in law school. She was asked to make opinions this way. She did not want to tell us.

There is a trend here. There is a trend. They don't want us to know what they think because they are so far out of the mainstream that they never could get picked if they told us their real views. They would never get supported by this body. They will not be honest about their views regarding *Brown v. Board of Education* or *Korematus v. United States* or *Miranda v. Arizona* or *Roe v. Wade*?

Judge Smith says what he thinks about the constitutionality of a statute the Supreme Court has yet to rule on, but he will not say what he thinks about Supreme Court opinions that have already been issued? Something is wrong with that. This nominee has it all turned around and it doesn't make sense.

The fact is, we are in the midst of a conservative judicial revolution. The very same people who decried the liberal activists, who took too many things too far--I am very critical of some of those opinions--are now doing the same thing themselves. When the hard right members of the conservative movement in the 1980s realized they could only get so much of their agenda implemented through elected branches because they were too far over for the American people, they turned their focus to the courts. They started a campaign that ran through the Reagan administration, through the first Bush administration, and continues through this administration. President Bush would like to portray himself as a moderate to the American people. Maybe he is. When I talk to him he sounds that way to me, one-on-one.

But if you look at who he nominates, there is hardly a moderate among them, particularly at the appellate court level. The nominees are committed to an ideological agenda which turns the clock back to maybe the 1930s, maybe the 1890s. They hate the Government and its power, by and large. They think the Federal Government has far too much power, which, let me tell you, in our post-September 11 world makes no sense.

So for the better part of the last decade, the commerce clause has been under assault and a whole host of laws protecting women, senior citizens, the disabled, and the environment have been invalidated. Now they turn their attention to the spending clause. To the average person, this sounds like mine-numbing stuff. But unfortunately, it has real impact on real people and it has to stop.

D. Brooks Smith is going to become a judge. We all know he has the vote. Tomorrow morning he will join a long line of judges, confirmed by the Senate, who appear to be intent on curtailing congressional power to protect the people who elect us.

At some point this Senate needs to wake up to the fact that our President and his Department of Justice are playing by different rules when it comes to nominating judges. They are using ideology as litmus tests, and then, when we want to ask about ideology, they say no, that is off the table. They are doing it to the detriment of the courts and the people the courts are supposed to protect.

I yield the floor.

The PRESIDING OFFICER. In my capacity as a Senator from Nevada, I suggest the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. **SCHUMER**). Without objection, it is so ordered.

The PRESIDING OFFICER. Under the previous order, the Chair now recognizes the Senator from New Jersey, Mr. *Torricelli*.

END



SENATOR ARLEN SPECTER PENNSYLVANIA



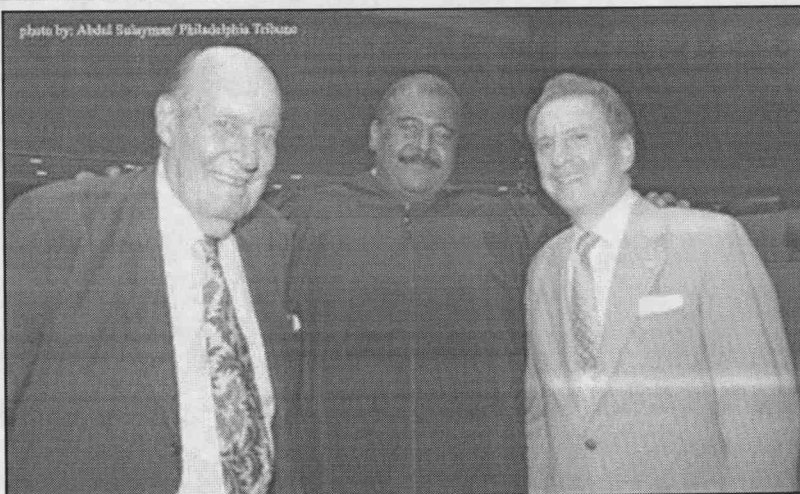
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Issues

Judicial Nominations

One of my most important duties as a United States Senator is the confirmation of federal judges. Article II, Section 2 of the Constitution states that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ... Judges of the Supreme Court, and all other officers of the United States." Because federal judges are given lifetime tenure, I take the Senate's role in the confirmation process very seriously.

photo by: Abdul Suleyman/Philadelphia Tribune



Too many judicial vacancies exist with federal judges, especially vacancies on the court of appeals. I hope that the Judiciary Committee and the Senate acts quickly to give all of President Bush's nominees a hearing and an up or down vote before the end of the 107th Congress.

In order to speed up the judicial confirmation process I recently proposed a resolution which would provide for timetables, so that after a certain number of days after a nomination, a hearing would be held; within a certain number of additional days there would be action by the Judiciary Committee on a vote; and within another specified time, there would be a vote on the Senate floor. I believe that such a process is necessary to make sure that there are enough judges on the federal courts to ensure adequate access to justice and to deal with the growing case backlog facing the federal judiciary.

However, we have had remarkable success in getting Pennsylvania judges confirmed in the 107th Congress. President Bush has nominated twelve Pennsylvanians to sit on the federal courts, including eleven, for the district courts and one for the court of appeals. Currently, the Senate has confirmed nine of these district court judges and one judge for the Third Circuit Court of Appeals which sits in Philadelphia.

This success is due to the bipartisan nominating commission which Senator Santorum and I have established. This commission reviews federal judicial candidates and recommends individuals to Senator Santorum and myself. We, in turn, recommend these individuals to the President. This process, I have learned, ensures consensus, diversity, and speeds along the confirmation of our judges.

The following is the current status of all Pennsylvania Federal Judicial Nominees:

Eastern District of Pennsylvania

Michael M. Baylson

CONFIRMED on April 30, 2002 (Vote: 98-0)

Legrome D. Davis

CONFIRMED on April 18, 2002 (Vote: 94-0)

James Knoll Gardner

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CONFIRMED on October 2, 2002 (Unanimous consent)

Cynthia M. Rufe

CONFIRMED on April 30, 2002 (Vote: 98-0)

Timothy J. Savage

CONFIRMED on August 1, 2002 (Voice Vote)

Middle District of Pennsylvania

Christopher C. Conner

CONFIRMED on July 26, 2002 (Voice Vote)

John E. Jones

CONFIRMED on July 29, 2002 (Vote: 96-0)

Western District of Pennsylvania

David S. Cercone

CONFIRMED on August 1, 2002 (Voice Vote)

Joy Flowers Conti

CONFIRMED on July, 29, 2002 (Vote: 96-0)

Terrence F. McVerry

CONFIRMED on September 3, 2002 (Vote: 88-0)

Arthur J. Schwab

Confirmed on September 13, 2002 (Vote: 92-0)

U.S. Court of Appeals for the 3rd Circuit

D. Brooks Smith

CONFIRMED on July 31, 2002

Judicial Nominations Press Releases

-  [Jul. 31 - Senator Arlen Specter \(R-PA\), a senior member of the U.S. Senat...](#)
-  [May. 23 - WASHINGTON, D.C. - D. Brooks Smith, President Bush's nominee for the United Stat...](#)
-  [Mar. 07 - WASHINGTON, D.C. - U.S. Senator Arlen Specter, a senior member of the Judiciary ...](#)
-  [Feb. 27 - U.S. Senator Arlen Specter, a senior member of the Judiciary Committee made the ...](#)
-  [Jan. 23 - WASHINGTON - Senator Arlen Specter \(R-PA\), made the following comments today reg...](#)

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JUDICIAL NOMINATIONS -- (Senate - March 08, 2002)

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Mr. SPECTER . Madam President, I have sought recognition to comment briefly on the pending nomination of Judge Charles Pickering for the circuit court of appeals, which was heard by the Judiciary Committee yesterday, with the vote postponed until next week.

I support Judge Pickering because I think Judge Pickering, in the year

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2002, is an appropriate nominee for the circuit court. If Charles Pickering were still a State Senator in the 1970s, I would vote against him because his civil rights record at that time was not good. But today he is a different man. This is a different time.

The opposition raised against Judge Pickering, in large measure, is about what he was as a Mississippi State Senator in the 1970s.

It is my hope that at a minimum we will send Judge Pickering's nomination to the floor of the Senate for a vote by the full Senate. The Constitution provides for confirmation by the Senate--not by the Senate Judiciary Committee. There are solid indicators that if Judge Pickering reached the floor, there would be 51 or more votes for his confirmation.

When you take into account an analysis of the comments within the beltway by those who oppose Judge Pickering vociferously, and those in Mississippi who know him best, they are for him. Those who talk about him in Mississippi talk in specifics about how he took a courageous stand against a leader of the Ku Klux Klan, about how he sided with an African American who was a defendant in a case where there was a white victim, something which was frequently not the case in the South.

This may be a warmup for the next Supreme Court nomination.

We have already seen some indicators of that with some members of the Judiciary Committee saying that a litmus test should be applied, and, if a nominee will not pledge to uphold *Roe v. Wade*, that nominee is not appropriate for confirmation.

This is an effort, in effect, to equate *Brown v. Board of Education* on segregation, with *Roe v. Wade*. It is obvious that if someone did not support *Brown v. Board of Education* and desegregation, that person would not be considered fit for the Federal bench today. But to apply a litmus test more broadly

is very troublesome, in my opinion.

It is my hope that if Judge Pickering receives a negative vote in committee along party lines, which seems almost certain, that at a minimum he would be sent to the floor for full floor consideration.

We ought to establish a truce--an armistice--on the partisan in-fighting which has been ongoing on nominations. When we had a Democrat in the White House and a Republican-controlled Senate, it was the mirror image of what we have today with Republican President Bush in the White house and a Senate Judiciary Committee in the Senate controlled by the Democrats. I said the same thing when we had President Clinton in the White House and a Republican-controlled Senate. I crossed party lines to vote for Judge Paez and Judge Berzon, Judge Gregory and Bill Lann Lee for Assistant Attorney General for the Civil Rights Division.

It is my hope that we will establish a protocol.

I think Senator *McConnell* was right when he said yesterday in the Judiciary Committee hearing that we are facing an "institutional crisis."

The American people do not like the partisan bickering--Democrats versus Republicans--especially when it comes to the selection of Federal judges and there is a judicial emergency in many circuits.

It is my hope that we will move ahead to try to end this partisanship.

There is solid precedent for submitting nominees to the full Senate when there is a negative or tied vote in committee. Judge Bork was defeated 8 to 5 in committee. Yet his nomination was sent to the floor for consideration as a Supreme Court nomination.

Justice Clarence Thomas had a tie vote in the committee of 7 to 7, but by a vote of 13 to 1 his nomination was sent to the floor.

Six nominees for district court or circuit courts have been sent to the full Senate when they did not receive an affirmative vote in committee--since 1951.

We still have time to revise the thinking on Judge Pickering. We still have time for an analysis on an appropriate way to handle Judge Pickering. But I submit that we ought to establish a principle from the Judiciary Committee that, if the vote is strictly along party lines, the matter be put before the full Senate for consideration.

I thank my distinguished colleague from New Hampshire for allowing me to precede him on the floor.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

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148 Cong Rec S 4113, *

CONGRESSIONAL RECORD -- SENATE

Thursday, **May 09, 2002**

107th Congress, 2nd Session

148 Cong Rec S 4113



REFERENCE: Vol. 148, No. 58

SECTION: Senate

TITLE: JUDICIAL NOMINATIONS

SPEAKER: Mr. **LOTT**; Mr. DASCHLE

TEXT: [*S4113]

Mr. **LOTT** . Mr. President, I have been wanting to speak about the situation with regard to the President's judicial nominations. I have a number of points I wish to make.

I know there were some discussions about the nominations earlier this morning and even this afternoon. The major point we are trying to make today is that today is the 1-year anniversary of eight of the President's nominations to serve on circuit courts. These minorities, men and women, have not even had the courtesy of a hearing, let alone a vote in the Judiciary Committee.

I have learned over the years that when you are talking about judges and judicial nominations each side will have their statistics about what happened in the Clinton years, what happened in the Reagan years, and what happens right now. But the fact is, these eight nominees have not even had a hearing; they have been pending for a full year.

There are actually 11 nominees who were sent forward in a group_the first nominations of President Bush. Three of those have been confirmed. Two of those, I might add, were recycled, in effect, because they were Democrats, or were selected by Democrats, and they were qualified. The President resubmitted their names. They got through the process. But these eight have not had any further consideration for a full year.

You can argue statistics. But usually Presidents get their circuit nominations confirmed within a year of having them sent forward.

The President sought men and women of great experience and who meet the highest standards of legal training, temperament, and judgment_for all of his nominations, but particularly for this first group of circuit court nominees.

He sought out nominees who respect the powers given to them by the Constitution and who will interpret the law_not make the law. He sought out nominees who have reputations as

lawyers of skill, discernment, and high character. He even sought out nominees who had a great deal of experience in arguing cases before the Supreme Court. In this group of eight nominees, they have collectively appeared before the Supreme Court over 60 times. One of the nominees has alone argued before the Supreme Court 30 times. In terms of their education, their experience, and their integrity, this group is unimpeachable and quite remarkable.

Here are these individuals' pictures. I think a picture helps inform our debate, because it takes the debate away from the realm of just statistics or mere names.

Mr. President, when we are talking about judges who have been delayed, we are talking about Miguel Estrada, who was born in Honduras, and has lived the American dream. He has tremendous experience in his profession, including serving as Assistant U.S. Solicitor General under President Clinton, a Supreme Court law clerk, arguing 15 cases before the Supreme Court, and working as a Federal prosecutor. He also graduated magna cum laude from Harvard Law School_not an institution known for turning out conservative lawyers, or judges_but certainly an eminently respected institution as far as quality, high standards, and academic rigor are concerned. Yet Estrada has been denied a fair hearing.

Why? Noone has suggested he is not qualified by education, by experience, or by professional or personal integrity.

Does he have a conservative philosophy? Does he believe in strict construction of the Founder's intent in interpreting the Constitution? Yes. Does that disqualify him? It should not.

I voted for Justice Ginsburg when she came before the Senate. I did not agree with her judicial or legal philosophy. I knew she would rule quite often in ways with which I would not agree. While most justices exercise discretion, you can't always count on how they may rule. But she was qualified by experience, by education, and by personal integrity and demeanor and I voted for her regardless of the fact that her philosophy was contrary to my own.

Unfortunately, I cannot think of any other reason than ideological prejudice for why Miguel Estrada has not had a hearing and an opportunity to be voted on_despite the fact that he was unanimously given the ABA's highest rating, "well qualified" by the American Bar Association which is supposed to be the Democrat's Gold Standard for evaluating nominees judicial qualifications. Yet, Miguel Estrada has not even had a hearing.

Another example, which is clearly one that is hard to understand, is the delay in considering Justice Priscilla Owen, a nominee to the Fifth Circuit Court of Appeals. I have a special feeling in my heart about this circuit because it does include my State of Mississippi. Judge Owen has served on the Texas Supreme Court since 1994. She has been involved in business in the private sector. She is an outstanding graduate of Baylor Law School in Texas.

Again, by education, by experience, and by personal integrity, this is a lady who should have been accorded a hearing and a vote by now in the Judiciary Committee and on the floor of the Senate.

Mr. President, why do we need another pound of flesh concerning the Fifth Circuit Court of Appeals? Is Judge Charles Pickering who has already been voted down in the Judiciary Committee not enough. If we are looking for tit for tat, how about just saying: OK, good, take that, Mr. President, Trent **Lott**, Republicans, we repaid you what you deserved from the past? But how does all of that apply to Priscilla Owen? Why has this lady not been accorded a hearing? Remember, [***S4114**]
once again, that she has been pending for a full year.

One interesting thing of note, Mr. President, is that two of these nominees, were actually nominated by the first President Bush. So they in a sense have been waiting over 10 years to get a fair hearing and be confirmed to the circuit courts.

John Roberts is one of those two, and has again been nominated to the DC Circuit Court of Appeals. He is one of the Nation's leading appellate lawyers, having argued 36 cases before the U.S. Supreme Court, and serving as a Deputy Solicitor General for our Nation. He also graduated magna cum laude from Harvard. So again, by education, by incredible experience, and by personal integrity, he has stellar qualifications to serve as a circuit court judge. Yet, he too has been denied a fair hearing and an opportunity to be considered by the Senate by the majority of Democrats on the Judiciary Committee.

Mr. President, our Nation's fourth President, James Madison, was certainly correct when he said that the courts exist to "exercise not the will of men, but the judgment of law." This President has gone to great lengths to nominate the kind of men and women who will do that once they are confirmed.

Another nominee who has been delayed for over a year without cause or justification, is Justice Deborah Cook, nominated to the Sixth Circuit Court of Appeals. She has served as a justice on the Ohio Supreme Court since 1994. Before becoming a judge, she was the first woman partner at Akron's oldest law firm. She is a graduate of the University of Akron Law School.

This is the circuit where half of the judicial seats are vacant. There is a long history on why that is, but the fact is that again the nominee is an eminently qualified nominee. And she has been waiting 52 weeks for a hearing even though the ABA voted unanimously that she was qualified.

So what is the problem, Mr. President? There are no allegations of improper conduct. There are no allegations that she is not qualified by experience, by education, or by demeanor, yet she is still waiting on a hearing.

Yet another nominee unjustifiably delayed is Judge Terrence Boyle, a nominee to the Fourth Circuit Court of Appeals. He was unanimously confirmed to be a Federal district judge in 1984.

Mr. President, one of the things that struck me as very interesting about Judge Pickering's treatment by the Democrats was that he has been a sitting federal district court judge since 1990, over 12 years. And now we have a nominee who has been a Federal district judge for almost two decades, who was unanimously confirmed in 1984. The former chairman of the State Democratic Party in North Carolina even supports his nomination. He is a graduate of American University's Law School. This is one of the two nominees, the other being John Roberts, who was first nominated to be a circuit court judge back during the first President Bush's administration. He was younger and well experienced then, and he now has another decade of experience as a Federal district court judge to his credit. And here he is back again, only to be denied a fair hearing by the Democrats.

So, in each and every one of these cases, there is no explanation for the year-long delay in giving President Bush's first group of nominees prompt and fair treatment.

Michael McConnell has been nominated to the Tenth Circuit Court of Appeals and again he is an eminently qualified legal scholar. He is one of the Nation's leading constitutional scholars, the author of legal books, and a prolific contributor to law journals. He has argued 11 cases before the Supreme Court. His reputation for fairness and integrity has generated support from numerous law professors. He is a graduate of the University of Chicago Law School. Again, on what possible grounds is such an extraordinarily qualified individual denied a

hearing for over a year?

Judge Dennis Shedd, a nominee to the Fourth Circuit Court of Appeals, was another nominee unanimously confirmed to be a Federal district judge in 1990_yet another sitting Federal district judge, Mr. President. He is strongly supported in his home State by both Senators_Senator Fritz Hollings and Senator Strom Thurmond_and served in the past as chief counsel to the Senate Judiciary Committee. He is one of ours no less. Yet, he has been waiting unjustifiably for over a year for a fair hearing and a vote.

Mr. President, I believe I have talked about each one of the nominee's personal qualifications to serve on the circuit courts of America. I should note that, back in January, the chairman of the Judiciary Committee indicated there would be a hearing for Justice Priscilla Owen, Michael McConnell, and Miguel Estrada_and that they would have hearings this year. Now, I guess we have 4 more months that have expired, another 4 months in which they have not been given a hearing much less a vote.

I hope they will given more than the courtesy of a hearing, which seems the minimum they should have. They should have a vote in the Judiciary Committee and then a vote here in the full Senate.

Mr. President, the delay in confirming such well qualified nominees to be judges has had an adverse impact on the judicial system itself. The number of vacancies has gone up over the past year_there are now almost 100 judgeships vacant_while 44 nominations languish in the Senate. As a result, justice is being delayed as the caseload burden increases for almost every current judge in the nation.

I would take a moment to note one curious thing about today's efforts regarding judges. We had six judges on the calendar ready to be voted on; but only four were moved, the other two were not. One of the two nominees has a very close association with Senator Hatch. The other one is the lone circuit judge on the calendar. So, once again, it appears circuit judges are receiving worse treatment by the Judiciary Committee than are the Federal district court nominees.

I realize around here we get to thinking: Well, wait a minute, circuit courts are more involved in the interpretation of the law. Maybe they are more important. But I will tell you what, if you ever practiced a day of law, the ones you see who really are dealing with the law every day are the Federal district judges. I do not understand the big dichotomy here and why the circuit judges are being delayed and treated so unfairly.

I want to point out what is happening in terms of these circuit judges nominated by President Bush as compared to the treatment that was afforded circuit court nominees during President Clinton's first two years in office.

First off, I should note that while President Bush sent his first nominations up on May 9, 2001, a year ago, President Clinton did not send up his first batch of nominations to the Senate until August of his first year in office.

So, there was actually less time to actually get President Clinton's nominees confirmed than there has been to get George Bush's out.

Yet you can see from the chart what is actually happening with Bush's nominees, particularly with respect to the circuit judges. President Clinton, in the 14 months after his first nominee was sent up, got 86 percent of them confirmed by the time Congress adjourned. Ultimately, over the course of the following Congress, Clinton ended up getting almost all of the judges he nominated during his first Congressional term. Again, I am not going to get into great arguments over the exact percentages or numbers, but there is clearly a problem here. While

Clinton got 86 percent of his circuit judges by the time his first Congress adjourned, President Bush only has 30 percent so far. And at the current pace the judiciary is considering Bush's nominees, it looks like Bush is not going to break 50% by the end of this Congress.

It looks as if we might get two or three more circuit judges by the end of the year, but it surely is moving deliberately slowly. The American people recognize this is a problem for the country. When you have a circuit like the 6th circuit that has a 50-percent vacancy rate, then you begin to wonder, do we have enough judges to cover all the cases, even the truly important ones?

This is a question of law and order, Mr. President, drug cases, terrorist cases.

Justice Rehnquist, the Chief Justice, has decried the vacancy crisis as **[*S4115]** "alarming." More than 10 percent of Federal judgeships are currently vacant. So this problem for our nation that is very serious, particularly after the terrorist attacks in New York and here in Washington.

I have talked to Senator Daschle about it. Senator Nickles and I, along with Senator Hatch, have talked to Senator Leahy and Senator Reid. I know, having been majority leader, that sometimes these problems are hard to resolve. The Judiciary Committee doesn't always follow instructions even from the elected leaders. But this creates a problem. We have been trying to resist slowing down or blocking meetings or progress on the legislative process because we want to move forward on these important bills. But we have to point out that there is a blatant unfairness here, to the country and to the nominees. I can't help but think of the cliché that justice delayed is justice denied. That is what is happening here.

I know my time is running out. I probably will come back and talk more about this later. I ask for fairness, fairness for these eight circuit judges. We can argue about the others later, the other circuit nominees, other district judges, but after an entire year President Bush's first eight nominees should have a hearing. They should have a vote on the Senate floor. No criticisms have been raised against them other than un-attributed hints that they are conservative, and the current majority in the Senate is looking for some sort of a litmus test or conformance, I guess, based on philosophy and ideology. I don't think that either fair or appropriate. It is not what is called for under the Constitution. I hope that the Senate will ultimately find a way to make progress in this area and give these nominees the opportunity to be fairly considered based upon their temperament, professional and educational qualifications, and their personal integrity.

As President Bush has noted in making the case for getting his nominees confirmed, Federal judges are key to making sure America functions well. Every day they uphold the rights of an individual, they protect the innocent, they punish the guilty. Their rulings are essential to the rule of law in our nation. To discharge their responsibilities the federal courts must have judges."

Because of the number of vacancies in our nation's courts, Americans are being forced to wait for justice, and the burden on federal judges is growing heavier.

Mr. President, one newspaper, the Wichita Eagle, got it exactly right on the judges issue back in March in part I think because it is located in the heart of America when it said: "But just as presidents have an obligation not to nominate the incompetent or unqualified to the federal bench, presidents deserve the broad authority in making their choices for such judicial posts. And the Senate has a responsibility to give those choices every possible consideration and, barring some glaring defect, confirm them quickly. Yet the backstabbing and stalling on judicial **confirmations** has escalated to the point of obstructing justice. It needs to stop."

This President's nominees are men and women of distinction and great accomplishment. They are solidly within the mainstream of American legal opinion, and they share a principled commitment to follow the law, not legislate it from the bench.

Mr. President, President Bush' nominees should be given fair hearings, voted on, and confirmed by the Senate as soon as possible.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

Mr. DASCHLE . Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DASCHLE . Mr. President, the people who have been discussing and negotiating the trade matter have asked for a little additional time. In order to accommodate their discussions, I ask unanimous consent that the period for morning business be extended until 3:45.

Mr. **LOTT** . Mr. President, at this point I would have to object. I don't know that I would want to. I just have not had a chance to discuss this with Senator Daschle.

The PRESIDING OFFICER. The Senator from Georgia.

(The remarks of Mr. Cleland pertaining to the introduction of ♦ S. 1492 are located in today's Record under "Statements on Introduced Bills and Joint Resolutions.")

The PRESIDING OFFICER. The Senator from Nevada is recognized.

SUBJECT: JUDGES (78%); LAWYERS (77%); EDUCATION (75%); ANNIVERSARIES (58%);

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May 9, 2002

lott.senate.gov

Senator Lott Asks the Senate to Vote on Circuit Judges

Senator Lott joined an overwhelming majority of Republican Senators on May 9 in calling on the Senate to vote on the confirmation of nine men and women nominated one year ago by President Bush to the Circuit Courts of Appeals.

★ "We're talking about outstanding Americans of diverse backgrounds who have not even had the courtesy of a hearing," Senator Lott said. "And there's no explanation for it." ★

The one-year-old nominations are: John G. Roberts and Miguel Estrada, both for the Court of Appeals for the District of Columbia; Terrence Boyle and Dennis Shedd, both for the 4th Circuit Court of Appeals; Michael McConnell and Jeffrey Sutton, both for the 10th Circuit Court of Appeals; Priscilla Owen for the 5th Circuit Court of Appeals; and Deborah Cook for the 6th Circuit Court of Appeals.

"It's a matter of simple fairness, and I think the American people understand that justice delayed is justice denied," Senator Lott said.

The Republican Leader said that historically, a president can count on seeing all of his first 11 Circuit Court nominees confirmed. Presidents Reagan, George Herbert Walker Bush and Clinton all enjoyed a 100% confirmation rate on their first 11 Circuit Court nominees, and all were confirmed well within a year of nomination. In stark contrast, eight of President Bush's nominations to the Circuit Courts which are only one step below the Supreme Court are still pending in the Judiciary Committee, 365 days after nomination.

"Justice is being denied in our courts because of the refusal of the 10 Democratic Senators on the Judiciary Committee to confirm conservative, well-qualified judges to our Circuit Courts of Appeals," Senator Lott said. "These 10 liberal Senators prefer judges who share their activist ideology and who would use the power of the bench to make laws that the Senators have been unsuccessful in passing through Congress.

"Justice delayed is justice denied. It's time for the Senate to stop this cowardly process of blocking these eight distinguished nominees in the Committee. It's time for the Senate to have the courage of its convictions. It's time to vote."

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August 1, 2002

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Senate Majority Leadership may have to be left back next year. . .

Senator Lott joined with Senators Kay Bailey Hutchison of Texas, Rick Santorum of Pennsylvania and the other members of the Senate Republican Leadership in issuing a 1st Semester Progress Report to the Senate Democratic Majority for the latter's failure to complete the people's business on critical issues facing the nation.

Majority Leader Tom Daschle and his leadership now controlling the Senate received:

- An "incomplete" on Energy for failing to bring a final energy independence bill to a vote while conflicts deepen in the Mid East;
- An "incomplete" on Prescription Drugs for denying seniors needed medications by bringing a flawed bill to the Senate floor strictly as a political issue, without any strategy or plan for actually putting a drug plan for seniors into law;
- An "incomplete" for failing to bring to a vote the President's Department of Homeland Security bill;
- An "incomplete, if not failure" for not passing a Budget to govern the nation's spending beginning October 1, 2002, the first time a Senate Majority has ignored the budget law since it was enacted in 1974;
- An "incomplete" on Welfare Reform Reauthorization, putting at risk our success story in moving welfare recipients off welfare rolls and into good jobs and future lives;
- An "incomplete" on enacting the defense funding bill for the new fiscal year beginning October 1, despite the President's calls to get this bill to his desk ASAP so that the War on Terrorism and our troops on the ground will not be affected by politics;
- And finally, an "incomplete" in confirming the President's judicial nominations to fill critical vacancies in the nation's Circuit Courts of Appeals so law and order judges will ensure that victims are not denied justice.

"As you can see, this is not the kind of report card you'd want to have to ask your parents to sign," Senator Lott told a press Capitol press conference on Thursday, August 1, when the report card was issued. "This Majority may have to be held back. But that's not stopping them from going out to recess tomorrow."

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October 17,
2002

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The Judicial Crisis

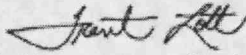
Yet again a few liberals on the Senate Judiciary Committee are trying to block a conservative judge from a conservative state, just as they did with Mississippi's Judge Charles Pickering and Judge Priscilla Owen, of Texas. This time, Judge Dennis Shedd, - a highly-qualified judge from South Carolina - is being denied a vote before the Senate Judiciary Committee, which has repeatedly failed in its duty to approve judges and report them to the full Senate floor for a vote, where they enjoy broad bipartisan support. This is creating a judicial crisis, and a shortage of federal judges. The reason for the committee's inaction: some people fear judges who strictly interpret law, rather than make it.

It is no secret that the political left has tried to achieve its agenda through the courts. They have done this with the help of activist judges who have ruled so broadly that they have essentially made new law from the bench. Many liberals too often feel the need to go around elected representatives and instead default to the courts. This is because on the many so-called "hot button" issues, a majority of Americans find the button not so hot at all, and in fact come down solidly on the traditional side. For example, most Americans solidly support responsible gun ownership. As we have seen in Mississippi, a wide majority support a sensible tort system, where frivolous lawsuits are kept out of court. An overwhelming majority of Americans believe that the words "under God" are perfectly acceptable for our Pledge of Allegiance. Even 30 years after legalization, roughly half of all Americans still strongly oppose abortion. For these reasons, and others, conservative judges - especially those who are practicing Christians like Judge Pickering - annoy, anger and scare the political left in this country, which has repeatedly shown hostility toward traditional values and traditional institutions like businesses, churches, marriage and families. Many on the left feel that conservative judges are conspiring to use the judicial branch to promote a conservative agenda in the same way the left has in the past used the bench to advance its liberal agenda.

I suggest nothing could be further from the truth. Judge Pickering, Judge Owen, Judge Shedd are all rated highly by the American Bar Association (ABA) for their legal experience and fairness in interpreting the law. As conservative jurists, they do not believe in making law from the bench. Sure, they have personal opinions and feelings, but they were not given this coveted ABA rating by a bunch of partisan hacks who share their views. Instead, the ABA - a professional organization made up of legal experts from all backgrounds - bestows this rating based on a judge's professional experience and ethical conduct. If anything, the records of Judge Pickering, Judge Owen and Judge Shedd show that they are prepared to rule fairly, whether they agree with the law personally or not.

With the exception of nominees to the Supreme Court, usually the U.S. Senate has downplayed personal philosophical differences in the confirmation of judges, particularly circuit judges. During my years in the Senate, I have voted for a number of judges with whom I disagreed sharply in terms of politics. I voted for Judge Ruth Bader Ginsburg's confirmation, when President Clinton nominated her for the U.S. Supreme court. She and I have differing views, but nevertheless she was qualified by education and experience. President Bush, and indeed all presidents, are entitled to nominate judges who are qualified by education, experience, and demeanor. The full Senate should be allowed by its Judiciary Committee to confirm or deny judges based on a judge's professional merits alone.

It is up to the Congress and President to make the law. It is up to judges to apply that law. To those who feel judges should indeed make law on the bench, and who fear judges like Judge Pickering, Judge Owen and Judge Shedd will use the courts to advance their personal views, I suggest they look at the records of these qualified men and women. Anyone will find these judges' standards to be much higher than that.

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USA TODAY, November 5, 2002

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USA TODAY

November 5, 2002, Tuesday, FINAL EDITION

SECTION: NEWS; Pg. 8A

LENGTH: 770 words

HEADLINE: **Senate** sub makes political waves

BYLINE: Andrea Stone

BODY:

An angry Minnesota Gov. Jesse Ventura appointed a political independent to the **Senate** on Monday as a temporary replacement for Democrat Paul Wellstone, who died last month in a plane crash. At the same time, two candidates vying for the full six-year term clashed in their first and only debate.

Ventura, miffed at the partisan tone of last week's memorial service for Wellstone, named Dean Barkley to represent Minnesota at the post-election **Senate** session that begins next week. Barkley's **Senate** bid in 1994 garnered the Reform Party the 5% of the vote needed to put it on the ballot and win public financing.

Democrats, who worry that Barkley will vote with Republicans on spending and homeland-security bills next week, accused Ventura of grandstanding. "It's typical Jesse Ventura," state Democratic Chairman Mike Erlandson said. "He decided to make a political rant when people wanted to focus on who is going to be their next U.S. senator."

Sara Janecek, a Republican strategist and co-editor of *Politics in Minnesota* newsletter, called Ventura's announcement "a ridiculous side show" and added, "The governor is trying to matter, and he doesn't."

Barkley's appointment will result in a 49-49 split, with two independents. It was unclear whether he would serve until Nov. 19, when today's election is certified, or until early January, when new senators usually are seated.

Senate Minority Leader Trent **Lott**, R-Miss, said if Barkley decided to side with Republicans, "I would be recognized as majority leader as soon as he is sworn in."

Lott said he hoped that would allow Republicans to push through not only homeland-security and terrorism-insurance bills, but also the nominations of more than 80 **judicial** and other **nominees** held up by Democrats.

"I'm sure this all puts him in a whirlwind," **Lott** said Monday on Oliver North's radio talk show. Barkley's "in the catbird seat right now. The decisions he makes will be very important."

If Barkley, 52, sides with the GOP, it will be a fitting end to the most topsy-turvy **Senate** in U.S. history. It began with a 50-50 split and Sen. Tom Daschle, D-S.D., as majority leader for a few weeks in January 2001 before Dick Cheney replaced Al Gore as president of the **Senate**. **Lott** ran the **Senate** until June 2001, when Sen. Jim Jeffords of Vermont bolted from the Republican Party and became an independent allied with Democrats. Daschle took over until now.

The two men vying for the full six-year term squared off in a polite but at times heated debate at St. Paul's Fitzgerald Theater, an old vaudeville house best known as the home of public radio's *A Prairie Home Companion*.

Mondale, 74, who served in the **Senate** from 1964 to 1976, was aggressive throughout the debate. He called Coleman's campaign "the poster child for what is wrong in politics," citing its reliance on contributions from corporations and special-interest groups.

Coleman, 53, a former Democrat and mayor of St. Paul, criticized what he called his former party's divisive tone. He pledged to work across party lines.

The two clashed most on tax policy. Coleman said he favors making President **Bush's** 10-year, \$ 1.35 trillion tax cuts permanent. He noted that taxes rose during Mondale's stint as President Carter's vice president. He reminded viewers of Mondale's pledge in the 1984 presidential race to raise taxes.

Mondale parried by noting that President Reagan raised taxes after beating him in a landslide. "I was the one who told the truth before the election," Mondale said. "And I think that's one of the big things Minnesotans have to look at: Who's got the courage to stand up, level with the people, even when it's difficult?"

Mondale said he favors tax cuts for the middle class; he said the **Bush** tax cuts most benefit the wealthiest 1% of Americans.

Lawrence Jacobs, a political scientist at the University of Minnesota, said Mondale surprised many observers with his aggressive approach in the debate. He called the strategy "high risk" but necessary if the Democrat is to win over the 10% of independent voters who remain undecided.

In summing up, Coleman reiterated what became his campaign theme after Mondale stepped in to replace Wellstone: that the race is about the future, not the past. Mondale appealed to voters to "re-elect" him.

"It's the question of, who can get the job done?" he said. "I know the **Senate**. I've served in

the **Senate**. I was the president of the **Senate**. And under the rules, if you will re-elect me, I go into the **Senate** leadership on the first day."

GRAPHIC: PHOTO, B/W, Ann Heisenfelt, AP; After debate in St. Paul: Republican Norm Coleman, left, and Democrat Walter Mondale are competing to represent Minnesota for the full six-year term in the **Senate**. The Minnesota Independence Party was not invited to the debate Monday.

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April 30th, 2002

Contact: Margarita Tapia, 202.224.5225

JUDICIARY STATEMENT: "STATUS OF JUDICIAL CONFIRMATIONS"

Statement of Sen. Orrin Hatch

before the

Senate Judiciary Committee

"Status of Judicial Confirmations"

Hatch

Mr. President, I would like to respond briefly to some comments made earlier today on the topic of judicial confirmations. I had no intention of bringing up this topic today, but now I find myself with no choice but to set the record straight. I want to make one observation and then two simple points.

Mr. President, my observation is this: The American people want this Senate to help – rather than hinder – President Bush and anyone else who is President. Everyone understands that we are living at a time of great national importance. Our government is being put to a test. President Bush is performing extraordinarily well, and he is leading our country and our military in the right direction to achieve prosperity and security for all Americans. The American people support President Bush and his Administration, and they correctly believe that the Senate should do the same.

But the people who follow the Judiciary Committee's record on reviewing and approving President Bush's judicial nominations are frustrated – for good reason – with the way in which this body has treated President Bush. They know that President Bush gave great care and attention to finding nominees who are extremely well-qualified, highly talented legal thinkers who hold mainstream American values. There is not an ideologue among them. To the contrary, President Bush's picks for the judiciary are all principled and fair people, from a variety of backgrounds and experiences, who are committed to following precedent, applying the law as it exists, and standing firm against judicial activism. President Bush should not be forced to divert any more of his time and attention away from the war on terrorism and his many domestic priorities in order to persuade this body to do what is right for the American people.

Now, Mr. President, I would like to make two points that directly respond to the comments made earlier today.

Page 1 of 3

First, the current Senate leadership is NOT doing a better job this Congress than the Senate has done under other presidents. I listened as my colleague explained that, if looked at through the right looking glass, or examined in the right subsection of the right time period of the right session of the right Congress, then the current numbers are pretty impressive.

But Mr. President, the most important measure of performance should be how we are handling the most important courts: the Circuit Court of Appeal. Let's compare the treatment of President Bush's first 11 circuit court nominees to the first 11 of previous presidents. President Reagan, the first President Bush and President Clinton all enjoyed a 100% confirmation rate on their first 11 Circuit Court nominees,

and all were confirmed well within a year. President Reagan's first 11 were confirmed in an average of 39 days, the first President Bush's first 11 averaged 88 days, and President Clinton's first 11 - only 115 days. The longest any of these individuals were held up in Committee was 202 days. In stark contrast to previous presidents, 8 of President Bush's first 11 nominations - made on May 9th, 2001, almost a year ago - are still pending in Committee without so much as a hearing! That's nearly 365 days, and only 3 of President's first 11 nominees are confirmed. Is this what the Democratic leadership considers a record-breaking pace? It may be record-breaking, all right, but not the record they're talking about. They are confirming with the velocity of molasses.

Now I heard my colleague suggest that some of the first 11 nominees may have been superseded out of courtesy to Republican Senators who requested some later-nominated judges to move first. Well, I know how difficult it is to Chair the committee, and such requests do come in. But I would suggest to my friend that he do what I did for President Clinton: consider more than one circuit nominee per hearing. That's what we did, under Republican leadership, no fewer than 10 times. Why not two at a time?

Of course, the pace of confirming a President's first 11 nominees is not the only measure by which the current leadership is falling short. My colleague suggested that kudos should be awarded for bringing the circuit court vacancy rate down to 29. Well, it was NEVER that high at the end of ANY Congress when Republicans controlled the Senate. And I certainly don't recall that, during my Chairmanship, any of our Circuit Courts were facing the kind of crisis that is going on today in the 6th Circuit Court of Appeals, where the Court is operating at half-staff despite the fact that President Bush has nominated SEVEN highly qualified people to serve on that court.

The fact is that, at the close of the 106th Congress, when I was Chairman of the Judiciary Committee, there were only 67 vacancies in the federal judiciary. In the space of one Democratic-controlled congressional session last year, that number shot up to nearly 100, where it remains today. Under Republican leadership, the Senate confirmed essentially the same number of judges for President Clinton (377) as it did for President Reagan (382), which proves bipartisan fairness - especially when you consider that President Reagan had six years of his party controlling the Senate, and President Clinton had only two.

So, how did we go from 67 vacancies at the end of the Clinton Administration to nearly 100 today? There can be only one answer: The current pace of hearings and confirmations is simply not keeping up with the increase in vacancies. We are moving so slowly that we are barely keeping up with natural attrition. President Bush nominated 66 highly qualified individuals to fill judicial vacancies last year. But in the first four months of Democratic control of the Senate last year, only 6 federal judges were confirmed. At several hearings, the Judiciary Committee considered only one or two judges at a time. The Committee voted on only 6 of 29 circuit court nominees in 2001, a rate of 21%, leaving 23 of them without any action at all.

This leads to my second point, Mr. President, which is that the current situation has nothing whatsoever to do with ideology. I was surprised to hear my friend, the Chairman of the Judiciary Committee, address earlier today the question of introducing ideology into the judicial confirmation process. Some of my Democrat colleagues have made no bones about the fact that this is exactly what they are seeking to do. In July, they have even held hearings expressly on how to justify it. We saw what happened to Judge Charles Pickering.

What is now occurring is far beyond the mere tug-of-war politics that unfortunately surrounds Senate judicial confirmation since Robert Bork. Some of my colleagues are out to effect a fundamental change in our constitutional system, as they were instructed to do by noted liberal law professors at a retreat

early last year. Rather than seeking to determine the judiciousness of a nominee and whether a nominee will be able to rule on the law or the Constitution without personal bias, they want to guarantee that our judges all think in the same way, a way that is much further to the left of mainstream than most of President Bush's nominees.

In the judiciary that some would create, citizens will have to worry about the personal politics of the judge to whom they come for justice under the law. I strongly object to that result.

Mr. President, the legitimacy of our courts, and especially the Supreme Court, comes from much more than black robes and a high bench. It comes from the people's belief that judges and justices will apply a judicial philosophy without regard to personal politics or bias.

In conclusion, Mr. President, it is time for this Senate to examine the real situation in the Judiciary Committee, rather than listen to more inventive ways of spinning it. We have lots of work to do. There are 90 vacancies in the federal judiciary – a vacancy rate of more than 10.5% – and we have 50 nominees pending, including 4 nominees for the Court of Federal Claims. Nineteen of the pending nominees are for circuit court positions, yet the Senate has confirmed only 9 circuit judges this Congress. This is despite a crisis of 29 vacancies pending in the circuit courts nationwide – virtually the same number of vacancies pending when the Democrats took control of the Senate in June of last year.

Mr. President, the American people are disappointed in this process. They want the Senate to help – not hinder – President Bush. I urge my friends across the aisle to focus on this situation, to step up the pace of hearings and votes, and to do what's right for the country.

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April 12th, 2002

Contact: Margarita Tapia 202.224.5225

HATCH ADDRESSES JUDICIAL CONFIRMATION PROCESS IN 'STATE OF THE SENATE'

Washington - Sen. Orrin G. Hatch (R-Utah), ranking Republican member of the Senate Committee on the Judiciary, today issued the following remarks on the current state of the judicial confirmation process:

"Thank you, Leader, for this opportunity to report on the State of the Senate's responsibility to confirm federal judges. I am sorry to say the we are not doing as well as I would like for the American people.

"The fact is our federal courts are in a vacancy crisis, while here in the Senate the judicial confirmation process appears to have fallen into the hands of very liberal Senate Democrats who appear intent on letting outside, extreme-left, special interest groups launch the most invidious attacks on the good people the President has nominated.

"Though you would think that Democrats might have recoiled after the national backlash they got from the hurtful way they treated a good man like Charles Pickering of Mississippi, it seems the stoves of the special interest groups are readying to boil up an attack on Judge Brooks Smith of Pennsylvania.

"Judge Smith has a very distinguished record as a federal judge for almost 14 years, and no one has questioned his ability or competence. Yet the extremists are trying to make hay out of the fact that he used to be a member of a family oriented fishing club, like hundreds of clubs that exist from Vermont to Utah that happen to limit membership to men or to women for solely leisure purposes.

"What is most distressing about this latest inside Washington attack is that it is yesterday's hysteria in more ways than one. Since 1988, the courts and the Judicial Conference have made clear that there is nothing improper about a Judge or nominee belonging to a single gender club that exhibits certain attributes first articulated by Justice William Brennan as an extension of First Amendment speech.

"I, for one, stand by the Freedom of Association. As Justice Thurgood Marshall pointed out, the ability to associate as we see fit is part of what makes this country great, and a freedom we honor. I hope Democrats do also. Judges, or people who might want to be Judges someday, are just as free as anyone else to exercise that right.

"The American people will roll their eyes at an attempt to ignore a 14-year career on the bench while focusing on a private hunting or fishing club . For goodness sake, Judge Smith has the support of the Women's Bar Association of Western Pennsylvania and the local Domestic Violence Board in Pennsylvania.

"This sort of thing is not good for the country. In the case of Judge Pickering, I have to say, I am very concerned that an impression has been created by how Judge Pickering was treated, that Democrats are imposing a litmus test on personal views, in some cases derived of religious conviction. Judge Pickering was a Southern Baptist. The American people -- liberal or conservative -- will not, and should not, stand for this. To impose a litmus test offends everyone who appreciates the rule of law and the diversity that makes our country strong.

"Let me just report that today marks the 338th day since President Bush announced his first 11 picks for the federal bench. There can be little doubt that the unwillingness of Democrats to move more

expeditiously in judicial confirmations is exacerbating the existing circuit court vacancy crisis.

"What is happening in the Senate confirmation process is not tit for tat or mere pay back, Democrats are in the throes of pursuing a course that is more serious than that. Senate Democrats are seeking to de-diversify the federal judiciary. They are seeking a federal judiciary that looks nothing like the American people.

"One of my Senate colleagues, the senior Senator from New York, repeatedly argues that we need more diversity on our circuit courts of appeal. I couldn't agree more! But Democrats do not walk the talk. The 6th Circuit, for the Midwest States, currently has 6 Democrat-appointed judges, but only 2 Republican. President Bush has 7 nominees pending for that circuit, none have received a hearing. The 9th Circuit, for the Western states, has 17 Democrat-appointed judges but only 7 Republicans. No pending nominee has received a hearing. And in the 2nd Circuit, which covers New York, there are 9 Democrats and 1 Republican, but we do not hear Democrats clamoring for diversity in the 2nd Circuit.

"The bottom line is that nearly one in five circuit court seats is vacant all across America. When President Bush sent up his first nominees we had 31 circuit court vacancies, and today we still have 31 vacancies despite the nation's need. President Bush has responded to the circuit court vacancy crisis by rapidly nominating top-notch men and women. The only obstacle standing in the way of the nominees' ability to serve the American people is a Democrat-led Senate."

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April 11th, 2002

Contact: Margarita Tapia 202.224.5225

JUDICIARY STATEMENT: "NOMINATIONS OF HOWARD, ANDERSON, BAYLSON, GRIESBACH, LANCASTER, RUFE, AND WALTER"

Statement of Senator Orrin G. Hatch Ranking Republican Member Before the United States Senate Committee on the Judiciary Hearing on the Nominations of Jeffrey R. Howard, to be U.S. Circuit Judge, First Circuit Percy Anderson, to be U.S. District Judge, Central District of California Michael M. Baylson, to be U.S. District Judge, E. District of Pennsylvania William C. Griesbach, to be U.S. District Judge, Eastern District of Wisconsin Joan E. Lancaster, to be U.S. District Judge, District of Minnesota Cynthia M. Rufe, to be U.S. District Judge, Eastern District of Pennsylvania John F. Walter, to be U.S. District Judge, Central District of California

Statement of Sen. Orrin Hatch

before the

Senate Judiciary Committee

I am pleased that the Judiciary Committee is considering the nominations of seven exceedingly well-qualified candidates for the federal bench, and I would like to welcome you to the Committee.

Before we discuss the excellent credentials of today's nominees, however, I must take just a minute to make an observation about how this hearing fits into the bigger picture of the Committee's work on judicial nominations.

Today marks the 337th day since President Bush announced his first 11 picks for the federal bench. Eight of those nominations have been languishing in this committee for nearly a year with no commitments for hearings or votes any time soon. All eight received the ABA's majority rating of either well-qualified or qualified. Among these are some of the very best lawyers in the history of our country, including Miguel Estrada, John Roberts and Michael McConnell, just to name three.

This Committee's unwillingness to move more expeditiously on these nominations is exacerbating the circuit court vacancy crisis that exists in America today. Nearly one in five circuit court seats is vacant all across America. When President Bush sent up his first nominees we had 31 circuit court vacancies, and today we still have 31 vacancies. The DC Circuit Court of Appeals is one-third vacant and the 6th Circuit is 50-percent vacant.

President Bush has responded to the circuit court vacancy crisis by rapidly nominating top-notch men and women. The only obstacle standing in the way of the nominees' ability to serve the American people is this Committee.

I am glad that we will consider a circuit court nominee today, but I will point out that in years past under Republican leadership, we regularly considered two or more circuit nominees at a time. In fact, we did so on ten different occasions.

I'm also particularly pleased to see nominees John Walter and Percy Anderson from the Central District of California here - and I'll bet they are happy to be here today too - considering it's been 10 years since they were initially nominated to their seats during the first Bush Administration. They were both

nominated in March of 1992, but unfortunately the Senate - which was controlled by the Democrats at the time - denied them a hearing.

Interestingly, they are not the only nominees pending before the Committee today who were nominated by the first President Bush nearly 10 years ago. Terrence Boyle for the 4th Circuit, John Roberts for the D.C. Circuit, Henry Saad for the 6th Circuit, Leonard Davis for the Eastern District of Texas, Andrew Hanen for the Southern District of Texas, Ronald Leighton for the Western District of Washington, and Richard Dorr for the Western District of Missouri - all seven of these nominees were also nominated by the first President Bush, but never received Committee action at that time. I hope that they too will soon receive their long-awaited hearings.

Now, although I would like to explain my support for each of the seven excellent nominees before us today, in the interest of time, I am going to ask Chairman Kohl if the balance of my remarks could be included in the record at this point. That way, we will have more time for the introductions from Members and for the nominees themselves. Let me just say that you are all excellent nominees and I am going to support all of you. I will work with my colleagues for your swift confirmation.

Jeffrey Howard's nomination to the First Circuit Court of Appeals is one more example of the quality appointments that President Bush is making. Mr. Howard has the record of a great attorney and a great public servant. He has served his communities in elected and appointed office and in a myriad public and volunteer undertakings. The people of New Hampshire can be proud of him.

As New Hampshire's Attorney General, he wrote and implemented one of the nation's first effective comprehensive state wide interdisciplinary protocols to combat domestic violence. He also led the fight in New Hampshire for consumers that were the victim of fraudulent businesses. As Principal Associate Deputy Attorney General for the Justice Department, Mr. Howard was a top advisor to Attorney General William Barr, in the areas of asset forfeiture, drug enforcement, and civil rights.

Percy Anderson, nominated to be U.S. District Judge for the Central District of California, began his career representing indigent clients in civil matters. He later became an Assistant U.S. Attorney in Los Angeles, where he spent six years as First Assistant Division Chief, managing criminal division affairs in the absence of the Chief of the division. In 1985, he joined the Bryan Cave firm, specializing in white collar criminal defense and aviation litigation. In 1996, Mr. Anderson became a partner with Sonnenschein Nath & Rosenthal, a Los Angeles firm, where he focuses on commercial litigation, intellectual property, products liability, false claims, and white collar criminal defense work.

Michael Baylson, nominated to be U.S. District Judge for the Eastern District of Pennsylvania, is familiar with that district because he has served as the United States Attorney there. In that capacity, he developed a reputation for adopting new and successful strategies for the war on drugs, including the tactic of identifying a drug gang, then infiltrating it to learn all its members and indict them en masse. He also was an early proponent of the "Weed and Seed" program designed to "weed out" drug dealers from a community and then "seed" those communities with social services and financial support.

William C. Griesbach, nominated to be U.S. District Judge for the Eastern District of Wisconsin, comes to us with seven years of experience on the bench, having served as a Wisconsin State Circuit Court Judge since 1995. Prior to his elevation to the bench, Judge Griesbach obtained substantial experience in both criminal and civil litigation: He spent eight years as an Assistant District Attorney for Brown County Wisconsin handling criminal matters, and five years before that at a Green Bay, Wisconsin law firm working on civil cases.

Joan E. Lancaster, nominated to be U.S. District Judge for the District of Minnesota, began her career

as an Assistant City Attorney, trying approximately 12 jury and 40 court trials during her service. She then spent ten years as an Assistant U.S. Attorney for the District of Minnesota. After two years of private practice, Justice Lancaster was named as a District Court Judge in the 4th Judicial District in Minnesota. Since 1998, she has served as an Associate Justice on the Minnesota Supreme Court.

Cynthia M. Rufe, nominated to be U.S. District Judge for the Eastern District of Pennsylvania, is another example of how President Bush has tried to create a diverse federal judiciary. Judge Rufe can only be described as a true champion of the rights of children and women. She also was a high school teacher. In addition to her charity work, Judge Rufe has also run the gambit of the legal profession. She was a Public Defender for 5 years and went on to start her own private practice. As a judge, she was appointed by the Pennsylvania Supreme Court and served with distinction as a member of the Appellate Procedural Rules Committee.

John F. Walter, nominated to the U.S. District Court for the Central District of California, has gained experience in private practice and government service. Mr. Walter has served as an Assistant U.S. Attorney in the Criminal Division, Fraud and Special Prosecutions Unit, where he prosecuted the then-largest bank burglary in the U.S. He has been in private practice since 1972, working not only as a civil litigator but also as a criminal defense lawyer. As a member of the Federal Indigent Defense Panel, Mr. Walter has represented more than 75 indigent defendants charged with federal crimes in federal court and devoted thousands of pro bono hours to these cases.

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March 21st, 2002

Contact: Margarita Tapia 202.224.5225

FLOOR STATEMENT: "THE LOTT RESOLUTION & THE CIRCUIT COURT VACANCY CRISIS"

Statement of Sen. Orrin Hatch

before the

United States Senate

"Lott Resolution in light of the vacancy crisis on the Circuit Court."

Last Thursday, Senator Lott introduced a resolution calling for the Judiciary Committee to hold hearings on each of the circuit court judges nominated by President Bush on May 9 of last year.

We are coming up on the one-year anniversary of those nominations, and yet only 3 of the 11 nominees have had hearings and confirmation votes. All of these nominees have received well-qualified or qualified ratings from the American Bar Association, which some of my Democratic colleagues have described as the gold standard in evaluating judicial nominees.

Why is it so problematic that none of these 8 nominees have received a hearing or vote? Well, it is no secret that there is a vacancy crisis in the federal circuit courts, and that we are making no progress in addressing it.

Let's take a look at some numbers. A total of 22 circuit nominations are pending in the Judiciary Committee. But we have confirmed only 1 circuit judge this year, and only 7 since President Bush took office.

When Senate Democrats took over the Judiciary Committee in June of last year, there were 31 circuit court vacancies, and there remain 31 circuit court vacancies today. This does not represent progress – it represents stagnation. In contrast, at the end of 1995 (which was Republicans' first year of control of the Judiciary Committee during the Clinton Administration), there were only 13 circuit vacancies.

In fact, during President Clinton's first term, circuit court vacancies never exceeded 20 at the end of any year – including 1996, a presidential election year, when the pace of confirmations has traditionally slowed.

Moreover, there were only 2 circuit nominees left pending in Committee at the end of President Clinton's first year in office. In contrast, 23 of President Bush's circuit nominees were left hanging in Committee at the end of last year.

In light of the vacancy crisis, we cannot afford to let only 10 Senators defeat a circuit nominee. This is a question of process, not of seeking favorable treatment. For all these reasons, it is imperative to support Senator Lott's resolution to get hearings and votes for our longest pending circuit nominees. Given the vacancy crisis in our circuit courts, I can't imagine anyone voting against it.

Some of our Democratic colleagues have tried to blame the Republicans for the present circuit court vacancy crisis by suggesting that 45% of President Clinton's circuit court nominees were not confirmed during his presidency. But that number is inflated by double counting individuals that were nominated more than once.

For example, by their numbers, Marsha Berzon – who was nominated in the 105th Congress, but not confirmed until the 106th – would count as two nominations and only one confirmation. If you remove the double counting and count by individuals, without counting withdrawn nominees, President Clinton nominated 86 individuals for the Circuit Courts and only 21 were not confirmed. That's only 24% who were not confirmed, as opposed to 45%.

And, of those 21 nominees who did not move, 9 lacked home state support, 1 had incomplete paperwork, and another was nominated after the August recess in 2000. That leaves only 10 circuit court nominees that did not receive action – some of whom may have had issues that simply cannot be publicly divulged.

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March 21st, 2002

Contact: Margarita Tapia 202.224.5225

STATEMENT ON THE STATUS OF JUDICIAL CONFIRMATIONS

Washington – Sen. Orrin G. Hatch (R-Utah), Ranking Republican Member of the Senate Committee on the Judiciary, today addressed the status of judicial confirmations before the United States Senate. Senator Hatch's comments follow.

"Mr. President, I must respond to some of the comments that my colleagues across the aisle have made about the pace of judicial confirmations. These comments have included a gross distortion of my record as Chairman of the Judiciary Committee during six years of the Clinton Administration. Although we've all heard enough of the numbers, I will not hesitate to defend my record when it is unjustly attacked, as it has been over the past week.

"I believe that the source of many, if not all, of these attacks stems from the defensive posture that many of my Democratic colleagues have taken since ten members of the Judiciary Committee refused to send the nomination of Judge Charles Pickering to the floor for a vote by the full Senate. Some of these colleagues have defended what they call the Senate's fair treatment of judicial nominees in general, and Judge Pickering in specific. But the fact of the matter is that the Senate never got the opportunity to vote on Judge Pickering's nomination. The reality is that the ten Democratic members of the Judiciary Committee determined for the rest of the Senate the fate of Judge Pickering's nomination. This is despite the fact – or perhaps because of the fact – that had Judge Pickering's nomination been considered by the full Senate, he very likely would have been confirmed.

"The Committee's treatment of Judge Pickering is problematic for several reasons. First, during the six years that Republicans controlled the Senate during the Clinton Administration, not once was one of his judicial nominations killed by a Committee vote. The sole Clinton nominee who was defeated nevertheless received a floor vote by the full Senate. Judge Pickering was denied that opportunity. Some of my Democratic colleagues have said that their treatment of Judge Pickering was not payback. In one sense, they're right – if they were interested in treating President Bush's nominees as well as the Republicans treated President Clinton's nominees, then they would have sent Judge Pickering's nomination to the floor for a vote by the full Senate.

"Second, the actions of the Democratic members of the Committee were clearly orchestrated by liberal special interest groups. It is no coincidence that these groups asked the Committee to demand Judge Pickering's unpublished opinions, then – surprise! – the Committee announces that it will compel Judge Pickering to produce all of his unpublished opinions. I do not recall another nominee who has been subjected to a production demand of such scope – except, of course, for Judge D. Brooks Smith, another Bush nominee whom the groups have targeted.

"Let me read the text of the letter to Judge Smith. It simply says, "Copies of your unpublished opinions, not previously produced to the Committee, have been requested by Members. Please contact our nominations clerk . . . to arrange transmission of the materials. Thank you for your assistance in this matter." That's it. There is no explanation for why the Committee is demanding these unpublished opinions, and there was no consultation with the Republicans about taking the drastic step of demanding these opinions. This letter, incidentally, was sent to Judge Smith after his confirmation hearing – just like with Judge Pickering. There is nothing fair about subjecting nominees to fishing expeditions simply because the liberal special interest groups do not like them. The Committee's

treatment of Judge Pickering's nomination was not an example of the Committee doing its job, as one of my colleagues described it last week. Instead, it's an example of special interest groups pulling strings. I am deeply concerned about what this means for the fairness with which future judicial nominees will be treated – especially any Supreme Court justice that President Bush may have the opportunity to nominate.

"Some of my Democratic colleagues have tried to minimize the effect of their party-line Committee vote to defeat Judge Pickering's nomination by declaring that, last year, they held the first confirmation hearing on a Fifth Circuit judge since 1994. While this is technically true, there is an important fact they leave out: From 1994 to 1997, no Fifth Circuit nominees were pending for the Committee to act on. President Clinton did not nominate another Fifth Circuit judge until 1997, and that nominee did not have home state support due to lack of consultation from the White House. He was not renominated after the end of the 105th Congress. The next Fifth Circuit judge was not nominated until 1999. He, too, lacked home state support due to lack of consultation from the White House. Finally, a third Fifth Circuit nominee was nominated in 1999. So, in reality, only one of President Clinton's Fifth Circuit nominees after 1999 could have possibly moved, and I should say that nominee was not nominated until the seventh year of the Clinton presidency.

"Now, let's compare this record to the present Bush Administration. The Democrats have already killed one of President Bush's Fifth Circuit nominees, Judge Pickering, who enjoys the strong support of both of his home state senators. If they are being guided by precedent, then my Democratic colleagues have no excuse for refusing to move every other Fifth Circuit Bush nominee who has home state support. One such nominee, Justice Priscilla Owen of Texas, has been pending in Committee for over 300 days now without so much as a hearing.

"Which brings me to another point. My Democratic colleagues have argued at length about how fairly they are treating President Bush's judicial nominees, especially his circuit nominees. In fact, last week one of my colleagues said on the floor, "We are trying to accord nominees whose paperwork is complete and whose blue slips are returned both a hearing and a fair up or down vote." This colleague must have forgotten about the eight circuit judges whom President Bush nominated on May 9 of last year and who have been languishing in Committee without so much as a hearing for over 300 days. With one exception, the paperwork on all of these nominees has been complete for months. Each of these nominees has received a rating of well-qualified or qualified from the ABA, which my Democratic colleagues have referred to as the gold standard in evaluating judicial nominees.

"The rest of President Bush's circuit nominees have fared just as poorly. Only 9% of his circuit nominees awaiting a Committee vote have had a hearing thus far. This means that 91% of his circuit nominees, including 8 of his first 11 circuit judges nominated on May 9, have been languishing in Committee for no reason, but that the liberal interest groups don't want them to move.

"The failure of the Committee to act on these circuit nominees is particularly disturbing in light of the vacancy crisis in the circuit courts. The number of vacancies in the circuit courts is dramatically higher than it has been during the first two years of the most recent presidential Administrations. At the end of the first two years of the Bush I Administration, there were only 7 circuit court vacancies. At the end of the first two years of the first term of the Clinton Administration, there were only 15 circuit vacancies. At the end of the first two years of the second term of the Clinton Administration, there were only 14 vacancies. Incidentally, I chaired the Judiciary Committee during this time, and there were fewer vacancies than there were when Democrats controlled the Senate during the first two years of the first term of the Clinton Administration.

"Now, let's look at the present Administration. There are currently 31 vacancies in the circuit courts.

This is the same exact number of vacancies in the circuit courts that existed when the Democrats took control of the Senate on June 5 of last year. This does not represent progress – it represents stagnation. It is for this reason that I find it more than a little hard to swallow my colleague's arguments that their pace of judicial confirmations is keeping up with the vacancy rate. The numbers simply tell another story: We are making absolutely no progress in addressing the vacancy crisis in the federal judiciary.

“Even if you look beyond the circuit courts to the full judiciary, the numbers are not much better. The end-of-session vacancies during the first two years of Republican control of the Senate during the Clinton Administration never exceeded the vacancies we now face. At the end of 1995, my first year of chairing the Committee, there were 50 vacancies in the federal judiciary. Only 13 of these vacancies were in the circuit courts. At the end of 1996, my second year of chairing the Committee, there were 63 vacancies in the federal judiciary. Only 18 were in the circuit courts. But at the end of last session, there were 94 vacancies in the federal judiciary. Now we have 95 vacancies, which is a dramatic increase from the 67 vacancies that existed at the end of the 106th Congress. As we've seen, 31 of these vacancies are in the circuit courts. What does this mean? It means that the Senate's pace under Democratic control in confirming President Bush's judicial nominees is simply not keeping up with the increasing vacancy rate, not even in “accordance with the precedents and practices of the Committee.”

“For anyone who doubts that the vacancy crisis represents a problem, let me point out that the Sixth Circuit is presently functioning at a 50% capacity. Eight of that court's 16 seats are vacant. President Bush has nominated 7 well qualified individuals to fill the vacancies on that court. Two of those nominees, Deborah Cook and Jeffrey Sutton, have been pending since May 9 of last year. They were among those first 11 judges that President Bush nominated. Yet they have languished in Committee without so much as a hearing while the Sixth Circuit functions at 50% capacity. And although the Michigan Senators have blocked hearings for the three Bush nominees from Michigan by refusing to return blue slips, the paperwork on the remaining four nominees is complete. Again, nothing stands between them and a confirmation hearing except my Democratic colleagues.

“Another appellate court that is in trouble is the D.C. Circuit, which is missing one-third of its judges: It has only 8 of its 12 seats filled. President Bush nominated two exceedingly well qualified individuals to fill seats on the D.C. Circuit on May 9 of last year. Those individuals, Miguel Estrada and John Roberts, are among the most well respected appellate lawyers in the country. And I should say that Miguel Estrada would be the first Hispanic to sit on this important court. Democrats talk a lot about diversity, but apparently it's diversity only if the candidates agree with the extreme liberal views of the special interest groups. This troubles me. The Judiciary Committee has not granted them a hearing, much less a vote. If the D.C. Circuit and the Sixth Circuit are any indication, it appears that the Committee is doing what it can to avoid filling seats on the courts that need judges the most.

“Part of the problem is a reluctance by the Committee to move more than one circuit judge per hearing. In fact, I don't believe that the Democrats have moved more than one circuit judge per hearing during the entire time they've had control of the Senate. When I was Chairman, I had ten hearings with more than one circuit nominee on the agenda. In fact, I had hearings with more than one circuit nominee on the agenda in every session in which I was Chairman except for presidential election years. THAT is precedents and practices of the Committee. Let's stop making excuses and confirm judges. If we are going to get serious about filling circuit vacancies, then I encourage my Democratic colleagues to move more than one circuit nominee per hearing.

“One of the more ludicrous charges I've heard is that the Republicans did not confirm any judges while they held the majority in the Senate last year. Let me set the record straight on this. President Bush announced his first eleven judicial nominations on May 9. I scheduled a confirmation hearing on three of those judicial nominees – all circuit court nominees – for May 23. However, some Democratic

members of the Committee claimed to need more time to assess the nominees. Out of an abundance of caution, and in the interest of fairness, I agreed to postpone the hearing despite widespread speculation that the Republicans' loss of the majority in the Senate was imminent. As we all know, control of the Senate shifted to the Democrats shortly thereafter, on June 5. So, while the Republicans were ready to hold a hearing on three circuit judges within two weeks of their nomination in May, it took the Democrats until the end of August to hold confirmation hearings on three circuit judges.

"I've also heard my Democratic colleagues complain that I was unfair because almost 60 Clinton nominees never received a hearing or vote. Well, I have two responses to this charge. First, the Democrats who controlled the Senate during the first Bush Administration left 59 judicial nominees hanging without a hearing or vote at the end of four years. In contrast, only 53 Clinton nominees weren't confirmed over my 6 years as Chairman. Yet my Democratic colleagues claim that I was unfair to Clinton nominees, despite the fact that they left more Bush I nominees unconfirmed in a shorter period of time.

"Second, many of the Clinton nominees who were not confirmed had good reasons for not moving. As I've mentioned, not including withdrawn nominees, there were only 53 Article III judicial nominees who were nominated by President Clinton during my six years as Chairman who did not get confirmed. Of those, 9 were nominated too late in a Congress for the Committee to feasibly act on them or were lacking paperwork. That leaves 44. Seventeen of those lacked home state support, which was often the result of a lack of consultation with home state senators. There was no way to confirm those without completely ignoring the senatorial courtesy that we afford to home state senators in the nominations process. That leaves 27. One nominee was defeated on the Senate floor, which leaves only 26 remaining nominees. Of those 26, some may have had other reasons for not moving that I simply cannot comment on. So in all 6 years that I chaired the Committee while President Clinton was in office, we are really only talking about 26 nominees who were left.

"Now, I heard one of my Democratic colleagues on the floor last week comparing their pace to mine in increments of months – nine months to twelve months, nine months to nine months, three months to three months, and so on. I must admit that I had a tough time following his argument in light of the astronomical vacancy rate that we now face in the federal judiciary. But in terms of fairness, let me set forth what I consider to be the bottom line. President Clinton enjoyed an 85% confirmation rate on the individuals he nominated. A total of 377 Clinton nominees sit on the federal bench today. This number is only 5 short of President Reagan, who holds the all-time record of appointing judges to the bench. When President Bush's judicial confirmations start approaching these numbers, then I may be ready to agree that the Democrats are treating his nominees fairly."

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