EXECUTIVE SESSION

NOMINATION OF MARSHA L. BERZON, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

NOMINATION OF RICHARD A. PAEZ, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The PRESIDING OFFICER. The Senate will now return to executive session and resume postcloture debate on the two Ninth Circuit judicial nominations which the clerk will report.

The legislative clerk read the nominations of Marsha L. Berzon, of California, and Richard A. Paez, of California, to be United States Circuit Judges for the Ninth Circuit.

The PRESIDING OFFICER. Under the previous order, the Senator from New Hampshire, Mr. SMITH, shall be in control of up to 3 hours of total debate on both nominations and the Democratic leader or his designee shall be in control of up to 1.5 hours of total debate on both nominations.

Mr. SMITH of New Hampshire. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SMITH of New Hampshire. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SMITH of New Hampshire. Mr. President, as we have gone through this debate, although my name was not attached to anything in terms of a filibuster, it is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez. The issue is, why are we here? What is the role of the Senate in judicial nominations?

The Constitution gave the Senate the advise-and-consent role. We are supposed to advise the President and consent if we think the judge should be put on the court. We do not get very much opportunity to advise because the President just sends these nominations up here—he does not seek our advice—and then we are asked to consent.

Based on some of the comments that have been made to me privately and some of the things I have read publicly, it seems as if the Senate should be a rubber stamp, that we should just approve every judge who comes down the line and not do anything with the advise-and-consent role. That is not the way I read the Constitution.

I believe that is wrong. We have an obligation under the Constitution to review these judges very carefully. I have certainly voted for more than my share of judicial nominations this President has put forth. But I point out that the two nominees before us, in terms of their legal opinions—and that is all we are talking about; we are not talking about any personal matters other than their legal opinions—I believe are activist judges; they are out of the mainstream of American thought, and I do not think either one should be put on the court. The bottom line is they are controversial judges.

I was criticized by some for filibustering, that ''we are on a dangerous precedent'' of filibustering judges. The filibuster is over. We are now on the judges. The filibuster is a nonissue.

Filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to get information. It is to take the time to debate and to find out about what a judge's thoughts are and how he or she might act once they are placed on the court.

I was told by some of my colleagues yesterday that we are going down ''a dangerous path'' to debate these judges and slow them down, whether it be through a filibuster or debate in this Chamber. My colleagues will find there will be very few people who will speak in the roughly 3 hours on our side under my control. That is sad. I believe we should air the concerns we have.

As far as the issue of going down a dangerous path and a dangerous precedent, that we somehow have never gone before, as I pointed out yesterday and I reiterate this morning, since 1968, 13 judges have been filibustered by both political parties appointed by Presidents of both political parties, starting in 1968 with Abe Fortas and coming all the way forth to these two judges today.

It is not a new path to argue and to discuss information about these judges. In fact, Mr. President, Chief Justice William Rehnquist sat in your chair about a year ago finishing up the impeachment trial of President William Jefferson Clinton. When William Rehnquist was nominated to the Court, he was filibustered twice. Then after he was on the Court, he was filibustered again when asked to become the Chief Justice. In that filibuster, it is interesting to note, things that happened prior to him sitting on the Court were regurgitated and discussed. So I do not want to hear that I am going down some trail the Senate has never gone down before by talking about these judges and delaying. It is simply not true. I resent any argument to the contrary because it is simply not true.

I will talk a bit about the Ninth Circuit on which these two judges are about to go. Make no mistake about it, this is going to be a tough vote to win. I know that. But it does not mean the fight should not be made. We are all judged as Senators based on what we do, what we say, and how we act. History will judge us, as it has judged the great Senators such as Clay, Calhoun, and Webster who debated the great issues before and during the Civil War. We are judged on what positions we take. Maybe history will prove a Senator is right; maybe history will prove a Senator is wrong. When it comes time to make that vote, one does not have anyplace to hide. One has to make it and take the consequences one way or the other. I do what I do with the best information I have.

I can assure my colleagues that I have researched both of these judges very carefully. I have looked at the Ninth Circuit very carefully, and I have grave concerns about two very controversial judges being placed on a very controversial circuit court, the ninth. This is a renegade circuit court that is out of the mainstream of American jurisprudence. It has been reversed by the Supreme Court 90 percent of the time. It is important to let that sink in. Ninety percent of the decisions this Ninth Circuit has made have been overturned by the U.S. Supreme Court.

I want to repeat some of those statistics. From 1999 to now, 7 of 7, 100 percent of their cases, have been reversed. In 1998 to 1999, 13 of 18 were reversed, 72 percent.

From 1997 to 1998, 14 of 17, or 82 percent, were overturned. We can go on and on. From 1996 to 1997, 27 of 28 cases this court gave a decision on were overturned, 96 percent. From 1995 to 1996, 10 of 12 were overturned, 83 percent—and on and on and on. The average is: 90 percent of the cases were overturned in the past 6 years. There have been 84 reversals in the last 98 cases. That is an abysmal record, to put it mildly.

The Ninth Circuit is routinely issuing activist opinions. While the Supreme Court has been able to correct some of these abuses, the record is replete with antidemocratic, antibusiness, and procriminal decisions which distort the legitimate concerns and democratic participation of the residents of the Ninth Circuit. Some of the more outrageous opinions include striking down NEA decency standards, creating a ''right-to-die,'' blocking an abortion parental consent law, and a slew of obstructionist death penalty decisions.

I hope the American people and my colleagues understand that when you hear these terrible stories about prisoners getting out after 5 years, or people committing terrible crimes and never going to jail or getting pardoned or getting lenient sentences, this is not an accident. This happens because of the people we put on the court.

We are here as Senators to advise and consent, or not to consent, on the basis of these nominees. How many times do you read in the paper some judge let some criminal out, and the guy committed a crime again and again, and he got out again and did it again? It goes on and on—stalking, rape, murder, robbery, armed robbery, assault, over and over and over again. Time after time after time we hear about that happening. We sit around our living rooms at night, we watch television, we talk to each other, our families, and ask: Why did this happen? What in the world is the matter with the judges?

I say, with all due respect, when you have judges who are this far left out of the mainstream, surely out of the hundreds and hundreds of judges all over America, on the various district courts in this country, we can find somebody to serve on the circuit court who is not this controversial.

That is the bottom line. That is what this debate is about. That is why I am here on the floor. That is why, even though I know I am going to lose, I want this case made. That is why I have asked for the time to do it.

Again, the Senate, and particularly Republican Senators from Ninth Circuit States, are on record in favor of splitting this court; it is so controversial, making it into two circuits.

There was a commission called the White commission that recommended a substantial overhaul of the circuit's procedures, and that has not been implemented. It found that the circuit has so many judges that they are unable to monitor each other's decisions and they rarely have a chance to work together. That is what is going on. There are so many judges they cannot even monitor the decisions.

The Ninth Circuit covers 38 percent of the country, more than twice as much as any other circuit. It covers 50 million people, more than 20 million more than any other circuit. Not surprisingly, it has the most filings in the country.

President Clinton has already appointed 10 judges to the circuit. Democratic appointees compromise 15 of the 22 slots currently occupied. There is no need to put more controversial nominees on the court from a lame duck President.

Paez and Berzon have attracted significant opposition both within and outside the Senate. Both were reported out of the Judiciary Committee by a 10–8 vote. That is a pretty narrow vote. Neither would move the circuit to the mainstream. In fact, they are activist judges.

In Paez' case, the U.S. Chamber of Commerce is officially opposed to the Paez nomination, principally due to his decision in the Unocal case in 1997 allowing U.S. companies to be sued for the human rights abuses of foreign governments. Think about that. How would you like to be a U.S. company and be sued for the human rights violations and abuses of a foreign government? That is the way Paez ruled.

The letter notes the chamber's serious concern about a judge pursuing a foreign policy agenda in this fashion and argues that it ''has the potential to cause significant disruption in the U.S. and world markets.''

The Judicial Selection Monitoring Project at Free Congress Foundation circulated a letter signed by 300 grassroots organizations opposing this nomination. The letter highlights Paez's 1995 Boalt Hall inappropriate remarks regarding pending ballot initiatives, on the belief that he ''is an activist judge,'' and his lack of ''judicial temperament.''

The ACLU of Southern California applauded his nomination as ''a welcome change after all the pro-law enforcement people we've seen appointed to the state and federal courts.'' Think about that statement by the ACLU. No matter what you think about the ACLU, let me repeat that statement. They stated, this nomination is ''a welcome change after all the pro-law enforcement people we've seen appointed to the state and federal courts.'' What does that tell you about this guy? I am telling you, my colleagues, I really wish we would stop and think about what we are doing.

Even the Washington Post, not exactly a bastion of conservatism, stated, in an October 29, 1999, editorial: ''Republican opposition to [Paez] is not entirely frivolous.'' It argued that his Boalt Hall speech was ''inappropriate'' and that a ''principled conservative could suspect, based on Judge Paez' comments, that he might be sympathetic to such [liberal activist] thinking and would be more generally a liberal activist on the bench.''

That is the Washington Post's nice way of saying: This guy may not be that good after all.

There is a lot of evidence out here. You have to understand the framework: A liberal activist court that has been overturned 90 percent of the time—the Ninth Circuit—and now we put a judge on there who is being lauded as ''a welcome change'' after all the prolaw enforcement people we have seen on the court.

I say to the American people and my colleagues, when you hear stories about people getting out of jail or not going to jail or committing crimes over and over and over again—and you ask yourself: Oh, those liberal judges, what are we going to do about them?—ask your Senators what they did about liberal judges when they came before the Senate, before we put them on the court. That is a legitimate question: Do you support people who are lauded because they are antilaw enforcement? Maybe you ought to ask them that question because that is exactly what is happening.

In Berzon's case, the Berzon nomination was described by the National Right to Work Committee as the ''worst judicial nomination President Clinton has ever made.'' She has been associate general counsel of the AFL–CIO since 1987 and has represented unions in the automobile, steel, electrical, garment, airline, Government, teachers, and other sectors both in a day-to-day capacity and in appellate practice.

Among the positions she has espoused which courts have rejected: One, State bars should be able to use compulsory dues of objecting members for lobbying. That is the way she ruled. You are forced, as a member of a union, to give dues. You are forced to allow those dues to be used for lobbying for something with which you disagree. The bottom line is: I want my job. I pay my union dues. And on top of that, they rub my nose in it further by saying: Now, in addition to that, we are going to spend money lobbying for something you disapprove of. She ruled yes; she would do that.

Secondly, unions should be able to prohibit members from resigning during a strike. So somebody goes on strike, they decide they want to perhaps do something else, resign, for whatever reason—how about if it is for their health?—she is prohibiting them from resigning during a strike. What does that mean? If somebody has a heart attack, they cannot quit?

What have we come to in this country? You should not be surprised when you hear about these outrageous decisions coming down through the courts because we are putting the people on the courts who give us these outrageous decisions. We do not deal with it in a forthright manner.

There are better judges than this. Bill Clinton can bring better judges than this before the Senate. Frankly, he has, and they have been approved. They may not believe everything to my way of thinking, but he is the President. But we do not want judges who are so far over to the left that they swing the pendulum way over there against what American people want.

Another opinion she has espoused which courts have rejected is: Unions should be able to use nonmembers to subsidize union litigation in organizing. That is the way she ruled.

She describes herself as a believer in the labor movement, which is fine, but when you come on the court with an agenda, the Constitution should be your agenda, not labor, not a conservative or liberal or moderate cause. No, the Constitution should be your cause. If it is not constitutional, then you should not be for it.

The bottom line: The Senate should not confirm more judges to the Ninth Circuit unless and until its structure is reformed, and unless the nominee will help bring the circuit's jurisprudence back into the mainstream. This is clearly not the case with Judge Paez or Marsha Berzon. Neither nominee should be confirmed. It is that simple.

Now, let's look at some of the politics of the Ninth Circuit. In the Washington Times yesterday, Wednesday, March 8, was an article by Thomas Jipping:

Politics of the Ninth Circuit. Senators should reject judicial nominees.

I want to read one paragraph out of that op-ed piece:

The Senate this week will vote on two of the most controversial judicial nominations in recent memory. The result may well demonstrate whether Republicans deserve their majority status.

President Clinton has nominated U.S. District Judge Richard Paez and labor lawyer Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. Nearly twice as large as other circuits, it may also be the most influential, which is unfortunate because even the liberal New York Times calls it ''the country's most liberal appeals court.'' Two-

thirds of its judges are Democratic appointees. The Supreme Court has reversed its decision 90 percent of the time over the past 6 years—far more than any other circuit. And in 1996, Chief Justice Rehnquist wrote, ''Some panels of the Ninth Circuit have a hard time saying no to any litigant with a hard luck story.'' In its 1997–98 term, the Supreme Court reversed 27 of the 28 Ninth Circuit decisions it reviewed, 17 unanimously and 7 without either briefing or oral argument. Because this aggressive activism so grossly distorts the law, many Senators have long urged special scrutiny of Ninth Circuit nominees.

I ask unanimous consent that this entire article be printed in the RECORD.

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

[From the Washington Times, March 8, 2000]

POLITICS OF THE NINTH CIRCUIT

SENATORS SHOULD REJECT JUDICIAL NOMINEES

(By Thomas L. Jipping)

The Senate this week will vote on two of the most controversial judicial nominations in recent memory. The result may well demonstrate whether Republicans deserve their majority status.

President Clinton has nominated U.S. District Judge Richard Paez and labor lawyer Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. Nearly twice as large as other circuits, it may also be the most influential, which is unfortunate because even the liberal New York Times calls it ''the country's most liberal appeals court.'' Two-thirds of its judges are Democratic appointees. The Supreme Court has reversed its decisions nearly 90 percent of the time over the past six years, far more than any other circuit. In 1996, Chief Justice Rehnquist wrote that ''some panels of the Ninth Circuit have a hard time saying no to any litigant with a hard-luck story.'' In its 1997–98 term, the Supreme Court reversed 27 of the 28 Ninth Circuit decisions it reviewed, 17 unanimously and seven without either briefing or oral argument. Because this aggressive activism so grossly distorts the law, many senators have long urged special scrutiny of Ninth Circuit nominees.

Even ordinary scrutiny shows that these nominees will push that court further in the wrong direction. The L.A. Daily Journal quotes Judge Paez, who calls himself a liberal, describing his own aggressively activist judicial philosophy. Courts, he says, must tackle political questions that ''perhaps ideally and preferably should be resolved through the legislative process.'' America's Founders, however, did not suggest that legislatures exercise legislative power merely as an ideal or a preference; the first article of the Constitution they established, and that Judge Paez is sworn to uphold, states that ''all legislative powers'' are granted only to the legislature.

The L.A. Times says Judge Paez was a liberal state court judge. When nominated to the federal district bench, no less an arbiter of liberalism than the American Civil Liberties Union considered him ''a welcome change after all the pro law-enforcement people we've seen appointed.''

Judge Paez struck down a Los Angeles anti-panhandling ordinance enacted after a panhandler killed a young man over a quarter. He ruled that companies doing business overseas can be held liable for human rights abuses committed by foreign governments. The Institute for International Economics says this novel ruling would ''vastly expand the jurisdiction of the U.S. court system.'' The U.S. Chamber of Commerce, which normally steers clear of nomination fights, cites this decision in opposing Judge Paez. His decision against any jail time for U.S. Rep. Jay Kim, guilty of the largest admitted receipt of illegal campaign contributions in congressional history, prompted the newspaper Roll Call to suggest that Judge Paez may be ''too soft on criminals to be an appellate judge.''

The nominee also appears to place politics ahead of both judicial impartiality and independence. In a 1995 speech, for example, he attacked two California ballot initiatives while they were still in litigation even though the judicial code of conduct prohibited him from comments that ''cast reasonable doubt on [his] capacity to decide impartially any issue that may come before [him].''

Marsha Berzon's record may be as a lawyer and not a judge, but the clues lead to the same conclusion. Her training in the political use of the law had early impetus as a law clerk to activist Supreme Court Justice William Brennan and continued with membership or leadership of activist legal organizations such as the Brennan Center for Justice and Women's Legal Defense Fund. Hers is not benign disinterest; the political agenda these groups pursue in the courts, she says, hold ''a lot of importance and meaning for me.''

Miss Berzon repeatedly pressed extreme arguments that ignored the plain meaning of statutes and Supreme Court precedent, the very hallmarks of judicial activism. These include arguing that state bar associations can use compulsory dues of objecting members for political lobbying and that the right to refuse to join a labor union is somehow less protected by the First Amendment than other speech. These and other aspects of her controversial record made her one of only two Clinton nominees ever to receive eight negative votes in the Judiciary Committee.

Senators concerned about a politicized judiciary should find these nominations easy to oppose. Three things stand in the way. First, since a politicized judiciary is impossible to defend, its advocates stoop to playing the race and sex cards. Mr. Clinton first chooses women and minorities as some of his most radical nominees. Senators who would oppose white males with the same record face those dreaded labels ''racist'' and ''sexist'' if they don't create a double-standard and vote for these. Hopefully, senators will reject this perverse tactic and focus on the record which has led more than 300 grassroots organizations to oppose Judge Paez.

Second, those who cannot defend a politicized judiciary continue playing the numbers game. Batting 338–1 so far, however, Mr. Clinton has appointed more than 44 percent of all federal judges in active service. Democratic appointees now outnumber Republicans throughout the judiciary.

Third, the lure of patronage tempts individual senators to put their personal interests ahead of the country's interests. Rejecting these radical nominees means showing Americans that the Republican Party stands for at least basic principles of the rule of law and a judiciary independent from politics.

In 1993, then-Senate Minority Leader Bob Dole appeared on a live public affairs television show and a caller criticizes him for failing to block Mr. Clinton's judicial nominees. He responded: ''Give us a majority and if we don't produce, you ought to throw us out.'' Americans gave Republicans the majority and rejecting the Berzon and Paez nominations is their chance to produce.

Think about that. When you think about the makeup of the U.S. Supreme Court, there are some liberal justices there and some conservative justices there, but some of these decisions have been overturned unanimously; that is, with Scalia, Thomas, and Ruth Bader Ginsburg on the same vote. So they have to be outrageous to get that kind of support to overturn it. That is the whole point. So why are we adding more fuel to the fire?

I want to break into some categories here and a few of the Court's decisions on the Ninth Circuit. Let's look at criminal justice for a moment. It is very notorious for its anti-law enforcement record, as I said. And, again, Judge Paez is being praised for his anti-law enforcement status. So we are going to put another judge on the court that is anti-law enforcement, and he is being praised because he is being put on there.

In Morales v. California, 1996, the circuit struck down the California State law governing when defendants could present claims during habeas corpus appeals which had not been made during appeals in State courts. According to the California-based Criminal Justice Legal Foundation, this holding opened ''the doors to a flood of claims that would be barred anywhere else in the country.''

In U.S. v. Watts, in 1996, the Supreme Court issued summary reversals in two cases without even hearing arguments after the Ninth Circuit allowed past acquittals to be considered during sentencing. They are so outrageous they just rule.

In Calderon v. Thompson, in 1998, the Supreme Court reversed the Ninth Circuit's decision to block the scheduled execution of a convicted rapist and murderer with a bizarre and rarely used procedural maneuver, calling it a ''grave abuse of discretion.''

In Stewart v. LeGrand, 1999, the circuit blocked an execution on the grounds that the gas chamber was cruel and unusual punishment. The Supreme Court reversed that without even hearing the arguments.

So over and over and over again, we are hearing these arguments about how bad this court is.

I know there are other speakers on the floor on both sides here. So I am going to suspend in a moment.

Mr. President, I ask unanimous consent that the majority leader be recognized at 12:30 for up to 20 minutes relative to the pending nominations, and the 20 minutes be considered as time used under the control of Senator SMITH.

I further ask consent that the votes scheduled to occur at 2 p.m. today be postponed to now occur at 2:15 p.m. under the same terms as outlined in the previous consent.

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

The Senator from Nevada is recognized.

Mr. REID. Mr. President, I know the sincerity of the Senator from New Hampshire. But I also recognize that sincerity sometimes does not create the facts that are necessary to substantiate the sincerity.

With the Ninth Circuit Court of Appeals, what we have to understand is that, yes, they have been reversed a lot of times. For example, during the 1995–1996 term, five other circuits had higher reversal rates than the Ninth Circuit.

I also say to my friend that if you take, for example, this past year, we have had seven reversals so far. Four of them have come from judges who wrote the opinions and were appointed by Presidents Reagan and Bush.

The Supreme Court reverses most cases they take from the circuits. That is what they do. With the Ninth Circuit, they have thousands of cases. There are 51 million people who live within it. Mr. President, I think there is some substance to the fact that we need to take a look at the Ninth Circuit. Maybe it is too big. Maybe we need to revamp how it operates. But don't pick on Berzon and Paez because of that.

Also, Judge Paez is a very nice man. He graduated from one of the most conservative universities in the entire country, Brigham Young University. He went to one of the finest law schools in America, Boalt Hall, University of California Berkeley. It is always rated in the top 10. It is a fine, fine law school. His record is one of significant distinction. Here is a man who is unquestionably qualified for the Ninth Circuit or any other court. He has been a judge for 18 years. They have pored over all of the decisions he has made and they found relatively nothing.

I can't help what the ACLU says, but I can relate to you that there are many organizations that support his nomination and that are law enforcement-oriented organizations. We can talk about the National Association of Police Organizations; the Los Angeles Police Protective Association; the Los Angeles County Sheriff, Sherman Block, who recognizes his skills; Los Angeles District Attorney Garcetti; JAMES ROGAN, a Republican House Member and member of the impeachment team here just a year ago, supports Judge Paez. The Los Angeles County Police Chiefs Association, the Association for Los Angeles Deputy Sheriffs, Incorporated, and its president, Pete Brodie, support him.

Also, there has been some talk about how antibusiness Judge Paez is. I don't really want to get into this, but the simple fact is that in a very important decision in California—an issue in a very important discovery matter—he ruled for Philip Morris, the largest tobacco company in America. Does that mean he is protobacco? He also ruled in favor of the Isuzu Motor Company in a suit against the Consumers Union. Does that mean he is pro-foreign car manufacturers? Does that mean he is pro-big business? The answer is no. The Unocal case shows that he is a judge who follows the law and plays no favorites, as indicated in the Philip Morris case and the Isuzu Motor Company case.

His preliminary ruling in the Unocal case to dismiss may have displeased the company. His decision on that issue no more proves he is antibusiness than he is protobacco or pro-big automobile manufacturer.

There has been some talk that this man is antireligion. He is not antireligion. In fact, the case they continually refer to is a case where they are saying he said you can't use a Bible in the courtroom. Here is an exact transcript as to what he told the defendant. This is in court. Everybody was there. He says:

> I don't have a problem with the Bible. I don't care if you have it there on the table. My concern is I don't want any attempt to sway the jury. I don't want any demonstrative gesture that is not proper.

That is the end of the quote.

The report also says he told the defendants he would consider permitting the defendants to quote the Bible during closing arguments or to carry the book to the witness stand when they testified. I am not sure I would allow that if I were a judge. But he decided he would do it.

I have tried a lot of cases. When somebody comes up to that jury stand, it would be my personal opinion that it is improper to carry the Bible up there. I just do not think it is appropriate. Judge Paez believed it would be.

There has been some talk that he has bad judicial temperament. The Almanac of the Federal Judiciary isn't written about Democrats, Republicans, conservatives, or liberals. It includes reviews from attorneys who have appeared before all the Federal judges. They not only have the ability to look at his Federal judicial record but also his 13 years as a State judge in California where he served in the courts of unlimited jurisdiction. The Almanac for 1999 that reviews both his State court experience and his Federal court experience says:

> Lawyers reported that Paez had an excellent judicial temperament.

Some of the quotes from these lawyers include:

> I think he has great temperament.
> He has a very good demeanor.
> He is professional.
> He doesn't have any quirks.
> He is very good in the courtroom.
> He is courteous to everyone.

I think we should have an up-or-down vote on Judge Paez and Ms. Berzon.

I heard the distinguished chairman of the Judiciary Committee, the senior Senator from the State of Utah, talk about Ms. Berzon. He talked about what a great legal mind she has. You may not like her clients. She has done a lot of work for organized labor. But no one questions her qualities. She has a very fine, incisive political mind and will be a great addition to the Ninth Circuit.

As I have said, the Ninth Circuit is something of which I am very proud. I am proud of the Ninth Circuit. I fought when there was an attempt to split Nevada off from California. I practiced law in Nevada and in the courts in Nevada. Whether we like it or not, I fought the landmark decision made in the State of California. I fought to make sure Nevada would remain part of the California circuit.

I also am very proud of the Ninth Circuit because the senior judge, the man who is the administrative head of the Ninth Circuit Court and the chief judge of the Ninth Circuit, is a Nevadan, Judge Proctor Hug, Jr. He is a man who has a great legal mind. He excelled academically at Stanford Law School, and he has excelled on the Ninth Circuit.

I don't know, but I would bet that Judge Hug has written some opinions that have been reversed. That doesn't make him a bad man or a bad lawyer.

I hope we will look closely at what we are doing here. Judge Paez has a great record in the courtroom, in the classroom, and in the world and society in which he lives. He is a fine man, as is Marsha Berzon.

I hope we can move forward with these nominations. I hope there is an overwhelming vote. I think it would send a great message out of this Senate that we need to start doing things on a bipartisan basis. We hear the call for that all the time. There is no clearer example to show that than by voting overwhelmingly for these fine people—Judge Paez and Marsha Berzon. Both have established in their lives records of superior quality.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, thank you very much. I just arrived on the floor. I listened to some of the extensive remarks made by my friend from New Hampshire, Senator SMITH. I really came over to refute some of those remarks and some of those comments.

I have been through this fight over the judicial nominations once before. When Margaret Morrow was nominated and kept on the hook, people came to the floor of the Senate and said she was an activist, a liberal—the same buzzwords we are hearing. These buzzwords are: ''Out of control,'' ''liberal''—all of these words.

That was a great speech. But, unfortunately, it doesn't have anything to do with Margaret Morrow, who is as mainstream and as apple pie as you can get.

I say to my friend from New Hampshire, because I know people have varied opinions of this President, President Clinton, that I happen to think he has brought us out of the deepest, darkest economic nightmare we ever faced and I think will go down in history for that. But that is up to the historians. There is one thing about this President that I don't think anyone would refute. He is a pragmatist. He knows what he can get through this Senate. He certainly knows that if he puts someone before the Senate who is not in the mainstream, they are not going to get confirmed. He is not going to go through the exercise. It is very

painful for people to be nominated if they have no chance of being approved by the Senate. This President doesn't do that. In all my recommendations to him, and in all of Senator FEINSTEIN's recommendations to him, we have been very careful to make sure we refute things.

I hope the Senator from New Hampshire will appreciate this.

If I believe a judicial nominee is not going to pass the mainstream test, I don't even bother with it. If I don't believe a judicial nominee has Republican support, I will not even bother with it.

I have had several conversations with Chairman HATCH. He has been very clear. He says: BARBARA, you are not going to get people through who are not in the mainstream. You are not going to get people through who do not have bipartisan support. You will not get people through who do not have law enforcement support.

Yesterday, as Senator SESSIONS was speaking—believe me, I respect both of my colleagues' right to vote against these two nominations, if they so choose—I pointed out this wonderful record of support these two candidates have from Republicans and Democrats alike in law enforcement. My goodness, Sheldon Sloan, the head of Governor Pete Wilson's Judicial Advisory Committee, is the one who is backing Judge Paez.

Listen to this. I will repeat it. The head of Governor Pete Wilson's Judicial Advisory Committee is backing Richard Paez.

I ask unanimous consent to have printed in the RECORD several editorials supporting Richard Paez and Marsha Berzon.

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

[From the Los Angeles Times, Feb. 6, 2000]

JUDGE DESERVES ROUSING APPROVAL

Perhaps this week the full Senate will finally take up the nomination of Judge Richard Paez to a seat on the U.S. Court of Appeals for the 9th Circuit. With a decisive vote to confirm Paez, the Senate can redeem itself after its disgraceful treatment of this worthy jurist.

Paez, since 1964 a federal district judge in Los Angeles, was first nominated for the appellate bench by President Clinton more than four years ago. No nominee in memory has waited longer for a confirmation vote, a reflection on the Senate.

The first time the Senate Judiciary Committee considered his nomination, it refused to act, and the second time it voted approval, only to have the nomination die when Senate leaders refused to call an up-or-down vote. Last July, the panel once again forwarded Paez's name to the Senate, with committee Chairman Orrin G. Hatch (R–Utah) and one other Republican supporting the judge. But not until November did Majority Leader Trent Lott (R–Miss.) agree to set a Senate vote for March. Now March is upon us and Lott says he will deliver on his promise of a floor vote.

On the bench and before that as an attorney, Paez, a 52-year-old Latino, has earned a reputation for being thoughtful, fair and committed to civil rights. He would be an asset to the circuit court.

Republican leaders, whose treatment of Paez and other nominees stems from their deep animus toward President Clinton, are now anxious to cast themselves as an inclusive lot after divisive debates over religion and race in the presidential primary campaigns. A resounding vote to confirm Judge Paez is a good place to start.

[From the Los Angeles Times, Jan. 20, 2000]

INFAMOUS ANNIVERSARY FOR COURTS

Next Tuesday, four long years will have passed since President Clinton first nominated U.S. District Judge Richard A. Paez to a seat on the 9th Circuit Court of Appeals. It's a sorry moment.

The Senate has long toyed with Clinton's judicial nominees, grilling them mercilessly at Judiciary Committee hearings, then deep-freezing the nominations by refusing to call an up-or-down floor vote. No one has waited as long as Paez. First nominated to the 9th Circuit on Jan. 25, 1996, Paez, now 52, has been before the Judiciary Committee three times. Once, the committee refused to act; once, it approved him only to have the Senate let his nomination die by failing to vote. Last July, the committee approved Paez again, but the Senate still has not voted.

Why the delays? What so troubles Senate leaders about Paez? An extensive review of Paez's record, on the federal trial bench and, before that, on the Los Angeles Municipal Court and as a public-interest attorney, was published earlier this week in the Los Angeles Daily Journal, which covers legal affairs. The record reveals a jurist who is thoughtful, smart and unbiased. Regardless, some conservatives remain convinced, largely without evidence, that Paez has ''activist'' tendencies.

Late last year, Senate Majority Leader Trent Lott (R–Miss.) said he would call a floor vote by March 15 on Paez and a San Francisco lawyer, Marsha Berzon, whose nomination to the 9th Circuit also has languished.

There are now six vacant seats on the 9th Circuit Court and 76 on federal courts nationwide. The Senate's humiliating treatment of nominees like Paez and Berzon only serves to dissuade worthy men and women from serving on the federal bench.

[From the Washington Post, March 3, 2000]

THE PAEZ AND BERZON VOTES

Senate Majority Leader Trent Lott has indicated that the Senate will finally hold up-or-down votes on judicial nominees Richard Paez and Marsha Berzon by March 15. Judge Paez has waited four years for the Senate to consider his nomination, and Ms. Berzon has waited two. Both nominees to the 9th Circuit Court of Appeals are well qualified. It is time both were confirmed.

The ostensible reason for the opposition to these appointments is that the nominees allegedly harbor tendencies toward ''judicial activism.'' In neither case, however, is the allegation justified. Judge Paez made a single ill-advised remark about a proposed anti-affirmative action ballot initiative in California; his opponents also criticize him because, as a district court judge, he refused to dismiss a human rights lawsuit against a company doing business in Burma. Ms. Berzon stands accused of favoring abortion rights and supporting the labor movement. Such positions may trouble principled conservatives, but they are not the sort of ideological differences that should keep well-qualified nominees off the bench.

Some conservatives dislike the comparative liberalism of the 9th Circuit itself and so are reluctant to confirm judges who do not obviously break with that court's current tendency. But diversity among circuits is healthy, and the 9th Circuit is by no means a rogue operation out of the bounds of respectable legal thinking. Judge Paez and Ms. Berzon would be good additions to the court—and they have waited too long for the Senate to say so.

[From the Seattle Post-Intelligencer, February 26, 2000]

SENATE GOP DRAGS FEET ON JUSTICES

More than a few defendants have been in and out of U.S. District Judge Richard Paez's California courtroom—and prison as well—in the time the distinguished jurist has been waiting for a vote on his confirmation to the 9th Circuit U.S. Court of Appeals.

If only the ''speedy trial'' rules that Paez must follow applied to the U.S. Senate.

It's just our luck here in the 9th Circuit, which encompasses eight Western states including Washington and California, that Paez has become the poster child for the Republican-led Senate's refusal to schedule timely votes on nominations submitted by President Clinton.

This circuit, the biggest and arguably the busiest in the country, has six vacancies, yet Senate Majority Leader Trent Lott, R-Miss., had the gall to tell reporters Thursday that he does not believe additional judges are needed at this time. (Lott and fellow Republicans are really rankled by what they perceive as the court's left-leaning nature, but that's another tale.)

Lott disclosed that as he announced he would vote against Paez, who still stands a chance of becoming the first Hispanic on this appellate court. Well, that's some progress. At least Paez will have his day in ''court,'' although it will come more than four years after Clinton first sent his name to the Senate.

Paez's fitness is not the issue; the American Bar Association has given him its highest ranking. Timeliness is. Seven years ago it took an average of 83 days for the Senate to vote a federal judicial nominee up or down; now it takes more than three times that long.

Justice delayed is justice denied, whether it's for judges or defendants.

[From the New York Times, March 9, 2000]

ENDING A JUDICIAL BLOCKADE

The Senate is scheduled to hold confirmation votes today that would finally end the egregious stalling by Republicans that has blocked consideration of two worthy nominees for the United States Court of Appeals for the Ninth Circuit, on the West Coast. Richard Paez, a respected federal district judge in Los Angeles, has been waiting four years for the full Senate to act on his nomination. Marsha Berzon, a prominent appellate litigator in San Francisco, has been waiting two years.

Both these candidates were approved by the Senate Judiciary Committee with the support of its chairman, Orrin Hatch. But a floor vote was stalled by a few Republicans who reflexively branded the nominees as too liberal and too ''activist.'' Only after Democratic complaints about the Republicans' slowness in approving minority and female nominees did the majority leader, Trent Lott, agree to allow the full Senate to vote on their nominations.

The Senate should approve the Paez and Berzon nominations, then promptly vote on the 35 other pending judicial nominations. At the current sluggish pace, the Senate stands to approve even fewer judges this year than the 34 it confirmed last year, an indefensible record at a time when federal courts are facing rising caseloads and huge backlogs.

The fact that this is a presidential election year is no excuse for inaction. In 1992, President Bush's last year in office, the Senate,

then Democratic, confirmed 66 judges. In the last year of the Reagan administration, 42 judges were approved. The quality of justice suffers when the Senate misconstrues its constitutional role to advise and consent as a license to wage ideological warfare and procrastinate in hopes that a new president might submit other nominees.

Mrs. BOXER. I guess we have a conflict between the Washington Times and the New York Times. The New York Times writes today: ''Ending a Judicial Blockade.''

The Senate is scheduled to hold confirmation votes today that would finally end the egregious stalling by Republicans that has blocked consideration of two worthy nominees for the United States Court of Appeals for the Ninth Circuit, on the West Coast. Richard Paez, a respected federal district judge in Los Angeles, has been waiting four years for the full Senate to act on his nomination. Marsha Berzon, a prominent appellate litigator in San Francisco, has been waiting two years.

They recite the history, then state the Senate should approve the Paez and Berzon nominations.

The Los Angeles Times, editorial board, which is now dominated by Republicans, says: ''Judge Deserves Rousing Approval.'' It says:

On the bench and before that as an attorney, Paez, a 52-year-old Latino, has earned a reputation for being thoughtful, fair and committed to civil rights. He would be an asset to the circuit court.

The Washington Post says:

Judge Paez has waited four years for the Senate to consider his nomination, and Ms. Berzon has waited two. Both nominees to the 9th Circuit Court of Appeals are well qualified. It is time both were confirmed.

We hear the word ''activist'' mentioned. If I were to name an activist on the Republican side of the aisle, it would be my friend BOB SMITH. He is the best activist that the antichoice people have. He is an activist. He is the best activist the Humane Society has. When it comes to Judge Paez, when it comes to Marsha Berzon, I dispute the ''activist'' tag. Some have made the term ''activist'' a bad name. I don't think it is.

These two nominees have temperaments that fit the court. They are well reasoned. When Judge Paez was reviewed by 15 experts in the law profession, they said his opinions will stand the test of time; that he is well reasoned. The lawyers have refuted everything that has been said on this floor by people who don't know Judge Paez.

I will read statements from lawyers, the people who appear before him day after day, and anonymous quotes they gave to the Judicial Almanac when talking about Judge Paez and his temperament.

We are turning the word ''activist'' into something different. Margaret Morrow had to struggle to be confirmed. I think some of my friends on the other side of the aisle think you are an activist if you have a heartbeat or a pulse, if you are alive. Nominees have to have some opinions; that is what a judge does.

Accusing Judge Paez of being soft on crime is an incredible statement, because, as I understand it, a criminal sentence by Judge Paez has never, ever been overturned.

To hear people talk about letting rapists and other criminals free, some might have done it but not Judge Paez. He has never been overturned on a criminal sentence in his entire career, and he has been on the bench for 18 years.

Sometimes people come to the floor making an argument about the Ninth Circuit. How about putting two people on the Ninth Circuit who will make it better? That is the opportunity we have today.

I will read some comments made by the lawyers who appear before Judge Paez all the time. These are people who take all sides of the issue: He is a wonderful judge. He is outstanding. He is highly competent. He is smart. He is thoughtful. He is reflective.

''I don't know anyone,'' one lawyer said, ''who hasn't been exceedingly impressed by him. He does a great job.''

''He is very well prepared,'' says another.

''He knows more about a case than the lawyers.''

Here is another: ''I think he has a great temperament. He never says or does anything that is off. He has a good demeanor. He is professional. He doesn't have any quirks.''

I listened to my friend, Senator SMITH, who is eloquent, but he is not talking about the man these lawyers know. He certainly is not talking about the man whom all the law enforcement people who have endorsed him know.

We hear Judge Paez is soft on crime. Why, then, does the National Association of Police Organizations endorse him? Also endorsing him is the Los Angeles Police Protective League, the Los Angeles County Police Chief Association, the Association of Los Angeles Deputy Sheriffs, the Department of California Highway Control Commissioner. Why would he have bipartisan support from California State judges and justices, such as California Court of Appeals Justice Walter Croskey, bar leaders, business leaders, community leaders, the whole Hispanic community?

There is a lot of discussion about what party deserves to get the votes of the Hispanics. I hope we can rise above this, but I do hope we can listen to the Hispanic Chamber of Commerce which strongly support Judge Paez.

I will read from their letter:

To the Senate majority leader from the United States Hispanic Chamber of Commerce:

I urge you to consider the views of the U.S. Hispanic Chamber and of the Hispanic small business community as we await a decision from the Senate on the nomination of Judge Paez. Judge Paez would be a great asset to the Ninth Circuit Court of Appeals.

They conclude:

I therefore urge you to listen to the voice of the Hispanic community and confirm Judge Paez to the Ninth Circuit Court of Appeals.

Here is a joint statement from the Hispanic Chamber of Commerce—the businesspeople—and the Hispanic National Bar:

The Hispanic community is justifiably proud of Judge Paez's achievement. He is a jurist of integrity and decency, a role model for Hispanics everywhere. Yet he has been kept waiting for more than 49 months for a Senate vote. We applaud Senator LOTT's decision to give Judge Paez a vote and urge the Senate to give him full and fair consideration.

They conclude:

If Judge Paez's record is reviewed fairly, he will be confirmed on a bipartisan basis.

I know there is some thought as we get ready for an up-or-down vote on these two nominees that there might be a motion made to indefinitely postpone this vote. I have had discussions with the Parliamentarian who believes that motion would be in order. I say it would be precedent setting. We have these candidates. They have gone through a very difficult confirmation process, being nominated a few times, getting through the committee a few times, being asked extensive questions, surviving an important cloture vote, which, frankly, they won overwhelmingly. Eighty-some Senators said they have a right to have a vote. I admire those Senators who voted for that, even though they won't vote finally for either Marsha or Richard.

I make an appeal: If we vote to indefinitely postpone a vote on these two nominees or one of these two nominees, that is denying them an up-or-down vote.

That would be such a twisting of what cloture really means in these cases. It has never been done before for a judge, as far as we know—ever. Again, it would undermine what Senator LOTT said when he said these people deserve an up-or-down vote.

So I make a plea to my friend, Senator SMITH. He and I go at it on many issues, but we are good friends and we like each other. Consider what you would do if you were to make such a motion, or another Senator would do so. You would be saying these two people do not deserve an up-or-down vote. I think that would be an undermining of the spirit of what we did yesterday.

I hope we will not go that route. What goes around comes around. Then, when you have a President who sends down a nominee, you are setting your party's President up for this kind of twisting in the wind that I do not think any nominee ought to go through.

I thank my friends for their indulgence. I believe very deeply we have two mainstream, strong candidates, supported by Democrats and Republicans alike, both inside the Senate and outside the Senate. We have two people who have proven their mettle. I thank them for hanging in there. I know there were times when they wondered whether it was worth it; that they had

to look at their families one more time and say, ''We don't know yet. We don't know yet. We don't know when we are getting a vote.'' That is why I brought their pictures to the floor the last couple of days, to put a face on these nominees. They have children. They have spouses. They have community friends. They work hard. Their lives have essentially been in limbo—for Marsha for a couple of years.

It is tough when you are in a law firm and you have been nominated. The partners don't know what to do. Do they give you more cases? Do they not? If you start a case, will you be pulled? It is a very difficult thing for an attorney in that situation.

For Judge Paez, it has been tough for him to hear some of the things that have been said when he is a man who has such broad-based support in the community.

Colleagues on both sides of the aisle, this is a big and important day. If there should be a motion made to indefinitely postpone this nomination, please do not support it. That would undermine what we promised these nominees way back several months ago when we told them they would have a vote. If we have that vote, please turn against it. And then, please vote for these nominees. They deserve your vote.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. SMITH of New Hampshire. Mr. President, I might say to my colleague, she knows we respect each other and like each other personally.

The points she makes about the families, when a nominee comes before the Senate and there is a long delay, we understand that. That is not easy for anybody. But I might also say, as far as I know—and I speak for myself, and I am pretty sure I speak for everyone else—I remember Clarence Thomas and people going in to find out what videos he purchased. He had a family. And Robert Bork had a family. And Doug Ginsburg had a family. I remember some very nasty things being said about those nominees.

We are looking at court cases of these nominees, and that is all we are looking at. I have not said, nor has anyone said on the Senate floor, one word about their personal lives. I have no desire to go there. This is about their court cases. In terms of Judge Paez in particular, his judicial philosophy, his activist philosophy, I will use his own words:

> I appreciate the need for courts to act when they must. When the issue has been generated as a result of a failure of the political process to resolve a certain political question, there is no choice but for the courts to resolve the question that perhaps ideally and preferably should be resolved through the legislative process.

The legislative process is to write the laws. That is what we do here. It is not up to the courts to write the laws. It is up to the legislature to write the laws. You should not put your activist views, conservative or liberal, on the court. I want judges who will interpret the Constitution.

These are his own words. I also want to point out—and I am just now analyzing the case—I know it is not a criticism because I did not know it either until this morning, but apparently there was a criminal case of Judge Paez that was overturned yesterday. I am trying to analyze that now, or maybe Senator SESSIONS may get into it later. So there was at least one, in terms of a criminal overturn.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I will note, just before I start, a couple of points.

The distinguished Senator from New Hampshire spoke about video rental records of Judge Bork or Judge Thomas. He may recall when that happened, a law was passed, the Leahy-Simpson law, which I proposed, initiated, and drove through in short order, to make it illegal for anybody to go and check somebody's video records. Ideally, I would like to see us have as strong a law for our medical records, something that has been held up while we spend a lot of time on a lot of other things. That is something being held up by this Congress on medical privacy. I wish we could do the same with that situation. But on Judge Bork or Judge Thomas or any other judges, the Leahy-Simpson law says we cannot look at their records.

I also note it was the Democrats who said very strongly about both Judge Bork and Judge Thomas, there should be no filibuster. As I recall, we expedited them relatively quickly for votes. It was also this Senator, joined by some others on this side, who, on the Ginsburg matter, when items were being leaked to the press—as it turned out, some from the same White House from which his nomination came—it was this Senator who took to the floor, and spoke elsewhere, and said let us give Judge Ginsburg a hearing; he should not be subjected to anonymous leaks, wherever they are coming from. As I said, some, it turned out, came from the White House. It was the White House that then announced, news to him, he was going to be withdrawing his name, which of course he did.

It was approximately 12 weeks from the time Judge Bork was nominated until we had a vote. It was something like 15 weeks from the time Judge Thomas was nominated before we had a vote. Of course, on Judge Paez it has been 4 years; on Marsha Berzon, 2 years.

I think we should talk about facts. Up to this date, there have been a lot of red herrings set out on these two nominees. They have been held without votes. Now at the 11th hour, some have sought to raise the random assignment of the case against John Huang in the District Court of the Central District of California as another reason to extend what has already been a 4-year delay in our consideration of the nomination of Judge Richard Paez.

I have yet to hear anybody suggest that there was anything untoward in the assignment of Judge Paez on this case. The suggestion is out here, somehow this was some nefarious thing, to put Judge Paez on this case. So I checked around about what the court rules are in assigning cases, because most courts have rules on how cases are assigned. They are not secret. They are public, and they are publicly available. I know they are in my own State of Vermont. They are elsewhere. But I thought maybe there was something that those who were objecting to his assignment to this case knew that we didn't. So I checked with the Central District of California, and of course they do have court rules governing the assignment of cases.

In fact, I understand the assignment of cases in the central district is pursuant to general order No. 224 of that court. I mention this because I wonder if any of those who have impugned Judge Paez sitting on this case even bothered to check that rule as I did, as anybody can, simply by picking up the phone and calling.

Section 7 of that order deals with the assignment of criminal cases. Paragraph 7.1 says:

> The assignment of criminal cases shall be completely at random through the Automated Case Assignment System. . . .

That is how the cases are assigned. The order allows exceptions under supervision of the chief judge. In the Huang case, there is no indication any exception was involved. Quite the contrary. I am told the assignment was done pursuant to a random assignment. That is what I was told when I called. That is what anybody would have been told if they had bothered to call instead of slandering this judge.

Then to make sure, because I am amazed anybody even questioned that because it is such a longstanding rule, I went to the extraordinary length of getting a statement under oath subject to the penalty of perjury by the district court executive and clerk of court explaining how these cases are assigned; Sherri Carter, district court executive and clerk of court.

I must apologize on the record to Ms. Carter for any indication that the Senate does not take her word for this or that people insist she submit this statement under penalty of perjury. I say to her, this is a strange time. Any lawyer who practices anywhere in this country knows that practically any court has these same kind of random assignments. State courts do it. Federal courts do it. Certainly any lawyer in California knows it is a random assignment. I suspect the bailiffs can tell you that. The janitors can tell you in that court, but the Senate is so far removed from it that we need an affidavit telling us something that everybody else outside of the sacred 100 in this Chamber know.

I ask unanimous consent that the sworn affidavit of Sherri Carter, district court executive and clerk of court, saying that district judge Richard Paez was randomly assigned to the Huang case under the district court-approved random assignment methodology using an automated information processing system be printed in the RECORD.

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

U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,
Los Angeles, CA.

I, Sherri R. Carter, District Court Executive and Clerk of Court, for the United States District Court, Central District of California, declare that case number CR–99–524–RAP, U.S.A. v. John Huang, was randomly assigned to District Judge Richard A. Paez, on June 14, 1999 through the District Court approved random assignment methodology utilizing an automated information processing system.

Pursuant to 28 UCS 1746, I, Sherri R. Carter, District Court Executive and Clerk of Court, declare under penalty of perjury that the foregoing is true and correct executed on March 8, 2000.

SHERRI R. CARTER,
District Court Executive and Clerk of Court.

Mr. LEAHY. Mr. President, I am sure Judge Paez had no interest in being assigned that case or the case against a former Member of Congress, Republican Representative Jay Kim, or any other high-profile case. I suspect any judge who has a pending confirmation would be delighted to avoid such high-profile cases, but they follow the rules. If the machine comes up and says ''you are assigned,'' then that judge hears that case. Judge Paez ought not continue to be penalized for doing his job in ruling in those assigned cases.

There is no allegation—no credible allegation, no believable allegation, no factual allegation, no whisper of an allegation—outside this Chamber that he did anything to obtain jurisdiction over those matters. None whatsoever. That ought to settle this matter once and for all.

It is the same as buying a lottery ticket and having the machine pick the numbers for you. It is done automatically. He did not win the lottery on this because he did not want a high-profile case, but he did his job, the job he was sworn to do. We ought to do the job we are sworn to do and vote up or down on these two people and not, as some have suggested, have a vote to suspend indefinitely. That is the Senate saying: Notwithstanding we are being paid to vote yes or no, we decide to just vote maybe.

Let's vote up or down. In this particular case that has been talked about, Judge Paez sentenced John Huang to 1 year probation, 500 hours community service, and a $10,000 fine after he pled guilty to a felony conspiracy charge on August 12, 1999. He agreed to plead guilty after he reached an agreement, not with the judge but with the prosecution for the Department of Justice. Based on that agreement, the prosecutors recommended no jail time in exchange for the defendant's cooperation. Judge Paez's approval of the prosecutor's recommendation was not unusual.

During my years as a prosecutor, I can think of a number of times when I said to the judge: Would you give this type of a sentence because we are getting cooperation from this person? I am after bigger fish; I have bigger fish to fry. I need their cooperation. Will you please sentence him to what might appear to be a lighter sentence?

Judge Paez did put the sentencing off for 10 days, from August 2 to August 12. Why? To consider a request by a Republican Congressman, DAN BURTON, who asked Judge Paez to delay sentencing until Huang testified in front of his committee investigating campaign finance abuses. The Congress asked him to delay. The Federal prosecutors objected to Representative BURTON's request for the indefinite suspension of sentencing, and having delayed to consider the matter, Judge Paez proceeded with the sentencing on August 12. I believe he was correct in doing so. Huang's lawyer told the prosecutor he would cooperate with Representative BURTON's committee, notwithstanding sentencing. My recollection is that is exactly what he did.

When it became clear, in virtually unprecedented fashion, Judge Paez and Marsha Berzon would have to leap over a 60-vote margin in cloture, and when it became clear the Senate would not add to the disgrace and humiliation of holding them up this long, that we would invoke cloture they want to suspend it indefinitely. After four years we should be more than prepared to vote for him for the Ninth Circuit.

Suspending a vote on this nomination would be a tragedy. Here is a remarkable man: a Hispanic American who has reached the Federal bench, has the highest rating that bar associations can give for a nominee, one of the most qualified people I have seen before the committee, Republican or Democrat, in my 25 years here. He has been waiting, dangling, for 4 years, humiliated by the actions of the Senate.

Now they ask to delay him again. It does not match up to what should be the standards of a body that calls itself the conscience of the Nation. Let us be clear, the Huang plea agreement, the transcript of the sentencing and related documents are not new. They have been in the possession of the Judiciary Committee since at least September of 1999. Six months they have been here.

The sentencing, his postponement, and the position of sentence did not happen in secret. It was in the glare of nationwide publicity. Thousands of sentencings go on every year in this country in all kinds of courts rarely covered by the press. This one was. These events extend back to last August and before. It is not a justification for asking for new information. It has been here.

I think the opponents misdirect their complaints about the plea agreement between the Government and Mr. Huang at Judge Paez. Complain about the Government's recommendation. That is one thing. Do not blame the judge who followed them.

Moreover, in spite of the impression sought to be created here, the plea agreement, dated May 21, 1999, expressly provides that Mr. Huang is not immune from Federal prosecution under ''laws relating to national security or espionage'' but covers only that conduct he had disclosed to prosecutors. In fact, his own attorney acknowledged at the time of sentencing that this plea agreement, OK'd by the prosecutors and the judge, leaves Mr. Huang open to further prosecution.

As far as the sentencing, let's be clear what happened. The Senate should know, pursuant to the agreement, Mr. Huang pled guilty to one count of conspiracy, a charge that carries the maximum penalty of up to 5 years. As for the calculation of the sentencing guidelines, both the Government and the probation office agreed on that calculation. They further agreed that in light of his substantial cooperation, he should receive a sentence of 1 year's probation and 500 hours of community service.

In fact, the only disagreement between the prosecutors and the probation office was on the amount of the fine. In this case, Judge Paez disregarded what the probation office recommended and went with the prosecutors' recommendation, the higher fine, and he imposed that fine.

If you read the sentencing transcript, you see the judge acted in a conscientious manner. He insisted on a probation officer's report and recommendation before proceeding. He did not proceed until he was advised of the extent and nature of Huang's cooperation that was expected. The Government informed the court that Huang provided substantial, credible information helpful in task force investigations. The judge emphasized that Mr. Huang was expected to continue to cooperate after his sentencing.

I mentioned being a former prosecutor. I can tell you, when I was prosecuting cases nothing was more infuriating than when people did not know the facts of a case or the extent of cooperation or the value of the plea agreement, and they would try to pick apart an agreement after the fact.

I can think of cases where people would say: Oh, my gosh, how can this person get a light sentence? Why? Because they helped us catch five other people we would not have caught without them.

It is easy enough to criticize and second-guess. It is always easy to say someone else settled too cheap, that they made a bad deal. That undermines the role and morale of good prosecutors. We all know how clogged the already overloaded courts would be if prosecutors could not use their best

judgment and enter into plea agreements.

We have 75 vacancies in the Federal court. Prosecutors are under pressure all the time to move cases through because we have not confirmed the judges; we have not added the extra judges they need. The courts are backlogged. You cannot get civil cases heard because of all the criminal cases. Prosecutors have to make their best judgment.

Whether one agrees or disagrees with the agreement, no one can say, with a straight face, that we suddenly found out about it, or that now we have to have a last-minute postponement. We do not need such a thing.

This has been pending for 4 years. The facts have been here for 4 years. The nomination has been here for 4 years. Local law enforcement has strongly backed Judge Paez for 4 years. His home State Senators have strongly backed him for 4 years.

He is supported by the Los Angeles district attorney, the Los Angeles Police Protective League, the National Association of Police Organizations, the Association for Los Angeles Deputy Sheriffs, the Los Angeles County Police Chiefs' Association. This guy sounds like the kind of judge I would have liked to have had my cases assigned to when I was a prosecutor.

We have made this highly qualified man jump through hoops for 4 years. He was required to review his criminal sentences for his whole career on the Federal bench. This is what we asked him to do after he was pending for 4 years. He had two confirmation hearings, and had been voted out twice by the Republican-controlled Judiciary Committee.

A lesser person would have said: Enough is enough. This is such petty harassment. He did not complain. He complied. What do the facts show? He is a tough sentencer. Those are the facts, not the comment of some reporter thrown into a political story here in Washington.

The people of California, the people who know him best, named him the Federal Criminal Law Judge of the Year in 1999. He has had sentences within the sentencing guidelines more often than the national average for district judges. We ought to be praising him for that. People say district judges don't follow the guidelines. We ought to praise him for being above average in that.

We talk about his criminal judgments appealed. There were 32 criminal judgments appealed. He was affirmed 28 times. Two of the appeals were dismissed for lack of jurisdiction; one was remanded. Only 1 of the 32 was reversed, in part.

We talk about how we want people who are going to be upheld on appeal. There isn't a district court judge—Republican, Democrat, or anything else—who would not be delighted to have a record on appeal like Judge Paez.

He is a tough judge, a really tough judge. He is also a good judge, a well-trained judge, a highly intelligent judge, and a judge who wins on appeals.

Obviously, every Senator has a right to vote how he or she wants, but at least vote. I do not think it is right to hold somebody up. It would certainly be an outrageous mark of shame on the Senate if we took the unprecedented step, for a Federal judicial nominee, after cloture, to move to indefinitely postpone. It would be the first time that sequence would be followed in the Senate. That would be a mark of shame on us.

But what bothers me is the way people look for any reason—real or imagined—to vote against Judge Paez.

There seems to be no interest in looking at his whole record of public service. I have heard no mention of Judge Paez's decision in the Great Western Shows, Inc. case. That was a controversial case. I am sure he did not ask to be assigned to it. But he applied the law fairly and objectively. Let's mention this case.

We heard he may be a liberal judicial activist, whatever that is. It must mean, like the majority in the Supreme Court in the last year or so, taking away more rights from the States and people in patent cases, and so on. But let's talk about this.

In the Great Western Shows case, he heard and granted a motion for a preliminary injunction against a Los Angeles county ordinance that would have effectively banned gun shows, the sale of firearms and ammunition on county property. He went against those who wanted to ban the gun show because he found substantial questions that the ordinance was preempted by State law. So he granted an injunction so the gun show could proceed.

To me, that does not sound like a judicial activist. It reminds me of the courage that a Vermont district court judge showed back in 1994 when his nomination to the Second Circuit Court of Appeals was likewise pending before the Senate. At that time, Judge Fred Parker handed down his decision in the Frank case in which Judge Parker held the 10th amendment prohibited Congress from usurping the power of Vermont's Legislature and declared certain provisions of the Brady law unconstitutional.

I remember that very well because it was about the same time I was down asking the President of the United States to appoint Judge Parker, a conservative Republican, who served as the deputy attorney general of our State. I was asking the President to appoint Judge Parker to the Second Circuit. I also knew Judge Parker was an extraordinarily brilliant person. He was a classmate of mine in law school. He is highly honest. Usually he had supported my opponents.

I had to tell the President, who was strongly supporting the Brady law: This judge I want you to appoint to the Second Circuit Court of Appeals has just found a hunk of that law unconstitutional. The President said: Anything else you want me to do for you today?

But to Bill Clinton's credit, he did appoint Judge Parker to the Second Circuit. Oh, just as a little footnote, to Judge Parker's credit, the U.S. Supreme Court upheld him. They said he was right, that the way it was drafted, that part of the Brady law—which we have since changed—was unconstitutional.

The point is, both these judges, Judges Parker and Paez, acted with courage to do their duty. They applied the law to the facts, and they did their judicial duty. They did so at some personal risk while their nominations to higher courts were still pending before the Senate. I think the strength they show is commendable. They are the kinds of judges we need in our Federal courts to act with independence and in accordance with the law. All the Senators who were in the Senate at that time voted for Judge Parker.

I hoped they would give the same with respect to Judge Paez. He doesn't tailor rulings or sentences to please political supporters. He is not soft on crime. This is a man who gets upheld on virtually all his criminal cases. He is a person with great resolve and temperament and intellect. Those who seek to diminish this man or his record should reconsider and support his prompt confirmation.

I understand why people support him so strongly. I ask that a sampling of letters from the Hispanic National Bar Association, national Hispanic Leadership Agenda and its more than 30 constituent organizations, the League of United Latin American Citizens, and the U.S. Hispanic Chamber of Commerce in support of Judge Paez be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

HISPANIC NATIONAL BAR ASSOCIATION,
Washington, DC, February 20, 2000.

Hon. PATRICK LEAHY,
Courthouse Plaza,
Burlington, VT.

DEAR SENATOR LEAHY: It is the understanding of the Hispanic National Bar Association that Majority Leader Trent Lott has agreed to call a floor vote on the nomination of Judge Paez by March 15. Therefore, as the Regional President of the Hispanic National Bar Association with jurisdiction over the State of Vermont, I am writing to inquire into your position on the nomination of Judge Richard A. Paez to the United States Court of Appeals for the Ninth Circuit.

The Hispanic National Bar Association is a non-partisan organization with over 22,000 members that has as one of its goals to promote the appointment of qualified Hispanic candidates to the Bench. We have reviewed the qualifications of Judge Paez and strongly support his confirmation. In fact, his confirmation is one of our top priorities for this year.

I will contact your office within the next few days to see if you, or your staff, are available to meet with us to discuss this important nomination. If you have any questions, please feel free to contact me at (617) 565–3210.

For your information, I have attached a copy of a Los Angeles Daily Journal article on Judge Paez which, upon your perusal,

should clear up any misconceptions and incorrect labels that are currently the foundations of objections to his nomination.

I appreciate your attention to this request.

Sincerely,

R. LILIANA PALACIOS,
Regional President.

NATIONAL HISPANIC
LEADERSHIP AGENDA,
Washington, DC, March 3, 2000.

DEAR SENATOR: As members of the Board of Directors of the National Hispanic Leadership Agenda (NHLA), we are writing to reiterate our strong support for Judge Richard Paez to the Ninth Circuit Court of Appeals and our request that you vote to confirm him.

About two weeks ago, you should have received a letter from the NHLA signed by our Chair, Manuel Mirabal. Because we wish to convey to you fully the importance of this matter to the Latino community, we have decided to send you this additional letter with our individual signatures.

The NHLA represents a highly diverse and important cross-section of the national Latino community. Our organizations have offices and constituents throughout the country, and we come together when we find issues of mutual concern. We submit this letter on behalf of the organizations we represent, and we sign this letter as individuals prominent in various fields, including business, legal, labor, health, scientific, among others as well.

We come together to support a highly qualified candidate to the Ninth Circuit Court of Appeals—Judge Richard Paez. In 1994, Judge Paez became the first Mexican American appointed to the Central District Court of California in Los Angeles. This was a milestone for the Latino community. Now that Judge Paez has been nominated to the Ninth Circuit, we believe he will serve well not only the 14 million Latinos living in the Ninth Circuit, but all Americans who seek a fair review of the matters they bring to court.

Thank you again for considering our strong backing for Judge Paez, and we urge you to support his confirmation.

Sincerely,

Elena Rios, MD, National Hispanic Medical Association; Kofi Boateng, Executive Director, National Puerto Rican Forum; Elisa Sanchez, CEO, MANA, A National Latina Organization; Delia Pompa, Executive Director, National Association for Bilingual Education; Manuel Olivérez, President & CEO, National Association of Hispanic Federal Executives; Guarione M. Diaz, President & Executive Director, Cuban American National Council; Gabriela D. Lemus, Ph.D., Director of Policy, League of United Latin American Citizens.

Manuel Mirabal, President, National Puerto Rican Coalition; Arturo Vargas, Executive Director, National Association of Latino Elected and Appointed Officials; Anna Cabral, President, Hispanic Association on Corporate Responsibility; Gumecindo Salas, Hispanic Association of Colleges and Universities; Al Zapanta, President, U.S.-Mexico Chamber of Commerce; Mildred Garcia, Deputy Director, National Hispanic Council on Aging; Andres Tobar, Executive Director, National Association of Hispanic Publications.

Oscar Sanchez, Executive Director, Labor Council for Latin American Advancement; Gilberto Moreno, President & CEO, Association for the Advancement of Mexican Americans; Roberto Frisancho, President, Latino Civil Rights Center; Lourdes Santiago, Hispanic National Bar Association; Ronald Blackburn-Moreno, President, ASPIRA Association, Inc.; George Herrera, President/CEO, U.S. Hispanic Chamber of Commerce; Juan Figueroa, President and General Counsel, Puerto Rican Legal Defense and Education Fund; Raul Yzaguirre, President, National Council of La Raza; Antonia Hernández, President & General Counsel, Mexican American Legal Defense and Educational Fund.

LEAGUE OF UNITED
LATIN AMERICAN CITIZENS,
Washington, DC, March 6, 2000.

Hon. PATRICK LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: On behalf of the League of United Latin American Citizens, the oldest and largest Hispanic organization in the United States, I urge you to vote to confirm Judge Richard Paez to the Ninth Circuit Court of Appeals. Judge Paez was first nominated to serve on the Ninth Circuit on January 25, 1996—more than four years ago. This is an unusually long time to wait, especially considering Judge Paez's qualifications for the position.

Judge Paez currently serves with distinction as a Federal District Judge in the Central District of California, where he has been for over five years. Before that he served as a municipal judge in Los Angeles for thirteen years. When first considered by the Senate, Judge Paez was confirmed unanimously. Many of the Senators who agreed to his nomination in 1994 are still in office. Since he was nominated to the Ninth Circuit, Judge Paez has been through two hearings to review his qualifications and both times he was voted favorably out to be considered by the full Senate. He has been rated well-qualified by the American Bar Association and is supported by a wide array of individuals and organizations, including representatives from the business and law enforcement communities.

By March 15, 2000, Senate Majority Leader Trent Lott will move for a vote on Judge Paez. I strongly urge you to support his confirmation. His confirmation is important to LULAC not only because we have the opportunity to place an excellent judge in this important position, but as a Latino, he represents one of a very few opportunities for our community to be present at this level. It is also important to our judicial system, both how it operates and how it is perceived to operate, that individuals who have worked hard, played by the rules, and are qualified receive a fair chance just like others who may be different from them. Judge Paez has done everything it takes to be qualified for the position on the Ninth Circuit; he deserves your vote.

I hope we can count on you to support Judge Paez. LULAC will be recommending that this vote be include in the National Hispanic Leadership Agenda scorecord which will be published at the conclusion of this session.

Sincerely,

RICK DOVALINA,
National President.

UNITED STATES HISPANIC
CHAMBER OF COMMERCE,
Washington, DC, October 6, 1999.

Hon. TRENT LOTT,
Senate Majority Leader,
U.S. Capitol,
Washington, DC.

DEAR SENATE MAJORITY LEADER: On behalf of the Board of Directors of the United States Hispanic Chamber of Commerce (USHCC). I urge you to encourage a vote on the nomination of Federal District Court Judge Richard Paez to the Ninth Circuit Court of Appeals. I urge you to consider the views of the United States Hispanic Chamber of Commerce and of the Hispanic, small-business community as we await a decision from the Senate on the nomination of Judge Paez.

As you may know, the USHCC's primary goal is to represent the interests of over 1.5 million Hispanic-owned businesses in the United States and Puerto Rico. with a network of over 200 Hispanic chambers of commerce across the country, the USHCC stands as the preeminent business organization that effectively promoters the economic growth and development of Hispanic entrepreneurs. In addition, the USHCC provides and advocacy on many issues of importance to the Hispanic community. Hispanic entrepreneurs are interested in promoting the growth and development of Hispanics in the United States. For this reason, the USHCC supports the confirmation of Judge Paez to the Ninth Circuit.

Judge Paez was nominated to the Ninth Circuit Court of Appeals in 1996. He has been awaiting confirmation by the United States Senate for three and a half years, one of the longest pending nominations in history. Judge Paez has demonstrated the leadership and accomplishments that are well suited to a candidate for a Ninth Circuit Court Judge. He served as a judge in the Los Angeles Municipal Court for 13 years. While serving on that court, he was selected to serve in various leadership positions, including Presiding Judge. He was also elected to serve as Chair of the Los Angeles County Municipal Court Judges Association. In 1994, he was confirmed to the Central District Court of California where he currently serves.

Judge Paez would be a great asset to the Ninth Circuit Court of Appeals. He has the support of many civil rights, law enforcement and community groups, including that of the National Hispanic Leadership Agenda (NHLA) of which the USHCC is a member organization. The NHLA is a coalition of over 30 national and leading. Hispanic organizations in the United States. The USHCC has been supportive of NHLA's efforts regarding the confirmation of Judge Paez. I therefore urge you to listen to the voice of the Hispanic community and confirm Judge Paez to the Ninth Circuit Court of Appeals.

Respectfully submitted,

GEORGE HERRERA,
President and
Chief Executive Officer.

Mr. LEAHY. Mr. President, I hope today we will close the chapter of what has not been the greatest light and the greatest time of the Senate—close this chapter of 4 years of delay and harassment of this wonderful man and confirm him today.

Mr. President, how much time remains for the Senator from Vermont?

The PRESIDING OFFICER (Mr. ALLARD). There are 33 minutes remaining.

Mr. LEAHY. Mr. President, I yield the floor and reserve the remainder of my time. I thank my distinguished friend from New Hampshire for yielding.

The PRESIDING OFFICER. The Senator from New Hampshire is recognized.

Mr. SMITH of New Hampshire. Mr. President, in a moment I will yield to my colleague from Alabama. I want to respond to a couple of points that were made during the debate, in terms of

process, by the distinguished Senator from California, Mrs. BOXER, and Senator LEAHY of Vermont.

The criticism on the filibuster is a bit unwarranted. I could have come down here and thrown the Senate into quorum calls and delayed and delayed just for the sake of delay. None of us on our side, including me, did any such thing. We worked out an agreement with the majority leader for a limited amount of time, which on our side was 3 hours—it could have been 30, No. 1—after cloture. Secondly, I agreed to move the cloture time up, and the leader agreed with me.

The real purpose of that was to get facts out about these two judicial nominees, Berzon and Paez. I know in the case of Senator SESSIONS, who will speak for himself on this, he has new information about Judge Paez. I believe that when new information is there, in spite of the fact that this judge has been before the Senate for 4 years, it should be shared with the Senate. I think Senator SESSIONS has every right to share it. Frankly, I think Senators will want to hear it. So I hope they will listen when Senator SESSIONS speaks in detail about the new information he has because I think it is very important in the case of the nomination of Judge Paez.

I want to speak for just a moment on the issue of the random rule that my colleague from Vermont talked about. He indicated, to his credit, that he called and asked about the random rule, and he got a statement from the clerk that that was in fact random. Well, that is one statement, and it may well be true. I think we have a right to check that out to make sure it was random. If it were random, I ask my colleague, should this judge who is before the Senate to be confirmed for the circuit court, nominated by President Bill Clinton—is it the right thing to do, perception-wise, to sit on a case involving Maria Hsia, who has just been convicted for part of the fundraising scandal, along with John Huang who was also involved in that scandal? It seems to me, even if it did come out randomly, it would be good, common sense to say I will recuse myself from these cases because I don't think it looks good.

The random aspect has a problem, which Senator SESSIONS will address. The random aspect presents a problem for me because there are 34 judges there, and the fact that those 2 cases would be randomly assigned to this judge is pretty suspicious. But if you give them the benefit of the doubt, a bad judgment was made by Judge Paez in taking them.

Finally, much has been made here this morning as to comments about Hispanic judges. I think the implication is, somehow there is bias here. I remind my colleagues and the American people that we had a vote of whatever it was—95–0—on Judge Fuentes the other day. I voted for that judge, as did all of my colleagues. I certainly didn't assign any racial bias when Judge Thomas was opposed by many on the other side of the aisle, who happened to be a conservative black, which was the first sin—and probably the only sin, as far as I know—he committed. For that, he went through a living hell for a long time. Had he been a liberal black judge, I don't think there would have been a problem at all.

So I don't think we need to get into name calling and give the insinuation that somehow because Paez happens to be Hispanic—that is uncalled for, and I hope we can get away from that kind of debate. I look at each person on the basis of their qualifications and their decisions. For all I know—OK, Paez, is that a Hispanic name? I don't even know. I could care less. So I hope we can get beyond that.

At this time, I yield to my colleague from Alabama, Senator SESSIONS, whatever time he may consume.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Mr. President, I thank the Senator and I appreciate his leadership on this issue and his courage in standing up for it.

It is really offensive to me that it would be suggested I or other Members would oppose someone simply because they were Hispanic, African American, or any other nationality, religion, or racial background. I hardly knew he was Hispanic until we were into this matter. He has been held up for a number of years for reasons that have been discussed in some detail. He has stated, as a State judge, a philosophy of judging that is the absolute epitome of judicial activism. He said that when a legislative body doesn't act, it is the responsibility of the judge, or the judiciary, to act and fill the void. Well, when a legislative body, duly elected by the people of the United States, fails to act, that body has made a decision—a decision not to act. But they are elected. If they do the wrong thing, they can be removed from office. But now we want to have a Federal judge who is unelected, with a lifetime appointment, to blithely walk in and say: Well, I don't like this impasse. You guys have a problem and you didn't solve it, so I am going to reinterpret the meaning of the Constitution. That word doesn't mean that, or ''is'' means something else. So I am going to make this legislation say what I want it to say. I am going to solve this problem. You guys in the legislative branch would not solve it; you failed to solve it, and you are thinking about special interests. But I am above that, and I will do the right thing.

Mr. President, that is judicial activism. That is an antidemocratic act at its most fundamental point because that judge has a lifetime appointment. He has no accountability to the public whatsoever.

It is a thunderous power that the Founding Fathers gave Federal judges. And for the most part they have handled themselves well. But this doctrine of judicial activism that they have a right to act when the needs of the country are at stake is malicious, bad, and wrong. It undermines the rule of law. It undermines the democracy at its very core.

Hear me, America. When you have a Federal judge who is an unelected person unaccountable to the people, we have gone from a democracy to something else. I believe that is not healthy. His statement in that regard is a fundamental statement that indicates to me he is particularly not a good choice for the Ninth Circuit.

As the Senator so ably pointed out, it is the most activist circuit of all. I know the Senator mentioned the recent case in which he was reversed.

The city of Los Angeles passed a statute against panhandling after an individual on the street of Los Angeles was murdered when he wouldn't give somebody 25 cents. They passed legislation. The Los Angeles City Council is not a city council that has set about to deny civil liberties. They are one of the most open cities in the world.

What did Judge Paez do, according to the Federal Supplement opinion of his district court order in 1997? He found that the ordinance was invalid on its face under the California Constitution's Liberty of Speech clause for discriminating on the basis of content between categories of speech.

The case was appealed to the Federal court. They certified that question, as they sometimes do, to the California Supreme Court. This is a California statute, and the Federal judge was invalidated by the California Supreme Court.

Out of deference and respect to the California Supreme Court, what is your opinion of that? They reviewed the matter. They came back and concluded that the judge was wrong after having delayed the implementation of a duly passed statute by the duly elected leadership of the city of Los Angeles. This one sitting, lifetime-appointed judge unaccountable to the American people wiped it out. The California Supreme Court said this:

> As noted above, the regulation of solicitation long has been recognized as being within the government's police power. And, yet, plaintiff's suggested approach to content neutrality in many instances would frustrate or preclude that means—

Let me stop—

> [T]he kind of narrow tailoring that is generally demanded with regard to the exercise of such police power regulation in the area of protected expression. If, as plaintiff suggests, lawmakers cannot distinguish properly between solicitation for immediate exchange of money and all other kinds of speech, then it may be impossible to tailor legislation in this area in a manner that avoids rendering the legislation impermissibly over-inclusive.

It is free speech to say ''stick'em up, turn over your money or your life''? No, it is not.

This is a pretty cutting and direct rebuttal, and a blunt condemnation of Judge Paez from the Supreme Court of California—not a right-wing court, I submit:

In our view, a court should avoid a constitutional interpretation that so severely would constrain the legitimate exercise of government authority in an area where such regulation has long been acknowledged to be appropriate.

Indeed, one of the main reasons our murder rate fell in this country a few years ago was because Rudy Giuliani, as mayor of New York, examined what was happening to crime in New York, and he decided that what was happening was we were allowing panhandlers and drug dealers to be wandering the streets and they focused on small crime. They had a plummeting of the murder rate in New York. It dropped by about two-thirds in almost 1 year's time. In fact, there was almost a one-half decline in the murder rate in 1 year.

This judge would say those kinds of regulations that allow a city to take control of its streets is not valid, and it was reversed by the Supreme Court of California in pretty blunt language. To say he is not an activist and not willing to use his power as an unelected public official to set public policy in America is wrong.

That is only one of the cases that is involved here.

I am concerned about the sentencing of John Huang. It is a very important case. It is a case of real national importance. His activities were followed. The Democratic National Committee had to give back $1.6 million in contributions that had come from illegal sources, mainly foreign sources—the Lippo Group, and Riady, and so forth. That was a major news story, and it was for years.

We, as members of the Judiciary Committee, the chairman of the Judiciary Committee, leaders in the House and Senate, urged Attorney General Janet Reno to set up an independent prosecutor to investigate this campaign finance problem. She steadfastly refused to do so, although she did in a lot of other cases.

The employees of the Department of Justice are answerable to the Attorney General, who holds her office at the pleasure of the President of the United States. She can be removed at any moment by the President of the United States. She decided she would hold onto that case. She would not give it up, and she assured us that they would effectively prosecute it; they would get to the bottom of it and crack down on these illegal contributions from foreign governments, mainly believed to be the People's Republic of China, a Communist nation, and a significant competitor of the United States, while they were stealing our secrets at the same time from our laboratories.

This is a serious matter. She would not give it up. She said she would do a good job with it, and they took the case and investigated it. Her underlings met with John Huang's lawyers in Los Angeles, and they discussed the case and the disposition of it.

I was a Federal prosecutor for 15 years. I have some experience. I have been here for 3 years, but most of my career was as a Federal prosecutor.

So they have this meeting and they reach a plea agreement. I have a copy of the plea agreement. They had a plea agreement and presented it to the judge.

I tell you, a judge is not required to accept a plea agreement under the law, and I can document that entirely. A judge is not required to accept a plea agreement presented to him by a prosecutor. It is common knowledge and everyday practice. You present a plea to the judge. By accepting it, he accepts the guilty plea of that defendant. If he rejects it, he doesn't take the plea.

What did the plea agreement say about that particular issue? They said: Oh, you know, the judge is just a victim of the prosecutor. He is just bound by them.

I am telling you that a judge is a force. A Federal judge to a Federal prosecutor is a force. What he says or she says goes. They can demand all kinds of things before they take a plea, and they should demand all kinds of things before they take a plea.

For those who think the judge had no authority, I will read the exact language between John Huang and the Clinton Department of Justice prosecutors.

Paragraph 15: This agreement is not binding on the court. The United States and you understand that the court retains complete discretion to accept or reject the agreed-upon disposition as provided for in paragraph 15(f) of its agreement. If the court does not accept the recommended sentence, this agreement will be void, you will be free to withdraw your plea of guilty. If you do withdraw the plea, all that you have said and done in the course of leading to this plea cannot be used against you.

In addition, should the court reject this agreement, and should you, therefore, withdraw your guilty plea, the United States agrees it will dismiss the information, the charge, that is brought against you, without prejudice to the United States right to indict you on charges contained in the information and any other appropriate charges.

This is basic. They go to the court and plead guilty. The judge does a presentence report, as the Senator from Vermont said. A judge ought to be impeached if they don't do a pre-sentence report on a case such as this. That is routine. A pre-sentence report is made, which has not been made part of the record. There was a plea on what is called an information, not an indictment.

That means the case was not presented to a grand jury of 24 citizens to have them vote on what charges should be brought against John Huang.

Remember, the investigation began out of the charges of $1.6 million to the 1996 Democratic National Committee to benefit the Clinton-Gore campaign.

Some say: JEFF, you are just playing politics. You want to talk about campaign finance reform.

I am talking about the judge who took the plea on the man who was a central figure in the gathering of this money from a Communist nation. This is serious business. We ought not to treat this lightly.

Any judge who had already been nominated by this President for a higher Federal court position, I believe, should have realized the significance of the position he was in and conducted himself with a particularly high level of scrutiny. It was produced after this plea agreement was signed between the prosecutor and John Huang and his attorneys. They produced an agreed-upon charge—not an indictment because it wasn't a grand jury; it is called an information. It is written by the prosecutor, saying: The United States charges.

They did this, and presumably filed the case on the docket. In some fashion, the case went to Judge Paez. Out of 34 judges, this case goes to the Judge who is already being nominated by the President for another high court position. I know we have a clerk who has written a letter, but clerks get their fannies in trouble if they don't say those kinds of things. I don't know how this case got to him. I would like to have that clerk under oath for about an hour, and I will know after that whether or not it was handled in a legitimate way. That is what I believe. This little one- or two-line statement doesn't say a lot that satisfies me. I have seen many of those statements. The President submitted a many affidavits saying, ''I didn't do anything wrong'' in his civil cases. We learned later that he did do some things wrong.

It is curious to me that Judge Paez had drawn the other significant campaign finance reform case for the Democratic National Committee in the Clinton-Gore campaign. That was a Maria Hsia case. Maria Hsia is the one laundered the money through the Buddhist nuns for the campaign. He got both of those cases. That is a pretty high number. I would like to see a mathematical calculation of the chances of the two most prominent campaign finance reform cases both falling to 1 judge out of 34 judges in Los Angeles, California. I don't know how it happened. Maybe there is a good explanation. If there is, I am pleased to accept it.

I have been in courts and my experience is, and this is the reason I am concerned, usually in Federal courts, if there are 50 indictments returned by grand jury, they go on some sort of ''wheel'' and are randomly assigned. Cases that proceed on information by a prosecutor do not move through a grand jury. They move through the system in a different direction and do not always go on random selection.

Years ago, I remember when we would take the case to whatever judge was available. If a defendant wanted to plead guilty and we were satisfied, we called the judge and said: Judge, can you take the plea this afternoon at 4 o'clock? He would say, OK, or we would find another judge.

It is much more possible there is ''judge shopping'' on a plea to an information than on an indictment returned by a grand jury.

I think we ought to know this before we vote on a lifetime appointee. I wish it had been discovered sooner.

This is not an individual member of a law firm who had his practice disrupted. He is now a sitting Federal judge with a lifetime appointment. If he is not confirmed by this Senate, he will still be a Federal judge. He was previously confirmed by this Senate to be a Federal judge for the district court. I submit it is not too much to ask for a few weeks, 2 or 3 weeks, to have the matter cleared up. It has been 4 years; what is 3 more weeks to get the matter settled? That is what we ought to do if we want to do our duty.

I believe the evidence shows with some clarity why I believe the judge's actions at a minimum did not meet standards required of him.

There has been a lot of talk from those who defend Judge Paez. They say he is a victim of the prosecutor. Prosecutors have to take the pleas. It is routine to take the pleas.

This was not routine, No. 1.

Then they say the prosecutors were not doing their job. The prosecutors didn't tell him everything. He could not know everything.

We have examined the portions of the sentencing record we have been able to obtain, and we know at least some of those facts of which he was aware. I will analyze, based on the record, what he knew and what the sentencing guidelines require in terms of a sentence. I think I will demonstrate to the satisfaction of any fair observer that the judge did not follow the sentencing guidelines effectively. He found a lower level of wrongdoing than he should have. That level of wrongdoing allowed him to issue a light sentence instead of a sentence in jail.

I take very seriously the sentencing guidelines that were passed by this Congress a number of years ago. In the early 1980s, I was a U.S. attorney, a Federal prosecutor. The whole world held its breath when the U.S. Congress eliminated parole. It said to Federal judges: We are tired of one Federal judge giving 25 years for bank robbery and another giving probation for the same bank robbery offense. We don't want one judge who doesn't like drug cases giving everyone probation and another judge hanging an individual for minor amounts.

We are going to have guidelines. They passed detailed guidelines, and say the range would be 26 to 30 years. If the judge desired, he would give the lowest sentence allowed, 26; if he desired, he could give an individual 30.

The guidelines mandated and controlled sentencing. It was designed out of concern that there had been racial disparity. It was designed out of concern about an individual judge's predilictions to be soft or tough, and tried to create a uniform sentencing policy.

We held our breath. We didn't know if judges got their back up. They didn't like that. They had complete discretion before. They fussed. We wondered if they would follow. They did follow it. The courts of appeals and the Supreme Court directed them to follow. If they didn't follow guidelines, they reversed the sentences and sent the case back, saying: Follow these sentencing guidelines.

Even if we don't like them, they were passed by the elected Representatives of America in Congress. We, as judges, have to abide by those guidelines.

That is the basic point on that.

The plea agreement was stunning, in my view. And the information that was filed for the case was very troubling to me. We have a national matter involving the very integrity of the Presidential election by the infusion of large sums of illegal cash. It made national news, TV, radio, magazines, newspapers. What do the Department of Justice prosecutors do? Where do we charge John Huang with this fundamental violation of the 1996 election? Is that what he pled guilty to, in this information and plea agreement? I have it right here. He did not plead to one dime of illegal contributions to the Clinton-Gore Democratic National Committee campaign in 1996. His plea was to a $5,000 and a $2,500 campaign contribution to the Michael Woo for Mayor Campaign Committee in Los Angeles. That is what he pled guilty to. That is all he pled guilty to.

What did the prosecutor recommend? He recommended a nonincarcerated sentence of 1 year probation, no jail time, don't go to the Bastille, don't get locked up, don't serve time in jail for one of the biggest intrusions of illegal cash in the history of American political life. Plead guilty to a violation in a mayor's race. Don't discuss the matter of the Presidential election; it might embarrass the boss of the prosecutor who is handling the case.

This is raw stuff. It goes to the absolute core of justice in America. As U.S. attorney in Mobile, I prosecuted friends of mine, classmates of mine, business people I knew in the community, and drug dealers galore because I swore an oath we would have ''equal justice under law.'' It is on the Supreme Court, right across this street. Go look at it: ''Equal Justice Under Law.''

I assure you that, this very day in Los Angeles, CA, 25-year-old crack cocaine dealers are getting sentenced to 20 to 25 years in jail; some, life without parole. I was involved in a cocaine smuggling case. Five guys from Cleveland or somewhere brought in 1,500 pounds of cocaine, and the five of them got life without parole the same day because the Federal sentencing guidelines are tough on drug dealers. And they have tough provisions for corruption cases. But what did he get? He got 1 year probation and a $10,000 fine.

Do you think Mr. Riady would be glad to pay that fine? Do you think the Lippo Group could afford to pay a $10,000 fine for their buddy Johnny Huang? He testified. They said, you need to get at the bigger fish, and they did this because John Huang agreed to testify. Against whom did he testify? Did he provide important information? That is what prosecutors have to ask themselves. They had apparently debriefed him at the time of his plea and gotten him to tell what he knew and what he was going to cooperate about.

Who was the big fish? Who was the big fish that this great team of prosecutors agreed to prosecute? It was Maria Hsia. That is the only person, to my knowledge, John Huang has ever testified against. From what I hear, it was a pretty weak bit of testimony in a recent case in Washington. So they plea-bargained with John Huang, the big fish, and ended up getting testimony against some little fish.

What happens to Maria Hsia, the lady who raised all that laundered money at the Buddhist temple for Vice President GORE, the President of this Senate, when he chooses to be, there raising the money? She got convicted on five counts, allowing her to be sentenced for up to 25 years in jail.

It has always been curious to me why they did not try that case in Los Angeles, which would have been a much more favorable forum, according to most experts, than here in Washington. They brought it up here. Many say the Department of Justice was shocked they got a conviction, but they got a conviction. So now we have John Huang who raised $1.6 million, who pled guilty to a piddling mayor's race case and got 1 year probation, testifying against Maria Hsia, who, in my view, would be less culpable than he. She is subjected to up to 25 years in jail.

I am not talking just about politics. I love the Department of Justice. I spent over 15 years of my career in the Department of Justice. I love the ideals of the Department of Justice. When they sentence young people to jail for long periods of time, any prosecutor, any judge who does not have a moral commitment of the most basic kind to ensure that when people in suits and ties who have a lot of money commit crimes, they serve their time, is not much of a judge or prosecutor, in my view. They are not worthy to carry the badge.

What else did they do in this great prosecution that Janet Reno held onto? I was stunned. He was given transactional immunity. Listen to page 3 of the prosecutor's agreement that the judge approved. Not only did they not indict him for the $1.6 million or any of those funds, they gave him absolute immunity. Look at the language. This is the agreement, the contract between the prosecutor and Huang:

> The United States will not prosecute you for any other violations of Federal law other than those laws relating to national security or espionage, occurring before the date this agreement is signed by you.

That is a very dangerous plea agreement. I always warned my assistant U.S. attorneys not to sign those kinds of agreements. Under this agreement, had John Huang committed overt bribery, had it been proven he walked into the Oval Office, as I think he did on a number of occasions, and met the President of the United States and gave him $1 million cash for some bribe, he could never be prosecuted for that. He had complete immunity once this plea agreement was accepted. If he had committed a murder, he had complete immunity under Federal law based on this agreement. If he brought in drugs from the East, he would have been given complete immunity and could not be prosecuted for it.

He was given a sweetheart deal, a year probation and a $10,000 fine. That is not worthy of justice in America, I submit. It is a pitiful example of prosecuting, a debasement of justice. It is wrong, not right, not according to ideals and standards. I am stunned reading this document.

How did they do it? These Federal Sentencing Guidelines contain some pretty tough stuff. How did they wiggle this thing down to get a probation deal? Let's see. I have the document here. We looked at it. We looked at the factors in this kind of case, including the evidence the judge had, according to the transcript of sentencing. There is probably more evidence than this he could have considered, but we know that the judge was given these facts.

The judge started out with a base level of 6. That is the basic sentencing level for this type of fraud or deceit activity. I do not disagree with that. The prosecutors recommended a number of things, and the judge agreed. They recommended only a four-level departure downward for his cooperation. Apparently, the prosecutors felt the level of cooperation rendered by John Huang was not that significant. They asked for a four-level downward departure.

In addition, he had to then deal with the factors that would require an upward raising from level 6.

The judge found more than minimal planning. He upped it two. Certainly there was more than minimal planning in this deal to raise the money, even for the race in Los Angeles. It was 100-something thousand dollars—$156,000, I believe, for the total—even though he pled guilty specifically to $7,500. They gave him that sentencing and some other increases and decreases and adjustments.

I will go over several on which I believe the judge was clearly wrong.

In the facts before Judge Paez, I believe the evidence was clear that a substantial part of this fraudulent scheme was committed outside the United States. Indeed, the money came from outside the United States. That is what was illegal about it.

In the facts, the prosecutor said in the very information itself:

In 1992—

This is about the mayor's race—

. . . defendant Huang and other Lippo Group executives, entered into an arrangement by which (1) Huang and others would identify individuals and entities associated with Lippo Group that were eligible to contribute to various political committees.

They would find some people who were not identified as foreign and identify them. That is the first step.

The second step, according to the Justice Department prosecutors, was:

Huang would solicit the Contributors to make contributions to various political campaign committees.

Huang would find buddies at Lippo, and say: You are eligible to give; you give this money. And he would solicit them to give the money.

No. 3, the illegal part:

Lippo Group—

A foreign corporation out of Jakarta, Indonesia, with direct connections to Communist China.

Lippo Group would reimburse the Contributors for their contributions.

Do my colleagues see what that is? It is the classic launder. Lippo Group cannot give a contribution, so they take one of their employees, Huang, and get him to identify some people who can, and then reimburse him for the contributions. That is specifically provided for in the Federal election campaign law, and it is illegal. Wrong. No-no. You cannot do that.

Did some of this involve out-of-the-United States activities? Yes. Under the Federal guidelines, a judge is required to add two levels to the sentencing for that. Did Judge Paez do that? No, he ignored that provision of the sentencing guideline. He had that information because it was in the charge brought against Huang to which Huang admitted and pled guilty.

By the way, apparently the pattern of the contributions to the mayor's race was exactly the same as they used in the Presidential race: At least 24 illegal contributions spread out over a course of 2 years involving multiple U.S. and overseas corporate entities of which John Huang was responsible for soliciting and reimbursing the illegal contributions.

Those are the facts that were before the court. Judge Paez had that information.

Under the normal reading of the sentencing guidelines, that would have added between two and four levels because he would have been acting as an organizer or manager in this criminal activity. He clearly was. He was the hub of it. He was the organizer, the manager, and manipulator of it all. He was the one doing the dirty work to put it together. What did Judge Paez do? He ignored that and did not increase it one level for being an organizer and manager. I believe he clearly was required to do so if he were following the law that was mandated from this Congress.

These were the facts before the court.

No. 3: John Huang was an officer and director of various corporate entities involved in this case and also was director and vice chairman of a Lippo bank.

According to the guidelines, if a person commits a crime, and at the time of committing that crime, abuses ''a position of public or private trust,'' such as a director of a bank—we have that all the time. Bankers are being sentenced, directors are being sentenced, and they have their sentence enhanced because if they are an officer of a bank, the court holds them to a higher standard and they get more time than a teller would get for a similar crime.

For abusing ''a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense,'' as section 3B1.3, add two levels. Did the judge do that? No; no increase in levels.

When it all settled, Judge Paez was able to do what the prosecutors wanted. He helped them out. He bent the rules. He ignored the rules. He violated the rules. And what level of offense did he find? He found level 8.

Why is that important? Level 8 calls for a sentence of from zero to 6 months. A judge can give zero or as high as 6 months. That is the only range if he finds this level. If it had been level 9, zero would not be in the chart. It would not fit. If it was level 9, he would have had to serve time in jail. If it would have added up to, as I think it should have, at least to eight more levels, he would have faced from 12 to 30 months in the slammer, where he ought to be. That would be a good deal for him because that does not include the $1.6 million he raised in the Presidential campaign.

I do not know how in America we have become so blase. We have been so beaten down and so overwhelmed with manipulation of lawsuits and courts that I do not think we realize what is happening in this country. I am amazed there was not an absolute outrage by the people who were following this case over this plea. Maybe they thought he really was going to blow the whistle on somebody. Maybe they thought he was going to blow the whistle on the chairman of the Democratic Party or the Vice President or the President or the chairman of the campaign committee or some big fish. Maybe they thought this was not such a bad idea because certainly the prosecutors would not give away the case to get some piddling testimony against Maria Hsia. They probably did not need his testimony against her anyway.

I do not know about this. We need a hearing with Judge Paez. Having sentenced young people to jail with no background, no money, bad homes, dealing in drugs, how can he send them off to jail regularly and not send this guy in a suit and tie connected to one of the most wealthy enterprises in the world, the Lippo Group out of Indonesia, connected to Communist China, to jail? Why didn't he see fit to do anything about that? Did it have anything

to do with the fact the President of the United States had nominated him already for the Ninth Circuit Court of Appeals?

That is a troubling thought. He is entitled to have a day's hearing on it, be asked about it, and defend what he did. My analysis is this is not good.

Further, in my practice before Federal judges, they were not at all worried about prosecutors. If I had walked into the Southern District of Alabama, before any of the Federal judges in that district—basically, good, solid judges, not political, not out to befriend any political entity—and said, ''In our plea agreement, judge, he is going to plead guilty to contributing to the race of the mayor of Mobile; we are going to give him immunity for all these other charges'', I do not believe I would have the guts to walk in that courtroom.

That judge would say: Counsel, I am reading in the New York Times this man gave $1.6 million to the President's race. You have him plead guilty to contributing to the mayor's race, and you give him immunity for that plea? You want me to accept that plea? You are going to have to convince me. Show me.

None of that happened. He did not question this plea a bit. He facilitated this coverup because he accepted all their accounting measures which manipulated the guidelines so he could get the sweetheart deal of probation. That is wrong. That is not good. I am troubled by it.

I wish I realized this had happened and that we would have slowed down the hearings when they came up so we could have gotten into it. I wish I had. I do not supervise the staff of the Judiciary Committee who does most of the background work. They do a great job. Somehow it just did not get into our brains that this was a problem.

The more I investigate, looking in recent weeks at the actual documents from the court, and the more I read about this agreement and the sentencing guideline violations, the more this matter is stunning to me. I do not like it. I believe it is potentially an abuse of justice in America. If that is so, and it was done to protect a political party, or a Presidential candidate, or a Vice President, then why should we reward this judge with an elevation to a higher court by this very President who was protected? Why should we do that? I do not think it is a good idea.

In our committee, it was a 10–8 vote that reported out this nomination. Eight members of the committee, based on the judge's own judicial activist views, opposed this nomination. That was before we focused on this at all. I am concerned about that.

I wrestled with how to debate this procedurally. I have not agreed with some of my distinguished colleagues that we ought to conduct a filibuster. I just do not like that. I know Senator LEAHY talked about distinguished jurists and all. He did not have any hesitation to oppose Judge Bork, an extremely brilliant person, for the Supreme Court, but he did not filibuster that nomination. We took the vote. He fought it as hard as he could, but he did not filibuster it.

I am not one who thinks we need to get into filibustering these nominations. He would be 1 of 28 judges. It would be unfortunate to move us farther to the left in the Ninth Circuit and make it even harder to get back to the mainstream.

We ought to recognize he is a sitting Federal judge; he gets a paycheck every week. The difference in pay for a district judge and a circuit judge is not much, frankly; he would hardly miss the money. I think we ought to take a few weeks here and get into this. Let's have a hearing on it.

MOTION TO INDEFINITELY POSTPONE

Mr. President, I move, in a postcloture environment, to postpone indefinitely the nomination of Richard Paez in order for this body to get the answers I believe every Senator deserves with regard to the concerns I have raised about Judge Paez over the last several days. It is not in order for me to move to postpone to a time certain, according to our parliamentary and Senate rules, or I would do so.

Personally, I think 3 weeks, unless there is some complication, would be more than enough time to have a good hearing. I am willing to vote; if he is confirmed, fine. If he has good answers for all this, fine.

The PRESIDING OFFICER. The motion is debatable.

Mr. SESSIONS. Mr. President, I ask for the yeas and nays on the motion.

The PRESIDING OFFICER. Is there a sufficient second?

There is not a sufficient second at the moment.

Mr. SESSIONS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

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

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

Mr. SESSIONS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. SESSIONS. I thank the Chair, and I thank the Senator from Vermont, the distinguished ranking member of the Judiciary Committee, who has always played a big role in these issues and is an outstanding advocate. If I ever got into trouble, I would like him to represent me.

I think that is what we should do. That is the purpose of my motion. In a prompt evaluation of this matter, the public and this country are entitled to know about it, because, remember, once that confirmation is concluded, there is absolutely no other action this or any other body in the United States can take against any judge—in this case, Judge Paez—short of impeaching him for a criminal act.

We ought to consider that and take our time here in a few more weeks to settle this matter. We will feel better about ourselves. Perhaps the judge will have an answer. He certainly has a number of friends. He has a good family.

I believe his deficiencies for the position revolve around an honestly held political philosophy that I do not agree with—judicial activism. That is the main basis for opposing his nomination. But I am very troubled by the case I cited because I do not understand how it could have been disposed of in the way it was. I believe the judge should have blown the whistle on this with a proper plea bargain. It was not done. I would like to have him have an opportunity to explain why.

I yield the floor.

Mr. SMITH of New Hampshire. Mr. President, a parliamentary inquiry: As I understand it, the debate continues, and at the completion of the debate, there will be a vote on Senator SESSIONS' motion, and a debate on Paez and then Berzon—or is it Berzon and then Paez?

The PRESIDING OFFICER (Mr. L. CHAFEE). If the motion fails, then there would be a vote on the Paez nomination.

Mr. SMITH of New Hampshire. That is the order? It is Berzon, Paez, or the other way around?

The PRESIDING OFFICER. Berzon and Paez, Berzon first.

Mr. SMITH of New Hampshire. So there will be a vote, then, on Berzon and, after that, there will be the Sessions motion. And then, if that does not prevail, a vote on Paez?

The PRESIDING OFFICER. That is correct.

Mr. SMITH of New Hampshire. I thank the Chair.

As we continue this debate, I refer back to the Ninth Circuit chart behind me. This is a situation where we see, again, nearly 90 percent of the Ninth Circuit cases have been reversed by the Supreme Court. I have had this chart up all morning because I think that is a very significant number, to say the least.

Earlier in the debate, my colleague, Senator REID, made the argument that oftentimes we have higher numbers, as much as 100-percent reversal, with some of the circuit courts. He is correct. But what he did not say is that sometimes the reversals are one or two cases. For example, he said there were several times when the First and the Second Circuits were reversed 100 percent of the time. He is right. In the two cases he cited, one was when there was only one case, another was when there were six. Several of them were in the D.C. Circuit, the Federal Circuit, and others, a 100-percent overturn rate. The

100-percent overturn rate was based on one case.

What we are talking about here in the Ninth Circuit is, in 1996 and 1997, 27 of 28 cases overturned, a 96-percent overturn ratio. I think it is very important to understand what we are talking about. This is not 100 percent based on one case or two cases; this is based on 27 of 28 cases in 1996 and 1997. In the 1997–98 term of the Ninth Circuit, 13 of 17 were reversed, for a 76-percent rate. Then again, the Senator from Nevada referred to some other circuits that year. Of course, the Eleventh had two overturned out of two, for 100 percent. So it is pretty misleading to suggest that 90 percent is very common in overturning these circuit cases because there are higher percentages in other cases when, again, it is based on 1 or 2 cases, not on 27 or 28, as it was in 1996–97. It is based on 13 out of 17 in 1997–98. As of June 1999, it was 14 out of 18, for a total of 78 percent.

Yes, wherever you see a 100-percent overturn ratio, it is usually almost exclusively one or two cases at the most. Those are very dramatic and significant statistics.

I think what we have here is a situation where we have a rogue circuit that is basically way out of the mainstream of American political thought. Now we are putting two more judges on that court who—I think it is pretty obvious based on the information we have heard—are going to add to that out-of-the-mainstream majority.

Let us look at specifically each of these judges. Richard Paez is one of the nominees we are considering. It is no secret I am opposed to that nomination. In general, I oppose nominees who are judicial activists. I don't think judicial activism is what the Constitution or the Founding Fathers meant. I don't think they meant judicial activism on the right, and I don't think they meant judicial activism on the left.

I think what they meant is, interpret the Constitution, don't legislate from the bench, and uphold the Constitution as it was written. That is what they meant. That is not what we have gotten from many, certainly not from these two judges, and it is certainly not what we have gotten from several other judges who were put on the bench over the years.

In 1981, Richard Paez became Los Angeles Municipal Court judge, where he served until 1994. Since then, he has served as a U.S. district judge for the Central District of California. We can go back through a lot of cases; we have done a lot of research. If we go back to Prop. 187 and Prop. 209 in California, Proposition 187 was the California initiative to limit public assistance to illegal immigrants, and Proposition 209 was the California initiative to end State-run racial preference programs.

In 1995, Judge Paez spoke to the University of California at Berkeley Law School. This is what he said:

> The Latino community has for some time now faced heightened discrimination and hostility which came to a head with prop 187. The proposed anti-civil rights initiative will inflame the issues all over again without contributing to any serious discussion of our differences and similarities or ways to ensure equal opportunity for all.

Here we have a sitting Federal judge. He has his right to his opinion. We all do. But he is a sitting Federal judge talking about a California ballot initiative that was likely the subject of litigation. Why is he taking that position publicly on that particular proposition? The answer is simple: Because he has an agenda. Those comments were inappropriate for a Federal judge because his agenda is that he didn't like Prop. 187. So, therefore, he said so.

I think we all know—I have heard judge after judge after judge after judge come before the Judiciary Committee and, much to my consternation and frustration in trying to find out their philosophy, not answer questions about any case that might be pending or be before them. As frustrating as it is not to get an answer, that is correct. I don't think a sitting judge should be doing this. I think that issue alone on that one statement is enough to reject this nominee, just on that.

Again, Proposition 187 later became California Proposition 209, and it passed. And Proposition 209 ended affirmative action in California State programs. Paez should know that the Judicial Code of Conduct prohibits him from comments that cast any doubt on his capacity to decide this case or any case on an impartial basis. So he went over the line on an issue that he knew was going to come before him or certainly was reasonable to assume was going to come before him.

Is there any doubt about how Judge Paez would now rule on any California proposition that affects affirmative action? Regardless of how one feels about affirmative action, that is not the issue here. We now know how he feels. He has already told us. So I don't know how he gives us a fair decision when he has already said what his decision is.

He did say he was an activist judge in his own words, even though some on the floor have said he is not. I will repeat this again. He said:

> I appreciate the need for courts to act when they must when the issue has been generated as a result of the failure of the political process to resolve a certain political question. There is no choice but for the courts to resolve a question that perhaps ideally and preferably should be resolved through the legislative process.

In the Constitution, it doesn't say ''ideally'' and ''preferably'' in terms of the legislative process. If you can find that in the Constitution somewhere, that it says ideally and preferably the legislature should pass the laws, ideally and preferably the executive branch should enforce the laws, or ideally and preferably the judicial branch should interpret the laws—it doesn't say any of that. There is a very clear distinction in the Constitution: Three separate but equal branches of the United States Government.

It is very clear who is supposed to legislate, who is supposed to write the laws. It is not the Supreme Court. It is not the circuit court. It is not the district court. It is not any Federal court. We have a Federal judge talking about a California ballot initiative that was likely the subject of litigation. I think that is inappropriate.

Now, again, let's go back to another example. This was a decision rendered by Judge Paez in the case of John Doe I v. Unocal in March of 1997. I will read an excerpt from a letter that the U.S. Chamber of Commerce sent to me Monday, March 6, about Judge Paez. I ask unanimous consent that this letter be printed in the RECORD.

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

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Washington, DC, March 6, 2000.

Hon. ROBERT SMITH,
U.S. Senate, Washington, DC.

DEAR SENATOR SMITH: I am writing to inform you of the U.S. Chamber's opposition to the nomination of Richard A. Paez to the U.S. Court of Appeals for the Ninth Circuit. Our opposition to this nomination rests principally on a decision rendered by *Judge Paez in John Doe I v. Unocal* (hereafter, *Unocal*) in March of 1997.

Judge Paez' decision in the *Unocal* case suggests that U.S. companies conducting business in a foreign country may be held liable for the actions of that foreign government or the actions of any business enterprise owned by the foreign government. Aside from the constitutional question of whether it is appropriate for the courts to pursue their own foreign policy agendas; the Paez decision has the potential to cause significant disruption in U.S. and world markets.

Although the decision in the *Unocal* case dealt with a pretrial motion to dismiss and is currently on appeal, we view it as a serious threat to international commerce. Moreover, the *Unocal* decision represents a dangerous and unconstitutional intrusion by the courts into the formulation and implementation of U.S. foreign policy—a prerogative that rests solely with the Congress and the Executive Office.

As you know, improving the ability of American business to compete in the global marketplace is a top priority of the U.S. Chamber of Commerce. As part of our efforts to advance free trade, the Chamber's legal arm—the National Chamber Litigation Center—has challenged similar attempts by state and local governments to impose unilateral economic trade sanctions. Recently, the United States Court of Appeals for the First Circuit upheld a challenge supported by the National Chamber Litigation Center to the so-called Massachusetts Burma Law, which imposed sanctions on companies doing business with Burma (Myanmar).

Mr. SMITH of New Hampshire. Mr. President, I am quoting a couple of paragraphs from the letter from Mr. Bruce Josten of the U.S. Chamber:

DEAR SENATOR SMITH:

I am writing to inform you of the Chamber's opposition to the nomination of Richard A. Paez to the U.S. Court of Appeals for the Ninth Circuit. Our opposition to this nomination rests principally on a decision rendered by Judge Paez in John Doe I v. Unocal in March of 1997.

Judge Paez's decision in the Unocal case suggests that U.S. companies conducting

business in a foreign country may be held liable for the actions of that foreign government, or the actions of any business enterprise owned by the foreign government. Aside from the constitutional question of whether it is appropriate for the courts to pursue their own foreign policy agendas, the Paez decision has the potential to cause significant disruption in U.S. and world markets.

The next paragraph:

Although the decision in the Unocal case dealt with a pretrial motion to dismiss and is currently on appeal, we view it as a serious threat to international commerce. Moreover, the Unocal decision represents a dangerous and unconstitutional intrusion by the courts into the formulation and implementation of U.S. foreign policy—a prerogative that rests solely with the Congress and the Executive Office.

You can't say it any more clearly than that. You don't get involved in U.S. foreign policy on the court. This is a prerogative that rests only with the Congress and executive branch.

This man is intelligent, and no one is challenging that. He knows exactly what he is doing. He knows what the Constitution says. We will certainly give him that. He also knows how to implement his agenda as opposed to sticking with the Constitution. That is what we are talking about.

Now, this case is currently before the Supreme Court and we are hopeful, as Bruce Josten says, that the First Circuit Court decision invalidating the Massachusetts law will be upheld.

That is in another case involving the national chamber and another case that is referred to in the letter which will be part of the RECORD. So this is serious business.

I also think this hostility to religion is pretty serious. I want to get into this because this is very disturbing. Again, this is about a judge's views on issues; it is not about the judge personally. I think we see an open hostility to religion.

Mr. President, I want to preface what I am going to say just by saying this: Just to the left of the Chair's left hand is a Bible. In every court, they say we swear to uphold, to tell the truth, the whole truth, nothing but the truth. That Bible is on display for everyone to see here in the Senate Chamber. We swear oaths all the time on Bibles as witnesses. The President of the United States swears on a Bible and takes an oath to uphold the Constitution.

Now, in that framework, I want you to think about what I have just said and then listen to what Paez said. This was in the L.A. Times in 1989 when this case came up. It was a trial of five anti-abortion demonstrators accused of trespassing and conspiracy, and it flared into a dispute over whether the defendants can display their Bibles before prospective jurors. They had Bibles in the courtroom. It says:

In a rare flash of anger, Los Angeles Municipal Judge Richard A. Paez warned the defendants and their attorneys that he would instruct the court bailiff to confiscate the Bibles if they continued to openly consult or wave them during jury selection.

I want you to think about that. He is going to instruct the bailiff to haul people out—the defendants—if they are sitting there looking at their Bibles during jury selection.

Here is what he said:

''I don't want them [the bibles] in view of the jurors,'' Paez said sternly, raising his voice and motioning with his hand. ''Don't give me a hard time.''

Now, we could go a little bit further:

Paez, who has said he is determined to prevent the trial from being used as a platform to debate the moral and political issues surrounding abortion, ordered . . . the defendants to refrain from displaying their bibles prominently to the jury box. He had given similar instructions the day before.

But what happened was the defendants refused, challenging the judge to go ahead and hold them in contempt.

Further:

Co-defendant Michael McMonegle leaped to his feet, asking that the prosecutor be removed from the case.

''She is obviously an anti-Christian bigot,'' he said loudly. Tensions escalated until Paez recessed for lunch.

The showdown between the judge and defense attorney was averted, however, when [one of the lawyers] did not return for the afternoon session, saying he had to attend another trial in Federal Court.

A calmer Paez told the defendants that, while they may keep the Bible on the counsel table, they must not attempt to ''affirmatively communicate'' their religious beliefs to potential jurors who are being questioned.''

''I don't have a problem with the Bible. I don't care if you have it there (on the table),'' Paez said. ''My concern is I do not want any attempt to sway the jury. I don't want demonstrative gestures . . . . That is not proper.''

Paez said, on the other hand, that he would consider permitting the defendants, some of whom are representing themselves, to quote from the Bible during closing arguments or to carry the book to the witness stand when they testify.

I wonder whether Judge Paez put his hand on the Bible somewhere when he became a judge. What is the big deal? Are we going to destroy ourselves as a society because a group of defendants want to hold a Bible in their hands when they come into a courtroom? What kind of a judge is this? This is the kind of judge that Bill Clinton is putting on the courts. So when you hear about all this moral decadence and you hear about these problems and you hear about some being outraged by these decisions, why should you be surprised? Your Senators are putting them on the court. That is what is happening. Your Senators are approving these judges.

There is no mystery about this. It is a constitutional process. The President nominates and we approve or disapprove. So don't be surprised, and don't blame it on the President. We can stop him if we don't like them. He has a right to nominate anybody he wants to. We have a right under the Constitution—sometimes we forget that we do—to advise and consent. We are talking about extreme activism here. This is not the mainstream.

How many people in America listening to me now can honestly say they feel there is a threat to our whole constitutional process or to our court system because somebody carries a Bible into the room? Maybe we ought to take it out of here. That will probably be next. Somebody will stand up in here—who knows—and say I don't want to look at that Bible in here. That is what is happening in this country. You wonder why. Read about the Roman Empire and find out what happened to them. Find out where they went. Moral decadence. That is what happened to them. They went down the tubes. Is that what is in the future for America? I certainly hope not. If we keep doing this kind of stuff, it will happen. There are no surprises here. I don't understand why all these judges are doing this. There is nothing to understand. They are put on the bench. Hello, we put them there. The President nominates them and we approve them and on the bench they go. They make decisions not for 10 days, not for 10 years, but for life. You can't throw them off the bench for the decisions they make.

That is just one.

Finally, in the case of the Los Angeles Alliance for Survival of the City of L.A., Paez blocked a city ordinance designed to outlaw aggressive panhandling—Senator SESSIONS spoke about it—claiming that it was facially invalid under California's Constitution. The Supreme Court of California rejected Paez's decision and held that:

. . . a court should avoid a constitutional interpretation that so severely would constrain the legitimate exercise of government authority in an area where such regulation has long been acknowledged as appropriate.

He is an extreme, liberal activist who is not afraid to say ahead of the time in a matter that comes before his court how he is going to vote. He has done it on occasion after occasion.

Mr. LEAHY. Mr. President, will the Senator yield for a question on the Paez case which he cited?

Mr. SMITH of New Hampshire. Yes; the last one.

Mr. LEAHY. The so-called ''panhandling'' case. Will the Senator agree, however, that at the time Judge Paez made his decision, there was a Ninth Circuit decision on all fours, which he as a Federal district judge within that circuit was bound to follow, and he and all judges going for confirmation always say they will follow stare decisis, that they will follow the decision?

Is it not a fact that in that particular case he had a decision on all fours from his circuit which he had to follow? And is it not also a fact that the Ninth Circuit then, under a new ruling, submitted it to the California Supreme Court for their own ruling to the California Supreme Court? Because, obviously, you cannot appeal to the California Supreme Court, Judge Paez being a Federal court. But the Ninth Circuit then submitted it under a certification procedure—a new procedure—in California to the California

Supreme Court. And then a year or so later, they came down and said the Ninth Circuit's earlier ruling did not interpret California law correctly. They then changed theirs and thus changed the rule Judge Paez had to follow.

Is that not the fact?

Mr. SMITH of New Hampshire. Why was it overturned, reversed on appeal?

Mr. LEAHY. The point is, he has to follow what is in his circuit.

Mr. SMITH of New Hampshire. But it was reversed.

Mr. LEAHY. No. The circuit did. Judge Paez's decision, as I understand it, did not go to the Supreme Court because it couldn't go to the California Supreme Court. The circuit itself then changed their earlier decision, came back to the beginning, and had to follow the new decision, which he very much explained in his confirmation hearing. He said, among other things, that he lives in these neighborhoods; he has concerns himself.

But the point is, just as some Federal judge in my State would have to follow the Second Circuit's decisions, and a Federal judge in the State of New Hampshire would have to follow the First Circuit's decisions, he is caught kind of between a rock and a hard place.

What I am basically saying is, he should have followed his own stare decisis. Yet, if he didn't, then he is an activist judge. This man is damned if he does and damned if he doesn't.

Mr. SMITH of New Hampshire. I think the Senator is making my case that the Ninth Circuit is a rogue circuit which does not really follow the mainstream.

Mr. LEAHY. I notice that the Senator mentioned all the reversals. I think half of those reversals in the last year were decisions written by Reagan appointees and Bush appointees. I don't recall the Senator from New Hampshire or anyone on his side voting against those judges.

Mr. SMITH of New Hampshire. Mr. President, let me briefly discuss the other nominee, Marsha Berzon.

I think we have made a pretty overwhelming and compelling case about the Ninth Circuit itself being out of touch in having almost 90 percent of its cases overturned, as the chart in the back shows. And we are adding two more judges to that court, if they are approved, who are basically going to also, obviously, have cases overturned if they follow along the lines we are talking about.

When I think of all the judges who are qualified, whatever their political philosophy, if they are qualified to be a circuit court judge, why do we pick a judge who opposes having somebody carry a Bible into the courtroom? Because he is afraid somehow that is going to ruin the whole judicial process and somehow threaten the Constitution or the liberties of the United States of America? It doesn't make sense. It really, in my view, says a lot about the nominee.

We have approved many Clinton nominees who have come through this Senate. I voted for a lot of them myself. Some of them went through even without a challenge. But I think when you start talking about people who are this extreme, this is a mistake. I believe it is a mistake we will regret.

I commend my colleague, Senator SESSIONS, for what he has done with the most recent information he brought forth regarding the Maria Hsia case and the John Huang case.

I am going to bring something up that may set a few people off. But I am being told, as I stand here now, that there is a possibility the Vice President of the United States may be called, or has been called, to come to the chair during the vote on the Sessions motion or perhaps on the vote on Paez.

I want you to think for a second about the implications of that. He could be the tie breaker. He could be, in theory, the tie breaker.

Here you have the Vice President of the United States who was a close personal friend of Maria Hsia who shook down Buddhist nuns for money, was prosecuted for it, and convicted. And the judge whom Bill Clinton is trying to put on the court was involved in at least one case—not that one, but one case involving Maria Hsia, which gave her a break, if you will, a lenient sentence, and then in the other case, John Huang, $1.5 million from the Chinese Communist Government into the coffers of this administration, of which Vice President GORE is a part, and he goes in before Judge Paez, supposedly randomly selected, and gives the guy a plea bargain for a $7,500 contribution in the mayoral race in L.A., as Senator SESSIONS has pointed out.

Now the Vice President of the United States is going to sit in the Chair and break a tie for that judge? How far will this administration go to cover up and to be blatant and in your face on what they have done?

If he sits in this Chair today and votes on this nomination, if it should come to a tie, that is an outrage. It is outrageous, and it is an in-your-face outrage that I think the American people are not going to tolerate.

As Senator SESSIONS has so ably pointed out, I don't know whether it was random or not—there were 34 judges who could have gotten those 2 cases, and he got both of them. That is point No. 1.

Point No. 2: If it were random, then perhaps he should have said: You know, Bill Clinton nominated me, and I am before the Senate for a circuit court nomination. Both of these cases involve scandals in the President's administration. I will take a walk on these. Assign them to somebody else. But he didn't do it. He gave lenient punishment after he took them. And we are going to tolerate that by allowing Judge Paez to come in? It is just outrageous. It is just outrageous. Yet it is probably going to happen here on the floor.

I yield the floor.

Mr. THURMOND. Mr. President, I rise to express my opposition to the nominations of Richard Paez and Marsha Berzon for the Ninth Circuit Court of Appeals.

The Ninth Circuit is clearly out of the mainstream of law in this country today. It is clearly the most activist circuit in the Nation. The circuit has been reversed by the Supreme Court in almost 90 percent of the cases that have been considered in the past 6 years. In fact, in the current session of the Supreme Court, the Ninth Circuit's record is zero of seven. These nominees will not correct this problem.

Judge Paez is a self-described liberal. He has made inappropriate comments regarding ballot initiatives that were pending in California at the time he discussed them. I also have questions regarding his sentencing of John Huang. Further, he has made various questionable rulings that call into question whether he understands the limited role of a judge in our system of government. For example, he ruled that a Los Angeles ordinance that prohibited aggressive panhandling was unconstitutional. He prevented the enforcement of a reasonable ordinance enacted by the legislative branch because he said it violated free speech rights. The California Supreme Court later ruled contrary to Judge Paez after the question was submitted to them. This shows a lack of deference to the legislative branch. Also, he made a questionable ruling holding an American corporation liable for human rights violations committed by a foreign government, which prompted the U.S. Chamber of Commerce to oppose his nomination.

I also cannot support the nomination of Marsha Berzon. She has spent much of her career as an attorney for the labor movement, and she has been involved in liberal legal organizations. She served for years on the board of directors of the Northern California, ACLU, during which it filed questionable briefs in various cases.

If these nominees are confirmed, I hope they turn out to be sound, mainstream judges and not judicial activists from the left. I hope they will improve the dismal reversal rate of the ninth circuit.

However, we must evaluate judges based on the record before us. I am not convinced that these nominees are a sound addition to the ninth circuit, especially when it is already leaning far to the left. Therefore, I must opposed these nominees.

Mr. KYL. Mr. President, I rise to discuss the nominations of Richard Paez and Marsha Berzon to the Ninth Circuit Court of Appeals. I intend to vote against Judge Paez and for Marsha Berzon. Because these nominations have received a great deal of attention, I would like to briefly explain the reasons for my votes.

I want to begin by briefly discussing the ninth circuit. As a Senator from

Arizona (the state which generates more appeals than any other ninth circuit state except California), as a member of the Judiciary Committee, and as someone who practiced law in the ninth circuit for nearly 20 years, I have a keen interest in matters affecting the ninth circuit.

Richard Paez and Marsha Berzon are, of course, nominees to the ninth circuit. I agree with many of my colleagues that nominees to the ninth circuit should be given special scrutiny because of the problems with the circuit.

The ninth circuit has received a great deal of criticism—so much, in fact, that Congress passed bipartisan legislation to require a blue-ribbon commission to study the circuit. See Public Law No. 105–119, section 305(a)(1)(B) and (a)(6). Before both the House and Senate Judiciary Committees, I have testified in detail as to my concerns with the circuit, so I will not go into detail here. I would like to just mention one statistic that speaks volumes: In the past 6 years, the Supreme Court has reversed (often unanimously) the ninth circuit in 86 percent (85 of 99) of the cases it has reviewed. The average reversal rate for courts other than the ninth circuit is about 57 percent. As Justice Scalia commented in a September 9, 1998, letter to Justice White, the chair of the Commission on Structural Alternatives, the Ninth Circuit's ''reversal rate has appreciably—sometimes drastically—exceeded the national average.''

This is but one small piece in a mountain of evidence that indicates that the ninth circuit is out of the mainstream of American jurisprudence. See, for example, letters to the Commission on Structural Alternatives by Justice Scalia (August 21, 1998), Justice Kennedy (August 17, 1998), and Justice O'Connor (June 23, 1998); Commission on Structural Alternatives, Final Report, December 18, 1998; Review of the Report by the Commission on Structural Alternatives regarding the Ninth Circuit and S. 253, the Ninth Circuit Reorganization Act, hearing before the House Committee on the Judiciary, 106th Congress, 1st Session (July 16, 1999) (statements of ninth circuit Judges Pamela Ann Rymer (member of commission) and Diarmund F. O'Scannlain). It seems clear that the ninth circuit has problems. Even those who oppose dividing or splitting the circuit concede this point. Thus, in my opinion, nominees to this circuit—which is effectively the court of last resort for more than 52 million people—should be given special scrutiny.

The Constitution imposes an important role upon the Senate. In exercising its advice and consent power, the Senate must be vigilant in ensuring that, at a minimum, nominees are of top legal caliber, possess good judgment, have the proper judicial temperament, are of unquestioned integrity and impartiality, and would not abuse the great power of their office—an office they will hold for life.

In this regard, I would like to reiterate the comments that I made before this body 3 years ago, on March 12, 1997.

> Some have attributed the Ninth Circuit reversal rate to the unwieldy size of the bench. Others point to a history of judicial activism, sometimes in pursuit of political results. I suspect there is more than one reason for the problem. Whatever the case, the Senate will need to be especially sensitive to this problem when it provides its advice and consent on nominations to fill court vacancies. The nominees will need to demonstrate exceptional ability and objectivity. The Senate will obviously have an easier time evaluating candidates who have a record on a lower court bench. Such records are often good indications of whether a judge is—or is likely to be—a judicial activist, and whether he or she is frequently reversed. Nominees who do not have a judicial background or who have a more political background may be more difficult to evaluate. . . . [T]he Senate has as much responsibility as the President for those who end up being confirmed. We need to take that responsibility seriously—among other things, to begin the process of reducing the reversal rate of our largest circuit.

I remain quite concerned about the ninth circuit. In the October 1999 term, the U.S. Supreme Court has so far reviewed seven ninth circuit cases and in all seven cases the ninth circuit has been reversed—four times unanimously, twice by a 7–2 margin, and once by a 5–4 vote. If the ninth circuit continues to remain out of step, it will be very hard to continue to give ninth circuit nominees the benefit of the doubt. The risk is too great. The ninth circuit covers nine states and two territories. To have so many subject to a circuit that so often errs should concern us all.

Within this context, the general rule that a President should be given deference in making nominations to the federal judiciary is less relevant to today's nominations.

While Judge Paez is academically qualified, I have reservations about him for a variety of reasons. First, he made what many consider to be inappropriate comments while he was a federal district court judge. In an April 6, 1995 speech at Boalt Hall School of Law in Berkeley, California, Judge Paez said the following:

> The Latino community has, for some time now, faced heightened discrimination and hostility, which came to a head with the passage of proposition 187. The proposed anti-civil rights initiative [Proposition 209] will inflame the issues all over again, without contributing to any serious discussion of our differences and similarities or ways to ensure equal opportunity for all.

Judge Paez was, as I noted above, a sitting federal district court judge when he made this remark, and litigation was pending in Judge Paez' own court, the Central District of California, regarding the constitutionality of Proposition 187. The court had granted a temporary restraining order and had before it a request for a preliminary injunction, which the district court did not rule on until November 1995, 7 months after Judge Paez' speech. As Senator SPENCE ABRAHAM pointed out in a detailed statement before the Senate, Judge Paez' remark seems inconsistent with Canon 4(A)(1) of the Model Code of Judicial Conduct which governs judges' extra-judicial activities. Under that canon, ''a judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge.'' In discussing Judge Paez' comments in an October 29, 1999, editorial, the Washington Post stated that ''[f]or a sitting judge to disparage ballot initiatives that were likely subjects to litigation was inappropriate.'' And, indeed, the judge appears to have, at least privately, acknowledged this error.

Judge Paez made another troubling comment. On March 26, 1982, in the Los Angeles Daily Journal, he is quoted as making the following statement.

> I appreciate * * * the need of the courts to act when they must, when the issue has been generated as a result of the failure of the political process to resolve a certain political question * * * There's no choice but for the courts to resolve the question that perhaps ideally and preferably should be resolved through the legislative process.

At the time of this statement, Paez was a municipal court judge. In the same article, he commented that ''you could characterize my background as liberal.''

Judge Paez' supporters have made comments that raise concerns. For example, in an August 13, 1993 Los Angeles Times article, Romana Ripstein, the executive director of the American Civil Liberties Union of Southern California, made the following statement in discussing Paez's nomination to the federal district court: ''It's been a while since we've had these kinds of appointments to the federal court. I think it's a welcome change after all the pro-law enforcement people we've seen appointed to the state and federal courts.'' If this is an accurate portrayal of his predilections, Ms. Ripstein's characterization is troubling. Similarly, in a November 17, 1995, Los Angeles Daily Journal article, trial attorney Steven Yagman commented that ''Judge Paez embodies the ideal of the '60's. The Judge is an intelligent, moral person who got power and uses it to do good.'' Judges are not supposed to use power to do good (especially since that is a subjective term). Judges are supposed to apply the law. That's why we say we are a nation of laws.

Judge Paez also has been criticized for giving—without explaining how he arrived at the sentence—what many consider to be a light sentence to former Representative Jay Kim following Kim's guilty plea for having accepted more than $250,000 in illegal campaign contributions, the largest acknowledge receipt of illegal contributions in congressional history. In the March 10, 1998, Los Angeles Times, Assistant U.S. Attorney Stephen Mansfield said, ''The sentence . . . must not

be a 'slap on the wrist.' It must not approximate a penalty for 'jaywalking'.'' The Los Angeles Times also reported that ''[o]utside the federal courthouse, prosecutors made it clear that they were disappointed but not stunned by Paez' sentence.'' On March 12, 1998, Roll Call wrote, ''All the evidence—and the fact that Kim received a lighter sentence than his former campaign treasurer—makes Judge Paez' sentence a mere slap on the wrist and makes us think that the Senate Judiciary Committee ought to question whether Paez isn't too soft on criminals to be an appellate judge.''

None of these factors would by itself necessarily disqualify a nominee, but taken as a whole they are troubling and lead me to conclude that, on balance, Judge Paez is apt to be an activist rather than a neutral arbiter. As a result, I reluctantly conclude that I cannot support his nomination.

I have concerns about Marsha Berzon. Almost her entire legal experience has been in one narrow field—labor law. According to her Senate Judiciary questionnaire, ''more than 95 percent'' of her work has been civil. Additionally, she stated that ''I have not personally examined or cross-examined a witness in any trial'' and that ''I have not tried any cases myself, jury or non-jury.''

Concerns have been expressed by the National Right to Work Committee and the Chamber of Commerce because of her narrow labor-oriented background. While I share these concerns, I am unaware of credible evidence suggesting that she fails to possess the requisite capability or temperament to serve on the bench. As a result, although I have serious concerns about her nomination, I will support it.

Mr. CRAIG. Mr. President, there are few duties of the Senate more important than the confirmation of nominees to positions on the federal bench.

It is my strong belief that the qualifications of the nominees must be weighed carefully and deliberately, no matter what level of the court system the nominee is supposed to join.

My decision on a judicial nominee's fitness is based on my evaluation of three criteria: character, competence and judicial philosophy—that is, how the nominee views the duty of the court and its scope of authority. This is the original role of the judiciary: neither rubber-stamping legislative decisions, nor overreaching to act as substitute legislators. I have heard from citizens complaining about the harm done by social activists of the bench—harm that may only be reversed by an extraordinary action on the part of the legislative branch, if at all.

It is exactly this aspect of the nomination before us that concerns me. I have reviewed the background materials on Judge Paez, and I cannot ignore the nominee's penchant for imposing his own political vision on the case before him.

Judge Paez has shown, on more than one occasion, his activist judicial philosophy. He was quoted in the Los Angeles Daily Journal as saying: ''I appreciate the need of the courts to act when they must, when the issue has been generated as a result of the failure of the political process to resolve a certain political question. . . . There is no choice but for the courts to resolve the question that perhaps ideally and preferably should be resolved through the legislative process.''

That is as clear a statement of judicial activism as I have ever heard.

On another occasion, Judge Paez demonstrated that his politics were more important than the appearance of judicial impartially and independence. In a 1995 speech he attacked California Proposition 187 (to end assistance to illegal immigrants) as anti-Latino ''discrimination and hostility'' and Proposition 209 (to end racial and gender preferences in California) as anti-civil rights. What strikes me is that, at the time, both propositions were subject of pending litigation. Clearly the Judicial Code of Conduct prohibits a judge from such comments.

Even if these were the only incidents of this kind, they would weigh heavily with me. But Judge Paez' record contains a number of other troubling episodes. In the Los Angeles Alliance for Survival case, Judge Paez ruled that a Los Angeles city ordinance—prohibiting aggressive panhandling at specified public places and passed in response to the death of a young man who refused to give a panhandler 25 cents—was unconstitutional under California's constitution. He affirmed that this law constituted ''content-based discrimination'' because it applied only to people soliciting money and consequently granted an injunction to prevent it from being enforced. However, apart from Los Angeles where the ordinance has yet to be enforced, the same law has been ''peacefully'' upheld in other parts of California by other federal judges.

The position expressed by Judge Paez was well out of the mainstream. This became even clearer last week, when the Supreme Court of California, asked by the Ninth Circuit Court of Appeals to rule on the merits of Paez' holding, held that the Los Angeles ordinance was constitutional and valid.

I have also been troubled about the implications and consequences of the Unocal decision issued by Judge Paez in 1997, in which he ruled that American companies can be held liable for human rights abuses committed by the foreign governments or overseas companies owned by the foreign governments with which they do business. This decision leaves open a wide range of issues and has the potential to cause significant consequences in the U.S. and world markets, not to mention U.S. foreign policy.

It is not surprising that the U.S. Chamber of Commerce has expressed its opposition to the nomination of Judge Paez to the U.S. Court of Appeals for the Ninth Circuit, in view of the decision's potential impact on international commerce. At a minimum, Judge Paez pushed the limits of prior law in this ruling—but this decision takes on a great deal more significance in light of his prior statements and other judgments. This is a judge who is ready, willing, and able to act on an opportunity to open new frontiers in the law.

I share the concerns that many of my colleagues have raised about the structure of the ninth circuit itself. It covers 38 percent of the area of the Nation and serves more than 50 million people, 20 million more than any other circuit. It has 28 authorized judgeships, 11 more than any other circuit. I am one of the majority of Senators representing that circuit who believe it should be split.

The ninth circuit remains, as the New York Times labeled it, ''the country's most liberal appeals court'' and a circuit out of the mainstream of American jurisprudence.

Over the past six years, the Supreme Court has reversed nearly 90 percent of the ninth circuit cases it has reviewed: in 1997–98, the reversal rate was 96 percent (27 out of 28 decisions) and 35 percent of the decisions reviewed by the Supreme Court were from the ninth circuit.

It has been suggested that the ninth circuit has difficulty developing and maintaining coherent and consistent law because, as the size of the unit increases, the opportunities the court's judges have to sit together and to develop a close, continual, collaborative decision making decrease. Of course, this would increase the risk of intracircuit conflicts since judges are unable to monitor each other's decisions and very seldom have the chance to work together.

In any event, my constituents and other citizens in the ninth circuit would hardly be well served by adding yet another liberal judicial activist to the current mix. Whether or not Congress ultimately addresses the circuit's problems by agreeing to the split I am advocating, this Senate should not exacerbate the problems with this ill-advised nomination.

I know the administration must take the best case possible for its nominees, but they cannot expect this Senator to ignore ''the other part of the story.'' Judge Paez' record reflects an eagerness to use his authority to accomplish social change and a disrespect for principles of judicial decision making. In sum, I strongly believe it would be a mistake to advance Judge Paez to the ninth circuit, and I will vote against his confirmation.

Mr. GORTON. Mr. President, the nomination of U.S. District Court Judge Richard Paez to the Ninth Circuit Court is, to put it mildly, controversial. His nomination has now been before the Senate for almost 4 years, a period of time close to a dubious record. He deserves a vote, and at least serious consideration of an affirmative vote, for that reason alone.

The President nominates, and by and with the advice and consent of the Senate, appoints judges to the Federal courts. That constitutional system allows Senators as much latitude to approve or disapprove judicial nominations on the basis of the nominee's judicial and political philosophies as it does to the President in making those nominations. In my view, however, that senatorial prerogative does not extend to rejecting Presidential nominees solely on the ground that a Senator would have chosen someone else. If a nominee clearly falls within a fairly broad philosophical mainstream and is otherwise competent, he or she should probably be confirmed.

In my view, Judge Paez falls within that broad mainstream. I have considered carefully the objections of colleagues whose views I greatly respect. But I have also considered the views of Republicans and conservatives from California and who know Judge Paez best—including Congressman ROGAN. Their views persuade me to vote to confirm Judge Paez to the Ninth Circuit.

The nomination of Marsha Berzon to the Ninth Circuit, however, seems to me to create too great a risk that we are confirming someone for a lifetime appointment to the most influential circuit court in the country, who falls on the far side of the philosophical divide I described in my remarks on Judge Paez. Ms. Berzon has a relatively narrow scope of private practice in a highly ideological field, and has been active and ideological in the expression of her political views. Ms. Berzon also has no judicial experience, and so has no record by which to determine whether her ideological activism will be curtailed once she is on the bench. It certainly is possible that it would be. It is also possible that it will not. Given the concerns of many, including my colleagues on the Judiciary Committee who voted against her confirmation, that the Ninth Circuit already is ideologically unbalanced, I simply am not willing to take this risk. I see no clear reason to consent, in constitutional terms, to her nomination.

Mr. BIDEN. Mr. President, I rise in support of Richard Paez' nomination to the United States Court of Appeals for the Ninth Circuit. And I must say, this vote is long, long overdue. I have heard a lot of talk here on the floor along the lines of hey—this is politics as usual. ''Oh when Senator BIDEN was chairman of the Judiciary Committee, we held nominees up all the time.''

Let me say this: forget my tenure as chairman of the Judiciary Committee. As far as I know, no judicial nominee in the history of this nation has waited as long as Judge Paez has for a vote. Four years is not even within the ballpark of a reasonable delay.

Judge Paez is a well-respected, experienced jurist. We already confirmed his nomination to the federal district court bench. He has served with distinction for 6 years on the federal district court and for 13 years before that as a municipal court judge in Los Angeles. The American Bar Association has given Judge Paez its highest rating, pronouncing him ''well qualified.'' Judge Paez enjoys broad bipartisan support in his own community, including from law enforcement officials.

Judge Paez is an honorable man, a man of integrity, and a man who has devoted his entire career to service—first, to service to the poor as a committed poverty lawyer, and then to service to the public at large as a state and then federal judge. His record does the President and his supporters proud.

From what I can tell, listening to the debate on the floor, the opposition to Judge Paez boils down to a few main points. First, to some off-hand remarks that he made about the California initiatives that maybe were ill-advised, but I believe may have been misconstrued—but we have already heard this discussed at length on the floor. I think it is a real shame to judge a man's distinguished 19-year record on the bench on the basis of any single remark.

More importantly, though, opponents cite concerns about the allegedly out-of-whack ninth circuit, which detractors like to call a ''rogue'' court. Aside from the fact that several circuits are reversed as or more often than the ninth circuit, I say this: If you have a problem with the ninth circuit, let's consider whether we should change the ninth circuit. I'm not saying whether we should or that we shouldn't, but there are several proposals out there to restructure the court. Let's debate them.

Why should we punish the millions of people who live in the ninth circuit by depriving them of the judges they need to mete out timely and fair justice? There are six vacancies on the ninth circuit—that is more than 20 percent of the 28 positions authorized for the court. And even more judges are needed to handle that court's heavy case load. All of these vacancies, by the way, are characterized by the Judicial Conference as judicial emergencies.

Let's not take out our differences on the ninth circuit on the people who live there and more importantly for today, let's not take out our differences on this nominee or—for that matter, on Marsha Berzon, another outstanding nominee who we are also voting on today.

The Los Angeles Daily Journal did an in-depth study of the criticisms leveled against Judge Paez and found that they were unfounded. What they concluded was this:

> The portrait that emerged is of a thoughtful, unbiased and even-tempered judge, propelled into the political spotlight, only to be trapped in a seemingly never-ending and bitterly polarized nominations process.

Let us end that nominations process for Judge Paez here and now, and let it end with a vote of support.

Mr. REED. Mr. President, I thank Chairman HATCH and Senator LEAHY for all of the hard work they've put into, and continue to put into, the judicial nomination process.

I also recognize Senator LOTT for making a commitment to bring the Paez and Berzon nominations to the Floor for a vote by March 15, over the protests of certain members of his caucus.

First, a process comment. One of the most important duties of the United States Senate, as envisioned by our founding fathers, is the confirmation of Presidential appointments. Article II, Section 2, of the Constitution states that the President shall nominate and ''appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States'' with the ''Advice and Consent of the Senate.'' This is one of our enumerated duties in the Constitution, and to my mind, we have egregiously failed to uphold this duty in the case of Judge Richard Paez.

More often than not, nominations move through the Senate the way they're supposed to. However, in this case, the system has broken down. As a result, considerable public attention is being paid to this nomination, especially among members of the Latino community, because the Senate is not doing its job. This is troubling. In regards to nominations, the public rightly expects us to move judiciously and expeditiously and without regard to politics.

No nominee for judicial office should have to wait four years to have his appointment confirmed. Allowing Judge Richard Paez and his family to wait four years for this body to perform its constitutional duty is inexcusable.

Judge Paez has opened up his life and resume for our examination, so that we can make a very important decision about his qualifications for a very important job, lifetime tenure on the United States Ninth Circuit Court of Appeals. This is appropriate. Judge Paez should be subject to serious scrutiny by this body.

But no citizen of this country should have to wait three Congresses for this body to act. Just as he has presented his qualifications to us to the best of his ability, we need to make a decision about these qualifications to the best of our ability in a timely fashion.

In the private sector, how many of us would subject ourselves to the process that Judge Paez has subjected himself in order to be on the Board of Directors or the CEO of one of America's top companies. Most of us would choose not to go through that process at all.

And that is exactly my point, we should not make this process so painful that America's best and brightest attorneys are unwilling to subject themselves or their families to what has become an increasingly unpleasant and distressing process. We should be doing everything that we can to encourage people like Judge Paez to aspire to be members of our judicial branch. This,

despite lower pay and greater responsibility than most lawyers have in private practice.

As the Chief Judge of the Ninth Circuit Court of Appeals wrote in a March 2, 2000 letter to Senators HATCH and LEAHY, the Ninth Circuit Court has had a 300% increase in workload with no increase in active judges.

Unfortunately, the Paez and Berson nominations are indicative of a greater systemic breakdown that should be disturbing to both Republicans and Democrats. Even Justice Rehnquist has felt it necessary to comment on the problems being caused by greater federal court workloads, and too few judges.

Second, it's clear that the President has nominated lawyers of extraordinary ability when it comes to Judge Richard Paez and Ms. Marsha Berzon. Both have received the American Bar Associations's highest rating (''well-qualified'') and we are fortunate that these individuals have been willing to go through such a grueling federal judicial nomination process thus far.

I ask my colleagues today take their constitutional duty seriously and vote for these nominees on the basis of their objective qualifications, and not on the basis of petty politics. This process is much too important to the citizens of this great democracy to do otherwise.

Mr. MURKOWSKI. Mr. President, I see the Senator from California. I see the majority leader noticeably present on the floor. I am curious to know about the procedure. Are we going to continue?

Mr. SMITH of New Hampshire. Yes. There is a unanimous consent for the majority leader to speak now and, after he finishes, we go back to the debate.

Mr. MURKOWSKI. I wonder, after the majority leader speaks and the Senator from California speaks, if I could be recognized, in that order.

Might I ask the senior Senator from California how long she will speak?

Mrs. FEINSTEIN. I thank the Senator from Alaska. I will yield myself 10 minutes from our manager's time.

Mr. MURKOWSKI. And the leader, of course, will go on for whatever time is necessary. I ask unanimous consent for that time allotment.

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

The majority leader is recognized.

Mr. LOTT. Mr. President, what we do today with a vote on these nominations is important. It does matter. I am sure both of these two individuals, Richard Paez and Marsha Berzon, are fine people and are well intentioned in the positions they take, but we are going to vote on them being confirmed to the Ninth Circuit Court of Appeals for life. That is serious.

Yes, the President has a right to make nominations to the Federal bench of his choice. However, we have a role in that process. We should, and we do, take it very seriously. We should not give a man or a woman life tenure if there is some problem with his or her background, whether academically or ethically, or if there is a problem with a series of decisions or positions they have taken.

I certainly don't take this lightly. I would have preferred if these individuals had never been nominated, never been reported out of the Judiciary Committee, and that the situation would not have arisen in which there is this vote on the floor. But after a lot of consultation back and forth with my colleagues, a reasonable case could be made they should at least have a vote on their confirmation one way or the other.

As majority leader, I must make decisions as to the time and manner in which matters are considered. Sometimes my colleagues think it is the right way and the right time; sometimes that is not the case. Once I make a commitment for a vote, I am going to keep that commitment the best I can, keep my word, and go forward.

I have colleagues on my side of the aisle who don't like going forward with this vote. At this time, I think it is appropriate that we have a vote. I urge my colleagues to vote against these two nominees. However, it is time we have the vote, and we will do so today.

Let me discuss why I feel so strongly that these two nominees should not be confirmed. First, it is about the Ninth Circuit Court of Appeals, which is clearly a circuit court of appeals that is out of sync with the mainstream and has been repeatedly reversed by the Supreme Court.

In recent days, I have seen references to the Ninth Circuit as containing ''California, Arizona, and a handful of other states.'' My state is in the Fifth Circuit Court of Appeals, but I would take umbrage if my circuit was referred to as ''the circuit that has Texas and other States.'' But there are only three States in our circuit, the Fifth Circuit.

The Ninth Circuit clearly has a problem. It is too large, it is too unwieldy, and it is not functioning effectively. It is not serving the people of the circuit well, and we must remember that it is not just the ''circuit of California, Arizona, and other States.'' How would someone like to be in the circuit that is referred to that way if one lives in Utah, Nevada, Montana, Idaho, Washington, Oregon, Alaska, Guam, and Hawaii?

We need to do something about this. We have known we needed to do something about it for years, but we haven't done it. Millions of people who live in the States of the Ninth Circuit must submit their disputes to a court that has consistently flouted the statutes and the Constitution of the United States.

It covers 50 million people. Nearly 40 percent of the area of this country is in this one circuit. In the past 6 years, the Ninth Circuit has been reversed by the Supreme Court in 85 out of 99 cases considered, roughly a 90-percent reversal rate. In most classes, that would be rated as an abysmal failure. There is something not right here.

It was bad before the President Clinton appointees were added, and it has gotten worse. In the 1996–1997 term, the Ninth Circuit was reversed 27 out of 28 times, including 17 unanimous reversals. There is something wrong with this circuit.

Let me give some specific examples of the kind of decisions they are entering:

In Washington v. Glucksberg, the Ninth Circuit found a constitutional right to die, a decision reversed unanimously by the Supreme Court;

In Calderon v. Thompson, 1997, the Ninth Circuit blocked an execution based on a procedural device the Supreme Court called a ''grave abuse of discretion'';

In Mazurek v. Armstrong, 1996, the Ninth Circuit enjoined a Montana law allowing only doctors to perform abortions, only to be reversed once again by the Supreme Court.

I have a long list of decisions from the Ninth Circuit, and I ask unanimous consent I be able to have these lists and other material printed at the conclusion of my remarks.

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

(See Exhibit 1.)

Mr. LOTT. There is a problem with this circuit. It is a circuit that has serious problems with its rulings. It is an extremely liberal circuit, and it will get worse with these two nominees. That is one of the reasons I have been hesitant to bring up the nominees.

Now, let me go to the next point. I hope it won't happen, but I suspect there is going to be somebody in this Chamber, or certainly in the media, who will suggest that the consideration of these nominees has something to do with their race or gender.

These charges are totally false. We don't have a place where we check race or gender when we consider these nominees. It is irrelevant. We had a nominee last year who was defeated in the Senate that turned out to be African American. I am confident at least half the Senators didn't even know that. We didn't talk about that.

In this case, the fact that Judge Paez is Hispanic is not a consideration at all. We need more minorities and women on the courts. Let me make this point so everybody will be aware of it now: Last year, 18 of the 34 judicial nominees confirmed by the Senate, or 53 percent, were women or minorities. By contrast, only 51 percent of President Clinton's nominees were women or minorities. However, I am not going to charge him with some sort of discrimination based on race or gender.

I will have printed for the RECORD a list of some of the statistics showing this Senate is more than willing and desirous of confirming women and minorities of all backgrounds to the courts. Over the past several years, we have confirmed a high percentage from minority groups or women, including a unanimous or near-unanimous confirmation of an Hispanic nominee to

the Third Circuit Court of Appeals earlier his week.

While some have expressed concern at the delay in bringing up the nominations we are considering today, it is important to keep in mind that each of these nominees was opposed by almost half of the Members of the Judiciary Committee. This is the committee charged with reviewing the background and qualifications of nominees. Any time so many Members of the Judiciary Committee express this level of concern, this body should proceed with caution.

The charges that race has somehow played a part in the Senate's consideration of these or other nominees is more than false. It demeans the Senate and those making the charges. If the charges are made in a cynical attempt to gain some political advantage, that is even worse. No real or perceived political advantage is worth debasing your own integrity by falsely impugning that of others.

Let me go to the specifics of Judge Paez. Some say: How long must he wait? What will happen? He is on the Federal district court now, so it is not as if he is waiting for employment.

He has a long record and philosophy that is very liberal. That is not disqualifying anymore than we should disqualify somebody because they are conservative. He has a record also of highly questionable rulings and political statements while sitting on the bench. When he was being considered as a judge, for instance, he was quoted as saying:

> The courts must tackle political questions that ''perhaps ideally and preferably should be resolved through the legislative process''.

That is the point. He believes the courts should be willing to do what is our job, not theirs. That is a fundamental problem.

When he was being nominated to the Federal district bench, no less an arbiter of liberalism than the American Civil Liberties Union considered him a ''welcome change after all the pro law enforcement people we have seen appointed.''

I think the American people want pro law enforcement people appointed to the bench regardless of their background or any other consideration.

There have been some astounding cases: Judge Paez struck down a Los Angeles antipanhandling ordinance enacted after a panhandler killed a young man over a quarter; he ruled companies doing business overseas can be held liable for human rights abuses committed by foreign governments.

Excuse me? How in the world could he extrapolate anything in the laws of this country or the Constitution that would allow him to make such a decision?

Now we have the situation with John Huang. I do not know what happened there, but it seems to me there is a conflict of interest. The American people need to understand. He somehow or other was selected to be the judge in the John Huang case, and he agreed to a very light plea-bargained sentence at a time, I believe, when his confirmation was still pending, involving a matter where the President of the United States was clearly implicated. There is something not right about that. It does not pass the smell test.

Am I willing now to charge some illegality, or some totally unethical act? No. But we should have done more on this, on that point, before we came to this vote.

Last, but not least, when you are on the bench—I have kidded my friends who are Federal judges about how they ascend to someplace in the sky, never to be heard from again: Retirement to the Federal bench. They laugh. I laugh. But in a way, that is the way it is and that is as it should be. Because when you go on the bench, your political involvement, your personal preferences, should remain private. You should assume the bench and keep your mouth shut until you rule appropriately.

When you have a judge speak out, as Judge Paez did in 1995, for example, and attack two California ballot initiatives while they were still in litigation or potentially the subject of litigation, that is a big problem. The Judicial Code of Conduct prohibits judges, as it should, from comments that ''cast reasonable doubt on his capacity to decide impartially, any issue that may come before him,'' that is a fundamental point.

You cannot, as a Federal judge, make political statements on initiatives on the ballot that bring into question your impartiality in these cases in any way. It is highly inappropriate.

With regard to the nomination of Ms. Berzon, she does not have a record of judicial decisions, having served as a prominent labor lawyer for many years. Clearly, however, her positions are very questionable in terms of how she would rule when she got on the Ninth Circuit Court of Appeals. I think it would be a mistake.

I am particulary troubled by some of the extreme pro-labor positions she has advocated—positions that have been summarily rejected by the Supreme Court.

Some of the questionable positions she has advocated include arguing that new employees, or more junior employees that worked during a strike, must be layed off in favor of more senior employees when the strike is over. She also argued unsuccessfully that unions should be able to prevent members from resigning during a strike.

Finally, her statements on the use of union funds for political activities—or other activities not directly related to union negotiations and bargaining—raise serious questions about her willingness to live within the letter and spirit of the Beck decision.

It is no wonder that the proponents of these nominations ignore the record of the Ninth Circuit and the judicial approach of these nominees. We are told instead of their strong qualifications and personal attributes. I have no doubt that Judge Paez and Ms. Berzon are fine lawyers and are technically competent. My concern is with their judicial philosophies and their likely activism on the court.

Let me go back to my beginning point. This is very serious. We are going to be voting on putting these two individuals on the Ninth Circuit for life. I think the record is clear that they would be activists on the bench.

Judicial activism is a fundamental challenge to our system of government, and it represents a danger that requires constant vigilance. In our tradition and under our laws, we give power not to a specific group of trained experts, but rest our faith in the ability of all Americans, whatever their backgrounds, to participate in their government. Judicial activism robs the people of their role, and undermines the basis of our democracy.

Nowhere is this problem of judicial activism greater than in the Ninth Circuit. And nowhere is it more incumbent upon us as Senators to take seriously our responsibility to restore a proper respect for our system of representative government.

I believe these nominees should not be confirmed. Number 1, because there is a problem with this circuit; No. 2, because, in the case of Judge Paez, of the rulings he has been involved in, many of them of a highly questionable nature; No. 3, in his case, for remarks he has made in the political arena while sitting as a judge on issues that could come before him.

While her public record is not as extensive, the same questions exist for Ms. Berzon, particulary when you look at her positions with regard to the type of issues that may well be coming before the Ninth Circuit, and eventually, before the Supreme Court. There is great doubt about the basis for her confirmation.

While I have kept my word and we will vote on these judges today, I will vote against them both.

EXHIBIT 1

NINTH CIRCUIT REVERSALS BY THE SUPREME COURT

For the period from 1994 through 2000, 85 of the 99 Ninth Circuit cases considered by the Supreme Court were overturned:

1999–2000 7 of 7—100%.

U.S. v. Locke (3/6/00—unanimous)—improper to allow state regulation over oil tankers when area was federally preempted.

Rice v. Cayetano (2/23/00)—improper to uphold Hawaii constitutional provision allowing only certain race to vote.

Roe v. Flores—Warden (2/23/00)—remanded ineffective counsel case.

U.S. v. Martinez-Salazar (1/19/00—unanimous)—improper to throw out conviction when juror was stricken with preemptory challenge after refusal to excuse the juror for cause.

Smith v. Robbins (1/19/00)—improper to strike down California law concerning indigent appeals.

Guiterrez v. Ada (1/19/00—unanimous)—improper statutory interpretation of Guam election law.

Los Angeles Police Department v. United Reporting Pub. Corp. (1/7/99)improper to

strike down California law on arrestee information.

1998–1999 13 of 18—72%.
1997–1998 14 of 17—82%.
1996–1997 27 of 28—96%.
1995–1996 10–12—83%.
1994–1995 14 of 17—82%.

RECORD ON CONFIRMING MINORITY AND FEMALE JUDICIAL NOMINEES

President Clinton has touted his record of appointing qualified minority and female nominees to the bench. Since all of these judges received Senate confirmation, the Senate's record must, by definition, mirror the President's. In fact, in 1999, 53% of the nominees confirmed were women and/or minorities, compared to only 51% of Clinton's nominees.

This Congress, over half (21) of the total number (42) of nominees reported out of the Senate Judiciary Committee were either a minority, a female, or both. Similarly, over half (18) of the total number (34) of nominees confirmed were either a minority, a female, or both.[1] Half of the 34 nominations pending in committee are white males. (Statistics as of 2/29/00)

According to the Judiciary Committee, during the first session of the 106th Congress, on average minorities were reported out of committee faster (108 days) than white male candidates (123 days). Similarly, on average minorities were confirmed faster (122 days) than white males (143 days).

Senator Hatch in an Op-Ed to the Washington Post cited a Task Force on Federal Judicial Selection study reporting that the pace of actual confirmations was the same for minorities and non-minorities in 1997–98.

In the Democratic-controlled 102nd Congress, the Senate took 18% longer to confirm minority and female district court nominees than white males. In comparison, the Republican-controlled Senates in 97th, 98th, and 99th Congresses moved female nominees faster than males.

Mr. LEAHY. Mr. President, first, I do thank the distinguished majority leader for keeping the commitment he made to me, to Senator DASCHLE, to the two Senators from California, and others last year to bring these nominations to a vote. I appreciate that. I wish, of course, he would vote for the two nominees, but that is his right.

We keep talking about these reversal rates, the Ninth Circuit being reversed the most. Of course, that is not the case. I will put in the RECORD later on a letter from Chief Judge Hug, who shows a number of circuits that have been reversed far more than the Ninth Circuit.

I will also point out, as I did earlier, about half of the most recent reversals have been on decisions written by appointees of President Reagan and appointees of President Bush. So I would not be blaming President Clinton for this.

We have heard a great deal about the so-called panhandling decision. The judge had no choice in that matter. He had a case on all fours from his own circuit. As a district judge, he had to follow that decision. Whether he liked it or not, that is what he had to follow. Subsequently, when his own circuit reversed its position on it, then he would have to follow the new position.

Last, I am disturbed to have it suggested that the judge could not tell litigants in a courtroom that they could not wave anything in the face of jurors, whether it is a Bible or a newspaper. I yield to nobody in this body in my defense of the first amendment. I have certainly received more first amendment awards than anybody serving here. I would say also if they were to wave a newspaper and a headline in the face of jurors, a judge could say: No, you can't do that.

That is not freedom of the press. That is not freedom of religion. No judge anywhere is going to allow litigants to wave anything in the face of jurors to influence them, nor to act outside of the regular rules of court, or when you can refer to an item in evidence or not, when you can refer to it in argument.

I just point that out. We continuously attack this man for doing the things he is supposed to do.

I yield to the distinguished Senator from California who seeks 10 minutes, I understand. I yield 10 minutes.

Mrs. FEINSTEIN. Mr. President, I want to take a few minutes as a 7-year member of the Judiciary Committee, to set the record straight on some of the comments that have been made with respect to the Ninth Circuit Court of Appeals. I have heard that circuit called a rogue circuit, out of control, out of sync with the rest of the Nation. All of this is based on statistics for 1 year, 1996–1997, when the Supreme Court reversed that circuit 27 out of 28 times.

The question is, Even in that year, did that place it as the most reversed circuit? The answer is no because even in that year they fell in the middle of the pack. When the Ninth Circuit's reversal rate was 95 percent, it was still less than five other circuits: The Fifth, the Second, the Seventh, D.C., and Federal Circuits all had a 100-percent reversal rate.

You can seek out the Ninth Circuit because it has 9,000 cases on appeal as opposed to a circuit with 1,000 or 1,500 cases. But the record is the record, even in that year, that much maligned year that is the basis of all of these comments.

Let's look at some of the other years. In the 1998–1999 Supreme Court session, the Supreme Court reviewed 18 cases of the Ninth Circuit; 4 were affirmed, 11 were reversed, and 3 had mixed rulings. So only 11 out of 18 cases were outrightly reversed. That is a 61-percent reversal rate.

Is that the worst? No. This is less than the reversal rates for the Third Circuit, 67 percent; the Fifth Circuit, which was reversed 80 percent of the time; and the Seventh Circuit, 80 percent of the time; the Eleventh Circuit, 88 percent; and the Federal Circuit, 75 percent.

In terms of reversals, the Ninth Circuit is not at the bottom of the pack, it is in the middle of the pack.

I think I know why there were newspaper articles. The Ninth Circuit has been made a target by many conservatives who either want to see it split or, in some way, destroyed. That has become very clear to me as a member of the Judiciary Committee as I have watched proposal after proposal surface.

Am I always pleased with the Ninth Circuit? Absolutely not. Do I like all the decisions? Of course not. But the point is, the Ninth Circuit is well within the parameters, and in virtually every year that one can look at reversals, one will see the Ninth Circuit is approximately in the middle of the pack.

The argument is also made that Clinton appointees are making decisions that are being reversed. I have looked at the Ninth Circuit judges who were reversed over the last 3 years by the Supreme Court. Once again I correct the record. On only eight occasions in the last three full Supreme Court terms have Clinton appointees on the Ninth Circuit joined in decisions later reversed by the Supreme Court. At the end of the 1998–1999 term, Clinton appointees were 20 percent of the judges on the Ninth Circuit.

If one wants to compare, compare Clinton appointees with Reagan appointees. Reagan appointees on the Ninth Circuit have been overturned in 30 instances from the 1996–1997 Supreme Court term through the 1998–1999 term. Currently, there are the same number of Reagan appointees on the Ninth Circuit as Clinton appointees.

I have wondered, as I have watched this debate emerge for the last 7 years, why there is this persistent effort to demean, to break up, in some way to destroy this court. I have a hard time fathoming why.

Mr. President, I ask unanimous consent to print in the RECORD a letter from the Chief Judge of the Ninth Circuit Court of Appeals.

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

UNITED STATES COURTS
FOR THE NINTH CIRCUIT,
Reno, NV, March 1, 2000.

Hon. ORRIN HATCH,
U.S. Senator, Dirksen Senate Office Building, Washington, DC.

Hon. PATRICK LEAHY,
U.S. Senator, Russell Senate Office Building, Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I write on behalf of the Ninth Circuit Court of Appeals to emphasize the importance of filling the judicial vacancies on this court.

During the four years that I have been Chief Judge of the Ninth Circuit, we have had up to ten vacancies on the court of appeals. We now have six vacancies, two have been vacant since 1996, two since 1997, one since 1998, and one since 1999. It has been very difficult to operate a court of appeals with up to one-third of our active judges missing. As you know, I have worked with the White House and the Senate in an attempt to fill these vacancies in a timely manner, and I am continuing to do so.

[1] These figures include non-controversial nominees such as Charles Wilson (Eleventh Circuit), Ann Claire Williams (Seventh Circuit), Adalberto Jose Jordan (S.D. Fla.), Carlos Murguia (D. Kan), William Haynes, Jr. (M.D. Tenn.), Victor Marrero (S.D.N.Y.), and George Daniels (S.D.N.Y.), all of whom were confirmed within 7 months of their nomination.

As Chief Judge, I have implored our active judges and our senior judges, on an emergency basis, to carry a larger caseload during this interim while the vacancies are being filled, in order to do our best to avoid building up a backlog of cases with the consequent delay for the litigants.

Our judges have been most responsive in hearing considerably more cases than would ordinarily be assigned. I am very grateful, but I cannot expect the judges to do this, on an emergency basis, for the indefinite future.

In addition, we have called upon the district judges within our circuit to serve on panels, as well as visiting judges from other circuits. However, this is not the ideal way to perform the services of a court of appeals. The appeals from the Ninth Circuit should be heard by the judges of the Ninth Circuit Court of Appeals.

Despite all these efforts, we do have a backlog of cases, which principally affect civil cases, some of which have had to wait a year or more to be heard. My major concern is that we have had a significant increase in filings this past year, which considerably exceed the number of cases we are able to terminate even with this enhanced effort. In the year ending December 31, 1999, the number of appeals filed was 9,444, and the number of appeals terminated was 8,407. This is a difference of over 1,000 cases.

If our six vacancies were filled and those judges were on our court, it would mean we could decide an additional 800 cases on the merits. If they are not filled, I can anticipate considerable delay for the litigants of this circuit.

Our court is very pleased that the leadership of the Senate has committed to hold a floor vote this month on nominees Judge Richard Paez and Marsha Berzon. We have every hope that they will be confirmed. We would ask, however, that the other nominees, Barry P. Goode, James F. Duffy, Jr., Richard C. Tallman, and Johnnie B. Rawlinson receive hearings before the Judiciary Committee in the near future. It is vital to our Ninth Circuit Court of Appeals.

By the way of emphasizing the need brought about by our increasing caseload and the importance of filling these vacancies, I might note a little historical perspective. In 1980, shortly after I came on the court of appeals, we had 23 active judges with a caseload of 3,000 appeals. Today, with 6 of our 28 judgeships vacant, we have 22 active judges to hear over 9,000 appeals. You can see the importance of proceeding promptly with the confirmation process.

I might make one other observation—I have noted that the reversal rate of the Supreme Court in one unusual year, 1996–97, has assumed some importance in the hearings. Even in that year, when the Ninth Circuit's reversal rate was 95%, it was less than five other circuits—the Fifth, Second, Seventh, D.C., and Federal Circuits—all with a 100% reversal rate. In the 1997–98 term, the Ninth Circuit's reversal rate was 76%, equivalent to that of the First Circuit's 75%, and less than the Sixth and Eleventh Circuits' 100% reversal rate. In the 1998–99 term, the Ninth Circuit's reversal rate was 78%, equivalent to that of the Second and Federal Circuits' 75%, and less than the Fifth Circuit's 80%, the Seventh Circuit's 80%, and the Eleventh Circuit's 88% reversal rates.

However, the important point to emphasize, in my opinion, is that the reversal rate has little to do with the effectiveness of any circuit court of appeals. For example, the 13, 14, or 20 cases reversed in a term were out of 4,500 cases decided on the merits in the Ninth Circuit. The reversal rate in any circuit should also have little to do with the nomination or confirmation of judges to fill vacancies on a court.

Our judges on the Ninth Circuit Court of Appeals will certainly appreciate any efforts on your parts to afford the judicial nominees a hearing in the near future and a prompt vote on the floor of the Senate.

Yours sincerely,

PROCTER HUG, Jr.,
Chief Judge.

Mrs. FEINSTEIN. Mr. President, I will quickly read the paragraph to which the ranking member alluded. I believe it is worthwhile for everybody to hear this. Judge Hug said:

I might make one other observation—I have noted that the reversal rate of the Supreme Court in one unusual year, 1996–97, has assumed some importance in the hearings.

These are the hearings on confirmation.

Even in that year, when the Ninth Circuit's reversal rate was 95 percent, it was less than five other circuits—the Fifth, Second, Seventh and Federal Circuits—all with a 100 percent reversal rate. In the 1997–98 term, the Ninth Circuit's reversal rate was 76 percent, equivalent to that of the First Circuit's 75 percent and less than the Sixth and Eleventh Circuits' 100 percent reversal rate. In the 1998–99 term, the Ninth Circuit's reversal rate was 78 percent, equivalent to the Second and Federal Circuits' 75 percent and less than the Fifth Circuit's 80 percent, the Seventh Circuit's 80 percent, and the Eleventh Circuit's 88 percent reversal rates.

Once again, the Chief Judge of the Ninth Circuit attests that the Ninth Circuit's reversal rate is substantially in the middle of the pack of all the circuits. I hope the record stands corrected.

I want to speak about the two judges before us and indicate my strong support for the appointment of both Judge Paez and Mrs. Berzon.

Judge Paez has been before this body for 4 years. He has had two hearings and has been reported out of committee twice. Marsha Berzon has been before this body for 2 years, and she has had two hearings and been reported out of committee once.

I have sat as ranking member on one of her hearings. It was equal in the quality and numbers of questions to any Supreme Court hearing on which I have sat, and I have sat on two of them. She was asked detailed questions on the law, questions about her performance, questions about her background, and, I say to this body, she measured up every step of the way. She is a brilliant appellate lawyer, and she has represented both business clients as well as trade union clients.

Judge Paez has 19 years of experience as a judge and 6 years as a Federal court judge. I will speak about his record on criminal appeals.

According to the Westlaw database, 32 of his criminal judgments have been appealed; 28 of these were affirmed. The Circuit Court dismissed two appeals for lack of jurisdiction, remanded one for further proceedings, and one judgment was affirmed in part or reversed in part. That is an 87-percent affirmance rate. That is pretty good.

Judge Paez has not been reversed on a criminal sentence. Of his 28 criminal affirmances, they include 6 cases where a sentence he imposed was upheld by the appellate court; 4 involved his decision to enhance the defendant's defense level within the guidelines, actually giving the offender a tougher sentence, and 2 involved Judge Paez's refusal to grant a downward departure.

Judge Paez was also named Federal criminal judge of the year by the Century City Bar Association.

As I have looked at this case and listened to members in the Judiciary Committee, a lot of the objection seems to come down to one speech he made at the University of California Boalt Hall where he criticized a proposition on the ballot which was a very incendiary ballot measure in California. It was Proposition 209, and that may have been somewhat intemperate.

My point is, one comment does not outweigh 19 years of good judicial service, 6 of them on the Federal court. I believe strongly that both these nominees deserve confirmation today.

I thank the Chair.

The PRESIDING OFFICER (Mr. BUNNING). The Senator from Alaska is recognized.

Mr. MURKOWSKI. Mr. President, I want to talk a bit about the matter before us, the judicial nominations of Paez and Berzon.

I have listened to the debate today, and it is fair to say, to a large degree, the Ninth Circuit Court has made itself the target. The suggestion was made the Ninth Circuit is in the middle of the pack with regard to reversals. Thirty-three percent of the reversals over the last 3 years have come out of the Ninth Circuit Court. I have talked to judges in that court. They are so frustrated by the caseload and their inability to follow the cases in the court that they privately and publicly suggest something be done.

We have been at this for a long time. We have been discussing it, we have been arguing, we have been debating how we split it up. Naturally, California is a little reluctant to see it split up, for lots of reasons which I do not think are necessary to go into.

The reality is this body has an obligation of timely justice, and timely justice is not being done in the Ninth Circuit for a couple of reasons. It serves the largest population of all the circuits. The judges can't handle all the cases. Legal reasoning has been abandoned in favor of extremist views. The Ninth Circuit has invited this upon itself.

The point I make is, we have an obligation on our watch to do something about this problem. We have to do it. It is inevitable.

This week I introduced legislation to split the Ninth Circuit. These two nominees are perfect examples of why my bill should be passed immediately by this body. Senator HATCH and other are co-sponsoring this bill.

The Ninth Circuit is already plagued with a very activist group on the judiciary who bring their causes to the bench with them.

But let's look at the number of cases that have been reversed by the Supreme Court. This chart shows the number of cases reversed by the U.S. Supreme Court between 1997 and 1999. The statement has been made that the Ninth Circuit court is somewhere in the middle. It is more than the middle. The Ninth Circuit has almost a quarter of all the court reversals in all of our circuit courts. Next is followed by the Eighth Circuit and then the Fifth Circuit. It is not a factual statement to suggest that the reversals in the Ninth Circuit are somewhere in the middle.

We have another chart I will describe to you as the Ninth Circuit Court of Appeals, a court that is out of control. From 1994 to the year 2000, the number of decisions reversed, 86 percent; decisions upheld, 14 percent.

If this followed a pattern in the other circuit courts, I would not be up here arguing; but it is far too high. It suggests it is out of control. The reality is that 86 percent of the decisions were reversed in that period, from 1994 to the year 2000; and 14 percent of the decisions were upheld by the Supreme Court. These are people who were denied justice—at great cost.

Let's look at the reason why it is so obvious that we have to do something about it. It is the caseload. Look at the growth of the caseload. From 1991 through the year 2000, it has gone from 7,500 to 9,500. It continues to increase. What they will tell you is it is increasing beyond a manageable level. We all know something about managers and management. Some of us are better managers than others; some are worse than others. But you have some real problems when the judges cannot follow the decisions that are coming out of the court. They will be the first ones to acknowledge that.

Let me show you a chart referencing the population in relation to the other circuit courts because that is very important. The circuit courts are depicted on this chart—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, currently the Ninth, the Tenth, and Eleventh. I want to move this chart up a little bit. I am not sure the Presiding Officer can see it. This is the story. It is cold, hard facts.

Here is the Ninth Circuit shown on the chart. It is almost off the chart. The Ninth Circuit will increase 26 percent by the year 2010. It is at 50 million now. That is the problem. We have to split it. The question is, who is going to accept the responsibility? Are we going to put it off? The longer we put it off, the less timely justice prevails.

We owe this to the residents of the States affected. They ought to have something to say about it. We are saying we want it changed. We do not hear that from California. But the other States say they want a change; they want an equitable change.

What have we done? We have reached out and tried to get opinions of people who know something about the problem. Everybody is an expert; and everybody can get an expert. But the Supreme Court agrees that reform is needed. How much higher do you have to go?

Here is what they say:

> The disproportionate segment of this Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and reversing them by lop-sided margins, suggests that this error-reduction function is not being performed effectively.

That means justice is not being done. That is Justice Scalia.

> With respect to the Ninth Circuit in particular, in my view the circuit is simply too large.

Isn't that what it shows? That is Supreme Court Justice Sandra Day O'Connor.

> In my opinion the arguments in favor of dividing the Circuit into either two or three smaller circuits overwhelmingly outweigh the single serious objection to such a change.

These are the Supreme Court Justices who have to make these reversals.

I have another chart. You can read, at your leisure, what retired Supreme Court Chief Justice William Burger said.

> I strongly believe that the 9th Circuit is far too cumbersome and it should be divided.

Supreme Court Justice Anthony M. Kennedy:

> I have increasing doubts and increasing reservations about the wisdom of retaining the Ninth Circuit in its historic size, and with its historic jurisdiction. We have very dedicated judges on that circuit, very scholarly judges . . . But I think institutionally, and from the collegial standpoint, that it is too large to have the discipline and control that's necessary for an effective circuit.

We have a hard enough time controlling discipline here, and there are only 100 of us—plus 100 egos. But I will not go into that.

> We (the Ninth Circuit) cannot grow without limit . . . As the number of opinions increases. . . .

That is the Honorable Diarmuid O'Scannlain, a Ninth Circuit judge, I might add.

Our former colleague, Senator Mark O. Hatfield:

> The increased likelihood of intracircuit conflicts is an important justification for splitting the Court.

There you have it, one of our own.

In my opinion, this matter before us is further evidence of the necessity of splitting the court. The circuit is already plagued with activists on the judiciary who bring their causes to the bench with them. I do not think that is appropriate. One simply has to look at the rate of reversals to find the proof. I have gone into that. Now is the time for Congress to stop this unwieldy circuit. I hope we will because our inaction is only going to weaken an already detached and out of control circuit.

Most shocking is that the nominees do little to deflect accusations that they share an activist judicial philosophy. Justice Paez, in his own words, stated that he ''appreciate[s] . . . the need of the courts to act when they must, when the issue has been generated as a result of the failure of the political process to resolve a certain political question. . . .''

He then continues:

> There's no choice but for the courts to resolve the question that perhaps ideally and preferably should be resolved through the legislative process.

I think that statement deserves a great deal of thought and consideration because he is implying that if we don't take care of it through the political process, this judge is going to simply take action into his own hands. I am not ready for that. That, to me, is a flag.

One does not have to be a legal scholar to see that this is a blatant infringement upon the Constitution, the Constitution we rely upon to protect ourselves from improper Government actions. Article I, as I know the Chair is familiar, clearly states that ''[a]ll legislative powers herein granted shall be vested in a Congress of the United States.'' Should this body abdicate its role and confirm nominees who openly defy the Constitution? I hope we will all answer with a resounding ''no.''

Unfortunately, Judge Paez's background goes far beyond activist judicial decisions. I think we should all pause and reflect upon a nomination for which the director of the ACLU in Southern California states:

> It's been a while since we had these kinds of appointments to the federal court. I think it's a welcome change after all the pro-law enforcement people we have seen appointed to the state and federal courts.

That sends another message to me. I am not sure this judge is going to have the balance necessary to protect our law enforcement people. They need a lot of protection. They are hit by the press. They are hit by mistakes. They are hit by the exposure they have out there, protecting our property and protecting us. We owe more to the men and women who risk their lives each and every day to maintain law and order. We owe more to Americans who see crime around every corner. There is a lot of it, and a lot of them see it.

Time and time again, Judge Paez has demonstrated a lack of proper judicial temperament. We should be able to agree that judges should be impartial and not speak out on matters that may appear before their court. I think we do agree on that. Yet Paez, during the California Proposition 209 ballot initiative debate which would have ended racial quotas and discrimination by the State government, labeled the proposal ''anti-civil rights'' and said it would ''inflame the issue all over again without contributing to any serious discussion.''

I am realist enough to recognize that people in California and their elected representation have a better understanding of this than I do. It sounds a little strange and uncomfortable to me.

A judge is expected to remain impartial. Certainly, they should not comment upon efforts by the citizens of California, in their wisdom, to pass a

legal and constitutional ballot initiative. Judicial Cannon 4(A)(1) alone requires that a judge do nothing ''to cast reasonable doubt on the judge's capacity to act impartially as a judge.'' This is not a person who should be deciding cases that affect 50 million people in our circuit court.

Here, again, is the chart that shows the proof of why this court is out of control.

I also find it ironic that supporters of Marsha Berzon are the very people who claim to be advocates of campaign finance ''reform.'' It is interesting because there are some political overtones there. There probably are going to be some more. While quick to target political speech by national parties, they seem to have turned a blind eye to true injustice in our campaign finance system. I am referring to the forced speech that large and radical unions placed upon their willing members. Many of the union members acknowledge that privately; they are a little hesitant to do it publicly.

The majority has worked hard to open the workforce to all Americans and to remove automatic payroll contributions to unions for political ads of which members disapprove. Shouldn't those members have a right? I think so.

Now the Clinton administration has sent us a judicial nominee who has been labeled by the National Right to Work Committee as the ''worst'' Clinton appointee in terms of labor issues. I wonder how objective that person is.

While representing the Nation's most powerful unions, Ms. Berzon stated that mandatory union dues ''implicates first amendment values only to a very limited degree.'' I wonder how limited that is. Thankfully, the Supreme Court struck down this logic in Communication Workers of America v. Beck.

Look at the Ninth Circuit's already startling reversal rate by the Supreme Court. In 1997, it was 95 percent. One can imagine an even more detached judiciary with the addition of Ms. Berzon. This period this chart shows is for the years 1994 through 2000: 86 percent of the decisions reversed, only 14 upheld. That is a reflection on the court, and it is a reflection on us for not doing something about it.

Mr. Paez is no stranger to the reform debate. During a time when we expect firm and fair enforcement of our Nation's financing laws, Judge Paez gave one individual an unusually light sentence after he admitted to accepting more than $250,000 in illegal campaign contributions. This is the largest acknowledged receipt of illegal contributions in congressional history, except for POGO maybe. We have 300-some-odd thousand in reward money out there that we have to investigate. There are going to be some heads rolling once that is made public and the public and this body understands how that system of whistleblowers works. What was the sentence? The sentence was 1 year on probation and 200 hours of community service. This is for $250,000 illegal campaign contributions. This is the real problem in campaign financing.

I could go on for a long time. I see the Senator from Maryland waiting to be recognized. I could continue listing the seemingly countless reasons why these two nominees should be rejected by this Senate. But, I find that unnecessary. There really is only one reason. Because the people of the Ninth Circuit deserve better. They deserve better.

They deserve a justice system that reflects the temperament of the society. They deserve a judiciary that creates dependable case law by following judicial precedent. They deserve a judiciary that provides swift yet fair justice.

Most importantly, they deserve a judiciary that follows the Constitution and the rule of law and objectivity. For these reasons, I urge my colleagues to reject the two nominations before us prior to the vote this afternoon.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Ms. MIKULSKI. Mr. President, I ask unanimous consent to speak for 5 minutes as in morning business, ensuring that it doesn't take time from either side on this debate. This has been cleared with the leadership on the other side.

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

(The remarks of Ms. MIKULSKI pertaining to the introduction of S. 2229 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. SMITH of New Hampshire. I thank my colleague from Alaska for his comments in support of the opposition to these two nominees.

I yield myself 5 minutes to summarize.

We have a circuit court, the Ninth Circuit, widely considered by most objective observers a renegade circuit that is out of the mainstream of American jurisprudence, a circuit court that has had decisions overturned by the Supreme Court nearly 90 percent of the time in the past 6 years. That is a very high percentage of the number of cases they have. It is the largest circuit in the country. It includes the 7–7 overturn rate in 1999–2000 and 27–28 reversal rate in 1996–1997. In fact, 17 of the decisions in 1996–1997 out of the 27 were overturned unanimously, which means both the liberal and the conservative Justices on the Supreme Court agree that these decisions were so outrageous, they had to be overturned.

It is a court that routinely issues activist opinions, opinions that conflict with the basic American constitutional and legal principles. We have had a great debate on some of the outrageous decisions that have come down.

As I have said, these two new nominees will, if approved, add to that court in a way that is going to continue to have cases overturned. These two judges, Ms. Berzon as well as Mr. Paez, have both indicated by their own track records they will be making similar decisions. I think this is most disturbing.

In the case of Marsha Berzon, we are talking about a potential judicial activist on labor issues. As I said before, it doesn't matter what the issues are, what one believes in personally. The job as a judge is to interpret the Constitution in a way that does not put personal views on the court but, rather, enforces the Constitution.

Ms. Berzon has described her practice: From the outset of my law practice, an important client has been the AFL–CIO. Since 1975, I have devoted a substantial part of my practice to aiding labor organizations affiliated with the AFL–CIO at the Supreme Court and other appellate litigation.

There is nothing wrong with that on the surface. She certainly has a right to represent anyone she chooses to represent if she is asked to do it in a court of law.

The question is, Why talk about that when she knows that cases involving labor could come before her? Imagine what would happen on this floor. We have heard a lot of people outraged by what we have done, getting a good, thorough debate on the two nominees.

Imagine if we had a nominee before the Senate, the outcry from the other side of the aisle if we had a guy or gal come before the Senate, a nominee of any President—say of President Bush in the future—and this person said, ''I have since 1975 devoted a substantial part of my practice to fighting gun control and have been affiliated with the National Rifle Association and gun owners of America in many cases before the courts of America.''

Imagine what we would hear on the other side. They have a right to air that if they wish. I think it would be justified if a person were to say he was going to promote the interests of any particular group or industry.

It is not new to raise the debate on issues about a particular nominee. I get tired of hearing talk that we are wrong to raise these issues because these judges happen to be liberals.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, it is not a question of liberal or conservative. As I recall, when the Democrats were in control of the Senate during 6 years overlapping the Reagan and Bush Presidencies, we voted to confirm about 99 percent of the nominations of President Reagan and President Bush.

Justice Scalia is considered one of the most conservative Members of the Supreme Court. As I recall, he got a unanimous vote from the Republicans and Democrats in the Senate Judiciary Committee. I believe he had a unanimous vote on the floor of the Senate.

Let's not use this shibboleth. We have also had a number of judicial nominees who said they were members of the National Rifle Association and a number who have said they have defended conservative organizations. I

never remember a single one having difficulty being confirmed. Let's not use that.

If we want to assume for the sake of argument that the Ninth Circuit is dominated by liberal activist judges, these critics urge the Senate to reject the confirmation of new judges. They are not letting two basically moderate judges come, thereby adding to the mix. It does not make a great deal of sense to me that they want to keep the court exactly the way it is.

I ask unanimous consent to have printed in the RECORD a letter from Judge Procter Hug that points out there are a number of circuits that have far higher reversal rates than the Ninth Circuit.

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

UNITED STATES COURTS
FOR THE NINTH CIRCUIT,
Reno, NV, March 2, 2000.

Hon. ORRIN HATCH,
Chairman, Senate Judiciary Committee, Russell Senate Office Building, Washington, DC.

Hon. PATRICK LEAHY,
Ranking Member, Senate Judiciary Committee, Russell Senate Office Building, Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I write on behalf of the Ninth Circuit Court of Appeals to emphasize the importance of filling the judicial vacancies on this court.

During the four years that I have been Chief Judge of the Ninth Circuit, we have had up to ten vacancies on the court of appeals. We now have six vacancies, two have been vacant since 1996, two since 1997, one since 1998, and one since 1999. It has been very difficult to operate a court of appeals with up to one-third of our active judges missing. As you know, I have worked with the White House and the Senate in an attempt to fill these vacancies in a timely manner, and I am continuing to do so.

As Chief Judge, I have implored our active judges and our senior judges, on an emergency basis, to carry a larger caseload during this interim while the vacancies are being filled, in order to do our best to avoid building up a backlog of cases with the consequent delay for the litigants.

Our judges have been most responsive in hearing considerably more cases than would ordinarily be assigned. I am very grateful, but I cannot expect the judges to do this, on an emergency basis, for the indefinite future.

In addition, we have called upon the district judges within our circuit to serve on panels, as well as visiting judges from other circuits. However, this is not the ideal way to perform the services of a court of appeals. The appeals from the Ninth Circuit should be heard by the judges of the Ninth Circuit Court of Appeals.

Despite all of these efforts, we do have a backlog of cases, which principally affect civil cases, some of which have had to wait a year or more to be heard. My major concern is that we have had a significant increase in filings this past year, which considerably exceed the number of cases we are able to terminate even with this enhanced effort. In the year ending December 31, 1999, the number of appeals filed was 9,444, and the number of appeals terminated was 8,047. This is a difference of over 1,000 cases.

If our six vacancies were filled and those judges were on our court, it would mean we could decide an additional 800 cases on the merits. If they are not filled, I can anticipate considerable delay for the litigants of this circuit.

Our court is very pleased that the leadership of the Senate has committed to hold a floor vote this month on nominees Judge Richard Paez and Marsha Berzon. We have every hope that they will be confirmed. We would ask, however, that the other nominees, Barry P. Goode, James F. Duffy, Jr., Richard C. Tallman, and Johnnie B. Rawlinson receive hearings before the Judiciary Committee in the near future. It is vital to our Ninth Circuit Court of Appeals.

By the way of emphasizing the need brought about by our increasing caseload and the importance of filling these vacancies, I might note a little historical perspective. In 1980, shortly after I came on the court of appeals, we had 23 active judges with a caseload of 3,000 appeals. Today, with 6 of our 28 judgeships vacant, we have 22 active judges to hear over 9,000 appeals. You can see the importance of proceeding promptly with the confirmation process.

I might make one other observation—I have noted that the reversal rate of the Supreme Court in one unusual year, 1996–97, has assumed some importance in the hearings. Even in that year, when the Ninth Circuit's reversal rate was 95%, it was less than five other circuits—the Fifth, Second, Seventh, D.C., and Federal Circuits—all with a 100% reversal rate. In the 1997–98 term, the Ninth Circuit's reversal rate was 76%, equivalent to that of the First Circuit's 75%, and less than the Sixth and Eleventh Circuits' 100% reversal rate. In the 1998–99 term, the Ninth Circuit's reversal rate was 78%, equivalent to that of the Second and Federal Circuits' 75%, and less than the Fifth Circuit's 80%, the Seventh Circuit's 80%, and the Eleventh Circuit's 88% reversal rates.

However, the important point to emphasize, in my opinion, is that the reversal rate has little to do with the effectiveness of any circuit court of appeals. For example, the 13, 14, or 20 cases reversed in a term were out of 4,500 cases decided on the merits in the Ninth Circuit. The reversal rate in any circuit should also have little to do with the nomination or confirmation of judges to fill vacancies on a court.

Our judges on the Ninth Circuit Court of Appeals will certainly appreciate any efforts on your parts to afford the judicial nominees a hearing in the near future and a prompt vote on the floor of the Senate.

Yours sincerely,

PROCTER HUG, Jr.,
Chief Judge.

REVERSAL RATE 1996–97 TERM

Revised 7/07/97

	Total cases	Number reversed	Percent reversed for circuits
Total	80	57	76
Org.	1	0	0
1st	1	1	100
2d	6	6	100
3d	3	2	67
4th	2	1	50
5th	5	4	80
6th	3	2	67
7th	3	3	100
8th	8	5	63
9th	21	20	95
10th	2	1	50
11th	6	1	17
D.C. Clr	1	1	100
Federal	1	1	100
Arm. Forces	1	0	0
Dist. Cts	8	4	50
State Cts	8	5	63

REVERSAL RATE 1997–98 TERM

(Signed opinions issued amended 7/02/1998)

Circuits	Total cases	Number reversed	Supreme Court reversal rate (percent)	Reversal average for all circuits (percent)
Total	91	54	59	55
1st	4	3	75	
2d	3	1	33	
3d	4	1	25	
4th	2	1	50	
5th	12	6	50	
6th	3	3	100	
7th	7	4	57	
8th	13	8	62	
9th	17	13	76	
10th	1	0	0	
11th	2	2	100	
D.C. Cir	9	4	44	
Federal	2	1	50	
Arm. Forces	1	1	100	
Dist. Cts	2	1	50	
State Cts	8	5	63	
Org	1	0	0	

Reversal Rate Average = total circuit reversal rates divided by number of circuits.

REVERSAL RATE 1998–99 TERM

(Signed & per curiam opinions issued as of June 23, 1999)

	Total cases	Number affirmed	Number reversed	Reversal rate (percent)
Total	81	24	57	70
1st	0	0	0	0
2d	4	1	3	75
3d	6	2	4	67
4th	4	2	2	50
5th	5	1	4	80
6th	4	2	2	50
7th	5	1	4	80
8th	3	2	1	33
9th	18	4	14	78
10th	4	3	1	25
11th	8	1	7	88
D.C. Cir	2	1	1	50
Federal	4	1	3	75
Arm. Forces	1	0	1	100
Dist. Cts.	3	1	2	67
State	10	2	8	80
Org	0	0	0	0

Mr. LEAHY. Mr. President, four out of seven recent reversals were decisions written by either a Reagan or Bush appointee from the Ninth Circuit. Somehow it wasn't brought out on the other side.

As far as showing fairness, even for Clarence Thomas, who had a tie vote, with Republicans and Democrats voting against him in the Senate Judiciary Committee, the Democrats, being in charge of the Senate, still allowed him to come forward for a vote even though normally that would have killed it.

The circuits should not all be the same. Different circuits have different attitudes. They come from different parts of the country. If they were to be all the same, we might as well just have one big circuit for the whole country. The Second Circuit is different from the Third Circuit. The Third is different from the Fifth, and so on.

I remind my friends on the other side, if we are going to have a litmus test for a circuit, let us understand what this means when applied to the Fourth Circuit. That is the most conservative and activist in the country. Ironically enough, we forget the fact the very conservative circuit can be a very activist circuit. Nobody would deny it is one of the most activist circuits in the country, rewriting legislation willy-nilly.

If the argument is accepted from the other side, then no nominee other than one with a more liberal judicial philosophy should be confirmed in the foreseeable future to the Fourth Circuit. I am not trying to make that argument. But if you follow their argument, that is the case.

Mr. President, I thank the Majority Leader for bringing this matter to a vote. After two years, it is time to vote on the nomination of Marsha Berzon. She is one of the most qualified nominees I have seen in 25 years, and Senator HATCH has agreed with that assessment publically. He voted for her in the Judiciary Committee.

Marsha Berzon is an outstanding nominee. Her legal skills are outstanding, her practice and productivity have been extraordinary. Lawyers against whom she has litigated regard her as highly qualified for the bench. She was first nominated in January 1998, some 26 months ago. By all accounts, she is an exceptional lawyer with extensive appellate experience, including a number of cases heard by the Supreme Court. She has the strong support of both California Senators and a well-qualified rating from the American Bar Association.

She was initially nominated in January 1998. She participated in an extensive two-part confirmation hearing before the Committee back on July 30, 1998. Thereafter she received a number of sets of written questions from a number of Senators and responded in August, two years ago. A second round of written questions was sent and she responded by the middle of September, two years ago. Despite the efforts of Senator FEINSTEIN, Senator KENNEDY, Senator SPECTER and myself to have her considered by the Committee, she was not included on an agenda and not voted on during all of 1998. Her nomination was returned to the President without action by the Committee or the Senate in October 1998.

The President renominated Ms. Berzon in January 1999. She participated in her second confirmation hearing in June, was sent additional sets of written questions, responded and got and answered another round. I do not know why those questions were not asked in 1998.

Finally, on July 1, 1999, almost eight months ago, the Committee considered the nomination and agreed to report it to the Senate favorably. After more than two years the Senate will, at long last, vote on the nomination. Senators who find some reason to oppose this exceptionally qualified woman lawyer can vote against her if they choose, but she will finally be accorded an up or down vote. That is what I have been asking for and that is what fairness demands.

Senator HATCH was right two years ago when he called for an end to the political game that has infected the confirmation process. These are real people whose lives are affected. Marsha Berzon has been held hostage for 26 months, not knowing what to make of her private practice or when the Senate will deem it appropriate finally to vote on her nomination.

Last fall I received a Resolution from the National Association of Women Judges. The NAWJ urged expeditious action on nominations to federal judicial vacancies. The President of the Women Judges, Judge Mary Schroeder, is right when she cautions that ''few first-rate potential nominees will be willing to endure such a tortured process'' and the country will pay a high price for driving away outstanding candidates to fill these important positions. The Resolution notes the scores of continuing vacancies with highly qualified women and men nominees and the nonpartisan study of delays in the confirmation process, and even more extensive delays for women nominees, found by the Task Force on Judicial Selection formed by Citizens for Independent Courts. The Resolution notes that such delay ''is costly and unfair to litigants and the individual nominees and their families whose lives and career are on hold for the duration of the protracted process.'' In conclusion, the National Association of Women Judges ''urges the Senate of the United States to bring the pending nominations for the federal judiciary to an expeditious vote so that those who have been nominated can get on with their lives and these vacancies can be filled.'' We received that Resolution in October 1999 and I included it in the RECORD at that time—October 1999.

There are judicial emergencies vacancies all over the country. The Fifth Circuit Court of Appeals has had to declare that entire Circuit in an emergency. Its workload has gone up 65 percent in the last 9 years; but they are being forced to operate with almost one-quarter of their bench vacant despite highly qualified nominees having been sent to the Senate by the President.

Continuing dilatory practices demeans the Senate, itself. I have great respect for this institution and its traditions. Still, I must say that the use of secret holds for extended periods that doom a nomination from ever being considered by the United States Senate is wrong and unfair and beneath us. After four years with respect to Judge Paez and two years with respect to Marsha Berzon, it is time for the Senate to vote up-or-down on these nominations. I, again, ask the Senate to be fair to these judicial nominees and all nominees. For the last few years the Senate has allowed one or two or three secret holds to stop judicial nominations from even getting a vote. That is wrong.

The Washington Post noted last year:

> [T]he Constitution does not make the Senate's role in the confirmation process optional, and the Senate ends up abdicating responsibility when the majority leader denies nominees a timely vote. All the nominees awaiting floor votes * * * should receive them immediately.

The Florida Sun-Sentinel has written:

> The ''Big Stall'' in the U.S. Senate continues, as senators work slower and slower each year in confirming badly needed federal judges. * * * This worsening process is inexcusable, bordering on malfeasance in office, especially given the urgent need to fill vacancies on a badly undermanned federal bench. * * * The stalling, in many cases, is nothing more than a partisan political dirty trick.

Nominees deserve to be treated with dignity and dispatch—not delayed for two or three or four years.

Acting to fill judicial vacancies is a constitutional duty that the Senate—and all of its members—are obligated to fulfill. In its unprecedented slowdown in the handling of nominees since the 104th Congress, the Senate is shirking its duty. That is wrong and should end.

Today the New York Times included an editorial entitled ''Ending a Judicial Blockade'' in which it notes: ''The quality of justice suffers when the Senate misconstrues its constitutional role to advise and consent as a license to wage ideological warfare and procrastinate in hopes that a new president might submit other nominees.''

In 1992, a Democratic majority in the Senate acted to confirm 66 judicial nominations for a Republican President in his last year in office. With the confirmations of Judge Paez and Marsha Berzon to the Ninth Circuit today, this Senate will have confirmed only seven judicial nominations so far this year. I look forward, at long last, to the confirmation of Marsha Berzon and ask other Senators to join with me to work to confirm many, many more qualified nominees to the federal vacancies around the country in the weeks ahead this year.

Mr. President, I yield the floor.

Mr. SMITH of New Hampshire. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. SMITH of New Hampshire. Mr. President, several comments have been made today, I think correctly so. I do not think the information was out. But it is interesting we now have a capital sentencing case, Arreguin v. Prunty, in which Judge Paez was reversed, as of yesterday. Several people had said no criminal case of his had been reversed. Those statements were correct. That has changed now since March 9. So here we have this judge being reversed, this judge we are now talking about putting on the circuit court.

In this case, the defendant was an accomplice to robbery and murder and he actively encouraged the murder of an innocent civilian.

Under California law, an accomplice can only be sentenced to life without parole or death if he was a ''major participant'' in the capital crime.

In Arreguin, an impartial jury unanimously convicted the defendant as an accomplice to robbery and murder.

The State trial judge instructed the jury on what a ''major participant'' was. The jury sentenced the defendant to life without parole.

The California appellate courts recognized that the State trial judge made a technical error in giving the ''major participant'' instruction, but held that the record clearly showed that the defendant was in fact a ''major participant'' in the robbery-murder and affirmed the sentence under the harmless error rule.

On habeas review, however, Judge Paez held that the Constitution somehow created a liberty interest in receiving a perfect jury instruction—even if he was clearly a major participant in the robbery-murder.

This is a classic example of the continued liberal activist interpretation of the Constitution by Judge Paez.

Yestreday, March 8, 2000, a unanimous panel of the Ninth Circuit reversed Judge Paez and reinstated the sentence of the defendant to life without parole.

The Ninth Circuit agreed with and quoted the California appellate court, stating:

> . . . under any reasonable interpretation of the evidence, [Arreguin] was a major participant and the error was harmless beyond a reasonable doubt.

The [California] court further stated:

> Standing within arms's reach of an armed accomplice exhorting, ''Shoot 'im, shoot 'im'' about the victim, immediately after another accomplice forcibly broke the truck window, warrants no other reasonable conclusion than that appellant was a major participant. Appellant's testimony that he did not participate at all was necessarily rejected by the jury in its verdict. This harmless error analysis is sufficient. . . . Therefore, we reverse the grant of the writ.

Once again, this shows a continuing liberal, activist interpretation of the Constitution that even the Ninth Circuit could not agree with. Judge Paez will not move the Ninth Circuit into the mainstream, he will make the problem. Accordingly, I will vote against this nominee.

Judge Paez will not move the Ninth Circuit into the mainstream; he is going to make it the problem.

That is one of the major reasons why I am not going to vote for Judge Paez, and in my view, respectfully, I do not think others should either.

I also want to mention the Senate has received over 10,000 signatures on petitions opposing the Berzon nomination because of her extreme position on labor matters. Here are the 10,000 signatures. That is a lot of signatures. That is a lot of time people take to oppose a judge, and not even a Supreme Court Justice but an appellate court judge or circuit court judge.

There is a lot of opposition out there. Also, I might add, there is a lot of knowledge about these nominees.

They should be rejected.

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

Mr. SMITH of New Hampshire. I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SMITH of New Hampshire. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SMITH of New Hampshire. I ask unanimous consent time be charged equally to both sides, in the quorum.

Mr. LEAHY. Reserving the right to object, and I shall not, I think it is probably a moot point right now. I see the distinguished Democratic leader on the floor going to seek recognition.

Mr. SMITH of New Hampshire. I just wanted to protect the time I had. I yield the floor.

The PRESIDING OFFICER. The minority leader.

Mr. DASCHLE. Mr. President, I will use my leader time so as not to take time of either side.

I want to add my voice especially to those of the distinguished senior Senator from Vermont and the Senator from California, who have spoken so eloquently on this matter for what seems to be several days. I want to make three points.

I think the most disconcerting aspect of this debate, for those who may be watching, is the concern that I would have, having heard many of our colleagues express their virtual desire to influence the Ninth Circuit and the decisions made there. Our Founding Fathers did an extraordinary job of creating the checks and balances in our constitutional system. As I travel around the world and talk to leaders from other parts of the world, who have not enjoyed that delicate balance between the judiciary, the executive, and legislative branches, the lament I hear all around the world is: We don't have an independent judiciary. We have a politicized judiciary. Because it is politicized, we don't have the rule of law. Because we don't have the rule of law, we don't have the predictability in law that creates the extraordinary stability that you have in your country.

These leaders tell me: We want the rule of law, and we recognize that if we are ever going to acquire it, what we have to do is to depoliticize our judiciary, and we have to ensure that we do what you have done—respect its independence.

There is a huge difference between voting against somebody's philosophy or experience or qualifications based upon past judgments in a particular trial—and Senators have every right to do so on the basis of whatever qualifications they may choose. All of those criteria, it seems to me, are fair game. But if we are saying we ought to vote against someone, or for someone, because we want to influence the direction of a certain circuit, I think we get precariously close to creating the kind of politicization of the judiciary that, to me, is frightening. We need to be very, very careful. For 200 years, we have been able to maintain that independence and discipline it takes to ensure the rule of law will always prevail.

I hope as we cast our votes, people will cast them based upon whether they think Judge Paez and Marsha Berzon are capable—whether they have the right qualifications. And, frankly, if they want to throw in philosophy, so be it. But let us not say this ought to be some judgment on the Ninth Circuit. Let us not say that somehow we want to send a message to the Ninth Circuit or any circuit, for that matter. That is not our role. That is not our responsibility. In the Constitution, the Founding Fathers had no design, no possible thought that we as Senators ought to be influencing in any way decisions made by the court, an independent and coequal branch of government.

That is my first point.

My second point is that I believe there is a time and a place for us to consider any nominee and, once having done so, we need to get on with it. I cannot imagine that anybody could justify, anybody could rationalize, anybody could explain why, in the name of public service, we would put anyone through the misery and the extraordinary anguish that these two nominees have had to face for years. Why would anyone ever offer themselves for public service if they knew what they had to go through was what these two people have had to experience and endure?

I do not know who is going to be President next. I do not know who is going to be in the majority in the next Congress. But let's just assume that the roles are reversed and we, the Democrats, are in the majority and we have a Republican President—which I do not think is going to happen. If that happens, do we really want to wait 4 years to take up a Republican nominee? Do we want to pay back our colleagues for having made these people wait as long as they have? I know that I have heard from people over the last several months: that we should do to them what they have done to us.

But, I do not want to hear about that in this body. There is going to be no payback. We are not going to do to Republican nominees, whenever that happens, what they have done to Democratic nominees. Why? Because it is not right.

Will we differ? Absolutely. Will we have votes and vote against nominees on the basis of whatever we choose? Absolutely. But are we going to make them wait for years and years to get their fair opportunity to be voted on and considered? Absolutely not. That is not right. I do not care who is in charge. I do not care which President is making the nomination. That is not right.

I hope somehow the nominations that are still pending will not be subjected to the same extraordinary, unfair process to which these nominees were subjected. We have 34 nominees pending. There is no reason why every single one of them cannot be confirmed or at least considered in the next few months.

The last point I will make is one I have made a couple of times before, but it bears repeating. This has been a very difficult process for a lot of people, and there are a lot of people who deserve some credit. I have already cited the extraordinary contribution of the senior Senator from Vermont, our ranking Judiciary Committee member. I have already noted the efforts made by the California delegation, especially Senator BOXER. Senator HATCH is here. I note his cooperation and the effort he has made in getting us to this point.

I thank the majority leader. He and I have talked about this on several occasions, and it is never easy when you have dissent within your own caucus to make decisions. He made a commitment last year, and he held to that commitment this year. He said we would have these votes, up or down, on the confirmation of these two judicial nominees before the 15th of March, and we are going to do that. I publicly thank him and commend him for holding to that commitment. It is not easy. He has done a difficult thing, but he has done it.

I hope today we can celebrate not only the confirmation of two judges, but renewed comity between our parties when it comes to all nominees—regardless of party, regardless of administration, and regardless of who controls the Senate. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I ask unanimous consent, since we need a little more time and I need to make some remarks on this, that the remaining time be 3 minutes for the distinguished Senator from New Hampshire, Mr. SMITH; 3 minutes for the distinguished Senator from Vermont, Mr. LEAHY; and 8 minutes for myself.

Mr. LEAHY. Reserving the right to object, and I shall not object, as I understand, normally I would have had 14 minutes. This will accommodate the distinguished Senator from Utah and the distinguished Senator from New Hampshire. Do I understand that following that time, we then will have the vote? Is that part of the Senator's request?

Mr. HATCH. That is part of my unanimous consent request.

Mr. LEAHY. I have no objection.

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

Mr. HATCH. Mr. President, perhaps I can start first.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I was listening in the past hour to the eloquent statement of Senator MURKOWSKI explaining why the Ninth Circuit ought to be split. His statement comes 2 days after Senator MURKOWSKI and I introduced legislation that would split that circuit into two more manageable circuits.

It strikes me that this subject is precisely the one that this body ought to be debating today as the real solution to the stated concerns about the Ninth Circuit.

As I explained recently on the Senate floor, the massive size of the circuit's boundaries has confronted the circuit's judges with a real difficulty in maintaining the coherence of its circuit law.

I will not let my concerns regarding the Ninth Circuit—many of which appear to me to be structural in dimension—affect my judgment on the confirmation of Judge Paez, who is an innocent party with regard to that circuit's dubious record. Doing so would force him into the role of Atlas in carrying problems not of his own making.

Mr. President, I rise today to speak on the nomination of federal district Judge Richard Paez to the Ninth Circuit Court of Appeals.

I have to say, I have served a number of years in the Senate, and I have never seen a ''motion to postpone indefinitely'' that was brought to delay the consideration of a judicial nomination post-cloture.

Indeed, I must confess to being somewhat baffled that, after a filibuster is cut off by cloture, the Senate could still delay a final vote on a nomination. A parliamentary ruling to this effect means that, after today, our cloture rule is further weakened.

But on occasion, like Justice Holmes' statement about the law, the life of the Senate is not logic but experience. And I have no interest in quibbling further with this ruling.

As I turn to the merits of the situation before us, I want to begin by commending the efforts of my colleague from Alabama for his legal acumen and tenacity in presenting his case why a further postponement in considering Judge Paez's nomination would be warranted. I am proud to have worked with Senator SESSIONS on legislation involving civil asset forfeiture, and involving youth violence, and a whole raft of other issues, as well. Senator SESSIONS' prosecutorial talents have not left him, and my respect for him as a principled advocate has never been greater than today.

The same goes for Senator SMITH.

Still, I must take exception to the point that he has so forcefully advocated. I must explain why the time has finally come for an up-or-down vote to be cast on Judge Paez's nomination.

Senator SESSIONS' request for a postponement is grounded in Judge Paez's handling of the Government's case against John Huang.

Let us begin with the determinative fact: Though Mr. Huang may have been involved in illegalities in connection with the Clinton-Gore reelection campaign of 1996, he was not charged with a single such count.

The Assistant United States Attorney who was asked why no such charges were brought responded by saying that: ''we investigated all the allegations and felt that the charges in this case fully addressed his culpability.''

Ultimately, Mr. Huang pleaded guilty to a single felony charge of conspiring to violate Federal election law. In that plea, he admitted to laundering a $2,500 contribution to an unsuccessful contestant in Los Angeles' 1993 mayoral campaign, and $5,000 to an entity called the California Victory Fund '94, the funds of which were shared by a Democrat candidate, the Democratic Party, and two Democrat committees.

Prosecutors—in exchange for Mr. Huang's guilty plea to this single charge—recommended that Mr. Huang receive no jail time, but instead be ordered to pay a $10,000 fine and provide 500 hours of community service.

Judge Paez accepted the prosecutor's recommendation, which was consistent, by the way, with the report of the probation office.

So with this factual premise, I would like to address Senator SESSIONS' argument that Mr. Huang's sentence—which he concedes was the one recommended by the prosecution—was insufficiently harsh.

From that premise, there are only a few possibilities:

First, that Judge Paez should have ignored the Federal prosecutors and handed down a stiffer penalty than the one they recommended. But let's consider this. From a man like Senator SESSIONS who believes—as I do—in judicial restraint, it is anomalous to suggest that judges should depart from the adversarial system and impose their own view of an appropriate punishment.

A second alternative is that the prosecution should have recommended a stronger punishment, and that Judge Paez ought to have accepted it. That may indeed be correct. I am on record as expressing similar concern about the level of punishment sought. I am very upset about what the prosecutors did in this matter.

But the problem with this hypothesis is that it is just that —a hypothesis. The prosecution did not recommend a stronger sentence. And we should not castigate Judge Paez for the acts of another—in this case, the prosecution—by holding him accountable for the prosecution's failure to make a stronger case against John Huang.

In any event, neither of these scenarios is one in which Judge Paez can fairly be faulted for not acting more aggressively.

Of course, there is nothing to suggest any sort of impropriety pursuant to which Judge Paez acted in sync with prosecutors to ensure a lenient handling of a case so sensitive to the Clinton administration. Nor is there any evidence at all to suggest that a departure was made in this case from the automated, random case-assignment system utilized in the Federal court for the Central District of California.

Yes, I believe some inside and outside this administration have engaged in fraud upon fraud against the laws, ethical norms, and the people of this country.

But I cannot accept, in the absence of any supporting evidence, that two

branches of Government engaged in a conspiracy to alleviate a defendant of responsibility for violations of Federal law.

This speculative theory should not become the basis for any further delay by the United States Senate. There is no reasonable basis—let alone any hint of evidence—to suggest that further delay would amount to anything other than further delay.

Of course, I can understand and appreciate fully why it is that some of my colleagues remain so dubious about the results of the Huang prosecution. It is because that prosecution was born out of an egregious conflict of interest with the President's own prosecutors—subject always to his own oversight and control—being asked to investigate a matter that, if ultimately prosecuted in an appropriately zealous fashion, could have led to enormous embarrassment to the President.

The result is that the prosecution's decision not to prosecute any of the wrongdoing alleged in connection with the President's reelection campaign can be objectively viewed as a cover-up, and as favoritism to the President. No less a person than Senator SESSIONS, among many others in this body, retain such doubts. And if they have doubts, it is to be expected that the American people have doubts, thereby undermining the public's faith in the rule of law in this country.

This is precisely why I called so insistently upon our Attorney General to appoint an independent prosecutor to investigate all alleged illegalities involving our Federal campaign laws in connection with the 1996 Clinton-Gore campaign.

The Judiciary Committee, under my direction, was the first to formally request the appointment of an independent counsel to investigate alleged illegalities in connection with the President's 1996 reelection campaign. And the Judiciary Committee has formed a formal task force, led by Senator SPECTER, to inquire into the Department of Justice's handling of this and other campaign finance investigations.

But for purposes of our vote today, the determinative point is that our concerns about the manner in which our Federal campaign finance laws have been flouted do not at all implicate Judge Paez.

So we must now proceed to put this matter to a vote, and end the lengthy delay in this matter by choosing—on the basis of the abundant evidence known to us at this time—whether it shall be yea or nay on Judge Paez' nomination. No further information or delay is needed to cast an intelligent and knowing vote on this nomination.

Mr. President, I thank my colleagues for allowing me to make this statement.

The PRESIDING OFFICER. Who yields time?

The Senator from Vermont.

Mr. LEAHY. Mr. President, I know we are about to finish this debate. I do want to compliment the two Senators from California for bringing before us two fine judicial nominees: Judge Paez and, I hope soon to be, Judge Marsha Berzon.

I compliment the distinguished Democratic leader for what he said on the floor—a true leadership statement. I compliment my friend from Utah, Senator HATCH, who says we should go forward and defeat this motion to, in effect, kill, by parliamentary maneuver, one of these nominations.

I agree with what the Senator from South Dakota, our distinguished Democratic leader, said, that we should not get ourselves in a position where there is payback. Whoever the next President might be, if it is a Republican President do we start doing the same things to him the Republicans have done to President Clinton? That should not be done in judicial nominations. We should protect the integrity and the independence of our Federal courts.

I have served here for 25 years. I love and revere this body. The day I leave the Senate, I will know that I have left the finest time of my life, the best and most productive time of my life, the time that I pass on to my children and my grandchildren, by being 1 of 100 men and women whom I respect and have looked forward to working with every day. But that is because I think of this body as being the conscience of the Nation.

If we now use a parliamentary procedure, something totally unprecedented on a Federal judgeship following a cloture motion, then we shame the Senate. We should not.

Judged by any traditional standards of qualifications, competence, temperament, or experience, both Marsha Berzon and Judge Paez should be confirmed. They will be good judges. They will probably be even great judges. Their commitment to law and justice will serve the people of their circuit and our country.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. VOINOVICH). Who yields time?

Mr. SMITH of New Hampshire. Mr. President, I yield 1½ minutes to the distinguished Senator from Alabama.

Mr. SESSIONS. Mr. President, I would like to sum up briefly and say there is new evidence that Judge Paez, a sitting district judge, while being nominated to the Ninth Circuit, under nomination by the President of the United States, found on his docket—rightly or wrongly, out of 34 judges—the John Huang case, and he accepts a plea bargain that did not require Huang to plead at all to the $1.6 million in illegal campaign money he raised for the Democratic National Committee, for the Clinton-Gore campaign.

He pled guilty only to a small contribution in the city of Los Angeles. He was given immunity for that amount.

When the guidelines were calculated based on the evidence the judge had at that time, he should have added two additional levels for having a substantial part of the scheme being outside the United States, two to four additional levels for being an organizer or a manager, and two additional levels for violating a position of trust as the vice president of a bank. Those are levels that should have been added by the judge. He failed to do so. In so doing, he was able to find a level of eight, the highest possible level in which he could give this individual zero time in jail, straight probation, and immunity on the most serious charge. I believe it is wrong, and we need to have a hearing on it to find out how it happened.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. SMITH of New Hampshire. Mr. President, I don't apologize for exercising my rights under the Senate rules and the Constitution to advise and consent and speak against any judge, as did the other side on William Rehnquist, twice, and four or five other judges in the last 25 or 30 years, to name a few.

In response to what Senator SESSIONS said, his motion is very important in regards to Judge Paez. I ask my colleagues to consider one question: What if it was not random that Paez got the John Huang case? What if? Well, if you want to put the guy on the court and find out later, that is up to you.

Finally, this is an activist court. This is a court that has been overturned 209 percent of the time. We are putting two judges on it, one who says that a member of a union can't resign in a strike no matter what the reason, and, finally, Paez, who is opposed by the U.S. Chamber and who believes that a defendant cannot carry a Bible into a courtroom, much as that Bible sits here on the desk of the Presiding Officer right now. Those are the kinds of people we are putting on the bench.

I strongly urge that both of these nominees be rejected and that Senator SESSIONS' motion be supported.

I yield the floor.

The PRESIDING OFFICER. All time has expired.

The question is, Will the Senate advise and consent to the nomination of Marsha L. Berzon, of California, to be United States Circuit Judge for the Ninth Circuit?

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, a point of order.

The PRESIDING OFFICER. The Senator will state the point of order.

Mr. SESSIONS. I understand the Vice President is in the Chamber. Under the Senate rules, a person who has a personal conflict of interest in a vote is not allowed to vote. I make a parliamentary inquiry——

Mr. LEAHY. Regular order.

Mr. SESSIONS. As to whether or not the Vice President should be required to recuse himself under these circumstances on the vote.

The PRESIDING OFFICER. The right of the Vice President is in the Constitution. The question is on confirmation of the nominations.

Mr. SESSIONS. Mr. President, may the Vice President exercise his discretion and recuse himself?

Mr. LEAHY. Mr. President, regular order.

The PRESIDING OFFICER. Debate is not in order. The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Arizona (Mr. MCCAIN) and the Senator from Colorado (Mr. CAMPBELL) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 64, nays 34, as follows:

[Rollcall Vote No. 38 Ex.]

YEAS—64

Akaka	Fitzgerald	Mikulski
Baucus	Frist	Moynihan
Bayh	Graham	Murray
Bennett	Harkin	Reed
Biden	Hatch	Reid
Bingaman	Hollings	Robb
Boxer	Inouye	Rockefeller
Breaux	Jeffords	Roth
Bryan	Johnson	Santorum
Burns	Kennedy	Sarbanes
Byrd	Kerrey	Schumer
Chafee, L.	Kerry	Smith (OR)
Cleland	Kohl	Snowe
Collins	Kyl	Specter
Conrad	Landrieu	Stevens
Daschle	Lautenberg	Thompson
Dodd	Leahy	Torricelli
Dorgan	Levin	Warner
Durbin	Lieberman	Wellstone
Edwards	Lincoln	Wyden
Feingold	Lugar	
Feinstein	Mack	

NAYS—34

Abraham	Enzi	McConnell
Allard	Gorton	Murkowski
Ashcroft	Gramm	Nickles
Bond	Grams	Roberts
Brownback	Grassley	Sessions
Bunning	Gregg	Shelby
Cochran	Hagel	Smith (NH)
Coverdell	Helms	Thomas
Craig	Hutchinson	Thurmond
Crapo	Hutchison	Voinovich
DeWine	Inhofe	
Domenici	Lott	

NOT VOTING—2

Campbell	McCain

The nomination was confirmed.

Mr. LEAHY. Mr. President, I move to reconsider the vote.

Mrs. BOXER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER (Mr. FITZGERALD). The question is on agreeing to the motion to indefinitely postpone. The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Arizona (Mr. MCCAIN) and the Senator from Colorado (Mr. CAMPBELL) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 31, nays 67, as follows:

[Rollcall Vote No. 39 Ex.]

YEAS—31

Allard	Frist	Murkowski
Ashcroft	Gramm	Nickles
Bond	Grams	Santorum
Brownback	Grassley	Sessions
Burns	Gregg	Shelby
Cochran	Helms	Smith (NH)
Coverdell	Hutchinson	Thomas
Craig	Inhofe	Thurmond
Crapo	Kyl	Warner
DeWine	Lott	
Fitzgerald	McConnell	

NAYS—67

Abraham	Feingold	Mack
Akaka	Feinstein	Mikulski
Baucus	Gorton	Moynihan
Bayh	Graham	Murray
Bennett	Hagel	Reed
Biden	Harkin	Reid
Bingaman	Hatch	Robb
Boxer	Hollings	Roberts
Breaux	Hutchison	Rockefeller
Bryan	Inouye	Roth
Bunning	Jeffords	Sarbanes
Byrd	Johnson	Schumer
Chafee, L.	Kennedy	Smith (OR)
Cleland	Kerrey	Snowe
Collins	Kerry	Specter
Conrad	Kohl	Stevens
Daschle	Landrieu	Thompson
Dodd	Lautenberg	Torricelli
Domenici	Leahy	Voinovich
Dorgan	Levin	Wellstone
Durbin	Lieberman	Wyden
Edwards	Lincoln	
Enzi	Lugar	

NOT VOTING—2

Campbell	McCain

The motion was rejected.

Mr. LEAHY. Mr. President, I move to reconsider the vote.

Mr. HATCH. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SESSIONS. Mr. President, I ask for the yeas and nays on the Paez nomination.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Richard A. Paez, of California, to be United States Circuit Judge for the Ninth Circuit? The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Colorado (Mr. CAMPBELL) and the Senator from Arizona (Mr. MCCAIN) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced, yeas 59, nays 39, as follows:

[Rollcall Vote No. 40 Ex.]

YEAS—59

Akaka	Dodd	Kennedy
Baucus	Domenici	Kerrey
Bayh	Dorgan	Kerry
Bennett	Durbin	Kohl
Biden	Edwards	Landrieu
Bingaman	Feingold	Lautenberg
Boxer	Feinstein	Leahy
Breaux	Gorton	Levin
Bryan	Graham	Lieberman
Byrd	Harkin	Lincoln
Chafee, L.	Hatch	Lugar
Cleland	Hollings	Mack
Collins	Inouye	Mikulski
Conrad	Jeffords	Moynihan
Daschle	Johnson	Murray
Reed	Sarbanes	Stevens
Reid	Schumer	Torricelli
Robb	Smith (OR)	Wellstone
Rockefeller	Snowe	Wyden
Roth	Specter	

NAYS—39

Abraham	Fitzgerald	McConnell
Allard	Frist	Murkowski
Ashcroft	Gramm	Nickles
Bond	Grams	Roberts
Brownback	Grassley	Santorum
Bunning	Gregg	Sessions
Burns	Hagel	Shelby
Cochran	Helms	Smith (NH)
Coverdell	Hutchinson	Thomas
Craig	Hutchison	Thompson
Crapo	Inhofe	Thurmond
DeWine	Kyl	Voinovich
Enzi	Lott	Warner

NOT VOTING—2

Campbell	McCain

The nomination was confirmed.

Mr. LEAHY. Mr. President, I move to reconsider the vote.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I am glad the Senate has done the right thing. Maybe we should say in this Lenten season that Judge Paez has now moved out of purgatory into the reward he justly deserves. The Senate has done the right thing today but did the wrong thing for 4 years in holding this good jurist hostage. Marsha Berzon, another nominee who I predict will be a stellar judge, was held far too long.

I thank my colleagues who voted to right this injustice and voted for both of them. I thank those who worked hard to bring this on to the floor for a vote.

Also, just a footnote, the Senate did the right thing in its second vote in rejecting the cockamamy idea of having a motion to suspend indefinitely a judicial nominee following a cloture vote. That may sound like inside baseball, but that would have been a terrible precedent. I applaud the distinguished Democratic leader for speaking out so strongly against that motion, and I compliment the chairman of our Senate Judiciary Committee, Senator HATCH, for sticking with these nominees, both of whom passed our committee.

We have done the right thing. We have righted a wrong of 4 years. I think now the Senate should go on, set aside partisanship, and let us look at those nominees who are still pending.

I yield the floor.

LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate will now resume legislative session.

The Senator from West Virginia.

ENDING THE DELAY ON JUVENILE JUSTICE LEGISLATION

Mr. BYRD. Mr. President, is it any wonder why the approval ratings of the Congress go up every time we go into