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# GHOSTS OF NOMINATIONS PAST: SETTING THE RECORD STRAIGHT

## HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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# GHOSTS OF NOMINATIONS PAST: SETTING THE RECORD STRAIGHT

**THURSDAY, MAY 9, 2002**

UNITED STATES SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, OF THE COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Schumer, chairman of the subcommittee, presiding.

Present: Senators Schumer, Durbin, Hatch, Sessions, Kyl, and DeWine.

## OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Chairman SCHUMER. The hearing will come to order, and just before I begin I am going to lay out the ground rules because everyone has busy, busy days here. So I will make an opening statement. Senator Sessions will make an opening statement. We will go to the panel.

We are going to stick strictly to the 5-minute rule and we are going to limit this to members of our subcommittee. I think what we are going to try and do is limit this to the members of the subcommittee because I know that there are time constraints and Senator Sessions wanted to make sure that the second panel got on in a timely way. So we will do that. We are going to stick to 5 minutes and subcommittee members, except I would certainly allow Senator Hatch and Senator Leahy to be part of this if they wish. I think they are ex officio members of the subcommittee anyway.

We are at a unique time and place in our Nation's history. Our Government is as closely divided as it has ever been. The House is narrowly governed by Republicans and the Senate is narrowly governed by Democrats, and the White House was won in the closest contested election in our history.

In the midst of this divided Government, we are in an unprecedented era of conservative judicial activism on the courts. For decades, conservatives, often convincingly, in my opinion, decried the Warren Court as a "legislator of policy, reasoning backward from its desired results when ruling to expand equal protection, the right to vote, criminal defendants' rights, and the right to privacy."

Today, similar criticisms of the courts acting as social policymakers, actively rejecting the will of Congress, exist, and with good reason. Elected officials, as opposed to unelected judges, should get the benefit of the doubt with respect to policy judgments, and

courts should not reach out to impose their will over that of elected legislatures.

It is easy for judges to express their personal views and their opinions. While that might be appealing for some to do, it is not what the Founding Fathers intended, but it is exactly what is happening on the Federal bench today.

Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve. These decisions affect in a fundamental way our ability to address major national issues like discrimination against the disabled and the aged, protecting the environment, and combatting gun violence. Those limits are being put in place by judges who are sticking to an ideological agenda that can only be fairly described as conservative judicial activism.

So when the President tells the Nation that he intends to stock the courts with conservatives in the mold of Justices Scalia and Thomas, we have good reason to worry that the courts, which are already hanging in the balance, will be knocked right out of the mainstream.

Ten months ago, the Judiciary Committee was reorganized under Democratic control. Since that day, Senator Leahy has moved nominees, including many conservatives, including many pro-life nominees, rapidly. I know that my friends on the other side are going to show up with all kinds of numbers and charts to try to prove their point, and we can get into a fight over whose numbers are more compelling, but I don't know what good that does.

All I know is that in the 10 months we have held the committee, we have confirmed 52 judges, with 4 more being confirmed today, if we are allowed to proceed on the floor. As the chart behind me demonstrates, right over there, we have done better in our first 10 months than anyone has done in the first 12 months of control; as you can see, the 104th Congress, 34; the 105th, 23; the 106th, 24; and this Congress, only 10 months thus far, 52. The number is likely to go up above 70 by the time the year is out.

But numbers only tell a small part of the story. The real problem, in my judgment, is not the numbers. The real problem is that there is no mandate to throw the third branch of Government out of whack with the rest of the country. Nonetheless, that is the plan, and it is a bad one.

As I have said time and time again, I have three criteria when I vote for and play a role in selecting judges. They must be excellent, moderate, and diverse—excellent legally, moderate ideologically, and diversity must be accounted for. I don't like putting idealogues on the bench, whether they be of the far right or the far left. Each group tends to want to want to legislate from the bench.

While a couple of Scalias and Thomases could be useful—I wouldn't mind a Supreme Court with, say, a Scalia or a Thomas on one side and a Brennan on the other—it is dangerous if they are not balanced, if we have five Scalias, five Thomases.

But this administration isn't about balance. They are not about keeping the courts within the mainstream, they are not about nominating independent-thinking, non-ideological judges. You don't have to take my word for it because they are saying it themselves. From the President on down, the message is ringing clear as a bell:

they are going to send up wave after wave of conservative nominees. It doesn't matter if we shoot a few down because ultimately enough will get through to stack the courts.

It is a bad plan for the courts, for the country, and for all average, everyday Americans, for whom most of these judges have the last say on some of the most important matters in their lives.

At a time when the Supreme Court is taking fewer than 100 cases a year, the lower courts, particularly the courts of appeals, have immense power. The conservatives know that, and they knew it when they controlled the Senate during the Clinton presidency. They knew how important those lower court judgeships are and they did everything possible to keep the seats open so they could fill them with conservative idealogues.

All that said, I want to publicly concede to my friends on the other side—both literally and politically, I want to concede they are correct about a few things. They are correct when they say that the vacancy rate on the Federal courts is high and should be lowered, and they have a point when they say we could move faster. I know that you might be shocked to hear me say this, but I believe that when that is said, it is right on both counts.

But here are my two responses: First, send us moderate, non-ideological judges and we will confirm them quickly. The proof isn't in the pudding; it is in the record. Moderate nominees who are well qualified and don't appear to adhere to an ideological agenda—these could be conservative, these could be liberal, these could be pro-choice, these could be pro-life—are moving through the Senate—moderate, non-ideological judges are moving through the Senate like a hot knife through butter.

The problem is that red flags are being raised for so many nominees that we are forced to slow down, sometimes to a snail's pace, to fully examine their records. We would like nothing more than to confirm every judge immediately, but when you hear what we are hearing about some of these nominees, and when you know because he is telling you so that the President is using ideology as a litmus test, well, we have a duty to the American people, a constitutional duty, to fully review their records and assess fitness for the bench.

The upshot is that while we are moving quickly, we could move faster if the other side would only work with us to select nominees who will be broadly supported. The Constitution doesn't just say that the Senate will consent. It says the Senate shall advise and consent. I promise you that a little more advice would lead to a lot easier consent.

In other words, if we were consulted ahead of time, if we were asked what about this judge, what about that judge, things could move easier. But what this administration has done thus far is just send raft after raft, with no advice, with no consultation, and what they expect us to do is rubber-stamp every one of them, regardless of their views, regardless of how far out of the mainstream they are, regardless of how much they would stack a bench in a certain direction.

The second point, and this goes to why we are here today, is that we have so many vacancies on the Federal courts precisely because

when the other side controlled the Judiciary Committee, they failed to confirm qualified, ideologically moderate Clinton nominees.

President Clinton, it is well known, did not nominate raft after raft of far-left judges, people from legal aid or the Civil Liberties Union. Most of his nominees tended to be partners in law firms or prosecutors. That is so different from the nominees we are seeing here, so different.

What happened was that the other side engaged in a quite deliberate slow-down to keep slots open. We all know, and is not news to anybody, that if they won the presidential election, they would be able to put their ideologically conservative nominees on the courts, not just the four that are here today.

As you can see from the chart behind me, the list of names is impressive both in numbers and in qualifications.

The chart is on its way. We will put the chart up when it gets here.

In the debate over how well we are performing in moving nominees, this point seems totally lost. These vacancies exist because 2 years ago the other side refused to confirm President Clinton's nominees, who by and large were far closer to the mainstream than most of President Bush's nominees.

Don't judge by what Jeff Sessions thinks or Orrin Hatch thinks or Chuck Schumer thinks. Just draw a chart and make 100 be the most liberal and 1 be the most conservative in terms of where the American people are, and just plot where the Clinton nominees were on most issues and where the Bush nominees were. You find many more zero-to-10's on the Bush side than you find 90-to-100's on the Clinton side.

So this isn't about tit-for-tat. It is not about what is good for the goose being good for the gander. It is about keeping moderation on the bench. It is about preventing the bench from being brought way over to the other side, which is in their own words what this administration wants to do.

So if highly qualified, moderate Clinton nominees like the four well-respected, eminently able individuals we have here today had been confirmed, the vacancy rate would be lower and we would have some confidence that the bench wouldn't be dominated by conservative idealogues.

But that is not what happened. They weren't confirmed, and there is no good reason they weren't confirmed, other than a desire to keep seats open so they could be filled by a new President implementing an off-the-mainstream agenda when it comes to the courts.

I will pit the qualifications of our four witnesses—Jorge Rangel, Kent Markus, Bonnie Campbell, and Enrique Moreno—against those of any four nominees from the Bush administration. They are legally excellent, they are ideologically moderate, and it is a diverse group. They belong on the bench. Why weren't they confirmed?

Well, we might not be able to answer that question today, but we will be able to answer the cries of unfairness from the other side. They have created a problem by not confirming qualified nominees. They propose to solve the problem by nominating out-of-the-mainstream, conservative idealogues, and then they complain we don't move quickly enough to implement their unacceptable so-

lution. This is not fair; it is not right, it smacks of hypocrisy. There is no other way to put it.

Let me say something. I can speak for myself. I will not be bamboozled into rubber-stamping a slate of Scalias and Thomases, who by any measure are conservative, activist judges. We are not going to be bullied into letting this administration stack the courts for decades to come.

The choice is this to the administration: consult with us, nominate reasonable, moderate men and women who belong on the bench and we will confirm them right away. Nominate idealogues willing to sacrifice the interests of many to serve the interests of a narrow few and you will have a fight on your hands. It is that simple.

I know that each of these fine people sitting before us must be shocked to hear the arguments they have heard from our friends from the other side. I for one am anxious to hear about their experiences and their reactions to some of the conduct we have been seeing.

Before introducing our first panel, I will turn to my ranking member, my friend, Senator Jeff Sessions. We have had a pretty good run in keeping our hearings bipartisan. Today is a little bit different. This is clearly a hearing that is going to divide us, but our side has been pummeled day after day by unfair allegations and I think it is fair that we have a chance to answer back.

So I know that Jeff is not happy about this hearing, but I just want to tell him that on the many issues we work together on, we will be working together on. But on issues where I at least feel that the truth is getting way out of hand, I think there is a need to show our side of the story.

Nonetheless, I will continue to do everything I can to treat my colleague as he has always treated me, with professionalism and courtesy. So even if things do get a little hot today, Jeff, I am going to consider you a friend when the day is done. If you think it will help you in November, you are welcome to tell your Alabama constituents that you have a pal in Chuck Schumer.

What I said earlier is we were just going to have opening statements from the Chair and the ranking member so we can move this hearing along, particularly so we can get to the second panel early.

Senator SESSIONS. Mr. Chairman, Senator Hatch is the ranking member of the full committee.

Chairman SCHUMER. I said I would make an exception for Senator Hatch and Senator Leahy.

Senator SESSIONS. Let me just make one little brief point. You have in conducting these hearings taken positions that I have not agreed with, but we have had some good and fair hearings. I think today I am troubled by the way we are organizing this hearing that talks about "ghosts of nominations past," but we only have nominations from the Clinton administration, whereas there are some witnesses that have a different viewpoint from the previous years in which I think the record will show the attack on nominees was far more vigorous than anything that occurred during the time President Clinton was in office.

So I would ask that the minority witnesses, Judge Carlos Bea and former White House Counsel Boyden Gray, be able to participate and sit at this panel so we could have one panel. Who knows how long this hearing may go? They may not even get to testify. I think it would create a wrong impression if that were to occur, Mr. Chairman.

You have always been fair; you really have. I have enjoyed it, but this I would disagree procedurally with you on.

Chairman SCHUMER. If the Senator would yield, we have discussed it and the way we are going to structure this hearing is to have the four witnesses from the Clinton administration first, and then Senator Sessions was able to structure the second panel in whatever way he wanted second, instead of mixing the two.

Senator SESSIONS. Well, I never thought that was a good idea.

Chairman SCHUMER. I know you didn't.

Senator SESSIONS. And I object to that. I don't think it is going to be fair in the long run. Mr. Chairman, your remarks were eloquent, as always, and delivered with force, but to an unusual degree I disagree with your thesis and almost everything in it.

But, Mr. Chairman, I would yield to Chairman Hatch.

Chairman SCHUMER. Thank you, Senator Sessions. Senator Hatch, I know, will probably disagree fervently with everything I have said and refute it in his usual intelligent forceful way.

Senator Hatch.

## STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I do think it would be more fair if you had all six people here at the same table because at 11:30 we are going to be voting on a series of votes and for all intents and purposes that is probably going to be the end of the hearing.

Chairman SCHUMER. These are four judges, I think, that we are going to vote on.

Senator HATCH. Well, sure.

Chairman SCHUMER. Yes.

Senator HATCH. And not six, by the way, that came out of the committee, and I might add not my judge from Utah, which is a direct slap. I view it as a direct slap, since I don't know of any Senator on this committee that I didn't bend over backwards to help and my two judges have been sitting there for almost a year, and one, Michael McConnell, for a year, yesterday. But thank you, Mr. Chairman. If you could do that, I think it would be more fair.

Thank you for giving me the opportunity to weigh in on the topic of judicial nominations from the past. I don't believe in ghosts, but I agree with you that there seem to be a number of illusions floating around Capitol Hill related to this committee's handling of judges. I applaud your desire to set the record straight, and I am here to help you do exactly that.

I wish that instead of this cute hearing, we were having a hearing to confirm the many nominees that are pending in limbo before the committee. But you are in power and you set the pace and agenda for such nomination hearings. So given this hearing, I

would just like to shine a candle on five points that never seem to see the light of day in any discussion of past confirmations.

First, there seems to be an immortal myth around here that it was the Republicans who created the current vacancy crisis by stalling President Clinton's nominees. That is purely and unmistakably false. The fact is that the number of judicial vacancies decreased by 3 during the 6 years of Republican leadership. There were 70 vacancies when I became chairman of the Judiciary Committee in January of 1995 and President Clinton was in office, and there were 67 at the close of the 106th Congress, in December of 2000, the end of President Clinton's presidency. The Republicans did not create, or even add to, the current vacancy crisis.

Each member of the committee is entitled to his or her opinion on what happened, but not to his or her own set of facts. I think we ought to avoid Enron-type accounting in this matter, regardless of what some of the liberal interest groups are asserting.

Second, there has been a considerable slight-of-hand when it comes to the true overall record of President Clinton's nominations. The undisputed fact is that Republicans treated a Democrat President just as well as they did a Republican one. We did not use any litmus tests, regardless of our personal views, whether it was abortion, religion, or personal ideology. That didn't enter in. Otherwise, President Clinton wouldn't have had many judges confirmed. I am disappointed to note that that seems to be precisely what is happening with the Democrat-controlled Senate now.

Let's be honest and look at the true facts. During President Clinton's 8 years in office, the Senate confirmed 377 judges, essentially the same, only 5 less, than the all-time confirmation champion, Ronald Reagan, who confirmed 382. So President Clinton had virtually the same number of judges confirmed as Ronald Reagan.

Yet, Ronald Reagan had 6 years of a Senate controlled by his own party to help him get the 382. Now, contrast that with President Clinton. He had 6 years of the opposition party, the Republican Party, in charge of the Judiciary Committee and got virtually the same number.

True, there were individual instances where a handful of nominees did not move, but it is nothing like the systematic and calculated stalling tactics being employed by this Democrat Senate to stop President Bush's highly qualified nominees.

At this point, I should also add that the Clinton nominees we confirmed were no mainstream moderates, as some may have led us to believe. We confirmed nominees, and I think we should have confirmed these nominees because President Clinton was the President. That was the attitude I had, but we confirmed nominees; just to mention a few, Judge Marcia Berzon, Judge Richard Paez, Judge Margaret Morrow, Judge Willy Fletcher, all to the Ninth Circuit Court of Appeals. They are among the most liberal nominees we have ever had before the committee, but they were worthy and they were qualified, and President Clinton was the President and I put them through. They were confirmed with my support as chairman, and I can tell you not a single one of those would be characterized by any measure of the imagination as nominees with political ideologies "within the mainstream," or I should say within the moderate mainstream.

I had personal political views almost completely opposite to them, but they were confirmed. I saw that they were, and I applied no litmus test to them. I reviewed them on their legal capabilities and qualifications to be a judge, and that is all I am asking for from the Democratic majority. That is not what is happening, and it is clear that there is a calculated and wholesale slow-walking of President Bush's nominees, and particularly for the circuit courts.

Third, let me say that an illusion has been created out of thin air that the Republicans left an undue number of nominees pending in committee without votes at the end of the Clinton administration. Again, more Arthur Andersen accounting here.

Get ready for the truth: There were 41 such nominees—let me repeat, 41—which is 13 less than the 54 the Democrats who controlled the Senate in 1992 left at the end of the first Bush administration when they had control of the committee. That is 41 under my chairmanship and 54 under the Democrat-controlled Senate in 1992, at the end of the first Bush administration.

I have to say that there were about 6 of those 54 that were left hanging by the Democrats who were put up too late in the process to get through, but there were 9 of the 41 who were put up really at the last minute and had no real chance of getting through in those time constraints. So if you add those in, it is 48 left hanging by the Democrats at the end of the first President Bush's administration and there were 32 left hanging by us.

I could go on and name these so-called ghosts that the Senate Democrats left hanging from the past Republican administration, but I thought better of it because it might make for good theatrics. But if anyone is interested in the names, we will be glad to provide them.

We have a chart here. As you can see from this chart, President Clinton, just like President Reagan and the first President Bush, got all of his first 11 circuit court nominees confirmed, all within 1 year. All were confirmed well within 1 year of their nominations.

This is in stark contrast to today. Eight of President Bush's first 11 nominations are still pending without a hearing, despite being here for one whole year as of yesterday. All have their ABA ratings, all rated "well qualified" or "qualified," and all but one have their home State Senators' support. That one is North Carolina's nominee, whom Senator Edwards has yet to return a blue slip for.

Frankly, I didn't apply blue slips to circuit judges, if I recall, but even if we did, I reserved the right to bring them up anyway. But this is the second nomination for Judge Terry Boyle. So he has been waiting for over 10 years, and so has John Roberts, who has been renominated.

Finally, my fifth point is shown in this chart. President Clinton had the privilege of seeing 97 of his first 100 judicial nominees confirmed, and the average time from nomination to confirmation was 93 days. Such a record was par for the course, until the current Senate leadership took over last year. President Reagan got 97 of his first 100 judicial nominations confirmed in an average of 36 days, but he had 6 years of a Republican Senate to help him. President George H.W. Bush saw 95 of his first 100 confirmed in an average of 78 days.

But the ground rules have obviously been changed, as the extreme interest groups have reportedly instructed our colleagues. As we sit here today, the Senate has confirmed only 52—not the 97 President Clinton got—only 52 of President Bush's nominees. The average number of days to confirm those few is over 150, and increasing everyday.

The reason I mention these five points is that there are some people who read the title of this hearing and saw the witness list and noted that it is being held on the 1-year anniversary of President Bush's first 11 nominations who jump to the conclusion that the purpose of the hearing is to find historical justification for blocking President Bush's choices for the Federal judiciary.

First of all, I would never accuse my good friend from New York of such a thing. Second, there simply is no historical justification for blocking President Bush's first 11 or first 100 judicial nominees, nor is there any truth to the myth that the vacancies we have today were caused by the Republican Senate. In other words, anything conjured up from the past and dressed up as a reason to thwart the requests of President Bush should be dismissed.

Now, if I can switch gears just for a little bit and say something that I consider to be personal, even though it has had and still could have a lot of bearing on this process, back before I became chairman of this committee in 1995 I was personally affected by several events that occurred under the auspices of "advise and consent." Those events included the mistreatment of nominees, including Sessions, Bork, Thomas, Ryskamp, Rehnquist, and others.

I saw how politics can affect the human spirit, both in success and defeat, and I saw how baseless allegations can take on a life of their own and how they can take away the life from their victims. By the time I became chairman, I had determined to change the process that had gotten so vicious.

I worked to restore dignity back to the committee and the Senate. I championed the cause of President Clinton's Supreme Court nominee, Ruth Bader Ginsburg, even though she was criticized by many as a liberal activist and was a former general counsel of the ACLU, which I would certainly not hold against anybody. I used my influence to quiet her detractors. I helped secure her vote, which was 96 to 3.

Under my chairmanship, for those below the Supreme Court, I ended the practice of inviting witnesses to come into hearings to disparage nominees. We just didn't allow it and I told them to get lost, and I incurred a lot of enmity from the conservative groups in Washington and elsewhere for doing that.

I dealt with FBI background issues in private, because sometimes they are nothing; sometimes they are serious. But whenever they are mentioned in public, people immediately jump to the conclusion that they are serious and there must be something wrong with that nominee. So I dealt with FBI background issues in private conferences with Senators, never mentioning them in public hearings. That is a practice I am concerned is not being followed by this committee.

I told interest groups, even the ones whose work I liked in other areas, that they were not welcome to smear Clinton nominees. I refused to alter the 200-year tradition of deference to Presidents by

shifting the burden onto nominees, and I informed the White House of problems that could, if made public, lead a nominee to a humiliating vote of defeat so the nominee could withdraw rather than face that fate.

These are the reasons that we were able to confirm 377 Clinton nominees, including some pretty contentious ones such as Berzon and Paez for the Ninth Circuit. I worked to get these two confirmed, I stuck my neck out for them, and I still believe to this day that I did the right thing even though I am increasingly pessimistic that someone on the other side of the aisle will step up to the plate and reciprocate for any Bush nominees who might be in the same circumstances.

I urge and call upon the Democrat majority to show some leadership and put partisanship and politics of personal destruction behind. Give fair hearings and confirmations of qualified nominees and keep the judiciary independent, as our forefathers intended, and keep the left-wing interest groups out of the nomination process.

Chairman Schumer, I have a great deal of admiration for you. I count you as one of my close friends in the Senate, and that is not the usual B.S. that shows up in the Senate from time to time. I mean it, and people who know me know I mean it.

I understand how some people have felt. Were there some I wish I could have gotten through? You bet your life there were, but that is always the case, whether Democrats are in control or Republicans are in control.

But I wanted to make these five points because they are legitimate, they are honest, they are truthful, and frankly I think they can't be ignored. I get a little tired of having my chairmanship, should I say, discredited by false facts and by false conclusions. I did the best I could under the circumstances, and I think in comparison to what the Democrats have done in almost case it was better, and in most cases much better.

So, again, I feel badly for anybody who didn't make it through. I have always felt that way, but on the other hand that happened whether the Democrats were in control of the committee or Republicans. It is just the process. In any event, I did everything in my power to try and do what is right, and I really appreciate you giving me this honor of being able to go forth here and make these comments.

Thank you, sir.

Chairman SCHUMER. Well, thank you, Chairman Hatch.

Senator HATCH. Mr. Chairman, I have to go to the floor.

Chairman SCHUMER. I understand. We very much appreciate your statement. We are going to disagree strongly on this issue, but nothing is personal and I too consider you a close friend.

We are now going to get to the four witnesses on the first panel. I am going to introduce each one, ask them to speak, and then introduce——

Senator SESSIONS. Mr. Chairman, may I have a few opening remarks?

Chairman SCHUMER. Please, please. I thought that you had ceded. Please.

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Mr. Chairman, this is indeed an interesting hearing, "Ghosts of Nominations Past," but the "Ghosts of Nominations Past" did not arise in 1995 when Senator Hatch became chairman of this committee. It arose really years before in the mid–1980s. I remember it well.

Certainly, we will never forget the hotly-contested hearings in which Robert Bork, William Rehnquist, and Clarence Thomas were bitterly attacked. Some might even remember the Session, Manion, and Fitzwater hearings, those earlier and fainter ghosts who were "Borked" before they knew what to call it.

Poor Judge Fitzwater, a wonderful Baptist, an honors graduate of Baylor, young, with a fine family, rated by the Houston bar as the best judge in Houston, suffered mercilessly because in an election in which he was on the ballot as a candidate, he had passed out a flyer that warned if one violated the voting laws of Texas, they could be prosecuted. He was accused of chilled voting rights.

One judge was required to give up membership in a historic, but all-male British club which he attended only once or twice a year. Once having given it up, the Torquemada team here, their zealotry assuaged, allowed him to move on to confirmation.

First, I would like to compliment Senator Hatch for the way he conducted this committee during his chairmanship. He elevated debate, treated nominees with respect, and kept vacancies low enough to ensure that judicial business would not be delayed. In fact, I cannot recall a single hearing at which special interest group representatives were called to testify against one of President Clinton's judicial nominees.

Further, Senator Hatch continued the tradition that a nominee that had the approval of the President and his two home State Senators, a clean background check by the FBI, and in most cases an ABA rating of "qualified" or better, was presumed to move forward to confirmation. Of course, the Senate must never be considered a potted plant on these matters, but I do believe a strong presumption for confirmation should exist.

At the end of the first Bush administration, there were 97 vacancies; that was former President Bush. When the Democrats were in charge of the Senate, there were 97 vacancies. There were 54 nominees unconfirmed, awaiting action. Under Chairman Hatch and a Republican Senate, at the end of the Clinton administration there were only 67 vacancies and 41 nominations that expired without action. Thus, in my view, the ghosts arising from the remains of prior nominees are overwhelmingly the product of my Democratic colleagues' administration of this committee, not from Senator Hatch's leadership.

The problem is that the ghosts of nomination present is beginning to bring back bad memories. The New York Times reported that on April 30, 2001, at a private retreat, Professor Laurence Tribe, along with Professor Cass Sunstein and Marcia Greenberger, lectured the Democratic Senators on how to block judicial nominees by "changing the ground rules." That is what we are talking about, changing the ground rules. So we have a contradiction here. We have a complaint that the Clinton nominees were treated unfairly,

so therefore the remedy is to treat the Bush nominees even more harshly.

Then on June 26, Professors Tribe, along with Professor Sunstein and Ms. Greenberger, were invited to testify before this subcommittee at a hearing entitled "Should Ideology Matter?" They argued that political ideology—at its base, that means the politics of the nominee, I suggest—was a legitimate issue to be considered, thus setting a higher hurdle for Republican nominees than had been used to confirm Democratic nominees.

Then on September 4, 2001, this subcommittee held a second hearing entitled "The Senate's Role in the Confirmation Process: Whose Burden?" At the hearing, we were told that the burden that Senator Hatch had placed on the Senate to reject a nominee should be shifted to the nominee; that is, the Bush nominees now had the burden to prove that he or she had characteristics worthy of confirmation that exceeded their paper record and their record of achievement.

As support for the use of ideology to aggressively oppose judicial nominees, we have heard the assertion from Professor Tribe, Marcia Greenberger, and members of this committee that during the first 100 years of our country's history, 1 out of 4 nominees to the Supreme Court were rejected by the Senate based largely on the nominee's ideology.

Chairman SCHUMER. While you are taking a drink, I would like to compliment you on your charts. They are very creative.

Senator SESSIONS. I wonder whose ghost that is on that chart. It could be mine.

Chairman SCHUMER. I am glad you are using the title. Ghosts come back.

Senator SESSIONS. We have examined the history on this matter and discovered a different story. A number of the early Supreme Court nominees were not rejected at all, but declined to serve on what was perceived to be the low-paying, non-prestigious job they were asked to take.

Those declining to serve were Robert Harrison, Levi Lincoln, William Smith, Roscoe Conkling, William Cushing, and John Quincy Adams. Further, two nominees that some count as rejected were only temporarily delayed and were eventually confirmed. Those nominees were Roger Taney and Stanley Matthews.

Moreover, 10 nominees were not acted upon or were rejected primarily because of the lame duck or near-lame duck status of the nominating President, not primarily because of their ideology. Those include Jeremiah Black, John Crittenden, Reuben Walworth, Edward King, John Specter, John Read, Edward Bradford, George Badger, William Micou, and Henry Stanbery. In the instance of Henry Stanbery, who was nominated after Andrew Johnson's failed impeachment, the Senate not only declined to act upon his nomination, but passed legislation to remove the tenth seat for which Stanbery was nominated. Regardless of whatever personal ideology these men may have had, the Senate, it appears, would not have confirmed them.

William Hornblower and Wheeler Peckham were rejected because New York Senator David Hill refused to confirm anyone that President Cleveland nominated unless it was his personal choice

from New York—a trend I hope you don't take too seriously, Senator Schumer.

Chairman SCHUMER. Hill was in the other line of Senate seats, not in my line of Senate seats.

Senator SESSIONS. I know you strongly believe and have insisted on an intense consultation on judges from New York, and I believe you are receiving a good bit of consultation on those nominations.

It appears that only five nominees were not confirmed primarily because of their personal ideology. These nominees were John Rutledge, who opposed Jay's Treaty; Alexander Wolcott, who vigorously sought enforcement of the Embargo Act; Ebenezer Hoar, who opposed Andrew Johnson's impeachment; George Woodward, who was an extreme American nativist; and Caleb Cushing, whose constant political party-switching incensed his fellow Senators.

Thus, only about 5 percent of the Supreme Court nominees can fairly be said to have been rejected for any kind of personal ideology. Clearly, that was the historical exception and not the rule. I can say with confidence, therefore, that the assertion that 1 out of 4 nominees in the first 100 years of this country were rejected on the basis of ideology is false and creates a false impression about the process.

The fact that such a view has never been the rule is confirmed by the testimony we had earlier of Lloyd Cutler, White House Counsel to Democratic Presidents Carter and Clinton, and the independent Miller Commission that absolutely rejected the contention that political ideology should be used by the Senate to reject nominees.

If history is to serve as a guide, however, we would do well to examine it with respect to the burden, or lack of thereof, on nominees to prove their worthiness of confirmation beyond their paper record.

During the first 130 years of our Nation's history, the Senate did not ask nominees any questions at hearings, probing or otherwise. The first nominee to even appear before the Senate was Harlan Fiske Stone, in 1925, and nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan II, in 1955.

Occasionally, the committee asked nominees questions in writing, but there was no probing examination or cross-examination in the committee. So it would have been difficult to believe the early Senate thought that a nominee was required to bear some illusory burden of earning the confirmation, to submit to vigorous cross-examination, and to personally convince Senators on the committee that he truly met the criteria in a way not reflected in the record of the nominee. So if we use history as a guide, and it is a good one, I think we ought to understand it first.

In conclusion, I am concerned with the injection of political ideology—the focus on the political popularity of the results of a case—instead of judicial philosophy, the focus on the integrity of the process. I agree with President Clinton's White House Counsel, Lloyd Cutler, that the use of ideology could politicize our independent judiciary.

Mr. Chairman, we did have a lot of ACLU lawyers that President Clinton nominated to the bench, for example. At one period, I think, before you came to the Senate we had three or four in a

month, so I had someone check the positions of the ACLU. Of course, they favor legalization of drugs. They believe the Constitution bars any control of pornography, even child pornography.

So I took to asking the witnesses, do you agree with this, if they were a member of the ACLU. They would all say, oh, no, they didn't agree with that, and I would usually say, then why did you join this group? That is their position. Why did you join it? But I voted to confirm most of those judges, and I think most of us on our side moved forward with a lot of nominees that had very liberal backgrounds.

I believe most of those, it struck me, were committed to enforcing the law as written, even if they may disagree with me in what it should be, and I think many of them will make great judges. I think just because some of these nominees that President Bush sends forth have views that are consistent with his political views does not mean they can't be able and competent judges, and it would be a shame to have them held up, as is occurring today.

Thank you.

Chairman SCHUMER. Thank you, Senator Sessions.

We are now going to proceed to the witnesses. I will introduce everyone and then let them testify.

Our first witness is Jorge Rangel. He is currently an attorney in private practice in Corpus Christi, Texas. He was nominated to the U.S. Court of Appeals for the Fifth Circuit by President Clinton in 1997, but Mr. Rangel was never granted a hearing by the Republican-controlled Judiciary Committee, never granted a hearing.

A graduate of the University of Houston and the Harvard Law School, Jorge Rangel went on to a distinguished career of 20 years in private practice in a Corpus Christi firm. In 1983, he was appointed to a judgeship on the Texas State District Court, where he served before returning to private practice.

Judge Rangel has also been active in legal and community associations over the years, including time as an officer of the Board of Governors of the Bar Association of the Fifth Circuit and of the American Board of Trial Advocates. He served on the Advisory Council of the Texas Center for Legal Ethics and Professionalism, on the Board of Directors of the Texas–Mexico Bar Association, as Chair of the Texas Board of Legal Specialization, as Chair of the Antitrust and Business Litigation Section of the State Bar of Texas, on the Advisory Board of the Food Bank of Corpus Christi, on the Executive Board of the Boys Scouts of America, Southern Region, and President of the Board of the United Way of the Coastal Bend, among many, many others.

A look through Judge Rangel's life and career shows both have been distinguished. He has dedicated himself to the betterment of his profession and his community, all the while working hard to represent clients in a variety of legal matters. He has written no so-called controversial writings. He has been affiliated with no so-called liberal groups, and gave no one any reason whatsoever to question his credentials and fitness for the bench. He was rated "well qualified" by the ABA.

Yet, for reasons that many have characterized as totally political, Jorge Rangel's nomination was help up for more than a year, from July 1997 until the end of the 1998 congressional session, a total

of more than 15 months, with no explanation or hint of opposition to him.

Judge Rangel, it is an honor to have you here and you may proceed. We will try to limit each witness to the 5-minute rule.

**STATEMENT OF JORGE C. RANGEL, CORPUS CHRISTI, TEXAS**

Mr. RANGEL. Thank you, Mr. Chairman and members of the subcommittee.

On July 24, 1997, President Clinton nominated me to the U.S. Court of Appeals for the Fifth Circuit. Almost 5 years later, I welcome this opportunity to appear before a committee of the U.S. Senate to discuss that nomination.

I must confess that this hearing is not exactly what I envisioned when my nomination was announced. At the time, I fully expected that in due course the Senate Judiciary Committee, in discharging its advise and consent responsibilities under the Constitution, would conduct a hearing to review my background and qualifications. I was sadly mistaken, because the hearing never materialized.

My nomination died the following year, when the Senate adjourned on October 21, 1998. The next day, I wrote the President requesting that my nomination not be resubmitted in the next session of Congress because personally and professionally I could not continue to place my life on hold while waiting to see if the political forces at play would favor me with a hearing. The delay had taken its toll and it was time to move on.

The confirmation process was grueling and time-consuming, but I did everything that was asked of me. I invested almost 2 years of my life in the process, starting early in 1997 when my name first surfaced as a possible nominee to fill a vacancy that exists to this day.

I underwent extensive background checks by the FBI, the Justice Department, and the White House. After the ABA committee completed its investigation into my professional qualifications, I received a "well qualified" rating. I filled out countless forms containing every conceivable question concerning every aspect of my adult life, including detailed financial information.

After my nomination was forwarded to the Senate, a cross-section of the Texas legal community, including Democrats and Republicans, sent dozens of letters to Senator Gramm and Hutchison urging my confirmation. In September 1997, I met with the Senators' statewide advisory committee of lawyers which advised them on judicial nominations. The committee asked numerous questions about my legal experience and about my views of the role of the judiciary in our society.

In May 1998, at my request, I met privately and separately with Senator Gramm and Senator Hutchison to discuss the status of my nomination and to answer their individual questions. During those meetings, I made a personal plea for a hearing. They stated that they were still considering my nomination and would let me know if I needed to submit any additional information.

As the weeks of delay turned into months, nothing seemed to bring me closer to a hearing. Each letter of support triggered a

form response acknowledging receipt and stating that my background and credentials were under review.

While my nomination was pending, I was inducted as a Fellow of the American College of Trial Lawyers, one of the legal profession's most prestigious organizations whose membership is limited to lawyers who have distinguished themselves in the courtroom. The president of the group, the late Ed Brodsky from New York, asked me to give the response speech on behalf of all of the inductees at the induction ceremonies. I duly reported the news to those reviewing my nomination, but it was of no apparent consequence.

When the 1-year anniversary of my nomination passed without a hearing, it became clear that there was nothing that I could do to open the doors to the hearing room of the Senate Judiciary Committee. The doors remained closed until the end. I was never given a reason why my nomination did not merit a hearing.

Even with the passage of time, I find it difficult to reconcile my experience in the confirmation process with the basic notions of fair play, justice, and due process that have guided me in my career. Moving from the past to the present, I am somewhat troubled at the ease with which some are now attacking the pace of judicial confirmations, while choosing to ignore or forget what happened to so many of President Clinton's judicial nominees. We have become mere historical statistics in a never-ending numbers game.

With all due respect, Mr. Chairman, I would like to raise my voice to underscore the point that those statistics represent real human beings with real families and real careers that suffered at the hands of those who, for political reasons, set out to prevent many of us from being confirmed. Hopefully, our presence here today will, in fact, set the record straight so that other judicial nominees, regardless of their party affiliation, will not suffer the same fate. They and the American people deserve better.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rangel follows:]

STATEMENT OF HON. JORGE C. RANGEL, CORPUS CHRISTI, TEXAS

Mr. Chairman, Members of the Subcommittee: On July 24, 1997, President Clinton nominated me to the United States Court of Appeals for the Fifth Circuit. Almost 5 years later, I welcome this opportunity to appear before a committee of the U.S. Senate to discuss that nomination. I must confess that this hearing is not exactly what I envisioned when my nomination was announced. At the time, I fully expected that, in due course, the Senate Judiciary Committee, in discharging its advice and consent responsibilities under the Constitution, would conduct a hearing to review my background and qualifications.

I was sadly mistaken, because the hearing never materialized. My nomination died the following year when the Senate adjourned on October 21, 1998. The next day I wrote the President, requesting that my nomination not be resubmitted in the next session of Congress, because, personally and professionally, I could not continue to place my life on hold while waiting to see if the political forces at play would favor me with a hearing. The delay had taken its toll and it was time to move on.

The confirmation process was grueling and time-consuming, but I did everything that was asked of me. I invested almost 2 years of my life in the process, starting in early 1997 when my name first surfaced as a possible nominee to fill a vacancy that exists to this day. I underwent extensive background checks by the FBI, the Justice Department and the White House. After the ABA Committee completed its investigation into my professional qualifications, I received a well qualified rating. I filled out countless forms containing every conceivable question concerning every aspect of my adult life, including detailed financial information.

After my nomination was forwarded to the Senate, a cross section of the Texas legal community, including Democrats and Republicans, sent dozens of letters to Senators Gramm and Hutchison urging my confirmation. In September 1997, I met with the Senators' state-wide advisory committee of lawyers which advised them on judicial nominations. The committee asked numerous questions about my legal experience and about my views on the role of the judiciary in our society. In May 1998, at my request, I met privately and separately with Senator Gramm and Senator Hutchison to discuss the status of my nomination and to answer their individual questions. During those meetings, I made a personal plea for a hearing. They stated that they were still considering my nomination and would let me know if l needed to submit any additional information.

As the weeks of delay turned into months, nothing seemed to bring me closer to a hearing. Each letter of support triggered a form response acknowledging receipt and stating that my background and credentials were under review. While my nomination was pending, I was inducted as a Fellow of the American College of Trial Lawyers, one of the legal profession's most prestigious organizations, whose membership is limited to lawyers who have distinguished themselves in the courtroom. The president of the group, the late Ed Brodsky from New York, asked me to give the response speech on behalf of all the inductees at the induction ceremonies. I duly reported the news to those reviewing my nomination, but it was of no apparent consequence.

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Thank you Mr. Chairman.

Chairman SCHUMER. Thank you, Mr. Rangel.

Our next witness is Kent Markus. He is the Director of the Dave Thomas Center for Adoption Law at Capital University Law School in Columbus, Ohio. A graduate of Northwestern University and the Harvard Law School, Professor Markus was nominated by President Clinton to serve on the U.S. Court of Appeals for the Sixth Circuit in February of 2000, and quickly received the approval of both of his home State Senators, two Republicans, Mike DeWine and George Voinovich.

Despite this bipartisan support, a "qualified" rating from the ABA, and an excellent record of achievement and service, Professor Markus was never afforded the courtesy of a hearing before the Judiciary Committee and his nomination was returned to the President at the close of the 106th Congress.

Professor Markus previously served as Deputy Chief of Staff at the U.S. Justice Department and as the highest-ranking adviser to Attorney General Janet Reno. During his approximately 5 years at Justice, Professor Markus was responsible for national implementation of the 1994 Crime Act and was the first Director of the Community–Oriented Policing Services Office, the COPS Office, responsible for putting 100,000 new community police officers on the streets. He managed the Department's dealings with Congress and

was the point person for the Department on crime policy, in general, with special attention to juvenile crime and gun violence.

Prior to his service at the Justice Department, Professor Markus was the Chief of Staff at the Democratic National Committee, and before that Chief of Staff for a former Ohio Attorney General. Early in his career, Professor Markus, a Cleveland native, worked at law firms in Australia, Alaska, and Washington, D.C., held a clerkship with a Federal judge, practiced law, and taught at Cleveland State Law School. On Capitol Hill, Markus worked for former U.S. Speakers Carl Albert and Tip O'Neill, and House Rules Committee Chairman Richard Bolling.

Mr. Markus, you may proceed.

**STATEMENT OF KENT MARKUS, PROFESSOR, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OHIO**

Mr. MARKUS. Thank you, Mr. Chairman, Senator Sessions, members of the subcommittee. In the past when I have testified at congressional hearings, I have always thanked the Chair for inviting me, and while I am grateful for the opportunity to talk with you about the confirmation process for Federal judges, as Mr. Rangel said, this isn't quite the Senate Judiciary hearing that I had once longed for.

I am here today because I concur with President Bush that we need to find a way to consider Federal judicial nominations without undue delay. But I am also here today because I believe that the history regarding the current vacancy backlog is being obscured by some, and I believe that this historical revisionism is exacerbating the negative political dynamics surrounding judicial confirmations.

I don't think we will ever stop the retaliatory cycle of judicial nomination delay unless both political parties agree to compromise, a topic I will address at the end of my testimony.

Chairman SCHUMER. Mr. Markus, your entire statement—it is rather lengthy—will be read in the record, so if you can highlight the key points.

Mr. MARKUS. I am going to try and be selective, Mr. Chairman.

Chairman SCHUMER. Great.

Mr. MARKUS. In the summer of 1999, I was contacted by friends at the Justice Department who informed me that Judge David Nelson of the Sixth Circuit had notified the White House that he would take senior status in October of that year. They asked me if I wanted to be considered for the seat and I told them that I most assuredly did. I immediately confirmed my interest with a letter to the White House Counsel.

Throughout that fall, the White House reviewed possible nominees for Judge Nelson's seat, and as a result of a strong and cordial working relationship with Senator DeWine, I was able to represent to the White House that I was confident Senator DeWine would advise them that he had no objection to my nomination.

Shortly thereafter, the White House nominations counsel informed me that he had indeed conferred with Senator DeWine and reported that he had been pleased by the Senator's decidedly favorable response. In December, I was informed that the President had tentatively selected me as the nominee for the vacancy and began

the documentation and background process described by Mr. Rangel.

Since I had left the Justice Department with a high-level security clearance a little more than a year before, the FBI was able to complete its update check relatively easily. The ABA also moved swiftly, and on February 9 of 2000 I was the President's first judicial nominee in that calendar year, and then the waiting began.

On the day of my nomination, in an interview with the Cleveland Plain Dealer Senator DeWine declared me to be well qualified for the position. Not long after, both Senators DeWine and Voinovich returned their blue slips, indicating they had no objection to my nomination receiving a hearing. I believe I was the only circuit nominee in the country awaiting a hearing with blue slips returned by two Republican home State Senators.

At the time, the Sixth Circuit was operating at three-quarters strength, with 4 of its 16 seats vacant. It was apparent that the Sixth Circuit nominees from Michigan were being held up, and it seemed that if there were any chance for relief for the circuit, it would come from my confirmation.

While my nomination was pending, my confirmation was supported by, among others, 14 past presidents of the Ohio State Bar Association, representing every political stripe; more than 80 Ohio law school deans and professors, again coming from every point on the political spectrum; prominent Republicans in Ohio, including the Chief Justice of the Ohio Supreme Court, another Justice of the Ohio Supreme Court, Justice Evelyn Stratton, Congresswoman Deborah Pryce, and Congressman David Hobson. I also had support from the National District Attorneys Association, the Fraternal Order of Police, and had endorsements from virtually every major newspaper in the State of Ohio, including two editorials from the generally conservative Columbus Dispatch.

As a result of the vacancies on the court, the Sixth Circuit had become the slowest appellate court in the Nation. It was also evident at the time that more Sixth Circuit vacancies were on the way. Of the 12 members of the court at the time, 5 were eligible for senior status in the years 2000 and 2001.

At the time my nomination was pending, despite the lower vacancy rates than the Sixth Circuit, the Senate confirmed circuit nominees to the Third, Ninth, and Federal Circuits, and afforded hearings to nominees from the Eighth and D.C. Circuits. No Sixth Circuit nominees had been afforded a hearing in the prior 2 years. Of the nominees awaiting a Judiciary Committee hearing, there was no circuit with more nominees pending than the Sixth Circuit.

Yet, with the high vacancies already impacting the Sixth Circuit's performance and more vacancies on the way, why did my nomination expire without a hearing? To their credit, Senator DeWine and his staff, and Senator Hatch's staff and others close to him were very straight with me. Over and over again, they told me two things. No. 1, there will be no more confirmations to the Sixth Circuit during the Clinton administration. No. 2, this has nothing to do with you; don't take it personally. It doesn't matter who the nominee is, what credentials they may have or what support they may have. See item No. 1.

While I never had the opportunity to discuss the matter personally with Senator Hatch, with whom I had an excellent relationship during my tenure at the Justice Department, it was my strong sense that he and Senator DeWine were not at all comfortable with this state of affairs. On one occasion, Senator DeWine told me, this is bigger than you and it is bigger than me.

Senator Kohl, who had kindly agreed to champion my nomination within the Judiciary Committee, encountered a similar brick wall. The fact was a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees.

I see my time has expired, Mr. Chairman, and I know my full statement is in the record. I am happy to discuss with the committee any thoughts on how we might remove ourselves from this downward cycle in the future.

[The prepared statement of Mr. Markus follows:]

STATEMENT OF KENT MARKUS, PROFESSOR, CAPITAL UNIVERSITY LAW SCHOOL

Good morning Mr. Chairman, Sen. Sessions and members of the Subcommittee. My name is Kent Markus. I'm a professor at Capital University Law School in Columbus, Ohio where I also serve as the Director of the Dave Thomas Center for Adoption Law, a nationally unique institution aimed at improving child welfare and adoption systems.

In the past when I've testified at Congressional Hearings, I've always thanked the Chair for inviting me. And while I am grateful for the opportunity to talk with you about the confirmation process for Federal judges, this isn't quite the Senate Judiciary Committee hearing that I had once longed for.

I'm here today because I concur with President Bush that we need to find a way to consider Federal judicial nominations without undue delay. But I'm also here today because I believe that the history regarding the current vacancy backlog is being obscured by some—and I believe that this historical revisionism is exacerbating the negative political dynamic surrounding judicial confirmations. I don't think that we'll ever stop the retaliatory, tit-for-tat cycle of judicial confirmation delay unless both political parties agree to compromises—a topic I'll address at the end of my testimony.

MY EXPERIENCE AS A FEDERAL JUDICIAL NOMINEE

In the summer of 1999, I was contacted by friends at the Department of Justice. They informed me that Judge David Nelson of the 6th Circuit had notified the White House that he would take senior status on October 1st of that year. They asked if I wanted to be considered for the seat. I told them that I most assuredly did.

To confirm my interest, I immediately wrote to the then White House Counsel Chuck Ruff. My letter, in part, stated as follows:

> I write to express my deep interest in appointment to the vacancy on the 6th Circuit resulting from Judge David Nelson's decision to leave active status. I believe that the range and breadth of my professional experience have prepared me for such a position and I am confident that I would serve in a manner that would bring credit to the President and others involved in selecting me.
>
> At different points in my professional life, I have worked in the legislative, executive and judicial branches of the Federal Government. I am presently a law professor and have also been a private practice litigator and the manager of two private, non-profit organizations. I have been consistently involved in making, implementing and interpreting Federal (as well as state) law. If appointed, I believe that the unusual breadth of my career would help me to decide cases through a blending of rigorous legal analysis with common sense practicality.
>
> In addition to intellect, I believe that a key aspect of performing well as a judge is attitude. I believe in the importance of presenting timely, clear and cogent rulings. I believe that judges should interpret the law and that legislators should make the law. I believe that government service—and particularly service in the judiciary—is a public trust that requires a commitment to show nei-

ther bias nor prejudice to any party. As an appeals court judge, I would expect to live by these principles and bring energy, commitment, common sense, good humor and humility to the courthouse everyday.

Throughout that fall, the White House reviewed possible nominees for Judge Nelson's seat. As the result of a strong and cordial working relationship with Senator DeWine, I was able to represent to the White House that I was confident Senator DeWine would advise them that he would have no objection to my nomination. Shortly thereafter, the White House nominations counsel informed me that he had conferred with Senator DeWine about my possible nomination. He reported to me that he had been pleased by the Senator's decidedly favorable response.

In December, I was informed that the President had tentatively selected me as the nominee for the vacancy. I was instructed to provide the voluminous documentation required of nominees by the White House, the Justice Department, the FBI, the Senate, and the Administrative Office of the Courts so that ABA and FBI background checks could commence.

Since I had left the Justice Department with a high level security clearance just a little more than a year before, the FBI was able to complete its update check relatively easily. The ABA also moved swiftly. On February 9, 2000, I was the President's first judicial nominee in that calendar year.

And then the waiting began.

On the day of my nomination, in an interview with the *Cleveland Plain Dealer*, Senator DeWine declared me to be "well-qualified" for the position. Not long after, both Senators DeWine and Voinovich returned their "blue-slips" indicating that they had no objection to my nomination receiving a hearing.

At the time, the 6th Circuit was operating at three-quarters strength, with 4 of its 16 seats vacant. It was apparent that the 6th Circuit nominees from Michigan were being held up and it seemed that if there were any chance for relief for the Circuit, it would come from my confirmation.

While my nomination was pending, my confirmation was supported by, among others:

• Fourteen past presidents of the Ohio State Bar Association—representing individuals of every political stripe.

• More than 80 Ohio law school deans and professors, again, coming from every point on the political and ideological spectrum.

• Prominent Ohio Republicans, including Ohio Supreme Court Chief Justice Thomas Moyer, Ohio Supreme Court Justice Evelyn Stratton, Congresswoman Deborah Pryce, Congressman David Hobson, State Auditor Jim Petro, former Columbus Mayor Greg Lashutka, and former Franklin County Prosecutor Mike Miller.

• The National District Attorneys Association and the National Fraternal Order of Police.

• Virtually every major newspaper in the state, including two editorials by the generally conservative *Columbus Dispatch*.

As a result of the vacancies on the court—one stemming back to 1995 that is still open today—the 6th Circuit became the slowest appellate court in the Nation. Then Chief Judge Martin told me that the average time for a case to move from filing to decision was 2 years—a period 5½ to 6 months slower than the next slowest circuit.

Friends of mine on the District Court informed me that a request for them to sit by assignment on the Circuit Court—traditionally an honor for District Court judges—had become so routine and onerous given busy dockets of their own that some district judges had begun to refuse the previously prestigious assignment.

It was also evident at that time that more 6th Circuit vacancies were on the way—of the 12 members of the court at that time, 5 were to be eligible for senior status in 2000 or 2001. The possibility that the court would be half-empty before any reinforcements arrived is the reality we face today.

At the time my nomination was pending, despite lower vacancy rates than the 6th Circuit, in calendar year 2000, the Senate confirmed circuit nominees to the 3rd, 9th, and Federal Circuits and afforded hearings to nominees from the 8th and DC Circuits. No 6th Circuit nominee had been afforded a hearing in the prior 2 years. Of the nominees awaiting a Judiciary Committee hearing, there was no circuit with more nominees than the 6th Circuit.

With high vacancies already impacting the 6th Circuit's performance, and more vacancies on the way, why, then, did my nomination expire without even a hearing? To their credit, Senator DeWine and his staff and Senator Hatch's staff and others close to him were straight with me. Over and over again they told me two things:

(1) There will be no more confirmations to the 6th Circuit during the Clinton Administration, and

(2) This has nothing to do with you; don't take it personally—it doesn't matter who the nominee is, what credentials they may have or what support they may have—see item number 1.

While I never had the opportunity to discuss the matter personally with Senator Hatch, with whom I had an excellent relationship during my tenure at the Justice Department, it was my strong sense that he and Senator DeWine were not at all comfortable with this State of affairs. On one occasion, Senator DeWine told me "This is bigger than you and it's bigger than me." Senator Kohl, who had kindly agreed to champion my nomination within the Judiciary Committee, encountered a similar brick wall.

The fact was, a decision had been made to hold the vacancies and see who won the Presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees.

Although I had hoped to be serving on the Federal Bench over the course of the last several years, I have certainly enjoyed the teaching career the Senate's inaction has afforded me. I do talk a little bit about my experience in my Legislation class and greatly enjoy my Adoption Center work on behalf of kids—especially kids who have been abused or neglected—in need of a safe, permanent home. I'm particularly grateful to Senator DeWine for his continued leadership in the area and was proud that my Center recognized him with our highest award this year, The Dave Thomas Award.

Still, it's my sincere hope that we can find a way to allow Federal judicial nominees to receive timely consideration without undue delay. The current system is simply unfair to good and talented people from across the political and legal spectrum who are eager to lend their talents to the nation's well-being as members of the Federal judiciary.

## A SOLUTION?

Since I teach Legislation to law students, I've tried to apply some of the lessons I discuss with my students to looking for a resolution to this problem. As an academic, here's how I see things.

A great many pending vacancies stem from the refusal of the Republican-controlled Senate to confirm, or even provide a hearing to, well-qualified Clinton nominees. Other vacancies stem from the normal course of judicial retirements that have occurred during the Bush Administration.

It seems clear that as long as the Democrats control the Senate, they will seek to ensure that their Republican colleagues do not benefit from their failure to process Clinton nominees and are denied the ill-gotten gain of a super-abundance of judicial appointments. Senate Democrats will insist that the White House should not be able to put conservative judges in seats that the Democrats believe would not be vacant but for stall tactics employed for several years by their Republican colleagues.

Ironically, Republican Senators, on the other hand, will now insist that whatever the reasons for the vacancy, the courts are problematically backlogged and nominees are being ill-treated. They will insist that as long as a nominee is intellectually, temperamentally, and experientially well-prepared for service on the bench, confirmation hearings should be scheduled, post haste, with the treatment of Clinton nominees forgotten and forgiven.

One promising development with respect to the consideration of judicial nominees is greater transparency in the process. Anonymous holds are gone. More candid and open discussion about nominees—at timely nomination hearings—will reflect well on the entire Senate and will remove the frustrating mystery confronted by past nominees.

If the two parties wish to break the judicial nominations logjam, each will have to pay some deference to the other side's view. The Democrats will have to acknowledge that, in the end, the country is not well-served if the judicial branch is forced to operate at a level substantially less than full strength. The Republicans will have to accept that it is particularly galling to their Democratic colleagues to allow an extremely conservative individual fill a seat for which a Clinton nominee was left languishing without even a hearing. And the White House will simply have to confer more earnestly and completely with Democrats in the Senate about the acceptability of nominees and may need to withdraw some that are pending in the spirit of that increased consultation.

If both parties will take the first step together, it's possible that we can stop the downward spiral plaguing the consideration of Federal judicial nominations. I'm eager to see what happens and discuss it with my class—and of course I'd be pleased to answer any questions members of the Subcommittee may have.

Chairman SCHUMER. Well, I thank you, Mr. Markus, and your solution is a thoughtful one and if we have a chance, I will try to ask you a question or two on it, which we appreciate.

Our next witness is Bonnie Campbell. She is now a partner at the distinguished Washington law firm of Arent Fox, where she acts as an adviser, negotiator, advocate, and litigator representing employers in personnel, labor relations, employment discrimination benefits, and other employment-related matters.

A graduate of Drake University and Drake's Law School, Ms. Campbell has an outstanding record of public service. She was nominated by President Clinton early in 2000 to serve on the U.S. Court of Appeals for the Eighth Circuit. She was supported by both of her Senators, Democrat Tom Harkin and Republican Chuck Grassley, given a "qualified" rating by the ABA, and afforded a hearing before the Judiciary Committee a few months later, in May of 2000.

However, despite a non-controversial, rather unremarkable hearing, Ms. Campbell was never scheduled for a committee vote. No explanation for this failure to grant her due process was ever given and her nomination was eventually returned at the end of the 106th Congress. In January of 2001, President Clinton renominated Ms. Campbell, but President Bush failed to seize the opportunity and withdrew her nomination shortly thereafter.

At the time of her nomination, Ms. Campbell was nearing the end of a distinguished term at the U.S. Department of Justice, where she served as Director of the Violence Against Women Office, a position to which she had been appointed by President Clinton in 1995. In that capacity, she oversaw a $1.6 billion program to provide funding to States to strengthen their efforts in the areas of domestic violence and sexual abuse.

She also directed the Federal Government's efforts to implement the new criminal statutes created by the 1994 Violence Against Women Act. Ms. Campbell oversaw the Justice Department's efforts to combine tough new Federal laws with assistance to States and localities to fight against violence against women. She also served for Secretary Madeline Albright as U.S. representative to the international negotiations on the creation of an international criminal court.

Before coming to Washington, Ms. Campbell served as the Attorney General of Iowa, the first woman ever elected to that position. During her tenure in office, she was instrumental in pushing the State legislature to strengthen Iowa's domestic abuse statute, and in 1992 she authored one of the Nation's first anti-stalking laws.

In 1997, Bonnie Campbell was named by Time magazine as one of the 25 most influential people in America. Ms. Campbell's record of distinguished public service and her experience in private practice combined to make an excellent nominee to the Court of Appeals for the Eighth Circuit, a fact with which both of her Senators obviously agreed.

Given the chance at her hearing to raise questions about her or her work, members of the Senate Judiciary Committee voiced no objections at all, and no opposition from any quarter surfaced on any issue. Yet, once afforded a hearing, Bonnie Campbell was left to linger in limbo. She was not granted a committee vote, but nei-

ther was she confronted with any objection to her nomination proceeding.

Ms. Campbell, you may proceed. Your entire statement will be read into the record. We thank you for being here.

**STATEMENT OF BONNIE J. CAMPBELL, WASHINGTON, D.C.**

Ms. CAMPBELL. Thank you, Mr. Chairman. Good morning, members of the subcommittee. It is indeed a pleasure to be here today.

In 1999, I learned that one of the Iowa judges serving on the Eighth Circuit had announced his pending retirement. I informed the White House of my interest in applying for that position, and I commenced the rather laborious paperwork so well described by Judge Rangel.

President Clinton nominated me for the U.S. Court of Appeals for the Eighth Circuit on March 2 of 2000. I was pleased and proud to have been nominated, and had the support of both my Senators, Senator Grassley and Senator Harkin, with whom I had worked for years. Indeed, Iowa's two Senators have had a history of bipartisan support for judicial nominees for Iowa and Eighth Circuit vacancies.

The Senate Judiciary Committee scheduled my confirmation hearing for May 25, and I felt privileged to have the opportunity to appear before the committee to answer any questions. Now, hearing from my colleagues, I realize how truly privileged I was. Both Senator Harkin and Senator Grassley took time from their very busy schedules to attend my hearing, make introductory remarks, and express their support for my nomination.

From my own experience at the hearing and the observation of more astute observers than I, it seemed that my confirmation hearing was cordial, even friendly. Certainly, there was no hint that my nomination was viewed as controversial or contentious in any fashion.

After the hearing, I received written follow-up questions from a number of Senators and I responded to those questions as quickly as possible. I continued to receive further written questions until late June. I answered each Senator's questions as completely and honestly as I could, and then I waited.

By roughly July of 2000, after my confirmation hearing and after I had answered many follow-up questions, there was no indication that the Senate Judiciary Committee intended to schedule my nomination for a vote. The Senate leadership began publicly stating that the White House had submitted some nominations so late in the session that the committee would not be able to schedule further hearings or votes on those nominees, especially those nominated for the appellate courts.

However, this "it is too late" excuse turned out not to be a hard and fast rule. A nominee for the Ninth Circuit and two district court nominees were all nominated on July 21, 2000, more than 4 months after I was nominated, provided a hearing 4 days later, voted out of committee 2 days later, and confirmed by the Senate on October 3. These confirmations are evidence that the Senate had the capacity to move nominations through the process quickly when there was a determination to do so.

Despite the fact that Senator Harkin went to the floor nearly everyday pleading with the Senate leadership to schedule a vote on my nomination, I never got a vote out of the committee or of the full Senate.

At that time, any individual Senator could put an anonymous hold on a nominee, and I heard rumors that various Senators had indeed a hold on my nomination. There were other rumors floating around. One suggested the possibility that because the President had recess-appointed a Justice Department official, there would be no further confirmation votes for nominees as a kind of payback against the President.

The more common theory was the one so capably described by my colleague, Kent Markus, which was that it was simply too late and there were not going to be any additional votes. To say that I was disappointed is obviously an understatement.

Last week, President Bush declared a vacancy crisis in the Federal courts and suggested that the slowness of the process is "endangering the administration of justice in America." In my view, President Bush could have simultaneously underscored his deep concern for the vacancy level in the Federal judiciary and demonstrated a bipartisan approach to filling those vacancies simply by renominating a number of individuals who had already been through the most time-consuming aspects of this process, rather than withdrawing their names when his new administration came to office.

Considering the context of that moment—as you described, a sharply and narrowly divided electorate; the President assumed office after receiving less than 50 percent of the popular vote; a divided Congress so competitive that the switch of one person changed control of the Senate; a divided Supreme Court—most key decisions are 5 to 4—such a wonderful show of bipartisanship would not only have reduced the vacancy level within the Federal judiciary, but also set a positive, constructive tone for filling future vacancies, one that in the end would have served the new President well.

I know it is naive to say that even today President Bush could make a bipartisan gesture of goodwill by renominating some of those individuals who were never given the opportunity for a hearing or for a vote.

I will stop there because I am trying to be respectful of the time constraints.

[The prepared statement of Ms. Campbell follows:]

STATEMENT OF BONNIE J. CAMPBELL, WASHINGTON, DC.

Mr. Chairman and Committee Members. Good morning. It is a pleasure for me to be here today to discuss the Federal judicial selection process and to share a little about my own experience as a nominee within that process.

By way of introduction, let me discuss briefly the salient aspects of my background. I was born and raised in upstate New York but spent most of my adult life in Iowa. I attended Drake University and Drake Law School. After law school, I joined a law firm in Des Moines and engaged in the general practice of law. In 1991, I was sworn in as Iowa's Attorney General and began a legal career in the public sector. In 1995, I was appointed by President Clinton as the first Director of the Violence Against Women Office in the U.S. Department of Justice, where I also served as Counsel to the Attorney General. After my tenure at the Department of Justice, I joined the Arent Fox Law Firm here in the District of Columbia.

In 1999, I learned that one of the Iowa Judges serving on the Eighth Circuit had announced his pending retirement, thus creating a vacancy on the Court. Believing that my experience as an attorney in private practice, as Iowa Attorney General, and as Director of the Violence Against Women Office and Counsel to the Attorney General had prepared me well for a position as an appellate judge, I informed the White House of my interest in applying for the position. I commenced the paperwork to begin the vetting process for the FBI, the American Bar Association, the Department of Justice, and this Committee.

President Clinton nominated me for the United States Court of Appeals for the Eighth Circuit on March 2, 2000. I was pleased and proud to have been nominated and to have the support of both of my Senators—Senator Grassley and Senator Harkin. Indeed, Iowa's two Senators have had a history of bipartisan support for judicial nominees for Iowa and Eighth Circuit vacancies.

The Senate Judiciary Committee scheduled my confirmation hearing for May 25, 2000, and I felt privileged to have the opportunity to appear before the Committee to answer any questions the Senators might have of me. Both Senator Harkin and Senator Grassley took time from their busy schedules to attend my hearing, make introductory remarks, and express their support for my nomination. From my own experience and the observation of more astute observers than I, it seemed that my confirmation hearing was cordial, even friendly; certainly there was no hint that my nomination was controversial or contentious in any fashion.

After the hearing, I received written follow-up questions from a number of Senators, and I responded to those questions as quickly as possible. I received further written questions until late June. I answered each Senator's question as completely and honestly as I could. And, then I waited.

By roughly July, 2000, after my confirmation hearing and after I had answered many follow-up questions from various Senators, there was no indication that the Senate Judiciary Committee intended to schedule my nomination for a vote. The Senate leadership began publicly stating that the White House had submitted some nominations so late in the session that the Committee would not be able to schedule further hearings or votes on nominees, especially those nominated for the appellate courts. However, this "It's too late" excuse turned out not to be a hard and fast rule. A nominee for the Ninth Circuit and two district court nominees were all nominated on July 21, 2000 (more than 4 months after I was nominated), provided a hearing 4 days later (July 25, 2000), voted out of committee 2 days later (July 27, 2000), and confirmed by the Senate on October 3, 2000 These confirmations are evidence that the Senate had the capacity to move nominees through the process quickly when there was a determination to do so.

Despite the fact that Senator Harkin went to the Senate floor nearly every day pleading with the Senate leadership to schedule a vote on my nomination, I never got a vote in the Senate Judiciary Committee; consequently, I never got a vote of the full Senate. And, of course, I was never told why there was no vote on my nomination. At that time, an individual Senator could put an anonymous hold on a nominee, and I heard rumors that various Senators had put a hold on my nomination. There were other rumors: one offered the possibility that the President's recess appointment of a Justice Department official so angered certain Senators that the Senate retaliated by not confirming any more circuit court nominees; another speculated that the Majority Leader had simply decided to stop the judicial selection process completely until after the November election, hoping to avoid confirming any more Clinton nominees to the courts. This latter theory is, of course, the most likely explanation for the refusal to confirm judicial nominees, and, certainly, the one to which I ascribe.

To say that I was disappointed is an understatement. My own circumstance aside, I always appreciated that, compared to others whose nominations similarly landed in limbo, I was probably relatively better positioned. I was caught up in the process for nearly 2 years. However, at least I did not have a private legal practice to worry about while I was shuttled along an emotional rollercoaster for those many months. For those nominees who were in private practice or the private sector, I wondered often whether their businesses stayed afloat through the ups and downs of a long and painful judicial selection process.

Last week, President Bush declared a vacancy "crisis" in the Federal courts and suggested that the slowness of the process is "endangering the administration of justice in America." In my view, President Bush could have simultaneously underscored his deep concern for the vacancy level in the Federal judiciary and demonstrated a bipartisan approach to filling those vacancies by re-nominating a number of individuals who had already been through the most time-consuming aspects of the process, rather than withdrawing their names when his new Administration came to office.

Considering the context of that moment—a sharply and narrowly divided electorate (the President assumed office after receiving less than fifty percent of the popular vote), a divided Congress (so competitive that the switch of one person changed control of the Senate), a divided Supreme Court (most key decisions are 5 to 4)—such a wonderful show of bipartisanship would not only have reduced the vacancy level within the Federal judiciary but also set a positive, constructive tone for filling future vacancies, one that, in the end, would have served the new President well.

I say today in earnest that, even now, President Bush could make a bipartisan gesture of good will by re-nominating some of those individuals who were never given the opportunity for a hearing or a vote. Just to assure that no one views this particular comment as self-serving, let me point out that the vacancy for which I was nominated has been filled now by a capable and decent man whom I consider a friend.

Recently, President Bush said that every nominee for the Federal bench should be given a vote of the Senate, and I agree with him. There may have been Senators who opposed my nomination for one reason or another—certainly, I suspect that to be the case—but I will never know, because, like so many others, my nomination died in Committee.

Much has been said about whether it is appropriate for Senators to consider a nominee's "ideology" in the performance of their constitutionally mandated duty of advise and consent. Again, given the divisions within our society and its governmental institutions, common sense suggests that it would behoove the President to consult with the Senate on potential nominees in an honest attempt to assure that the candidates under consideration are within the mainstream of American thinking.

Any discussion of the judicial nominating process would be incomplete without at least a passing comment addressing the massive, duplicative paperwork which is required of potential nominees. For me these forms included: the ABA Personal Data Questionnaire; the Senate Judiciary Committee Questionnaire; two Justice Department questionnaires dealing with my family's financial affairs and my medical condition; and the FBI Background Investigation Forms. I certainly appreciate that anyone seeking a life-time appointment to the bench should be carefully vetted, but a consolidation of the various forms designed to eliminate duplication is definitely in order.

I close by expressing again my appreciation for the opportunity to appear on this panel discussing the Federal judicial selection process. I wish you well in your deliberations of this very important topic.

Thank you.

Chairman SCHUMER. Thank you, Ms. Campbell. We very much appreciate it.

Our fourth witness is Enrique Moreno. He is 47. He is an attorney in private practice in El Paso, Texas. A native of Mexico, Mr. Moreno is a graduate of Harvard University and the Harvard Law School.

Nominated by President Clinton in September of 1999 to serve on the U.S. Court of Appeals for the Fifth Circuit, Mr. Moreno was given the highest rating of "well qualified" by the ABA, and received significant support from community groups. He waited 15 months, but was never given the courtesy of a hearing before the Senate Judiciary Committee. President Clinton renominated him at the beginning of 2001, but President Bush withdrew the nomination after a short time.

Mr. Moreno has been extensively involved in his community, serving as Chairman of the United Way of El Paso County, Chairman of the Hispanic Leadership Institute, and President of the Board of the El Paso Cancer Treatment Center and the El Paso Legal Assistance Center, and his service to many other organizations.

He has been listed among the best lawyers in America, the top lawyers in El Paso, and has been given prestigious awards by the

El Paso Chapter of the NAACP, the Hispanic Leadership Institute, and the El Paso Hispanic Chamber of Commerce.

The El Paso Bar Association, the Mexican American Bar Association of El Paso, and the Hispanic National Bar Association are just a few of the organizations which endorsed his nomination, as did the local district attorney, county attorney, police chief, sheriff, the El Paso Chamber of Commerce, and the U.S. Hispanic Chamber of Commerce.

Despite all of this support, his public service, and his sterling legal credentials, Mr. Moreno was subjected to perhaps the worst treatment of any of President Clinton's nominees, although there are certainly many terrible stories to choose from.

In an unquestionably partisan political move, Enrique Moreno was insulted and demeaned by some Senators. Eight months after his nomination, the Senators from Texas announced their opposition to his confirmation on the clearly manufactured basis that he lacked the necessary experience. Seven of the 14 judges sitting on the Fifth Circuit at the time has no prior judicial experience when appointed, and 6 of those 7 were appointed by Republican Presidents.

Relying on the opinion of 10 of the 31 members of the handpicked, unelected, partisan "advisory committee," the Senators denied Mr. Moreno the opportunity to defend himself and his record in front of the Judiciary Committee. Outrage in the community over this action, described by the Texas Monthly as "a paroxysm of civic anger," was so strong that a folk ballad, called a correa, usually written about legendary heroes, was composed about Mr. Moreno's treatment.

The San Antonio Express News, the El Paso Times, the Houston Chronicle, the Austin American Statesman, and the Dallas Morning News all editorialized against the Senators' rejection of Moreno, a rejection which can only be explained in not very nice and very partisan terms.

Senator SESSIONS. Mr. Chairman, I would just note that my concerns that this panel would take up the time and there would be very little time for questions or the second panel before we vote are confirmed. I appreciate your introductions, but, in fact, they are more arguments than introductions. It has created a misimpression, frankly, into the problems that these nominees had. There is another side of this story. Obviously, we are not going to have much time to discuss it.

I just wanted to share that because I think you have taken full advantage of the Chair to make your points.

Chairman SCHUMER. I don't do it often, but once in a while it is fun. More than fun, I think it is important to do.

Let me try to limit Mr. Moreno to 5 minutes. The vote will begin at 11:30, but maybe we can keep going for another 10 or 15 minutes after. I will not ask questions and give you a chance, Senator Sessions, to ask some questions, as well as Senator Kyl.

Senator KYL. Mr. Chairman, might I just note I am not a member of this subcommittee, but I am a member of the full committee and I have been here for the full hearing and I would hope that prior to the time we have to go to vote, I would at least have some opportunity to make a comment or two.

Chairman SCHUMER. Well, we were going to just limit it to subcommittee members because of the time. But after Senator Sessions is finished with his questions, I again will forgo questioning, unless I feel the need in response to one of Senator Sessions' questions, and let you make a brief statement. So let us have Mr. Moreno make his statement.

Mr. Moreno, your entire statement will be read into the record, and if you could proceed in 5 minutes so we can get to the questions.

**STATEMENT OF ENRIQUE MORENO, EL PASO, TEXAS**

Mr. MORENO. Thank you, Mr. Chairman. I want to thank the subcommittee for the opportunity to appear before you. I greatly appreciate being given an opportunity to share my experience and to express a few personal viewpoints concerning the nomination process.

Although I have been asked on a variety of occasions, this is the first time that I have agreed to speak publicly about my nomination experience. I do so today at the invitation of this committee, with the sincere hope that in some way my experience will lead to constructive dialogue that will improve the process for future nominees.

Let me talk briefly about my background. I was not born in this country. My family emigrated to this country from Mexico when I was a young child. My father, a carpenter, and my mother, seamstress, came to this country with their children and their hope. Specifically, they hoped that their children could receive an education and succeed on their merits. My parents' hopes were realized.

My dad always joked that he had sent his dumbest son to Harvard. I have been privileged and fortunate to live the American dream. I have practiced law in El Paso for 21 years. My practice has included a wide spectrum of litigation. I have practiced both civil and criminal law. In the civil area, I have represented both plaintiffs and defendants. I have represented large business clients, and also advocated for individuals on behalf of their civil rights. My work has been recognized by my colleagues and by my community. I am especially proud of the recognition I have received from State district judges who are in a unique position to observe performance and professionalism.

I was nominated by President Clinton for a vacancy on the U.S. Court of Appeals for the Fifth Circuit on September 16, 1999. Even before my nomination, I went through a thorough vetting process by the White House Counsel's office, the Justice Department, the FBI, and the American Bar Association. I am proud to say that I received unanimously the highest rating given by the ABA to judicial nominees. I was the first person from El Paso to be nominated to the Fifth Circuit. No one from El Paso has ever served on this important court.

My nomination was received with great excitement. Certainly, my family and I felt that excitement. Certainly, my community felt that excitement. Perhaps because of my background, I came to realize that a lot of people identified with my nomination.

I will always remember being stopped on the street by an elderly woman whom I had never met. I will never forget her telling me in Spanish that she had heard about my nomination, that it was important, that she was praying for me, and that she would be lighting candles for me on my behalf. I was touched by that experience, but I was overwhelmed by the support that I received from others.

I received support from friends and colleagues, but also from strangers and non-lawyers. I received support from Democrats and Republicans. This support came from my community, from throughout the State of Texas and throughout the Nation. For those that I have not personally thanked, I would like to take this opportunity to express my gratitude for their support and encouragement.

I was a nominee for 14 months. I was nominated again by President Clinton on January 3, 2001, and became a nominee for another 3 months. In those 14 or 17 months, I waited and I waited. I was never offered a hearing before this committee. I would have welcomed the opportunity to appear, to answer your questions, to address your concerns, to submit my qualifications and experience to open and candid debate. I was never offered that opportunity.

That I am aware, there was no public opposition to my nomination. I was never publicly criticized for a specific position or a specific matter about my background. I don't recall being called controversial. If there were any specific concerns about me, they were never publicly debated.

Six months into my nomination, I was invited by my State Senators to interview with an advisory group. This was a private interview, the specific results of which are not known even to members of the advisory group. I was later advised that, of the 31 members of the advisory group, 10 members recommended against my confirmation, 5 recommended in favor of my confirmation, and 16 either abstained or did not express an opinion. The Senators from my State wrote a letter stating that because of this vote, they would not support my confirmation.

I do not think it is constructive for me to editorialize on that conclusion or that process. I think it is fair to observe, however, that an advisory group should not substitute for the U.S. Senate. I think it is also fair to observe that private deliberations are not a substitute for public debate. There is nothing in my background or my experience that I would shield from public debate.

Let me close by anticipating a question. I am often asked if I am personally disappointed or bitter about my experience. Let me say that I am not. You see, I have received such encouragement, support, goodwill, and kindness from so many sources that it would be an extreme act of selfishness for anyone who has experienced what I have experienced to say that they have a right to be personally disappointed.

I am not personally disappointed. I am disappointed for my community, for the people that supported my nomination, for the people that identified themselves with my nomination. With all due respect, I believe that they deserved better.

Thank you again for this opportunity.

[The prepared statement of Mr. Moreno follows:]

STATEMENT OF ENRIQUE MORENO, EL PASO, TEXAS

Good morning. I would like to thank the Committee for giving me the opportunity to appear before you. I greatly appreciate being given the opportunity to share my experiences and to express a few personal viewpoints concerning the nomination process. Although I have been asked to do so on a variety of occasions, this is the first time that I have agreed to speak publicly about my nomination experience. I do so today, at the invitation of the Committee, with the sincere hope, that, in some way, my experience will lead to a constructive dialog that will improve the process for future nominees.

Let me talk briefly about my background. I was not born in this country. My family immigrated to this country from Mexico when I was a young child. My father, a carpenter, and my mother, a seamstress, came to this country with their children and their hope. Specifically, they hoped that their children could receive an education and succeed on their merits. My parents' hopes were realized. My Dad always joked that he had sent his dumbest son to Harvard. I have been privileged and fortunate to live the American dream.

I have practiced law in El Paso, Texas for 21 years. My practice has included a wide spectrum of litigation. I have practiced both civil and criminal law. In the civil area I have represented both plaintiffs and defendants. I have represented large business clients and also individuals advocating for their civil rights. My work has been recognized by my colleagues and by my community. In one survey of State judges, I was rated as one of the three top trial attorneys in El Paso. I am especially proud of that recognition, coming as it did from the State District Judges who are in a unique position to observe performance and professionalism. I am proud of my career, my legal and non-legal experience, and the tradition that my career represents.

I was nominated by President Clinton for a vacancy on the United States Court of Appeals for the Fifth Circuit on September 16, 1999. Even before my nomination, I went through a very thorough vetting process by the White House Counsel's Office, the Justice Department, the FBI, and the American Bar Association. I am proud to say that I received, unanimously, the highest rating given by the ABA to judicial nominees. I was the first person from El Paso, Texas to be nominated to the Fifth Circuit. No one from El Paso has ever served on this important court.

My nomination was received with great excitement. Certainly, my family and I felt that excitement. Certainly, my community felt that excitement. Perhaps because of my background, I came to realize that a lot of people identified with my nomination. I will always remember being stopped on a street by an elderly woman whom I had never met. I will never forget her telling me in Spanish that she had heard about my nomination and that she was praying for me and lighting candles on my behalf.

I was overwhelmed by the outpouring of support that I received from her and so many others. I received the support from friends and colleagues, but also from strangers and nonlawyers. I received the support from Democrats and from Republicans. This support came from my community, from my home State of Texas, and throughout the Nation. For those that I have not thanked personally, I would like to take this opportunity to express my gratitude for the support and encouragement.

I was a nominee for 14 months. I was nominated again by President Clinton on January 3, 2001 and I became a nominee for another 3 months. In these 14 or 17 months, I waited and waited. I was never offered a hearing before this Committee. I would have welcomed the opportunity to appear, to answer questions, to address your concerns, to submit my qualifications and experience to open and candid debate. I was never offered that opportunity.

That I am aware, there was no public opposition to mynomination. I was never publicly criticized for a specific position or a specific matter about my background. I don't recall being called "controversial." If there were specific concerns about me, they were never publicly debated.

Six months into my nomination, I was invited by my State's Senators to interview with an advisory group. This was a private interview, the specific results of which are not known even to members of the advisory group. I was later advised that of the thirty-one members of this advisory group, ten members recommended against my confirmation, five recommended in favor of my confirmation, and 16 either abstained or did not express an opinion. The Senators from my State wrote a letter stating that because of this vote they would not support my confirmation. The only stated basis for the opposition was the apparent view of ten members of the Advisory Group that I "had not achieved the level of experience necessary to be fully engaged and effective" on the Fifth Circuit. I do not think it's constructive for me to editorialize on that conclusion or that process. I do think it is fair to observe,

however, that an advisory group should not substitute for the U.S. Senate. I also think it's fair to observe that private deliberations are not a substitute for public debate. There is nothing about my background or experience that I would shield from public debate.

I respect the Senate, its traditions and its customs. I continue to respect the nomination process. With all due respect, I have a simple and unoriginal observation about the nomination process. Nominees should get a hearing, hopefully a timely hearing. A nominee should receive an open public debate about the merits of his or her nomination.

Let me close by anticipating a question. I am often asked if I am personally disappointed or bitter about my experience. Let me say that I am not. You see, I have received so much encouragement, support, good will, and kindness from so many sources. It would be an act of selfishness for anyone who has experienced what I have experienced to say that they have a right to be personally disappointed. I am not personally disappointed. I am disappointed for my community, for the many people that supported my nomination, and for the many people that identified with my nomination. With all due respect, I believe that they deserved better.

Being nominated by the President of the United States for an important position is a source of great pride. Being recognized by my colleagues as well qualified for that position is also a source of great pride. Finally, appearing before this Committee is a source of great pride. While I would have preferred to appear before you earlier and under different circumstances, I hope that my comments and my experience can be used constructively.

Thank you again for this opportunity.

Chairman SCHUMER. Thank you, Mr. Moreno.

Now, I am going to let Senator Sessions do the first 5 minutes of questions.

Senator SESSIONS. Well, thank you, Mr. Chairman. Let me just say I appreciate these individuals who have testified. One thing I would say is you have not been subject to intensive probing in to your backgrounds to see what kind of subscriptions to magazines you might have, or been attacked personally or ethically, or had your ethics challenged in any way. I think that is something you can be proud of.

The system confirms a lot of people. We confirmed 377 for President Clinton. Only one was voted down and 41 were left unconfirmed. You were part of that 41, but I just want to say to you there is life after non-confirmation. I am sure you are finding that to be so. I wish you the best.

Mr. Chairman, if it would be all right if Senator Kyl could go first and then I could follow him.

Chairman SCHUMER. We are going to vote pretty soon, but, yes, I will be happy to give Senator Kyl—I would just the Senator to try and limit his comments to 5 minutes, no more.

Senator KYL. I will do it in less than 5 minutes, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator.

Senator KYL. I have just two quick points. I would like unanimous consent to submit a statement for the record.

Chairman SCHUMER. Without objection.

## STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Here are my two points, and let me begin by just quoting statements from two of the witnesses in the interests of time. From the last witness, this comment: "I have a simple and unoriginal observation about the nomination process. Nominees should get a hearing, hopefully a timely hearing. A nominee should

receive an open public debate about the merits of his or her nomination."

To one of the other witnesses this concluding two sentences: "Hopefully, our presence here today will, in fact, set the record straight so that other judicial nominees, regardless of their party affiliation, will not suffer the same fate. They and the American people deserve better."

Mr. Chairman, I agree, and I think that if this hearing establishes anything, it is that nominees should get a hearing—precisely the point that we and President Bush have been making. If it is wrong for three of these witnesses to have been denied a hearing, it is wrong for this committee now to deny a hearing to current nominees.

The second point I would like to make is to quibble a bit with the new standard that you discussed in your opening statement about the Senate's responsibility to ensure balance on the courts, especially because of the view that the Senator from New York can objectively define that balance when speaking of the Bush nominees as being "out-of-mainstream conservative idealogues." That is a direct quotation from you, I think.

I would just like to say that I suspect that neither the Senator from New York nor the Senator from Arizona, myself, can objectively define what is a conservative idealogue, as well perhaps as the President, who represents all of the country, who is elected by all of the citizens of the country, not just the citizens of a particular State with a particular relative ideology, a President that now has an approval rating of over 70 percent.

I would suggest that that kind of broad characterization has to be brought down to specific names. Is John Roberts an out-of-the-mainstream conservative idealogue? Is Miguel Estrada an out-of-the-mainstream conservative idealogue?

I will conclude this point by taking up the challenge of the chairman of the subcommittee, who said "I challenge you to present any of the four nominees of the eight circuit court nominees that the President made exactly a year ago today and stack them up against these nominees, and you will find that they are equally qualified."

Now, without denigrating any of the qualifications of these four witnesses, all of whom, I suspect, have very fine legal backgrounds, one of the four before us here has a unanimous "well qualified" background. Four of the nominees currently pending—Miguel Estrada, John Roberts, Priscilla Owen, and Terry Boyle—four of the nominees that have been pending now for over a year and haven't been given a hearing have "well qualified" unanimous recommendations from the American Bar Association.

My point again is not to suggest that any of these nominees would not have been qualified to serve on the Federal judiciary, but to make the point that the nominees that President Bush has made who have been languishing now for over a year without a hearing have received unanimous "well qualified" recommendations from the American Bar Association, your gold standard. So there can be no reason for these nominees not having a hearing, and as these witnesses have said, every one of these nominees deserves to have a hearing.

I appreciate your holding this hearing today, Mr. Chairman, because I think it makes the point that we have been making all along.

Thank you.

Chairman SCHUMER. Thank you, and I would just, before I call on my colleague from Alabama, say a couple of points.

No. 1, I think the Bar standard goes to one of the criteria I have had for nominating judges, and that is excellence. I think all four of these nominees, or former nominees, merit that standard of excellence. I think that the two you have mentioned, Estrada and Roberts, meet that excellence criteria.

I go beyond that; I have made no bones about it. I believe that moderation ought to be a standard, not moderation of each particular nominee, but moderation of the bench. The President has said it himself. The President has said that he wants nominees in the guise of Scalia and Thomas. Those are the two most conservative members on the Supreme Court, a Supreme Court that doesn't have anybody in the Brennan or the Hugo Black tradition. The most objective observers believe that both Ginsburg and Breyer, the two Clinton nominees, are fairly moderate.

Senator KYL. It is all in the eye of the beholder, Mr. Chairman.

Chairman SCHUMER. It is, it is. You know what? You and I will never agree, but it is sort of like what the Supreme Court said. I think it was Potter Stewart who said it about pornography: you know it when you see it, and I think most people know it and they see it.

We are not fools here. We know what the administration's plan has been here. They have stated it—thank God for their candor—and that is to recapture the judiciary and move it way over. Now, you may say that is mainstream. I don't think many people do.

If you look at what the opinions of Scalia and Thomas have stood for and then just look at polls and see where the American people stand on most of these issues, Scalia and Thomas, I would argue, are way out of the mainstream, far more out of the mainstream than Breyer and Ginsburg. But that is for another day, that is for another day.

I would just that "well qualified" by the Bar Association is a wonderful standard, but it is not my sole criteria. As you know, I have labored mightily that we do debate judicial ideology. I think that is fair. I just saw a survey. If you ask the American people if judicial ideology should be one of the things debated in choosing judges, 57 percent said yes, 30-some-odd percent said no.

It is not the only criteria. I have voted for many, many judges who are to the right to me and I have voted for some who are to the left of me, but it should be part of it, I think. That is what I am laboring to do here. This hearing is a little different. We have heard such indignation. I agree with you that everyone should have a hearing, but we have heard such indignation from the other side about judges being held up, when the same thing was done a year or two ago.

I don't understand that. I can understand saying that was wrong and this is wrong, but to be on such a high horse when just in a short time, not in distant historical memory, the same thing was done, that bothers me. That bothers me because that is saying that

something else is at work here. If someone felt so strongly that every judge should have a hearing, then why didn't that happen 2 years ago?

By the way, I do believe that Senator Hatch tried to make that happen, as one of the witnesses said. I do. I have to say this, that I think both Senator Kyl and Senator Sessions were very fair and have been fair in all of this. But we all know what happened. Somehow, somewhere, at a higher place, the signal came down "stop," and it did.

So let's get off the high dudgeon here that, oh, this is the most horrible thing. Well, if it was horrible in 2001 and 2002, it was also horrible in 1999 and 2000, and I would like to see the debate shift from that and go to the place where we are really all debating, which is judicial philosophy. We know that, we know that.

Hate the "gotcha" business, and it got many more conservative judges than liberal judges, unfortunately, but it was sort of strange to me when somebody was accused of a minor peccadillo back in their early, early days, a minor infraction, that somehow, if it was a liberal judge, all the Republicans said, that is a horrible infraction, I have to vote no, but all the Democrats said that is venial and forgivable. The opposite: when it was a conservative judge, all the Republicans would say that is venial, we can leave live with it, but all the Democrats were in high dudgeon.

Everyone knew what was going on. Everyone knew, because if it was really that we were just judging the merits of that minor impropriety back then, then the votes should have been scattered equally among Democrats, Republicans, liberals, conservatives. It wasn't.

So I have been pretty clear and pretty consistent here, as you know, and you have said that, to your credit. But let's debate what we are really debating here. Let's not put up subterfuges, and I would say that the slowness of the process again is not really what we are talking about here. It is not really what we are talking about. We are talking about something else, just as looking at minor improprieties, which seemed to be the rage 5 or 6 years ago—and both sides did it; I do not claim that this was a Republican or Democratic thing—was also a subterfuge. That is the point I wish to make here.

I apologize, Senator Sessions.

Senator SESSIONS. Well, Mr. Chairman, I don't agree. I think the ground rules have been changed. I think this is an unprecedented slow-down of judicial nominations, as the chart Senator Hatch put up there displays and shows. Overwhelmingly, President Clinton got the nominations he wanted confirmed.

This Senate is not a perfect body, and for these good people, there is no perfect consistency in this body. I mean, I guess you can count, well, Lord, how did I ever even get as far as I got? That is what I consoled myself with. I am amazed I even got to the U.S. Senate. Yet, I am not entitled to be a Federal judge.

The Senate does have responsibilities here, but we have got to discipline ourselves. We have got to have some sort of integrity in the process, and I believe we are looking at a historic slow-down of some of the finest nominees that any President has ever submitted.

I know, Ms. Campbell, you mentioned that the President should nominate maybe some of the nominees that were not confirmed. It did nominate, as you know, two former Clinton nominees, Roger Gregory and Legrome Davis, both of whom were confirmed. He didn't renominate every nominee that President Clinton had submitted, but he did that.

You served in the Department of Justice. Did President Clinton ever nominate any of the 54 unconfirmed nominees under former President Bush? Did he renominate any of those when he took office?

Ms. CAMPBELL. Unfortunately, I don't know the answer to that, and I was conceding that that sounded naive.

Senator SESSIONS. Well, the current President Bush has renominated a few of President Clinton's nominees. President Clinton renominated a few of the fine nominees that the first President Bush had submitted, and that is the way life is. So I think the current President Bush reached out significantly there, and I believe that is important.

Let me just mention a few things. I don't know how people make it sometimes and others don't make it. I am sure you have wrestled with that personally and you realize that it is not a reflection on you personally that you did not make it through this process.

I would point out that 377 were confirmed; 41 were left pending when President Clinton left office. Only one was voted down on the floor of the Senate. Only one was voted down, so I think that is a pretty good record. We would like to see the Democratic leadership provide the same respect to the Bush nominees that the Clinton nominees received.

You know, Mr. Markus and Ms. Campbell, I suspect you would have been good judges. I don't know, but this is a political environment. You were being nominated, I guess all of you were, to the courts one step below the U.S. Supreme Court, important courts. I know the two of you had been close to the administration, had been involved in the Department of Justice, but had not been active in the practice of law and had not tried any lawsuits, to my knowledge. I think neither one of you at the time of your nominations had actually tried a jury trial. Is that correct?

Ms. CAMPBELL. That is correct in my case, but I would argue that serving as a public sector lawyer is indeed the practice of law, far more akin to being an appellate judge.

Senator SESSIONS. Well, I respect that, but all I am telling you is all these factors come together. To me, it is a factor. I mean, I practiced law full-time in Federal court for 15 years before Federal judges, so I have some appreciation for that. That was a valuable experience to me. Serving in the Department of Justice was also a valuable experience.

But I think it was a lack in your record, so you come at it from a political process at the last of an administration and things may not have moved as fast as you felt like you were entitled to have them move. I mean, that is just the way the Senate works sometimes.

Mr. MARKUS. Senator, I think merely all we are saying is that had there been an opportunity for a hearing, we might have had an opportunity to discuss what factors were relevant, what our

backgrounds were, what qualifications we had, and whether we ought to have been confirmed.

Senator SESSIONS. Well, I understand that and I would just say this to you, that is part of the process—senatorial courtesy, the blue slip policy that is historically part of this process.

I know, Mr. Moreno and Judge Rangel, you fell afoul of that, but Senator Schumer wants to enhance it. He has advocated an enhanced power of the blue slip policy and he wants even more consultation than President Clinton ever gave to Republican Senators. So there is some inconsistency there, it seems to me.

I know our time is running out. Mr. Moreno, you have got a lot of fine supporters and I appreciate that, but this commission there that Senator Gramm had, I know, did not support your nomination. That was factor obviously, I guess, in the blue slip factor or the objection that occurred. So all these things are frustrating.

The vote is about over, Mr. Chairman. I have talked too long.

Chairman SCHUMER. I will let you have the last word.

Senator KYL. Mr. Chairman, might I just thank the panel of witnesses here? I especially appreciated just the tone, Mr. Moreno, of your comments. Not that I didn't appreciate the others, but I especially yours and I appreciate your being here.

Chairman SCHUMER. We have a second panel. We have four votes. We will resume in approximately one hour. The hearing is temporarily recessed.

[The subcommittee stood in recess from 11:45 a.m. to 12:50 p.m.]

Chairman SCHUMER. The hearing will resume. First, let me apologize to the witnesses and thank them for their patience. It is very rare that we get a block of four votes together that delays us so long, but unfortunately that happened. You might be happy to know that it was four judges we voted for. Anyway, it is something we can probably agree on.

Also, my colleague and friend, Jeff Sessions, is on his way over, but has given us the okay to start. So I am going to introduce the first witness, C. Boyden Gray. I have always wondered what the "C" stands for.

Mr. GRAY. Clayland.

Chairman SCHUMER. Clayland.

Mr. GRAY. I didn't want to be known as Clay Gray.

Chairman SCHUMER. Clay Gray, yes, that is true. I thought it might be Charles, but a lot of Charleses don't want the Charles and do a "C" also.

C. Boyden Gray is a graduate of Harvard University and the University of North Carolina Law School, where he served as Editor-in–Chief of the UNC Law Review. He clerked for Chief Justice Earl Warren, of the U.S. Supreme Court, for a year. Mr. Gray joined the Washington, D.C., law firm of Wilmer, Cutler and Pickering in 1969 and became a partner in 1976.

In 1981, he left the firm to serve as legal counsel to Vice President George Bush. He served as counsel to the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush. Mr. Gray later served as Director of the Office of Transition Counsel for the Bush transition team and as counsel to President Bush from 1989 to 1993. He returned to Wilmer Cutler in 1993.

Mr. Gray currently serves as Chairman of the Citizens for a Sound Economy. In addition, he is a member of Harvard University's Committee on University Development, the Board of Trustees of the Washington Scholarship Fund, St. Mark's School, and the National Cathedral School. He recently served on the Bush–Cheney Transition Department of Justice Advisory Committee.

Mr. Gray, your entire statement will be read into the record. You are an old hand here. You know the rules. You have 5 minutes and may proceed as you wish.

**STATEMENT OF C. BOYDEN GRAY, FORMER WHITE HOUSE COUNSEL, WASHINGTON, D.C.**

Mr. GRAY. Thank you very much, Mr. Chairman. In light of the testimony this morning, I thought I could probably best summarize my testimony with just two points.

First, we faced in 1989 a Democratic Senate with a larger majority than you have now.

Chairman SCHUMER. It couldn't be smaller. Excuse me. I am sorry.

Mr. GRAY. Yet, we were able to work out agreements with or consultations with the home State delegations and eventually get most of our nominees confirmed, even though many of them, I think, would be classified under your rubric as too conservative. This was not a factor, at least officially.

I therefore would submit that what is going on now is a change in the way judicial nominations have proceeded in the past. I think it is a fundamental change and if this is what the Senate can achieve, I suppose that is fair game. But it is, I want to again repeat, a fundamental change in the way I think this has operated in the past.

The second point that I want to make is that, notwithstanding that, it is true that in the last year of a presidency there is a slowdown, especially if it is thought that there might be a change in the White House. This is a tradition that may not be a pleasant one, but it goes back many, many years and it is quite bipartisan. Therefore, I think it is unfair to compare the confirmation rate, Mr. Chairman, of the last year of the Clinton administration with the first 2 years of the Bush 43 administration.

If you take the four witnesses, the fine men and women who were here earlier this morning, two of them had home State problems, and the other two were not last-minute, but last-year nominees, when traditionally the confirmation rate goes way, way down.

I have some personal experience with this, having been involved peripherally with the Judiciary Committee on some legislative battles in the late 1970s. In 1980, the Republicans, in the minority, slowed down the nominations of President Carter quite dramatically. Two did, however, get through—Justices Ginsburg and Breyer, one to the D.C. Circuit and one to the First Circuit. But this is a long, long tradition of slow-down and the comparisons just don't wash, in my opinion.

As I said, we were able in the Bush 41 administration to get consultations enough to not get expeditious treatment, necessarily, but to get many of our nominees through. Nevertheless, we still were

left with 54 not getting confirmed and 97 vacancies, as compared to the number of 41 and 67 from the past administration.

As for the current nominees of the Bush administration, I believe that, in addition to being well qualified, they are accepted and they are mainstream. They have, by and large, the support of their home State delegations and I don't know how anyone can say—to pick two examples of gentlemen that I know well myself, Roberts and Estrada, how they can be considered to put any court that they might be confirmed to out of whack. They are both very, very fine individuals.

I think John Roberts, who was a casualty of being nominated in the last year of Bush 41 and didn't make it, perhaps understandably, has argued more cases in the Supreme Court than any living appellate advocate, and I think has got the absolute support of anyone who has ever heard him or dealt with him.

If you go through some of the others who have not had hearings, I think you would see that there is really no basis for holding them up: Levinsky Smith, African American nominee to the Eighth Circuit, supported by both Arkansas Senators, not yet confirmed; Priscilla Owen, rated "well qualified" by the ABA, support of both Texas Senators, not yet confirmed; Jeff Sutton, former Solicitor General of Ohio, "well qualified" by the ABA, Sixth Circuit, home State Senate support, not yet confirmed; Deborah Cook, Ohio Supreme Court Justice, support of both Ohio Senators, not yet received a hearing; and, finally, Professor Michael McConnell, an old colleague of mine, a former Brennan clerk, rated "well qualified," supported by many of your supporters here, including Professor Cass Sunstein, support of both Utah Senators, but not yet confirmed.

I really believe that there is a change in the way this confirmation process has operated in the past. I believe the President of the United States is elected to make these judgments. I for one would like the power to say that balance is being affected one way or the other, but I believe that is for the President to decide, with the full Senate making vote, not for the Judiciary Committee to screen in isolation.

Thank you very much.

[The prepared statement of Mr. Gray follows:]

STATEMENT OF C. BOYDEN GRAY, FORMER WHITE HOUSE COUNSEL, WASHINGTON, DC.

## I. INTRODUCTION

Good morning, Mr. Chairman. Thank you for this opportunity to appear today. The topic of this hearing, "The Ghosts of Nominations Past: Setting the Record Straight," is of particular interest to me: As White House Counsel during the first Bush Administration from 1989 to 1993, I dealt directly with the selection of nominees and their confirmation.

## II. BUSH I NOMINEES

Our practice under President Bush was to consult home-state Senators in advance of nomination regarding nominees for the District and Circuit Court. In all but a small handful of cases, the Administration was able to secure the support or non-opposition of both home-state Senators. On this score, we and the Senators operated under generally accepted rules of engagement that a Senator's disagreement with a potential nominee on a legal or political question was not a sufficient basis for that Senator to oppose the nominee.

Our determined efforts not to surprise home-state Senators and to address any legitimate concerns in advance of nomination may have helped us avoid the multi-year delays experienced by some of President Clinton's nominees. Even though we nominated some individuals who Members of this Committee might view as more conservative than they would have preferred, generally speaking we had good faith on both sides and were able to secure home-state Senator support.

We were, of course, disappointed that outstanding nominees like Terry Boyle from North Carolina for the Fourth Circuit, Frederico Moreno from Florida for the 11th Circuit, Lillian Bevier from Virginia for the 4th Circuit, and John Roberts from Maryland for the D.C. Circuit did not get confirmed. In all, 54 of our nominees did not get confirmed at the end of the 102d Congress, and we were left with 97 vacancies on the Federal bench.

## III. Clinton Nominees

My understanding is that many of the Clinton nominees who were delayed for long periods of time and not confirmed had home-state Senator problems. For example, I am advised that Helene White, Kathleen McCree Lewis, Jorge Rangel, Enrique Moreno, James Beaty, and James Wynn all lacked support from one or both of their home-state Senators. Not knowing the particulars of all these instances, I cannot speak as to whether these issues were all of the kind we would have recognized and endeavored to address, but from my knowledge of the Senators involved, I would guess that the Clinton Administration must have been partially to blame in at least several of these instances.

Nonetheless, President Clinton was able to have 377 of his nominees confirmed—5 short of the all-time record. He lost one floor vote for a nominee to the district court. And when the Senate adjourned for the last time under his presidency, there were only 67 vacancies and only 41 nominations expired without action. Overall, that is a very good record.

## IV. Bush II Nominees

Of course, the context of this hearing clearly relates the "Ghost of Nominations Past" to the present nominees. Currently, of the 21 circuit court nominees pending, only 5 appear to have support issues with their home-state Senators. Thus, over 75 percent of these circuit nominees have no support issues from home-state Senators, but have still not been confirmed.

For example, John Roberts was nominated in Bush I, but his nomination expired through delay in 1992. There is widespread agreement that he is one of the top appellate attorneys in the Nation. He was renominated 1 year ago today by President George W. Bush, but still has not received a hearing. It has been 10 years—or 3,755 days—since his first nomination and he has spent over 1.5 years/620 days during which his nomination has actually been pending without a hearing.

Miguel Estrada, who will be the first Hispanic judge on the D.C, Circuit, was rated "well qualified" by the ABA. He is a former Supreme Court clerk, an alumnus of the Solicitor General's office, and a partner at a major D.C. firm. His professional qualifications are impeccable. A year after his nomination, he still has not received a hearing.

Levinsky Smith, an outstanding African American nominee to the 8th Circuit, is supported by both Arkansas Senators, but has not yet been confirmed.

Priscilla Owen, a justice on the Texas Supreme Court, has been rated "well qualified" by the ABA, is supported by both Texas Senators, but has not been confirmed.

Jeff Sutton, the former Solicitor General of Ohio, an excellent nominee to the 6th Circuit, is supported by both home-state Senators, but has not yet been confirmed.

Deborah Cook, a justice on the Ohio Supreme Court and an outstanding nominee to the 6th Circuit, is supported by both Ohio Senators, but has yet to receive a hearing.

And Professor Michael McConnell, who clerked for Justice William Brennan, was rated "well qualified" by the ABA, is supported by numerous professors, including Cass Sunstein, and has the support of both Utah Senators, but has not been confirmed.

## IV. Conclusion

In sum, I believe that the President and the Senate should work together, with good faith on both sides, to keep the courts staffed with a sufficient complement of judges to conduct the Nation's judicial business in a timely manner. This said, rarely will a President of one party nominate a person from the other party. But the President of one party should consult with Senators of the other party in good faith.

And, I believe that home-state Senators should, in turn, act in good faith toward the President.

As Lloyd Cutler and I stated at a hearing on the judicial selection process hearing last year, the Senate should confirm a President's nominees if they are qualified, even if the Senate might not share a particular nominee's ideology. I also believe that is generally what the Senate has done, including under President Clinton. For example, Ruth Bader Ginsburg, former General Counsel to the ACLU, was confirmed by a 96–3 vote despite the fact that most Republican Senators disagreed with her personal political views. I do not believe either the President or the Senate should impose a litmus test with respect to any particular issue. And I certainly do not believe the Senate Judiciary Committee—which means any individual Senator in an evenly divided Senate—should preclude full Senate consideration of a Presidential nominee.

Chairman SCHUMER. Thank you, Mr. Gray. We appreciate your testimony.

Now, we are going to hear from Judge Carlos Bea. The Honorable Carlos Bea is a superior court judge in San Francisco, California. A nominee to the Federal bench during the first Bush administration, Judge Bea is a native of Spain and a graduate of Stanford College and Stanford Law School.

Judge Bea was in private practice from 1959 to 1990. He was also involved in family businesses during that time, including as vice president and general counsel for the American Pacific Concrete Pipe Company. Since 1990, he has served on the local bench in San Francisco.

Judge Bea, your entire testimony will be read into the record and you may proceed as you wish for 5 minutes.

## STATEMENT OF CARLOS BEA, JUDGE, CALIFORNIA SUPERIOR COURT, SAN FRANCISCO, CALIFORNIA

Judge BEA. Thank you very much. I was born in Spain, but of Cuban parents, and was born a Cuban and went to school in Havana. Neither my family nor I had any contact with the Cuban government either then or now, except I was sent as part of the Cuban Olympic basketball team to Helsinki in 1952, and that is the only time I traveled on government money.

Chairman SCHUMER. Were you a forward or a guard?

Judge BEA. I was the tallest man on the team, at 6 foot 4 inches, so I was the center.

Chairman SCHUMER. I was a forward on my high school team—6 foot, 1 inch.

Judge BEA. When I went back to Stanford, I was a forward. I wasn't a center.

So, anyway, I was nominated. I was nominated by President Bush in November of 1991. Senator Seymour tried to help as much as he could. He was in the Senate a very short time, as you will remember. Senator Cranston received me very kindly and said that he was not going to pull the blue slip. I never got that straight, whether pulling is good or pulling is bad, but the blue slip wasn't a problem.

I am here really to address something that hasn't been talked about today, which is how some Hispanic or minority candidates are seen differently in this process than others. I am a Republican. A long time ago, 30 years ago, I was a member of the Republican State Central Committee, so I have done my time in the pits.

Some people say that I am conservative. Some of my pals who think that way since I got on the superior court don't really see me as that conservative anymore, and from time to time I have strayed off the reservation and supported Willie Brown and John Burton. On second thought, maybe in San Francisco they are conservatives.

I don't think that racial and ethnic make-up kept me off the bench, nor do I think that is happening to the Clinton appointees or to the Bush appointees. But I am suspicious of how certain minority candidates who are not liberals politically are treated, and it motivated me to find out a little bit about why I didn't get a hearing.

Unlike anybody else I have heard today, I actually made a Freedom of Information Act request and got my FBI file, and I went through it and it was very interesting. I wondered if there were some hard feelings left over because of my 1990 campaign. In my 1990 campaign, I had been run against by a candidate who described herself as liberal, progressive, and lesbian. I wondered if there were some hard feelings left over from that and that is why I tried to get my FBI file.

I also got some letters, copies of which I have here, in case you are interested, from gay and lesbian judges in San Francisco backing me to this committee. But what I found was that some hearsay statements—and I won't go into the subject matter—some hearsay statements that had been relayed to the committee in August of 1991 were not followed up on and asked to be investigated until September of 1992, 13 months later. Once they were investigated, the accusers recanted. But by that time, it was September 14, 1992, and there were no more hearings to be had.

I can't help but be suspicious that because I was a Republican and not allied with liberal interest groups that I was dealt with a little bit differently, like perhaps Justice Thomas and Mr. Estrada are being dealt with now. The delay in that case was tantamount to a denial.

I am not here to get the hearing I didn't get 10 years ago. Life moves on. As somebody said, there is life after a failed Federal appointment. But I am here to ask you respectfully to leave the politics of the nomination process to President Bush, President Clinton, or President Bush, or whoever is going to be our President from now on, because in committee, and because of the staff situation that we have, very busy, decisions are made and the decisions are made by delay and they are made in back-room deals and behind the backs of the persons affected, and with that no opportunity to come forward.

All I wanted when I was interviewed the second time by the FBI was that they call the people who had said whatever they had said against me and have them come here and let me examine them. When they were examined, they said, well, we got it wrong, it wasn't what we thought, and good-bye. But by that time, it was too late.

I have no hard feelings toward the Democratic leadership. I have a fine family. I have got four strapping sons, and here allow me a commercial. My oldest one won a silver medal for the United States in the 2000 Olympic Games in the men's pairs. He did a lot better than his dad.

Chairman SCHUMER. Congratulations. That is great.

Judge BEA. Well, I will accept that all day. I am having a wonderful time as a superior court judge in San Francisco—great attorneys and good cases.

I thank you very much for giving me this opportunity to put in my two cents' worth, even though I haven't used up all the time. If you have any questions, I will be glad to answer them.

[The prepared statement of Judge Bea follows:]

STATEMENT OF CARLOS BEA, JUDGE, CLIFORNIA SUPERIOR COURT, SAN FRANCISCO, CALIFORNIA

My name is Carlos Bea; I am a California Superior Court Judge sitting in San Francisco.

As you can tell from my name, I am Hispanic. I was born a Cuban citizen, went to school in Havana and came to live in this country when still a child. Neither my family nor I ever had anything to do with the Cuban government, present or past, except that I once played on the Cuban Olympic basketball team, in the Helsinki Games.

I was one of the 54 Bush I nominees whose nomination expired due to lack of Senate action. I was nominated by President Bush in November, 1991 and received New Judges' training. in January 1992. I never got a hearing date, and it was not for lack of trying. Senator Seymour tried very hard to get me a hearing. Senator Alan Cranston told me that he would not pull the Blue Slip on my nomination. Other Appointees, nominated after I was, did receive hearings that Spring and Summer of 1992.

I would like to address the race or ethnic issue which inevitably comes up at these hearings.

I am a Hispanic, a Republican—and former member of the State Central Committee—and a naturalized American. I think it is fair to State that my political views are generally Conservative, although from time to time I stray off the reservation and support candidates not thought to be Conservative—such as Willie Brown and John Burton. Well, I know what you are thinking: maybe in San Francisco they are thought to be Conservative.

I do not think the 1992 Senate held up action on my nomination because of my ethnic background. Nor do I think any Clinton nominations were held up on that account.

But I can't help but be suspicious of how Conservative minority candidates find their nominations vigorously contested: It happened to Clarence Thomas, Gerry Reynolds and Miguel Estrada.

I think it happened to me. As I say, I was nominated by Pres. Bush in November, 1991. Fall entered Winter, no hearings were scheduled for my nomination. Winter into Spring no hearings. Spring into Summer—and I became suspicious that someone had said something derogatory about me that I didn't know about. I wondered what it could be and speculated that it had to do with the 1990 election campaign.

After my appointment to the Superior Court by Gov. Deukmejian in 1990, I had been challenged in the confirmation election by a female attorney who described herself in the campaign as a liberal-progressive Lesbian. I had won that San Francisco-wide election 59 percent–41 percent. Just in case some hard feelings remained from the election, I asked and received letters of support from Gay and Lesbian judges on the San Francisco Superior Court. They were sent to this Committee.

What I didn't know, and what I found out years later when I got my FBI file through the Freedom of Information Act, was that in August 1991 BEFORE my nomination, some totally hearsay derogatory statements had been made about my campaign and about me. The Committee did not launch a followup investigation of those charges until September, 1992, over 13 months after the information was in the investigatory files. The follow-up investigation resulted in the accuser withdrawing the remarks and any opposition to my nomination. But by that time it was too late. No further hearings were scheduled.

The whole purpose of hearings is to air out spurious charges. Committee and committee staff can, and in this case did, avoid a clearing of a person's name by inaction. I doubt it would have happened had I not had conservative political views.

There are organizations—some would call them pressure groups—that advocate "Diversity" in everything except political views for minority candidates. One is "Diverse" if an ethnic and Liberal. One is not a real member of a minority group if one is politically Conservative.

There have been Press reports that confirm this result: Professor Lawrence Tribe, a member in good standing of the Liberal view, has been quoted as saying that a Hispanic nominee to the Supreme Court of the United States might have to be defeated if he or she were conservative.

This August body does itself and the Nation a great disservice when it adopts a political litmus test to judicial nominees. First, the politics held before reaching the Bench don't always play out in decisions. Look at Chief Justice Earl Warren, on the one hand; Justice Byron White, on the other.

But more importantly, the independence of the Judiciary as a co-equal branch of Government is imperiled. The Senate ought to pause and think what is the effect on the institution of the Judiciary when it is politicized.

The Judiciary has no arms with which to defend itself against such politicization. Much less do nominees before they become Judges.

Last, I hope no one has got the impression that anything I have said here is a result of sour feelings toward the Democratic leadership of the Senate. There is life after a failed Federal nomination.

First, I have been blessed with a wonderful wife and family of four boys—which I can't mention without pointing out that our boy Sebastian won a Silver Medal in the Mens' Pair for the United States in the 2000 Olympic Games.

Second, I have greatly enjoyed. my service in the Superior Court, with very interesting cases presented by superb counsel. And, time heals all wounds—and perhaps, vice versa.

Thank you for giving me the opportunity to address you. I will take any questions you or your counsel might have for me.

Chairman SCHUMER. Thank you, Judge Bea, and we very much appreciate your coming all the way across country and congratulations on your son. What was he in?

Judge BEA. The men's pair, the coxless men's pair, rowing. He and Ted Murphy from Dartmouth College were the two——

Chairman SCHUMER. Excellent, so it was a bi-coastal winning team.

Judge BEA. Right. They are warming up to go again in 2004, God willing.

Chairman SCHUMER. Great. Well, maybe he will even come to the 2012 Olympics, which we hope will be in New York City.

Judge BEA. Well, we hope it is going to be in San Francisco.

Chairman SCHUMER. Yes, that is right; you are one of the competing cities.

Mr. GRAY. We hope it is going to be here.

Chairman SCHUMER. Well, let's just hope it is in America. Well, thank you. Let me ask a couple of questions of Mr. Gray, and then I have one of Mr. Bea.

Mr. Gray, I remember you came before us, and you are an eloquent and extremely intelligent witness, and I think you came in 1999 and talked about how ideology should not be part of the process. Your basic view was just what Judge Bea said as well; he sort of said it: leave the politics to the President. You might say don't leave the politics to anybody, but that ideology shouldn't be part. Is that right?

Mr. GRAY. That is correct, yes, sir.

Chairman SCHUMER. Here is what I would like to ask you, because this is how some of us feel that when we bring up these things, they say leave out ideology, and I am sure you will be able to reconcile this.

You were part of a group. In May of 1997, you and some others of like political mind, conservatives, created the Project on the Judiciary. As I understand it, the purpose there was to investigate

the judicial philosophy of nominees to the Federal bench for signs of what the Project called "activism."

Maybe it is a coincidence that the Project only existed during the Clinton administration, 1997 to 2000. You were on the board, and William Bennett, Ed Meese, Dick Thornburgh. Previous Attorney General Thornburgh called the Project "a counterpoise to the American Bar Association." Then–Chairman Hatch had said the Judiciary Committee shouldn't take into account the Bar.

Now, I wasn't aware of it until recently, but it seems the Project on the Judiciary was sponsored by a group called the Ethics and Public Policy Center, which was established to "reinforce the bond between the Judeo–Christian moral tradition and the public debate over domestic and foreign policy issues." Yet, as I said, they didn't evaluate President Bush's nominees.

Now, I have no objection to that, but it does seem to me that that group was evaluating nominees on the basis not of the excellence or lack thereof of their legal qualifications—all the nominees you mentioned would meet my standard of excellence that way—but rather to look at views and ideology.

So just answer for me two questions. That seems to be the case. Why isn't it? And, second, why did this group stop after the presidency changed?

Mr. GRAY. Let me see if I can answer that in two ways. First, I am not sure it lasted even very long after it started. Maybe in Republican circles, as opposed to Democratic, when you get into these issues it is not easy to find money the way some of the liberal groups seem to be able to do.

But the purpose was not to influence directly the nomination process, but rather to tee up generally the question—using potential judges as a way of putting some flesh on the bones, raising a flag about judicial activism. It wasn't designed to deal with a specific set of nominees. It was designed rather to deal with the bigger question of judicial activism.

This is, of course, a question of judicial philosophy: what is the role of a judge? Should it be to legislate or to interpret the law as passed by the legislature. That was the focus of this group.

Chairman SCHUMER. So you didn't evaluate any nominees?

Mr. GRAY. I don't recall getting involved directly in the nomination process and being part of the nomination fights over any of the nominees that came through during that period. I was not involved, certainly.

Chairman SCHUMER. But it just seems to me if the group that you worked for believed that it was important to "reinforce the bonds between the Judeo–Christian moral tradition and the public debate over domestic and foreign policy issues," again that is fine with me, but——

Mr. GRAY. Well, that is a broad description of the——

Chairman SCHUMER. That is sort of ideology, "public debate over domestic and foreign policy issues." That is not looking at what law school the judge went to, what the temperament of the potential judge was, how good they are in court. It is looking at their views on issues.

Mr. GRAY. But, Senator Schumer, I think you are mixing two things.

Chairman SCHUMER. I like a nice, robust debate, so don't hold back.

Mr. GRAY. This effort was housed in this group called—I can't remember the name of it exactly. You are taking what was the general charter of the Ethics and Public Policy Center and reading that into this Judiciary Project, which I don't think is fair. I don't think the Judiciary Project was worrying about foreign policy or the Judeo–Christian ethic. I think they were worried about, as I said, the question of what is judicial activism and when does a judge exceed his or her role to interpret the law and instead fall over into making law. That was the focus of that effort. It had nothing to do with foreign policy.

Chairman SCHUMER. Why wouldn't it continue, then? I have said this repeatedly: Judge way off the mainstream, far left, far right, like to make law. I have seen in New York City a lot of judges to the far left just love to sort of prescribe what they want. It doesn't matter how much it costs the city or the State, or whatever, and I think that is a bad way, in general, to make policy. It is a little bit anti-democratic.

But why would it stop, if that was its view, the minute the presidency changed hands?

Mr. GRAY. That is a good question. I don't know that it continued up to the end of the—maybe it did; I just don't recall. But by and large—and this is where I think the parties do differ—Republicans don't tend to nominate judges who have an expansive view of their role.

Every President that I have watched on the Republican side, and certainly the one that I served, campaigned on the principle that he would look for judges who would interpret and not make law. I think President Bush 43 has said virtually the same thing as his father, which was very close to what President Reagan campaigned on. Judicial activism is something I think is legitimate fair game; political ideology, no.

Chairman SCHUMER. So you could be a judicial activist on the right as well?

Mr. GRAY. Well, I suppose you could.

Chairman SCHUMER. You don't think Justice Scalia is an activist in terms of changing 30, 40, 50 years of law?

Mr. GRAY. I think he is stuck with precedent the way most judges are.

Chairman SCHUMER. I think he is less stuck with it than many others.

Mr. GRAY. Well, I suppose you could debate that, but I think he respects precedent as much as any.

Chairman SCHUMER. Let me continue here. One of the main articles of the Project on the Judiciary—this was the group you were part of, not the larger group—was an op ed called "In 2000 Supreme Court Is at Stake Too," and this was published in the Wall Street Journal. It discussed the close decisions of the Supreme Court in cases involving federalism, anti-discrimination law, prayer in the public schools, and abortion—some of the questions that I have tried to say are legitimate for us to ask judges about here. The publication of the Project on the Judiciary noted that many of

the decisions in these areas came down to one vote and that is why the presidential election of 2000 was so important.

You also told newspaper reporters that "For the Supreme Court, this is the most significant election in my lifetime." The Project on the Judiciary elaborated on that point. Here is what they said: "A liberal victory in 2000 would give the President the opportunity to replace the conservative Chief Justice and Justice O'Connor with liberal activists. That would give the current four–Justice minority a six-to-three majority on the Court. A conservative presidential victory, in contrast, would give the President an opportunity to replace Justice Stevens with a conservative jurist and increase the conservative majority."

Now, I am not objecting to someone having those views. In fact, that is just what I am saying. But it seems to me that somebody who comes before us and says ideology shouldn't matter and espouses these views—they seem to contradict one another, and you can cloak it in the words "judicial activism," but that is not even what they are saying here. They are saying "conservative," which is a distinct political philosophy.

Mr. GRAY. Well, as I said in my testimony——

Chairman SCHUMER. I will let you finish. I apologize, but it is part of the warp and woof of what we do.

Mr. GRAY. I agree with you it is part of what we do, but my point is that—and we did this; I testified just minutes ago that some of the nominees, many of the nominees, if not most of the nominees that President Bush 41 nominated would probably not pass muster under the litmus test that you are now imposing in this committee. But they went through, and I am saying what we are seeing now is a big change.

Chairman SCHUMER. What is the litmus test you are referring to?

Mr. GRAY. Well, you are saying that, in your view or in the view of the committee, some of these nominees—and I guess you include Roberts and Estrada—are too far to the right. All I am saying is we nominated Roberts ourselves and we didn't get him because he was a last-year nominee, but I believe that that is what the President is entitled to do.

That is what President Clinton was entitled to do and largely did. He got most of his nominees through. He had fewer left on the starting blocks than President Bush 41 did, as has been amply demonstrated, I think, this morning and at earlier hearings before this committee.

That is what a President is elected to do, and I don't believe that the Senate Judiciary Committee, in whoever's hands it is, Republican or Democrat, should say, well, we think these nominees are too conservative.

Chairman SCHUMER. So you are saying the President should allow ideology to enter into his nominations, which clearly happens. If you look at Democratic Presidents, the ideology and judicial philosophy is different than the Republican. But the Senate, in its advise and consent role, should not be allowed to take this into account. How can you reconcile that?

Mr. GRAY. I frankly believe that the full Senate will take into account what the full Senate will take into account, and I don't think

that anyone can control what the full Senate does. My point is more limited that I don't believe the Judiciary Committee ought to screen out, based on its view.

With all due respect, Senator Schumer, you represent New York. It is a State with definable characteristics.

Chairman SCHUMER. Let's hope.

Mr. GRAY. But those characteristics don't necessarily line up with the characteristics of people who come from Georgia or come from Alabama or come from Texas or even Oregon or Washington State. So, therefore, that is why the system is set up that the President nominates.

The President of one party is very unlikely to make many nominations of individuals of the other party. That is to be expected. That is not to say that it doesn't happen. It does happen, but it is not likely to happen, and the President got elected.

Now, there is an undercurrent—and this is perhaps more than what you asked, but there is an undercurrent of, well, there was a very close election and therefore, to use perhaps your words, he didn't have a mandate. But I don't know that you can calibrate it that way. I don't know that you can say, well, because there was a recount procedure in Florida, therefore the Senate Judiciary Committee has the right to try to balance the ideology, as it sees it, of the bench. I think it is up to the President and if the full Senate wants to reject nominees, it certainly will, regardless of what label is put on any nominee by any side.

Chairman SCHUMER. Well, I respect your view. I just would close, and then I will go to my colleague, Senator Sessions, by saying I think the view you have enunciated, which is it is okay for Presidents to nominate using ideology as part of the criteria—and now you are saying the full Senate can, but the Judiciary Committee can't, and that is a little different.

Mr. GRAY. Let me just clarify. You are saying that the President is using ideology. I am saying the President can nominate—and with the kind of ratings that they are getting from the ABA, "well qualified" in most cases—that the President is entitled to nominate these highly qualified people.

You may label them as ideological. I doubt if President Bush would label them as ideological. You may, but that is the President's choice. All I am saying is yes, and I don't think the Senate should reject, but I certainly don't believe the Senate Judiciary Committee should reject, and I don't believe the full Senate would.

Chairman SCHUMER. Thank you. I thank both witnesses, and again congratulations on your son, Mr. Bea.

Senator Sessions.

Senator SESSIONS. Judge Bea, I am sorry that the system did not work well for you. I was just recalling when I came up to testify at my little fiasco, and the day before I testified I read in the newspaper that two Department of Justice officials—and I was a member of the Department of Justice—had alleged that I had blocked a civil rights investigation in Conecuh County. So they asked me about it. I hardly had time to prepare and I couldn't believe anybody could be in error about that. I mean, surely these people wouldn't say that if something hadn't been the basis of it.

So I said I don't know what that could be. I don't think I have done that. I mumbled around there pretty inartfully and called back home to find out what was going on, and it later turned out, after the news had been dramatic that I had blocked this civil rights investigation, that the two career attorneys in the Civil Rights Division were in error, that it was a different county, and the former Democratic U.S. attorney, not me, had blocked this investigation. They recanted sometime after the story was all out there.

So I do think Senator Schumer shares our concern about that. He thinks we ought to be better about giving nominees a fair shake, and I do believe he is sincere about that.

Judge BEA. You had at least the pleasure of finding out what they were saying about you in time to do something about it. I had to scratch my head and say why am I not getting a hearing from fall to winter, from winter to spring, from spring to summer. I never found out until the Freedom of Information Act—God bless the Freedom of Information Act—came through and showed me.

Then for further rancor, it turns out that on further investigation the people who were accusing me of these vast misdeeds said, well, we may have gotten it wrong and we think he would be okay and we withdraw our objection. But that came so late, and so then when they finally came to interview me the second time and I had some newspaper articles saying my nomination had died—and they came to interview me again and I remember talking to the FBI people and saying is this a morbid joke? I mean, who could have thought this one up? This is really rubbing salt in wounds to ask me now. So, bless your lucky stars, you got your day in court. I didn't.

Senator SESSIONS. Well, let's mention that.

Chairman SCHUMER. He is not so happy with his day in court.

Senator SESSIONS. Well, all in all, this is a fun place to be. I am honored to be on this side of the table. All in all, it is better to be on this side than that side.

But Senator Schumer raises a point that I think I had in my mind, and I will ask you if you thought it so with you, that a lot of times people who make these statements, and these attorneys in the Civil Rights Division who said later they were mistaken and also said they felt betrayed that their comments had been made public—so my question is if you are at liberty to tell in confidence the FBI or anyone in the process something bad about a nominee and the nominee not know who said it or where it came from, it could encourage people who would just like to see your nomination fail to come forward with false information, couldn't it?

Judge BEA. Well, it could, and I am very conscious of the necessity to give confidentiality in order to get people to speak honestly. I am all for that. Don't get me wrong, but what I would suggest to staff and to the Senators is if something comes in that is bad about the nominee, the appointee, confront him right away.

You don't have to tell him who it is, but confront him right away and tell him this has come up and get the details so the man or woman can defend themselves. Don't just let it sit there on the back burner and kill the process. That is what I am here to say.

Give a shake, maybe not the fairest shake, but at least give a shake.

Senator SESSIONS. Well, thank you for sharing that. We deal with a lot of nominations. We ought to reach the highest possible level of fairness, and I think for the most part the system does, with the FBI and the White House and the Senate reviews. Local Senators usually take the matter seriously, so it is important that we do that.

Mr. Gray, a lot of the nominees that did not make it through the Clinton years was because they had an objection from their home State Senator, the senatorial courtesy, the blue slip policy. That is a fact of life historic here.

Could you share with us how that works and how a wise White House can work within that structure from your perspective?

Mr. GRAY. Well, the tradition, as I understand it, going back, is it is pretty important to have the assent of the home State Senators for appellate nominees. Now, if you look at it stepping back, there is a difference in the way home State prerogatives are treated between a district court nominee and an appellate nominee.

Senator SESSIONS. Well, President Reagan, for example, took the view that it was his nomination and he did not feel bound by the local State Senator. Isn't that correct?

Mr. GRAY. That is correct.

Senator SESSIONS. With respect to circuit judges?

Mr. GRAY. Appellate judges. Our view was probably not quite the same as that. We tried to get, and I think did in most cases get concurrence from the home State Senators, even though the individuals would not have been someone that they themselves would have proposed. Now, that seems like kind of being on both sides of it, but they could pretty well call the shots on the district nominees. We wouldn't let them have so much leeway on the appellate. But at the same time, we didn't want their opposition because that spelled trouble, and in most cases we did not have their opposition.

How do you deal with that? Well, you get on top of the curve as fast as you can and you work very, very hard to persuade the home State delegation that your nominee, which may be the same as theirs but not always is, is acceptable. It takes a lot of persuasion and a lot of work. I believe that President Clinton fell down on the job in that regard by not, in advance of his nominations, getting the political spade work done that would have saved him a lot of trouble.

Senator SESSIONS. And you have to watch who you nominate if you expect support.

Mr. GRAY. Well, of course.

Senator SESSIONS. For example, we had two in this previous panel, fine people who had been very active politically, had served in the Department of Justice, but neither one of them had ever tried a lawsuit, good people. In the last days of the Clinton administration, he tried to run those through and they didn't make it.

I mean, if you were advising President Bush in the latter days of his administration, if you put up that kind of nominee, you would probably tell him, wouldn't you, that you are liable to run into some difficulties with these nominees?

Mr. GRAY. I think you are liable to run into trouble and you are not going to get the kind of "well qualified" top rating from the ABA for those kinds of nominees and they are risky. So there are two problems here, which may be what you are getting at.

One is nominating someone who has the active opposition of the home State delegation. That is a very risky proposition. Nominating someone who doesn't have the best possible credentials in the last year is asking for a little trouble, too. That is a risky business, and both of those factors operated, I believe, with respect to the whole panel that was here this morning. Notwithstanding the fact they are great people, they were all risky nominees.

Senator SESSIONS. I remember in the last year of President Bush's administration he chose to nominate the chief of the appellate division of the Alabama Attorney General's office, a Democratic person, realizing that he needed a Harvard graduate, highly capable. He realized he needed a qualified nominee that would have broad support if he expected to get him through in the last months of that administration and he barely did. I think that is the reality of life.

Let me ask you about this question of ideology and philosophy. Lloyd Cutler, I know, has worked on these issues kind of like you have from the White House side over the years. He rejected the idea of ideology being a factor, saying it would politicize the courts.

Can you distinguish between political ideology and what that means in the confirmation process as opposed to a person's judicial philosophy?

Mr. GRAY. I will try, yes, sir. Political ideology to me means a person's political views as expressed in any number of fora. That person might have been, and often has been in the past a Senator who has been nominated to the Supreme Court. That person has a political ideology. That is what I think Lloyd and I—same law firm, different philosophies, different ideologies for sure—both believe is really off limits. That is not something that should be used to exclude a presidential nominee.

Now, judicial philosophy within the confines of one's views about the courts and the role of the courts is I think something that is more legitimately the subject of your inquiry; that is, is the nominee someone who is going to legislate from the bench. I will oversimplify it by saying that.

Now, you can say that is an aspect of political ideology. I will grant that. Yes, you could say that, but I believe that judges should stick to the job of judging and should not be legislating. I clerked for the Chief Justice, as the chairman pointed out, and we always used to say when we had time alone with him, which was every Saturday for lunch—he would take us to lunch—we would periodically say what a difficult job *Brown* v. *Board of Education* must have been to decide.

He said, you know, that is not the decision I am proudest of. Obviously, it had to be decided that way, but that was really a job for a legislature. Had we had *Reynolds* v. *Sims* and *Baker* v. *Carr*, one man, one vote, fully in place, I am not sure we would have had to decide that case. Having been stuck with it, we had to decide it the way we had to decide it. But, ideally, it wouldn't be for us to decide.

Here was a man who is regarded as a liberal icon who understood, I think, the limits of the role of the judiciary, and that is what I talk about when I mention judicial philosophy.

Senator SESSIONS. Well, you would not say that a person is a judicial activist just because in serving on a court they conclude that an act of the U.S. Congress violates the Constitution of the United States, would you?

Mr. GRAY. No. That is, since John Marshall anyway, probably the central job of a Supreme Court nominee. But, luckily, that is a job for Supreme Court nominees. It is not generally the job of district and appellate judges, although they can and they do, but the final say is the Supreme Court, which makes the Supreme Court a fairly high-stakes game, of course.

But I think exercising the right of constitutional judicial review is not an act of judicial activism. The kind of judicial activism I think of is when a district court judge takes over a school system and starts to run it or takes over an industry like the telecommunications industry and tries to run it over an extended period of time.

You might be in a situation where in an emergency you have to do something temporarily, but to view it as a long-term exercise, I think, is the kind of judicial activism that I am talking about.

Senator SESSIONS. We certainly have court systems, prison systems, mental health systems, and school systems all over America still being run today by Federal judges, some of them 10, 15, 20 years ongoing. I am not sure that is democracy. A Federal judge is not elected. They are appointed for life. They are unaccountable to the public, and so if they are going to run a political institution, at some point we need somebody accountable to the public, it seems to me. I do think there have been abuses there.

I just strongly believe that a disciplined, responsible, non-activist judge can on occasion conclude that the Commerce Clause is a part of the U.S. Constitution, and that on some occasions the U.S. Congress just might pass a law that too much encroaches on the limitations imposed by commerce, or the limitations on Federal action limited by commerce, and I don't think that is activist.

Now, Senator Schumer views some of those rulings that have cut back on some of the law as activist. I just don't believe that is activist. I would point out that a number of the conservatives voted on this rather surprising recent Supreme Court decision on child pornography, the virtual computerized pornography. Some of the conservatives voted on that. Justice Scalia voted, amazingly to me, that the act of burning a flag is speech, with the liberals, which I don't agree with.

I do think that the right to take your money and buy a television ad in the last 60 days of an election is speech, big-time speech, but I don't think the act of burning a flag is speech. We all have little disagreements. I just believe that if we aren't careful and respect the judges—and the fact that one of the witnesses we just had on the previous panel was counsel to the Democratic National Committee didn't qualify him. He never tried a case. That didn't disqualify him, but in the last days of an administration with little other compensating basis to justify his nomination, it faltered. I think that is probably the way the system works.

Mr. Chairman, I hope that you and the Democratic leadership will reconsider some of the changes in the ground rules that you have attempted to move forward here that make the confirmation of judges much more difficult. I think we should not do that. In the long run, we will be sorry about it.

What we need to call on judges to do is to go to work everyday and to enforce the law as written. A restrained, responsible judge is not a threat to our liberties. The judge that is the threat is the one that is willing to reinterpret the meaning of words and to impose their political views in a case when they are not authorized to do so.

Chairman SCHUMER. Well, thank you. I thank Senator Sessions. We disagree, but he always puts it well and like a gentleman, politely, strongly and well.

I thank the witnesses for really putting up with us here. We apologize for that long gap, but your testimony was excellent and I will commend it to my colleagues.

Senator SESSIONS. Mr. Chairman, I would offer for the record several statements—Senator Grassley; a letter from a nominee, and a couple of other items.

Chairman SCHUMER. The record will be open for other statements from others of our colleagues, as well as for what Senator Sessions asked.

Senator Leahy also has a statement for the record.

With that, the hearing is adjourned.

[Whereupon, at 1:38 p.m., the subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

# NEWS RELEASE

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

FOR IMMEDIATE RELEASE
May 9, 2002

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## FLOOD OF EXTREMIST CIRCUIT COURT NOMINEES IS OF GRAVE CONCERN TO AMERICAN WOMEN

*Statement of Nancy Zirkin, AAUW Director of Public Policy and Government Relations*

"The American Association of University Women (AAUW), 150,000 bipartisan members nationwide, applauds the Senate Judiciary Committee for its thorough and careful review of nominees to the U.S. Circuit Court of Appeals. With women's lives and futures at stake, we believe that only moderate jurists committed to upholding women's reproductive rights, civil rights, and individual liberties should be confirmed.

"The circuit courts exercise enormous power in deciding cases that determine the rights of all Americans in such areas as civil rights, employment discrimination, right to privacy, rights of workers, reproductive freedom, and the environment. The vast majority of cases decided by the U.S. Circuit Courts never make it to the Supreme Court. For example, the U.S. Supreme Court now decides an average of 70-80 cases per year while the circuit courts decide 28,000 cases. In effect, many circuit court rulings are the final word on our rights, making the selection of judges extremely important to us all.

"Extremists confirmed to the U.S. Circuit Courts of Appeal will have the power to tip the scales of justice away from the protection of a woman's constitutional right to an abortion, and other civil and constitutional rights such as individual liberties, privacy, health and safety, and the environment. Further, confirming extremists to the circuit courts could mean elevation to the Supreme Court since the circuit courts act as a farm team to the Supreme Court. In fact, seven of the nine current members of the Supreme Court were circuit court judges when they were nominated for the Supreme Court.

"Already, ultra-conservative jurists have overturned affirmative action in the fifth circuit and placed onerous restrictions on abortion providers in the fourth and fifth circuits. These are just two examples of a growing number of cases where extremist judges have limited civil rights and individual liberties for the citizens of their circuits.

"Michael McConnell, nominated to the 10th Circuit, is an example of a jurist whose record must be closely scrutinized. In a radical departure from decades of separation of church and state, he has argued in favor of broad public funding of religious institutions. Additionally, in 1996 he argued before the Supreme Court that a woman's right to abortion was of questionable legitimacy and even more questionable prudence. The Senate Judiciary Committee must closely examine his positions on civil and individual rights and liberties and, if found to be extremist, he must be rejected.

"Federal judicial appointments, which are lifetime positions, are far too important to hastily confirm nominees with extremist or controversial positions. The Senate holds an enormous responsibility in its constitutional role to advise and consent on federal judicial nominations. That power must be wielded with the utmost of care. No nominee is presumptively entitled to confirmation. Nominees must be subject to the highest standard of scrutiny, and protection of the rights of the people should take precedence over the agenda of either political party or the aspirations of any judicial candidate.

"Many of the nominees put forth by the Administration are divisive. Because of their extreme opinions, review of their record is an onerous process, resulting in long-term vacancies in the court. The U.S. Circuit Courts, and through them the citizens of this country, would be better served by the nomination of moderates whose confirmations could be expedited. With so much at stake, AAUW hopes that in the future the President and Senate will work together in a consultative process to ensure that only moderates are considered for these vital positions."

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**AAUW, representing 150,000 college graduates and more than 1,500 branches, is the nation's leading advocate for education and equity for women and girls. Please visit our web site at www.aauw.org for more information.**

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Lillian R. BeVier
*Henry L. and Grace Doherty Charitable Foundation Professor of Law*
*Class of 1963 Research Professor*

175 YEARS

May 9, 2002

For the Record

Republican Members
Committee on the Judiciary
United States Senate
152 Dirksen Office Building
Washington, D.C. 20510

Dear Senator Hatch:

Thank you for offering me the opportunity to testify today before the Subcommittee on Administrative Oversight and the Courts' hearing entitled "Ghosts of Nominations Past: Setting the Record Straight." While I was unable to accept the invitation, I did want to share a few thoughts with you on the judicial confirmation process.

As you know, I was nominated by President George H. Bush to the Fourth Circuit Court of Appeals on October 22, 1991, with the support of both of my home state senators from Virginia. Unfortunately, hearings on my nomination were repeatedly delayed, and, never having been granted a hearing, I remained unconfirmed at the expiration of the 102nd Congress, October 8, 1992. Of course my nomination lapsed upon the election of President Clinton. While I was frustrated by the process and disappointed not to have been granted a hearing by the Senate Judiciary Committee, I consider myself fortunate in having been able to continue my very rewarding job teaching law at the University of Virginia Law School. In addition, not being granted a hearing had its own silver lining of sorts in that I did not have to undergo the type of partisan hearing to which several other nominees had been subjected.

Senator Hatch, when you were Chairman of the Judiciary Committee, I was encouraged to observe your decorous and fair administration of nomination hearings. To my knowledge, you never called in conservative special interest groups to testify against President Clinton's judicial nominees during your tenure as Chairman. In treating all nominees with respect, you preserved the dignity of the Senate and went a long way toward restoring the integrity of the confirmation process. Especially in the aftermath of the recent Ashcroft and Pickering nominations, I wish that Chairman Leahy and Senator Shumer were more inclined to follow your example.

Again, thank you for the opportunity to testify, and my sincere hopes for success in your continued efforts to improve the judicial confirmation process.

Sincerely yours,

Lillian R. BeVier

*580 Massie Road • Charlottesville, Virginia 22903-1789 • 434.924.3132 • FAX 434.924.7536 • email: lbevier@law5.law.virginia.edu*

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 8, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Attn: Nicolle Puopolo

Dear Mr. Chairman:

Thank you for your letter to the Office of Justice Programs' Assistant Attorney General Deborah J. Daniels dated May 2, 2002, and your letter to the Violence Against Women Office's Director Diane M. Stuart dated April 30, 2002, submitting written questions from the Subcommittee on Crime and Drugs. Both Ms. Daniels and Ms. Stuart appreciated the opportunity to testify at the recent Subcommittee hearing, "Leading the Fight: The Violence Against Women Office."

As you know, the Subcommittee submitted several very substantive questions and requested that we respond by May 10, 2002. Although we are working to respond to the Subcommittee's questions, in order to respond to each question at the level of detail required, we do not expect to be able to meet the May 10 deadline. Please be assured, however, that we are working diligently to respond as accurately and thoroughly as possible to the questions posed by the Subcommittee and will forward our responses to you as soon as possible.

I appreciate the Subcommittee's continued strong interest in addressing violence against women. Please contact this office if we can be of further assistance on this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

I'd like to use my question time to make a few general comments, rather than ask the witnesses questions.

I've been a member of the Senate Judiciary Committee for over 20 years. I've lived through the judicial nominations process under a Republican President and a Democratic Senate, a Democratic President and a Republican Senate, as well as a Democratic President and a Democratic Senate. I've seen the way that the Judiciary Committee has handled judicial nominations throughout the years. And I'm sorry to say that the process has been seriously degraded.

During the Clinton Administration, Senator Leahy and the Democrats consistently took the position that judicial nominations should be brought up and voted on, and that there was no reason to hold nominees up. They argued that if

the nominees didn't have the votes, then they wouldn't pass. That was and remains my position as well. My policy has always been to bring up judicial nominees for a vote.

But with a Republican President in office, the Democrats have changed their tune and are blocking consideration of many of these judges. That isn't right. There are currently too many vacancies in the federal courts for these kinds of partisan games.

Some have tried to blame the Republicans for the vacancy crisis, but that isn't true. When Senator Hatch became Chairman of the Judiciary Committee in January 1995, there were 70 vacancies in the federal judiciary. At the end of the 106th Congress, there were 67 vacancies in the federal judiciary - Senator Hatch decreased the number of vacancies by 3. But now, with a Republican President and a Democratic Senate, the vacancy rate has soared to record

heights. Senator Hatch has said, and I agree, that the dramatic increase in vacancies means that the Senate's pace under Democratic control in confirming President Bush's judicial nominees is simply not keeping up with the increasing vacancy rate, not even in accordance with the precedents and practices of the Committee. That really isn't fair to our judicial system.

Also, I'm sorry to say that we're seeing the same kind of coordinated partisan attacks against Republican judicial candidates, similar to those organized in the late 1980s and early 1990s when Republicans were in the White House. That was when a number of left wing outside interest groups ganged together to defeat the nominations of worthy nominees just because they did not meet their approval. Harsh tactics, unfounded and misleading allegations, as well as character and ethical smears, were all employed to degrade the judicial confirmation process. These groups put out

propaganda and background papers to attack and dig up dirt on the nominees. Republican judicial candidates were unfairly demeaned and called racists, racially insensitive, or anti-Roe. The net result was that a large number of Republican nominees were killed in Committee. I have a letter here from Lillian BeVier that shares some of her thoughts about the judicial confirmation process as a nominee that was denied a hearing during that time.

But when Senator Hatch became Chairman, he told the conservative interest groups that he was not going to work with them to kill nominees of President Clinton that did not meet their litmus test. He told them to get lost. He was fair and wanted to treat the nominees fairly. He tried to elevate the debate and treat nominees with respect. So when the conservative groups asked Senator Hatch to block every Clinton nominee, I stood with Senator Hatch in saying that we need to evaluate judicial nominees on their merits, not on

pure ideology.

Like I said, we're seeing the partisan tactics being resurrected once again. Many of the liberal outside interest groups that made it a practice to drag the nominees through the mud with unfounded allegations and code words are back in full swing. And the credibility being given to them is troubling. Even when allegations have been proven to be false, they are continued to be cited as true. That's just not right. While the left wing outside interest groups have a right to participate in the debate just as any other group, they shouldn't be able to hijack the Judiciary Committee and the full Senate in regard to the judicial confirmation process.

Right now, the left wing special interest groups are working to defeat any nominee that does not pass their liberal special interest litmus test. The special interest groups that attacked John Roberts, Terry Boyle and Lillian BeVier are now

attacking this new batch of Republican judicial nominees. We've seen their handiwork with their shameless attacks on Judge Pickering. We've heard their baseless attacks on Brooks Smith. These smear tactics have got to stop. These attack groups should not be allowed to demean this Committee or the Senate as a whole.

A recent National Review article outlined the behind-the-scenes moves by several left wing special interest groups in doing the dirty work to defeat the nomination of Judge Pickering to the Fifth Circuit. The groups had requested in-depth information and all the opinions of Judge Pickering, and then went into action to create a record against him. The National Review article shows how these groups hijacked the Judiciary Committee into doing their bidding.

We need to get these low-life, smear tactics and uber-partisan politics out of the judicial process. Character attacks made

by outside groups should not be able to destroy the nominations process. Unfounded personal attacks on good men and women should not be allowed to take over the will of this Committee. The political agenda of the left wing outside interest groups which subjects qualified judicial nominees to ugly personal attacks sets an extremely bad precedent for future nominations. We cannot allow the agendas of these organizations to be used as the ultimate litmus test as to whether the Senate should vote to confirm or reject a nominee. We must be able to conduct the judicial confirmation process without the degradation that is being forced on us. And it is the duty of the Judiciary Committee and the full Senate to rise above the partisan political rhetoric so we can fulfill our constitutional responsibility.

WT 5/9/02 A21

# Senatorial stonewalling

## Neas gang obstructs judicial nominees

**By Thomas L. Jipping**

Today, on the anniversary of President Bush's first judicial nominations, Senate Democrats are holding a hearing on judicial confirmations. It could be to consider the 73 percent of those initial nominees still waiting for a hearing. It's not. Titled "Ghosts of Nominations Past: Setting the Record Straight," this hearing is to change the subject.

Scheduled deliberately to interfere with today's anniversary event, this hearing will somehow try to justify the Democrats' current confirmation obstruction campaign by saying the Republican Senate treated President Clinton's nominees badly. No, really — these grown politicians don't deny the obstruction, but use the excuse parents refuse to accept even from small children: "They did it first."

The American people won't fall for the con. First, Republicans didn't do it first. Judicial confirmation history did not begin in 1995 with the Republican Senate majority. The liberal New York Times reported in October 1988 that "Democrats were determined to bury" President Reagan's nominees before the election because those judicial positions were "too precious to . . . give up."

Four years later, believing they could capture the White House, Democrats killed even more Republican nominees. The Democrat Senate ignored 54 pending Bush nominees so that the Bush presidency would close with a whopping 97 judicial vacancies. It worked, vacancies swelling to 113 when Mr. Clinton took office. In contrast, the Republican Senate did not address 41 Clinton nominees, many named too late to consider, and the Clinton presidency closed with just 67 judicial vacancies. Mr. Bush faced 82 vacancies when he took office.

Second, Republicans didn't do it as much. In today's hearing, subcommittee chairman Sen. Charles Schumer surely won't mention that since he and his fellow Democrats took over the Senate last year, vacancies have averaged 45 percent higher than when Republicans ran the Senate under Mr. Clinton. This difference is a pattern, not an aberration. Over the last dozen years, judicial vacancies averaged 113 when Democrats ran the Senate and just 71 when Republicans were in charge.

Third, the accusation doesn't make sense. Republican resistance to some Clinton nominees helped create some vacancies but does not even explain, let alone justify, Democrats' refusal to fill those vacancies today. The excuse for higher vacancies in the early 1990s — that the first President Bush made few nominations — doesn't work, either. The second President Bush has sent the Senate a record number of nominations, including 30 to the U.S. Court of Appeals. While the previous three presidents enjoyed an average 92 percent confirmation rate for their appeals-court nominees in their first two years, Mr. Bush is stalled at a mere 30 percent. Democrats have plenty of nominees to confirm, but they just won't confirm them.

**These grown politicians don't deny the obstruction but use the excuse parents refuse to accept even from small children: "They did it first."**

Fourth, Democrats use tactics Republicans never even tried. Democrats, for example, have called interest group witnesses to attack nearly a dozen prominent Republican judicial nominees to all three levels of the judiciary. In contrast, while he was Judiciary Committee chairman, Sen. Orrin Hatch never called interest group witnesses to testify against Clinton nominees.

Those same far-left interest groups are still calling the Democratic shots. The principal string-puller is Ralph Neas, now president of the so-called People for the American Way (PAW). Working with left-wing Harvard law professor Laurence Tribe, Mr. Neas changed the confirmation rules and tactics in the 1980s so the Senate could highjack judicial selection. He perfected the drive-by smear to defeat or damage a series of judicial nominations since then.

Well, he's *baaaaack*. The Neas gang deployed early last year against Attorney General John Ashcroft and Solicitor General Ted Olson. Mr. Tribe joined Senate Democrats at their April 2001 planning retreat for a refresher course on the partisan attack confirmation ground rules. Mr. Neas' Senate Democrats then savaged and rejected the appeals-court nomination of Charles Pickering and are now gunning for more.

Mr. Neas is the real ghost of nominations past and present. The question is whether he will haunt nominations future. He and his far-left troops are fighting for a judiciary that will impose his political agenda rather than follow the law. Mr. Neas' agenda — which "we the people" reject in the political process — opposes such things as parental involvement in their children's health-care decisions, as well as limitations on child pornography, drug use, flag burning and publicly funded indecent and religiously bigoted "art."

The Neas-directed stall has blocked even black appeals-court nominees such as Lavenski Smith. A former Arkansas Supreme Court justice, law professor and legal services attorney, Justice Smith is supported by both home-state senators, Republican Tim Hutchinson and Democrat Blanche Lincoln. He is supported by Dale Charles, president of the Arkansas NAACP, and Arkansas Governor Mike Huckabee. He has been waiting without a hearing for 357 days.

Senate Democrats should hold judicial confirmation hearings, but on nominees rather than on changing the rules and stacking the political deck against them. And they should not let Ralph Neas be the ghost of nominations future; that ghost would be frightening indeed.

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*Thomas L. Jipping is a senior fellow in legal studies at Concerned Women for America, the nation's largest public policy women's organization.*

Jon Kyl

Statement of Senator Jon Kyl

I would like to make two quick points. Let me begin by quoting statements from two of today's witnesses. Enrique Moreno testified, "I have a simple and unoriginal observation about the nomination process. Nominees should get a hearing, hopefully a timely hearing. A nominee should receive an open public debate about the merits of his or her nomination." Jorge Rangel testified, "Hopefully, our presence here today will in fact set the record straight so that other judicial nominees, regardless of their party affiliation, will not suffer the same fate. They and the American people deserve better." I agree.

So, first, if this hearing establishes anything, it is that nominees should get a hearing — precisely the point that Republican Senators and President Bush have been making. If it was wrong for three of these witnesses to be denied a hearing, it is wrong for this Committee now to deny a hearing to current nominees.

The second point I would like to make is that I disagree with the new standard that Senator Schumer discussed in his opening statement: namely, that it is our job to ensure ideological "balance" on the courts, especially since he assumes he can objectively define balance. It's not our job to define balance. One senator might view everyone nominated by President Bush as a "conservative ideologue." But with all due respect to the Senator from New York, he is not the best judge of "ideology" — nor am I. We represent two ends of the ideological spectrum. President Bush, who represents the entire country, not just a particular state, has a greater claim to represent the people of America — and polls show him with an approval rating of over 70 percent.

Who are these "out-of-the-mainstream conservative ideologues"? John Roberts? Miguel Estrada? These nominees and six others nominated on May 9, 2001 have been waiting over a year for a hearing. As today's witnesses have said, nominees should get a hearing.

# U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

**STATEMENT OF SENATOR PATRICK LEAHY,**
**CHAIRMAN, SENATE JUDICIARY COMMITTEE**
**HEARING OF THE COURTS AND ADMINISTRATIVE OVERSIGHT SUBCOMMITTEE**
**"GHOSTS OF NOMINATIONS PAST"**
**MAY 9, 2002**

I thank Senator Schumer and the Subcommittee for organizing today's hearing. We will hear from four of the more than 50 judicial nominees of President Clinton who were never given votes on their nominations, leaving many of these seats vacant for years.

The fact is that the Democratic majority inherited 110 judicial vacancies on July 10, 2001. Many of these vacancies were caused or perpetuated by Republican stalling and obstruction between January 1995 and July 2001. During that period, overall vacancies rose by almost 75 percent, from 63 to 110. Vacancies on the Courts of Appeals rose even more. They more than doubled from 16 to 33.

I also appreciate the four Clinton nominees who have agreed to appear before the Subcommittee to discuss their experiences as individuals whose nominations languished for months and years during the period of Republican leadership. I wish the Republican majority would have allowed these nominees and the dozens of others, many of whom waited for years, to have the courtesy of votes on their nominations.

Some years ago I had occasion during a Supreme Court confirmation hearing to talk about Judge Bork's "confirmation conversion." What we are now seeing among Republicans is what Judge Rangel has properly and aptly termed "confirmation amnesia." It is as if 1996, 1997, 1999 and 2000 never happened.

We had occasion to hear from Justice Ronnie White early last year on how he was mistreated by the Senate and his record mischaracterized by some. I hope we were able to help set the record straight in that regard after Republicans ambushed his nomination in an unprecedented 11th hour, party-line vote against his confirmation on the Senate floor.

I say to Judge Rangel, who was nominated to the United States Court of Appeals for the Fifth Circuit, I regret that I could not do more to get you a hearing and a Committee vote during the years your nomination was pending and I served as this Committee's Ranking Member. I am sure you know that it was not for lack of trying. You have an outstanding record of accomplishment. I wish you had been allowed to go forward to join the federal bench. The nation would have been well-served by your elevation.

Judge Rangel, I have had occasion to quote from the letter you wrote after you had waited almost two years to receive a hearing. You said that while patience was a virtue you could not leave your life on hold for any longer. You waited patiently through almost half of a presidential term. I am sorry.

Some nominations were able somehow to prevail over Republican stalling tactics. For example, Judge Richard Paez and Judge William Fletcher waited more than four years, more than one whole presidential term, to be confirmed. They were among the lucky ones. Other nominees, like Michigan Judge Helene White, who was nominated to the 6th Circuit, waited for four years for nothing. She was never accorded a hearing. Other Clinton nominations, far too many, waited two, three, and four years to be returned to the White House at the end of a Congress without Senate action or, if they survived the process, to be confirmed.

The fact is that numerous moderate, qualified, Clinton judicial nominees waited more than a year for a hearing or a vote and some never got a hearing of a vote. When the Committee refused to vote on the nominations of Bonnie Campbell and Allen Snyder after their hearings, I termed it a cruel hoax.

General Campbell, as a distinguished former Iowa Attorney General and head of the Violence Against Women Office at the Department of Justice, you deserved better treatment. I am also sorry that we could not get you a vote by the Republican-controlled Senate Judiciary Committee. After all you have done throughout your legal career on behalf of victim's rights, I cannot believe how you were treated by the Senate. You served admirably in the Justice Department, leading the efforts to implement the landmark Violence Against Women Act. You served as the Attorney General of the State of Iowa, elected to that position of responsibility by a majority of citizens in your home-State. I know you would have been a fair-minded judge committed to following precedent. You had the bipartisan support of both of your home-state Senators and were given a hearing in May of 2000, but were never given a vote on your nomination. It was the cruelest of hoaxes that people like you and Allen Snyder (who clerked for Chief Justice Rehnquist and is a partner at a top law firm) and many others were given hearings but were never accorded a vote by the Senate Judiciary Committee under the Republican majority.

Despite claims by some Republicans that there was no time to vote on your nomination after your hearing in May and before the Session ended that December, we all know that other nominees were confirmed, including nominees from Arizona who were nominated in July, given a hearing within days of their nomination and then confirmed in October that year. I know Senator Harkin went to the floor repeatedly to ask that you be given a vote on your nomination.

The list of those Clinton nominees who never got a hearing or a vote is long, and filled with distinguished, moderate nominees. I will not list all of the Clinton nominees who were treated badly but recall a few who never got a Committee vote during those years: Judge Roger Gregory (4th Circuit), Bonnie Campbell (8th Circuit), Allen Snyder (D.C. Circuit), Elena Kagan (D.C. Circuit), James Beaty (4th Circuit), Judge Richard Leonard (4th Circuit), Robert Raymar (3rd Circuit), Barry Goode (9th Circuit), H. Alston Johnson (5th Circuit), Enrique Moreno (5th Circuit), Jorge Rangel (5th Circuit), James Duffy (9th Circuit), James Wynn (4th Circuit), Kathleen McCree

Lewis (6th Circuit), Robert Cindrich (3rd Circuit), Stephen Orlofsky (3rd Circuit), Christine Arguello (10th Circuit). These, of course, are only a sampling of the nominees to the Circuit Courts, who did not get a vote. It would take too long to detail them all.

Mr. Moreno, I am sorry that the Republican-controlled Committee never held a hearing on your nomination. To this day I cannot believe that anyone anywhere would have the capacity to assert that you were not qualified for the Circuit Court. You received the highest rating from the American Bar Association, well qualified. You earned and deserved that rating. I understand that you immigrated to the United States from Mexico, that you worked hard your whole life, getting into Harvard for both college and law school and graduating with honors. You were active in the community. At the time you were nominated you had been a practicing lawyer for 19 years. You were and are an outstanding American who would be a credit to our courts. Unfortunately, Republicans blocked your nomination, and we could not get you a hearing. Thank you for coming to Washington today. I know today's hearing is no consolation for the confirmation hearing you never received.

I know that President Clinton renominated you, Mr. Moreno, and other Circuit nominees in January 2001 to give the Senate another opportunity to do the right thing and confirm you. Unfortunately, the Republican-controlled Senate did not take any action on those nominations when they were in the majority last Spring.

President Bush has recently said he wanted all judicial nominees to be treated fairly, regardless of who is President, and I agree with him. I am sorry you were treated so unfairly and that even into last year, we could not get bipartisan cooperation to get you a vote.

Instead, last May the White House sent the Senate, which was then controlled by the Republicans, a slate of circuit court nominees, most selected primarily for their ideology instead of for their commitment to the fairness and independence of the federal judiciary, to be rubber stamped. These nominees have generated a great deal of concern among ordinary Americans that their rights will not be enforced, that the nominees are likely to be judicial activists.

In addition, we have seen nominees like Judge Pickering who failed the President's own articulated standard that judges should follow the law. His nomination was defeated because his conduct as a judge demonstrated that his personal views interfered with following precedent, in the cross-burning case and others. The Senate Judiciary Committee under a Democratic-led Senate gave Judge Pickering a hearing and a fair vote, which is much more than many Clinton nominees received.

People like Judge Rangel, who – unlike Judge Pickering – did not demonstrate a penchant for injecting his personal views into his decisions, never got a hearing. Others like Professor Kent Markus, who had the strong support of both of his home-state Senators, never got a hearing on his nomination. Mr. Markus, who is the Director of the Dave Thomas Adoption Center at Capital University Law School and a former official at the Justice Department, never got a hearing and never got a vote.

There has never been an explanation for why his nomination did not receive consideration by the Committee. I am certain that it had nothing to do with him personally. It seems that some in the Republican Caucus decided after the last confirmation of a 6th Circuit judge in 1997 that there would be no more confirmations to the 6th Circuit until the presidency changed. For more than four years the Republican-controlled Senate refused to hold any hearings on Sixth Circuit nominees. That is why there is a vacancy crisis in that circuit. That is why half of the seats on the Sixth Circuit are vacant.

Professor Markus, your confirmation would have helped avert that circumstance on the 6th Circuit. As would the confirmations of Kathleen McCree Lewis and Judge Helene White, who were both previously nominated for vacancies on that Court. Ms. Lewis is the daughter of one of our nation's most respected Solicitors General and appellate court judges, Wade McCree, and was another qualified nominee who never got a hearing or a vote.

Six vacancies on the 6th Circuit arose before 2001. None -- not one of the Clinton nominees to those current vacancies on the Sixth Circuit -- received a hearing by the Judiciary Committee under Republican leadership. One of those seats has been vacant since 1995, the first term of President Clinton. Judge Helene White of Michigan was nominated in January 1997 and did not receive a hearing during the more than 1,500 days before her nomination was withdrawn by President Bush in March of 2001.

Some on the other side of the aisle held these seats open for years for another President to fill, instead of proceeding fairly on those consensus nominees. Some were unwilling to move forward knowing that retirements and attrition would create four additional seats that would arise naturally for the next President. That is why there are now eight vacancies on the Sixth Circuit, why it is half empty.

Long before some of the recent voices of concern were raised about the vacancies on that court, Democratic Senators in 1997, 1998, 1999, and 2000 implored the Republican majority to give the Sixth Circuit nominees hearings. Those requests, made not just for the sake of the nominees but for the sake of the public's business before the court, were ignored. Numerous articles and editorials urged the Republican leadership to act on those nominations. Fourteen former presidents of the Michigan State Bar pleaded for hearings on those nominations.

The former Chief Judge of the Sixth Circuit, Judge Gilbert Merritt, wrote to the Judiciary Committee Chairman years ago to ask that the nominees get hearings and that the vacancies be filled. The Chief Judge noted that, with four vacancies the Sixth Circuit "is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court." Years ago, he predicted: "By the time the next President in inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them."

Nonetheless, no Sixth Circuit hearings were held in the last three years of the Clinton

Administration, despite these pleas. Not one. Since the shift in majority the situation has been exacerbated as two additional vacancies have arisen.

Last month's hearing for on the nomination of Judge Gibbons to the Sixth Circuit was the first hearing on a Sixth Circuit nomination in almost 5 years, even though three outstanding, fair-minded individuals were nominated to the Sixth Circuit by President Clinton and pending before the Committee for anywhere from one year to over four years.

Similarly, the hearing the Democrats held on the nomination of Judge Edith Clement to the Fifth Circuit last year was the first on a Fifth Circuit nominee in seven years and she was the first new judge confirmed to that Court in six years. When we held a hearing on the nomination of Judge Harris Hartz last year, it was the first hearing on a Tenth Circuit nominee in six years and he was the first new judge confirmed to that Court in six years. When we held the hearing on the nomination of Judge Roger Gregory last year, it was the first hearing on a Fourth Circuit nominee in three years, and he was the first new judge in three years.

Large numbers of vacancies exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half – 56 percent – of President Clinton's Courts of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Courts of Appeals during the entire 1996 session. The Clinton nominees on the panel today are the victims of that obstruction. They are also role models: distinguished members of our legal community who have withstood unfair and unfounded attacks with grace and with incredible patience and fortitude.

The witnesses on the first panel today are the faces and voices of the numbers behind the vacancy crisis we have been talking about in Washington. From the time the Republicans took control of the Senate in 1995 until the reorganization of the Committee last July, circuit vacancies increased from 16 to 33, more than doubling. That number would not have doubled had these nominees and others like them been given votes by the Republicans.

Democrats have broken with that recent history of inaction. Nine nominees have already been confirmed to the Courts of Appeals in fewer than 10 months. As of today, a total of 56 of President Bush's judicial nominees will have been confirmed.

The number of judicial confirmations we have already achieved in fewer than 10 months – 56 – exceeds the number confirmed during all of 2000, 1999, 1997 and 1996, four out of six full years under Republican leadership. We will have 18 hearings on judicial nominees in fewer than ten months, which is more hearings than Republicans held in any year they were in charge of the Committee. I just wish that we could have had a timely and fair confirmation hearing and vote for each of you.

Once again, I would like to thank Senator Schumer for chairing this hearing today on this important part of the recent history of judicial nominations.

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**Senator McConnell's Remarks**
**"The Ghosts of Nominations Past: Setting the Record Straight"**
**May 9, 2002**

I understand that Mr. Markus and Ms. Campbell are disappointed that they did not get confirmed. But they were nominated, respectively, in February and March of 2000, less than nine months before the election. It is my understanding that only one nominee who was put up that late in the process was confirmed.

Again, I understand their disappointment. But Democrats do not have a monopoly on disappointment. There were many of President George H. W. Bush's nominees who waited longer than Mr. Markus and Ms. Campbell and who never got a hearing, such as Lillian BeVier, Terrence Boyle, John Roberts. Indeed, some of these nominees, like Judge Boyle and Mr. Roberts, have again been nominated and have again been waiting over a year for a hearing. I suppose one could now say that they've been waiting over a decade for a hearing, and they still

haven't had one.

Mr. Markus's testimony leaves the impression that Republicans are somehow to blame for the vacancy crisis in the Sixth Circuit. I would like to dispel that myth. Of the eight vacancies on the Sixth Circuit, fully one-half of them arose only last year, and two more arose in the final fourteen months of the Clinton Administration. Furthermore, for five of the eight vacancies, there was not even a Clinton nominee.

And it is not like President Clinton did not get any nominees confirmed to the Sixth Circuit. On the contrary, he had five nominees confirmed, and four of the five (or 80%) were confirmed by a Republican Senate. Indeed, the Republican Senate confirmed so many Democrat nominees to the Sixth Circuit that there are now three times as many Democrat-appointed judges on that court than there are

Republican-appointed judges. There are six Democrat-appointed judges and only two Republican-appointed judges. I note that fact for my Democrat colleagues who purport to want balance on the appellate courts.

So the Republican Senate moved a good number of President Clinton's nominees to the Sixth Circuit, and again, while I understand Mr. Markus may be disappointed that he was not one of them, when a President nominates you late in his administration, like President Clinton did with him, sometimes that happens. If you do not believe me, you can ask Judge Boyle, Mr. Roberts, and several other nominees from the Administration of President George H. W. Bush who were nominated relatively earlier than Mr. Markus, waited longer for a hearing than Markus, and never got one, including to this very day.

But I would like now to talk about a nominee who was not nominated at the tail end of an administration, like Mr. Markus or Ms.

Campbell were, but a nominee who was appointed at the very beginning of an Administration. That nominee is Henry Saad of Michigan, whom President Bush has nominated to the Sixth Circuit Court of Appeals.

Henry William Saad would be the first Arab-American ever on any federal appeals court. He is an exceptionally qualified nominee. He has been a judge on the Michigan Court of Appeals for eight years. Prior to that, he was a practicing attorney in a Detroit-area law firm. Judge Saad has been an adjunct professor of law at the University of Detroit and at Wayne State University for 25 years. Judge Saad graduated *magna cum laude* from Wayne State University. In 2000, the school conferred on him a special Order of the Coif award. It is no wonder that the American Bar Association has given Judge Saad a high rating, with a majority rating him "qualified" and a minority rating him

"well-qualified."

Judge Saad has enjoyed strong bi-partisan support throughout his career. For example, during the 1996 election to retain his seat on the Michigan Court of Appeals, Judge Saad was supported by both the Michigan Chamber of Commerce and the United Auto Workers.

Judge Saad has been active in professional organizations and in his community, and he has been recognized for his civic service. He has been a member of the American Arabic and Jewish Friends, The Greater Detroit Inter-Faith Roundtable of the National Conference of Christians and Jews, the Arab-American Bar Association, and the Arab-American Chadian Council. In 1995, he received the Arab-American and Chadian Council Civic Humanitarian Award for Outstanding Dedication to

Serving the Community with Compassion and Understanding.

Now, I understand that historically there has been some hard feelings with respect to Sixth Circuit nominees. I can personally attest to that. Six of the eight senators from the Sixth Circuit (or 75%) are Republicans. And we were pretty upset when it appeared that this Committee was going to recognize a heretofore unheard of policy of allowing a circuit-wide blue slip, that is, allowing a senator of one state to veto nominees from every other state in an entire circuit. That would stop nominees from all four states that make up the Sixth Circuit.

It appears a circuit-wide blue slip is not going to be recognized, although for the better part of a year–as Sixth Circuit vacancies continued to balloon–it looked like it was going to be. So I understand hard feelings. But I do not think they should go on forever. And I think it is a shame that such hard feelings would thwart President Bush's

strong commitment to diversity. It is a significant milestone to nominate the first Arab-American to any federal circuit court as President Bush has done with Judge Saad. It is particularly significant in the present political climate with the War on Terrorism.

So I hope that any lingering hard feelings can be overcome and that Judge Saad will get a fair shake, and that we can help the Arab-American community reach this milestone during a particularly important time in our nation's history. I thank the Chairman.

## Breakdown of the 20 Nominees "Rejected" out of
## the 85 Supreme Court Nominees Submitted Between 1789 and 1900

**To support the use of ideology as a standard by which to confirm or reject the nomination of United States Supreme Court justices, some have asserted that between 1789 and 1900, 1 out of 4 Supreme Court nominees were rejected that such rejections arose in large part from the nominees' ideologies.[1] This statistic,[2] which is misleading, states that the Senate refused to confirm 20 out of 85 Supreme Court nominees. In actuality, 2 of the 20 nominees were eventually confirmed, 10 of the 20 were either rejected or not acted upon because they had been nominated by lameduck, or near lameduck, administrations, 3 were rejected for other reasons (*e.g.*, a senator wanted his favorites nominated), and only 5 of the 20 nominees were rejected on ideological grounds – primarily based on their personal political views. Because only 1 out of more than 20 nominees was rejected because of his ideology, a nominee's ideology historically played only a minor or nonexistent role in confirmation. Also, 6 nominees declined.**

**Actually Confirmed**

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| Roger B. Taney[3] | Nomination was postponed, but confirmed a few months later. (1836) | A struggle between the Senate and President Jackson resulted in Taney's nomination being postponed, but President Jackson re-nominated him, and Taney was eventually confirmed.[4] |

[1] *See, e.g.*, *Should Ideology Matter?: Judicial Nominations 2001: Hearings Before the Senate Subcomm. On Admin. Oversight and the Courts of the Comm. On the Judiciary*, 107th Cong. *9 (2001) (Marci Greenberger) ("During its first hundred years, between 1789 and 1900, 20 of 85 Supreme Court nominees did not make it to the bench – they were rejected, withdrawn, or not acted upon. Between 1895 and 1969, during a period in which many Administrations did not use judicial philosophy as a driving selection criterion, just one nominee was rejected.")

[2] *See* JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS ix (1999).

[3] Even though Roger Taney was actually confirmed, Laurence Tribe characterizes the initial opposition he encountered as based on ideological grounds, namely his opposition to the National Bank. LAURENCE H.TRIBE, GOD SAVE THIS HONORABLE COURT 86 (1985).

[4] HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 74-75 (1999); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 858 (Kermit L. Hall, ed. 1992) [hereinafter OXFORD COMPANION].

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| Stanley Matthews[5] | Not acted on under President Hayes, but later confirmed under President Garfield. (1881) | Matthews was nominated in the waning days of the Hayes administration, not allowing the Senate enough time to act, but he was renominated and confirmed under Presdient Garfield.[6] |

[5]While Stanley Matthews was also actually confirmed, Professor Tribe asserts that the initial opposition to him was due to his sympathy with business interests. TRIBE, *supra* note 3, at 89.

[6]ABRAHAM, *supra* at note 4, at 102-103; OXFORD COMPANION, *supra* note 4, at 533.

**Not Confirmed Due to Opposition to the Nominating President**

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| John J. Crittenden[7] | Postponed (1828) | Nominated in the last days of John Quincy Adams's lame duck administration; Andrew Jackson had already been elected.[8] |
| John Spencer | Rejected (1844) | The Henry Clay dominated Senate disliked Tyler and refused to confirm 5 of his 6 Supreme Court nominees. Spencer, was opposed due to his acceptance of cabinet posts under John Tyler. Accordingly, his nomination was defeated, but not based on his personal political or jurisprudential ideology.[9] |

[7]John Crittenden's nomination is described by Laurence H. Tribe as having been postponed because Crittenden was a moderate Whig. TRIBE, *supra* note 3, at 31.

[8]ABRAHAM, *supra* note 4, at 70 ("Adams, now a lame-duck president, send Crittenden's name to the Senate late in December 1828. Yet victorious Andrew Jackson's Democratic supporters in that body were not about to award the Supreme Court plum to a Clay Whig and , without ever discussing Crittenden's qualifications *or his views*, by a vote of 23:17 'postponed' the nomination in February 1829, thus consigning it to oblivion.") (emphasis added); David J. Danelski, Confirmation Controversy: The Selection of a Supreme Court Justice: Ideology as a Ground for the Rejection of the Bork Nomination, 84 Nw. U.L. Rev. 900, 907-08 (1990) ("Crittenden's case may be a clear precedent for partisan rejection of lameduck nominations, but it is not a clear precedent for ideological rejection of Supreme Court nominees.").

[9]ABRAHAM, *supra* note 4 at 29, 79 ("[S[pencer] was an avowed political enemy of Henry Clay and his followers, and it was with more ease than the rejection vote of 21:26 indicated that the Clay faction succeeded in blocking Spencer."); OXFORD COMPANION, *supra* note 4, at 816 ("[T]he Senate rejected by a vote of 21 to 26, owing largely to the opposition of those Whigs who distrusted any friend of Tyler and to Spencer's fierce temper.").

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| Reuben Walworth | Withdrawn (1844) | President Tyler withdrew Walworth after the Senate postponed the nomination indefinitely. The Whig Senators were mistakenly confident that Henry Clay would defeat James Polk in the next presidential election, and that Clay would submit nominees more to their liking.[10] |
| Edward King | Withdrawn (1844) | President Tyler withdrew King after the Senate postponed the nomination indefinitely. The Whig Senators were mistakenly confident that Henry Clay would defeat James Polk in the next presidential election and that Clay would submit nominees more to their liking.[11] |

[10] ABRAHAM, *supra* note 4 at 29, 79 ("It was now June, and the Whig Senators thinking they had victory in their grasp in the forthcoming presidential election, moved to postpone" both the Walworth and King nominations by votes of 20:27 and 18:29, respectively."); OXFORD COMPANION, *supra* note 4, at 908 ("Walworth's nomination suffered from Tyler's lack of support from either Whigs or Democrats.").

[11] ABRAHAM, *supra* note 4 at 79 ("It was now June, and the Whig Senators thinking they had victory in their grasp in the forthcoming presidential election, moved to postpone" both the Walworth and King nominations by votes of 20:27 and 18:29, respectively."); OXFORD COMPANION, *supra* note 4, at 486 ("Both the King and Read nominations failed as a result of Tyler's lack of support from either the Whig or Democratic party.").

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| John M. Read | Not Acted On (1844) | Although Read had Democratic and Whig support, the Senate adjourned without acting on his nomination because Read was nominated by Tyler and was nominated during the waning days of Tyler's lame duck administration.[12] |
| Edward A. Bradford | Not Acted On (1852) | When Bradford was nominated, the Senate was about to adjourn before the elections. Because President Fillmore was a lameduck, the Senate did not act on the Bradford's nomination.[13] |

[12] ABRAHAM, *supra* note 4 at 80 ("[Tyler] nominated well-known Philadelphia lawyer with supporters in both the Whig and Democratic camps, a one-time U.S. attorney of proved legal acumen and political deftness, John Meredith Read. But it was now mid-February, and a weary Senate adjourned without acting on the nomination – thus handing Tyler his fifth failure. It was widely expected that the incoming President Polk would have more luck."); OXFORD COMPANION, *supra* note 4, at 709 ("[The Read] nomination[] suffered from Tyler's lack of support from either Whigs or Democrats.").

[13] ABRAHAM, supra note 4, at 83 ("Fillmore's first choice to succeed the late [Justice McKinley] was Edward A. Bradford of Louisiana, a well-known, able lawyer from the same circuit. The Senate, however, was about to adjourn and it was in no mood to expedite a Fillmore nomination. ... [I]t reconvened after Pierce's victory ...."); OXFORD COMPANION, *supra* note 4, at 81 ("The Democratic majority in the Senate failed to act on the nomination before the end of the session.").

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| George E. Badger | Postponed (1853) | President Fillmore was now a lameduck, and the Senate chose to preserve the nomination for the incoming president, Franklin Pierce. In addition, Badger drew some opposition because he was a North Carolinian and lived outside the 5th Circuit where the preceeding justice had resided.[14] |
| William C. Micou | Not Acted On (1853) | The Senate failed to act on another Fillmore nominee, preserving the Court vacancy for incoming Democratic President Franklin Pierce.[15] |

[14] ABRAHAM, *supra* note 4, at 83 ("When [the Senate] reconvened after Pierce's victory, Fillmore named U.S. Senator George E. Badger of North Carolina on January 3, 1853. A conservative Whig who was not readily identifiable as either pro-slavery or anti-slavery, Badger was nonetheless a clearly committed Whig who had served as secretary of the navy in the Harrison and Tyler cabinets. The Democratic majority in the Senate was not about to deprive the victorious incoming President of the choice of his own man, even though rejecting one of its own members would be little short of political sacrilege."); OXFORD COMPANION, *supra* note 4, at 54 ("Badger's residence outside the fifth circuit aroused criticism from Alabama, Mississippi, and Louisiana senators, who preferred resident candidates.").

[15] ABRAHAM, *supra* note 4, at 83 ("Finally, lame-duck Fillmore turned back to Louisiana and to another well-known attorney, William C. Micou – law partner of U.S. Senator-elect Judah P. Benjamin, to whom Fillmore had offered the Court post, but who preferred to go to the Senate. ... Predictably, the Senate refused to act on Micou's nomination, and the McKinley seat remained vacant for the incoming Franklin Pierce to fill."); OXFORD COMPANION, *supra* note 4, at 545 ("The Democratic majority in the Senate, however, failed to confirm [Micou's] appointment. Within a month, the new Democratic President, Franklin Pierce, had appointed John A. Campbell.").

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| Jeremiah S. Black[16] | Rejected (1861) | Was nominated at the end of Buchanan's lame-duck term, and Republican senators wanted to hold the seat for Lincoln.[17] |
| Henry Stanbery | Not Acted On (1866) | After Andrew Johnson survived impeachment, the Senate was opposed to any Johnson nominees, and when a vacancy to which Stanbery was nominated arose, the Senate passed a bill that abolished the vacant seat and provided a proviso that when the next vacancy occurred that seat would also be eliminated.[18] |

[16]Laurence Tribe characterizes Black's true liability as his opposition to abolition of slavery. TRIBE, *supra* note 3, at 88.

[17]ABRAHAM, *supra* note 4, at 29 ("Democrat James Buchanan's nomination of Jeremiah S. Black in December 1860, three months before his term ended, fell 25:26, chiefly because Republican senators wanted to hold the seat for Abraham Lincoln to fill."), 86; Danelski, *supra* note 8, at 910 ("The standard explanation that Black's defeat turned chiefly on the nomination's timing, Buchanan's loss of power, and Republican control of the Senate is more plausible. As in Crittenden's case, Black's party affiliation was far more important to his defeat than his ideology.").

[18]ABRAHAM, *supra* note 4 at 93 ("Vacillating for almost a year, Johnson finally chose Attorney General Henry Stanbery, and Ohio Republican of considerable legal skill and a well-liked public figure. But it is doubtful that the Senate would have approved God himself had he been nominated by Andrew Johnson. Not only did it fail to act on the Stanbery nomination, it also passed a bill that abolished the vacant ... set, reducing the Court's membership from ten to nine."); OXFORD COMPANION, *supra* note 4, at 818 ("Henry Stanbery's nomination fell victim to the bitter conflict between President Andrew Johnson and Republican leaders in Congress.").

**Rejected on other grounds**

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| George H. Williams | Withdrawn (1873) | Williams requested that the President withdraw his name. Williams had been attacked as being unqualified.[19] |
| William Hornblower | Rejected (1893) | President Cleveland's nominees were rejected because Senator David Hill was disappointed when Cleveland refused to select Hill's favored candidates and Hill convinced his fellow Senators to vote likewise when Cleveland nominated an enemy of Hill's friend.[20] |

[19] ABRAHAM, *supra* note 4 at 98 ("It was now November and Grant, realizing that he had to take some action, turned to his attorney general, George H. Williams of Oregon, an honest but only marginally capable individual. Williams's nomination ran into immediate flak from the bar, press, and public – all of whom quite rightly deemed William to be lacking in stature – but Grant persisted in pushing the 50-year-old lawyer until the Judiciary Committee approved his nomination. The full Senate, however, demurred, and the president withdrew Williams's name early in January 1874 at the nominee's own request."); OXFORD COMPANION, *supra* note 4, at 031 ("President Ulysses S. Grant's 1873 nomination of George Williams for the position of chief justice met with considerable controversy, arousing opposition in the Senate and among the organized bar that viewed Williams as too undistinguished for the nation's chief legal position. At Williams's request Grant withdrew the nomination.").

[20] ABRAHAM, *supra* note 4 at 108 ("[New York's] astute and powerful Senator David B. Hill advanced numerous suggestions to the president. But Hill was a member of an anti-Cleveland patronage faction in New York's Democratic party, at odds with the president on personnel matters, and the president refused to heed the senator despite of the letter's threats to invoke senatorial courtesy. When Cleveland thus proposed a conservative corporation lawyer and Cleveland loyalist, William B. Hornblower, to the Senate at the end of the summer, Hill, although with some difficulty, rallied his colleagues, and Hornblower went down to defeat 24:30 four months later."); OXFORD COMPANION, *supra* note 4, at 412 ("A year earlier, Hornblower, as a member of a committee of the New York City Bar Association, had conducted an investigation into an election irregularity, leading to the defeat of Isaac H. Maynard in a contest for a seat on the New York Court of Appeals. Maynard's powerful ally and friend, Senator David B. Hill of New York retaliated by leading a successful campaign to defeat Hornblower's nomination; the nomination was rejected by a vote of 30 to 24on 15 January 1894.").

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| Wheeler H. Peckham | Rejected (1894) | President Cleveland's nominees were rejected because Senator David Hill was disappointed when Cleveland refused to select Hill's favored candidates, and Peckham had also been involved in a patronage conflict with Hill in which Hill was the loser.[21] |

[21] ABRAHAM, *supra* note 4, at 108 ("Not one to capitulate readily, Cleveland again ignored Hill's admonitions, and nominated another New Yorker of similar persuasions, Wheeler H. Peckham, that January. Following a month of debate, Hill's senatorial courtesy claims proved to be victorious again, this time by a nine-vote margin, 32:41."); OXFORD COMPANION, *supra* note 4, at 627-28 ("Peckham was opposed by Senator David B. Hill of New York because Peckham had become involved in a patronage squabble between Cleveland and Hill, in which Hill was the loser. Hill invoked senatorial courtesy and the Senate voted 41 to 32 against confirmation on 16 February 1894.") .

**Rejected on Ideological Grounds**

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| John Rutledge | Rejected (1795) | Rutledge had actually already been appointed as an associate justice on the Supreme Court; only his nomination for the Chief Justice position was rejected because of his opposition to Jay's Treaty.[22] |
| Alexander Wolcott[23] | Rejected (1811) | Wolcott's nomination was rejected because of his vigorous enforcement of embargo and nonintercourse acts when he was a U.S. Collector of Customs.[24] |

[22] ABRAHAM, *supra* note 4, at 30 ("Rutledge had asked President Washington for the appointment on John Jay's resignation but now found his fellow Federalists voting against him because of his vigorous opposition to Jay's Treaty of 1794. The Federalist senators refused to confirm a public figure who actively opposed the treaty they had championed so ardently ...."); OXFORD COMPANION, *supra* note 4, at 751 ("Rutlege's nomination as chief justice was in extreme jeopardy even before Washington submitted it to the Senate. On 16 July 1795 Rutledge presided over a meeting in Charleston protesting the Senate's ratification of Jay's Treaty. Not content simply to lead the meeting, Rutledge delivered a lengthy harangue against the treaty and urged the president not to sign it. Outraged by his opposition to Jay's Treaty, a cornerstone of the administration's diplomacy, and concerned by the reports of his insanity, the Federalist majority in the Senate voted against Rutledges's nomination on 15 December 1795 by a vote of 14 to 10 ....").

[23] While Abraham lists qualification as a side-issue in the failure of Wolcott's confirmation, Laurence Tribe attributes the rejection of Wolcott's nomination as entirely based upon his lack of qualification. TRIBE, *supra* note 3, at 81.

[24] ABRAHAM, *supra* note 4, at 30 ("In 1811 James Madison's nomination of Alexander Wolcott's vigorous enforcement of the embargo and nonintercourse acts when he was U.S. collector of customs in Connecticut. There was, however, also some genuine question as to Wolcott's legal qualifications and his moral cosmos."); OXFORD COMPANION, *supra* note 4, at 935 ("Spurred on by Wolcott's vigorous and unpopular enforcement of the Embargo, a federal statute of 1807 that prohibited all naval commerce to foreign countries, Federalists greeted his nomination with contempt, describing him as a man of mediocre talent. Despite the partisanship of these attacks, they were not far off the mark and even Republicans found it difficult to defend Wolcott. The extreme doubts within both parties about his judicial abilities caused the Senate to reject his nomination by a vote of 9 to 24.").

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| George Woodward | Rejected (1846) | Woodward was rejected because of his reputation as an extreme American nativist and because of divisions within the Democratic party.[25] |
| Ebenezer R. Hoar | Rejected (1869-70) | Hoar was rejected because he would not support Republican Senators in their strictly partisan suggestions for lower-court nominees, opposed Andrew Johnson's impeachment, and worked for a federal civil service system.[26] |

[25] *See* ABRAHAM, *supra* note 4, at 81 ("Although a member of a distinguished family and a proved Democrat, Woodward had acquired a reputation as an extreme American nativist and was staunchly opposed by several Democratic senators, among them Simon Cameron of his home state."); *see also* OXFORD COMPANION, *supra* note 4, at 939 ("Although a loyal Democrat from a distinguished family, Woodward failed to gain Senate confirmation. Divisions within the Democratic party – especially opposition from a senator from Woodward's home state – caused the Senate on 22 January 1846 to reject Woodward's nomination by a vote of 20 to 29.") *But see* Danelski, *supra* note 8, at 908 ("The historical context of Woodward's rejection is useful in understanding the event. The Senate was in a feisty mood. In the two years preceding Woodward's nomination it had defeated five of Tyler's Supreme Court nominations, despite the fact that all the nominees were highly regarded lawyers. Further, in the same year Woodward was rejected, two Polk nominees to executive offices were also rejected. Polk interpreted those rejections as attempts to embarrass his administration. In view of all the evidence, it is hard to conclude that Woodward's rejection is a clear precedent supporting Tribe's thesis [that a historical precedent exists for the regular rejection of nominees based on their personal ideology.]").

[26] ABRAHAM, *supra* note 4, at 96 ("Hoar was superbly qualified, but after seven weeks of debate and delay the Senate rejected him 24:33 on February 3, 1870. The majority was furious with Hoar for his refusal to back their strictly partisan suggestions for lower-court nominees, his active labors ob behalf of a merit civil service system for the federal government, and his opposition to Andrew Johnson's impeachment."); OXFORD COMPANION, *supra* note 4, at 404 ("President Grant nominated Hoar for a seat on the Supreme Court on 15 December 1869; a bitter fight over his confirmation raged for seven weeks. The Senate rejected his nomination on 3 February 1870 by a vote of 33 to 24. His high professional standards, refusal to play party politics, and advocacy of a civil service system lost for the nation a justice of uncompromising integrity.").

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| Caleb Cushing[27] | Withdrawn (1874) | Although qualified, his nomination was withdrawn by the President because of his age - he was 74 -, because he had made many enemies by switching political parties on a regular basis, and because he wrote a letter of recommendation for a former law clerk to Jefferson Davis. Cushing was arguably rejected because of his lack of political loyalty, rather than his adherence to a particular political or judicial ideology. Nonetheless, the reasons were somewhat connected to his past personal views.[28] |

[27]Professor Tribe acknowledges that Cushing's political unreliability factored in the withdrawal of his nomination, but posits that it was Cushing's pro-slavery views and correspondence with Confederate President Jefferson Davis that truly doomed his nomination. TRIBE, *supra* note 3, at 88.

[28]ABRAHAM, *supra* note 4, at 32 ("Cushing's age – 74 – was noted prominently during debate, but the real reason for his rejection was the Senate's not entirely erroneous belief that Grant's close personal friend was a political chameleon. Indeed, Cushing had been, in turn, a regular Whig, a Tyler Whig, a Democrat, a Johnson Constitutional Conservative, and finally a Republican."); Danelski, *supra* note 8, at 911 (reviewing numerous historical sources and concluding "[i]n view of these essentially nonideological interpretations, it is difficult to conclude with any confidence that Cushing's views on slavery were the principal cause of his defeat.")