Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Opening Statement of Senator Patrick Leahy
Ranking Democratic Member
Business Meeting of the Committee on the Judiciary
June 17, 2004

For more than a year I have sought answers from the Department of Justice, the FBI, the CIA, and the Department of Defense regarding reported and, in some instances, documented, cases of the abuse of prisoners in U.S. custody.

Contrary to the statements of some Administration officials, the photographs and reports that have emerged of prisoner abuse in Iraq depict an interrogation and detention system operating contrary to U.S. law and the Geneva Conventions. And now we know such acts are not limited to Iraq, but have been reported in Afghanistan and Guantanamo Bay.

Despite my prodding and the requests of others, we have received virtually nothing from the Administration. And what we did receive were self-serving conclusions and statements of policy that were clearly not followed. For example, the Defense Department's General Counsel wrote to me in June 2003 that the United States would adhere to our commitments under the Torture Convention. The President reiterated this policy. But we have since learned, mainly from press reports, that these policies were subverted by the very Administration that espoused them.

Some of the documents that we seek have been posted on the Internet in draft or redacted form. But even with these daily disclosures, the Justice Department refuses to give us -- the Senate oversight Committee -- the documents.

Last week, several members of this Committee asked the Attorney General to turn over the memoranda that appear to have formed the backdrop for these abusive policies. He refused. To make matters worse, he failed to provide a legitimate reason for his refusal. By the end of the hearing he seemed to challenge us to subpoena these documents.

On Tuesday night, all of the Democratic Members of the Committee reiterated these requests in a formal submission to the Attorney General. Some of us have been reaching out across the aisle on these important matters, which should not be partisan. We should be moving forward collectively. The Chairman knows that these matters are of the utmost importance to us. I had hoped that before today or this morning we would hear how we were proceeding together to get to the bottom of all the questions that face us. We need to know the role of the Justice Department and the lawyers at the White House in reinterpreting the law and our treaty

obligations, and we need to know who had decided to justify and excuse prisoner abuse and even torture.

Some of us tried very hard to obtain detailed information from Jay Bybee and William Haynes, but the Administration did not cooperate. We received no support from the Republican side. I have also tried for over a year to obtain all the post-September 11 Office of Legal Counsel memos. The Attorney General refused to make them available. He has refused us even an index of what documents he is withholding.

We may have been able to avert this national disaster if we had worked together on these requests and gotten some cooperation from the Ashcroft Justice Department. We should not let another day or another meeting go by without facing up to our responsibilities as the Senate oversight Committee to get to the bottom of what happened, who was involved and what needs to be fixed.

We need to begin the process of restoring our government's credibility on these matters here and throughout the world. Secretary Ridge acknowledged in our subsequent hearing last week that the scenes of prisoner abuse have served as recruiting tools for those who wish to foment anti-Americanism and terrorism. Secretary Rumsfeld recently spoke to an international conference in Singapore about the troubling unknown of whether the extremists are minting newly recruited terrorists faster than the United States can capture or kill them. He said, "It's quite clear to me that we do not have a coherent approach to this." When Secretary Rumsfeld testified before the Appropriations Committee about the prison abuses he rested his defense on having had the interrogation methods approved by the lawyers. Well, we need to know what license those lawyers provided and why they went about redefining legal and international obligations in ways that have contributed to exposing Americans around the world to greater dangers.

The President has said we need to get to the bottom of this scandal. But how can we get to the bottom of it when there is stonewalling at the top?

I hope that we can all work together in a bipartisan manner to get to the bottom of these urgent matters. We should start by obtaining the underlying documents from the Justice Department. I had hoped the Attorney General would cooperate with us, but unless he is willing to reverse his position from that which he took at last week's hearing, that is not going to happen. He has pretentiously snubbed the Senate and this Committee yet again. He is demanding that the Committee formally demand the materials.

We have conducted successful bipartisan inquiries in the past and can do so now. The Ruby Ridge investigation, in which many of us participated under the leadership of Sen. Specter and Sen. Kohl, has been viewed as a model of cooperation. When we needed to issue subpoenas we did, and we worked together. This is too important to our Nation and to Americans all around the world to let it slide and just trust this Executive Branch to investigate itself. We need to perform our fundamental oversight responsibilities and we all know it. I implore all Senators to work with us in good faith to get to the bottom of this.

I have asked staff to circulate materials that could serve as a Committee demand for those documents. We have listed memoranda that we have read about in published reports but that the

Department of Justice has not provided to us. I emphasize that we are not asking for documents that are being generated as a part of any ongoing law enforcement investigation, such as the newly launched investigations into the deaths of prisoners overseas. We are asking for historical documents. Indeed, a White House spokesperson noted last week that a key Justice Department memoranda, that was dated August 2002, was not prepared to offer advice but was "analytical" in the nature of a survey and scholarly treatise. We do not intend to jeopardize law enforcement investigations of wrongdoing and will work with the Justice Department to ensure that we do not. But we need to do our job.

Just a few years ago, in 1999, the Chairman sought documents on presidential grants of clemency, a particularly and exclusively Executive Branch function in accordance with our Constitution. When his requests were initially resisted he responded by saying: "[T]his is unacceptable ... It belittles oversight functions that are so indispensable to our system of checks and balances. What is fundamentally at stake here, in my view, is the responsibility of the Department of Justice to respect this committee's oversight functions, whether it be run by Democrats or Republicans." Senator Hatch continued: "I would think, should the Democrats take control of the committee, you would want me to support you if this was a Republican administration, and I can tell you I would support you because I think it is the right thing to do." I hope that he will support us today. The right thing to do is for this Committee to do its job. To be effective, we need the documents and information. To get them we need to join together to seek them from the Ashcroft Justice Department.

These memos and the policies they lay out could not be more important. They have subjected our Nation to criticism around the globe and created circumstances that placed our soldiers and our citizens overseas in even greater danger. Our enemies have already cited the abuses at Abu Ghraib as justification for harming Americans.

Getting to the heart of these issues -- including a careful review of the memos -- is our job; no other Committee of Congress is doing this work. We need to understand what the Attorney General knew and approved and what the President knew and approved. As Senator Sessions said just a few years ago: "The President is not free to act in a corrupt, underhanded, or secretive manner, nor is he free to take actions that have significant impact on our national security and not be called on, pursuant to congressional oversight authority, to explain his purposes and to produce documents and evidence that he relied upon to make the decision."

The President and others in his Administration have pledged to cooperate in finding the facts and making government officials accountable for this scandal. That cannot be done if Attorney General Ashcroft now draws a line in the sand that keeps vital information from the Senate and from this Committee. Hiding these documents from view is the brazen sign of a cover-up, not of cooperation.

I urge all members of this Committee to join in bipartisan action by way of a subpoena to the Justice Department to obtain these documents without further delay.

Statement of Senator Patrick Leahy
On Satellite Home Viewer Extension Act of 2004
Senate Committee on the Judiciary
Executive Committee Meeting
June 17, 2004

Mr. Chairman, the satellite bill before us today is an example of the achievements we can make when we work together. This bill is great for the industry, for television consumers and for programming owners. It protects subscribers in every state, expands viewing choices for most dish owners, promotes access to local programming, and increases direct, head-to-head, competition between cable and satellite providers.

Easily, this bill will benefit 21 million satellite television dish owners throughout the nation, and I am happy to note that over 85,000 of those subscribers are in Vermont.

I want to thank Chairman Hatch, along with Senators Kohl and DeWine for providing such strong leadership in this effort. In 1998 and 1999 we developed a major satellite law which transformed the industry by allowing local television stations to be carried by satellite and beamed back down to the local communities served by those stations. This marked the first time that thousands of TV owners were able to get the full complement of local network stations. In 1997 we found a way to avoid cutoffs of satellite TV service to millions of homes and to protect the local affiliate broadcast system. The following year we forged an alliance behind a strong satellite bill to permit local stations to be offered by satellite, thus increasing competition between cable and satellite providers.

We also worked with the Public Broadcasting System so they could offer a national feed as they transitioned to having their local programming beamed up to satellites and then beamed back down to much larger, new audiences.

Because of those efforts, today, in Vermont and most other states dish owners can watch their local stations instead of getting signals from distant stations. Such a service allows television watchers to be more easily connected to their communities as well as providing them access to necessary emergency signals, news and broadcasts.

A Careful Balance of Interests

This bill provides a careful balancing of interests. I am pleased that it includes a provision which complements a provision in the House Judiciary Committee's bill. That House provision provides that WMUR, an ABC affiliate, will be available via satellite throughout New Hampshire. I know that this is strongly supported by Senators Gregg and Sununu.

That represents good policy for New Hampshire residents in the northern counties who do not now receive signals from WMUR via satellite. They have been shut out of receiving news about New Hampshire political and social events.

However, that provision would mean that an ABC-affiliated Vermont television station would likely lose viewers in two, of those four New Hampshire counties, which that Vermont station is

now authorized to serve. It could also mean that other Vermont stations would lose viewers to WMUR in two New Hampshire counties and one Vermont county. Working with Chairman Hatch and the New Hampshire Senators, I crafted a provision that benefits viewers in both Vermont and New Hampshire. Under my provision, Vermont stations will be available via satellite for the first time in Vermont's two southern-most counties. The signals of Vermont's ABC affiliate will directly compete with WMUR in Windham County in Vermont - that will provide balance to the fact that under this substitute WMUR will compete with Vermont stations which now serve New Hampshire. Indeed, one of those New Hampshire counties has a large population.

Viewers in both states will simply choose whether they want to watch WMUR, from Manchester, or watch WVNY or one of the other Vermont stations. For the first time, these residents in both states will be able to receive home-state news and programming via satellite.

Long-Awaited Service For Bennington And Windham Counties

Under this new language, all Vermont broadcast stations will be available in those two counties. For too long, Bennington and Windham Counties have not been able to receive television news about what is happening in Vermont. Because of Vermont's alpine topography, with many towns in the saddles of our mountains, thousands of Vermonters did not receive Vermont television stations over the air. This new provision solves that problem.

I want to make a point about what dish owners will have to pay for these new options. I have been working to assure more competition between cable and satellite television providers to keep consumer costs down. There is nothing in this substitute language which would require any increase in rates to consumers. Indeed, competition with cable, and between DirecTV and EchoStar, could reduce rates.

Under the substitute, the U.S. Copyright office is required to determine the "fair market value" of the programming made available via satellite. They would then determine the royalties which the satellite carriers, not home dish owners, would pay for the programs. Note that the royalties set by the copyright office are a small fraction of what the satellite carriers actually charge consumers for out-of-state network broadcast stations.

Also, current law requires that no royalties, whatsoever, be charged for offering local TV stations to satellite dish owners. Yet both satellite carriers, EchoStar and DirecTV, charge dish owners about $6, or so per month for this programming, which they receive for free. Satellite carriers will have no sound excuse to increase rates under this approach.

I want to make one final point regarding those households who were permitted to continue to receive distant network broadcast signals via satellite while they also received competing local signals from the same network. I know one Senator wants to have some termination of this "dual" service at some fixed date. I will certainly work with that Senator and others on this issue of promoting localism in network broadcasting.

I received a great deal of input from Vermont on this effort. Many state Senators and Representatives from Bennington and Windham counties encouraged me to include the provision

allowing all Vermont stations to be offered via satellite in those southern counties. The Vermont General Assembly also enacted a resolution supporting that provision.

I heard testimony from John King of Vermont Public Television at a hearing before the Judiciary Committee on those same issues. In addition, my staff provided drafts and met with representatives of every full-power television station in Vermont. They also met with representatives of Adelphia Cable, Vermont's largest cable provider, and other providers.

The staff of each Member of this Committee was involved in this year's effort and their work was much appreciated. I would like to note in particular the careful work of David Jones from the majority staff. The U.S. Copyright Office, especially Bill Roberts, did another great job assisting us. Eloise Gore of the FCC provided very helpful guidance.

I hope that the Congress acts swiftly on this important legislation.

Statement of Senator Patrick Leahy
Senate Judiciary Committee
Executive Business Meeting
The Saad Nomination
June 17, 2004

A Republican Double Standard

A vote on the nomination of Henry Saad today will set a precedent in this Committee, and will be long remembered in the annals of the Senate and of our Committee for the double standard it embodies. In collusion with a White House of the same party, the Senate's Republicans have engaged in a series of changed practices and broken rules on this Committee. The White House and some in the Senate have even suggested changing the Senate's rules to consolidate the White House's control over the judicial nominations process. Over the last three and one-half years, the good faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous six years has been met with nothing but divisive partisanship.

Today is the first time that our Chairman will proceed to a Committee vote on a judicial nominee with two negative blue slips returned to the Committee. I believe this nomination evidenced the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It is certainly the only time in the last 50 years, and I know it to be the only time during my 29 years in the Senate.

When Chairman Hatch chaired this Committee and we were considering the nominations of a Democratic President, one unreturned blue slip, let alone a negative blue slip from one home-state Senator, was enough to doom a nomination and prevent a hearing on that nomination. Indeed, among the more than 60 Clinton judicial nominees who this Committee did not consider there were several who were blocked in spite of the positive blue slips from both home-state Senators. So long as one Republican Senator had an objection, it appeared to be honored,

whether that was Senator Helms of North Carolina objecting to an African-American nominee from Virginia, or Senator Gorton of Washington objecting to nominees from California.

Last year this Committee, under this Chairman, took the unprecedented action of proceeding to a hearing on President Bush's controversial nomination of Carolyn Kuhl to the Ninth Circuit, over the objection of Senator Boxer. When the senior Senator from California announced her opposition to the nomination at the beginning of a Judiciary business meeting, I suggested to the Chairman that further proceedings on that nomination ought to be carefully considered and noted that he had never proceeded on a nomination opposed by both home-state Senators once their opposition was known. Nonetheless, in one in a continuing series of changes of practice and position, this Committee was required to proceed with the Kuhl nomination, and a divisive vote was the result. The Senate has withheld consent to that nomination after extended debate.

Now this Committee is making a further profound change in its practices. When a Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home-state Senator stalled any nomination. The Chairman cannot cite a single example of a single time that he went forward with a hearing over the objection or negative blue slip of a single Republican home-state Senator during the years that President Clinton was the nominating authority. But now that a Republican President is doing the nominating, no amount of objecting by Democratic Senators is sufficient. The Chairman overrode the objection of one home-state Senator with the Kuhl nomination. The Chairman outdoes himself today by overriding the objections of both home-state Senators and going forward with this nomination.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two conflicting policies the Chairman has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways -- some to work unfairness, and others to attempt to remedy it -- it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now.

Partisanship Patterns

The double standards that the Republican majority has adopted obviously depend upon the occupant of the White House. This change in practice marks another example of their disregard for the rules and practices of this Committee. The Republican majority has already abandoned our historic practice of bipartisan investigation as in the Pryor nomination, and the majority has abandoned the meaning and consistent practice of protecting minority rights through a longstanding Committee rule, Rule 4, that required a member of the minority to vote to cut off debate in order to bring a matter to a vote in several other instances. The Committee took another giant step in the direction of unbridled partisanship through Judge Saad's hearing. During these years we have suffered through the scandal of the theft of staff memoranda and files from the Judiciary computer by Republican staff, a matter which is now under criminal investigation by the Department of Justice. It is all part of a pattern that has included bending, changing and even breaking this Committee's rules to gain partisan advantage and to stiffen the White House's influence over the Senate. At the White House's urging, some have even sought to change the Senate's own rules. Republican partisans will apparently stop at nothing in their efforts to aid and abet this White House in the efforts to politicize the federal judiciary.

Both of the Senators from Michigan are respected Members of the Senate. Both are fair-minded. Both are committed to solving the problems caused by Republican high-handedness in blocking earlier nominees to the Sixth Circuit. Both of these home-state Senators have attempted to work with the White House to offer their advice, but their input was rejected. They have suggested ways to end the impasse on judicial nominations for Michigan, including a bipartisan commission along the lines of a similar commission in Wisconsin. This is a good idea and a fair idea. I am familiar with the work of bipartisan screening commissions. Vermont and its Republican, Democratic and Independent Senators had used such a commission for more than 25 years with great success. I commend the Senators representing Michigan for their constructive suggestion and for their good faith efforts to work with this White House in spite of the Administration's refusal to work with them.

Some Senators in this Committee have said we need to forget the unfairness of the past on nominations and start on a clean slate. But the way to wipe that slate clean is through cooperation now, and moving forward together -- not with the petulant, partisan unilateralism that we have seen so often from this Administration.

Although President Bush promised on the campaign trail to be a uniter and not a divider, his practice once in office with respect to judicial nominees has been more divisive than those of any president any of us have served with. Citing the remarks of a White House official, The Lansing State Journal reported, for example, that the President is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that the White House is not willing to work toward consensus with all Senators.

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founding Fathers established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will has written, "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, the Republican majority is not acting in a measured way but in disregard for the traditions of bipartisanship that are the hallmark of the Senate.

Republican White House, Different Rules

When there was a Democratic President in the White House, circuit court nominees were delayed and deferred, and vacancies on the Courts of Appeals more than doubled under Republican leadership from 16 in January 1995, to 33 when the Democratic majority took over part way through 2001.

Under Democratic leadership, we held hearings on 20 circuit court nominees in 17 months. Indeed, while Republicans averaged seven confirmations to the circuit courts every 12 months for the last President, the Senate under Democratic leadership confirmed 17 in its 17 months with an historically uncooperative White House.

With a Republican in the White House, the Republican majority shifted from the restrained pace it had said was required for Clinton nominees, into overdrive for the most controversial of President Bush's nominees. In 2003 alone, 13 circuit court judges were confirmed. This year we held more hearings have been held for nominees in just five months than were held in all of 1996 or all of 2000. One hundred and eighty-six of President Bush's nominees have been confirmed so far - more than in all four years of President Reagan's first term, when he had a Republican Senate to work with. When a Democratic President was seeking re-election in 1996, the Republican Senate majority did not allow a single circuit court nominee to be confirmed the entire 1996 session -- not one.

Without going through a lengthy discussion of blue slips and practices and policies let me illustrate the Republican double standards by noting the distinctive blue slips used by the Chairman with a Democratic President, and then with a Republican President. These pieces of blue paper are what the Chairman uses to solicit the opinions of home-state Senators about the President's nominees. Simply stated, the blue slip practice is the enforcement mechanism for the consultation that the Constitution intends and requires. When President Clinton was in office, the Chairman's blue slip sent to Senators, asking their consent, said this:

"Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators."

When President Bush began his term, and Senator Hatch took over the chairmanship of this Committee, he changed his blue slip to drop the assurance he had always provided Republican Senators who had an objection. He eliminated the statement of his consistent practice in the past by striking the sentence that provided: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." Of course what that had meant in practice in the years 1995-2000 was that no hearings would take place on a judicial nominee unless and until both home-state Senators returned blue slips indicating that they did not object to proceeding with a hearing on the nominee.

Confirmation Amnesia

I know Republican partisans hate being reminded of the double standards by which they operated when asked to consider so many of President Clinton's nominees. I know that they would rather exist in a state of "confirmation amnesia," but that is not fair and that is not right. The blue slip policy in effect, and enforced strictly, by the Chairman during the Clinton Administration operated as an absolute bar to the consideration of any nominee to any court unless both home-state Senators had returned positive blue slips. No time limit was set and no reason had to be articulated.

Remember also that before I became Chairman in June of 2001, all of these decisions were being made in secret. Blue slips were not public, and they were allowed to operate as anonymous holds on otherwise qualified nominees.

A few examples of the operation of the blue slip process and how it was scrupulously honored by the Committee during the Clinton Presidency are worth remembering. Remember, in the 106th

Congress alone, more than half of President Clinton=s circuit court nominees were defeated through the operation of the blue slip or other such partisan obstruction.

Perhaps the most vivid is the story of the United States Court of Appeals for the Fourth Circuit, where Senator Helms was permitted by this Committee to resist President Clinton's nominees for six years. Judge James Beaty was first nominated to the Fourth Circuit from North Carolina by President Clinton in 1995, but no action was taken on his nomination in 1995, 1996, 1997, or 1998. Another Fourth Circuit nominee from North Carolina, Rich Leonard, was nominated in 1995, but no action was taken on his nomination either, in 1995 or 1996. The nomination of Judge James Wynn, again a North Carolina nominee to the Fourth Circuit, sent to the Senate by President Clinton in 1999, languished without action in 1999, 2000, and early 2001 until President Bush withdrew his nomination.

A similar tale exists in connection with the Fifth Circuit where Enrique Moreno, Jorge Rangel and Alston Johnson were nominated but never given confirmation hearings.

Perhaps the best documented abuses are those that stopped the nominations of Judge Helene White, Kathleen McCree Lewis and Professor Kent Markus to the Sixth Circuit. Judge White and Ms. Lewis were themselves Michigan nominees. Republicans in the Senate prevented consideration of any of President Clinton's nominees to the Sixth Circuit for years. When I became Chairman in 2001, I ended that impasse. The vacancies that once plagued the Sixth Circuit have been cut in half. Where Republican obstruction led to eight vacancies on that 16-judge court, Democratic cooperation allowed four of those vacancies to be filled. The Sixth Circuit currently has more judges and fewer vacancies than it has had in years.

Those of us who were involved in this process in the years 1995-2000 know that the Clinton White House bent over backwards to work with Republican Senators and seek their advice on appointments to both circuit and district court vacancies. There were many times when the White House made nominations at the direct suggestion of Republican Senators, and there are judges sitting today on the Ninth Circuit and the Fourth Circuit, in the district courts in Arizona, Utah, Mississippi, and many other places only because the recommendations and demands of Republicans Senators were honored.

In contrast, since the beginning of its time in the White House, this Bush Administration has sought to overturn traditions of bipartisan nominating commissions and to run roughshod over the advice of Democratic Senators. They attempted to change the exemplary systems in Wisconsin, Washington, and Florida that had worked so well for so many years. They ignored the protests of Senators like Senator Boxer who not only objected to the nominee proposed by the White House, but who, in an attempt to reach a true compromise, also suggested Republican alternatives. And today, despite the best efforts of the well-respected Senators from Michigan, who have proposed a bipartisan commission similar to their sister state of Wisconsin, we see the Administration has flatly rejected any sort of compromise.

Record of Consensus Confirmations

Many of the 186 nominees who have been confirmed for this President have proceeded by consensus out of Committee and on the Senate Floor. I would have hoped that the scores of

nominees agreed upon by home-state Senators of both parties, voted out of Committee unanimously and confirmed without opposition in the full Senate would have been enough of a lesson for the President. I would have hoped that the Michigan Senators' principled and reasoned opposition to the way the Sixth Circuit nominations have occurred would have been a starting point from which to reach a compromise. But, as with so many other nominees and so many other issues, compromise was not forthcoming from this White House. Instead, they have refused to acknowledge the wrong done to President Clinton's nominees to the very same Court, and they have refused to budge. It is a shame.

When the Committee reports this nomination, we will have reported more than 200 of President Bush's judicial nominees. As I said, most have been reported with unanimous support by Democrats and Republicans. Some have been contentious and some have been so extreme that they have not garnered bipartisan support and have been problematic. We have demonstrated time and again that when we unite and work together we make progress. Republicans have too often chosen, instead, to seek to pack the courts and tilt them out of balance and to use unfounded allegations of prejudice to drive wedges among Americans for partisan political purposes.

We have more federal judges currently serving than at any time in our nation's history and we have succeeded in reducing judicial vacancies to the lowest level in 14 years. Even Alberto Gonzales, the White House Counsel, conceded recently that: "If you look at the total numbers, I think one could draw the conclusion that we've been fairly successful in having a lot of the president's nominees confirmed." The Republican leader in the Senate has termed our efforts "steady progress." The White House would be even more successful if they would work with us to resolve this situation in the Sixth Circuit.

An Invitation For Confrontation

That Chairman Hatch has carried this matter over for so many months, so many times is indicative of how divisive it will be. When I was chair he insisted that any matter or nominee carried over for a week was entitled to and must necessarily receive a vote the next week. That was never our rule of course and his practice here belies it. What was troubling in this case was that he proceeded over the objection of both home-state Senators.

His decision to proceed to a vote today is even more deeply troubling. It portends more conflict in the days and weeks ahead. Far from achieving a truce and more progress in filling judicial vacancies it appears that Republican partisans are demanding more confrontation. That is regrettable.

Senate Democrats had demonstrated our good faith in confirming 100 of President Bush's judicial nominees in our 17 months in the majority. We have now cooperated in the confirmation of more judicial nominees for President Bush than President Reagan achieved working hand in hand with a Republican Senate majority. We have already confirmed more judges this Congress than were confirmed before the presidential elections in 1996 or 2000. We are proceeding in accord with the agreement reached with the White House last month to consider and possibly confirm as many as 198 judicial nominees. We have demonstrated not only our willingness to cooperate but we have done so to achieve historic confirmation numbers and historically low

numbers of judicial vacancies. I have come to recognize that no good deed we do in correcting the Republican abuses of the past goes unpunished.

Another Troubling Nominee

Unfortunately, this President has also chosen to nominate for some important circuit court seats some candidates who on their merits are not deserving of lifetime appointments. It appears that Judge Saad is one of those nominees. Clearly the Senators from Michigan have grave concerns.

I also have concerns about the nominee, his legal judgment, and his ability to be fair. While Judge Saad was an attorney his practice primarily consisted of defending large corporations against employees' claims of race discrimination, age discrimination, sexual harassment and wrongful termination. A review of Judge Saad's cases on the Michigan Court of Appeals raises concerns because he frequently favored employers in complaints brought by workers, even in the face of extremely sympathetic facts.

For example, in Cocke v. Trecorp Enterprises, a young Burger King employee was aggressively and repeatedly sexually harassed and assaulted by her shift manager. More than once, she reported this treatment to her other shift managers who promised to take care of it. The trial court prevented her case from going to the jury but Judge Saad dissented from an appellate decision reversing the trial court. Judge Saad ignored the legal standard of review followed by the majority and would have protected the corporation from responsibility for the shift manager's notorious and unlawful behavior.

Also, in Coleman v. Michigan, a female corrections officer brought a sexual harassment suit against her employer, the State of Michigan. This officer was assaulted and nearly raped by an armed prisoner. According to the officer's complaint, after this terrible attack, her supervisor insinuated that she provoked the attack because of her attire. The supervisor made the officer come to his office on a regular basis to check the appropriateness of her clothing and he frequently called her to discuss personal matters, such as her relationship with her boyfriend. Despite these serious allegations, the trial court granted summary disposition in favor of the state of Michigan. Judge Saad joined in the Michigan Court of Appeals' per curiam opinion affirming the trial court's grant of summary disposition. The corrections officer appealed his decision to the Michigan Supreme Court, which reversed and held that her claims constituted sufficient evidence to go to trial.

In another case, Fuller v. McPherson Hospital, a jury who heard live testimony was persuaded to conclude that a woman had endured sexual harassment from her immediate supervisor and other superiors. The trial court vacated the jury findings because it found that the plaintiff had not complained of the harassment while working at the hospital. On appeal, the panel reinstated the jury's finding of sexual harassment but Judge Saad dissented. Unfortunately, his dissent in this case was only two sentences and failed to address his colleagues' legal conclusions.

An Intemperate Response

I cannot speak in open session about all concerns but I can note a temperament problem, as evidenced by an email he sent, a copy of which he mistakenly sent to Senator Stabenow as well.

In Judge Saad's email he displays not only shockingly bad manners, but appalling judgment and a possible threatening nature.

In the email exchange, Judge Saad is writing to someone named Joe, forwarding him a copy of another email sent by Senator Stabenow in response to a letter of support for Saad's nomination. In her response Senator Stabenow politely and reasonably explains the basis for her continuing objection to the nomination, explaining that she understands the writer's "concerns and frustrations," thanking them, and offering her help in the future. Apparently this type of honest disagreement with a constituent and courteous explanation was too much for Judge Saad. Here is what he wrote in response to the Senator's explanation:

She sends this standard response to all those who inquire about this subject. We know, of course, that this is the game they play. Pretend to do the right thing while abusing the system and undermining the constitutional process. Perhaps some day she will pay the price for her misconduct.

I know that Senator Stabenow does not need me to defend her, and I doubt that sort of personal threat concerns her, but I think Judge Saad's message deserves examination by this Committee. It shows a shocking lack of good judgment, a pronounced political viewpoint, and a total absence of respect for the process undertaken by Senators of good faith and good will.

As soon as they saw this email message, both Michigan Senators wrote to the President's Counsel, Alberto Gonzales, alerting him to the offensive comments. While I do not believe Judge Gonzales or the President ever responded, two weeks later Judge Saad did get around to sending a "non-apology." He wrote:

I write regarding your and Senator Levin's recent letter to Alberto R. Gonzales, Counsel to the President (a copy of which you sent to me), relating to an e-mail message that I meant to send only to a close personal friend of mine. Unfortunately, this e-mail, which commented on my pending nomination, was inadvertently sent to your office. I regret that the e-mail was sent to you and certainly apologize for any personal concern this may have caused you. I have a great deal of respect for our political institutions and meant no lack of respect to you.

He cannot bring himself to say he is sorry for his words, to apologize for accusing a Senator of abusing the system she so respects, or even for expressing the hope that she would "pay for her conduct." Instead he is sorry that he was caught, and if what he said may have caused Senator Stabenow "personal concern."

Apart from all of the procedural problems with this nomination, I have serious concerns about giving lifetime tenure to someone with this stunning lack of judgment. The people of the Sixth Circuit deserve better than this. And the American people, the independent federal judiciary, the U.S. Senate, and this venerable Committee, all deserve better than the double standard that is now squarely on display for all to see.