impacts of the deficit on such important things as our manufacturing capacity and the integrity of our industrial base, on productivity, jobs and wages in specific sectors.

Throughout the 1980's, my own State of West Virginia literally bled manufacturing jobs. We saw the jobs of hardworking, honest West Virginians in the glass, steel, pottery, shoe manufacturing and leather goods industries—and other so-called smokestack industries—hemorrhage across our borders and shipped overseas. While economic development efforts in my State have commendably encouraged our businesses to refocus to help recover from those losses, the lack of knowledge about the causes and impact of our trade deficit leaves West Virginia, and the nation as a whole, at a disadvantage in the arena of global competition.

We debate the trade deficit from time to time. We moan about it. We complain about it. But, if we do not understand the nature, of the long-term vulnerabilities that such manufacturing imbalances create in our economy and standard of living, we are surely in the dark. It appears to me that debate over trade matters too often takes on the form of rhetorical bombast regarding so-called protectionists versus so-called free traders. This is hardly a debate worthy of the name, given the problems we are facing. It is not an informed debate. We are talking past each other, and in far too general terms. It has been more of an ideological exchange than a real debate, primarily because we have not had sufficient analytical work done on the data bearing on this problem. Neither side knows enough about what is really transpiring in our economy, given the very recent nature of these persistent deficits.

Certainly we know that the deficit reflects on the ability of American business to compete abroad. We want to be competitive. Certainly we know that specific deficits with specific trading partners cause frictions between the United States and our friends and allies. This is particularly the case with the Japanese, and is quickly becoming the case with China. It is clear that the trade deficit has contributed to the depreciation of the dollar and the ability of Americans to afford foreign products. Less clear, but of vital importance, is the relationship of the trade deficit to other important policy questions on the table between the United States and our foreign trading partners.

Attempts by the United States to reduce tariff and nontariff barriers in the Japan and China markets, which clearly restrict access of U.S. goods to those markets, have been crippled by the intervention of other, more important policy goals. During the cold war, the United States-Japan security relationship had a severe dampening effect on our efforts to reduce these myriad barriers in Japan to United States exports. The same effect appears to have resulted from our need for the Japanese to participate in our treasury bill auctions. This becomes a closed cycle—the need to finance the trade deficit with foreign capital, resulting in regular involvement of the Japanese Government in our treasury bill auctions, seems to dampen our efforts to push the Japanese on market-opening arrangements. Naturally, without reciprocal open markets, the trade imbalance remains exaggerated between the United States and Japan, prompting further need for Japanese financial support to fund the national debt. Of course, this is a vicious circle. Thus, some argue that the need for Japanese involvement in financing our national debt hurt the ability of our trade negotiators to get stronger provisions in the dispute settled last year over the Japanese market for auto parts.

Similar considerations appear to prevail in negotiating market access with the Chinese in the area of intellectual property. While our trade negotiator managed a laudable, very specific agreement with the Chinese in 1995 in this area, the Chinese were derelict in implementing it, leading to another high-wire negotiation last year to avoid sanctions on the Chinese, and to get the Chinese to implement the accord as they had promised. Again, it is unclear whether the Chinese will now follow through in a consistent manner with the implementing mechanisms for the intellectual property agreement belatedly agreed to in the latest negotiation. The highly trumpeted mantra about how the U.S.-China relationship will be one of, if not the most important, U.S. bilateral relationship for the next half century, has a chilling effect on insisting on fair, reciprocal treatment, and good faith implementation of agreements signed with the Chinese government.

The Chinese government has again recently reiterated its desire to become a member of the World Trade Organization and certainly her interest in joining that organization is a commendable indication of her willingness to submit to the rules of that organization regarding her trading practices. There is legitimate concern however, that insufficient progress has been made by the Chinese on removing a wide variety of non tariff discriminatory barriers to U.S. goods and services, as she committed to do in the 1992 bilateral Market Access Memorandum of Understanding [MOU]. Indeed, in the 1996 report by the United States Trade Representative entitled foreign trade barriers, the amount of material devoted to the range of such barriers on the part of China is exceeded only by the material on Japan, indicating that we have a continued persistent problem that needs serious attention along these lines.

It will only be when we truly understand the specific impacts of these large deficits on our economy, particularly our industrial and manufacturing base, that the importance of insisting on fair play in the matter of trade will become clear.

Finally, the legislation requires the Commission to examine alternative strategies which we can pursue to achieve the systematic reduction of the deficit, particularly how to retard the migration of our manufacturing base abroad, and the changes that might be needed to our basic trade agreements and practices.

These are the purposes of the Commission that Senator DORGAN and I have proposed in this legislation.

I commend the distinguished Senator from North Dakota for his studious approach to this question. He is as knowledgeable, if not more so, than certainly most other Senators, and perhaps any other Senators, as far as I am concerned, on this subject. I am pleased to join him in offering this proposal for the consideration of the Senate.

I hope that many of our colleagues will join us, and that we can secure passage of the proposal in the near future.

Mr. President, I yield the floor.

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

The PRESIDING OFFICER (Ms. COLLINS). Without objection, it is so ordered.

EXECUTIVE SESSION

NOMINATION OF MERRICK B. GARLAND, OF MARYLAND, TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA

The PRESIDING OFFICER. The Senate will proceed to executive session.

The clerk will report the nomination.

The assistant legislative clerk read the nomination of Merrick B. Garland, of Maryland, to be U.S. circuit judge for the District of Columbia Circuit.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Madam President, before we get to the specific discussion of the merits of Merrick B. Garland, let me make an important point. There have been some suggestions made that this Republican Congress is not moving as rapidly or as well as it should on judges, or at least last year did not move as well or as rapidly as it should have on judges.

With regard to judicial vacancies, the important point I would like to make before getting into factual distortions that are being made about the judiciary confirmation process is this. Federal judges should not be confirmed simply as part of a numbers game to reduce the vacancy rate to a particular level.

While I plan to oversee a fair and principled confirmation process, as I

always have, I want to emphasize that the primary criteria in this process is not how many vacancies need to be filled but whether President Clinton's nominees are qualified to serve on the bench and will not, upon receiving their judicial commission, spend a lifetime career rendering politically motivated, activist decisions. The Senate has an obligation to the American people to thoroughly review the records of the nominees it receives to ensure that they are qualified and capable to serve as Federal judges. Frankly, the need to do that is imperative, and the record of activism demonstrated by so many of President Clinton's nominees calls for all the more vigilance in reviewing his nominees.

So I have no problem with those who want to review these nominees with great specificity. The recent allegations by my colleagues on the other side of the aisle and in the media that there is a Republican stall of judges is nothing short of disingenuous.

The fact is that last Congress under Republican leadership the Federal courts had 65 vacancies—as you see, the Federal courts had 65 vacancies—which is virtually identical to the number of vacancies—63—there were at the end of the previous Congress when the Democrat-controlled Congress was processing Clinton judges.

Historically speaking, this is a very low vacancy rate. In contrast, at the end of the 102d Congress, when Senator BIDEN chaired the Judiciary Committee and President Bush was at the White House, there were 97 vacancies—as you can see, back in the 102d Congress, 97 vacancies—in the Federal system for an 11.46 percent vacancy rate, nearly twice the vacancy rate than at the adjournment of the 104th or last Congress. That rate was, of course, 7.7 percent at that time.

The vacancies have risen since the end of Congress so that there are now 95 vacancies, or a vacancy rate of just over 11 percent. But a little perspective reveals that this is by no means a high level for the beginning of a Congress. In fact, it is far lower than the vacancy rates at the beginning of Democrat-controlled Congresses, like the 102d when the vacancy rate at the beginning of that Congress was 14.89 percent, and the 103d Congress at 12.88 percent. In the 104th, it was down to 8.27 and now it is 10.07.

Moreover, we just reported two judges out of the committee this past Thursday—Merrick Garland for the DC circuit and Colleen Kollar-Kotelly for the DC district court. We had a hearing on four judicial nominees just yesterday. I hope that will put to rest any of the partisan allegations that have been seen deployed about delaying tactics to hold up nominees.

In fact, this is the most prompt reporting of judges to the floor in recent Congresses. When the Senate was under the control of the other party, the first hearing on judicial nominees in the new Congress was typically not held until mid-March or April and candidates were not reported to the floor until after these hearings.

In the 100th Congress, the first hearing was not held until March 4, 1987. In the 101st Congress, the first judges hearing was not held until April 5, 1989. And in the 102d Congress, when there was a vacancy rate of 15 percent in the courts, the first hearing was not held until March 13, 1991.

So I think some of the arguments made against what we have been doing are just fallacious and I think done for partisan reasons. We ought to get rid of the partisanship when it comes to judges and go ahead and do what is right. I have tried to do that.

Now let us talk about the number of judges confirmed last year. Democrats have been critical of the fact that only 17 judges were confirmed last year. The fact is that President Clinton had already had so many judges confirmed that he only nominated 21 judges last year. During President Clinton's first term, he had 202 judges confirmed—more than President Bush, 194; President Reagan, 164 in his first term; President Ford, 65 in his term. I might say that as a result there were very few vacancies to fill at the end of the 104th Congress, and the courts were virtually at full capacity.

In fact, at the close of the last Congress, there were only 65 vacancies in the entire system, which is a vacancy rate of 7.7 percent. In fact, the number of vacancies under my chairmanship at the close of the 104th Congress, 65 vacancies—when a Republican Senate was processing Clinton's nominees—was virtually identical to the number of vacancies at the end of the 103d Congress, 63, when a Democrat-controlled Senate was processing President Clinton's nominees. At that point the Department of Justice proclaimed that they had nearly reached full employment in the 837-member Federal judiciary. That is in an October 12, 1994, Department of Justice press release.

When the Democrats left open 7.44 percent of Federal judgeships after President Clinton's first 2 years, we had approached ''full employment'' of the Federal judiciary. But, when Republicans are in control, a virtually identical vacancy level becomes an ''unprecedented situation,'' the ''worst kind of politicizing of the Federal judiciary.'' Those are comments that were made by my friend, Senator LEAHY. And ''partisan tactics by Senate Republicans,'' according to the New York Times. This is nothing short of disingenuous.

In contrast, at the end of the 102d Congress when Senator BIDEN chaired the Judiciary Committee and President Bush was in the White House, there were 97 vacancies in the Federal system for an 11.46 percent vacancy rate—nearly twice the vacancy rate than at adjournment of the 104th Congress, which was 65 vacancies at a 7.7 percent vacancy rate.

What about the judges who were left unconfirmed at the end of last August?

It is true, 28 nominees did not get confirmed last Congress. There is no use kidding about it. We had 28 who did not make it through. But this was at a point where there were only 65 vacancies in the court, or, in other words, a full Federal judiciary. There is some extra consideration here. Compare this to the end of the 102d Congress when, notwithstanding 97 vacancies in the Federal system, the Democratic Senate left 55 Bush nominees unconfirmed.

Let us talk about the present vacancies. Due to an unprecedented number of retirements since Congress adjourned, there are currently 95 vacancies in our Federal system or a vacancy rate of 11.25 percent as of March 1 of this year. That is the most recent report from the Administrative Office of the Courts. Notice that when the 105th Congress convened on January 7, 1997, there were 85 vacancies, or a 10.7 percent vacancy rate. But a little perspective reveals that this is by no means a high level for the beginning of the Congress. In fact, it is lower than the vacancy rates at the beginning of the Democratically controlled 102d and 103d Congresses, where the vacancy rates were 126 vacancies in the 102d, at a 14.89 percent vacancy rate, with 109 vacancies in the 103d, for a 12.88 vacancy rate.

So, there is little or no reason to be this critical or this irritated with what has gone on. I pledge to the Senate to do the very best that I can to try to confirm President Clinton's judges, if they are not superlegislators, if they are people who will uphold the law and interpret the law and the laws made by those who are elected to make them. Judges have no reason on Earth to be making laws from the bench or to act as superlegislators from the bench and to overrule the will of the majority of the people in this country when the laws are very explicitly written—or at any other time, I might add.

Having said all that, we are bringing our first two nominees this year to the floor, one of whom is in contention. I think unjustifiably so.

Madam President, I rise to speak on behalf of the nomination of Merrick B. Garland for a seat on the U.S. Court of Appeals for the District of Columbia Circuit. On March 6, 1997, the Judiciary Committee, including a majority of Republican members, by a vote of 14 to 4, favorably reported to the full Senate Mr. Clinton's nomination of Merrick B. Garland. Based solely on his qualifications, I support the nomination of Mr. Garland and I encourage my colleagues to do the same.

To my knowledge, no one, absolutely no one disputes the following: Merrick B. Garland is highly qualified to sit on the D.C. circuit. His intelligence and his scholarship cannot be questioned. He is a magna cum laude graduate of the Harvard Law School. Mr. Garland was articles editor of the law review, one of the most important positions for any law student at any university, but in particular at Harvard; a very difficult position to earn. And he has

written articles in the Harvard Law Review and the Yale Law Journal, two of the most prestigious journals in the country, on issues such as administrative law and antitrust policy.

His legal experience is equally impressive. Mr. Garland has been a Supreme Court law clerk, a Federal criminal prosecutor, a partner in one of the most prestigious Washington firms, Arnold & Porter, Deputy Assistant Attorney General in the Justice Department's Criminal Division, and, since April of 1994, Principal Associate Deputy Attorney General to Jamie Gorelick, at the Justice Department, where he has directed the Department's investigation and prosecution of the Oklahoma City bombing case. And he has done a superb job there.

Mr. Garland's experience, legal skills, and handling of the Oklahoma City bombing case have earned him the support of officials who served in the Justice Department during the Reagan and Bush administrations, including former Deputy Attorney General George Terwilliger, former Deputy Attorney General Donald Ayer, former head of the Office of Legal Counsel, Charles Cooper, and former U.S. attorneys Jay Stephens and Dan Webb—all Republicans, I might add, who are strong supporters of Mr. Garland, as I believe they should be, as I believe we all should be.

Oklahoma Governor Frank Keating, who himself was denied one of those judgeships by our friends on the other side—even though I think most all of them admitted he would have made a tremendous judge, but has since done well for himself in becoming the Governor of Oklahoma and has distinguished himself. I might add his nomination, back in 1992, for the 10th Circuit Court of Appeals in the 102d Congress, was never voted on by the Judiciary Committee. He languished in the committee for quite a length of time. But Governor Keating has endorsed Mr. Garland's nomination, praising in particular his leadership in the Oklahoma City bombing case. As he should be praised.

Mr. Garland was originally nominated in September 1995. His nomination was favorably reported by the Judiciary Committee but not acted on by the Senate during the 104th Congress, much to my chagrin, because I think he should have passed in that last Congress. But to my colleagues' credit, and certainly to the leader's credit, the new majority leader, he has cooperated with the Judiciary Committee in bringing this nomination to the floor.

At the time of Mr. Garland's original nomination to fill the seat vacated by Judge Abner Mikva, who went on to become White House Counsel, concerns were raised by several, including several distinguished judges here in Washington, as to whether the D.C. circuit needed its full complement of 12 judges due to a declining workload on the Court. I support Senator GRASSLEY's efforts to study the systemwide caseloads of the Federal judiciary and am fully prepared to work with Senator GRASSLEY as chairman of that Subcommittee on the Courts, on legislation to authorize or deauthorize seats wherever such adjustments on the allocation of Federal judges are warranted, based upon court caseloads.

With respect to the D.C. circuit, however, the retirement of Judge James Buckley, in August 1996, last year, now leaves only 10 active judges on the 12-seat court. Accordingly, the Garland confirmation does not present the Senate with a question whether the 12th seat on the D.C. Circuit should be filled, and I have made it clear to the administration that I do not intend to fill that seat unless and until they can show, and I believe it will take quite a bit of time before they could show it, that there is a need for the filling of that seat. In fact, I would be, right now, for doing away with that seat. If at some future time we need that extra, 12th seat, fine, we will pass a bill to grant it again. But right now it is not needed.

I would just say, rather, with the two current vacancies, Garland will be filling only the 11th seat. So the 12th seat is not in play anymore, which was the critical seat.

The confirmation of Merrick B. Garland to fill the court's now vacant 11th seat is supported by D.C. Circuit Judge Laurence Silberman, a Reagan appointee who himself testified against creating and/or preserving unneeded judicial seats on his circuit, meaning the 12th seat, and who has stated that, ''it would be a mistake, a serious mistake, for Congress to reduce''—that is, the Circuit Court of Appeals for the District of Columbia—''down below 11 judges.''

I am aware that there may be some who take the position that the D.C. circuit's workload statistics do not even warrant 11 judges. With all due respect, I think these arguments completely miss the mark, and caution my colleagues to appreciate that certain statistics can, if not properly understood, be misleading.

The position that the D.C. circuit should have fewer than 11 judges is belied not just by the statements of Judge Silberman, who himself wanted to get rid of the 12th seat, but also by the fact that comparing workloads in the D.C. circuit to that of other circuits is, to a large extent, a pointless exercise.

There is little dispute that the D.C. circuit's docket is, by far, the most complex and time consuming in the Nation. Justice Department statistics show that whereas in a typical circuit, 5.9 percent of all cases filed are administrative appeals, which are generally far more time consuming than other appeals, and 26.7 percent are prisoner petitions which tend to be disposed of far more quickly than other appeals. While that is true in other circuit courts, 45.3 percent of the cases filed in the D.C. circuit over the past 3 years have been complex administrative appeals and only 7 percent easily disposed of prisoner petitions.

Moreover, most of the administrative appeals heard in the D.C. circuit involved the Federal Energy Regulatory Commission, the Federal Communications Commission and the Environmental Protection Agency and are much more complex and time consuming than even the immigration and labor appeals, which comprise most of the administrative agency cases filed in other circuits.

In short, simply comparing the number of cases filed in the D.C. circuit to the number filed in other circuits, and even comparing the number of agency appeals, is not a reliable indicator of the courts' comparative workloads.

As Senators, we have a responsibility to the public to ensure that candidates for the Federal bench are scrutinized for political activists. A judge who does not appreciate the inherent limits on judicial authority under the Constitution and would seek to legislate from the bench rather than interpret the law is a judicial activist, and nominees who will be judicial activists are simply not qualified to sit on any Federal bench, let alone the Federal circuit court of appeals or any Federal circuit court of appeals.

As chairman of the Judiciary Committee, I will continue to carefully scrutinize the records involved in cases of judicial nominees and to exercise the Senate's advise-and-consent power to ensure we keep activists off the bench. In addition, I will continue to speak out both in the Senate and in other forums to increase public awareness of harm to our society posed by such activists. Although we can never guarantee what the future actions of any judicial nominee will be or any judge, for that matter, and it may be difficult to discern whether a particular candidate will be an activist, I do not believe there is anything in Mr. Garland's record to indicate that, if confirmed, he could amount to an activist judge or might ultimately be an activist judge.

Accordingly, I believe Mr. Garland is a fine nominee. I know him personally, I know of his integrity, I know of his legal ability, I know of his honesty, I know of his acumen, and he belongs on the court. I believe he is not only a fine nominee, but is as good as Republicans can expect from this administration. In fact, I would place him at the top of the list. There are some other very good people, so I don't mean to put them down, but this man deserves to be at the top of the list. Opposition to this nomination will only serve to undermine the credibility of our legitimate goal of keeping proven activists off the bench.

I fully support his nomination, and I urge my colleagues to strongly consider voting in favor of confirmation.

I hope that we will also confirm the nominee Colleen Kollar-Kotelly, although we will only be voting on

Merrick Garland today, that is my understanding. I hope we will put both these judges through. I do not know of any opposition to the nominee Colleen Kollar-Kotelly, and I know very limited opposition at this point to Mr. Garland. Like I say, I do not think there is a legitimate argument against Mr. Garland's nomination, and I hope that our colleagues will vote to confirm him today.

I reserve the remainder of my time.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I am delighted the Senate is finally considering the nomination of Merrick Garland to the U.S. Court of Appeals, the District of Columbia Circuit. I compliment my good friend, the senior Senator from Utah, for his kind remarks about Mr. Garland.

Like the distinguished chairman of the Senate Judiciary Committee, I too believe that Merrick Garland is highly qualified for this appointment and would make an outstanding Federal judge.

My concern that I have expressed before is that this is the first and only judicial nomination scheduled for consideration in these first 3 months of the 105th Congress. The Senate is about to go on vacation for a couple of weeks. It will be the only judgeship considered, as I understand it. In the past, the Senate has not had to wait the Ides of March for the first judicial confirmation. The Federal judiciary has almost 100 vacancies now and, with the Ides of March, we are getting only one vacancy filled.

I, too, am sorry we have not proceeded to confirm and schedule the nomination of Judge Colleen Kollar-Kotelly to the district court bench. Here is one nominee we could go with, and we ought to be able to do that today, too.

The Senate first received Merrick Garland's nomination from the President on September 5, 1995. We are now way into March of 1997. So we have this nomination that has been here since 1995. All but the most cynical say this man is highly qualified, a decent person, a brilliant lawyer, a public servant who will make an outstanding judge, but his nomination sat here from 1995 until today.

This is a man who has broad bipartisan support. Governor Keating of Oklahoma; Governor Branstad of Iowa; William Coleman, Jr., a former member of a Republican President's Cabinet, former Reagan and Bush administration officials, Robert Mueller, Jay Stephens, Dan Webb, Charles Cooper—all have supported Merrick Garland. So this is not a case of somebody out of the pale. In fact, the Legal Times titled him, ''Garland: A Centrist Choice.'' I will put those recommendation letters in the RECORD later on.

So why, when you have somebody who, in my 22 years here, is one of the most outstanding nominees for the court of appeals, has that person been held up? What fatal flaw in his character has been uncovered? None, there is no fatal flaw. There was not a person who spoke against, credibly spoke against, his qualifications to be a judge, but he was one of the unlucky victims of the Republican shutdown of the confirmation process last year. I liken it to pulling the wings off a fly. This is what happened.

The Judiciary Committee reported his nomination to the Senate in 1995—in 1995. But here we are in 1997, and we finally get to vote on it.

Madam President, we have 100 vacancies on the Federal bench. At this rate, by the end of this Congress, with normal attrition, we will probably have 130 or 140. We had an abysmal record last session dealing with Federal judicial vacancies.

We ought to show what we have here. Here, Madam President, are the number of judges confirmed during the second Senate session in Presidential election years:

In 1980, 9 appeals court judges, 55 district court judges.

In 1984, 10 appeals court judges, 33 district court judges.

In 1988, 7 Court of Appeals judges, 35 district court judges.

In 1992—incidentally, 1992, Democrats were in charge with a Republican President—11 appeals court judges, 55 district court judges.

So what happens when you switch it over, put in a Republican Senate and Democratic President? Do you see the same sense of bipartisanship? Not on your life.

It is 11 appeals court judges, 55 district court judges with a Republican President and a Democratic Congress. Switch it to a Democratic President and a Republican Congress—zero, nada, zip, goose egg for the court of appeals judges and only 17 for the district court judges. Not too good.

We have some other charts here. Chief Justice Rehnquist spoke on this. A Chief Justice speaks only in a restrained fashion, when he does. But look what he said. Look at what Chief Justice William Rehnquist said about the pace we have seen in this Senate:

> The number of judicial vacancies can have a profound impact on a court's ability to manage its caseload effectively. Because the number of judges confirmed in 1996 was low in comparison to the number confirmed in preceding years, the vacancy rate is beginning to climb . . . It is hoped that the administration and Congress will continue to recognize that filling judicial vacancies is crucial to the fair and effective administration of justice.

The administration is sending up judges, but it is like tossing them down into a black hole in space. Nothing comes back out.

In fact, 25 percent of the current vacancies have persisted for more than 18 months. They are considered a judicial emergency jurisdiction.

There are 69 current vacancies in our Nation's district courts. Almost one in six district court judgeships is or soon will become vacant.

I compliment the distinguished majority leader and my good friend from Utah, the chairman of the Senate Judiciary Committee, in scheduling this one nominee to the Federal Court of Appeals, but there are still 24 current vacancies on the Federal courts of appeals. That number is rising.

We are way behind the pace of confirming the judges we have seen in our past Congresses. In fact, let us take a look at—I just happen to have a chart on that, Madam President. I know Senators were anxiously hoping I might.

Number of judges confirmed in past Congresses: 102d Congress, 124; 103d Congress, 129; 104th Congress, 75. So far in the 105th Congress, none. I assume that is going to change later this afternoon when we finally do confirm one judge. But look at this: 102d Congress, 124; 103d Congress, 129 confirmed; 104th Congress, 75 confirmed. The 105th Congress, zippo.

I think we ought to take a look at this next chart. We have 94 judicial vacancies. Just put the old magnifying glass—I used to be in law enforcement, Madam President. We actually used these things. Of course, we were kind of a small jurisdiction and I am just a small-town lawyer from Vermont. We do the best we can. But the magnifying glass shows zero. I am pleased by the end of this afternoon I can put a ''1'' in there, and let us hope that maybe we will get some more. Let us hope maybe we will get some more.

We can joke about it, but it is not a joking matter. We have people with their lives on hold. When the President asks some man or woman to take a Federal courtship, their entire practice is put on hold—it is kind of a good news/bad news situation. The President calls up and says, ''I've got good news for you. I'm going to nominate you for the Federal bench. Now I have bad news for you. I'm going to nominate you for the Federal bench.'' He or she finds their law practice basically stops on the date of that nomination. They cannot bring on new clients. Their partners give him or her a big party and say, ''Please move out of your office,'' because they know it is going to take a year or 2 or 3 to get through the confirmation process.

This is partisanship of an unprecedented nature. I have spoken twice on this floor today on what happens when we forget the normal traditions of the Senate. Traditionally—certainly not in my lifetime—no Democratic majority leader or Republican majority leader of the Senate would bring up a resolution for a vote directly attacking the President of the United States—directly or indirectly attacking the President of the United States—on a day when the President is heading off to a summit with other world leaders, especially with the leader of the other nuclear superpower, Russia. Yet, that tradition, which, as I said, has existed my whole lifetime, was broken today.

The other thing is that no matter which party controls the Senate, no

matter what party controls the Presidency, we have always worked together so that the President, having been elected, can, subject to normal—normal—advise and consent, can appoint the judges he wants. And that tradition has been broken.

If we are going to go against these basic tenets of bipartisanship, then the Senate will not be the conscience of the Nation that it should be. The Senate will suffer. And if the Senate suffers, the country suffers.

I withhold the balance of my time.

PRIVILEGE OF THE FLOOR

Madam President, if I might just for a moment, I ask unanimous consent that Tom Perez of Senator KENNEDY's staff be granted floor privileges.

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

Mr. LEAHY. Madam President, I ask unanimous consent that a number of letters I referred to be printed in the RECORD.

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

STATE OF OKLAHOMA,
OFFICE OF THE GOVERNOR,
Oklahoma City, OK, February 19, 1996.

Senator BOB DOLE,
U.S. Senate, Washington, DC.

SENATOR DOLE: I endorse Merrick Garland for confirmation to the United States Court of Appeals for the D.C. Circuit. Merrick will be a solid addition to this esteemed court.

A Harvard Law School graduate in 1977, a former Assistant United States Attorney and a former partner in Washington's Arnold and Porter Law Firm, Merrick will bring an array of skills and experience to this judgeship. Merrick is further developing his talents and enhancing his reputation as the Principle Associate Deputy Attorney General.

Last April, in Oklahoma City, Merrick was at the helm of the Justice Department's investigation following the bombing of the Oklahoma City Federal Building, the bloodiest and most tragic act of terrorism on American soil. During the investigation, Merrick distinguished himself in a situation where he had to lead a highly complicated investigation and make quick decisions during critical times.

Merrick Garland is an intelligent, experienced and evenhanded individual. I hope you give him full consideration for confirmation to the United States Court of Appeals for the D.C. Circuit.

Sincerely,

FRANK KEATING,
Governor.

OFFICE OF THE GOVERNOR,
Des Moines, IA, October 10, 1995.

Senator CHARLES E. GRASSLEY,
Hart Senate Office Building, Washington, DC.

DEAR CHUCK: I am writing to ask your support and assistance in the confirmation process for a second cousin, Merrick Garland, who has been nominated to be a judge on the U.S. Court of Appeals for the District of Columbia.

Merrick Garland has had a distinguished legal career. He was a partner for many years in the Washington law firm of Arnold and Porter. During the Bush Administration, Merrick was asked by Jay Stephens, the U.S. Attorney for the District of Columbia, to take on a three year stint as an Assistant U.S. Attorney. As I'm sure you know, Jay Stephens is the son of Lyle Stephens, the Representative from Plymouth County that we served with in the Iowa Legislature.

Recently, he has been overseeing the federal investigation and prosecution efforts in the Oklahoma City bombing, having been sent there the second day after the blast occurred. He was serving in the position as principal Associate Deputy Attorney General.

I am enclosing a number of news clippings about Merrick Garland. I would especially encourage you to review the Legal Times and article entitled: Garland, A Centrist Choice.

As always, I appreciate all of your efforts. Hope all is going well for you.

Sincerely,

TERRY E. BRANSTAD,
Governor of Iowa.

O'MELVENY & MYERS,
Washington, DC, October 11, 1995.

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

DEAR ORRIN: As you know, President Clinton has nominated Merrick B. Garland, Esquire, to fill the judicial vacancy on the United States Court of Appeals for the District of Columbia Circuit caused by the retirement of Chief Judge Mikva.

I write this letter to indicate my full support and admiration of Mr. Garland and urge that you soon have a hearing of the Senate Committee on the Judiciary and thereafter support him to fill the vacancy.

Mr. Garland has a first-rate legal mind, took magna cum laude and summa cum laude advantages of education at Harvard College and Harvard Law School. In private practice, he became and has the reputation of being an outstanding courtroom lawyer. In addition, on several occasions, he satisfied his urge to be a public servant by two law clerkships, one for Mr. Justice William J. Brennan and the other for the late Judge Henry J. Friendly. He has also served in the Justice Department on several occasions. I have known Merrick Garland as a lawyer and as a friend and greatly admire his personal integrity, learning in the law and his desire to be a great public servant. His legal, social and political views are those most Americans admire and are well within the fine hopes and principles of this country, which you have often expressed in conversations with me as to the type of person you would like to see on the federal judiciary, particularly on the appellate courts.

I first got to know Mr. Garland when he was Special Assistant to Deputy and then Attorney General Civiletti, as my daughter, Lovida, Jr., was the other Special Assistant. I still see him and his wife from time to time and they are the type of Americans whom I greatly admire.

As is stated at the outset of this letter, I hope you will see to it that Mr. Garland soon has his hearing and that you, at and after the hearing, will actively support him for confirmation. If you have any questions, please give me a call and I will walk over to see you.

Take care.

Sincerely,

WILLIAM T. COLEMAN, Jr.

VENABLE, BAETJER AND HOWARD, LLP,
Baltimore, MD, September 7, 1995.

Re Merrick B. Garland.

Hon. BARBARA A. MIKULSKI,
U.S. Senate, Hart Senate Office Bldg., Washington, DC.

DEAR SENATOR MIKULSKI: I just wanted to call your attention to the fact that Merrick B. Garland has been nominated by President Clinton for appointment to the United States Court of Appeals for the DC Circuit.

Merrick is an outstanding lawyer with a very distinguished career both in private practice at Arnold & Porter and in government service, first as a special assistant to me when I was Attorney General and then later as an Assistant United States Attorney for the District and, most recently, as Chief Associate Deputy Attorney General to Jamie Gorelick. Additionally, his academic background was outstanding, culminating in his clerkship to Supreme Court Justice Brennan. In every way, he is a superb candidate for that bench, and I just wanted you to know of my personal admiration for him.

Kindest regards.

Sincerely,

BENJAMIN R. CIVILETTI.

MCGUIRE WOODS, BATTLE & BOOTHE, III,
Washington, DC, October 16, 1995.

Re Nomination of Merrick B. Garland to the U.S. Court of Appeals for the District of Columbia Circuit.

Hon. ORIN G. HATCH,
Chairman, United States Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: I have been asked to express my views to you on Merrick Garland's nomination to sit on the Federal Court of appeals in the District of Columbia. First, I believe Mr. Garland is an accomplished and learned lawyer and is most certainly qualified for a seat on this important bench. Second, my experience with Mr. Garland leads me to the conclusion that he would decide cases on the law based on an objective and fair analysis of the positions of the parties in any dispute. Third, I perceive Mr. Garland as a man who believes and follows certain principles, but not one whose philosophical beliefs would overpower his objective analysis of legal issues.

I know of no reason to suggest that the President's choice for his vacancy on the Court of Appeals should not be confirmed. As you, of course, have demonstrated during your tenure as Chairman, the President's nominees are his choices and are entitled to be confirmed where it is clear that th4e nominee would be a capable and fair jurist. I believe Mr. Garland meets that criteria and support favorable consideration of his nomination.

Sincerely yours,

GEORGE J. TERWILLIGER, III.

JONES, DAY, REAVIS & POGUE,
Washington, DC, October 10, 1995.

Re Merrick B. Garland.

Senator ORRIN G. HATCH,
U.S. Senate, Senate Russell Office Building, Washington, DC.

DEAR SENATOR HATCH: I first met Merrick Garland in the mid–1970's, when we overlapped as students at the Harvard Law School. While I have not known him well, I have been well aware that his academic background is impeccable, and that he is reputed to be a very bright, highly effective and understated lawyer.

During January of 1994, while he was serving in the Department of Justice, I had occasion to deal with him directly on a matter of some public moment and sensitivity. I was struck by the thoroughness of his preparation, the depth of his understanding of the matters in issue, both factural and legal, and his ability to express himself simply and convincingly. I was still more impressed with his comments, from obvious personal conviction, on the essential role of honesty, integrity, and forthrightness in government.

Our discussions at that time were followed by further conversations on several later occasions. I have also had an opportunity to

observe from a distance his performance in the Department and to discuss that performance with people closer to the scene. I am left with a distinct impression of him as a person of great skill, diligence, and sound judgment, who is driven more by a sense of public service than of personal aggrandizement.

My own service in the Justice Department during the last two Republican Administrations convinced me that government suffers greatly from a shortage of people combining such exceptional abilities with a primary drive to serve interests beyond their own. Merrick Garland's nomination affords the Senate chance to place one such person in a position where such impulses can be harnessed to the maximum public good. I hope that the Senate will seize that opportunity.

Very Truly Yours,

DONALD B. AYER.

SHAW, PITTMAN, POTTS & TROWBRIDGE,
Washington DC, November 9, 1995.

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

DEAR SENATOR HATCH: I write to express my support for President Clinton's nomination of Merrick Garland to the position of circuit Judge of the United States Court of Appeals for the District of Columbia. I've known Merrick since 1978, when we served as law clerks to Supreme Court Justices—he for Justice Brennan and I for Justice (now Chief Justice) Rehnquist. Like our respective bosses, Merrick and I disagreed on many legal issues. Still, I believe that Merrick possesses the qualities of a fine judge.

You are no doubt well aware of the details of Merrick's background as a practicing lawyer, a federal prosecutor, a law teacher, and now a high-ranking official of the Department of Justice. This varied background has given Merrick a breadth and depth of legal experience that few lawyers his age can rival, and he has distinguished himself in all of his professional pursuits. He is a man of great learning, not just in the law, but also in other disciplines. Not only is Merrick enormously gifted intellectually, but he is thoughtful as well, for he respects other points of view and fairly and honestly assesses the merits of all sides of an issue. And he has a stable, even-tempered, and courteous manner. He would comport himself on the bench with dignity and fairness. In short, I believe that Merrick Garland will be among President Clinton's very best judicial appointments.

Sincerely,

CHARLES J. COOPER.

Washington, DC, November 25, 1995.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee, Senate Dirksen Building, Washington, DC.

DEAR MR. CHAIRMAN: I write with regard to the nomination of Merrick Garland to the Court of Appeals for the District of Columbia.

I have known Mr. Garland since 1990 when he was an Assistant United States Attorney and I was the Assistant Attorney General for the Criminal Division in the Department of Justice. Over the Years I have had occasion to see his work in several cases.

Based both on my own observations and on his reputation in the legal community, I believe him to be exceptionally qualified for a Circuit Court appointment. Throughout my association with him I have always been impressed by his judgment. Most importantly, Mr. Garland exemplifies the qualifies of fairness, integrity and scholarship which are so important for those who sit on the bench.

If I can be of any further assistance, please do not hesitate to call me.

Sincerely,

ROBERT S. MUELLER, III.

PILLSBURY MADISON & SUTRO,
Washington, DC, November 28, 1995.

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

Hon. CHARLES E. GRASSLEY,
Chairman, Senate Judiciary Subcommittee on Administrative Oversight and the Courts, Hart Senate Office Building, Washington, DC.

DEAR SENATOR HATCH AND GRASSLEY: I am writing with respect to the nomination of Merrick Garland to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit. I understand you have significant reservations about filling the existing vacancy on the District of Columbia Circuit at this time. In the event you consider filling the vacancy at this time, I commend Merrick Garland for your consideration.

I have known Mr. Garland for nearly ten years. We met initially during my service as Deputy Counsel to the President while Mr. Garland was assisting in an Independent Counsel investigation. During the course of that contact, I was impressed with Mr. Garland's professionalism and judgment. After I was appointed United State Attorney for the District of Columbia, Mr. Garland expressed to me an interest in gaining additional prosecutorial experience, and applied for a position as an Assistant United States Attorney. I hired Mr. Garland for my staff, and initially assigned him to a narcotics unit where he had an opportunity to assist in investigating a number of significant cases and to gain valuable trial experience. Mr. Garland quickly established himself as a dedicated prosecutor who was willing to handle the tough cases. He conducted thorough investigations, and became a skilled trial attorney.

Subsequently, after gaining significant trial experience, Mr. Garland was assigned to the Public Corruption section of the U.S. Attorney's Office. There he had an opportunity to investigate and try a number of complex, sensitive cases. In the Public Corruption section, Mr. Garland demonstrated an excellent capacity to investigate complex transactions, and approached these important cases with maturity and balanced judgment. He was thorough and thoughtful in exercising his responsibility, and he always acted in accord with the highest ethical and professional standards.

During his service as an Assistant United State Attorney, Mr. Garland distinguished himself as one of the most capable prosecutors in the Office. He brought to bear a number of outstanding talents. He was bright. He had the intellectual capacity to parse complex transactions. He built sound working relationships with agents and staff based on mutual respect. He was willing to work hard to get the job done. He was dedicated to his job. He exercised sound judgment, and approached his work with professionalism and thoughtfulness. He exhibited excellent interpersonal skills, and was delightful to work with. In sum, his service as an Assistant United States Attorney was market by dedication, sound judgment, excellent legal ability, a balanced temperament, and the highest ethical and professional standards. These are qualities which I believe he would bring to the bench as well.

I appreciate the opportunity to provide these comments for your consideration.

Sincerely,

JAY B. STEPHENS.

WINSTON & STRAWN,
Chicago, IL, October 10, 1995.

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

DEAR SENATOR HATCH: It is my understanding that Merrick Garland's name has been submitted to the Senate Judiciary Committee to fill a vacancy on the D.C. Circuit Court of Appeals. Merrick is a very talented lawyer, who has had an outstanding career in both the private and public sectors.

In particular, he has exhibited exceptional legal abilities during his recent term of office in the U.S. Department of Justice. Throughout the United States, Merrick has been recognized as a person within the Clinton Department of Justice who is fair, thoughtful and reasonable. He clearly possesses the ability to address legal issues and resolve them in a fair and equitable manner.

Accordingly, in my opinion, Merrick will be an outstanding addition to the D.C. Circuit Court of Appeals, and I strongly recommend his confirmation by your committee. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

DAN K. WEBB.

AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY,
Washington, DC, September 21, 1995.

Re Merrick Brian Garland, United States Court of Appeals for the District of Columbia Circuit.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Merrick Brian Garland for appointment as Judge of the United States Court of Appeals for the District of Columbia Circuit.

Our Committee is of the unanimous opinion that Mr. Garland is Well Qualified for this appointment.

A copy of this letter has been sent to Mr. Garland for his information.

Sincerely,

CAROLYN B. LAMM,
Chair.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Thank you very much.

I am here today to speak on a subject that is most important to all of us in America, the Federal judiciary.

I had the honor for 12 years to serve as a U.S. attorney, and during that time I practiced in Federal court before Federal judges. All of our cases that were appealed were appealed to Federal circuit courts of appeals. And that is where those final judgments of appeal were ruled on. I think an efficient and effective and capable Federal judiciary is a bulwark for freedom in America. It is a cornerstone of the rule of law, and it is something that we must protect at all costs. We need to be professional and expeditious in dealing with those problems.

I must say, however, I do not agree that there has been a stall in the handling of judges. As Senator HATCH has so ably pointed out, there were 22 nominations last year, and 17 of those were confirmed. We are moving rapidly

on the nominations that are now before the Judiciary Committee.

There is one today I want to talk about, Merrick Garland, because really I do not believe that that judgeship should be filled based on the caseload in that circuit, and for no other reason.

But I think it is important to say that there is not a stall, that I or other Senators could have delayed the vote on Merrick Garland for longer periods of time had we chosen to do so. We want to have a vote on it. We want to have a debate on it. We want this Senate to consider whether or not this vacancy should be filled. And I think it should not.

Senator HATCH brilliantly led, recently, an effort to pass a balanced budget amendment on the floor of this Senate. For days and hours he stood here and battled for what would really be a global settlement of our financial crisis in this United States. We failed by one vote to accomplish that goal. But it was a noble goal.

That having slipped beyond us, I think it is incumbent upon those of us who have been sent here by the taxpayers of America to marshal our courage and to look at every single expenditure this Nation expends and to decide whether or not it is justified. And if it is not justified, to say so. And if it is not justified, to not spend it.

In this country today a circuit court of appeals judge costs the taxpayers of America $1 million a year. That includes their library, their office space, law clerks, secretaries, and all the other expenses that go with operating a major judicial office in America. That is a significant and important expenditure that we are asking the citizens of the United States to bear. And I think we ought to ask ourselves, is it needed?

I want to point out a number of things at this time that make it clear to me that this judgeship, more than any other judgeship in America, is not needed. Let me show this chart behind me which I think fundamentally tells the story. We have 11 circuit courts of appeal in America. Every trial that is tried in a Federal court that is appealed goes to one of these circuit courts of appeal. From there, the only other appeal is to the U.S. Supreme Court. Most cases are not decided by the Supreme Court. The vast majority of appeals are decided in one of these 11 circuit courts of appeal.

Senator GRASSLEY, who chairs the Subcommittee on Court Administration, earlier this year had hearings on the caseloads of the circuit courts of appeals. He had at that hearing the just recently former chief judge of the Eleventh Circuit Court of Appeals, which has the highest caseload per judge in America. Total appeals filed per judge for the year ending September 30, 1996, was 575 cases per judge. He also had testifying before that committee Chief Judge Harvey Wilkinson from the Fourth Circuit Court of Appeals. They are the third most busy circuit in America. They have 378 cases filed per judge in a year's time. Both of those judges talked to us and talked to our committee about their concerns for the Federal judiciary and gave some observations they had learned.

First of all, Judge Tjoflat, former chief judge of the eleventh circuit, testified how when the courts of appeals get larger and those numbers of judges go up from 8, 10, 12, to 15, the collegiality breaks down. It is harder to have a unified court. It takes more time to get a ruling on a case. It has more panels of judges meeting, and they are more often in conflict with one another. It is difficult to have the kind of cohesiveness that he felt was desirable in a court. Judge Wilkinson agreed with that.

I think what is most important with regard to our decision today, however, is what they said about their need for more judges. Judge Tjoflat, of the eleventh circuit, said even though they have 575 filings per judge in the Eleventh Circuit Court of Appeals, they do not need another judge. Even Judge Harvey Wilkinson said even though they have 378 filings per judge in the fourth circuit, they do not need another judge. He also noted, and the records will bear it out, that the Fourth Circuit Court of Appeals has the fastest disposition rate, the shortest time between filing and decision, of any circuit in America, and they are the third busiest circuit in America. That is good judging. That is good administration. That is fidelity to the taxpayers' money, and they ought to be commended for that.

When you look at that and compare it to the situation we are talking about today with 11 judges in the D.C. circuit, they now have only 124 cases per judge, less than one-fourth the number of cases per judge as the eleventh circuit has. What that says to me, Madam President, is that we are spending money on positions that are not necessary.

The former chief judge of the D.C. circuit, with just 123 cases per judge, back in 1995 said he did believe the 11th judgeship should be filled but he did not believe the 12th should be filled. As recently as March of this year, just a few weeks ago, he wrote another letter discussing that situation. This is what he said in a letter addressed to Senator HATCH:

> You asked me yesterday for my view as to whether the court needs 11 active judges and whether I would be willing to communicate that view to other Senators of your committee. As I told you, my opinion on this matter has not changed since I testified before Senator GRASSLEY's committee in 1995. I said then and still believe that we should have 11 active judges. On the other hand, I then testified and still believe that we do not need and should not have 12 judges. Indeed, given the continued decline in our caseload since I last testified, I believe the case for the 12th judge at any time in the foreseeable future is almost frivolous, and, as you know, since I testified, Judge Buckley has taken senior status and sits part time, and I will be eligible to take senior status in 3 years. That is why I continue to advocate the elimination of the 12th judgeship.

So that is the former chief judge of the D.C. circuit saying that to fill the 12th judgeship would be frivolous, and he noted that there is a continuing decline in the caseload in the circuit.

Madam President, let me point out something that I think is significant. Judge Buckley, who is a distinguished member of that court has taken senior status. But that does not mean that he will not be working. At a minimum, he would be required as a senior-status judge to carry one-third of his normal caseload. Many senior judges take much more than one-third of their caseload. They are relieved of administrative obligations, and they can handle almost a full judicial caseload. It does not indicate, because Judge Buckley announced he would be taking senior status, that he would not be doing any work. He would still be handling a significant portion of his former caseload. I think that is another argument we ought to think about.

Finally, the numbers are very interesting with regard to the eleventh circuit in terms of the declining caseload mentioned by Judge Silberman in his letter to Senator HATCH. We have examined the numbers of this circuit and discovered that there has been a 15 percent decline in filings in the D.C. circuit last year. That is the largest decline of any circuit in America. It apparently will continue to decline. At least there is no indication that it will not. If that is so, that is an additional reason that this judgeship should not be filled.

I think Senator LEAHY, the most able advocate for Mr. Garland, indicated in committee that it would be unwise to use these kinds of numbers not to fill a judgeship, but it seems to me we have to recognize that, if you fill a judgeship, that is an appointment for life. If that judgeship position needs to be abolished, the first thing we ought to do is not fill it. That is just good public policy. That is common sense. That is the way it has always been done in this country, I think. We ought to look at that.

So what we have is the lowest caseload per judge in America, declining by as much as 15 percent last year, and it may continue to decline this year. The numbers are clear. The taxpayer should not be burdened with the responsibility of paying for a Federal judge sitting in a D.C. circuit without a full caseload of cases to manage.

Let me say this about Mr. Garland. I have had occasion to talk with him on the phone. I told him I was not here to delay his appointment, his hearing on his case. I think it is time for this Senate to consider it. I think it is time for us to vote on it. Based on what I see, that judgeship should not be filled. He has a high position with the Department of Justice and, by all accounts, does a good job there. There will be a number of judgeship vacancies in the D.C. trial judges. He has been a trial

lawyer. He would be a good person to fill one of those. I would feel comfortable supporting him for another judgeship.

Based on my commitment to frugal management of the money of this Nation, I feel this position should not be filled at this time. I oppose it, and I urge my colleagues to do so.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Thank you, Madam President. First, let me associate myself with the remarks of my distinguished colleague from Alabama who has just spoken. My position is quite the same as his with respect to this nominee. Certainly, I must begin by saying that I believe Mr. Garland is well qualified for the court of appeals. He earned degrees from Harvard College and Harvard Law School and clerked for Judge Friendly on the U.S. Court of Appeals for the Second Circuit and for Justice Brennan on the Supreme Court and, since 1993, he has worked for the Department of Justice. So there is no question, he is qualified to serve on the court.

Like my colleague from Alabama, my colleague from Iowa, and others, I believe that the 12th seat on this circuit does not need to be filled and am quite skeptical that the 11th seat, the seat to which Mr. Garland has been nominated, needs to be filled either. The case against filling the 12th seat is very compelling, and it also makes me question the need to fill the 11th seat.

In the fall of 1995, the Courts Subcommittee of the Judiciary Committee held a hearing on the caseloads of the D.C. circuit. Judge Silberman, who has served on the D.C. circuit for the past 11 years, testified that most members of the D.C. circuit have come to think of the D.C. circuit as a de facto court of 11. In other words, even though there are 12 seats, theoretically, it is really being thought of as an 11-member court by its members. In fact, in response to written questions, Judge Silberman pointed out that the courtroom, normally used for en banc hearings, seats only 11 judges. In other words, that is what they can accommodate.

When Congress created the 12th judgeship in 1984, Congress may have thought that the D.C. circuit's caseload would continue to rise, as it had for the previous decade. But, in fact, as my colleague from Alabama has pointed out, exactly the opposite has occurred; the caseload has dropped. It is the only circuit in the Nation with fewer new cases filed now than in 1985. During the entire period, the D.C. circuit has had a full complement of 12 judges for only 1 year.

In a letter to Senator GRASSLEY, Judge Silberman wrote that the D.C. circuit can easily schedule its upcoming arguments with 11 judges and remain quite current. Further, Judge Silberman noted that while the D.C. circuit, unlike most others, has not had any senior judges available to sit with it, the court has invited visiting judges only on those occasions when it was down to 10 active judges.

Additionally, according to the Administrative Office of the U.S. Courts, it costs more than $800,000 a year to pay for a circuit judge and the elements associated with that judge's work. In light of recent efforts to curtail Federal spending, again, I agree with my colleague from Alabama that it is imprudent to spend such a sum of money unless the need is very clear.

Senators GRASSLEY and SESSIONS have made sound arguments that the D.C. circuit does not need to fill the 11th seat. Their arguments are reasonable and not based upon partisan considerations. Similarly, my concerns with the Garland nomination are based strictly on the caseload requirements of the circuit, not on partisanship or the qualifications of the nominee.

I would not want the opposition to the nomination, therefore, to be considered partisan in any way. Thus, although I do not believe that the administration has met its burden of showing that the 11th seat needs to be filled, in the spirit of cooperation, and to get the nominee to the floor of the Senate, I voted to favorably report the nomination of Merrick Garland from the Judiciary Committee when we voted on that a couple of weeks ago. But, at the time, I reserved the right to oppose filling that 11th vacancy when the full Senate considered the nomination. That time has now come, and being fully persuaded by the arguments made by Senator SESSIONS and Senator GRASSLEY, I reluctantly will vote against the confirmation of this nominee.

Based on the hearing of the Courts Subcommittee, caseload statistics, and other information, as I said, I have concluded that the D.C. circuit does not need 12 judges and does not, at this point, need 11 judges. Therefore, I will vote against the nomination of Merrick Garland.

If Mr. Garland is confirmed and another vacancy occurs, thereby opening up the 11th seat again, I plan to vote against filling the seat—and, of course, the 12th seat—unless there is a significant increase in the caseload or some other extraordinary circumstance.

Madam President, I want to thank Senator GRASSLEY for his leadership in this area, as chairman of the subcommittee, and for allowing me to speak prior to his comments, which I gather will be delivered next.

I yield the floor.

The PRESIDING OFFICER. The Senator from Iowa is recognized.

Mr. GRASSLEY. Madam President, I rise today to express my views of the pending nomination. As chairman of the Subcommittee on Administrative Oversight and the Courts, I have closely studied the D.C. circuit for over a year now. And I can confidently conclude that the D.C. circuit does not need 12 judges or even 11 judges. Filling either of these two seats would just be a waste of taxpayer money—to the tune of about $1 million per year for each seat. The total price tag for funding an article III judge over the life of that judges is an average of $18 million.

Madam President, $18 million is a whole lot of money that we would be wasting if we fill the vacancies on the D.C. circuit.

In 1995, I chaired a hearing before the Judiciary Subcommittee on Administrative Oversight and the Courts on the D.C. circuit. At the hearing, Judge Lawrence Silberman—who sits on that court—testified that 12 judges were just too many. According to Judge Silberman, when the D.C. circuit has too many judges there just isn't enough work to go around.

In fact, as for the 12th seat, the main courtroom in the D.C. courthouse does not even fit 12 judges. When there are 12 judges, special arrangements have to be made when the court sits in an en banc capacity.

I would ask my colleagues to consider the steady decrease in new cases filed in the D.C. circuit. Since 1985, the number of new case filings in the D.C. circuit has declined precipitously. And it continues to decline, even those who support filling the vacancies have to admit this. At most, the D.C. circuit is only entitled to a maximum of 10 judges under the judicial conference's formula for determining how many judges should be allotted to each court.

Judge Silberman recently wrote to the entire Judiciary Committee to say that filling the 12th seat would be—in his words—''frivolous.'' According to the latest statistics, complex cases in the D.C. circuit declined by another 23 percent, continuing the steady decline in cases in the D.C. circuit. With fewer and fewer cases per year, it doesn't make sense to put more and more judges on the D.C. circuit. That would be throwing taxpayer dollars down a rat hole.

So the case against filling the current vacancies is compelling. I believe that Congress has a unique opportunity here. I believe that we should abolish the 12th seat and at least the 11th seat should not be filled at this time. I believe that a majority of the Juidicary Committee agrees the case has been made against filling the 12th seat and Chairman HATCH has agreed not to fill it. So, no matter what happens today, at least we know that the totally unnecessary 12th seat will not be filled. At least the taxpayers can rest a little easier on that score.

Abolishing judicial seats is completely nonpartisan. If a judicial seat is abolished, no President— Democrat or Republican—could fill it. As long as any judgeship exists, the temptation to nominate someone to fill the seat will be overwhelming—even with the outrageous cost to the American taxpayer.

Again, according to the Federal judges themselves, the total cost to the American taxpayer for a single article III judge is about $18 million. That's not chump change. That's something to look at. That's real money we can save.

Here in Congress, we have downsized committees and eliminated important support agencies like the Office of Technology Assessment. The same is true of the executive branch. Congress has considered the elimination of whole Cabinet posts. It is against this backdrop that we need to consider abolishing judgeships where appropriate—like in the D.C. circuit or elsewhere.

While some may incorrectly question Congress' authority to look into these matters, we are in fact on firm constitutional ground. Article III of the Constitution gives Congress broad authority over the lower Federal courts. Also, the Constitution gives Congress the ''power of the purse.'' Throughout my career, I have taken this responsibility very seriously. I, too, am a taxpayer, and I want to make sure that taxpayer funds aren't wasted.

Some may say that Congress should simply let judges decide how many judgeships should exist and how they should be allocated. I agree that we should defer to the judicial conference to some degree. However, there have been numerous occasions in the past where Congress has added judgeships without the approval of the Judicial Conference in 1990, the last time we created judgeships, the Congress created judgeships in Delaware, the District of Columbia and Washington State without the approval of the Judicial Conference. In 1984, when the 12th judgeship at issue in this hearing was created—Congress created 10 judgeships without the prior approval of the Judicial Conference. It is clear that if Congress can create judgeships without judicial approval, then Congress can leave existing judgeships vacant or abolish judgeships without judicial approval. It would be illogical for the Constitution to give Congress broad authority over the lower Federal courts and yet constrain Congress from acting unless the lower Federal courts first gave prior approval.

Madam President, I ask my colleagues to vote ''no'' on the current nomination and strike a blow for fiscal responsibility. Spending $18 million on an unnecessary judge is wrong. I have nothing against the nominee. Mr. Garland seems to be well qualified and would probably make a good judge—in some other court. Now, I've been around here long enough to know where the votes are. I assume Mr. Garland will be confirmed. But, I hope that by having this vote—and we've only had four judicial votes in the last 4 years—a clear message will be sent that these nominations will no longer be taken for granted.

Let's be honest—filling the current vacancies in the D.C. circuit is about political patronage and not about improving the quality of judicial decision making. And who gets stuck with the tab for this? The American taxpayer. I think it's time that we stand up for hardworking Americans and say no to this nomination.

I would like to make a few comments about the Judicial nomination process in general. Just about every day or so we hear the political hue and cry about how slow the process has been. This is even though we confirmed a record number of 202 judges in President Clinton's first term—more than we did in either President Reagan's or President Bush's first term.

I have heard the other side try to make the argument that not filling vacancies is the same as delaying justice. Well, when you have Clinton nominees or judges who are lenient on murderers because their female victim did not suffer enough, or you have a judge that tries to exclude bags of drug evidence against drug dealers, or a judge that says a bomb is not really a bomb because it did not go off and kill somebody—then I think that's when justice is denied.

The American people have caught on to this. And, I think the American people would just as soon leave some of these seats unfilled rather than filling them with judges who are soft on criminals or who want to create their own laws.

We have heard repeatedly from the other side that a number of judicial emergency vacancies exist. We are told that not filling these vacancies is causing terrible strife across the country. Now, to hear the term ''judicial emergency'' sounds like we are in dire straits. But, in fact, a judicial emergency not only means that the seat has been open for 18 months. It does not mean anything more than that, despite the rhetoric we hear.

In fact, it is more than interesting to note that out of the 24 so-called judicial emergencies, the administration has not even bothered to make a nomination to half them. That is right, Mr. President. After all we have heard about Republicans not filling these so-called judicial emergencies which are not really emergencies, we find that the administration has not even sent up nominees for half of them after having over a year and a half to do so.

But, we continue to hear about this so-called caseload crisis. My office even got a timely fax from the judicial conference yesterday bemoaning the increase in caseload. Well, Mr. President, I sent out the first time ever national survey to article III judges last year. I learned many things from the responses. Among them, I learned that while caseloads are rising in many jurisdictions, the majority of judges believed the caseloads were manageable with the current number of judges. A number of judges would even like to see a reduction in their ranks.

We know that much of the increased caseload is due to prisoner petitions, which are dealt with very quickly and easily, despite the hue and cry we hear. As a matter of fact the judicial conference even admits some of the increase is due to prisoners filing in order to beat the deadline for the new filing fees we imposed. So, there may be isolated problems, but there is no national crisis—period.

On February 5, I had the opportunity to chair a judiciary subcommittee hearing on judicial resources, concentrating on the fourth circuit. My efforts in regard to judgeship allocations are based upon need and whether the taxpayers should be paying for judgeships that just are not needed. We heard from the chief judge that filling the current two vacancies would actually make the court's work more difficult for a number of reasons. He argued that justice can actually be delayed with more judges because of the added uncertainty in the law with the increased number of differing panel decisions. I am sorry that only three Senators were there to hear this very enlightening testimony.

We in the majority have been criticized for not moving fast enough on nominations. However, we know there was a higher vacancy rate in the judiciary at the end of the 103d Democrat Congress than there was at the end of the 104th Republican Congress. Even though there were 65 vacancies at the end of last year, there were only 28 nominees that were not confirmed. All of them had some kind of problem or concern attached to them. The big story here is how the administration sat on its rights and responsibilities and did not make nominations for more than half of the vacancies. And some of the 28 nominations that were not confirmed were only sent to us near the end of the Congress. Yet, the administration has the gall to blame others for their failings.

I think it is also important to remember the great deal of deference we on this side gave to the President in his first term. As I said, we have confirmed over 200 nominees. All but four, including two Supreme Court nominees, were approved by voice vote. That is a great deal of cooperation. Some would say too much cooperation.

But now, after 4 years of a checkered track record, it is clear to me that we need to start paying a lot more attention to whom we're confirming. Because like it or not, we are being held responsible for them.

I cannot help but remember last year when some of us criticized a ridiculous decision by a Federal judge in New York who tried to exclude overwhelming evidence in a drug case. What was one of the first things we heard from the administration? After they also attacked the decision, they turned around and attacked the Republican Members who criticized the decision. They said, you Republicans voted for the nominee, so you share any of the blame.

Well, the vote on Judge Baer was a voice vote. But, I think many of us woke up to the fact that the American people are going to hold us accountable for some of these judges and their bad decisions. So, there is no question the scrutiny is going to increase, thanks to this administration, and more time and

effort is going to be put into these nominees. And, yes, we will continue to criticize bad decisions. If a judge that has life tenure cannot withstand criticism, then maybe he or she should not be on the bench.

Now, having said all of this, we have before us a nominee who we're ready to vote on. I had been one of those holding up the nominee for the D.C. circuit, the nomination before us. I believe I have made the case that the 12th seat should not be filled because there is not enough work for 12 judges, or even 11 judges for that matter. My argument has always been with filling the seat—not the nominee. Now that we have two open seats—even though the caseload continues to decline—I'm willing to make a good faith effort in allowing the Garland nomination to move forward.

But, given the continued caseload decline, and the judicial conference's own formula giving the circuit only 9.5 judges, I cannot support filling even the 11th seat. So, I will vote ''no.'' I assume I will be in the minority here and the nominee will be confirmed, but I think the point has to be made. I very much appreciate Chairman HATCH's efforts in regard to my concerns, and his decision to not fill the unnecessary 12th seat.

So, there have been a lot of personal attacks lately. Motives are questioned and misrepresented. This is really beneath the Senate. And I hope it will not continue.

Despite the attacks that have been launched against those of us who want to be responsible, all we are saying is send us qualified nominees who will interpret the law and not try to create it. Send us nominees who will not favor defendants over victims, and who will be tough on crime. Send us nominees who will uphold the Constitution and not try to change it. As long as the judgeships are actually needed, if the administration sends us these kinds of nominees, they will be confirmed.

I thank the Chair.

The PRESIDING OFFICER (Mr. FAIRCLOTH). The Chair recognizes the Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise today in opposition to the nomination of Merrick B. Garland to be a judge on the U.S. Court of Appeals for the District of Columbia Circuit. I commend Senators SESSIONS, KYL, and GRASSLEY for taking this course.

Let me state from the outset that my opposition has nothing to do with the nominee himself. I have no reservations about Mr. Garland's qualifications or character to serve in this capacity. He had an excellent academic record at both Harvard College and Harvard Law School before serving as a law clerk on the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court. Also, he has served in distinguished positions in private law practice and with the Department of Justice. Moreover, I have no doubt that Mr. Garland is a man of character and integrity.

However, qualifications and character are not the only factors we must consider in deciding whether to confirm someone for a Federal judgeship. A more fundamental question is whether we should fill the position itself. Mr. Garland was nominated for the 11th seat on the D.C. circuit. I do not feel that this vacancy needs to be filled. Thus, I cannot vote in favor of this nomination.

The caseload of the D.C. circuit is considerably lower than any other circuit court in the Nation. In 1996, the eleventh circuit had almost five times the number of cases per judge as the D.C. circuit. The fourth circuit had over three times as many cases filed. Specifically, about 378 appeals were filed per judge in the fourth circuit in 1996, compared to only about 123 in the D.C. circuit.

Moreover, the caseload of the D.C. circuit is falling, not rising. Statistics from the Administrative Office show a decline in filings in the D.C. circuit over the past year.

I am well aware of the argument that the cases in the D.C. circuit are more complex and take more time to handle, and therefore we should not expect the D.C. circuit to have the same caseload per judge as other circuits. However, this fact cannot justify the great disparity in the caseload that exists today between the D.C. circuit and any other circuit. This is especially true since the D.C. circuit caseload is declining. In short, it is my view that the existing membership of the D.C. circuit is capable of handling that court's caseload.

Mr. President, one of the core duties of a Member of this great Body is to determine how to spend, and whether to spend, the hard-earned money of the taxpayers of this Nation. We must exercise our duty prudently and conservatively because it is not our money or the Government's money we are spending; it is the taxpayers' money. Today, the Republican Congress is working diligently to find spending cuts that will permit us to finally achieve a balanced budget. In making these hard choices, no area should be overlooked, including the judicial branch. Under the Constitution, the Congress has the power of the purse, and it has broad authority over the lower Federal courts. This body has the power to eliminate or decide not to fund vacant lower Federal judgeships, just as it had the power to create them in the first place.

The cost of funding a Federal judgeship has been estimated at about $1 million per year. This is a substantial sum of money, and a vastly greater sum if we consider the lifetime service of a judge. We must take a close look at vacant judgeships to determine whether they are needed.

In this regard, Senator GRASSLEY, the chairman of the Judiciary Subcommittee on the Courts and Administrative Oversight, has been holding hearings regarding the proper allocation of Federal judgeships. I would like to take this opportunity to commend Senator GRASSLEY for the fine leadership he is providing in this important area. Through Senator GRASSLEY's hard work, we have learned and continue to learn much about the needs of the Federal courts.

During one such subcommittee hearing this year, the Chief Judge of the Court of Appeals for the Fourth Circuit, J. Harvie Wilkinson III, explained that having more judges on the circuit court does not always mean fewer cases and a faster disposition of existing ones. He indicated it may mean just the opposite. More judges can mean less collegial decisionmaking and more intracircuit conflicts. As a result of such differences, more en banc hearings are necessary to resolve the disputes. More fundamentally, a large Federal judiciary is an invitation for the Congress to expand Federal jurisdiction and further interfere in areas that have been traditionally reserved for the States.

In summary, I oppose this nomination only because I do not believe that the caseload of the D.C. circuit warrants an additional judge. Mr. Garland is a fine man, but I believe that my first obligation must be to the taxpayers of this Nation.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The distinguished Senator from Vermont.

Mr. LEAHY. Mr. President, how much time is remaining to the distinguished senior Senator from Utah and myself?

The PRESIDING OFFICER. The Senators have 54 minutes.

Mr. LEAHY. I thank the Chair.

Mr. President, I am concerned when I hear attempts to tie Mr. Garland's nomination to the number of judges in the D.C. circuit. Let us remember that Mr. Garland is there to fill the 11th seat on the D.C. circuit, not the 12th seat. Even Judge Silberman, who has argued for abolishing the 12th seat for this court, has testified that ''it would be a mistake, a serious mistake, for Congress to reduce down below 11 judges.'' That is a verbatim quote from Judge Silberman.

But we should also remember that when we just put numbers here, numbers do not tell the whole story. The D.C. circuit's docket is by far the most complex and difficult in the Nation. You can have a dozen routine matters in another circuit and one highly complex issue involving the U.S. Government in the D.C. circuit, brought because it is the D.C. circuit, that one would go on and equal the dozen or more anywhere else.

We can debate later on the size of the D.C. circuit, whether it should be 11 or 12. But we are talking about the 11th seat. And what Senators ought to be talking about is the fact that Merrick Garland is a superb nominee. He has been seen as a superb nominee by Republicans and Democrats alike, by all writers in this field. At a time when some seem to want people who are not

qualified, here is a person with qualifications that are among the best I have ever seen.

So, let us not get too carried away with the debate on what size the court should be. We can have legislation on that. The fact is, we have a judge who is needed, a judge who was nominated, and whose nomination was accepted and voted on by the Senate Judiciary Committee in 1995. It is now 1997. Let us stop the dillydallying. I suppose, as we are not doing anything else—we do not have any votes on budgets or chemical weapons treaties or any of these other things we can do—I suppose we can spend time on this. We ought to just vote this through, because at the rate we are currently going we are falling further and further behind, and more and more vacancies are continuing to mount over longer and longer times, to the detriment of greater numbers of Americans and the national cause of prompt justice.

Frankly, I fear these delays are going to persist. In fact, the debate on what should be in the courts took an especially ugly turn over the last 2 weeks. Some Republicans have started calling for the impeachment of Federal judges who decide a case in a way they do not like. A Member of the House Republican leadership called for the impeachment of a Federal judge in Texas because he disagreed with his decision in the voting rights case, a decision that, whichever way he went, was going to be appealed by the other side. If he ruled for the plaintiffs, the defendants were going to appeal; if he ruled for the defendants, the plaintiffs would have appealed. But this Member of the other body decided, forget the appeals, he disagrees, so impeach the judge. He is quoted in the Associated Press as saying, ''I am instituting the checks and balances. For too long we have let the judiciary branch act on its own, unimpeded and unchallenged, and Congress' duty is to challenge the judicial branch.''

The suggestion of using impeachment as a way to challenge the independence of the Federal judiciary, an independence of the judiciary that is admired throughout the world, the independence of a judiciary that has been the hallmark of our Constitution and our democracy, the independence of a Federal judiciary that has made it possible for this country to become the wealthiest, most powerful democracy known in history and still remain a democracy—to talk of using impeachment to challenge that independence demeans our Constitution, and it certainly demeans the Congress when Members of Congress speak that way. It is also the height of arrogance. It ignores the basic principle of a free and independent judicial branch of Government. We would not have the democracy we have today without that independence.

I wonder if some have taken time to reread the Constitution. Maybe I give them too much benefit of the doubt. I will ask them to read the Constitution. Article II, section 4, of the Constitution states:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The Founders of this country did not consider disagreement with a Member of the House of Representatives as an impeachable offense. In fact, the Founders of this country would have laughed that one right out. Can you imagine? I suggested some read the Constitution and, I must admit, in a moment of exasperation, I suggested perhaps some who were making these claims had never read a book at all. But, of course, they have. There is one by Lewis Carroll. It is called Alice in Wonderland. The queen had a couple different points she made. One, of course, if all else failed was, ''Off with their heads.'' The other is, ''The law is what I say the law is.''

We all lift our hands at the beginning of our term in office and swear allegiance to that Constitution, but all of a sudden there is something found in there that none of us knew about. Impeach a judge because you disagree with a judge's decision? I tried an awful lot of cases before I came here. I was fortunate in that, a chance to try cases at the trial level and the appellate level. Sometimes I won, sometimes I lost, but there was always an appeal. In fact, I found in the cases I won as a prosecutor, the person on the way to jail would invariably file an appeal. I just knew the appeal would be made. That is the way the courts go.

You do not suddenly say because I won the case, the judge was to be impeached.

I think back to about 40 years ago and those who wanted to impeach the U.S. Supreme Court. Why? Because they refused to uphold segregation—let's impeach the Court. In fact, I made my first trip here to the U.S. Capitol in Washington, DC, when I was in my late teens. At that time, for the first time, I saw the billboards and demonstrations against the Chief Justice after the landmark Brown versus Board of Education decision. I wondered what was going on.

In the 1950's, it was not uncommon to see billboards and bumper stickers saying, ''Impeach Earl Warren.'' These signs were so prevalent, Mr. President, that a young man from Georgia at that time once remarked that his most vivid childhood memory of the Supreme Court was the ''Impeach Earl Warren'' signs that lined Highway 17 near Savannah. He said: ''I didn't understand who this Earl Warren fellow was, but I knew he was in some kind of trouble.''

That young man from Georgia is now a Supreme Court Justice himself, Justice Clarence Thomas.

In hindsight, it seems laughable, as in hindsight the current calls of impeachment of current judges will also be laughable. At that time, the call to impeach was popular within a narrow and intolerant group which did not understand how our democracy works or what was its strength. Apparently, it is fashionable in some quarters to sloganeer about impeaching Federal judges again.

It was wrong in the 1950's to have somebody who wanted to protect the sin and stain of segregation to call for the impeachment of Earl Warren. It is wrong for some today to call for the impeachment of a Federal judge because of a disagreement with a single decision.

So I hope all of us—all of us—stop acting as though we can go to something way beyond our Constitution because a judge comes out with a decision that we may disagree with. That is not a high crime or misdemeanor; it is not an impeachable offense. Maybe it is an appealable question, but not an impeachable offense.

We in the Congress cannot act as some super court of appeals. Good Lord, we even had a suggestion over the weekend that maybe even the Congress should have the power to vote to override any decision. In fact, it would be a super court of appeals. Good Lord, Mr. President, look at the pace of this Congress. We have almost 100 vacancies on the Federal court and certainly by the end of business yesterday, we had not filled a single one of them. We have not had a minute of debate on the budget. We have done nothing about bringing up campaign finance reform.

Cooler heads are prevailing. I commend the distinguished majority leader, Senator LOTT, for his remarks on these impeachment threats. He is quoted as saying that impeachment should be based on improper conduct of a judge, not on his or her decisions or appeals. I think that is the way it should be. I think perhaps we should step back before we go down this dark road.

I understand, Mr. President, that the distinguished senior Senator from Maryland wishes 5 minutes; is that correct?

Mr. SARBANES. If the Senator can yield me 5 minutes, I would appreciate it.

Mr. LEAHY. Mr. President, I yield 5 minutes to the distinguished senior Senator from Maryland.

The PRESIDING OFFICER. The Chair recognizes the distinguished Senator from Maryland.

Mr. SARBANES. I thank the Chair.

I would like to ask the distinguished Senator from Vermont a couple of questions, if I can, about the charts he was referring to earlier. I want to make sure I understand them fully.

This one, as I understand, shows the number of judges that have been confirmed in the last three Congresses—we are now in the 105th Congress. There are currently 94 vacancies in the Federal court system?

Mr. LEAHY. There are. There will very soon be 100.

Mr. SARBANES. As yet, no judges have been confirmed in this Congress?

Mr. LEAHY. That's right.

Mr. SARBANES. This is the first judge that has come before us?

Mr. LEAHY. That is right.

Mr. SARBANES. Although I gather there are some 25 judges pending in the Judiciary Committee.

Mr. LEAHY. Between 23 and 25, enough to fill a quarter of the vacancies that are pending. Of course, on Mr. Garland, he came before the committee in 1995 and was approved by the committee the first time in 1995. We are now in 1997. It is not moving with alacrity.

Mr. SARBANES. It is not even moving with the speed of a glacier, one might observe.

Mr. LEAHY. I was going to say, there is a certain glacier connotation to the speed of confirming judges.

Mr. SARBANES. In the previous Congress, the 104th Congress, 75 judges were confirmed?

Mr. LEAHY. That's right.

Mr. SARBANES. The previous Congress, the 103d, 129, and the one before that, the 102d, 124; is that correct?

Mr. LEAHY. The Senator is correct.

Mr. SARBANES. There is a significant falloff in the number of judges being confirmed.

Mr. LEAHY. In the 104th Congress, I tell my friend from Maryland, there was an unprecedented slowdown in the confirmation of judges to the extent that I think the only year that we could find, certainly in recent memory, where no court of appeals judges were confirmed at all was in the second session of the 104th Congress. The slowdown was so dramatic in the second session of the 104th Congress that it dropped the number down to certainly an unprecedented low, considering the vacancies.

Mr. SARBANES. I am quite concerned with these developments. The Congress has become much more political and partisan by any judgment. I think that is regrettable, but it has happened, and we have to try to contend with it here as best we can. But I think it is a dire mistake if this attitude carries over into our decisions regarding the judiciary, the third, independent branch of our Government and the one that, in order to maintain public confidence in our justice system, ought to have politics removed from it as much as is humanly possible.

Would the Senator from Vermont agree with that observation?

Mr. LEAHY. I absolutely agree. It has been my experience in the past that Republicans and Democrats have worked closely together with both Republican and Democratic Presidents to keep the judiciary out of politics, knowing that all Americans would go to court not asking whether a judge is Republican or Democrat, but asking whether this is a place they will get justice. If we politicize it, they may not be able to answer that question the way they have in the past.

Mr. SARBANES. Therefore, I am very interested in this chart you have prepared: The number of judges confirmed during the second Senate session in the Presidential election years.

Now, what has happened? What happened in 1996 is dramatic. No appeals court judges were confirmed and only 17 district court judges.

Mr. LEAHY. If my friend from Maryland will yield on that, I will point out the contrast. In 1992 we had a Republican President and a Democratic Senate; we confirmed 11 appellate court judges and 55 district court judges. Four years later you have a Democratic President and a Republican Senate and look at the vast difference: zero appellate court judges and only 17 district court judges, notwithstanding an enormous vacancy rate.

I think what it shows is that, if you want something to demonstrate partisanship, when the Democrats controlled the Senate with a Republican President, they still cooperated to give that Republican President a significant number of judges in the second session, in a Presidential election year, the time it normally slows down, as contrasted to the absolute opposite, the unprecedented opposite, of what happened when you have a Democratic President and a Republican Senate.

Mr. SARBANES. Let me take the Senator's——

Mr. CHAFEE. Could I ask a question in here at the proper time? I do not want to interrupt the flow. I had a question of the manager?

Mr. LEAHY. The Senator from Maryland has the floor.

Mr. SARBANES. I yield for the inquiry.

Mr. CHAFEE. My question is this. As I understand it, there are 3 hours on this bill, so presumably that would take us up to around 6 o'clock, as I understand.

Mr. LEAHY. Unless time is yielded back.

Mr. CHAFEE. I wonder if there appeared to be much of a chance that some time might be yielded back? It would be very helpful to me, but I do not want to stop any pearls of wisdom.

Mr. LEAHY. I have a member of the Leahy family to whom I have had the privilege of being married nearly 35 years who hopes time will be yielded back. As her husband, I hope time will be yielded back. I am about to just give the floor back to the Senator from Maryland. I do not know how much more time is going to be taken in opposition to Mr. Garland. I know of very little time that is going to be taken further here.

So the long way around, to answer my good friend from Rhode Island, I hope time will be yielded back fairly soon.

Mr. CHAFEE. Put me down as a firm supporter of Mrs. Leahy.

Mr. LEAHY. I am sure she would be delighted to know that.

Mr. SARBANES. If the Senator would yield for one further question, just to take your analysis a step further, in 1992 and 1988, in each of those years, you had a Republican President and a Democratic Senate, is that not correct?

Mr. LEAHY. Right.

Mr. SARBANES. It is in both these years, not just the contrast of the last year of the Bush Presidency. But in the last year of the second Reagan administration, we confirmed 7 appeals judges, then 11 for the last year of the Bush administration, and last year the number was zero. For district court judges in those years it was 35, 55 and 17. That is a dramatic difference. An element has intruded itself in this confirmation process that was not heretofore present.

Mr. LEAHY. If the Senator would yield a moment.

In 1984, there was a Republican Senate and Republican President, and you see 10 and 33. In 1992, there is a Republican President and Democratic Senate, and the Democratic Senate actually did better for the Republican President than the Republican Senate for the Republican President.

Mr. SARBANES. Exactly.

Let me say I am very deeply concerned about this development. I want to commend the Senator from Vermont because he has been speaking out on this very important matter for some time now.

Moving to the pending nomination, I want to speak first to Merrick Garland's merits, although let me say that I do not understand any of my colleagues to be questioning his capabilities and qualifications to serve on the bench. In fact, Members on both sides have spoken very highly of Merrick Garland and noted his outstanding character.

I was privileged, since he is a resident of my State, to have the honor to introduce him at his confirmation hearing before the Senate Judiciary Committee. That was on November 30, 1995, almost 18 months ago. I believed then and continue to believe now that he will make an outstanding addition to the D.C. circuit.

His career exemplifies his strong commitment to the law and to public service.

He is a magna cum laude graduate from Harvard Law School. He clerked for Judge Henry Friendly on the second circuit and for Justice William Brennan at the Supreme Court.

He has had a long association with the Justice Department, first as a special assistant to then Att. Gen. Benjamin Civiletti. He then became a partner at Arnold & Porter when he left the Justice Department to go into private practice.

Upon returning to public service, he has served as an assistant U.S. attorney for the District of Columbia, dealing with public corruption and Government fraud cases. He has also served as Deputy Assistant Attorney General in the Justice Department's Criminal Division and as Principal Associate Deputy Attorney General, both very high ranking positions within the Department.

In all of these positions he has served our country with great distinction.

He has published extensively in several areas of the law and has remained active in bar association activities.

In every respect, in his intellect, his character, and his experience, he would make an outstanding addition to the bench.

Let me now just briefly talk about this new line of attack, so to speak, that has arisen about whether vacancies on the D.C. circuit should be filled.

First of all, I think any analysis of the courts' need to fill vacancies cannot be based simply on caseload statistics—this is a benchmark that one needs to analyze carefully in order to determine what lies behind the cases. In fact, the D.C. circuit's situation in particular makes clear that mere case filing numbers do not tell the whole story with respect to the burdens that the court faces. The D.C. circuit receives, in complexity and importance, cases that do not come as a general rule before the other circuits across the country. It has had major, major cases that it has had to deal with as a routine matter, cases of great weight and importance to the nation.

The D.C. circuit also handles numerous appeals from administrative agency decisions that are characterized by voluminous records and complex fact patterns. In fact, almost half of the D.C. circuit's cases are these kinds of administrative appeals—46 percent. The next highest circuit in this respect is the ninth circuit with 9.6 percent of their cases being of this kind.

The D.C. circuit also handles fewer of the least complex and time-consuming cases, criminal and diversity cases, than any of its sister circuits. Only 11 percent of its cases are diversity cases. No other circuit has less than 24 percent.

In testimony before the Judiciary Committee's Courts Subcommittee, D.C. Circuit Judge Harry Edwards—the Chief Judge of the circuit—gave one example of the kind of complex administrative cases that are a routine part of the D.C. circuit's caseload. He talked about a case to review a FERC order, an order of the Federal Energy Regulatory Commission. This order produced, at the time of appeal, 287 separate petitions for review by 163 separate parties, and a briefing schedule that provided for the filing of 27 briefs, totaling over 900 pages.

I am simply making the point that they get very complex matters to deal with in the D.C. circuit, and that the case filing numbers relied on by other side do not tell the whole story.

Recall also that the vacancy we are talking about filling here is the 11th out of 12 slots on the D.C. circuit. Originally, Merrick Garland was being opposed on the basis that the 12th spot on the circuit court ought not to be filled. Now, with the taking of senior status by one of the D.C. circuit's judges, we are talking about filling the 11th spot, not the 12th spot, on that court and yet Members have come forward opposing the Garland nomination, a fact which I very much regret.

Now I want to address just very briefly the fact that the fourth circuit was raised earlier by one of my colleagues in this debate. He cited the view of Fourth Circuit Chief Judge Wilkinson, presented at a February 1997 Judiciary Subcommittee hearing, that the President and Senate do not need to fill the two vacancies that exist on that court.

It is interesting that at that same hearing, testimony that I do not think has been cited, by Judge Sam Ervin, the very able and distinguished circuit judge of the Court of Appeals for the Fourth Circuit, and the son of our former distinguished colleague, was presented before the panel in support of filling the vacancies.

Mr. President, I ask unanimous consent that the very thoughtful statement by Judge Ervin be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. SARBANES. It is very important to note that with respect to the fourth circuit, there is a nominee pending before the Judiciary Committee, whose nomination was submitted in the last Congress—two nominations, as a matter of fact, were submitted to the Committee last year—and one has been resubmitted by the administration right at the beginning of this session.

The PRESIDING OFFICER. The Senator from Maryland has spoken for considerably more than 5 minutes.

Mr. SARBANES. Would the Senator give me 2 minutes to close up?

Mr. LEAHY. I yield 2 additional minutes.

Mr. SARBANES. There is no way with a nominee having been sent to the Senate by the President, that an argument for not approving the nominee based on not needing the judgeship can be made without it carrying with it an ad hominem argument against the nominee.

If people are really serious about reducing vacancies on the courts, they need to scrub down the number of places before the nominees are submitted, by legislation. Once the nominees come here, you cannot divorce the attack on the individual from the attack on the need for the seat on the bench. We have the chief judge of the fourth circuit coming in against filling spots when nominees are pending.

Now, how can that position be taken and considered separate from opposition to the nominee? They say, ''Well, I am not against this nominee, but I just do not think this spot ought to be filled.'' Of course, that is small comfort to the nominee whose nomination is pending and has been put forward in order to fill the vacancy.

Now, Judge Ervin, in his testimony, sets forth, I think, a very persuasive case why the fourth circuit needs to have those vacancies filled. I commend that statement to my colleagues. I will not go through it in detail here, given the fact that this debate is coming to a close.

I do encourage my colleagues to consider carefully the political cloud with which we are now surrounding the judgeships.

I say to my colleagues on the other side, we did not behave this way at a time when the Senate Democrats were in control of the Senate and we were dealing with the nominations of Republican Presidents. I will be very frank. I think the judiciary deserves better than that from us. I hope that game will come to an end and we will be able to move ahead with the confirmation of judges in an orderly fashion.

In closing, let me again state that I am very supportive of the judicial nominee who is before the Senate today. I think he is a person of outstanding merit who will make an outstanding judge, and I urge his confirmation.

EXHIBIT 1

STATEMENT OF THE HONORABLE SAM J. ERVIN III

Mr. Chairman and members of the Subcommittee, my name is Sam J. Ervin, III, of Morganton, North Carolina. I am an active United States Circuit Judge for the Fourth Circuit, having been appointed in May, 1980. I had the honor of serving as the Chief Judge of that Circuit from February, 1989 until February, 1996. I appreciate the Subcommittee's willingness to hear my views.

I support the actions of the Judicial Conference of the United States in its efforts to address the important issue of judgeship needs. I commend Chief Judge Julia Gibbons and the other members of the Judicial Resources Committee for establishing a principled method for evaluating these needs.

I am in agreement with my good friend and colleague, Chief Judge J. Harvie Wilkinson, III, that the federal judiciary should remain of limited size and jurisdiction. Should anyone present doubt my commitment to those principles, I quote from a resolution that I introduced on June 24, 1993: (which was unanimously adopted by the Article III Judges of the Fourth Circuit)

''Chief Judge ERVIN. If I may, I would like to submit for consideration a resolution reading as follows:

'' 'Resolved that the future role of the federal courts should remain complementary to the role of the state courts in our society. They should not usurp the role of state courts.

'' 'To achieve that goal, it is the consensus of the Conference that the Congress might consider such issues as the federal courts remaining an institution of limited size and jurisdiction. The ability of the federal courts to fulfill their historical limited and specialized role is dependent on the willingness of Congress to maintain jurisdictional balance and curtail the federalization of traditional state crimes and causes of action.' ''

My appearance here today, however, is necessitated by Chief Judge Wilkinson's proposal that we do not need to fill the two judicial vacancies that presently exist in our circuit. It is my conviction that our failure to do so would be a serious mistake.

First, a brief history leading up to the subject of whether these two existing vacancies should or should not be filled;

On October 9, 1985, when the late Harrison Winter was our Chief Judge, the circuit judges, with a single dissent, voted to ask for

four additional active judges for the Fourth Circuit.

On October 4, 1989, we again indicated by another formal action that while we did not desire a court of more than 15 active judges, we unanimously reaffirmed our earlier request for four additional judges.

Legislation was passed in 1990 authorizing a number of additional judgeships, including four new circuit court judges for the Fourth Circuit. Thereafter, three of these so-called Omnibus Bill judges were nominated and subsequently confirmed: Judge Hamilton (S.C.) in July, 1991; Judge Luttig (V.A.) in August, 1991; and Judge Motz (M.D.) in June, 1994.

The fourth (and final) Omnibus Bill judgeship has remained unfilled since it was created in December, 1990. As of this date, there is no pending nomination for this vacancy, and I believe that this is the only 1990 circuit judgeship that remains unfilled.

The second Fourth Circuit vacancy was created when Judge J. Dickson Phillips, Jr., of North Carolina, took senior status, effective July 31, 1994. More than two and one-half years later, the Honorable James M. Beaty, Jr., a District Court Judge in the Middle District of North Carolina, was nominated to succeed Judge Phillips, but no action has been taken on that nomination by the Senate Judiciary Committee.

To my knowledge, the judges of the Fourth Circuit have never taken any formal action to indicate an unwillingness to stand by our requests that these two vacancies be filled.

In order to evaluate the Circuit's needs for these two judgeships, I suggest that we must realistically assess our present situation:

Present Active Judges: At this time, the Fourth Circuit has 13 active judges. Five of these judges are 70 years of age or older. Their present ages are: 90, 78, 76, 73, and 70. Is it realistic to expect that all of these judges will be able to continue to serve indefinitely?

Present Senior Judges: The last printed report from the Administrative Office is outdated in reflecting that we have 4 senior judges. One of the four retired on July 31, 1995, and is no longer eligible to sit.

Another has indicated that he does not plan to sit any more. The remaining two, whose current ages are 79 and 74, have each been sitting 2 days per court week, thereby constituting 4/5 of one judge.

Necessary Panels: For the past several years, we have been averaging 5 panels of judges each court week. With our present complement of active and senior judges, we lack a sufficient number of judges to fill 5 panels without bringing in district judges from our own circuit or senior judges from other circuits.

Current Statistics: Rather than burden you with more numbers, I will simply refer to the latest figures published by the Administrative Office. I am confident that those statistics fully justify the filling of the two existing vacancies. In fact, as I understand it, if the numerical portion of the existing formula were applied (the 500 filings per panel with pro se appeals weighted as one-third of the cases) the Fourth Circuit would be eligible to receive 20 judgeships. We have never requested more than 15.

North Carolina: I note that Judge Gibbon's Judicial Resource Committee has listed as a factor to be considered in allocating judgeships, geographical considerations within a circuit. At the risk of being thought provincial, I emphasize the special impact that a failure to fill the two presently unfilled seats on the Fourth Circuit will have on North Carolina. The expectation has been that these seats would be assigned to that state. I, of course, recognize that there is no law which requires that this allocation be made—actually this is a matter for the executive and legislative branches to determine—but it seems to be the fair thing to do for the following reasons:

a. North Carolina is the most populous state in the circuit.

b. North Carolina has one of the highest numbers of filings in the district courts in the circuit.

c. North Carolina, like West Virginia, has had only two seats, while both Virginia and Maryland have three each, and South Carolina has four. Filling the two existing vacancies from North Carolina would do no more than to restore that state to parity with our sister states. I point out that should I decide to take senior status—as I am eligible to do—North Carolina would have no active judge. That situation would create some insurmountable problems for both the bar and litigants of that state.

d. While it has been suggested to me that this imbalance could be remedied by assigning seats now held by judges from other states to North Carolina as they are opened by death or retirement, that seems an unpredictable solution—especially in the present political climate.

Above all else, I seek to be as sure as it is humanly possible to be that our circuit has a sufficient number of judges to enable us to render swift and certain justice in all of the cases that come before us. Some recent legislation and our adoption of new internal operating procedures may well reduce our caseload to some degree but countervailing circumstances, including the continuation of the federalization of numerous state crimes, the creation of new private rights of action, the rapid population growth of the region, and the increased complexity of both the criminal and civil cases now coming to the federal courts (to mention only a few of the relevant factors) will, I fear, more than offset any decreases in our workloads. I do believe that we would have sufficient personnel to enable us to do the work that is assigned to us in a fashion acceptable to all if these two vacancies are filled—at least for the foreseeable future.

Mr. Chairman, in the Questionnaire which you sent to the members of the judiciary some time ago, you raised the legitimate question of whether we as judges were being required by our respective workloads to delegate more of our judicial functions than was ideal—or even healthy—to elbow law clerks, staff law clerks or other non-judicial employees. I was not privy to the answers my colleagues returned to those questions, but I strongly suspect that many of us would admit that the degree of delegation required in the courts of appeals is greater than is ideal. Speaking only for myself, I would like to be able to devote greater personal attention to every matter that comes before me than I am now able to do.

I sincerely believe that our present ability to carry out our duties in a manner pleasing to this Subcommittee, to the public, and to ourselves would be enhanced by the filling of these two long vacant positions.

Mr. BIDEN. Mr. President, 2 of the 12 seats on the District of Columbia Court of Appeals are currently vacant. Some have argued that the vacancy to which Merrick Garland has been nominated should not be filled because the D.C. circuit is overstaffed. But the reasons Congress gave for approving 12 seats for the D.C. circuit remain compelling today and justify filling this vacancy.

Further, to propose eliminating a circuit court judgeship within the context of a particular nomination, rather than through the deliberative process we normally follow in addressing judgeship needs, jeopardizes the impartiality and independence of the judiciary.

Merrick Garland's nomination was first delivered to the Senate on September 6, 1995—more than 18 months ago. The Judiciary Committee held a confirmation hearing on the nomination on November 30, 1995, and forwarded the nomination for consideration by the full Senate 2 weeks later. The full Senate failed to act on Garland's nomination for 9½ more months, however, returning it to the President at the close of the 104th Congress.

In fact, the Senate refused to confirm a single circuit court judge during the entire second session of the last Congress. This was the first time in more than 20 years that an entire session of Congress had passed without a single circuit court confirmation. Nonetheless, some argued that shutting down the confirmation process is par for the course in an election year. They are wrong. And let me set the record straight.

George Bush made nearly one-third of his 253 judicial nominations in 1992, a Presidential election year. As chairman of the Judiciary Committee, I held 15 nomination hearings that year, including 3 in July, 2 in August, and 1 in September. In 1992—the last Presidential election year—the Senate continued to confirm judges through the waning days of the 102d Congress. We even confirmed 7 judges on October 8—the last day of the second session. As a result, the Senate confirmed all 66 nominees the Judiciary Committee reported out that year—55 for the district courts and 11 for the circuit courts. Let me repeat: last session, only 17 district judges were confirmed and no circuit judges were confirmed.

Now that the election is over and Merrick Garland has been renominated, Republicans argue that we should not vote to confirm him because the District of Columbia circuit needs only 10 judges. They are wrong. And let me set the record straight.

Congress has previously recognized the need for 12 judges. Twelve years ago, based on the recommendation of the Judicial Conference of the United States, Congress concluded that the D.C. circuit's caseload warranted 12 judgeships. The Senate report to the 1984 legislation creating an additional judgeship states:

> Located at the seat of the Federal government, the Court of Appeals for the District of Columbia inevitably receives a significant amount of its caseload from federal administrative agencies headquartered in that area. Administrative appeals filed in this court numbered 504 in 1982 and represented 34.8 percent of the incoming caseload. Due to the nature of the caseload which includes many unique cases involving complex legal, economic and social issues of national importance and a large backlog of pending appeals, this court requires one additional judgeship.

The D.C. circuit needs 12 judges to handle its complex caseload. A large portion of the D.C. Circuit caseload consists of complex administrative appeals which generally consume a larger

amount of judicial resources than other appellate cases. Therefore, comparison of raw caseload data between the D.C. circuit, with its high percentage of complex administrative cases, and the other circuits is misleading. According to the statistics provided by the Administrative Office of U.S. Courts for the period from September 30, 1995 to September 30, 1996, 1,347 cases were filed in the D.C. circuit, 474 of which—or 35.2 percent—were administrative appeals. In contrast, in the remaining 11 circuits, of the 51,991 cases filed, only 2,827—or 5.4 percent—were administrative appeals.

The D.C. circuit has a long time interval between filing a notice of appeal and final disposition. Because the D.C. circuit has this incredibly high percentage of administrative appeals relative to the other circuits and because these types of cases require tremendous amounts of judicial resources, litigants in the D.C. circuit must wait an average of 12 months between the filing of the notice of appeal and final disposition. Only 3 of the 12 circuits have a longer average for this time frame.

The fact that the D.C. circuit has a long time interval between filing and disposition is indicative of the complex cases that the circuit handles. Other circuits have more criminal appeals and garden-variety diversity cases that often are amenable to summary disposition without oral argument.

The D.C. circuit has fewer pro se appeals than other circuits. In addition to having fewer criminal appeals and diversity cases, the D.C. circuit has a lower percentage of pro se mandamus cases than all other circuits. Chief Judge Edwards has noted that pro se appeals are often frivolous, easily identified as lacking merit, or otherwise amenable to disposition without significant expenditure of judicial resources.

The D.C. circuit has more cases of national importance than other circuits. Not only are complex administrative appeals commonly heard in the D.C. circuit, but as a result of its location at the seat of the Federal Government, the D.C. circuit also hears a disproportionate number of the high-profile cases of national importance that reach the U.S. Courts of Appeals. The D.C. circuit decided in 1996 alone National Treasury Employees Union versus United States of America, a challenge to the constitutionality of the Line-Item Veto Act, as well as Perot versus Federal Election Commission, an appeal from a district court's rejection of Ross Perot's attempt to participate in last year's Presidential debates.

The same reasons that supported the creation of a 12 judgeship for the D.C. circuit in 1984 justify its existence now. If reasoned deliberation and study of this circuit leads to the conclusion that a future vacancy should not be filled, then we should address that issue, but not within the context of this nomination. If ad hoc analysis becomes our mode of operation, we will give the appearance of a politicized judiciary.

I congratulate Merrick Garland for his distinguished career and commend President Clinton for making this nomination. I hope that the Senate will act to confirm him as expeditiously as possible.

Mr. BURNS. Mr. President, I rise today to express my opposition to the confirmation of Merrick Garland to the D.C. circuit.

Even though the nominee has the character and is highly qualified for the position, there is a larger question that must be examined. Does this seat really need to be filled? Especially since it has remained empty for 1½ years?

The answer is that the D.C. circuit does not need another seat, especially when there are many other problems in the other district circuits that have not been focused on yet. I base my opinion on the fact that the D.C. circuit had 4,359 cases as of October 1996. The ninth circuit, the circuit in which Montana is housed, had 71,462 cases. That is almost 20 times the number of cases. The D.C. circuit ranked last in the total number of cases as compared to each of the other district circuits in the Nation. If we examine these numbers, it does not seem as if the D.C. judges are handling any cases at all.

This is also a very expensive seat. It will cost the American taxpayers an extra $1 million to fill this seat. This will not be money well spent.

There are adequate numbers of judges on the circuit, why are we confirming this seat? I urge my colleagues to examine the numbers and vote against the filling of this unneeded seat.

Ms. MIKULSKI. Mr. President, I rise today in support of the nomination of Merrick Garland to the U.S. Court of Appeals for the D.C. circuit. Mr. Garland is a resident of my State of Maryland.

I am pleased that his nomination is finally on the Senate floor for a vote. It is critical that vacancies on the Federal bench are filled, especially at the appellate level.

Mr. Garland has a distinguished legal record in the public and private sectors. He has specialized in criminal, civil, and appellate litigation, as well as administrative and antitrust law. I believe his experience will serve him well on the Federal bench once he is confirmed.

Mr. Garland is a magna cum laude graduate of Harvard Law School and a summa cum laude graduate of Harvard College. While at Harvard Law School, he was the articles editor of the Harvard Law Review and a member of the prestigious Phi Beta Kappa, while he attended Harvard College.

When I decide whether to support a judicial nominee, I look at whether the nominee is competent; whether the nominee possesses the appropriate judicial temperament; whether the nominee possesses the highest personal and professional integrity, and whether the nominee will protect our core constitutional values.

I believe that Mr. Garland possesses all of these qualifications. His legal and academic record are exemplary. I am impressed that he has devoted part of his career to public service. He served as the Principal Associate Deputy Attorney General in the Department of Justice. And he clerked after law school for one of the most distinguished Supreme Court Justices, Justice William J. Brennan, Jr.

He's also done extensive pro-bono legal work on behalf of disadvantaged individuals. He has represented an African-American employee in a claim of racial discrimination, a mother in a custody dispute, and court-requested representation of a prisoner.

I urge my colleagues to support Mr. Garland's nomination to the U.S. Court of Appeals D.C. Circuit. I hope that once Mr. Garland is confirmed, we can move forward to a vote on the other pending Federal judicial nominees.

Mr. FAIRCLOTH. Mr. President, I rise today to vote ''no'' on the nomination of Merrick Garland to the U.S. Court of Appeals for the District of Columbia Circuit.

In so voting, I take no position on the personal qualifications of Mr. Garland to be a Federal appeals court judge. What I do take a position on is that the vacant 12th seat on the U.S. Court of Appeals for the District of Columbia Circuit does not need to be filled. Senator CHUCK GRASSLEY, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts, has examined this issue thoroughly, and has determined that the court's workload does not justify the existence of the 12th seat. Last Congress, Senator GRASSLEY introduced legislation to abolish this unneeded seat. By proceeding to renominate Mr. Garland, President Clinton has flatly ignored this uncontradicted factual record.

I commend Senator GRASSLEY for his important work on this matter, as well as Senator JEFF SESSIONS, who has also emphasized the importance of this matter. With the Federal deficit at an all time high, we should always be vigilant in looking for all opportunities to cut wasteful Government spending; this is one such opportunity. After all, each unnecessary circuit judge and his or her staff cost the taxpayer at least $1 million a year.

Lastly, our vote today is an important precedent, since it marks the beginning of the Senate's new commitment to hold rollcall votes on all judicial nominees. This is a policy change which I had urged on my Republican colleagues by letter of January 8, 1997, to the Republican Conference. Voting on Federal judges, who serve for life and who exert dramatic—mostly unchecked—influence over society, should be one of the most important aspects of serving as a U.S. Senator.

Rollcall votes will, I believe, impress upon the individual judge, the individual Senator, and the public the importance of just what we are voting on. I hope that my colleagues will regard this vote, and every vote they take on a Federal judge, as being among the most important votes they will ever take.

The PRESIDING OFFICER. The Chair recognizes the distinguished Senator from Utah.

Mr. HATCH. Mr. President, we should inform the Senate that our intent is to yield back the time if we can by 5:15 so people can vote at that time. It could be just a wee bit longer than that. That is our intention. Those who want to come over and use the time need to come now.

I yield 10 minutes to the distinguished Senator from Pennsylvania, who is a distinguished member of the Judiciary Committee.

Mr. LEAHY. Will the Senator yield for a moment?

Mr. HATCH. I yield.

PRIVILEGE OF THE FLOOR

Mr. LEAHY. Mr. President, I ask unanimous consent that Victoria Bassetti of Senator DURBIN's staff be allowed the privilege of the floor during this debate.

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

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I thank my colleague, the distinguished chairman of the Judiciary Committee, for yielding me time.

I have sought recognition to voice my very strong support for the nomination of Merrick Garland for the Court of Appeals for the District of Columbia. Mr. President, a great deal has been said today on this floor which is of great importance but not really tremendously related to Merrick Garland's nomination. I hope we have a chance to analyze the entire process of confirmation of judges and the respective roles of the President and the Senate, because the President has the nominating authority and the Senate has the constitutional authority for confirmation. There are a great many things that ought to be done on both sides to expedite the nomination and confirmation of judges.

In my own State, Pennsylvania has quite a number of vacancies now, and I have been in discussions with the President's representatives at the White House about trying to get these nominations filled. There is something to be said on many sides of this issue. The matter confronting the Senate now is, what are we going to do with Merrick Garland? His record is extraordinary. I have been on the Judiciary Committee going into my 17th year and I do not believe I have seen a nominee with the qualifications that this man has.

He graduated from Harvard College, summa cum laude, was Phi Beta Kappa, and graduated from Harvard Law School, magna cum laude. He was on the Harvard Law Review and was the Articles Editor there. He has an extraordinary record of publications, on the issue of Antitrust, in the Yale Law Journal. And I might say, Mr. President, that this nominee exhibited perhaps his best judgment in associating himself with Yale Law School on the article, then going on into FTC investigations, the controversial veto issue, professional responsibility and commercial speech. It is really an extraordinary, extraordinary record. This man, at the age of 45, coming into the court of appeals, may well be a distinguished prospect for the Supreme Court of the United States.

Beyond his record in school and his writings, he was law clerk to a very distinguished circuit judge, Judge Harry Jay Friendly, and he served as law clerk to Supreme Court Justice William Brennan, Jr., and was a partner of distinguished law firms, and worked as a prosecuting attorney. He now serves as Deputy Assistant Attorney General of the United States in the U.S. Department of Justice, in the Criminal Law Division, where I have had occasion to work with him on a professional basis. He just is an extraordinary prospect for the court of appeals.

He has not been treated very gently in the confirmation process, having been nominated in September 1995. He passed through the Judiciary Committee in the 104th Congress and was kept off the agenda by a single hold. That is when a Senator voices an objection without stating a reason, or perhaps multiple holds, but I know a single hold stood in his way.

I compliment the majority leader, Senator LOTT, for bringing his nomination to the floor at this time so that he may be acted upon, yes or no. He really is extraordinary, and I think he has a remarkable career ahead. I am delighted to offer my voice of strong support for his confirmation.

I thank the Chair. I thank my colleague from Utah. I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I also want to thank the distinguished senior Senator from Pennsylvania because he was also the decisive Senator who came in and made the quorum at the time we voted Mr. Garland out of committee. Sometimes we forget those little procedural things we have to do just to get here on the floor.

Mr. SPECTER. I thank my colleague from Vermont for making that comment. I had presided over Merrick Garland's confirmation proceedings in the 104th Congress. It was hard to find a Senator when I came in that afternoon. I found out Merrick Garland was there and five other people. It was an interesting afternoon. We had a great many responsibilities.

I went to law school not too long ago and I know what it is like to be on the law review. They call it the Law Journal at Yale. It is remarkable to have the kind of record that Merrick Garland has. Those writings are just extraordinary. It takes long hours and extraordinary study to turn one of those articles out, and there is a wide array of issues that he has written on. He could be making a lot of money. He is currently in public service and he is prepared to go to the court of appeals at the age of 45. We need judges in America with real intellectual abilities. We need judges like Holmes and Brandeis and Cardozo on the courts of the United States. We need them on the Supreme Court of the United States. This is a real prospect. We ought to get him up and out.

I yield the floor.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the distinguished Senator from Massachusetts.

Mr. KENNEDY. Will the Senator yield me 5 minutes?

Mr. LEAHY. Yes.

Mr. KENNEDY. Mr. President, I support the nomination of Merrick Garland for the vacancy on the D.C. circuit, and I am concerned that it has taken more than 18 months for the nomination to reach the Senate floor.

No one can question Mr. Garland's qualifications and fitness to serve on the D.C. circuit. He is a respected lawyer, a former Supreme Court law clerk, a partner at a prestigious law firm, and since 1989, has served with distinction in the Department of Justice under both Republican and Democratic administrations.

Support for him is bipartisan. We have received letters of support from numerous Reagan and Bush Justice Department officials, including former Deputy Attorneys General George Terwilliger and Donald Ayers, former Office of Legal Counsel Chief Charles Cooper and former U.S. Attorneys Jay Stephens, Joe Whitley, and Dan Webb. Jay Stephens, who was U.S. attorney when Garland served at that office in the District of Columbia, called Garland a person of ''dedication, sound judgment, excellent legal ability, a balanced temperament, and the highest ethical and professional standards.'' The National District Attorney's Office supports his nomination, calling Garland an excellent lawyer, brilliant scholar, and a man of high integrity.'' There can be no serious doubt about his ability to serve as a fair and impartial judge on the D.C. circuit.

Why then, has it taken 18 months to bring this nomination before the U.S. Senate? And why is it that no other judicial nominees have been brought before the Senate?

In fact, only 17 judges—all for district court appointments—were confirmed during all of 1996. Obviously, that was a Presidential election year. But the slow-down in acting on judicial nominations was unprecedented. In 1992, when President Bush was seeking reelection, the Senate, under control of the Democratic Party, still confirmed 66 district court and appellate court judges.

Justice delayed is justice denied. Thousands of Americans with legitimate grievances cannot get their day in court, because judicial vacancies are not being filled and current Federal judges don't have the time to hear their cases. It's hard to crack down on crime when there are not enough judges to enforce the laws that Congress passes.

Many of us are concerned about the harsh partisanship that is being applied to the judicial nomination process. Republicans in the Senate have organized an ad hoc Republican task force to develop procedures for screening judges. They have rejected a formal role for the American Bar Association in assessing candidates. Republicans are seeking to force the President to conduct the real debate with them behind closed doors—nominee by nominee—to make sure each person the President names meets an ideological litmus test. In fact, some have suggested a quota system, in which half of all judicial nominations come from Republicans in Congress and half from President Clinton.

If the Federal courts were a business, they would be in bankruptcy. There are over 90 vacancies in judgeships today. In his 1996 annual report, Chief Justice Rehnquist criticized Congress failure last year to create additional Federal judgeships and called it a shortcoming. The Administrative Office of the U.S. Courts has requested an additional 20 temporary positions on the courts of appeals and 21 permanent and 12 temporary positions in the district courts to address the heavy backlogs that are piling up.

In the case of Merrick Garland, some Republicans argue that we do not need to fill either of the two current vacancies in the D.C. circuit, because the caseload is too light. Many nonpartisan observers regard the D.C. circuit as the second most important court in the United States, after the Supreme Court. There currently is only one senior judge to assist the other 10 members of the Court.

In terms of both quantity and quality of its caseload, the D.C. circuit ranks among the Nation's busiest. It handles a disproportionately high proportion of cases of national significance involving intricate legal issues. Complex administrative appeals were 38 percent of the caseload of the D.C. circuit during fiscal year 1995, as compared with only 5.5 percent in other circuits.

By contrast, pro se appeals, which are generally the easiest to resolve, constituted only 11.8 percent of the D.C. circuit's caseload in 1995, by far the lowest percentage of any circuit in the country.

Diversity cases, which less often raise complex and time-consuming issues, constituted only 13.6 percent of the D.C. circuit's caseload in 1995, compared with 30 percent in the other circuits. So the charts and graphs that some of our Republican colleagues are using do not tell the whole story.

The court's backlog is also growing. In 1984, when the 12th seat was added, the court had a backlog of 1,200 cases. Today, that backlog exceeds 2,000 cases, despite a bench that is highly respected for its intellect and dedication. As former Republican Senator Charles Mathias stated on behalf of the nonpartisan Council for Court Excellence, ''It is in the public interest for the D.C. Circuit to have its full complement of twelve active judges.''

It is time to end the excessive partisanship over judicial nominations. I hope very much that our action on Merrick Garland is a sign that the unacceptable log jam is breaking and that the Senate is now returning to its proper role of advise and consent, not partisan obstruction, in the consideration of judicial nominations.

So, again, Mr. President, I join with those that are urging the Senate's favorable consideration of this extraordinary nominee. This is an individual who has been willing to be put forward now for over some 18 months. He has appeared before the committee and, as has been pointed out, his record is one of special recognition, a brilliant academic record, a strong commitment to public service. He has served under both Democrats and Republicans. He has been an extraordinary success in the private sector, as well.

I don't think I have seen, in recent times, the range of different support that this nominee has for this position. It is breathtaking in its scope. And the background of this individual has urged us to move forward with this nomination. We are extremely fortunate in the district circuit court to be able to have someone of this quality. As has been pointed out, it is a special court, really second in special recognition to the Supreme Court of the United States, in terms of the complexity of the cases that we require this court to resolve.

So, Mr. President, I join with all of those and urge a positive vote in favor of this extraordinary nominee. Merrick Garland will be an outstanding jurist, as everything in his life has reflected. He has been an outstanding individual. I remember very clearly the quote of Senator Mathias, who was a very prominent, significant member of the Judiciary Committee, who took great interest in the quality of justice in this country and the quality of individuals. He has joined in urging that we move forward with this nominee and put him on the court, where he will serve this country with great distinction. I join my other colleagues in hoping that the vote for him will be overwhelming. It deserves to be. I think we will all be well served with his continued dedication of public service on the court.

I yield the floor.

Mr. LEAHY. Mr. President, I yield 10 minutes to the distinguished Senator from Illinois.

Mr. DURBIN. Mr. President, I rise today to support the nomination of Merrick Garland to be judge on the D.C. Circuit Court of Appeals. It is interesting today in this debate that many people have spoken and no one has questioned his integrity nor his ability. He was born in Chicago, graduated from Harvard College magna cum laude, Harvard Law School and, as has been said by other speakers, had a distinguished career both as a lecturer at Harvard Law School and partner in a prestigious firm, and then prosecuting cases in the District of Columbia during the past few years, served as well in the Department of Justice.

Despite Mr. Garland's obvious and many qualifications for this job, we must vote on whether he will serve on the D.C. Circuit Court of Appeals. Frankly, we should leap at the opportunity to have him on that court. But we are not here today to consider the significant contribution Mr. Garland's appointment could have to the D.C. circuit. Rather, we are focusing on whether the D.C. circuit needs 11 judges rather than 10 judges.

I submit that this debate is not just about numbers. It is about the administration of justice; the fair, prompt, equitable, and thorough administration of justice is at stake. In all fairness, I must confess that I would rather err on the side of too many judges than too few. I would rather have too many judges doing too thorough and too thoughtful a job than too few judges rushed and careless in frantic efforts to handle their caseload. No one but the most shortsighted argues that the D.C. circuit does not need this 11th judge. Indeed, last year when the debate turned on whether a 12th judge was needed, the Reagan-appointed Judge Silberman was often cited in support of the effort to cut that 12th seat. However, he recently wrote to the Judiciary Committee and said, ''I still believe we should have 11 active judges.'' So why are we arguing about this 11th seat today?

Some argue that D.C. circuit judges handle fewer cases per judge than any other circuit. I won't make an analogy to the Supreme Court in the number of cases that they handle. We know they are cases of great moment, and they should have the time to deliberate them in an appropriate manner. But the smaller number of cases per judge is an inaccurate way of measuring the work of the D.C. circuit judges. Let me say, at the outset, that we cannot overlook the fact that this circuit, more than most—probably more than any—has many administrative appeals to consider. As the Federal appeals court sitting in the Capital, the D.C. circuit handles the lion's share of administrative appeals.

This chart that was prepared gives an idea of the administrative agency appeals filed per judge in all the Federal circuits across the United States. If you will note, D.C. circuit has 56 appeals filed per judge. Most other circuits are in the teens—the eighth circuit, only 8; the ninth circuit is 37. But it is a significantly different caseload that faces the judges in these circuits.

For those who are not familiar with these administrative cases, I suggest that you not dismiss them because of the word ''administrative.'' Let me show you what I mean. This is a file for one administrative law case that a judge must pore through to come to a good conclusion.

Let me show you another thing. This is a pro se petition from a prisoner in jail. There are many of these that are filed across the country. But consider the gravity and the challenge of this administrative appeal, as opposed to this rather smaller appeal in terms of volume. So these judges who serve in this circuit really bear an unusually large responsibility in extremely technical cases. Over the last 3 years, for which data is available, 45.3 percent of the cases filed in the D.C. circuit were administrative appeals of the size and complexity that I have just noted, compared with an average of 5.9 percent outside the D.C. circuit.

Let me also add here that I could go into detail, but I will not because I know it is the intent of the Chair to move this matter to a vote very quickly. I also want to comment for a moment on the period of time that this very able nominee has waited for confirmation. It is unfortunate. In fact, it is sad, and it borders on tragic, that men and women who are prepared to give their lives to public service, who have gone through a withering process of investigation, by the FBI, by the Judiciary Committee, by the White House, by the American Bar Association, and so many others, still must wait over a year, in many cases, for their nominations to be considered by the Judiciary Committee and by this Chamber.

I will tell you, a few days ago it was my good fortune to speak to a group of judges at the Supreme Court Building. As I walked through that building and saw the busts of great jurists who have served this country, I wondered how many of them could pass the test that we now impose on nominees today, how many of them would be willing to endure that test and to say that their family, friends, colleagues, and others that their lives will be on hold waiting for some decision from Capitol Hill. It does a great disservice to this country and to the judiciary for us to create a process that is so demanding that ordinary people would be discouraged from trying.

We have, in this case, an extraordinary individual, Merrick Garland, who has waited patiently now for over a year to be considered by this Judiciary Committee and by this U.S. Senate.

I hope those on the other side will make an effort to overcome the problems that we have seen over the past year. We really have to address the fact that there are so many vacancies on Federal benches across this country—not just in the District of Columbia but almost 100 nationwide—vacancies that need to be filled so that people will be treated fairly. If those vacancies are not filled with honest and competent individuals in a timely manner, it is a great disservice to this country.

I think we should move and move quickly to approve this nomination of Merrick Garland. I hope that his patience will be rewarded today, as it should be. I am certain, based on his background and all that I have come to know of him and my personal meeting with him, that he will make an extraordinary contribution.

We need the 11th judge in the D.C. circuit to handle this mountain of administrative appeals. How many people will come to us and complain, ''Oh, the case is in court, and it is going to take forever. What is going on, Senator? What is going on, Congressman? Why aren't the courts more responsive?'' Part of the problem is that the bench is vacant, the judges aren't appointed, and the caseload that has been imposed on these judges is overwhelming.

We can take care of one circuit today by the appointment of this fine man to fill this seat.

Thank you, Mr. President.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I ask unanimous consent that an article from the Legal Times of August 1995 regarding Mr. Garland be printed in the RECORD.

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

[From the Legal Times, Aug. 7, 1995]

GARLAND: A CENTRIST CHOICE

(By Eva M. Rodriquez)

He was schooled at Harvard in administrative law by moderate professor-turned-Justice Stephen Breyer, and took his antitrust training from conservative Philip Areeda.

He earned his prosecutorial stripes under Jay Stephens, the hard-charging Republican U.S. attorney in the District and former deputy counsel to President Ronald Reagan. And he cut his teeth in the private sector as a partner at Arnold & Porter, one of the city's wealthiest and most influential firms.

At first blush, Merrick Garland may seem like a solid-judicial pick for a Republican president. But according to two administration sources, the 42-year-old top aide to Deputy Attorney General Jamie Gorelick is almost certain to be President Bill Clinton's third nominee to be the prestigious U.S. Court of Appeals for the D.C. Circuit.

Although Garland has his share of liberal credentials—including a coveted clerkship with retired Supreme Court Justice William Brennan Jr.—he is almost sure to be a much more middle-of-the-road jurist than the man he would replace, former Chief Judge Abner Mikva, who retired from the D.C. Circuit last fall to take the job of White House counsel.

News of Garland's near-lock on the nomination has left a smattering of liberals privately grumbling that he is too conservative. But his nonideological approach and his easy rapport with both liberals and conservatives has earned Garland high praise from people on both sides of the aisle.

''I think he is a very talented lawyer,'' says Garland's former boss Stephens, now a partner at the D.C. office of San Francisco's Pillsbury, Madison & Sutro. ''He's bright, energetic, and he has a very balanced demeanor.''

Garland's current boss also lauds him. ''He has enormous personal and intellectual integrity, impeccable legal credentials, a breadth of experience in both public and private sectors, and the personality and demeanor that you'd expect in a judge,'' says Gorelick, who acknowledges that she is a strong backer of Garland's but declines to discuss whether he is definitely the administration's nominee. ''He is very thoughtful, is good at listening to all points of view, and makes decisions on the merits.'' Attorney General Janet Reno also thinks highly of Garland, Gorelick says.

The widespread praise Garland garnered for his thorough and evenhanded leadership during the critical initial investigation into the Oklahoma City bombing also hasn't hurt his chances for a nomination to the federal bench.

A Republican staffer on the Senate Judiciary Committee declines to discuss Garland's chances for confirmation, other than to say that the committee has received no opposition in anticipation of a Garland nomination.

Garland, a 1977 magna cum laude graduate of Harvard Law School who clerked for famed 2nd Circuit Judge Henry Friendly in addition to Brennan, declines comment. Mikva was out of town and could not be reached for comment.

Garland's reputation as a nonideological thinker may have helped him win the nomination over Peter Edelman, who last fall was reportedly the White House's top pick for the D.C. Circuit vacancy. Edelman, who is currently counselor to Health and Human Services Secretary Donna Shalala, was a favorite of the more liberal ranks in the Democratic Party, but he immediately drew opposition from conservatives—including Sen. Orrin Hatch (R–Utah), chairman of the Senate Judiciary Committee, who believed Edelman to be too radical and too activist in his approach to the law. Opposition to Edelman only intensified after the GOP's sweeping victory in last fall's midterm election.

Edelman, according to two lawyers involved in the judicial-selections process, is likely to be nominated for one of the two vacancies on the U.S. District Court here. But D.C. Del. Eleanor Holmes Norton, whose judicial nominating commission has forwarded names to Clinton for previous D.C. federal court vacancies, may have candidates of her own. The commission will accept applications for the two vacancies until August 11.

The two sources say Clinton is likely to nominate Garland before Congress breaks for the August recess. The two sources also say that the president may decide to submit a package of D.C. nominees, including one for the appeals court vacancy and another for one of the two open seats on the District Court. One trial court vacancy was created in June when Judge Joyce Hens Green took senior status; the other came open when Judge Harold Greene followed suit earlier this month.

Others mentioned as possible contenders for a District Court seat include Brooksley Born, a partner at D.C.'s Arnold & Porter who is said to have very strong support among women's groups, and U.S. Attorney Eric Holder, Jr., who is a former D.C. Superior Court judge and at one time was mentioned as a possible appeals court nominee.

Mr. LEAHY. Mr. President, I thank the distinguished Senator from Illinois. His dramatic showing of the difference between the pro se appeals that many courts handle and the complexity of the administrative issues that the District of Columbia Circuit Court of Appeals handles is very instructive for us. Everybody talks about caseloads. Some

cases are handled in a matter of minutes. Others take months. They each count for one case. He has demonstrated that in the District of Columbia circuit, because of its unique nature, many of them count for a month.

Mr. President, I withhold the remainder of my time.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, my good friend from Illinois, the distinguished Senator, has just spoken. I would just observe that more government isn't necessarily better government, and, also, in the sense of justice more judges do not automatically guarantee better justice.

I can remember from my service, being appointed by the Chief Justice in 1989, I believe it was, to a 2-year study, the only study we have ever had, of the Federal judiciary that we were looking and projecting what number of cases were going to have to be filed over the next couple of decades. The only conclusion you could come to, if those figures were accurate—and, so far, they have been proven to be accurate—is that you could never appoint enough judges to take care of the problems that we are having with the explosion of cases; that you have to look at a lot of other ways. How do you dispense justice in the less-adversarial environment of a courtroom and in the less-costly environment of the courtroom? For instance, what can you do for alternate dispute resolutions? There are a lot of other ways that I as a nonlawyer am not qualified to speak to. But I can tell you that more judges is never going to solve the problem of more cases.

Another area we have to do something about is tort reform, as an example of something that we have to do about the number of cases piling up.

So I just ask my good friend from Illinois to think about those things as well.

I want to respond to some of the comments raised by those who feel that the caseload statistics indicate that filling the 11th seat is necessary. In my view, this is not a fair reading of the caseload numbers.

I point my colleagues' attention to a Washington Times editorial which appeared on October 30, 1995. That editorial considered the question of whether or not the administrative type of cases in the D.C. circuit are really as complicated and so complicated that caseload statistics can be misleading. I would like to quote from that editorial.

> Per panel the District of Columbia circuit averages at best half the dispositions of other circuits. To make a perfectly reasonable comparison that takes account of the greater complexity of the cases in the D.C. circuit, then we should be asking, Is each case in the D.C. circuit on average twice as complicated as the average case in the other circuits? That seems unlikely in the extreme.

It seems to me that this point is exactly correct. Granted, the caseload of the circuit is a little different. I grant that.

I agree with the point made in a hearing I held on the District of Columbia circuit in my subcommittee. The point is that other circuits—the second circuit in particular—have a large percentage of complicated cases. In the second circuit, those cases are complex, commercial litigations coming out of New York City. But you do not hear people complaining that the total staffing level of the second circuit should not be determined according to those statistics.

So I believe that complexity of cases in the D.C. circuit is overstated. It really is a nonargument when the number of agency cases has declined by 23 percent in the last year. Moreover, now the District of Columbia circuit has a senior judge. That happens to be a former member of this body, Judge Buckley. Since senior judges must carry at least a one-third caseload, and they typically carry a one-half caseload, it is fair to consider the District of Columbia circuit as having 10½ judges right now when the ratio says 9½ judges.

So let's see if what we have works because what we have right now won't cost the taxpayers any more money.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Thank you, Mr. President.

I am pleased to be able to comment on this judicial vacancy. I certainly respect Senator GRASSLEY and his comments. I agree with him very, very much.

I think it is an important point to note that people say that administrative cases are difficult to administer, and that they may have a file that is fairly thick. Well, judges have law clerks. They go through the files. Even if the file is thick, the issue coming up on an administrative appeal may be very simple and may involve nothing more than a simple interpretation of law. Many of those can be disposed of very easily.

Based on my 12 years of experience as a U.S. attorney practicing in Federal court in cases involving all kinds of Federal litigation, I don't at all concede the point that every administrative law case is substantially more difficult than others. As a matter of fact, Judge Silberman testified in 1995 that it is true that the administrative law cases are generally more complicated, and other judges in other circuits, like the second circuit, will tell you that some of their commercial litigation coming out of the Federal district court is terribly complicated, too. I am not in a position to compare the two.

Let me just say this from personal experience. I talked earlier today about the testimony of Chief Judge Tjoflat from the Eleventh Circuit Court of Appeals. He said that they have 575 cases per judge, and that they cannot handle any more cases. I was involved in a 7-week trial of a criminal case that I personally prosecuted. In the course of that trial 18,000 pages of transcript were generated, and when the case was heard on appeal, there were 20 or more issues involving 5 or more defendants. Many of these criminal cases are extremely difficult.

I will also point out that the eleventh circuit includes the southern district of Florida which probably has, outside of New York and California, the largest number of complex criminal cases, in particular international drug smuggling cases, of any circuit in America. Those cases are sent to the eleventh circuit and yet they can manage their caseload in this fashion. I think it is a remarkable accomplishment.

The fourth circuit, with 378 cases per judge, has the fastest turnaround of any circuit in America.

We talk about the need to move cases rapidly, and it is argued that we need more judges to move cases rapidly. How is it that the fourth circuit, with 378 cases per judge, has the fastest disposition rate of any circuit in America? It is because they are managing their caseload well and because they do not have more judges than are necessary. As Judge Tjoflat testified before our committee, too many judges actually slows down the process and makes good judging more difficult. I think that is a matter that we should address.

I would like to note that we have not delayed this matter. We are prepared to have this matter come to a vote. More delays would have been possible if we had wanted simply to delay this process. I feel it is time to vote on this issue. I respect the legal ability of Mr. Garland. He was on the Harvard Law Review. It does not bother me if he was editor in chief of the Harvard Law Review. It would not bother me if he had been editor in chief of the law review at the University of Alabama School of Law. The fact remains that the taxpayers should not be required to pay for a judge we do not need. The taxpayers should not have to pay $1 million per year for a judge that is not needed.

Mischief sometimes gets started. I recall the old saying my mother used to use: an idle mind is the devil's workshop. We need judges with full caseloads, with plenty of work to do, important work to do.

This circuit is showing a serious decline in caseload. In fact, caseload in this circuit declined 15 percent last year. That decline continues. I think it would be very unwise for us to fill a vacancy if there is any possibility that the caseload will continue to decline. We do not need to fill it now, and we certainly do not need to fill it in the face of this declining caseload, because once it is filled, the judge holds that position for life and the taxpayers are

obligated to pay that judge's salary for life. That is an unjust burden on the taxpayers of America.

Fundamentally, this is a question of efficiency and productivity. There are courts in this Nation that are overworked, particularly many of the trial courts. We may not have enough money to fill those vacancies. Let us take the money from this Washington, DC circuit court and use it to fund judges and prosecutors and public defenders in circuits and district courts all over America that are overcrowded and are overworked.

Those are my comments. We have studied the numbers carefully. We are not here to delay. We are not here in any way to impugn the integrity of Mr. Garland. By all accounts, he is a fine person and an able lawyer. He does have a very good job with the U.S. Department of Justice. We probably need some trial judges here in Washington, DC, and if the President nominated him to be one of those trial judges, I would be pleased to support him for that.

That will conclude my remarks at this time.

I ask unanimous consent to have printed in the RECORD a letter from Judge Silberman dated March 4, 1997, in which he said that the filling of the 12th seat would be frivolous and in which he noted the continuing decline in caseload.

I also ask unanimous consent to have printed in the RECORD a letter from the Director of Governmental Affairs for the Christian Coalition written in opposition to the filling of this vacancy, noting that it is not warranted.

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

U.S. COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT,
Washington, DC, March 4, 1997.

Hon. ORRIN G. HATCH,
Dirksen Senate Office Building,
Washington, DC

DEAR CHAIRMAN HATCH: Your asked me yesterday for my view as to whether this court needs 11 active judges and whether I would be willing to communicate that view to other senators of your committee. As I told you, my opinion on this matter has not changed since I testified before Senator Grassley's subcommittee in 1995. I said then, and I still believe, that we should have 11 active judges.

On the other hand, I then testified and still believe we do not need and should not have 12 judges. Indeed, given the continued decline in our caseload since I testified, I believe that the case for a 12th judge at any time in the foreseeable future is almost frivolous. As you know, since I testified, Judge Buckley has taken senior status and sits part-time, and I will be eligible to take senior status in only three years. That is why I continue to advocate the elimination of the 12th judgeship.

Sincerely,

LAURENCE H. SILBERMAN,
U.S. Circuit Judge.

CHRISTIAN COALITION,
Washington, DC, March 19, 1997.

DEAR SENATOR: I am writing to urge you to vote against confirming judicial candidate Merrick Garland. The workload for the D.C. Circuit does not warrant filling either the 11th or 12th seats on the D.C. Circuit. When one considers that approximately 1 million dollars worth of taxpayer dollars is involved for each judgeship, it is important for the Senate to eliminate unnecessary seats whenever possible. Please vote against confirming Merrick Garland. Thank you for your consideration of our views.

Sincerely,

BRIAN LOPINA,
Director, Governmental Affairs Office.

The PRESIDING OFFICER. Who yields time?

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I am glad to hear that nobody wants to delay Merrick Garland. I would only point out that his nomination first came before us in 1995, and he was voted out of committee, I believe unanimously, by Republicans and Democrats alike, in 1995. We are going to vote, I hope, very soon to confirm him. But if that is not delay, I would hate like heck to see what delay would be around here. He was nominated in 1995, got through the committee in 1995 and will finally get confirmed in 1997.

I understand other members say they would be perfectly willing to help out on the district court; we need help. We have Judge Colleen Killar-Kotelly who is still waiting, nominated very early in 1996, has yet to come through, even though in 1996 alone the criminal case backlog increased by 37 percent. We talk about getting tough on criminals. We certainly will not send the judges that might do it.

I withhold the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. LOTT addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. LOTT. Mr. President, I would like to make a brief statement to explain my vote that I will cast later on today. I know we are having interesting discussion, and this is one that has been a long time coming, getting this judgeship to the floor of the Senate for a vote.

Obviously, there has been support for this nominee by Senator HATCH and by Senator SPECTER and others. Senator LEAHY has been pushing to get these judges voted on. This is the first one of the year. I presume this is a celebratory event.

Mr. LEAHY. It is showing, if my friend from Mississippi will yield, remarkable speed. As I said, he was nominated in 1995, first got through the committee unanimously, Republicans and Democrats, in 1995. We are now just before our second vacation of the year in 1997. I am glad, whenever it is, to get him through.

Mr. LOTT. But now maybe I can comment just briefly on why it has taken so long. There were a lot of factors involved. I will vote not to confirm Merrick Garland to be a D.C. Circuit Court of Appeals judge. I have no opposition to Mr. Garland himself. I think he is qualified. I think he has experience that would be helpful. And I think his disposition is acceptable, too.

In fact, based on all the reports that I have heard about him, I think he more than likely would be a much more acceptable nominee to this court as compared to many of the other nominees we have considered or may be considering in the future.

It is my belief that this court of appeals is more than adequately staffed based on the number of cases pending on the court's docket, the filings per judge at this court as it is currently staffed for the year ending September, 1996, with the trend of such filings over the last several years, and in comparison to other workloads of circuit courts of appeal around the country. It is very small. I think as compared to others certainly they have more judges than they need.

I am looking at this chart over here. The District of Columbia Court of Appeals is at the bottom end of the caseload, and yet you have other circuit courts across the country—my own circuit, the fifth, is about in the middle. The eleventh circuit obviously has a high caseload as compared to this particular court.

So I really do not think this confirmation is needed. Even if it does get through, I want to say right now that regardless of the next nominee, unless this caseload is dramatically turned around, I hope it would never even be considered regardless of how qualified the nominee may be, he or she, in a Democratic administration.

I recognize that some circuits do have tremendous caseloads, but this is certainly not the case in this circuit, and therefore I will vote against the nomination based on that. In fact, I just do not think an additional judge is needed in this district court of appeals.

I ask unanimous consent to print in the RECORD a list of the filings per judge in 1996 and the total appeals docket in 1995 per judge that shows as compared to other circuits this judge is not needed.

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

Appeals filed per judge in 1996:

D.C. Cir., 123	6th Cir., 341
10th Cir., 216	9th Cir., 360
1st Cir., 227	2nd Cir., 372
3rd Cir., 280	4th Cir., 378
7th Cir., 295	5th Cir., 443
8th Cir., 307	11th Cir., 575

Total appeals on docket for year ending 1995/per judge:

1st Cir., 1339 (4 judges=335)
2nd Cir., 3987 (12 judges=332)
3rd Cir., 3485 (13 judges=268)
4th Cir., 3542 (12 judges=295)
5th Cir., 5696 (15 judges=380)
6th Cir., 3343 (13 judges=257)
7th Cir., 2200 (8 judges=275)
8th Cir., 3176 (10 judges=318)
9th Cir., ?
10th Cir., 2104 (8 judges=263)
11th Cir., 6057 (10 judges=606)
D.C. Cir., 2065 (10 judges=206)

Mr. LOTT. I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Missouri.

Mr. ASHCROFT. I yield myself such time from the opposition time as is necessary for me to make a statement.

Mr. President, I rise today to speak, not in opposition to Merrick Garland for filling the seat on the U.S. court of appeals, but in opposition to filling the seat at all. The U.S. Court of Appeals for the District of Columbia Circuit is a judicial circuit which has the lowest caseload of any of the judicial circuits in the country, and I think this is a time when we ought to ask ourselves some serious questions about whether or not we intend to staff circuits in spite of the fact that there are adequate judges in the circuits to handle the caseload which is currently required of the circuit.

First, the amount of judicial work in the circuit raises questions about the necessity of confirming another appellate judge for the D.C. circuit. It appears that filling this vacancy would be an inefficient use of judicial resources. Before filling any vacancy for an appellate judgeship, the U.S. Senate should look at the filings per judgeship compared with other jurisdictions. Of the 12 courts of appeals, the D.C. circuit has the lowest filings per judge of any of the 12 courts of appeals. While the D.C. circuit has had only 123 cases filed per judge, the eighth circuit, the circuit in which I live, handled nearly three times the D.C. circuit's total of appeal filings, with 307 appeals filed per judge. The eleventh circuit court of appeals, in comparison, had 575 appeals filed per judge.

The D.C. Circuit Court of Appeals now has two open seats. But Judge James Buckley, who took senior status last year, which means he is still obligated to handle a caseload equivalent to that of an average judge in active service who would handle a 3-month caseload, is still there. So you have a senior status judge who is handling the equivalent of a quarter of the load that a normal judge in the circuit would handle. So you do not have the loss completely of the second judge in those two vacancies; you have the loss of one judge, and then you have one-quarter judge in the senior status making up for any slack.

Still, the D.C. circuit is the least populated with work. And it is the circuit that does not merit additional judges to conduct the work which simply is not there. If we were to use the formula expressed by the Judicial Conference, between 1986 and 1994 the D.C. circuit court would rate just in the order of nine judges to handle its current caseload. So, in terms of the Judicial Conference's own assessment of how many judges would be needed, the caseload of the D.C. circuit would rate nine judges. It has 10 judges now, and if you start to add the additional caseload that can be handled by senior judges, it seems to me that adds an additional capacity of that court to handle work for which it is already overstaffed.

While appeals filings for all of the Nation's U.S. courts of appeals increased to an all-time high of 4 percent, the number of filings filed in the D.C. circuit actually dropped last year; it dropped 15 percent. So you have an increase of appeals in the system generally of 4 percent, you have a decline in the D.C. circuit of 15 percent, of the 12 additional circuits, the District of Colombia had the largest decline in appeals last year.

Mr. President, ending the era of big Government includes all three branches of government. But if we cannot end big government where we have had declining demand for services, and where we are already overstaffed, where can we end big government? To believe that the judicial branch should be excluded from the exercise of responsibility or should be overstaffed or should ignore the trends in terms of case filings and should be overpopulated with individuals because there are slots available, in spite of the fact that the work or the caseload is not there to justify those slots, would be for us to deny a responsible position in this matter.

Let me just indicate that there are two vacancies and virtually everyone will confess that at least one of them should not be filled. This is not a matter of saying some people think all the vacancies ought to be filled; others think that neither of the two should be filled. There is a general consensus that filling the second of the two would certainly be a waste and surplus. I think if you look carefully and you measure the caseload by what the Judicial Conference had previously stated was an appropriate caseload, and you look at the potential for work by the senior active judges who have taken senior status, you can come but to one conclusion, that it is not an appropriate deployment of the tax dollars of the citizens of this great Nation to add a judge to a court where the workload does not justify it.

Good government is not to fill a vacancy simply because it exists. To fill this vacancy without taking into account the lack of caseload is fiscally irresponsible.

Before I yield the floor, I would like to address the argument that the D.C. court of appeals might be considered to be a different court, unique, one of a kind, because it has a lot of cases that are administrative in nature and they have a certain level of complexity. I think in this regard it is important to cite Judge Silberman, who sits on the D.C. court of appeals. On this point, in 1995, he testified as follows:

It is true that the administrative law cases are generally more complicated. But other judges in other circuits, like the second circuit, will tell you that some of their commercial litigation coming out of the Federal District Court is terribly complicated, too. The truth of the matter is, some of the administrative law cases in the D.C. circuit are complicated. But if you look at the second circuit, the caseload of which is more than twice as much as the D.C. circuit, in the second circuit their caseload is complicated as well.

The fact of the matter is, it is time for the U.S. Senate, which called the circuit courts into creation, which called district courts into creation, to begin to exercise a responsible approach toward staffing those courts and not to staff them when the workload does not justify it. Even if the nature of the cases coming before the D.C. circuit is unique, those cases are not so difficult, or different from the other cases which have their own uniqueness and have their own difficulty, whether they be commercial instead of administrative, so as to mean that we should populate the court with staffing which is not required by the caseload.

Mr. President, I plan to vote against Mr. Garland, not for any reason to impair his standing or his credentials. I do not think this is a question about the qualifications of the judge. But it is a question about the deployment of the public's resource and about the staffing level for courts which do not have caseload to justify it.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Vermont.

Mr. LEAHY. Mr. President, there has been a lot of discussion, just now again, quoting Judge Silberman. What is needed—I would note, he wrote to the distinguished chairman, Senator HATCH, and said that we should have 11 active judges. We talk about this as though the nominee was going to be the 12th judge. In fact, the nominee is the 11th judge.

I ask unanimous consent that a letter dated March 4, 1997, by Judge Silberman, in which he said, ''. . . I still believe that we should have 11 active judges,'' be printed in the RECORD at this point.

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

U.S. COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT,
Washington, DC, March 4, 1997.

Hon. ORRIN G. HATCH,
Dirksen Senate Office Building,
Washington DC.

DEAR CHAIRMAN HATCH: You asked me yesterday for my view as to whether this court needs 11 active judges and whether I would be willing to communicate that view to other senators of your committee. As I told you, my opinion on this matter has not changed since I testified before Senator Grassley's subcommittee in 1995. I said then, and I still believe, that we should have 11 active judges.

On the other hand, I then testified and still believe we do not need and should not have 12 judges. Indeed, given the continued decline in our caseload since I testified, I believe that the case for a 12th judge at any time in the foreseeable future is almost frivolous. As you know, since I testified, Judge Buckley has taken senior status and sits part-time, and I will be eligible to take senior status in only three years. That is why I

continue to advocate the elimination of the 12th judgeship.

Sincerely,

LAURENCE H. SILBERMAN,
U.S. Circuit Judge.

Mr. HATCH. Mr. President, I have been sitting here listening to this. In all honesty, I would like to see one person come to this floor and say one reason why Merrick Garland does not deserve this position. It has been almost a year. In the last Congress, I must have gone on this issue, trying to get him up, for most of that time.

First, there was the 12th seat, he was going to get that. Then, when Buckley retired, everybody that I know of, who knows anything about it, other than some of our outside groups who do not seem to want any judges, said that we need the 11th seat.

As I suspected, nobody in this body is willing to challenge the merit of Merrick Garland's nomination. I have not heard one challenge to him yet. In fact, they openly concede that Mr. Garland is highly qualified to be an appellate judge. Rather, they use arguments that the D.C. circuit does not need 12 judges in order to oppose the confirmation of Mr. Garland for the 11th seat on this court.

There is not a harder-nosed conservative or more decent conservative that I know than Larry Silberman. I talked to him personally. If he said to me they did not need the 10th seat, I could understand this argument, and I could understand this minirebellion that is occurring. But he said they needed the 11th seat. If he had said, ''All we need are 10 seats, we don't need the 11th or 12th,'' I would have been on his side, and it would not be because of partisan politics, it would be because I trust him and I believe in his integrity. But I called him personally and he said, ''Yes, we do need the 11th seat.''

My colleague from Alabama circulated a letter saying confirming Merrick Garland would be a ''ripoff'' of the taxpayers. Having just led the fight for the balanced budget amendment, I do not think that is quite fair. I am never going to rip off the taxpayers. But I will tell you one thing, playing politics with judges is unfair, and I am sick of it, and, frankly, we are going to see what happens around here. A ''ripoff?'' Let's be serious about this, folks. This is a serious matter.

My colleague referred to the testimony of Chief Judge Wilkinson of the fourth circuit. That is a different matter. I have challenged the distinguished chairman of the Subcommittee on Courts to look into that, and I am going to be heavily guided by what Senator GRASSLEY comes up with.

The statements of Judge Tjoflat from the eleventh circuit has also been mentioned. But what do the judges on the D.C. circuit court say? It is one thing for Wilkinson to get up and make a comment, it is another thing for Tjoflat, who has problems in that circuit, but what do the judges on the D.C. circuit say? Both Chief Judge Edwards and Judge Silberman, a respected conservative, agree that, in Judge Silberman's words ''it would be a mistake, a serious mistake for Congress to reduce the D.C. circuit down below 11 judges.''

If I did not believe that, I would not have brought this judgeship nomination to the floor. I have to tell you, if anybody doubts my integrity, I want to see them afterwards.

As for the statistics that have been cited, with all due respect, they are not a fair or accurate characterization of the D.C. circuit's caseload relative to the other circuits' caseloads. I made that case earlier.

I am prepared to yield back the time if the other side is prepared to yield back their time. Is there anybody going to want to speak on the other side?

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. I am prepared to yield back time.

The PRESIDING OFFICER. The Senator from Utah has no time to yield back at this point. The Senator from Iowa has approximately 17 minutes remaining on the opposition side.

Mr. SESSIONS. I would like to be recognized.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Mr. President, there is nobody in this body who has fought harder for a balanced budget amendment and for controlling Federal spending than the distinguished Senator from Utah, Senator HATCH. His leadership has been terrific on that. I respect that. I guess we just have a disagreement.

I think it is really unusual that a judge would cite a 12th seat as frivolous and note in his own letter that it was frivolous because of a declining caseload. Even though Judge Silberman himself said he felt they ought to go ahead and fill the 11th seat, we, after full study of it and in the course of careful deliberations, had the opportunity to hear from two other chief judges from two other circuits that indicated, even though they have much higher caseloads, 575 to 378 cases per judge, that they did not need a new circuit judgeship.

So, therefore, I concluded that a circuit with 124 cases per judgeship did not need to be filled, and that the $1 million per year, if it is not justified, would be a ripoff of the taxpayers. I feel that we can spend that money more efficiently on trial judges in circuits and districts that are already overwhelmed with heavy caseloads and not on the D.C. circuit that is overstaffed already. I yield the floor, Mr. President.

Mr. GRASSLEY. We yield back the time on our side, and I ask for the yeas and nays.

The PRESIDING OFFICER. The yeas and nays have been requested. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Merrick B. Garland, of Maryland, to be U.S. circuit judge for the District of Columbia circuit? On this question, the yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. FORD. I announce that the Senator from Ohio [Mr. GLENN] is necessarily absent.

The PRESIDING OFFICER (Ms. COLLINS). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 76, nays 23, as follows:

[Rollcall Vote No. 34 Ex.]

YEAS—76

Abraham	Feingold	Mikulski
Akaka	Feinstein	Moseley-Braun
Baucus	Ford	Moynihan
Bennett	Gorton	Murkowski
Biden	Graham	Murray
Bingaman	Harkin	Reed
Bond	Hatch	Reid
Boxer	Hollings	Robb
Breaux	Hutchison	Roberts
Bryan	Inhofe	Rockefeller
Bumpers	Inouye	Roth
Byrd	Jeffords	Santorum
Campbell	Johnson	Sarbanes
Chafee	Kempthorne	Smith, Bob
Cleland	Kennedy	Smith, Gordon H.
Coats	Kerrey	Snowe
Cochran	Kerry	Specter
Collins	Kohl	Stevens
Conrad	Landrieu	Thomas
D'Amato	Lautenberg	Thompson
Daschle	Leahy	Torricelli
DeWine	Levin	Warner
Dodd	Lieberman	Wellstone
Domenici	Lugar	Wyden
Dorgan	Mack	
Durbin	McCain	

NAYS—23

Allard	Frist	Kyl
Ashcroft	Gramm	Lott
Brownback	Grams	McConnell
Burns	Grassley	Nickles
Coverdell	Gregg	Sessions
Craig	Hagel	Shelby
Enzi	Helms	Thurmond
Faircloth	Hutchinson	

NOT VOTING—1

Glenn

The nomination was confirmed.

Mr. LEAHY. Madam President, I move to reconsider the vote.

Mr. HATCH. I move to lay it on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Madam President, this is the first judge confirmed in this Congress. I hope it will be the first of many, many.

I remind my colleagues we have close to 100 vacancies in the Federal court. We have begun with one of the most outstanding nominations any President has sent.

That is the nomination of Merrick Garland—now Judge Garland. I compliment him on that. He was nominated in 1995; it first passed through the Judiciary Committee unanimously in 1995, and it is now 1997. We need to move——

Mrs. BOXER. Madam President, the Senate is not in order.

The PRESIDING OFFICER. The Senate will be in order. The Senator is entitled to be heard.

The Senator from Vermont.

Mr. LEAHY. Madam President, I thank the Chair. I wish also to compliment my friend, the distinguished senior Senator from Utah for his help in doing this. I also wish to compliment Senators who paid attention to his very, very strong statement at the end of this debate on behalf of Judge Garland. I think that the Senator from Utah and I are committed to trying to move, in a bipartisan fashion, to get these judges here. I hope all Senators will join us in doing that. The Federal judiciary should not be held hostage to partisan, petty, or ideological constraints that really reflect only a minority of views.

The Federal judiciary is really a blessing in our democracy in the fact that it is so independent. Our Federal judiciary is the envy of all the rest of the world. The distinguished Senator from Utah and I are committed to keeping it that way. We will work together to keep it that way. I thank him for his help on this nomination.

Mr. DASCHLE. Mr. President, I would like to reiterate what PAT LEAHY has said about how glad we are that Merrick Garland has finally been considered by the Senate for appointment to the U.S. Court of Appeals for the District of Columbia Circuit. We wholeheartedly believe that Mr. Garland is highly qualified for this position and deserves the strong vote we just gave him.

Mr. Garland has been awaiting this day since being nominated by the President on September 5, 1995—1½ years ago. His qualifications are clear. The ABA's standing committee on the Federal judiciary found him well qualified to serve on the Federal bench, and he has received the support of a bipartisan and ideologically diverse group of individuals.

His credentials cannot be challenged. He has worked at the Department of Justice as the Principal Associate Deputy Attorney General, in private practice and served as a law clerk to Justice Brennan on the Supreme Court and a law clerk to Judge Friendly on the U.S. Court of Appeals for the Second Circuit.

I am happy that today, after his long wait, Merrick Garland finally knows that he will serve as a Federal judge.

It is unfortunate, however, that we have not yet voted on any other judges during this session of Congress—at a time when we have almost 100 vacancies on the Federal bench. That is a vacancy rate of over 10 percent.

I hope that voting on Merrick Garland's confirmation today signals that we are going to address this serious problem and begin to fill those long empty seats on the Federal bench.

Mr. President, I am extremely pleased that the Senate has confirmed the nomination of Merrick Garland to the U.S. Court of Appeals for the District of Columbia Circuit. Let us ensure that our Federal bench has a full complement of such qualified judges so that the business of justice can go forward.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Madam President, I want to thank my colleagues who voted for Judge Merrick Garland. I believe they did what was right.

With regard to Federal judgeships, we ought to do what is right. I take this job as seriously as anything I have ever done in the Senate. I want to thank my colleagues who voted with us for supporting the nominee.

Having said that, there have been a serious number of nominees whom we have confirmed in the past who have proven to be activist judges once they got on the bench and who told us when they were before the committee they would not be activist and they would not undermine the role of the judiciary by legislating from the bench. Then they get to the bench and they start legislating from the bench.

I want them to know, and I want to send a warning to the judiciary right now, if they are going to continue to disregard the law, if they are going to continue, in many respects, to bypass the democratic processes of this country, if they are going to start substituting their own policy preferences for what the law really says, then it is going to be a tough time around here. This vote proves it.

I don't feel good about all those who voted against this nomination, but the fact of the matter is that there is some reason for their doing so. Republicans are fed up with these judges who disregard the role of judging once they get to the courts, after having told us and promised that they will abide by the role of judging. Now, I am upset—there is no question about that—because I think the finest nominee that I have seen from this administration is Merrick Garland, and I think he deserved better. But I also understand my colleagues.

I am sending a warning out right now that these judges who are sitting on the bench better start thinking about the role of judging and quit trying to do our jobs. We have to stand for reelection. That is why the buck should stop here—not with some Federal judge who is doing what he or she thinks is better for humanity and mankind.

We have judges on the Ninth Circuit Court of Appeals who could care less about what the Congress says, or what the President says, or what the legislative and executive branches say. That is why they are reversed so routinely by the Supreme Court. It is pathetic. I don't mean to single them out, but it is the most glaring example of activist judges in this country.

Let me just say this. I am sending a message right now that I intend to move forward with judges, and, if this administration will send decent people up here who will abide by the rule of judging and the rule of law and quit substituting their own policy preferences and finding excuses for every criminal that comes before them, they are going to have support from me. I hope they will have more support from the Judiciary Committee in the future. But if they are going to send up more activists, there is going to be war.

I don't think the judiciary has ever had a better friend than ORRIN HATCH; I know they haven't. I will fight for them. I think they ought to be getting more pay. I think we ought to support them in every way we possibly can. They are tough jobs, they are cloistered jobs. They are difficult jobs. They take great intellectual acumen and ability.

Madam President, I am telling you, we have far too many judges on both the left and the right who disregard what the rule of judging is and who legislate from the bench as superlegislators in black robes who disregard the democratic processes in this country and who do whatever they feel like doing. They are undermining the judiciary, and they are putting the judiciary in this country in jeopardy. I am darn sick of it. My colleagues on our side are sick of it. I don't care whether it is activism from the right or from the left; it is wrong. We ought to stop it, and the judiciary is the only place where it can be stopped.

I once had one of the most eminent legal thinkers in the country say that he has never seen anybody on the Supreme Court move to the right; they have always moved to the left as they have grown. I would like to not worry about whether they are moving right or left, but whether they are doing the job that judges should do.

I am serving notice to the Senate, too. I am chairman of the Senate Judiciary Committee, and I take this responsibility seriously. I want everybody in this body to know I take it seriously. It means a lot to me. I have tried a lot of cases in Federal courts. I have tried a lot of cases in State courts. I have a lot of respect for the judiciary. So I take this seriously, and I don't want politics ever to be played with it. I get a little tired of the other side bleating about politics, after the years and years of their mistreatment of Reagan and Bush judges and the glaring, inexcusable examples where they treated Republican nominees in a shamefully unfair way. Nobody could ever forget the Rehnquist nomination, the Bork nomination, and even the Souter nomination, where he wasn't treated quite as well as he should have been—and above all, the Clarence Thomas nomination; it was abysmal. Those were low points in Senate history. So I don't think either side has a right to start bleating about who is righteous on judges.

I intend to do the best I can here. I want my colleagues to know that. I certainly want to place my colleagues on my side, and I certainly want to do

the right thing for all concerned. This is an important nomination. I believe Merrick Garland will go on to distinction. Nobody will be more disappointed than I if he turns out to be an activist judge in the end. If he does, I think he will be one of the principal underminers in the Federal judiciary in the history of this country. But he told me he will not do that, and I trust that he will not. That doesn't mean we have to agree on every case that comes before any of these courts; we are going to have disagreements. And just because you disagree with one judge doesn't mean that judge should be impeached either. To throw around the issue of impeachment because you disagree with a judge here and there is wrong.

There are some lame-brained decisions out there, we all know that. Some of them are occurring primarily in California. Frankly, we have to get rid of the politics with regard to judges and start doing what's right. With every fiber of my body, I am going to try to do right with respect to judges because I respect that branch so much. To me, our freedoms would not have been preserved without that branch. But the way some of these judges are acting, our freedoms are being eroded by some in that branch. It is time for them to wake up and realize that that has to end.

I yield the floor.

SETTING THE RECORD STRAIGHT ON JUDICIAL NOMINATIONS

Mr. BIDEN. Madam President, I have not spoken on judges this year, but having worked on it for so many years with my friend from Utah, having either been the ranking member or chairman of that committee. But let me make one point.

It is one thing to say that we are going to disagree on judges. We did that when we were in control. We did that. And we said that all the judges that have been nominated here by two successive Republican Presidents—we picked seven out of a total of over 500—we said we disagree with these judges. The most celebrated case was Judge Bork, and less celebrated cases were people who have gone beyond being judges. Some are Senators. But the bottom line was that we understand that.

But what I do not understand is this notion and all of the talk about activist judges without any identification of who the activist judges are. It is one thing for the Republicans to say that we are not going to vote for or allow activist judges. We understand that. We are big folks. We understand baseball, hardball. We got that part. No problem.

But what I do not understand is saying we are not going to allow activist judges and then not identifying who those activist judges are. This is kind of what is going on here, and no one wants to say it. But since I have the reputation of saying what no one wants to say, I am going to say it.

Part of what is going on here is, and in the Republican caucus there are some who say, No. We want to change the rules. We want to make sure, of all the people nominated for the Federal bench, that the Republican Senators should be able to nominate half of them, or 40 percent of them, or 30 percent of them. That is malarkey. That is flat-out malarkey. That is blackmail. That has nothing to do with activist judges.

I do not doubt the sincerity of my friend from Utah. We have worked together for 22 years. But here is my challenge. Any judge nominated by the President of the United States, if you have a problem with his or her activism, name it. Tell us what it is. Define it like we did. You disagreed. You disagreed with the definition. But we said straight up, ''Bang. I do not want Bork for the following reasons.'' People understand that. But do not try to change 200 years of precedent and tell us that we are not letting judges up because we want the Republican Senator to be able to name the judge. Don't do that, or else do it and do it in the open. Let's have a little bit of legislating in the sunshine here. Do it flat in the open.

I see my colleagues nodding and smiling. I am sort of breaching the unspoken rule here not to talk about what is really happening. But that is what is really happening. I will not name certain Senators. But I have had Senators come up to me and say, JOE, here is the deal. We will let the following judges through in my State if you agree to get the President to say that I get to name three of them. Now folks, that is a change of a deal. That is changing precedent. That isn't how it works. The President nominates. We dispose one way or another of that nomination. And the historical practice has been—and while I was chairman we never once did that—that never once that I am aware of did we ever say, ''By the way, we are not letting Judge A through unless you give me Judges B and C.''

Now, let me set the record totally straight here. There are States where precedents were set years ago. The Republican and Democratic Senator, when it was a split delegation, have made a deal up front in the open. In New York, Senator Javits and Senator MOYNIHAN said: Look. In the State of New York, the way we are going to do this is that whomever is the Senator representing the party of the President—I believe they broke it down to 60—for every two people that Senator gets to name, the Senator in the party other than the President gets to name one. OK, fine. Jacob Javits did not go to PAT MOYNIHAN and demand that he was going to do that. MOYNIHAN made the offer, as I understand it, to Jacob Javits. That is not a bad way to proceed.

But now to come along and say, ''By the way, in the name of activist judges, we are not going to move judges'' is not what this is about.

I might point out that all the talk last election that started off—it all fizzled because it did not go anywhere—about how there is going to be an issue about activism on the courts, we pointed out that of all the judges that came up in Clinton's first term, almost all of them were voted unanimously out of this body by Democrats and Republicans, including the former majority leader. He only voted against three of all the nominees, then he argued, by the way, that Clinton nominated too many activist judges. And then it kind of fizzled when I held a little press conference, and said, ''By the way. You voted for all of them.'' It kind of made it hard to make this case that they were so activist.

So look. Let me say that I will not take any more time, but I will come back to the floor with all of the numbers and the details. But here is the deal.

If the Republican majority in the Senate says, ''Look, the following 2, 5, 10, 12, 20 judges are activist for the following reasons, and we are against them,'' we understand that. We will fight it. If we disagree, we will fight it. But if they come along and say, ''We are just not letting these judges come up because really what is happening is they are coming to guys like me and saying, 'Hey, I will make you a deal. You give me 50 percent of judges, and I will let these other judges go through.' '' Then that isn't part of the deal.

Look, I have a message to the Court. I know the Court never reads the CONGRESSIONAL RECORD, and Justice Scalia said that we should not consider the RECORD for legislative history because everybody knows that all the CONGRESSIONAL RECORD is is what Senators' staff say and not what Senators know. He is wrong. But that is what he said. Maybe they don't read it. But I want to send a message.

Madam President, when I was chairman of the committee and there was a Republican President named Reagan and a Republican President named Bush, the Judicial Conference on a monthly basis would write to me and say, ''Why aren't you passing more judges?'' They have been strangely silent about the vacancies that exist. Now, I agree that the administration has been slow in pulling the trigger here. They have not sent enough nominees up in a timely fashion. And I have been critical of them for the last 2 years, Madam President. But that is not the case now. All I am saying to you is, as they say in parts of my State, ''I smell a rat here.'' What I think is happening—and I hope I am wrong—is that this is not about activism.

This is about trying to keep the President of the United States of America from being able to appoint judges, particularly as it relates to the courts of appeals.

Now, what is happening is what happened today. Merrick Garland was