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CREATOR: Latonia Becenti (CN=Latonia Becenti/OU=WHO/O=EOP [WHO])

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SUBJECT:

TO: Van-Alan H. Shima (CN=Van-Alan H. Shima/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

TEXT:

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

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 \par }\pard \qc\widctlpar\adjustright {3 of 3 DOCUMENTS
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 \par }\pard \qc\li1200\ri1200\widctlpar\adjustright {CONGRESSIONAL RECORD -- }{
 \i SENATE}{
 \par
 \par Tuesday, July 25, 2000
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 \par 106th Congress, 2nd Session
 \par
 \par }{\i 146 Cong Rec S 7531}{
 \par
 \par }\pard \widctlpar\adjustright {REFERENCE: Vol. 146, No. 98
 \par
 \par TITLE: JUDICIAL NOMINEES
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 \par SPEAKER: Mr. LEAHY; Mr. SANTORUM; Mr. REID; Mr. NICKLES
 \par
 \par TEXT: [*S7531]
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 \par }\pard \fi360\sb120\widctlpar\adjustright {Mr. President, I am sorry I was
 not on the Senate floor to
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 \par }\pard \widctlpar\adjustright { hear Chairman Hatch earlier this afternoon
 . I was attending an
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 \par important confirmation hearing and chairing a meeting of the bipartisan
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 \par Internet Caucus. I spoke to the issue of judicial nominations last
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 \par Friday and say, again, with 60 current and longstanding vacancies
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 \par within the federal judiciary, and seven more on the horizon, we cannot
 \par
 \par afford to stop or slow down the little progress we are making.
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 \par }\pard \fi360\sb120\widctlpar\adjustright {Our hearing today included thre
 e nominees moved forward to fill
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 \par }\pard \widctlpar\adjustright { positions on the District Court of Arizona
 that have all been declared
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 \par judicial emergencies. Each of the nominees was nominated last Friday.
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 \par They are now having their hearing, they look forward to being voted out
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 \par of committee on Thursday and approved by the Senate before the week is
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 \par out--within one week of nomination. This demonstrates what we can do

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\par when we want to take action. All the talk about needing six months or
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\par more to process and review nominees is just that--talk. If all goes
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\par according to schedule, these nominees will be in and out of the Senate
\par
\par in less than one week.
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\par }\pard \fi360\sb120\widctlpar\adjustright {We could do that with a number
of nominees. Instead, this is a Senate
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\par }\pard \widctlpar\adjustright { that has kept highly-qualified nominees, s
uch as Richard Paez and
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\par Marsha Berzon, waiting for years before they get a vote. There is just
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\par no reason to have a qualified nominee like Judge Helene White of
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\par Michigan held hostage for over 42 months without a hearing.
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\par }\pard \fi360\sb120\widctlpar\adjustright {I am disappointed to have seen
another hearing come and go without
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\par }\pard \widctlpar\adjustright { even one nominee to fill one of the many v
acancies to the Courts of
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\par Appeals around the country. I was encouraged to hear Senator Lott
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\par recently say that he continues to urge the Judiciary Committee to make
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\par progress on judicial nominations. The Majority Leader said: "There are
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\par a number of nominations that have had hearings, nominations that are
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\par ready for a vote and other nominations that have been pending for quite

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\par some time and that should be considered.'" He went on to note that the
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\par groups of judges he expects us to report to the Senate will include
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\par "not only district judges but circuit judges.'" Unfortunately, the
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\par Committee has not honored the Majority Leader's representations and was

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\par only willing to consider a few District Court nominees at today's
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\par hearing. Pending before the Committee are a dozen nominees to the
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\par Federal Courts of Appeals who are awaiting a hearing--12 nominees, not
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\par one of which the Republican Majority saw fit to include in this
\par
\par hearing. Left off the agenda are Judge Helene White of Michigan, who is

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\par now the longest pending judicial nomination at over 42 months without
\par even a hearing; Barry Goode, whose nomination to the Ninth Circuit was
\par the subject of Senator Feinstein's statements at our Committee meeting
\par last Thursday and who has been pending for over two years; as well as a

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\par number of qualified minority nominees whom I have been speaking about
\par throughout the year, including Kathleen McCree Lewis of Michigan,
\par Enrique Moreno of Texas and Roger Gregory of Virginia.
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\par }\pard \fi360\sb120\widctlpar\adjustright {I noted for the Senate last Fri
day that there continue to be multiple
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\par }\pard \widctlpar\adjustright { vacancies on the Fourth, Fifth, Sixth, Nin
th, Tenth and District of
\par
\par Columbia Circuits. With 20 vacancies, our appellate courts have nearly
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\par half of the total judicial emergency vacancies in the federal court
\par
\par system. I know how fond our Chairman is of percentages, so I note that
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\par the vacancy rate for our Courts of Appeals is more than 11 percent
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\par nationwide. Of course that vacancy rate does not begin to take into
\par
\par account the additional judgeships requested by the Judicial Conference
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\par to handle their increased workloads. If we added the 11 additional
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\par appellate judges being requested, the vacancy rate would be 16 percent.

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\par By comparison, the vacancy rate at the end of the Bush Administration,
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\par even after a Democratic Majority had acted in 1990 to add 11 new
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\par judgeships for the Courts of Appeals, was only 11 percent. Even though
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\par the Congress has not approved a single new Circuit Court
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\par position within the federal judiciary since 1990, the Republican Senate

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\par has by design lost ground in filling vacancies on our appellate courts.
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\par }\pard \fi360\sb120\widctlpar\adjustright {At our first Judiciary Committe
e meeting of the year, I noted the
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\par }\pard \widctlpar\adjustright { opportunity we had to make bipartisan stri
des toward easing the vacancy
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\par crisis in our nation's federal courts. I believed that a confirmation

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\par total of 65 by the end of the year was achievable if we made the
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\par effort, exhibited the commitment, and did the work that was needed to
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\par be done. I urged that we proceed promptly with confirmations of a
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\par number of outstanding nominations to the Court of Appeals, including
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\par qualified minority and women candidates.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Yet only five nominees to the a
ppellate courts around the country
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\par }\pard \widctlpar\adjustright { have had nomination hearings this year and
only three of those five
\par
\par have been reported by the Committee to the Senate and confirmed--only
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\par three all year. The Committee included no Court of Appeals nominees at
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\par the hearings on April 27 and July 12, and there are no Court of Appeals

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\par nominee at the hearing today. The Committee has yet to report the
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\par nomination of Allen Snyder to the District of Columbia Circuit,
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\par although his hearing was 11 weeks ago, or the nomination of Bonnie
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\par Campbell to the Eighth Circuit, although her hearing was eight weeks
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\par ago. The Republican candidate for President talks about final Senate
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\par action on nominations within 60 days and we cannot get the Committee to

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\par report some nominations within 60 days of their hearing.
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\par }\pard \fi360\sb120\widctlpar\adjustright {There is no good reason to have
a qualified nominee such as Judge
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\par }\pard \widctlpar\adjustright { Helene White of Michigan held hostage for
over 42 months without a
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\par hearing--42 months, and she has not even gotten a hearing. We had two
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\par men who were nominated last Friday, and they had a hearing today. They
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\par will probably be confirmed this week. Helene White has been held
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\par hostage for over 42 months without a hearing. She is the record holder
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\par for judicial nominees who have had to wait for a hearing--and her wait
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\par continues. It is insulting to the people of Michigan, insulting to the
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\par court, and insulting to her. The people of Michigan deserve a vote up

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\par or down on this outstanding lawyer and Judge from Michigan.
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\par [*S7532]
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\par }\pard \fi360\sb120\widctlpar\adjustright {Now why do I keep mentioning th
is? I keep mentioning it because,
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\par }\pard \widctlpar\adjustright { frankly, we are doing a poor job in confir
ming judges. I compare this
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\par to the last year of President Bush's term. We had a Democratic majority

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\par in the Senate. We confirmed twice as many judges then as this Senate is

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\par confirming now with a Republican majority and a Democratic President.
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\par Something was said the other day that, well, the Democrats are in the
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\par minority, and that is probably why they complain so. Well, heavens, I
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\par would be happy to have the complaints of the Republicans when they were

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\par in the minority. The Democrats moved twice as many judges for a
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\par Republican President as Republicans are moving for a Democratic
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\par President. It is a simple fact.
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\par }\pard \fi360\sb120\widctlpar\adjustright {The soon-to-be presidential nom
inee of the Republican Party has
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\par }\pard \widctlpar\adjustright { said--and I agree with him--that this is w
rong, the Senate ought to
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\par vote these people up or down in 60 days. Of course, we could do that.
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\par There is a concern that has been expressed--and rightly so--that so
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\par many nominees are held without any vote. Nobody votes against them, but

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\par nobody gets an opportunity to vote for them; they just sit there. And
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\par even though the criticism stings, the fact is that, on average, women
\par
\par and minorities take longer to go through this Senate than white males
\par
\par do. Some women, some minorities have gone through very quickly, but
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\par most have taken longer.
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\par }\pard \fi360\sb120\widctlpar\adjustright {I said earlier that I do not see any sense of bias or sexism in our

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\par }\pard \widctlpar\adjustright { chairman. I have known him for over 20 years, and I have never heard

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\par him make a biased remark or a sexist remark during that whole time. But

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\par something is happening, somewhere they are being held up. It is wrong.

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\par One of the things that most Republicans and Democrats ought to be able

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\par to agree on is what Governor Bush said: Do it and vote them up or down

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\par in 60 days. Let's make a decision.

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\par }\pard \fi360\sb120\widctlpar\adjustright {Some of these people got held up for 2 or 3 or 4 years. When they

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\par }\pard \widctlpar\adjustright { finally got a vote, they passed overwhelmingly. But for 2 or 3 or 4

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\par years they were humiliated, caused to dangle, have their law practices

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\par fall apart, have people question what was going on. Why? Because one or

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\par two Senators thought they should be held up. Well, let those one or two

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\par Senators vote against them. We are paid to vote yes or no, not maybe. I

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\par do not know whether it is because they are women, because they are

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\par Hispanic, because they are too liberal, or too conservative, too

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\par active, not active enough, that people don't want them to be confirmed.

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\par Let them vote against them.

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\par }\pard \fi360\sb120\widctlpar\adjustright {I argued, when we had a very distinguished African American justice

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\par }\pard \widctlpar\adjustright { of a State supreme court, that we ought to let him at least have a

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\par vote. We had a vote after 2 years and, on a party line vote, he was

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\par voted down. Every single Republican voted against him, and every single

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\par Democrat voted for him, even though he had the highest rating of the

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\par American Bar Association, even though he was a justice of his state's

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\par highest court, and even though he was one of the most outstanding
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\par nominees either of a Democratic or Republican President to come before
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\par the Senate. At least he had a vote. I think the vote was wrong; he
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\par should have been confirmed. But at least he had a vote.
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\par }\pard \fi360\sb120\widctlpar\adjustright {I also worry about are all thes
e people who are not even given a
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\par }\pard \widctlpar\adjustright { vote.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Senator Hatch compared this yea
r's confirmation total against totals
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\par }\pard \widctlpar\adjustright { from other Presidential election years. Th
e only year to which this can
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\par be favorably compared is 1996 when the Republican majority in the
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\par Senate refused to confirm even a single appellate court judge to the
\par
\par Federal bench. The total that year was zero. That is hardly a
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\par comparison in which to take pride. I say let us compare 1992, in which
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\par there was a Democratic majority in the Senate and a Republican
\par
\par President. We confirmed 11 court of appeals nominees during that
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\par Republican President's last year in office--11 court of appeals
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\par nominees, and 66 judges in all. In fact, we went out in October of that

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\par year. We were having hearings in September. We were having people
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\par confirmed in October.
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\par }\pard \fi360\sb120\widctlpar\adjustright {So do not come here and say the
Democrats are not well grounded in
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\par }\pard \widctlpar\adjustright { complaining about what is happening. We es
tablished the way
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\par nonpartisanship can work in confirming judges. We did it for Republican

\par
\par Presidents. Obviously, it is not being done for a Democratic President.

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\par What we did in 1992, between July 24 and October 8, was the Senate
\par
\par confirmed 32 judicial nominees. We ought to try to do the same here,
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\par basically, from now until about the time we go out. Again, the last

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\par time that happened at the end of a President's term, the Democrats
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\par helped get 32 judges through during that period of 10 weeks at the end
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\par of the Congress. Well, we ought to do the same here. The Republicans
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\par ought to be willing to do the same thing.
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\par }\pard \fi360\sb120\widctlpar\adjustright {In fact, in 1992 the Committee
held 15 hearings--twice as many as
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\par }\pard \widctlpar\adjustright { this Committee has found time to hold this
year. Late that year, we met
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\par on July 29, August 4, August 11, and September 24, and all of the
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\par nominees who had hearings then were eventually confirmed before
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\par adjournment. We have a long way to go before we can think about resting

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\par on any laurels.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Having begun so slowly in the f
irst half of this year, we have much
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\par }\pard \widctlpar\adjustright { more to do before the Senate takes its fin
al action on judicial
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\par nominees this year. We cannot afford to follow the "Thurmond Rule"
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\par and stop acting on these nominees now in anticipation of the
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\par presidential election in November. We must use all the time until
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\par adjournment to remedy the vacancies that have been perpetuated on the
\par
\par courts to the detriment of the American people and the administration
\par
\par of justice. That should be a top priority for the Senate for the rest
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\par of this year. In the last 10 weeks of the 1992 session, between July 24

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\par and October 8, 1992, the Senate confirmed 32 judicial nominations. I
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\par will work with the Republican Majority to try to match that record.
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\par }\pard \fi360\sb120\widctlpar\adjustright {One of our most important const
itutional responsibilities as United
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\par }\pard \widctlpar\adjustright { States Senators is to advise and consent o
n the scores of judicial
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\par nominations sent to us to fill the vacancies on the federal courts
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\par around the country. I continue to urge the Senate to meet its
\par responsibilities to all nominees, including women and minorities. That
\par these highly qualified nominees are being needlessly delayed is most
\par regrettable. The President spoke to this situation earlier this month
\par in his appearance before the NAACP. The Senate should join with the
\par President to confirm these well-qualified, diverse and fair-minded
\par nominees to fulfill the needs of the federal courts around the country.
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\par }\pard \fi360\sbl20\widctlpar\adjustright {The Arizona vacancies are each
judicial emergency vacancies. Two were
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\par }\pard \widctlpar\adjustright { authorized in appropriations legislation 1
ast year when the Republicans
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\par Majority continued its refusal to consider a bill to meet the judicial
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\par Conference's recommendation for 72 additional judges around the
\par
\par country. All we were able to authorize were a few judgeships in
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\par Arizona, Florida and Nevada. That points out one of the reasons that
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\par the comparisons that Chairman Hatch is seeking to draw to the vacancy
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\par rates at the end of the Bush Administration are incorrect. During
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\par President Reagan's Administration and again during the Bush
\par
\par Administration, Congress added a significant number of new judgeships.
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\par The so-called vacancy rate that Senator Hatch is so fond of citing at
\par
\par the end of the Bush Administration is highly inflated by the addition
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\par of 85 new judgeships in 1990 and by the addition of 87 new judgeships
\par
\par in 1984, of which many where yet to be filled. By contrast the
\par
\par vacancies currently plaguing the federal courts are longstanding and in

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\par spite of Republican intransigence against authorizing additional
\par
\par judgeships requested by the Judicial Conference since 1996. If those
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\par additional judgeships were taken into account, the vacancy rate today
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\par would be over 13 percent with over 120 vacancies--hardly a comparison
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\par that the Republican majority would want to make, but that would be
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\par comparing comparable figures.
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\par }\pard \fi360\sb120\widctlpar\adjustright {In addition, even running the g
auntlet and getting a confirmation
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\par }\pard \widctlpar\adjustright { hearing does not automatically guarantee s
omeone a vote before the
\par
\par current Judiciary Committee. Bonnie Campbell, nominated by the
\par
\par President on March 2, 2000, has completed the nomination and hearing
\par
\par process and is strongly supported by Senator Grassley and Senator
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\par Harkin from her home state. But her name continues to be left off the
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\par agenda at our executive meetings for the last several weeks. She is a
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\par former Iowa Attorney General and former high ranking Justice Department

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\par official who has worked extensively on domestic violence and crime
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\par [*S7533]
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\par victims matters. Allen Snyder is another well-respected and highly-
\par
\par qualified nominee who got a hearing but no Committee vote. He was
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\par nominated on September 22, 1999, received the highest rating from the
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\par ABA, enjoys the full support of his home state Senators, and had his
\par
\par hearing on May 10, 2000. There are and have been many others.
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\par }\pard \fi360\sb120\widctlpar\adjustright {I continue to urge the Senate t
o meet its responsibilities to all
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\par }\pard \widctlpar\adjustright { nominees, including women and minorities.
That highly-qualified
\par
\par nominees are being needlessly delayed is most regrettable. The Senate
\par
\par should join with the President to confirm well-qualified, diverse and
\par
\par fair-minded nominees to fulfill the needs of the federal courts around
\par
\par the country.
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\par }\pard \fi360\sb120\widctlpar\adjustright {More than two years ago Chief J
ustice William Rehnquist warned that
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\par }\pard \widctlpar\adjustright { "vacancies cannot remain at such high leve
ls indefinitely without
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\par eroding the quality of justice that traditionally has been associated
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\par with the federal judiciary.'" The New York Times reported last year how

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\par the crushing workload in the federal appellate courts has led to what
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\par it calls a "two-tier system" for appeals, skipping oral arguments in
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\par more and more cases. Law clerks and attorney staff are being used more
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\par and more extensively in the determination of cases as backlogs grow.
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\par Bureaucratic imperatives seem to be replacing the judicial deliberation

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\par needed for the fair administration of justice. These are not the ways
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\par to continue the high quality of decisionmaking for which our federal
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\par courts are admired or to engender confidence in our justice system.
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\par }\pard \fi360\sb120\widctlpar\adjustright {When the President and the Chief Justice spoke out, the Senate
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\par }\pard \widctlpar\adjustright { briefly got about its business of considering judicial nominations last
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\par year. Unfortunately, last year the Republican majority returned to the
\par
\par stalling tactics of 1996 and 1997 and judicial vacancies are again
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\par growing in both number and duration. Chief Justice Rehnquist wrote at
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\par the end of 1997: "The Senate is surely under no obligation to confirm
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\par any particular nominee, but after the necessary time for inquiry it
\par
\par should vote him up or vote him down.'" The Senate is not defeating
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\par judicial nominations in up or down votes on their qualifications but
\par
\par refusing to consider them and killing them through inaction.
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\par }\pard \fi360\sb120\widctlpar\adjustright {During Republican control it has taken two-year periods for the
\par
\par }\pard \widctlpar\adjustright { Senate to match the one-year total of 101 judges confirmed in 1994,
\par
\par when we were on course to end the vacancies gap. Nominees like Judge
\par
\par Helene White, Barry Goode, Judge Legrome Davis, and J. Rich Leonard,
\par
\par deserve to be treated with dignity and dispatch--not delayed for two
\par
\par and three years. We are still seeing outstanding nominees nitpicked and

\par
\par delayed to the point that good women and men are being deterred from
\par
\par seeking to serve as federal judges. Nominees practicing law see their
\par
\par work put on hold while they await the outcome of their nominations.
\par
\par Their families cannot plan. They are left to twist in the wind. All of
\par
\par this despite the fact that, by all objective accounts and studies, the
\par
\par judges that President Clinton has appointed have been a moderate group,

\par
\par rendering moderate decisions, and certainly including far fewer
\par
\par ideologues than were nominated during the Reagan Administration.
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\par
\par }\pard \fi360\sb120\widctlpar\adjustright {Federal law enforcement relies
on judges to hear criminal cases, and
\par
\par }\pard \widctlpar\adjustright { individuals and businesses pay taxes to ex
ercise their right to resolve
\par
\par civil disputes in the federal courts. As workloads continue to grow and

\par
\par vacancies are perpetuated, the remaining judges are being overwhelmed
\par
\par and the work of the federal judiciary is suffering.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {Our independent federal judicia
ry sets us apart from virtually all
\par
\par }\pard \widctlpar\adjustright { others in the world. Every nation that in
this century has moved toward
\par
\par democracy has sent observers to the United States in their efforts to
\par
\par emulate our judiciary. Those fostering this slowdown of the
\par
\par confirmation process and other attacks on the judiciary are risking
\par
\par harm to institutions that protect our personal freedoms and
\par
\par independence.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {What progress we started making
two years ago has been lost and the
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\par }\pard \widctlpar\adjustright { Senate is again failing even to keep up wi
th normal attrition. Far from
\par
\par closing the vacancies gap, the number of current vacancies has grown
\par
\par from 57, when Congress recessed last year, to 60. Since some like to
\par

\par speak in terms of percentage, I should note that the judicial vacancy
\par
\par rate now stands at over seven percent of the federal judiciary (60/
\par
\par 852). If one considers the 63 additional judges recommended by the
\par
\par judicial conference, the vacancies rate would be over 13 percent (123/
\par
\par 915).
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {What is most significant about
the recent trend of judicial vacancies
\par
\par }\pard \widctlpar\adjustright { and vacancy rates is that the vacancies th
at existed in 1993 (after the
\par
\par creation of 85 new judgeships in 1990) had been cut almost in half in
\par
\par 1994, when the rate was reduced to 7.4% with 63 vacancies at the end of

\par
\par the 103rd Congress. We continued to make progress even into 1995. In
\par
\par fact, the vacancy rate was lowered to 5.8% after the 1995 session, and
\par
\par before the partisan attack on federal judges began in earnest in 1996
\par
\par and 1997.
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\par
\par }\pard \fi360\sb120\widctlpar\adjustright {Progress in the reduction of ju
dicial vacancies was reversed in 1996,
\par
\par }\pard \widctlpar\adjustright { when Congress adjourned leaving 64 vacanci
es, and in 1997, when
\par
\par Congress adjourned leaving 80 vacancies and a 9.5% rate. No one was
\par
\par happier than I that the Senate was able to make progress in 1998 toward

\par
\par reducing the vacancy rate. I praised Senator Hatch for his effort.
\par
\par Unfortunately, the vacancies are now growing again.
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\par
\par }\pard \fi360\sb120\widctlpar\adjustright {Let me also set the record stra
ight, yet again, on the erroneous but
\par
\par }\pard \widctlpar\adjustright { oft-repeated argument that "the Clinton Ad
ministration is on record as
\par
\par having stated that a vacancy rate just over 7% is virtual full-
\par
\par employment of the judiciary.'" That is not true.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {The statement can only be allud
ed to an October 1994 press release.

\par
\par }\pard \widctlpar\adjustright { That press release cannot be construed or even fairly misconstrued in
\par
\par this manner. That press release was pointing out at the end of the
\par
\par 103rd Congress that if the Senate proceeded to confirm the 14 nominees
\par
\par then on the Senate calendar, it would have reduced the judicial vacancy

\par
\par rate to 4.7%, which the press release then proceeded to compare to a
\par
\par favorable unemployment rate of under 5%.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {This was not a statement of administration position or even a policy
\par
\par }\pard \widctlpar\adjustright { statement but a poorly designed press release that included an ill-
\par
\par conceived comment. Job vacancy rates and unemployment rates are not
\par
\par comparable. Unemployment rates are measures of people who do not have
\par
\par jobs not of federal offices vacant without an appointed office holder.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {When I learned that some Republicans had for partisan purposes seized
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\par }\pard \widctlpar\adjustright { upon this press release, taken it out of context, ignored what the
\par
\par press release actually said and were manipulating it into a
\par
\par misstatement of Clinton administration policy, I asked the Attorney
\par
\par General, in 1997, whether there was any level or percentage of judicial

\par
\par vacancies that the administration considered acceptable or equal to
\par
\par "full employment."
\par
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\par }\pard \fi360\sb120\widctlpar\adjustright {The Department responded:
\par
\par }\pard \widctlpar\adjustright {
\par
\par There is no level or percentage of vacancies that justifies
\par
\par a slow down in the Senate on the confirmation of nominees for
\par
\par judicial positions. While the Department did once, in the
\par
\par fall of 1994, characterize a 4.7 percent vacancy rate in the
\par
\par federal judiciary as the equivalent of the Department of

\par
\par Labor full employment' standard, that characterization was
\par
\par intended simply to emphasize the hard work and productivity
\par
\par of the Administration and the Senate in reducing the
\par
\par extraordinary number of vacancies in the federal Article III
\par
\par judiciary in 1993 and 1994. Of course, there is a certain
\par
\par small vacancy rate, due to retirements and deaths and the
\par
\par time required by the appointment process, that will always
\par
\par exist. The current vacancy rate is 11.3 percent. It did reach
\par
\par 12 percent this past summer. The President and the Senate
\par
\par should continually be working diligently to fill vacancies as
\par
\par they arise, and should always strive to reach 100 percent
\par
\par capacity for the federal bench.
\par
\par
\par }}\pard \fi360\sb120\widctlpar\adjustright {At no time has the Clinton administration stated that it believes
\par
\par }}\pard \widctlpar\adjustright { that 7 percent vacancies on the federal bench is acceptable or a
\par
\par virtually full federal bench. Only Republicans have expressed that
\par
\par opinion. As the Justice Department noted two years ago in response to
\par
\par an inquiry on this very questions, the Senate should be "working
\par
\par diligently to fill vacancies as they arise, and should always strive to

\par
\par reach 100 percent capacity for the federal bench.''
\par
\par
\par }}\pard \fi360\sb120\widctlpar\adjustright {Indeed, I informed the Senate of these facts in a statement in the
\par
\par }}\pard \widctlpar\adjustright { Congressional Record on July 7, 1998, so that there would be no future
\par
\par misunderstanding or misstatement of the record. Nonetheless, in spite
\par
\par of the facts and in spite of my July 1998 statement, these misleading
\par
\par statements continue to be repeated.
\par
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\par }}\pard \fi360\sb120\widctlpar\adjustright {The Senate should get about the business of voting on the
\par

\par }\pard \widctlpar\adjustright { confirmation
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\par
\par [*S7534]
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\par
\par of the scores of judicial nominations that have been delayed with
\par
\par justification for too long. We must redouble our efforts to work with
\par
\par the President to end the longstanding vacancies that plague the federal

\par
\par courts and disadvantage all Americans. That is our constitutional
\par
\par responsibility. It should not be shirked.
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\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I am sorry that Senator Hatch f
eels that he is being attacked from
\par
\par }\pard \widctlpar\adjustright { all sides. I regret that some on his side
of the aisle and other
\par
\par critics have sought to prevent him from doing his duty. I have gone out

\par
\par of my way to compliment the Chairman when praise was warranted and to
\par
\par keep my criticism from becoming personal.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {With respect to the Senate's tr
eatment of nominees who are women or
\par
\par }\pard \widctlpar\adjustright { minorities, I remain vigilant. I have said
that I do not regard Senator
\par
\par Hatch as a biased person. I have also been outspoken in my concern
\par
\par about the manner in which we are failing to consider qualified minority

\par
\par and women nominees over the last four years. From Margaret Morrow and
\par
\par Margaret McKeown and Sonia Sotomayor, through Richard Paez and Marsha
\par
\par Berzon, and including Judge James Beatty, Judge James Wynn, Roger
\par
\par Gregory, Enrique Moreno and all the other qualified women and minority
\par
\par nominees who have been delayed and opposed over the last four years, I
\par
\par have spoken out. The Senate may never remove the blot that occurred
\par
\par last October when the Republican Senators emerged from a Republican
\par
\par Caucus to vote lockstep against Justice Ronnie White to be a Federal

\par
\par District Court Judge in Missouri.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {The United States Senate is the scene where some 50 years ago, in
\par
\par }\pard \widctlpar\adjustright { October 1949, the Senate confirmed President Truman's nomination of
\par
\par William Henry Hastie to the Court of Appeals for the Third Circuit, the

\par
\par first Senate confirmation of an African American to our federal
\par
\par district courts and courts of appeal. This Senate is also where some 30

\par
\par years ago the Senate confirmed President Johnson's nomination of
\par
\par Thurgood Marshall to the United States Supreme Court.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {And this is where last October, the Senate wrongfully rejected
\par
\par }\pard \widctlpar\adjustright { President Clinton's nomination of Justice Ronnie White. That vote made
\par
\par me doubt seriously whether this Senate, serving at the end of a half
\par
\par century of progress, would have voted to confirm Judge Hastie or
\par
\par Justice Marshall.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {On October 5, 1999, the Senate Republicans voted in lockstep to
\par
\par }\pard \widctlpar\adjustright { reject the nomination of Justice Ronnie White to the federal court in
\par
\par Missouri--a nomination that had been waiting 27 months for a vote. For
\par
\par the first time in almost 50 years a nominee to a federal district court

\par
\par was defeated by the United States Senate. There was no Senate debate
\par
\par that day on the nomination. There was no open discussion--just that
\par
\par which took place behind the closed doors of the Republican caucus lunch

\par
\par that led to the party-line vote.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {It is unfortunate that the Republican Senate has on a number of
\par

\par }\pard \widctlpar\adjustright { occasions delayed consideration of too many women and minority

\par

\par nominees. The treatment of Judge Richard Paez and Marsha Berzon are

\par

\par examples from earlier this year. Both of these nominees were eventually

\par

\par confirmed this past March by wide margins.

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\par }\pard \fi360\sb120\widctlpar\adjustright {I have been calling for the Senate to work to ensure that all

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\par }\pard \widctlpar\adjustright { nominees are given fair treatment, including a fair vote for the many

\par

\par minority and women candidates who remain pending. According to the

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\par report released last September by the Task Force on Judicial Selection

\par

\par of Citizens for Independent Courts, the time it has been taking for the

\par

\par Senate to consider nominees has grown significantly and during the

\par

\par 105th Congress, minorities and women nominees took significantly longer

\par

\par to gain Senate consideration than white male nominees: 60 days longer

\par

\par for non-whites, and 65 days longer for women than men. The study

\par

\par verified that the time to confirm female nominees was now significantly

\par

\par longer than that to confirm male nominees--a difference that has defied

\par

\par logical explanation. They recommend that "the responsible officials

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\par address this matter to assure that candidates for judgeships are not

\par

\par treated differently based on their gender.''

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\par }\pard \fi360\sb120\widctlpar\adjustright {On July 13, 2000, President Clinton spoke before the NAACP Convention

\par

\par }\pard \widctlpar\adjustright { in Baltimore and lamented the fact that the Senate has been slow to act

\par

\par on his judicial nominees who are women and minorities. He said: "The

\par

\par quality of justice suffers when highly-qualified women and minority

\par

\par candidates, fully vested, fully supported by the American Bar

\par

\par Association, are denied the opportunity to serve for partisan political

\par
\par reasons.'' He went on to say: "The face of injustice is not
\par
\par compassion; it is indifference, or worse. For the integrity of the
\par
\par courts and the strength of our Constitution, I ask the Republicans to
\par
\par give these people a vote. Vote them down if you don't want them on.'' I

\par
\par agree with the President.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {The Senate should be moving for
ward to consider the nominations of
\par
\par }\pard \widctlpar\adjustright { Judge James Wynn, Jr. and Roger Gregory to
the Fourth Circuit. When
\par
\par confirmed, Judge Wynn and Mr. Gregory will be the first African-
\par
\par Americans to serve on the Fourth Circuit and will each fill a judicial
\par
\par emergency vacancy. Fifty years has passed since the confirmation of
\par
\par Judge Hastie to the Third Circuit and still there has never been an
\par
\par African-American on the Fourth Circuit. The nomination of Judge James
\par
\par A. Beatty, Jr., was previously sent to us by President Clinton in 1995.

\par
\par That nomination was never considered by the Senate Judiciary Committee
\par
\par or the Senate and was returned to President Clinton without action at
\par
\par the end of 1998. It is time for the Senate to act on a qualified
\par
\par African-American nominee to the Fourth Circuit. President Clinton spoke

\par
\par powerfully about these matters last week. We should respond not by
\par
\par misunderstanding or mischaracterizing what he said, but by taking
\par
\par action on this well-qualified nominees.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {In addition, the Senate should
act favorably on the nominations of
\par
\par }\pard \widctlpar\adjustright { Judge Helene White and Kathleen McCree Lew
is to the Sixth Circuit,
\par
\par Bonnie Campbell to the Eighth Circuit, and Enrique Moreno to the Fifth
\par
\par Circuit. Mr. Moreno succeeded to the nomination of Jorge Rangel on
\par
\par which the Senate refused to act last Congress. These are well-qualified

\par
\par nominees who will add to the capabilities and diversity of those
\par
\par courts. In fact, the Chief Judge of the Fifth Circuit declared that a
\par
\par judicial emergency exists on that court, caused by the number of
\par
\par judicial vacancies, the lack of Senate action on pending nominations,
\par
\par and the overwhelming workload.
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\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I am disappointed that the Comm
ittee has not reported the nomination
\par
\par }\pard \widctlpar\adjustright { of Bonnie Campbell to the Eighth Circuit.
She completed the nomination
\par
\par and hearing process two months ago and is strongly supported by Senator

\par
\par Grassley and Senator Harkin from her home state. She will make an
\par
\par outstanding judge.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {Filling these vacancies with qu
alified nominees is the concern of all
\par
\par }\pard \widctlpar\adjustright { Americans. The Senate should treat minorit
y and women and all nominees
\par
\par fairly and proceed to consider them without delay.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I think it was unfortunate that
the chairman tried to assign blame
\par
\par }\pard \widctlpar\adjustright { for the Senate's lack of progress on a num
ber of legislative items. I
\par
\par disagree with that assessment. He knows, as I do, that the Democratic
\par
\par leader made a proposal that would have moved the H-1B legislation and
\par
\par allowed votes on the humanitarian immigration issues. The Republicans
\par
\par refused Senator Daschle's offer. We all know the Democrats have not
\par
\par opposed the religious liberty bill Senator Kennedy helped develop. We
\par
\par all know we have been pressing for reauthorization of the Violence
\par
\par Against Women's Act for many months. It is not fair to suggest
\par
\par Democrats are holding that up.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I will give you one other examp
le. I am getting calls from police

\par
\par }\pard \widctlpar\adjustright { organizations, and I see the distinguished assistant minority leader,
\par
\par the Senator from Nevada, who served as a police officer. He will
\par
\par understand this. I am getting calls from police organizations all over
\par
\par the country.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {They ask me: Why hasn't the Campbell-Leahy bill to provide more
\par
\par }\pard \widctlpar\adjustright { bulletproof vests passed? Why hasn't it gone through the Senate? I tell
\par
\par my friend from Nevada what I told them. I said: My friend from Nevada,
\par
\par who is the Democratic whip, has checked, as I have, with every single
\par
\par Democrat, and every single Democrat is willing to pass it this minute
\par
\par by unanimous consent. We said that to the Republican leader.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {We were told there was an objection on the Republican side. My
\par
\par }\pard \widctlpar\adjustright { goodness. Have we gotten so partisan that a bill
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\par
\par [*S7535]
\par
\par
\par
\par sponsored by the distinguished Senator from Colorado, Mr. Campbell, by
\par
\par myself and the distinguished chairman of the Senate Judiciary
\par
\par Committee, Mr. Hatch, a bill to provide bulletproof vests--cosponsored
\par
\par by the distinguished Senator from Nevada, Mr. Reid, as well--that a
\par
\par bill to provide bulletproof vests for law enforcement officers is being

\par
\par stalled by Republican objections? That is wrong.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {If that bill were allowed to come to the floor for a vote, I am
\par
\par }\pard \widctlpar\adjustright { willing to bet--in fact, I know because we have already checked--that
\par
\par every Democratic Senator would vote for it. But I am also willing to
\par

\par bet that virtually every Republican Senator would vote for it. This is
\par
\par not a Democrat or Republican bill. In fact, Senator Campbell and I have

\par
\par specifically worked to make sure it is not a partisan bill.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {So I tell my friends from law e
nforcement: Please call the other side
\par
\par }\pard \widctlpar\adjustright { of the aisle. I am convinced that a majori
ty of Republicans support it,
\par
\par but somebody on the Republican side is holding it up. The Democrats are

\par
\par willing to pass it immediately.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {The chairman of the Judiciary C
ommittee knows we were working toward
\par
\par }\pard \widctlpar\adjustright { a bankruptcy bill until the Republicans de
cided to end bipartisan
\par
\par discussion and negotiate among themselves and not negotiate with the
\par
\par Democrats.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {He knows we should have passed
the Madrid Protocol Implementation Act
\par
\par }\pard \widctlpar\adjustright { weeks, if not months, ago. I tell the busi
ness community that
\par
\par continuously asks me that every single Democrat is willing to move
\par
\par forward with it. It has been stalled on the Republican side.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {In fact, let me take a bill inv
olving the two of us. The Hatch-Leahy
\par
\par }\pard \widctlpar\adjustright { juvenile crime bill passed the Senate in M
ay of 1999. Again, I ask my
\par
\par friend from Nevada: As I recall, that passed with 73 votes, Democrats
\par
\par and Republicans, the majority of both parties. It passed the Senate
\par
\par with 73 votes.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {My friend from Utah is the chai
r of the House-Senate conference. But
\par
\par }\pard \widctlpar\adjustright { we haven't convened in almost a year. It i
s a bill that should have

\par
\par been enacted last year. But we will not even have a conference.
\par
\par Seventy-three Senators voted for that bill--73. We can't get the
\par
\par conference to meet on it and the Senate controls the conference.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {These are a lot of items, such
as the H-1B legislation, the religious
\par
\par }\pard \widctlpar\adjustright { liberty bill, the Violence Against Women A
ct reauthorization, the
\par
\par bulletproof vest bill, the Madrid Protocol Implementation Act, the
\par
\par Hatch-Leahy juvenile crime bill, the bankruptcy bill. These are things
\par
\par that can move forward. But there seems to be no movement from the other

\par
\par side.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I will continue to try to find
ways to work with the distinguished
\par
\par }\pard \widctlpar\adjustright { chairman, my friend from the Judiciary Com
mittee, to make progress. I
\par
\par point out that we worked together on civil asset forfeiture reform, and

\par
\par it passed. We worked together on intellectual property and antitrust
\par
\par matters. Those measures pass with a majority of Republicans and
\par
\par Democrats joining us. But now we find legislation on the bulletproof
\par
\par vest bill, which most of us agree on, that we cannot get passed. We
\par
\par find nominations on which we cannot get a vote--even when the soon to
\par
\par be Republican nominee for the Presidency, Governor Bush, said we ought
\par
\par to vote them up or down within 60 days. We can't get votes on them.
\par
\par Some stay stalled for months and years by humiliating delay.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I have spoken about how humilia
ting it must be to somebody who is
\par
\par }\pard \widctlpar\adjustright { nominated for a judgeship--the pinnacle of
their legal career. They get
\par
\par nominated. The American Bar and others looked at them, and said: This
\par
\par is an outstanding person, an outstanding lawyer, and they would be a
\par

\par terrific jurist. Usually we get inundated with letters from lawyers--
\par
\par Republicans and Democrats alike--who say they know this man or woman
\par
\par and he or she would make a superb judge. The FBI and others do the
\par
\par background check --as thorough as you can imagine, such that most
\par
\par people in private life would never be able to put up with it. Their
\par
\par privacy is just shredded. They come back and say: This is an
\par
\par outstanding person.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {If they are in private practice
, they are congratulated by their
\par
\par }\pard \widctlpar\adjustright { partners in their firm. They say how wonde
rful it is. They realize, of
\par
\par course, that the nominee can't take on any more new cases because no
\par
\par one wants conflicts of interest. They kind of suggest as soon as they
\par
\par have this party that the nominee can sort of move out so the rest of
\par
\par the law firm can go forward.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {The nominees wait and wait and
wait and wait. Nobody is against them,
\par
\par }\pard \widctlpar\adjustright { but they can't get a hearing. They can't g
et a vote. Then, if the
\par
\par public pressure grows enough, if they are in a high profile, they may
\par
\par get a hearing. Then if the pressure continues, they may get a Committee

\par
\par vote. And then, if the pressure really builds and the Democratic leader

\par
\par and the Democratic caucus insist, they may get a Senate vote on
\par
\par confirmation. When they get voted, they get confirmed--with the
\par
\par exception of Justice White--by 90 to 10, or 95 to 5, and many times
\par
\par unanimously. But their lives has been put on hold for 2 or 3 years.
\par
\par Their authority as a judge has been diminished because of that. It is
\par
\par humiliating to them.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {Frankly, it is humiliating to t
he Senate. It is beneath this great
\par

\par }\pard \widctlpar\adjustright { body. I have served here for over 25 years
. I can't think of any
\par
\par greater honor that could come to me than to have the people of Vermont
\par
\par allow me to serve here. I should put on my tombstone, other than
\par
\par husband and father, that I was a United States Senator.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {I have always thought of this S
enate as the conscience of the Nation.
\par
\par }\pard \widctlpar\adjustright { We are not handling the conscience of this
Nation very well.
\par
\par
\par }\pard \fi360\sb120\widctlpar\adjustright {We have a responsibility to uph
old the judiciary. If we allow it to
\par
\par }\pard \widctlpar\adjustright { be tattered, if we allow it to be shredded
, if we allow it to be
\par
\par humiliated, how can a democracy of a quarter of a billion people uphold

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\par our laws? How can the country have respect both for the laws and the
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\par courts that administer them, if we in the Senate, the most powerful
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\par legislative body in this country, don't show that same respect? If we
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\par diminish that, it will be an example to be followed by the rest of the
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\par people in this country.
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\par }\pard \fi360\sb120\widctlpar\adjustright {There are only 100 of us who ha
ve the privilege of serving here at
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\par }\pard \widctlpar\adjustright { any given time to represent a quarter of a
billion Americans. Sometimes
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\par we should think more of that responsibility than partisan politics.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. President, I yield the floo
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\par }\pard \fi360\sb120\widctlpar\adjustright {The PRESIDING OFFICER. The Sena
tor from Pennsylvania.
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\par }\pard \widctlpar\adjustright {
\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. SANTORUM. Mr. President, I
suggest the absence of a quorum.
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\par }\pard \fi360\sb120\widctlpar\adjustright {The PRESIDING OFFICER. The cler
k will call the roll.

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\par }\pard \fi360\sb120\widctlpar\adjustright {The legislative clerk proceeded to call the roll.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. REID. Mr. President, I ask unanimous consent that the order for
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\par }\pard \widctlpar\adjustright { the quorum call be rescinded.
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\par }\pard \fi360\sb120\widctlpar\adjustright {The PRESIDING OFFICER. Without objection, it is so ordered.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. REID. Mr. President, before my friend from Vermont leaves, let me
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\par }\pard \widctlpar\adjustright { say a few things. In this body, we tend not to give the accolades to
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\par our fellow Senators that we should. I want the Senator from Vermont to
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\par know how the entire Democratic caucus supports and follows the lead of
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\par this man on matters related to the judiciary. He has done an
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\par outstanding job leading the Democratic conference through this wide-ranging jurisdictional authority of the Judiciary Committee.
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\par }\pard \fi360\sb120\widctlpar\adjustright {We are very proud of the work that Pat Leahy does. The people of
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\par }\pard \widctlpar\adjustright { Vermont should know that, first of all, he is always looking after the
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\par people of Vermont. I am from a State 3,000 miles away from Vermont, the

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\par State of Nevada. People in Nevada should, every day, be thankful for
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\par the work the Senator does, not only for the State of Vermont but for
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\par the country.
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\par }\pard \fi360\sb120\widctlpar\adjustright {I want the Record to be spread with the fact that we in the minority
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\par }\pard \widctlpar\adjustright { are so grateful for the work the Senator from Vermont does for our
\par
\par country. The statement made today certainly outlines many of the
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\par problems we are having in the Senate, none of which are caused by the
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\par Senator from Vermont.

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\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. LEAHY. Mr. President, I thank my friend from Nevada. I must
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\par }\pard \widctlpar\adjustright { admit, in my 25 years, nobody has handled the job as whip the way the
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\par Senator has. In having the Senator as an ally on the floor, I come well

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\par armed, indeed.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. SANTORUM. I suggest the absence of a quorum.
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\par }\pard \widctlpar\adjustright {
\par }\pard \fi360\sb120\widctlpar\adjustright {The PRESIDING OFFICER. The clerk will call the roll.
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\par }\pard \fi360\sb120\widctlpar\adjustright {Mr. NICKLES. Mr. President, I ask unanimous consent that the order
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\par }\pard \widctlpar\adjustright { for the quorum call be rescinded.
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\par }\pard \fi360\sb120\widctlpar\adjustright {The PRESIDING OFFICER (Mr. Inhofe). Without objection, it is so
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\par }\pard \widctlpar\adjustright { ordered.
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\par SUBJECT: JUDGES\~(90%);\~CAUCUSES\~(78%);\~VOTERS AND VOTING\~(78%);\~
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\par LOAD-DATE: 07-26-2000
\par \sect }\sectd \sbknone\linex0\sectdefaultcl {\header \pard\plain \widctlpar\adjustright \f6\fs20 {\fs24
\par }}\pard\plain \widctlpar\adjustright \f6\fs20 {
\par }}===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mayra Martinez-Fernandez <MMartin4@doc.gov> (Mayra Martinez-Fernandez <MMA

CREATION DATE/TIME:17-OCT-2000 11:27:35.00

SUBJECT: Today's News

TO: Jeffrey L. Farrow (CN=Jeffrey L. Farrow/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TEXT:

THE SAN JUAN STAR

COVER: AMPHIBIOUS TRAINING RESUMES ON VIEQUES

NAVY RESUMES EXERCISES ON VIEQUES

by the Star staff and wire reports

Amphibious training on the Navy's Atlantic Fleet Weapons Training Facility on

Vieques began Monday evening, when a detachment of 200 Marines landed on Yellow Beach near the Navy's target range on the island. The maneuvers will

continue until Oct. 28. A Navy press release indicated that more than 31,000

US military personnel and an unknown number of NATO personnel were mobilized

for the joint naval exercises.

MEDICARE PAYMENT BOOST FOR PR RACES CONGRESSIONAL CLOCK

by Bob Friedman

The WH vowed Monday to push for the \$50 million annual increase in Medicare payments to island hospitals before Congress adjourns, but other developments

did not appear to bode well for PR getting the funds. Jeffrey Farrow said that the island Medicare raise was "a high priority" for President Clinton, and that the administration "has not at all given up on it." The legislation to increase funding to Medicare providers, including those in PR,

is expected to be tagged onto an unrelated bill. That would happen, according to an AP report, under rules that will deny Democrats the ability to seek amendments. Republicans may have dropped the Medicare help to PR in

order to get the Clinton administration to give in on other provisions that it opposes. The bargaining tool approach could mean that the extra Medicare

money to the island would be put back into the legislation in a tradeoff.

PIERAS TO DECIDE WHETHER TO RETURN 3 CASES TO LOCAL COURT

Days after rejecting that Puerto Ricans could vote for president in the upcoming elections, the 1st Court of Appeals on Monday ordered a federal judge to reconsider his petition to assume jurisdiction over three other similar cases. Senior US District Judge Jaime Pieras will have to decide whether to return to the local court those cases filed by the PIP, the Pro-ELA organization and PDP Sen. Eudaldo Baez Galib. Meanwhile, Gregorio Igartua de la Rosa, the lawyer who filed the lawsuit asking that Puerto Ricans be allowed the right to vote, said that he was considering whether to

appeal the 1st Circuit Court's decision. Going to the US Supreme Court is not the only remedy, Igartua said. The plaintiff could also ask the 1st Circuit for a rehearing "in bank," where all the judges on the appeals

court
could look at the case.

EL VOCERO

COVER: CLINTON NEGOTIATES WITH CONGRESS
ADDITIONAL \$100 MILLION FOR PR MEDICARE
INCREASE FAVORS REIMBURSEMENT HOSPITAL EXPENSES

CLINTON USES HIS POWER TO INCREASE MEDICARE FOR PR

by Lina Younes

The White House is willing to use its political power to make sure there is an increase in the formula for the Medicare reimbursement of expenses to PR hospitals. "We are still in negotiations. Like it has happened in many other occasions when it has to do with funds for PR, we will continue working to achieve our objectives," Jeffrey Farrow said. That was certainly the case with programs such as CHIP, the reimbursement of the rum tax, and the \$2.5 million to clarify the status options.

TWO PUERTO RICANS IN GORE'S LIST FOR SUPREME COURT

by Lina Younes

Puerto Rican Judges Jose Cabranes y Sonia Sotomayor are possible candidates to the US Supreme Court if Gore wins the elections.

PRESIDENTIAL VOTE

NO FROM BOSTON TO PIP "MANDAMUS"

by Carmen Enid Acevedo

The First Circuit of Boston yesterday denied the "Mandamus" petition filed by the PIP asking the court to order Judge Pieras to return the lawsuits questioning the constitutionality of the Presidential Vote Law to the local courts, because it thinks Judge Pieras will do it on his own after last Friday's decision.

ROSSELLO AFFIRMS

WILL MAKE CLINTON ORDER ON VIEQUES TO BE MET

by Marilynna Rodriguez

Gov. Rossello said that his intention is to make sure the Presidential Order on Vieques as it was written is met. "I think PR has demonstrated that it is complying with its part and, therefore, it is important the President acts to make sure his directives are implemented from all angles," Rossello said. He said he still doesn't know the date he will travel to Washington since the President had to leave for Egypt.

SEE STEP FORWARD IN STATUS SOLUTION

by Lina Younes

In statements before their respective federal houses, Sen. Larry Craig and Rep. Patrick Kennedy labeled the appropriation of \$2.5 million to facilitate the status solution as "a historic step to move forward the process of self-determination" for the island. Both Craig and Patrick agreed that the legislation is historic because "represents the first authorization by Congress for the US citizens of PR to choose the final political status of their island." "Presidents since Truman had tried similar authorizations and each House had approved similar language in the past, but the same language had never been approved nor had it been put into effect as a law,"

they said. "By adopting this disposition as part of the unexpected expenses of the Office of the President, it is the intention of Congress to support a future vote in Puerto Rico and that efforts are coordinated with the Administration to provide realistic options to be included in the ballot of the next referendum," they said. "The final solution of the political status of PR will require Congress and the US citizens of PR to work together to make a selection based on status options clearly defined and consistent with the US Constitution. This action that we have taken is an important contribution towards that end," they concluded.

EL NUEVO DIA

COVER: EL NUEVO DIA POLL

RACE IS CLOSE

PNP CANDIDATE AHEAD BY 4 POINTS

EL NUEVO DIA POLL

PESQUERA IS AHEAD

If the elections were held today:

2000

			August
Pesquera	43%		40%
Calderon	39%		35%
Berrios	8%	7%	
Undecided	7%		10%
Did not answer	3%	3%	

Those not affiliated will vote for:

Pesquera	17%
Calderon	23%
Berrios	20%
Will not vote	2%
Did not say	6%

Undecided: the key to victory

Those who are undecided make 7% of the possible total number of likely voters

at this stage of the campaign. Among those who were able to say for who they were leading to vote: Pesquera 18%; Calderon 10%

How was the poll conducted:

Face-to-face interviews throughout the island (excluding Vieques and Culebra); 1,000 likely voters; with a margin of error of + or - 3%.

APPOINTMENT WITH CLINTON DELAYED

by Nilka Estrada Resto

The renewed crisis in the Middle East has caused that Gov.. Rossello's visit

to Washington be delayed until further notice. The version of the presidential directives approved by Congress, that now moves to the Office of

the President, seems not to have Rossello to pleased. "I will tell Clinton that if we need to stay with these dispositions, that the land be transferred

before 12/31," Rossello said. "I am going to the White House to try to make

sure that everything that is finally approved agrees with the presidential directives," Rossello said.

SILA UPSET FOR CHANGES TO DIRECTIVES

by Mildred Rivera

Calderon strongly blasted against the changes to the directives on Vieques, and said the "Navy has Rossello and Pesquera lobbying in favor of its presence in Vieques." In a press release Calderon said she does not accept

the changes imposed by Congress on the presidential directives for the Navy to leave Vieques. "The changes Congress did to the directives on Vieques show they are working to try to prolong the bombing, since they not even respected President Clinton's plan. We will not accept the Navy having the decision power on this matter, neither will we accept they will continue playing with the health and safety of the people of Vieques. Also, there is

not only this. They did not give us the land. They gave the land to the Department of the Interior. If they already changed the date for the transfer of the land, they could try changing it again in April and continue

postponing the date at their will. We will not accept it," Calderon said.

ANOTHER ISLAND IS OFFERED TO THE NAVY FOR \$35 MILLIONS

by Leonor Mulero

The owners of the Panamenian island San Jose want to sell it to the Navy to use it as a substitute site for training, the legal representative of the owners, Emil Danciu, said. He said the price is \$35 millions. The island is

12,000 acres and was used as a training site during World War II. On October

9, Dancio sent the offer to Commander Michael Peck. In the letter, Dancio said Jeffrey Farrow asked for the information to be sent to Peck and Sec. Danzig. In an October 11 letter, Sen. Thompson said "the Committee does not

want any informatiion on San Jose." He also said "the Committee may never find an alternative because the Navy would like to stay where it is in Vieques."

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: "LEXIS ("LEXIS /NEXIS Print Delivery" <lexis-nexis@prod.lexis-nexis.com>

CREATION DATE/TIME:17-NOV-2000 12:00:58.00

SUBJECT: LEXIS(R)-NEXIS(R) Email Request (59:0:17238496)

TO: Peter I. Belk (CN=Peter I. Belk/OU=WHO/O=EOP [WHO])

READ:UNKNOWN

TEXT:

100297

Print Request: Current Document: 2

Time of Request: November 17, 2000 11:53 am EST

Number of Lines: 54

Job Number: 59:0:17238496

Client ID/Project Name:

Research Information:

News Group File, All
sonia w/1 sotomayor and sex w/1 discrimination

Note:

□,
PAGE 1

2 of 5 DOCUMENTS

Copyright 1997 The New York Times Company

The New York Times

May 20, 1997, Tuesday, Late Edition - Final

SECTION: Section B; Page 6; Column 3; Metropolitan Desk

LENGTH: 478 words

HEADLINE: Jury Finds Bank Must Pay Damages for Sex Discrimination

BYLINE: By BENJAMIN WEISER

BODY:

When Victoria Greenbaum went to work for a major bank in New York City

nine years ago, she says she was promised a vice presidency within three months. She never got it. And even though she made \$2 million one year for the bank in trading profits, she said she received only a \$20,000 bonus, while her male co-workers received much more.

Mrs. Greenbaum sued, and on Friday afternoon, a Federal jury agreed that she had been discriminated against because she was a woman. The jury in United States District Court in Manhattan returned a verdict of \$1.57 million in damages against her employer, the New York branch of Svenska Handelsbanken, Sweden's largest bank.

Mrs. Greenbaum described her workplace as one where men talked of visiting strip shows and one man asserted that women should not have the right to vote. The bank favored young employees, she said, and later dismissed her after she complained to the State Division of Human Rights.

In its verdict, the jury said that the bank "had a continuous policy and practice of discrimination" against Mrs. Greenbaum, 47, and that it had retaliated against her for filing her complaint.

The verdict, which included \$1.25 million in punitive damages, is part of a new wave of cases in which plaintiffs' lawyers seek punitive awards in Federal employment discrimination suits, said Wendy Williams, a professor at Georgetown University Law Center.

Congress has only allowed punitive awards in such cases since 1991, creating what Professor Williams called "a new set of concerns for institutions."

Mrs. Greenbaum and her lawyers said they felt vindicated. But the bank's lawyers contended that the evidence did not support the verdict and said they would appeal.

They said they also felt vindicated, noting that the jury had rejected Mrs. Greenbaum's claims of age discrimination and sexual harassment. They said they
□,
PAGE 2

The New York Times, May 20, 1997

planned to ask the judge, Sonia Sotomayor, to reduce or eliminate the punitive damages, which in any case would be capped by law at \$300,000.

During the trial, there was testimony that some male bank officials found Mrs. Greenbaum an "aggressive" and "abrasive woman." But Mrs. Greenbaum's lawyer, Robert Sapir, told the jury that the bank was dominated by an "old-boy

network," where male executives created "a culture that discriminated against women and discriminated against older people."

Mrs. Greenbaum testified that when she complained about the comments about strip shows, the bank did not act. Her lawyers asserted that she had received positive evaluations, including recommendations for promotions.

The bank's lawyer, Peter Hillman, questioned the veracity of her claims, telling the jury that while the bank was aware of her desire for a promotion and a higher salary, "she was not qualified to be a vice president" and was paid what her contributions merited.

LANGUAGE: ENGLISH

LOAD-DATE: May 20, 1997

□,

100297

***** Print Completed *****

Time of Request: November 17, 2000 11:53 am EST

Print Number: 59:0:17238496

Number of Lines: 54

Number of Pages: 2

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: "LEXIS ("LEXIS /NEXIS Print Delivery" (R) (R) [UNKNOWN])

CREATION DATE/TIME:17-NOV-2000 12:00:57.00

SUBJECT: LEXIS(R)-NEXIS(R) Email Request (711:0:17238606)

TO: Peter I. Belk (CN=Peter I. Belk/OU=WHO/O=EOP [WHO])

READ:UNKNOWN

TEXT:

100297

Print Request: Current Document: 7

Time of Request: November 17, 2000 11:56 am EST

Number of Lines: 482

Job Number: 711:0:17238606

Client ID/Project Name:

Research Information:

Federal Cases, Combined Courts
judge w/1 sotomayor

Note:

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PAGE 1

7 of 217 DOCUMENTS

FELIX SUTHERLAND, Petitioner, v. JANET RENO, Attorney
General of the United States, Respondent.

Docket No. 99-4145

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

228 F.3d 171; 2000 U.S. App. LEXIS 23363

July 12, 2000, Submitted

September 14, 2000, Decided

SUBSEQUENT HISTORY:

[*1]

As Amended September 20, 2000.

PRIOR HISTORY:

Appeal from an order of the Board of Immigration Appeals affirming that petitioner was eligible for removal under 8 U.S.C. @ 1227(a)(2)(E)(i) as an alien convicted of a crime of domestic violence based upon his Massachusetts conviction for indecent assault and battery on a person over the age of fourteen.

DISPOSITION:

Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner alien appealed the judgment of the Board of Immigration Appeals, which found that petitioner was eligible for removal as an alien who committed a crime of domestic violence.

OVERVIEW: Petitioner was deemed eligible for removal as an alien convicted of a

crime of domestic violence, based upon petitioner's state conviction for indecent assault and battery on a person over the age of fourteen.

Petitioner

maintained that the crime was not a crime of violence and that the victim, petitioner's stepdaughter, was not a protected person under the state domestic

violence laws. The court agreed with the lower court's judgment.

Petitioner's

offense satisfied the statutory definition of a crime of violence, since the

element of the offense requiring a non-consensual act by its nature involved a

substantial risk that physical force may be used, regardless of whether such

force was in fact used. Further, petitioner's victim was a person protected from

domestic violence under state law, since the victim was a member of petitioner's

household, and there was no requirement that the victim obtain a protective order prior to being entitled to protection under the domestic violence laws.

•

OUTCOME: Order was affirmed; petitioner alien was eligible for removal for commission of a crime of domestic violence, since the non-consensual element of

indecent assault and battery by its nature involved a substantial risk of force,

and no protective order was required to permit the victim, as a member of petitioner's household, to be protected by the state domestic violence laws.

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PAGE 2

228 F.3d 171; 2000 U.S. App. LEXIS 23363, *1

CORE CONCEPTS

Administrative Law : Judicial Review : Standards of Review : General Rules
When reviewing an agency determination, federal courts must accord substantial
deference to an agency's interpretation of the statutes it is charged with

administering. In such circumstances, where the relevant statutory provision is silent or ambiguous, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Administrative Law : Judicial Review : Standards of Review : General Rules
In contrast to situations where a federal agency is interpreting a statute it is charged with administering, courts owe no deference to an agency's interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.

Immigration Law : Judicial Review : Scope & Standards of Review
Where the Board of Immigration Appeals (BIA) is interpreting a provision of the Immigration and Naturalization Act, deference is warranted, but where the BIA is interpreting state or federal criminal laws, the court must review its decision de novo.

Immigration Law : Removal & Deportation : Grounds : Criminal Activity
See 8 U.S.C.S. @ 1227(a)(2)(E)(i).

Immigration Law : Removal & Deportation : Grounds : Criminal Activity
In the context of determining an alien's removal status for his or her criminal activity, whether a petitioner's crime constituted a crime of domestic violence under 8 U.S.C.S. @ 1227(a)(2)(E)(i) involves a two-pronged analysis: (1) whether petitioner's crime was a crime of violence as defined by 18 U.S.C.S. @ 16; and (2) whether petitioner's victim was a protected person within the meaning of 8 U.S.C.S. @ 1227(a)(2)(E)(i).

Criminal Law & Procedure : Criminal Offenses
See 18 U.S.C.S. @ 16.

Criminal Law & Procedure : Criminal Offenses
A crime of violence under 18 U.S.C.S. @ 16(b) has two constituent elements: (1) that the crime is a felony; and (2) that the crime, by its nature, involves a substantial risk that physical force may be used.

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
See Mass. Gen. Laws ch. 265, @ 13H.

Criminal Law & Procedure : Sentencing : Imposition of Sentence
Under federal law, a crime is a felony if the maximum term of imprisonment authorized for the offense is more than 1 year. 18 U.S.C.S. @ 3559(a).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
In Massachusetts, the crime of indecent assault and battery on a person over the

age of fourteen carries a maximum term of incarceration of five years in a state prison or two and one-half years in a jail or house of correction. Mass. Gen. Laws ch. 265, @ 13H.

□,
PAGE 3

228 F.3d 171; 2000 U.S. App. LEXIS 23363, *1

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
Massachusetts law defines the crime of indecent assault and battery on a person over the age of fourteen as a touching that when, judged by the normative standard of societal mores, is violative of social and behavioral expectations, in a manner which is fundamentally offensive to contemporary moral values and which the common sense of society would regard as immodest, immoral, and improper. So defined the term indecent affords a reasonable opportunity for a person of ordinary intelligence to know what is prohibited.

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
Lack of consent is also a requisite element of a violation of Mass. Gen. Laws ch. 265, @ 13H.

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
Any violation of Mass. Gen. Laws ch. 265, @ 13H, by its nature, presents a substantial risk that force may be used in order to overcome the victim's lack of consent and accomplish the indecent touching.

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
Immigration Law : Removal & Deportation : Grounds : Criminal Activity
In the context of an alien's removal status under 8 U.S.C.S. @ 1227(a)(2)(E)(i) for committing a crime of domestic violence, because the crime of sexual abuse of a child involves a non-consensual act upon another person, there is a substantial risk that physical force may be used in the course of committing the offense. It does not matter whether physical force is actually used. Sexual abuse of a child is therefore a crime of violence under 18 U.S.C.S. @ 16(b).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault
Immigration Law : Removal & Deportation : Grounds : Criminal Activity
In the context of an alien's removal status under 8 U.S.C.S. @ 1227(a)(2)(E)(i) for committing a crime of domestic violence, in indecent assault and battery cases, the non-consent of the victim is a touchstone for determining whether a crime involves a substantial risk that physical force against the person may be used. 18 U.S.C.S. @ 16(b).

Criminal Law & Procedure : Criminal Offenses : Crimes Against the Person :

Domestic Offenses

Mass. Gen. Laws ch. 209A generally protects household members from domestic abuse.

Criminal Law & Procedure : Criminal Offenses : Crimes Against the Person : Domestic Offenses

See Mass. Gen. Laws ch. 209A, @ 1.

Criminal Law & Procedure : Criminal Offenses : Crimes Against the Person : Domestic Offenses

In the context of interpreting the laws governing domestic violence crimes under

Mass. Gen. Laws ch. 209A, Mass. Gen. Laws ch. 209A, @ 1 defines family or household members to include persons who are or were residing together in the same household.

Criminal Law & Procedure : Criminal Offenses : Crimes Against the Person : Domestic Offenses

See Mass. Gen. Laws ch. 209A, @ 6.

□,

PAGE 4

228 F.3d 171; 2000 U.S. App. LEXIS 23363, *1

Criminal Law & Procedure : Criminal Offenses : Crimes Against the Person : Domestic Offenses

Mass Gen. Laws ch. 209A, @ 6 provides that, even when a protective order is not

in place, an officer shall arrest the alleged abuser whenever he has probable

cause to believe that the perpetrator has either (1) committed a felony; (2) committed a misdemeanor involving abuse; or (3) committed an assault and battery.

COUNSEL:

Robert D. Kolken, Sacks & Kolken, Buffalo, NY (Eric W. Schultz, on the brief), for petitioner.

Diogenes P. Kekatos, Assistant United States Attorney for the Southern District

of New York, for Mary Jo White, United States Attorney for the Southern District

of New York (Jeffrey Oestericher, Assistant United States Attorney for the Southern District of New York, on the brief), for respondent.

JUDGES:

Before: WALKER, POOLER, and SOTOMAYOR, Circuit Judges.

OPINIONBY:

SOTOMAYOR

OPINION:

AMENDED OPINION

SOTOMAYOR, Circuit Judge:

Felix Sutherland, a citizen of Trinidad and a permanent resident of the

United States, petitions this Court for review of an order of the Board of Immigration Appeals ("BIA") affirming that he is eligible for removal under 8 U.S.C. @ 1227 [*2] (a)(2)(E)(i) as an alien convicted of a crime of domestic violence based upon his July 1998 conviction in Massachusetts for indecent assault and battery on a person over the age of fourteen. Petitioner claims that his conviction does not satisfy either of the two requisite elements for a "crime of domestic violence" under 8 U.S.C. @ 1227(a)(2)(E)(i). Specifically, he contends that (1) his offense was not a "crime of violence" within the meaning of 18 U.S.C. @ 16(b); and (2) his victim was not protected from his acts by the domestic or family violence laws of Massachusetts. For the reasons discussed, we conclude that petitioner is removable under 8 U.S.C. @ 1227(a)(2)(E)(i) as an alien who was convicted of a crime of domestic violence and affirm the BIA's decision.

BACKGROUND

Petitioner, a citizen of Trinidad, entered this country as a lawful permanent resident on January 20, 1992. In April 1998, petitioner was charged with indecent assault and battery on a person over the age of fourteen in violation of Mass. Gen. Laws ch. 265, @ 13H (1990), n1 for allegedly reaching down the pajama pants of his 19-year-old [*3] stepdaughter, who was residing in his household at the time of the incident. On July 27, 1998, petitioner pleaded guilty to the charge and was sentenced to eleven months' incarceration, suspended, and was placed on probation for a term of three years. n2

□,

PAGE 5

228 F.3d 171; 2000 U.S. App. LEXIS 23363, *3

n1 Petitioner was originally charged with indecent assault and battery on a mentally retarded person in violation of Mass. Gen. Laws ch. 265, @ 13F, but that charge was later stricken and substituted with a charge under Mass. Gen. Laws ch. 265, @ 13H.

n2 As part of his sentence, petitioner was also referred for sex offender evaluation and treatment, and was ordered not to have any contact with the victim.

Based on this conviction, the Immigration and Naturalization Service ("INS") commenced removal proceedings against petitioner on August 24, 1998,

charging
that he was removable under 8 U.S.C. @ 1227(a)(2)(E)(i). At his removal hearing,
petitioner admitted that he was convicted under Mass. Gen. Law ch. 265, @ 13H,
but [*4] denied that his conviction was for a "crime of domestic violence" as defined under 8 U.S.C. @ 1227(a)(2)(E)(i). On January 20, 1999, Immigration Judge John B. Reid ("IJ") rejected petitioner's argument and determined that he was removable under 8 U.S.C. @ 1227(a)(2)(E)(i) because his @ 13H conviction constituted a crime of domestic violence.

Reviewing the matter on appeal, the BIA noted that an offense does not fall within the definition of a "crime of domestic violence" under 8 U.S.C. @ 1227(a)(2)(E)(i) unless (1) the crime is a "crime of violence" as defined in 18 U.S.C. @ 16, and (2) the person against whom the crime was committed was a "protected person" within the meaning of @ 1227(a)(2)(E)(i). Applying its traditional categorical approach to criminal convictions, the BIA determined that (1) petitioner's crime constituted a "crime of violence" because the crime, as defined by Massachusetts case law, requires an intentional touching that is both indecent and nonconsensual and, therefore, involves a substantial risk that physical force may be used, and (2) petitioner's victim was [*5] a "protected person" under Massachusetts law. The BIA therefore affirmed the IJ's decision and dismissed petitioner's appeal on August 27, 1999.

Petitioner now appeals from the BIA's decision pursuant to 8 U.S.C. @ 1252(a)(1).

DISCUSSION

1. Standard of Review

When reviewing an agency determination, federal courts must accord substantial deference to an agency's interpretation of the statutes it is charged with administering. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)); *Michel v. INS*, 206 F.3d 253, 260 (2d Cir. 2000). In such circumstances, where the relevant statutory provision is silent or ambiguous, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 843-44.

In contrast to situations where a federal agency is interpreting a statute it is charged with administering, "courts owe no deference [*6] to an

agency's

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interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws." Michel, 206 F.3d at 262 (opinion of Sotomayor, J.). n3 In Michel, this Court adopted the position of the Fifth Circuit that "where the BIA is interpreting [a provision] of the [Immigration and Naturalization Act ("INA")], Chevron deference is warranted, but where the BIA is interpreting state or federal criminal laws, we must review its decision de novo." Id. (citing Hamdan v. INS, 98 F.3d 183, 185 (5th Cir. 1996) ("We must uphold the BIA's determination [of] what conduct constitutes moral turpitude under the INA if it is reasonable. However, a determination of the elements of a [state] crime...for purposes of deportation pursuant to the INA is a question of law, which we review de novo.")).

n3 We note that in Michel, Judge Calabresi authored the majority opinion for Parts I-III and Judge Sotomayor authored the majority opinion for Parts IV-V. See Michel, 206 F.3d at 256, 261.

[*7]

Notwithstanding this Court's ruling in Michel, the Government adopts the remarkable position that "to the extent the BIA's determination required the examination of federal and state criminal law, [] the need for deference to the BIA's judgment is not diminished." Respondent's Br. at 16. Apparently, the Government regards this Court's statement of the standard of review in Michel as nonbinding dictum. We disagree. See Michel, 206 F.3d at 263 (holding "upon a de novo review of the relevant criminal statute...that all violations of New York Penal Law @ 165.40 are, by their nature, morally turpitudinous").

In support of its position, the Government cites Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996), to illustrate an instance where "this Court has deferred to the BIA's administration of the INA, even at the expense of departing from its own contrary interpretations of federal criminal statutes." Respondent's Br. at 17: To be sure, in Aguirre, this Court departed from its earlier interpretation of a federal criminal statute. See Aguirre, 79 F.3d at 318 (abandoning the

statutory construction adopted in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994)).

[*8] But the Aguirre panel (joined by the Jenkins panel) voluntarily abandoned its earlier construction of the relevant statute in the interest of nationwide uniformity. See Aguirre, 79 F.3d at 317 ("The issue here is not whether courts must take direction from an agency ruling, but whether they may voluntarily accept such guidance for the purpose of achieving a satisfactory statutory interpretation.... We have concluded that the interests of nationwide uniformity outweigh our adherence to Circuit precedent in this instance.") (citations and internal quotation marks omitted). In sum, nothing in Aguirre lends support to the notion that this Court is bound to defer to the BIA where the BIA has interpreted a criminal statute. To the contrary, Michel explicitly holds that the standard of review in such cases is de novo because the INS is not charged with the administration of such laws. See Michel, 206 F.3d at 262. Therefore, to the extent this Court must interpret Massachusetts or federal criminal laws, we review those aspects of the BIA's decision de novo. See *id.*

II. Merits

In the instant case, the BIA determined that petitioner [*9] was eligible for removal under 8 U.S.C. @ 1227(a)(2)(E)(i), which provides in relevant part that:

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(a) Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:...

(2)(E)(i) Any alien who at any time after admission is convicted of a crime of domestic violence.... For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18)... by any [] individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. @ 1227(a)(2)(E)(i). As a threshold matter, we agree with the BIA that the determination of whether petitioner's crime constituted a "crime of domestic

violence" under @ 1227(a)(2)(E)(i) involves a two-pronged analysis: (1) whether petitioner's crime was a "crime of violence" as defined by 18 U.S.C. @ 16; and (2) whether [*10] petitioner's victim was a "protected person" within the meaning of @ 1227(a)(2)(E)(i).

A. "Crime of Violence"

With respect to the first prong of the @ 1227(a)(2)(E)(i) analysis, 18 U.S.C. @ 16 defines a "crime of violence" as follows:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. @ 16. The BIA determined that petitioner committed a "crime of violence" within the meaning of @ 16(b), but not under @ 16(a). On appeal, the parties do not dispute that petitioner's conviction fails to meet the @ 16(a) definition.

A "crime of violence" under @ 16(b) has two constituent elements: (1) that the crime is a felony; and (2) that the crime, "by its nature," involves a substantial risk that physical force may be used. In this case, petitioner was convicted of indecent assault and battery on a person over [*11] the age of fourteen, in violation of chapter 265, @ 13H of the Mass. Gen. Laws, which states that:

Whoever commits an indecent assault and battery on a person who has attained age fourteen shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment for not more than two and one-half years in a jail or house of correction,

Mass. Gen. Laws ch. 265, @ 13H. Regarding the first element under 18 U.S.C. @ 16

(b), petitioner does not dispute that he was convicted of a felony. n4 As to the second element, however, petitioner maintains that his conviction was not for an offense that, "by its nature," involves a substantial risk that physical force may be used.

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n4 Under federal law, a crime is a "felony" if the maximum term of imprisonment authorized for the offense is "more than 1 year." See 18 U.S.C. @ 3559(a). In Massachusetts, the crime of indecent assault and battery on a person over the age of fourteen carries a maximum term of incarceration of five years in a state prison or two and one-half years in a jail or house of correction. See Mass. Gen. Laws ch. 265, @ 13H.

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Analyzing petitioner's state criminal conviction de novo, we agree with the BIA that any and all convictions under @ 13H would, by their nature, necessarily involve a substantial risk that physical force may be used. Although the statutory language of @ 13H does not set forth the elements of petitioner's offense, Massachusetts case law defines the crime as:

[a] touching...[that] when, judged by the normative standard of societal mores, is violative of social and behavioral expectations, in a manner which is fundamentally offensive to contemporary moral values and which the common sense of society would regard as immodest, immoral, and improper. So defined the term indecent affords a reasonable opportunity for a person of ordinary intelligence to know what is prohibited.

Commonwealth v. Lavigne, 42 Mass. App. Ct. 313, 676 N.E.2d 1170, 1172 (Mass. App. Ct. 1997) (citations and internal quotation marks omitted); see also Maghsoudi v. INS, 181 F.3d 8, 14-15 (1st Cir. 1999) (same); Commonwealth v. Mosby, 30 Mass. App. Ct. 181, 567 N.E.2d 939, 941 (Mass. App. Ct. 1991) (same); Commonwealth v. Perretti, 20 Mass. App. Ct. 36, 477 N.E.2d 1061, 1066 (Mass. App. Ct. 1985) [*13] (same).

Significantly, lack of consent is also a requisite element of a @ 13H violation. See Maghsoudi, 181 F.3d at 15 (noting that, under Massachusetts law, "lack of consent is an element of indecent assault on a person fourteen or older"); Commonwealth v. Burke, 390 Mass. 480, 457 N.E.2d 622, 625 n.4 (Mass. 1983) (stating, with respect to @ 13H, that "nonconsent is an element of the crime of indecent assault and battery on a person who has attained the age of fourteen"), partially abrogated by 1986 Mass. Acts ch. 187, (declaring, with respect to @ 13B, that a child under the age of fourteen is incapable of giving consent); Commonwealth v. Conefrey, 37 Mass. App. Ct. 290, 640 N.E.2d 116, 122 n.1 (Mass. App. Ct. 1994) ("Nonconsent is only an element of indecent

assault
and battery for victims over fourteen [@ 13H]), overruled on other
grounds, 420
Mass. 508, 650 N.E.2d 1268 (1995); Mosby, 567 N.E.2d at 941 (stating that,
in
order to convict under @ 13H, "the Commonwealth must prove beyond a
reasonable
doubt that the defendant committed an intentional, unprivileged, and
indecent
touching of the [*14] victim") (quoting Perretti, 477 N.E.2d at 1066)
(emphasis
added); Commonwealth v. Rowe, 18 Mass. App. Ct. 926, 465 N.E.2d 1220, 1221
(Mass. App. Ct. 1984) (noting that, after Burke, lack of consent is
clearly an
element of a conviction under @ 13H).

In its determination, the BIA reasoned that, because any offense under
@ 13H
is, by definition, nonconsensual, "the existence of lack of consent by the
victim necessarily creates a substantial risk that the perpetrator may use
force
or violence to accomplish the indecent touching of the victim." Certified
Administrative R. in A43 157 994 at 5 (emphasis added). Like the BIA, we
are
persuaded that any violation of Mass. Gen. Laws ch. 265, @ 13H, by its
nature,
presents a substantial risk that force may be used in order to overcome the
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victim's lack of consent and accomplish the indecent touching. See United
States
v. Rodriguez, 979 F.2d 138, 141 (8th Cir. 1992) ("The statutory language
'may'
and 'substantial risk' [in 18 U.S.C. @ 16(b)] must not be ignored....It
matters
not one whit whether the risk ultimately causes actual harm. Our scrutiny
ends
[*15] upon a finding that the risk of violence is present.").

In United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993), the
Tenth
Circuit observed that:

Because the crime involves a non-consensual act upon another person, there
is a
substantial risk that physical force may be used in the course of
committing the
offense. It does not matter whether physical force is actually
used....Sexual
abuse of a child is therefore a crime of violence under 18 U.S.C. @ 16(b).

Id. at 379; see also McCann v. Rosquist, 185 F.3d 1113, 1119-20 (10th Cir.
1999), vacated on other grounds by 120 S. Ct. 2003 (2000) ("In
Reyes-Castro, we
focused on the relationship between lack of consent and the substantial
risk of
the application of physical force. We conclude today that such
relationship is

significant regardless of the age of the victim."). Other circuits have echoed similar reasoning, analogizing to the categorical classification of burglary as a crime of violence. See, e.g., *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996) ("If burglary, with its tendency [*16] to cause alarm and to provoke physical confrontation, is considered a violent crime under 18 U.S.C. @ 16(b), then surely the same is true of the far greater intrusion that occurs when a child is sexually molested."); *United States v. Wood*, 52 F.3d 272, 276 (9th Cir. 1995) ("Just as it is possible to commit burglary--expressly defined as a crime of violence--without actually causing physical injury, the fact that conviction [for "taking indecent liberties with a minor"] was theoretically possible under circumstances which did not end in violence...does not alter our conclusion that the offense generally posed a serious potential risk of physical injury to the victim."). We agree with the reasoning of these cases and find that in indecent assault and battery cases, the non-consent of the victim is a touchstone for determining whether a crime "involves a substantial risk that physical force against the person...may be used...." 18 U.S.C. @ 16(b). Cf. *Xiong v. INS*, 173 F.3d 601, 607 (7th Cir. 1999) (holding that an alien's Wisconsin conviction for sexual contact with a person under age 16 was not a "crime [*17] of violence" under 18 U.S.C. @ 16(b) because "the conduct of which [defendant] was convicted consisted of consensual sex between a boyfriend and his fifteen-year-old girlfriend") (emphasis added). Because the victim's non-consent is a necessary element for conviction under Mass. Gen. Laws ch. 265, @ 13H, we hold that petitioner was convicted of a "crime of violence" within the meaning of 18 U.S.C. @ 16(b). n5

n5 In his brief, petitioner emphasizes that, pursuant to *In re Sweetser*, 1999 BIA LEXIS 18, Int. Dec. 3390, 1999 WL 311950 (BIA May 19, 1999), if a state criminal statute is "divisible" (i.e., it encompasses offenses that both do and do not constitute "crimes of violence" under 18 U.S.C. @ 16), the BIA is required to look to the specific facts underlying the record of conviction to determine whether the conviction is a deportable offense. See generally *Michel*, 206 F.3d at 265 n.3 (noting that "the BIA cannot justify a categorical approach if the relevant [criminal] statute encompasses both acts that do and do not involve moral turpitude"). Although petitioner's understanding of the divisibility principle is essentially accurate, we find that the BIA

correctly
adhered to its categorical approach in this case because, as dis