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## Senate

The Senate met at 9:30 a.m. and was called to order by the Honorable SAM BROWNBACK, a Senator from the State of Kansas.

### PRAYER

The Chaplain, ADM Barry C. Black, offered the following prayer:

O God of peace, end the civil war that rages in our hearts.

Fill our God-shaped void with Your presence and bid our striving to cease.

Thank You for Your steadfast love and Your redemptive presence among us.

Remind us that each day we make decisions for which we are accountable to You.

Give us wisdom and courage to burn life's brief candle, always aware of Your saving presence.

Use our Senators today as instruments of Your peace.

We pray this in Your strong name. Amen.

### PLEDGE OF ALLEGIANCE

The Honorable SAM BROWNBACK led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

### APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. STEVENS.)

The legislative clerk read the following letter:

U.S. SENATE,  
PRESIDENT PRO TEMPORE,  
Washington, DC, July 16, 2003.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable SAM BROWNBACK, a Senator from the State of Kansas, to perform the duties of the Chair.

TED STEVENS,  
President pro tempore.

Mr. BROWNBACK thereupon assumed the chair as Acting President pro tempore.

### SCHEDULE

Mr. FRIST. Mr. President, this morning we will have a period of morning business for 30 minutes. Following that 30-minute period, the Senate will begin consideration of H.R. 2330, the Burma sanctions legislation.

Under the order from last night, there will be 60 minutes for debate on the Burma bill with a vote on passage to occur later in a series of stacked votes. After that debate, we will resume consideration of the Defense appropriations bill for debate on the Dorgan amendment on war costs, to be followed by debate on the Bingaman amendment on detainees.

The Senate will then conduct a series of three rollcall votes on the two amendments and passage of the Burma bill. These votes are expected to begin shortly after 12 noon today. Additional amendments will be offered over the course of the day, and therefore rollcall votes will continue throughout the day and evening in order to complete action on the Defense appropriations bill.

### RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

### MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business until the hour of 10 a.m., with the first 15 minutes under the control of the majority leader or his designee, and the next 15 minutes under the control of Senator MIKULSKI or her designee.

### STALLED NOMINATIONS FOR THE SIXTH CIRCUIT

Mr. FRIST. Mr. President, I rise this morning to address a very specific situation—a dire situation—that exists in the administration of justice for the people of Tennessee, Kentucky, Ohio, and Michigan, the States that make up the Sixth Circuit Court of Appeals.

I am joined this morning by other Senators from the Sixth Circuit and, most notably, we are joined on the Senate floor by many Members of the House of Representatives, representing the four States of the Sixth Circuit.

This morning, we will be meeting with Michigan's attorney general, Mike Cox, and several other Michigan leaders. They flew down today to make their case in the Senate, encouraging us to do our job and move forward with the stalled Michigan nominations to the Sixth Circuit Court of Appeals. They will be presenting the Senate leadership with a petition of thousands of Michigan citizens asking the Senate to end this delay on the so-called Michigan four.

This petition corresponds with a concurrent resolution which has been introduced in the Michigan Legislature, also asking the Senate to end the almost 2-year delay on the Michigan nominations.

The people and leaders of Michigan are not just speaking for themselves; they speak for the people from all of the States concerned and affected by this inexcusable delay. That includes the people of Tennessee, Kentucky, as well as Ohio.

That is why last week I took the rare, but not unprecedented, action of vowing for discharge of these four stalled nominations from the Judiciary Committee, because the delay of these nominations affects more than the State of Michigan, and the entire Sixth Circuit congressional delegation does have an interest on behalf of the people of the States and districts we represent.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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In response to my discharge motion, my colleague, the senior Senator from Illinois, objected on behalf of the two Senators from Michigan on the basis that the stalled Michigan nominations had not had a hearing.

I thought at the time it was an odd objection given that the Senators from Michigan are the ones who are obstructing such hearings from even being held. Nevertheless, I respectfully considered the objection and studied the record of the Michigan nominations. This morning, I have sent a letter to Senator HATCH, chairman of the Judiciary Committee, along with Senator McCONNELL, who also signed and wrote this letter with me, asking them to hold hearings on these nominations as soon as possible.

Mr. President, I ask unanimous consent that this letter be printed in the RECORD.

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

CONGRESS OF THE UNITED STATES,  
Washington, DC, July 16, 2003.

Hon. ORRIN G. HATCH,  
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN HATCH: As leaders of the majority and senators who represent two of the four states that comprise the Sixth Circuit, we are requesting that you hold hearings on the nominations of Judges Henry W. Saad, Susan B. Neilson, David W. McKeague, and Richard A. Griffin to the U.S. Court of Appeals for the Sixth Circuit.

On July 7, 2003, the Majority Leader filed resolutions to discharge the Judiciary Committee from consideration of these nominees. These measures would allow the full Senate to consider their nominations, three of which have been pending for nearly two years (the fourth has been pending more than one year).

We believe that the discharge resolutions are necessary because the Michigan senators have returned negative blue slips in an effort to prevent you from holding hearings on these nominees. Our understanding, however, is that the Michigan senators' objection to these nominees is based not on any substantive concerns about their qualifications, integrity, or temperament. Indeed, these four nominees are held in the highest regard and enjoy solid reputations. Nor is it based on a failure of the White House to properly consult with the Michigan senators. In fact, it appears that the Administration has been extremely solicitous of their views, having engaged in extensive consultation, as that term is properly understood.

Rather, based upon our review of the record of consultation and correspondence, it appears that the Michigan Senators object to consideration of these nominees for purposes unrelated to their personal qualifications. Simply put, they believe that two Clinton nominees from Michigan who were not confirmed should be renominated by President Bush. Because the White House has not taken the extraordinary step of renominating these two Clinton nominees, the Michigan Senators have decided to block all four of Michigan's circuit court nominees (and both of its district court nominees as well).

This is not a valid reason to hold the entire Sixth Circuit hostage and inflict damage and delay on our constituents. This situation is unacceptable and simply cannot continue. The Michigan senators should not be able to

prevent the entire Senate from acting on four outstanding nominees who would fill judicial emergencies on an appellate court that is operating with fully one fourth of its seats vacant.

There are many others, including numerous Michigan public officials, who share this view. Nine members of the Michigan congressional delegation wrote you on February 26, 2003, asking you to provide hearings for the Sixth Circuit nominees from Michigan as soon as reasonably practical. On July 3, 2003, the Michigan Senate introduced a resolution calling for the United States Senate and Michigan's U.S. Senators to act to begin the confirmation hearings on Michigan's Sixth Circuit nominees.

In response to the filing last week of the resolution to discharge the Judiciary Committee from consideration of Judge McKeague's nomination, Senator Durbin stated, ". . . [T]his nomination for the Sixth Circuit, and the others that will be made by the majority leader, have not had the benefit of any hearing before the Senate Judiciary Committee. I believe that [a] hearing should take place before a lifetime appointment is given to any person to the Circuit Court." We wholeheartedly agree that the Michigan nominees to the Sixth Circuit deserve hearings, and accordingly request that you schedule hearings for Judges Saad, Neilson, McKeague, and Griffin as soon as possible.

On behalf of our constituents, we would appreciate your immediate attention to this most urgent matter.

Sincerely,

WILLIAM FRIST,  
U.S. Senate Majority Leader.  
MITCH McCONNELL,  
U.S. Senate Majority Whip.

Mr. FRIST. Mr. President, I also ask unanimous consent to have printed in the RECORD two letters from White House Counsel Alberto Gonzales outlining the history of these nominations.

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

THE WHITE HOUSE,  
Washington, March 28, 2003.

Hon. ORRIN HATCH,  
Chairman, Senate Judiciary Committee,  
U.S. Senate, Washington, DC.

DEAR CHAIRMAN HATCH: Thank you for your letter of March 25, advising the President of a letter you recently received from Senator Levin and Senator Stabenow. As you note, Senators Levin and Stabenow have returned blue slips objecting to all five judicial nominees from Michigan pending before the Committee. The Michigan Senators' letter further suggests that the White House did not engage in adequate consultation with them regarding these nominees. You have asked me to describe the nature and extent of consultation between the White House and the Michigan Senators regarding Richard Griffin, David McKeague, Susan Bieke Neilson, Henry Saad and Thomas Ludington. We are pleased to have the opportunity to explain why we believe there has been appropriate consultation.

Before turning to a chronological review of the record, we believe a general comment is in order. Senators Levin and Stabenow insisted from the outset that President Bush should renominate to the Sixth Circuit two nominees of President Clinton—Helene White and Kathleen McCree Lewis—who had not received hearings or votes. The Senators argued that "elementary fairness . . . necessitates that they be renominated, that hearings be held, and that they be voted up or down by the Senate Judiciary Committee."

See Levin-Stabenow Letter to President Bush (April 3, 2001). In response, we informed the Senators that we were in fact considering Judge White and Ms. McCree Lewis, along with numerous other candidates, for the Sixth Circuit, but that the President would not commit to renominating them for those seats. We explained that it is extraordinarily rare for a President to nominate for the federal bench an individual previously nominated by his predecessor, especially when the predecessor is from another political party; that President Bush was not responsible for the failure of Judge White and Ms. McCree Lewis to attain confirmation; and that numerous individuals appointed by President George H.W. Bush to the federal courts of appeals saw their nominations lapse without Senate action at the end of 1992, and did not have their names resubmitted by President Clinton. As we summarized, "President Bush is entitled to make his own appointments for these vacancies, and he may well prefer candidates other than those previously chosen by President Clinton." See Gonzales Letter to Senators Levin and Stabenow (April 10, 2001).

Following this initial exchange, in which the White House made its position very clear, we moved forward with the process of evaluating candidates for the judicial vacancies in Michigan—including Judge White and Ms. McCree Lewis, who we interviewed—and recommending nominees to the President. Throughout this process, we repeatedly consulted with the Michigan Senators, seeking their input on candidates time and time again, almost literally until the eve of their nominations. At no point did either Senator Levin or Senator Stabenow ever articulate any specific objections to any of the five nominees. Instead, the Michigan Senators consistently responded to our consultations by (1) continuing to ask that President Bush "address" the White and McCree Lewis situations by renominating them, and (2) refusing to provide feedback on our proposed candidates unless and until we gave in to that request.

Specifically, our records show that, prior to the nominations of the five individuals in question, the White House engaged in the following noteworthy consultations with the Michigan Senators.

April 3, 2001. The Michigan Senators write to the President to announce their position: "[E]lementary fairness to [Judge White and Ms. McCree Lewis] . . . necessitates that they be renominated, that hearings be held, and that they be voted up or down by the Senate Judiciary Committee"; and "[n]ominating others in their stead would not only be inconsistent with your stated goal of bipartisanship, it would compound the difficult situation we are now in relative to filling the Michigan judicial vacancies on the Sixth Circuit."

April 10, 2001. I respond in writing as described above—stating that we are considering Judge White and Ms. McCree Lewis, but that President Bush is entitled to make his own appointments for the Michigan vacancies.

May 17, 2001. At a meeting in my office, I provide the Senators with the names of individuals being considered for the Sixth Circuit (including Judges Saad, McKeague, and Griffin) and for the vacancy on the U.S. District Court for the Eastern District of Michigan (including Thomas Ludington). I invite the Senators to provide their feedback on those individuals. Senator Levin, however, states that he will not provide any reactions until "the larger issue" is settled.

May 17, 2001. Following up on my meeting with the Senators, Associate Counsel Brad Berenson calls the Chiefs of Staff of Senators Levin and Stabenow, again providing the

names of the candidates and soliciting the Senators' reaction.

May 23, 2001. Mr. Berenson consults again with Senator Levin's Chief of Staff regarding Judges Griffin, McKeague and Sadd—making clear that no nominations are definite, and again asking for reactions or feedback from the Senator. Mr. Berenson also delivers the same message and invitation by voice mail to Senator Stabenow's Chief of Staff.

June 7, 2001. Mr. Berenson again calls Senator Stabenow's Chief of Staff seeking the Senator's reaction to the potential judicial nominees. The Chief of Staff reports that Senator Stabenow does not know any of the individuals in question and again urges that no action should be taken on them until the White/McCree Lewis situation is addressed.

June 15, 2001. Mr. Berenson again calls Senator Stabenow's chief of Staff—once again seeking the Senator's reaction to the potential judicial nominees, and notifying the Senator that Susan Bieke Neilson is under consideration for the Sixth Circuit. Mr. Berenson also calls Senator Levin's Chief of Staff to deliver the same message, but is told that the Chief of Staff can not talk until the following Monday.

June 21, 2001. After leaving several telephone messages, Mr. Berenson succeeds in contacting Senator Levin's Chief of Staff. Again, he seeks the Senator's reaction to the potential judicial nominees we had identified on May 17; he also gives notice that Susan Bieke Neilson is under consideration for the Sixth Circuit.

July 9, 2001. Mr. Berenson speaks by phone with Senator Levin's Chief of Staff regarding Judge Neilson. Mr. Berenson leaves a voice mail message about Judge Neilson for Senator Stabenow's Chief of Staff.

August 8, 2001. Mr. Berenson places phone calls to both Senators' Chiefs of Staff. Both are on vacation, so Mr. Berenson leaves messages regarding Judge Ludington.

August 10, 2001. Senator Levin's Chief of Staff writes to Mr. Berenson reiterating Senator Levin's original position.

August 14, 2001. Mr. Berenson responds to Senator Levin's Chief of Staff, explaining that "although we gave careful consideration to the matter, including interviews of both women, the President does not intend to nominate both these women to the Sixth Circuit." Mr. Berenson's letter further notes that "[we] have . . . continued to keep the Senator fully informed at every stage of our deliberations, providing the names of individuals the President is considering for appointment and repeatedly soliciting the Senator's views," and advises that "we would prefer to have the Senator's input before the President makes nominations."

August 17, 2001. I send a letter to then-Chairman Leahy (with copies to the Michigan Senators as well as to you), once again clearly setting out the White House's position. I write that "I have met with Senators Levin and Stabenow and have listened carefully to their concerns regarding the history of nominations from Michigan to the Sixth Circuit. Although I understand their desire to have the President renominate two of President Clinton's candidates for the Court of Appeals . . . we believe it would be unfair to expect the President to do so. The net result of our discussions is an apparent stand-off in which the two Michigan Senators are attempting (inappropriately, in my view) to use the threat of negative blue slips against President Bush's Michigan circuit nominees to compel the President to renominate Clinton nominees based upon grievances in which president Bush played no part." I also reiterate that "[w]e remain committed to consulting closely with home-state Senators to identify judicial candidates the President may nominate with the support of the Sen-

ators; however, meaningful, good faith consultation by the Senators cannot, in my judgment, include a demand that President Bush select as nominees those individuals previously selected by the prior Administration."

August 22, 2001. Senator Levin's Chief of Staff writes to Mr. Berenson, proposing a bipartisan commission for judicial nominations in Michigan.

August 23, 2001. Mr. Berenson responds, explaining that the White House is not willing to consider a commission in Michigan at this time. Mr. Berenson elaborates: "Commissions exist or are under consideration in only two or three states in which history or other special circumstances clearly justify such an unorthodox mechanism. None of these circumstances exists in Michigan."

October 9, 2001. I meet with the Michigan Senators at Senator Levin's office to discuss potential solutions to the Sixth Circuit impasse.

October 31, 2001. I speak with Senator Levin to explain why the Michigan Senators' commission proposal is not acceptable, and to inform the Senator of the president's intent to make nominations to the Sixth Circuit seats shortly.

November 1, 2001. Senators Levin and Stabenow write to urge me "to reconsider [their] proposal to jointly establish a bipartisan judicial nominating commission for the existing Michigan vacancies on the Sixth Circuit Court of Appeals." Again, they do not provide any comments on Judges Griffin, McKeague, Neilson, Saad or Ludington—and they indicate that "we could not, in good conscience, return blue slips on Sixth Circuit nominees until the unfair treatment of the nominations of [Judge White and Ms. McCree Lewis] is addressed."

November 2, 2001. I respond to the Michigan Senators, respectfully declining to reconsider our decision not to establish a judicial nominating commission, and reiterating that we had proposed an appropriate solution to the Michigan situation. My letter also gives fair warning that "the President will soon make nominations to all of the existing federal judicial vacancies in Michigan," and invites the Michigan Senators to reconsider their position.

Following these extensive consultations by the White House, the President nominated Judges McKeague, Saad and Neilson on November 8, 2001.

Still, our consultations as to the remaining vacancies continued even after this point. I met with the Michigan Senators on December 19, 2001, and again on February 7, 2002, to discuss solutions to the Michigan situation, and I called them on June 20 and 24, 2002. Seeing no prospect of resolution, the President nominated Judge Griffin to the Sixth Circuit on June 26, 2002. Judge Ludington was nominated later that year, on September 12.

In short, we engaged in repeated pre-nomination consultations with the Michigan Senators regarding these five nominees, making every reasonable effort to get the Senators' feedback. We interviewed the candidates suggested by the Senators—Judge White and Ms. McCree Lewis. And we proposed our own reasonable solution to the matter. Notwithstanding these extensive efforts by the White House, the Michigan Senators steadfastly refused to provide feedback on the nominees, instead insisting that the President should first agree to nominate President Clinton's candidates and/or to turn the process over to a commission. After several months, with no sign of progress, and having received no specific objections to any of the individuals in question, the President proceeded with his nominations, to address the acknowledged judicial emergencies on the Sixth Circuit.

These emergencies continue to this day, and affect not only the constituents of Senators Levin and Stabenow, but also the citizens of Kentucky, Ohio and Tennessee.

I believe that any reasonable observer would agree that the record described above demonstrates that the White House engaged in appropriate consultations with respect to the five Michigan judicial nominees.

I trust that this letter provides the information you need regarding our extensive consultation with the Michigan Senators. However, I would be pleased to provide additional details if necessary.

Sincerely,

ALBERTO R. GONZALES,  
*Counsel to the President.*

THE WHITE HOUSE,  
*Washington, April 2, 2003.*

Hon. CARL LEVIN,  
*U.S. Senate,*  
*Washington, DC.*

Hon. DEBBIE A. STABENOW,  
*U.S. Senate,*  
*Washington, DC.*

DEAR SENATORS LEVIN AND STABENOW: I respectfully write with regard to your March 19 joint letter to Chairman Hatch, which accompanied your return of blue slips indicating your opposition to a hearing and vote for five pending Michigan nominees for federal judicial seats. Your letter explains that you are objecting to these Michigan nominees—and will continue to object to future Michigan nominees—in order to protest the fact that two of President Clinton's judicial nominees from Michigan did not receive hearings.

Although you have returned negative blue slips for all of these nominations, you do not indicate any opposition based upon qualifications to any of the five individuals in question. Nor did you express any such specific opposition during our pre-nomination consultations with your offices regarding these individuals. (This consultation history is described more fully in the attached response to any inquiry from Chairman Hatch.) In our judgment, all five nominees are indeed well qualified to serve on the federal bench, and deserve prompt hearings and votes. I will briefly review their qualifications below, before turning to your complaints regarding President Clinton's nominees and, finally, addressing your blue slips.

#### I. THE NOMINEES

David McKeague, Susan Bieke Neilson, Henry Saad, Richard Griffin and Thomas Ludington are well qualified for the judicial seats for which they have been nominated.

Judge McKeague has served on the U.S. District Court for the Western District of Michigan since 1991, when he was unanimously confirmed by the then-Democrat-controlled Senate. During his tenure as a district judge, he has on seven occasions been designated to sit on a panel of the Sixth Circuit. Chief Justice Rehnquist appointed Judge McKeague to serve on the Judicial Conference's Committee on Defender Services, where Judge McKeague chairs the funding subcommittee. The Chief Justice also appointed Judge McKeague to the District Judges Education Committee of the Federal Judicial Center, which Judge McKeague chairs. The American Bar Association ("ABA") has given Judge McKeague, a "Well Qualified" rating for the Sixth Circuit.

Judge Neilson has served on the 3rd Judicial Circuit Court of Michigan since 1991. She has written numerous articles and was co-editor and author of Michigan Civil Procedure, a two-volume treatise on all areas of Michigan civil practice. This treatise was selected by the Michigan Judicial Institute for purchase on behalf of every trial judge in the

State of Michigan and received the "Plain English Award" from the State Bar of Michigan. The ABA has unanimously rated Judge Neilson "Well-Qualified" for the Sixth Circuit.

Judge Saad has served on the Michigan Court of Appeals since 1994. During his 1996 retention election, he received broad bipartisan support, including endorsements from the Michigan Chamber of Commerce and the United Auto Workers. Judge Saad is also active in the community. He has served as President of the Wayne State University Law School Alumni Association, Chairman of the Board of the Oakland Community College Foundation, and as a Board Member on the National Conference of Christians and Jews. In 1995, he received the Arab-American and Chaldean Council Civic and Humanitarian Award for Outstanding Dedication to Serving the Community with Compassion and Understanding. The ABA has given Judge Saad a "Qualified" rating. It also bears noting that Judge Saad was nominated to the Eastern District of Michigan by President George H.W. Bush a decade ago, but did not receive a hearing.

Judge Griffin has served on the Michigan Court of Appeals since 1989. He has served the bench and bar in a number of volunteer capacities. He is a former member of the federal judicial selection committee for the Western District of Michigan, and currently serves as Chairman of the Quality Review Committee for the Michigan Court of Appeals. The ABA has rated Judge Griffin "Well Qualified" to serve on the Sixth Circuit.

In sum, all four of the President's Sixth Circuit nominees from Michigan have extensive experience on the state or federal benches; all are active in their communities and in the bar; all have extensive support in Michigan; and all have received Well Qualified or Qualified ratings from the ABA. We respectfully submit that by any traditional standard, Judges McKeague, Neilson, Saad and Griffin are superbly qualified candidates for the vacant seats on the Sixth Circuit—seats that have been designated "judicial emergencies" by the Judicial Conference.

Thomas Ludington is likewise fully qualified for the district court. He has considerable experience on the state bench—having served as Chief Judge of the 42nd Circuit Court in Michigan since 1995—and enjoys wide support within the State. And he too has received a unanimous "Well Qualified" rating from the ABA.

#### II. THE BASIS OF YOUR OBJECTIONS

In explaining your negative blue slips, you note that two of President Clinton's Michigan nominees to the Sixth Circuit, Judge Helene White and Kathleen McCree Lewis, did not receive hearings or votes.

We understand your position. President Bush has explained that too many nominees of both President Bill Clinton and President George H.W. Bush did not receive timely hearings and votes. For example, two of President George H.W. Bush's Sixth Circuit nominees—John Smietanka and Justin Wilson—and his nominee to the Eastern District of Michigan, Judge Saad, did not receive hearings or votes in the then-Democrat-controlled Senate a decade ago.

President Bush has called on both parties to move on from the cycle of blame and retribution that has plagued the Senate for more than a decade. Since the 2000 campaign, the President has emphasized that every judicial nominee should receive a committee hearing and up or down floor vote within a reasonable time, no matter who is President or which party controls the Senate. On October 30, 2002, after nearly two additional years of Senate delays, the President advanced a

plan involving all three Branches that would require, among other steps, the Senate to vote on nominees within 180 days of nomination. The plan would ensure a generous period of time for all Senators to gather information and have their voices heard and votes counted. Whether the nominee is John Smietanka or Helene White or Susan Bieke Neilson, whether the President is President Clinton or President Bush, whether the Senate is Republican- or Democrat-controlled, the President believes that the procedures for fair and timely Senate consideration and votes on judicial nominations should be the same.

#### III. THE SIGNIFICANCE OF THE BLUE SLIPS

Against this backdrop, let me turn to your blue slips.

It has been my understanding that the blue slip is not a veto, but rather a device to ensure adequate pre-nomination consultation with home-state Senators, such as has occurred in the cases of these five nominees. We understand this to have been the consistent Senate policy for at least the last 25 years—during the Chairmanships of Senators Kennedy, Thurmond, Biden and Hatch. And in recent weeks, several other Democratic Senators (including former Chairman Leahy) have argued that Jorge Rangel and Enrique Moreno, nominees of President Clinton to the Fifth Circuit, should have received hearings and votes notwithstanding what the Committee deemed to be inadequate consultation with home-state Senators—thereby implicitly embracing the view that home-State Senators should not be allowed to veto a nominee.

We agree strongly with the bipartisan policy maintained by Senators Kennedy, Thurmond, Biden, and Hatch as Chairs of the Judiciary Committee. We respectfully agree that the tradition of consultation does not and should not entail a veto for home-state Senators, particularly a veto wielded for ideological or political purposes. Rather, the intention of the Constitution and the tradition of the Senate require, in our judgment, that the full Senate hold on up or down vote on each judicial nominee. If the objections of home-state Senators to a nominee are persuasive, those objections either will deter the President from submitting the nomination in the first instance or, alternatively, will convince a majority of the Senate that the nomination should be rejected. As Senator Kennedy stated in 1981, however, the Senate has not allowed and should not allow "individual Senators [to] ban, prohibit, or bar" consideration of a nominee.

Once again I respectfully suggest that all Senators should have their voices heard and their votes counted on the nominations of Judges McKeague, Neilson, Saad, Griffin, and Ludington—five individuals well qualified to serve on the federal bench.

I remain hopeful that we can work together to fill these judicial emergencies and I remain ready to meet to explore options.

Sincerely,

ALBERTO R. GONZALES,  
*Counsel to the President.*

Mr. FRIST. After looking at the record, I have reached the conclusion that the objection to these nominees having hearings is based not on any substantive concerns about their qualifications, or their temperament, or about their integrity. Indeed, these four nominees are held in the highest regard and enjoy solid reputations. Nor is it based on a failure of the White House to properly consult with the Michigan Senators. In fact, it appears that the administration has been ex-

tremely solicitous of their views, having engaged in extensive and good-faith consultation, as that term is properly understood.

Rather, based upon review of the record of consultation and correspondence, it appears that the Michigan Senators object to the consideration of these nominees for purposes totally unrelated to their personal qualifications. Simply put, they believe that two Clinton nominees from Michigan who were not confirmed should be renominated by President Bush. Because the White House has not taken this extraordinary step of renominating two of former President Clinton's nominees, the Michigan Senators have decided to block, to obstruct, all four of Michigan's circuit court nominees. I might add, they are blocking the district court nominees as well.

I believe the reason it is important for us to shed light on this issue is—and I am sure the American people and my colleagues will agree—that this is not a valid reason to hold the people of the entire Sixth Circuit Court hostage and inflict damage and delay on our constituents.

The situation is simply unacceptable and cannot continue. The Michigan Senators, I believe, should not be able to prevent the entire Senate from acting on four outstanding nominees who would fill what we all know are officially classified as judicial emergencies on the appellate court that is operating with fully one-fourth of its seats vacant right now. These are judicial emergencies.

I should note that one of these nominees, Judge Henry Saad, was first nominated by the first President Bush and was never given a hearing. He has been waiting, in effect, for over a decade. It bears noting that when he is confirmed by this Senate, he will be the first Arab American to serve on the Federal courts.

The Constitution of the United States requires that the Senate responsibly and expeditiously vote on the President's nominees—"yea" or "nay"—and allow the courts to get on with their work. Instead, what is happening is that the President's nominees to the Sixth Circuit are being held up, and the Senate is blocked from performing its constitutional duty.

Among the 12 U.S. Courts of Appeals, the Sixth Circuit is now dead last in the timeliness of its disposition of cases.

District court judges within the Sixth Circuit warn us that by having to perform regular duty as a substitute judge on the court of appeals, their own trial dockets have slowed considerably.

Only a substantial commitment on the part of the senior judges of the Sixth Circuit, district judges from the within the Sixth Circuit, and visiting appellate judges from other circuits has kept the caseload even barely manageable. The Sixth Circuit is the third busiest court of appeals, and Chief

Judge Boyce Martin has asked Congress to authorize a 17th judge for the court. The court would be overworked even if it had its full complement of 16 judges.

According to District Judge Robert Bell, W.D. Michigan, "We're having to backfill with judges from other circuits, who are basically substitutes. You don't get the same sense of purpose and continuity you get with full-fledged court of appeals judges." Furthermore, "we don't have the time or the resources that the circuit court has. You can't help to conclude that if we had 16 full-time judges with the full complement of staff, that each case might get more consideration . . ."

Those are very troubling words: "Each case might get more consideration." It is unconscionable that we would deliberately allow our courts to get clogged up, backlogged, and undermined because some in Washington wish to politicize the process. Our courts are supposed to be fair and impartial. They are supposed to serve both victims and defendants. We are undermining the rights of our fellow citizens if we do not resolve this issue.

It is not just judges who are seeing what is happening. United States attorneys in Michigan tell us that the delays caused by the vacancies are complicating their ability to prosecute wrongdoers, defendants are able to commit more crime while awaiting trial, there is less consistency in the court's jurisprudence, and the United States is effectively being deprived of en banc review in some cases.

A letter signed by 31 Assistant United States Attorneys in the Eastern District of Michigan states:

[I]n years past, it was the normal practice of the Sixth Circuit that a case would be heard by the Court approximately three months after all briefs were filed, and in most cases an opinion would issue in about three additional months. At present, due to the large number of vacancies on the Court . . . it has been taking on average between twelve and eighteen months longer for most appeals to be completed . . .

Moreover, they go on:

[D]elays in criminal cases hurt the government . . . [T]he longer a case goes on, the more chance there is that witnesses will disappear, forget, or die, documents will be lost, and investigators will retire or be transferred . . . In some cases, convicted criminal defendants are granted bond pending appeal. The elongated appellate process therefore allows defendants to remain on the street for a longer period of time, possibly committing new offenses. In addition, the longer delay makes retrials more difficult if the appeal results in the reversal of a conviction.

They go on:

[T]he Sixth Circuit has resorted to having more district judges sit by designation as panel members. This practice has contributed to a slowdown of the hearing of cases in the district courts, because the district judges are taken out of those courtrooms. The widespread use of district judges also provides for less consistency in the appellate process than would obtain if full-time Circuit Judges heard most of the appeals.

And they conclude:

In some cases, the small number of judges on the Court has served to effectively deprive the United States of en banc review . . . Achieving a unanimous vote of all of those judges of the Court who were not part of the original panel is, as a matter of practice, impossible, and not worth seeking. However, if the Court was at full strength, an en banc review could have been granted with the votes of about two thirds of the active judges who were not part of the original panel.

I quote their comments at length because I want to lay out in unambiguous terms what is happening to our justice system.

Justice delayed is justice denied—justice denied to everyone, including victims, defendants, and the entire community.

President Bush has nominated four well-qualified individuals from Michigan to fill these vacancies. The objections of the Michigan Senators are, in my view, unreasonable. The basis of their complaint is that two nominees were left without hearings at the end of President Clinton's term in 2001.

They ignore the fact that two nominees were also left without hearings at the end of President Bush's term in 1993, which means that President Clinton got to appoint the same number of judges to the Sixth Circuit as the number of vacancies that came open during his Presidency.

Both parties have left nominations ending at the end of Presidents' terms. But the effort by my Michigan colleagues to block nominations at the outset of a President's term is unheard of.

Five of the Sixth Circuit's active judges—nearly half—were appointed by President Clinton.

Let me read from the Grand Rapids Press. It makes the point well, saying:

The Constitution does not give [Sens. Levin and Stabenow] co-presidential authority and certainly does not support the use of the Court of Appeals to nurse a political grudge . . . [Sens. Levin and Stabenow] have proposed that the president let a bipartisan commission make Sixth circuit nominations or that Mr. Bush renominate the two lapsed Clinton nominations. Mr. Bush has shown no interest in either retreat from his constitutional prerogatives. Nor should he. Movement in this matter should come from Sens. Levin and Stabenow—and, clearly, it should be backward.

Our courts cannot work if we do not have judges to run them. And our communities suffer when our courts do not work—victims, who never see justice, defendants who hang in limbo, and communities that go unprotected.

President Bush's judicial nominees deserve a simple up-or-down vote. That is all that is being asked. This is one of our most important constitutional duties. We cannot use the system to nurse grudges. The consequences are too great. The public expects us to do our duty. I call upon my fellow Senators to exercise their constitutional responsibilities and free the Michigan four.

Mr. President, I yield the Republican time to the majority whip, the Senator from Kentucky.

The ACTING PRESIDENT pro tempore. The Senator from Kentucky.

Mr. MCCONNELL. I thank the Chair.

Mr. President, I thank the majority leader for outlining what is truly a crisis in the Sixth Judicial Circuit, the federal circuit which includes Tennessee, Kentucky, Ohio, and Michigan.

As this chart illustrates, of the 16 judgeships on the Sixth Circuit, 4 seats are vacant. They are all Michigan seats. They are being held up by the Michigan Senators, strangely enough, as the majority leader has outlined, based upon some grievance that occurred in the past. But the problem is not the past; it is the present. We have a judicial vacancy crisis in the Sixth Circuit that affects not only the State of Michigan but litigants in Tennessee, Kentucky, and Ohio.

If we look at the second chart, we will see what the effect is on litigants. Back in 1996, the Sixth Circuit had to handle about 364 cases per active judge. For 2002, it is up to 643 cases per active judge, an increase of 77 percent.

The Sixth Circuit is essentially swamped with litigation, and justice is being denied by being delayed. It is the slowest circuit in the country. Sixth Circuit litigants have to wait on justice 50 percent longer than any other litigants in any other part of America just because they happen to be a litigant in the Sixth Judicial Circuit because of the action of the Michigan Senators in holding up all four of these well-qualified nominations to the Sixth Circuit. If you are so unfortunate as to be a litigant in the Sixth Circuit, you have to wait 50 percent longer than the national average to have your case dealt with.

Senatorial prerogatives are important, but my recollection is Senators do not get to pick circuit judges in the first place. I guess we can have an argument about the blue slip policy as it relates to district judges, but we do not get to pick circuit judges; they are a Presidential prerogative.

To simply withhold judges at the circuit level to secure nominations that the election does not give you an opportunity to achieve—in other words, the Republicans won the election in 2000—and, by doing that, dramatically disadvantage litigants not only in your own State but in three other States, seems to this Senator unfair.

I guess the issue is what can be done about it. As the majority leader indicated and as I believe the senior Senator from Illinois indicated last week—the Senator from Illinois noted that there had not been any hearings on these nominees—my suggestion and the majority leader's suggestion to the chairman of the Judiciary committee, Senator HATCH, is to have hearings on these nominees. We have sent him a letter requesting that, because of the judicial emergencies in the Sixth Circuit, he go forward with hearings on these nominees.

I hope Chairman HATCH will do that and the committee will forthwith act

on these judges, send them to the floor, and let the Senate work its will because we have a crisis. My people in Kentucky did not have anything to do with this issue, and they ought not be penalized because of actions in some other State in the Sixth Judicial Circuit. I hope Senator HATCH, the chairman of the Judiciary Committee, will hold these hearings in the very near future.

Mr. FRIST. Will the Senator from Kentucky yield for a question?

Mr. MCCONNELL. I do yield for a question.

Mr. FRIST. Mr. President, I ask the Senator from Kentucky to share his concern as to the effect this particular delay of the Sixth Circuit nominees has on the people we serve every day and how their real lives are being affected. I think that is what drives us in moving forward, recognizing this delay is simply unacceptable.

Mr. MCCONNELL. Mr. President, if you are a litigant from Tennessee or Kentucky and are having to wait 50 percent longer than a litigant in some other State because of the actions by the Senators from Michigan, it seems to me that is simply unfair. Because of some grievance that occurred in the past, some score being settled by holding hostage these litigants from Tennessee and Kentucky who had nothing to do with this situation, I think is grossly unfair.

One thing the majority leader has asked Senator HATCH to do that will help is have hearings, as has been suggested by the senior Senator from Illinois, and move forward on these nominations.

Mr. FRIST. Mr. President, I thank the Senator. That does bring into focus what we are here to do. For me, that brings into focus why, for us to be good stewards of the judiciary, we need to accelerate this process and move it forward. Indeed, that is what the Constitution calls upon us to do.

Mr. President, how much time remains on this side?

The ACTING PRESIDENT pro tempore. The leader controls 2 minutes 15 seconds.

Mr. FRIST. I yield the remainder of our time to the distinguished Senator from Tennessee.

The ACTING PRESIDENT pro tempore. The Senator from Tennessee is recognized.

Mr. ALEXANDER. Mr. President, I thank the majority leader and the whip for bringing this to the attention of the Senate.

I am new to the Senate. This situation is very disappointing to me as a Senator from the Sixth Circuit. I will give one example of how this affects people in real time and real lives in Tennessee, Kentucky, Ohio, and Michigan. Thirty-one assistant U.S. attorneys in the Eastern District of Michigan have written a letter to Senator LEVIN to complain that the vacancies have slowed justice, have complicated prosecutions, have enabled criminals

to commit more crimes while awaiting trial, have led to less consistency in decisions, and have deprived the United States of en banc review in some cases.

A group of law professors, in a letter to the majority leader, stated that because of the unfilled judicial vacancies, the Sixth Circuit takes as long as 15 months to reach a final disposition, 5 months more than the national average.

This is unfair to the people in our State. I hope the Judiciary Committee will move swiftly to hearings and the Senate will move swiftly to consider, vote on, and hopefully confirm the Michigan four.

I thank the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Mr. President, how much time do the Democrats have in morning business?

The ACTING PRESIDENT pro tempore. The Democrats have 15 minutes under a previous order.

Mr. REID. Mr. President, I yield all 15 minutes to Senator MIKULSKI.

The ACTING PRESIDENT pro tempore. The Senator from Maryland is recognized for up to 10 minutes.

Ms. MIKULSKI. I thank the Chair.

Mr. President, I yield 5 minutes to the Senator from Michigan and then 10 minutes to myself.

#### JUDICIAL NOMINEES

The ACTING PRESIDENT pro tempore. The Senator from Michigan is recognized for 5 minutes.

Ms. STABENOW. Mr. President, I thank my colleague and dear friend from Maryland. She has been waiting to speak for a long time. I appreciate her graciousness in allowing me to speak for a moment.

This is a very unfortunate time in the State of Michigan. We have traditionally had bipartisan cooperation on issues that affect our wonderful State and the people we all represent. I cannot think of a time when we have had in previous Congresses Republican colleagues on the House side doing press conferences and attacking the Senators. It is very unfortunate.

Let me speak first to the numbers our distinguished majority leader just used and other Members on the other side of the aisle. It is my understanding those numbers about backlogs were prior to the filling of four vacancies on the Sixth Circuit. So we are looking at a situation where there have been four vacancies already filled. Retired judges are used to hear cases.

We do not hear about the kind of backlog and the concern about the lack of justice going on in the Sixth Circuit. I believe that is absolutely inaccurate. What we do hear is a great concern about playing politics.

There was an effort to hold up all the nominees to the Sixth Circuit under President Clinton. Now, coming into this Senate, Senator LEVIN and I have attempted to work with the adminis-

tration to have a bipartisan solution to stop this. That is what we have been about, not going on with partisanship, which is what is happening now. Rather than working with us for a bipartisan solution, we see partisan press conferences. We see our colleagues on the other side of the aisle, and unfortunately our colleagues in the House on the Republican side, holding press conference after press conference attacking us, rather than working things out.

How do we work it out? Well, many States have bipartisan commissions to recommend nominees to the President, working with the Senators. We have put forward the Wisconsin motto which has the Senators from one party placing four people on a commission. The senior Republican in this case, Congressman SENSENBRENNER from Wisconsin, who is a part of this process, nominates four. They have two people from the Wisconsin bar, and the heads of the law schools. It works. It has been embraced by the White House.

It is disconcerting to me to see what has been agreed to and worked well in Wisconsin will not be allowed in Michigan. We know that in Washington State there is a commission. We know there are agreements in other States to work together with the Senators. But somehow in Michigan, instead of doing that, so our families, our workers, and our businesses can be represented and know that we will provide mainstream judges in a bipartisan way, we see unfortunate comments on the floor, we see misinformation, we see political press conferences over and over again.

This is how we got to this situation. It was partisanship in the last Senate under President Clinton, holding up the nominees. We are trying to change that and say let's stop this.

Instead of press conferences, I welcome colleagues in the Senate, as well as our House Members, to join us, to sit down and develop a motto such as Wisconsin and other States, where it works in a bipartisan way, to be able to put forward judges to fill these vacancies.

It is important who is on the bench. This is not the President's prerogative alone, nor any individual Senator. It means we need to work together because our families are affected, our business community, issues of privacy, health care, business law, the environment. Many issues are affected, and so it matters who is on the court from Michigan. We simply ask that we be treated with fairness as other Senators in other States have been, and we will continue to work to that end.

I yield back for my colleague from Maryland.

The ACTING PRESIDENT pro tempore. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, how much time is remaining?

The ACTING PRESIDENT pro tempore. Ten minutes.

Ms. MIKULSKI. I claim such time for myself.