EXECUTIVE SESSION

NOMINATION OF DENNIS W. SHEDD, OF SOUTH CAROLINA, TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to proceed to the consideration of Executive Order No. 1178, which the clerk will report.

The legislative clerk read the nomination of Dennis W. Shedd, of South Carolina, to be United States Circuit Judge for the Fourth Circuit.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, how much time is under the control of the Senator from Vermont?

The PRESIDING OFFICER. Three hours.

Mr. LEAHY. Mr. President, I have discussed this with the distinguished senior Senator from Utah. I am going to speak on another matter prior to going to the Shedd nomination, although I have no objection to the time coming out of the 3 hours.

INNOCENCE PROTECTION ACT

Mr. LEAHY. Mr. President, for more than 2 years, I have been working hard with Members on both sides of the aisle, in both Houses of Congress, to address the horrendous problem of innocent people being condemned to death within our judicial system. This is not a question of whether you are for or against the death penalty. Many of the House Members and Senate Members who have joined this effort are in favor of the death penalty. I suspect the majority of them are in favor of it. It goes to the question of what happens if you have an innocent person who is condemned to death.

Our bill, the Innocence Protection Act, proposes a number of basic commonsense reforms to our criminal justice system; reforms that are aimed at reducing the risk that innocent people will be put to death.

We have come a long way since I first introduced the IPA in February 2000. At that time, we had four Democratic cosponsors. Now there is a broad consensus across the country among Democrats and Republicans, supporters and opponents of the death penalty, liberals, conservatives, and moderates, that our death penalty machinery is broken. We know that putting an innocent person on death row is not just a nightmare, it is not just a dream, it is a frequently recurring reality.

Since the 1970s, more than 100 people who were sentenced to death have been released, not because of some technicality, but because they were innocent, because they had been sentenced to death by mistake. One wonders how many others were not discovered and how many innocent people were executed.

These are not just numbers, these are real people. Their lives are ruined. Let me give an example: Anthony Porter. Anthony Porter was 2 days from execution in 1998 when he was exonerated and released from prison. Why? Not because the criminal justice system worked. He was exonerated and released because a class of journalism students, who had taken on an investigation of his case, found that did he not commit the crime. They also found the real killer. A group of students from a journalism class did what should have been done by the criminal justice system in the first place.

Ray Krone spent 10 years in prison. Three of those ten years were on death row waiting for the news that he was about to be executed. Then, earlier this year, through DNA testing, he was exculpated and the real killer was identified. These are two of the many tragedies we learn about each year.

These situations result not only in the tragedy of putting an innocent person on death row, but they also leave the person who committed the crime free. Everything fails. We have the wrong person in prison. But we have not protected society or the criminal justice system because the real criminal is still out running free. Often times, the actual perpetrator is a serial criminal.

Today, Federal judges are voicing concerns about the death penalty. Justice Sandra Day O'Connor has warned that ''the system may well be allowing some innocent defendants to be executed.'' Justice Ginsburg has supported a State moratorium on the death penalty. Another respected jurist, Sixth Circuit Judge Gilbert Merritt, referred to the capital punishment system as ''broken,'' and two district court judges have found constitutional problems with the Federal death penalty.

We can agree there is a grave problem. The good news is that there is also a broad consensus on one important step we have to take—we must pass the Innocence Protection Act.

That is why I wanted to let my colleagues know what is happening. As the 107th Congress draws to a close, the IPA is cosponsored by a substantial bipartisan majority of the House and by 32 Senators from both sides of the aisle, including, most recently, Senator BOB SMITH of New Hampshire. A version of the bill has been reported by a bipartisan majority of the Senate Judiciary Committee. And the bill enjoys the support of ordinary Americans across the political spectrum.

What would the Innocence Protection Act do? As reported by the committee, the bill proposes two minimum steps that we need to take—not to make the system perfect, but simply to reduce what is currently an unacceptably high risk of error. First, we need to make good on the promise of modern technology in the form of DNA testing. Second, we need to make good on the constitutional promise of competent counsel.

DNA testing comes first because it is proven and effective. We all know that DNA testing is an extraordinary tool for uncovering the truth, whatever the truth may be. It is the fingerprint of the 21st Century. Prosecutors across the country rightly use it to prove guilt. By the same token, it should also be used to do what it is equally scientifically reliable to do: to establish innocence.

Just like fingerprints, in many crimes there are no fingerprints; in many crimes there is no DNA evidence.

Where there is DNA evidence, it can show us conclusively, even years after a conviction, where mistakes have been made. And there is no good reason not to use it.

Allowing testing does not deprive the State of its ability to present its case, and under a reasonable scheme for the preservation and testing of DNA evidence, it should be possible to preserve the evidence.

The Innocence Protection Act would therefore provide improved access to DNA testing for people who claim that they have been wrongfully convicted.

Just last week, prosecutors in St. Paul, MN, vacated a 1985 rape conviction after a review of old cases led to DNA testing that showed they had the wrong man—and also identified the actual rapist. Think how much better society would have been had they caught the real rapist 17 years ago. The district attorney wanted to conduct DNA testing in two other cases, but the evidence in those cases had already been destroyed. She has called on law enforcement agencies to adopt policies requiring retention of such evidence, and that is what our bill would call for.

Many cases have no DNA evidence to be tested, just as in most cases there are no fingerprints. In the vast majority of death row exonerations, no DNA testing has or could have been involved.

So the broad and growing consensus on death penalty reform has another top priority. All the statistics and evidence show that the single most frequent cause of wrongful convictions is inadequate defense representation at trial. The biggest thing we can do is to guarantee at least minimum competency for the defense in a capital case.

This bill offers States extra money for quality and accountability.

They can decline the money but then the money will be spent on one or more organizations that provide capital representation in that State. One way or another, the system is improved.

More money is good for the states. More openness and accountability is good for everyone. And better lawyering makes the trial process far less prone to error.

When I was a State's Attorney in Vermont, I wanted those I prosecuted to have competent defense counsel. I wanted to reach the right result in my trails, whatever that was, and I wanted a clean record, not a record riddled with error. Any prosecutor worth his or her salt will tell you the same; any

prosecutor who is afraid of trying his cases against competent defense counsel ought to try a new line of work, because the whole system works better if both prosecutor and defense counsel are competent. That is what I wanted when I was prosecuting cases because I wanted to make sure justice was done.

The Constitution requires the Government to provide an attorney for any defendant who cannot afford one. The unfortunate fact is that in some parts of the country, it is better to be rich and guilty than poor and innocent, because the rich will get their competent counsel, but those who are not rich often find their lives placed in the hands of underpaid court-appointed lawyers who are inexperienced, inept, uninterested, or worse.

We have seen case after case of sleeping lawyers, drunk lawyers, lawyers who meet with their clients for the first time on the eve of trial, and lawyers who refer to their own clients with racial slurs.

Part of the problem, I think, lies with some state court judges who do not appear to expect much of anything from criminal defense attorneys, even when they are representing people who are on trial for their lives. Good judges, like good prosecutors, want competent lawyering for both sides. But some judges run for reelection touting the number and speed of death sentences they have handed down. For them, the adversary system is a hindrance.

The problem of low standards is not confined to elected State judges. Earlier this year, a bare majority of the Supreme Court held that it was okay for the defendant in a capital murder trial to be represented by the same lawyer who represented the murder victim. Most law students would automatically say that is a conflict of interest, but our Supreme Court said that was all right. And last year, a Federal appeals court struggled with the question whether a defense lawyer who slept through most of his client's capital murder trial provided effective assistance of counsel.

Fortunately, a majority of the court eventually came to the sensible conclusion that ''unconscious counsel equates to no counsel at all,'' basically reversing what a State court said when it said the Constitution guarantees a person counsel. It does not guarantee they will stay awake.

No law can guarantee that no innocent person will be convicted. But surely we can do better than this. Surely we can demand more of defense counsel than that they simply show up for the trial and remain awake. When people in this country are put on trial for their lives, they should be defended by lawyers who meet reasonable standards of competence and who have sufficient funds to investigate the facts and prepare thoroughly for trial. As citizens, we expect that of our prosecutors. We ought to expect the same thing of our defense attorneys. That is all we ask for in the IPA.

I have heard four arguments against the bill. One wonders, with all these people from the right to the left, all these editorial writers and Members of Congress from both parties supporting the IPA, what that tells us.

First, critics claim that the bill is an affront to States' rights. As a Vermonter, and as a former State prosecutor, I agree that States' rights are very important. States should have the right to set their own laws, free of Federal preemption at the behest of special interests. They should have the right to set their own budgets, free of unfunded mandates. And their reasonable expectations of Federal funding for criminal justice and other essential programs should be met, rather than bankrupting State governments because of Federal tax policy.

The IPA is entirely consistent with these principles of State sovereignty. It leaves State laws, including the death penalty laws, in place. It offers States new funding for their criminal justice systems. And there was a provision added during the committee process establishing a student loan forgiveness program for prosecutors and public defenders, something that a lot of State governments say would help recruit and retain competent young lawyers.

This is one of those cases, like in the civil rights era, where the rhetoric of States rights is being abused as a code for the denial of basic justice and accountability. Some States have made meaningful reforms, but many have not. They have had more than a quarter of a century and 100 death row exonerations to get their act together, but they have failed. As many in this body argued in 1996, when promoting legislation to speed up executions, justice delayed is justice denied. I agree with that. We cannot wait forever while innocent lives are in peril.

I have heard a second argument against the IPA, which is that society cannot afford to pay for these reforms. The truth, however, is that we cannot afford to do otherwise if we want to maintain confidence in our criminal justice system. The costs of providing DNA testing and competent counsel are relatively small, especially when you compare them to the costs of retrials that are necessitated by the lack of adequate counsel at trial, or the cost of locking up innocent people for years or even decades. I am all for efficiency, but the greatest nation on Earth should not be skimping on justice in matters of life or death.

I have heard a third argument from a vocal minority of State prosecutors. They claim the bill would make it unduly difficult, if not impossible, to seek the death penalty. That is a shocking claim. When I prosecuted cases, I felt very comfortable prosecuting those cases under the laws of our State because of two things: I knew that all the evidence we had, including potentially exonerating evidence, had been given to the defendant. And I knew I was working in a well-functioning adversarial system with effective representation on the other side. That is the way it is supposed to work.

When I hear a prosecutor say that the IPA reforms—enabling DNA testing and securing adequate defense representation—would make it almost impossible for him to do his job, it makes me wonder what he thinks that job is.

Finally, there is one more argument against the bill which is rarely stated out loud. I call it the ''innocence denial'' argument. We saw this in the Earl Washington case in Virginia where, despite conclusive DNA evidence to the contrary, the Commonwealth for years clung to the hopelessly unreliable and implausible confession of a mentally retarded man. We see it in claims that ''the system is working'' when an innocent man is released after years on death row due to the work of journalism students. And we see it in the often-repeated insistence that, no matter how many people have been exonerated, no one can prove that an innocent person has actually been executed.

The innocence deniers will never concede there is a problem. But with 100 known instances of the system failing—and those are only the ones we know about—it would be surprising if there were not more unknown cases of innocent people being sentenced to death.

The IPA was passed out of committee in the Senate and is supported by a majority of the House. We ought to pass it before more lives are ruined.

As a prosecutor, I never had any hesitation to seek the severest penalties our State could provide for people who committed serious crimes. When I look at some of the cases I have reviewed over recent years, when I see shoddy evidence, or when I see evidence that was not looked at because it might have pointed to someone else, I wonder, why wouldn't society want a better system? Passing the IPA will help fix these problems and give greater credibility to our criminal justice system.

I yield the floor.

I suggest the absence of a quorum and ask that the time be equally divided.

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

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

TRIBUTE TO SENATOR STROM THURMOND

Mr. DEWINE. Mr. President, I rise today to recognize the accomplishments of our friend and colleague, Senator STROM THURMOND, an individual who has devoted his entire life to the service of the American people and who now stands before us as one of the most accomplished U.S. Senators in our nation's history.

I must say that I am saddened that I am making these comments on the heels of a controversy over the nomination of a highly qualified judicial nominee, Dennis Shedd, who was a longtime member of Senator THURMOND's staff and who was recommended to the President for this appointment by Senator THURMOND. While I won't go into the specifics of these hollow arguments against Judge Shedd, I cannot make these comments in praise of Senator THURMOND without mentioning my disappointment about the handling of Judge Shedd's nomination.

As our colleagues know, Senator THURMOND's nearly 50 years of service within this body make him the longest serving member since the Senate's inception, yet his contributions to public service and our Nation extend well beyond the United States Senate. From the time he served as Superintendent of Education in Edgefield, SC, STROM THURMOND placed the good of the Nation ahead of his personal career. He served over 36 years on active and reserve duty within the U.S. Army, while simultaneously holding many other public service positions.

Throughout, he was prepared to abandon his professional career on a moment's notice—ready to fight to preserve democracy and freedom. He was awarded five battle stars, as well as 18 decorations, medals, and awards, including the Bronze Star for Valor and the Purple Heart.

I have only—I say ''only''—been in the Senate for 8 years, but in the relatively short time I have had the pleasure of serving in the Senate alongside Senator THURMOND, we have worked together as sponsors or co-sponsors of dozens of bills, including legislation enhancing local law enforcement efforts to protect the elderly and child victims of violent crime, drug interdiction efforts designed to stem the tide of drugs flowing into our cities and schools, laws to end the practice of partial-birth abortion, and constitutional amendments to protect victims of violence. All of these collaborative efforts have benefited a great deal from the insight STROM THURMOND developed during his 12-year tenure as either chairman or ranking member of the Judiciary Committee and also, of course, his 50 years of service in this body.

While Senator THURMOND's Senate career speaks volumes about his commitment to this nation and to the people of South Carolina and to all Americans, I also must mention what a pleasure it has been for me to know Strom Thurmond as a person.

Over the years, he has shown great kindness and generosity to me and to my family. In particular, I would like to thank him for the hospitality he has shown my son, Brian, who recently graduated from South Carolina's Clemson University.

When I told STROM my son Brian was going to go to Clemson, he beamed. I could tell he was delighted. He said, You know, I went to Clemson. Of course I knew that. He said, I went to Clemson. I asked, STROM, What year did you graduate?

He said, I graduated from Clemson in 1923.

I looked at him. I said, STROM, my dad was born in 1923.

STROM THURMOND has had quite an unbelievable career. I have had the opportunity, as well, to listen to many of his stories. I asked him about his tenure at Clemson. He told me about the different times he would run barefooted from town to town. He was a long distance runner when he was there.

The great Athenian general Pericles once noted that:

> Where the rewards of virtue are greatest, there the noblest citizens are enlisted in the service of the state.

Our American democracy, like that of the Athenians, is designed to reward virtue with the opportunity to represent and defend fellow citizens. Certainly there is no man of our time better fit for and dedicated to these difficult tasks than STROM THURMOND. Indeed, he is a tribute to the American ethic of public service that the framers of our nation envisioned over two centuries ago.

It should come, then, as no surprise to my colleagues in the Senate, to the citizens of South Carolina, and to the American public that STROM THURMOND has left an indelible mark on our nation through his service—a mark that surely will never be forgotten or held in anything less than the highest regard.

We thank STROM for his service to our country, to South Carolina, and to the people who will miss his kindness and his friendship. But we look forward to seeing him, as we are sure we will, for a long time because he is a man of great courage and great integrity. We will miss him.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I thank my colleague for his kind remarks about our great friend, Senator THURMOND. I have been around here 26 years, and Senator THURMOND was the leader on the Judiciary Committee for most of that time. He has been a tremendous mentor and adviser to me.

He is a wonderful man. He has gone through so many changes in his life, and he has had many different experiences in his life. He is truly a war hero and truly one of the people I think everybody in this body has to admire. There is no question about it. He is one of the all-time great Senators. He has represented the State of South Carolina for all of these years very well.

I can remember traveling through the State with him. Just about everybody knew STROM, and he knew just about everybody in his State. It was absolutely amazing to me that a person could be so revered as STROM THURMOND was—and he deserved it.

He is not only a great man, but he has done great things in his life. He has done great things having come from the Old South, which has been highly criticized by many of us in this Chamber.

But let me just take a moment to pay tribute to my good friend and our distinguished colleague on this committee, the senior Senator from South Carolina, STROM THURMOND.

From the moment STROM THURMOND set foot in the Senate Chamber in 1954, he has been setting records. He was the only person ever elected to the U.S. Senate on a write-in-vote. That is a reworkable achievement. He is the longest serving Senator in the history of the U.S. Senate. As he approaches his 100th birthday, he is also the oldest serving Senator. Many of my colleagues will recall the momentous occasion in September of 1998 when he cast his 15,000th vote in the Senate. With these and so many other accomplishments over the years, he has appropriately been referred to as ''an institution within an institution.''

In 1902, the year STROM THURMOND was born, life expectancy was 51 years and today —the last time I heard—it is 77 years. But I think it is going up regularly. STROM continues to prove that, by any measure, he is anything but average.

He has seen so much in his life. To provide some context, let me point out that, since his birth, Oklahoma, New Mexico, Arizona, Alaska and Hawaii gained Statehood, and eleven amendments were added to the Constitution. The technological advancements he has witnessed, from the automobile to the airplane to the Internet, literally span a century of progress. Conveniences we have come to take for granted today were not always part of STROM THURMOND's world. Perhaps this explains why during our Judiciary committee hearings, we have heard him asking witnesses who were too far away from the microphone to ''please speak into the machine.''

The story of his remarkable political career truly could fill several volumes. It began with a win in 1928 for the Edgefield County Superintendent of Schools. Eighteen years later, he was Governor of South Carolina. STROM was even a Presidential candidate in 1948, running on the 'Dixiecrat' ticket against Democrat Harry Truman.

I must admit that he has come a long way in his political career, given that he originally came to the Senate as a Democrat. I am happy to say that wisdom came within a few short years when STROM saw the light and joined the Republican Party.

That was supposed to be humorous. But I did not hear any laughter.

When I first arrived in the Senate in January of 1977, he was my mentor. As my senior on the Judiciary committee, it was STROM THURMOND who helped me find my way and learn how the committee functioned. He has not only been a respected colleague, but a personal friend, ever since.

During his tenure as Chairman of the Judiciary committee, STROM THURMOND left an indelible mark on the

committee and the laws that came through it. He became known and respected for many fine qualities and positions—his devotion to the Constitution, his toughness on crime, his sense of fairness.

He is also famous for his incredible grip. Many of us have experienced STROM THURMOND holding our arm tightly as he explains a viewpoint and asks for our support. I might add that this can be a very effective approach.

STROM is also known to have a kind word or greeting for everyone who comes his way, and for being extremely good to his staff—and to all the workers here on Capitol Hill. No question. He has gone out of his way.

I might add that I have seen him operate in his own home State and other places. I have seen him. He has operated in the most even-mannered, decent, honorable way to people regardless of where they came from—regardless of their color, their religion, their country of origin, or any other distinguishing characteristic. STROM has always been good to everybody.

Despite his power and influence, he has never forgotten the importance of small acts of kindness.

STROM THURMOND is truly a legend—someone to whom the people of South Carolina owe an enormous debt of gratitude for all his years of service. Clearly, the people of South Carolina recognize the sacrifices he has made and are grateful for all he has done for them. In fact, you cannot mention the name STROM THURMOND in South Carolina without the audience bursting into spontaneous applause. He truly is an American political icon.

Abraham Lincoln once said that:

The better part of one's life consists of friendships.

With a friend like STROM THURMOND, this sentiment couldn't be more true. I am a great admirer of STROM THURMOND, and, as everyone around here knows, I am proud to call him my friend.

One final note about STROM THURMOND: He is a great patriot. I am grateful for his work with me over the years in support of a Constitutional Flag Amendment. A decorated veteran of World War II who fought at Normandy on D-Day, STROM THURMOND loves this country. He loves it very much. Let me just say this country loves him, too.

STROM THURMOND is a wonderful father. He has raised his children to be very fine people. And they love him as well.

When his daughter died, it was one of the most tragic things I have ever seen. It was the first and only time I ever saw STROM THURMOND shed tears. He is such a strong, resilient, patriotic leader. But on that day, at that funeral, STROM THURMOND broke down, which showed how much he loved his daughter and his family. I know how much he has. That is the mark of a great man.

I am glad today, or at least by tomorrow, hopefully, this body will be able to give STROM THURMOND the only thing he has asked of us, as a last request, in return for his service: the confirmation of his former chief counsel, Judge Dennis Shedd, who himself is a wonderful, decent man.

With that, Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, just so all Senators understand where we are, I have been told that the cloture vote that was scheduled for this afternoon has been vitiated. But we will be voting on the Shedd nomination sometime tomorrow morning.

I see the distinguished Senator from Florida on the floor. Could he indicate how long he wishes to speak? I was about to begin the debate on the nomination.

Mr. NELSON of Florida. About 10 minutes.

Mr. LEAHY. Mr. President, I ask unanimous consent that the distinguished Senator from Florida be recognized for 10 minutes, with the time divided equally. I make that request, that that 10 minutes of time be taken equally out of both sides.

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

The Senator from Florida is recognized for 10 minutes.

TECHNOLOGY AND FREEDOM

Mr. NELSON of Florida. Mr. President, I come to the floor not to speak on the Shedd nomination—and I had spoken to the chairman of the committee—but to speak about a matter we will be discussing tomorrow as we take up the homeland defense bill and some of the questions of privacy that have arisen, not necessarily directly involved in this bill but clearly in the discussion of homeland security.

Some grave questions of invasion of privacy have been noted. So I felt compelled to take the floor of the Senate to raise further the issue of governmental intrusion into the private lives of people.

I realize that in this technologically advanced age, in order to go after the bad guys, in order to be able to stop them before they hit us, clearly there has to be the clandestine means of penetrating the communications that are going on. That is very important to the defense of this country and our citizens. At the same time, the constitutional rights of privacy must always be foremost in our minds as we battle this new, elusive kind of enemy called the terrorist.

So I want to offer some words. I start, first, with words from a very famous American who had something significant to say about privacy, Justice Louis Brandeis, in which he argued, in a 1928 case, that the Framers of our Constitution—and I will quote Justice Brandeis:

. . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Justice Brandeis went on, that the Framers of the Constitution had:

. . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Now, Justice Brandeis wrote those words in a dissenting opinion in a 1928 case involving a liquor dealer who was convicted by evidence gathered through a wiretap, way back then, early in the last century. That case arose because technology had granted the Government an increased ability to peer inside people's private lives—then, in 1928, a wiretap.

The technology increased governmental authority, forcing the Supreme Court to evaluate and redefine the boundaries between freedom and governmental power. The technological advances also stimulated an important national debate about the balance between individual freedom and the legitimate needs of law enforcement.

Now we are at a similar crossroads, and those words ring out to us today as we go about trying to balance the rights between individual freedom and the legitimate needs of the Government to penetrate terrorist cells.

Technology has advanced faster than the Nation's norms and the laws for managing them. Modern technology makes possible unprecedented intrusions into the private lives of American people. This ability, coupled with increasing governmental demands to use that technology, poses a grave threat to personal privacy and personal freedom.

This past week, I was rivetted by the news of the revelations about how the Department of Defense is developing a computer system to grant intelligence and law enforcement authorities the power to secretly access ordinary citizens' private information, including e-mail, financial statements, and medical records—to access that private information without the protections of a court order.

Clearly, in this post-9/11 world, we need to develop tools that will enable our Government to keep us safe from terrorists by disrupting their operations. But these tools need to be balanced against the protection of innocent people's right to privacy. If the right to privacy means anything, it is the right of the individual to be free from unwarranted governmental intrusion.

So what rivetted my attention were reports, first in the New York Times, the Washington Post, and then in the Washington Times, that the so-called Total Information Awareness Program—located in DARPA, deep inside the Department of Defense—would make possible unwarranted governmental intrusions such as we have never seen before.

It is disturbing that we are developing a research system that, if ever used, would violate the Privacy Act as well as violate a lot of other Federal laws on unreasonable searches of private information without probable cause, which is the typical standard

that needs to be met. That is why we go to a judge to get an order allowing us to intrude on such things as searches, as seizures, on such things as wiretaps.

I have a serious concern about whether this type of program, called Total Information Awareness, can be used responsibly. So while we investigate and learn more about it, I intend to speak out to the Congress and to the committees on which I am privileged to serve—including the Armed Services Committee—to speak out that we need to oversee this program to ensure that there is no abuse of law-abiding individuals' privacy.

It has been reported that this program is authorized or endorsed by the homeland security legislation pending now in the Senate. And that does not appear to be the case. While it doesn't specifically tend to be the case, this legislation, the Homeland Security Department, does include a provision creating a research division within the new Homeland Security Department. It would develop, among other things, information technologies similar to the Total Information Awareness Program. While I strongly support funding for new research, and I certainly believe that we must use our technological advantage to defeat our enemies, at the same time I think we better take a breath, be very cautious that any new research done in the Defense Department or within the new proposed Department of Homeland Security does not threaten our personal freedoms.

I also have grave concerns that this information awareness program is being directed by someone who is very controversial: Retired Rear Admiral Poindexter, the former Reagan administration official who was convicted in, you remember, the Iran-contra story. There is a very legitimate question about whether or not he is the appropriate person to head such a sensitive program.

To quote from recent editions of the Washington Post, specifically November 16, an editorial:

> However revolutionary and innovative it may be, this is not neutral technology, and the potential for abuse is enormous.

The editorial continues:

> Because the legal system, designed to protect privacy, has yet to catch up with this technology, Congress needs to take a direct interest in this project.

The editorial goes on:

> And the defense secretary should appoint an outside committee to oversee it, before it proceeds.

The editorial concludes:

> Finally, everyone involved might also want to consider whether Adm. Poindexter is the best person to direct this extremely sensitive project.
>
> Though his criminal convictions were overturned on appeal, his record before the Congress hardly makes him an ideal protector of the legal system. . . .

That is the Washington Post.

In conclusion, ever since I had the privilege to serve with the likes of these great Senate giants on the floor right now, Senators LEAHY and HATCH, guardians of the Constitution because of their roles on the premier committee that guards the Constitution in the Senate, privacy is an issue that has attracted my attention and concern.

Has my time expired?

The PRESIDING OFFICER (Mr. NELSON of Nebraska.) The Senator's time has expired.

Mr. NELSON of Florida. I ask unanimous consent that I conclude my remarks in 2 minutes.

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

Mr. NELSON of Florida. I thank Senators for letting me make this case.

When I first came here, I became concerned that back in 1999 we allowed banks and insurance companies to merge, but we didn't protect individual's privacy. It would shock people to know that if you go have a physical exam in order to get a life insurance policy and if that life insurance company is acquired by a bank, that the access to those individually identifiable medical records is unlimited, without your personal consent, to anywhere within that bank holding company.

You might also be interested to know that recently we had the issuance of rules by the Bush administration on medical record privacy, but there was a huge omission in that pharmaceutical companies could go to drugstore chains, pay the drugstore chain for the names and ability to communicate to individual people who had prescriptions, and then that pharmaceutical chain could contact that individual patient, asking them, soliciting them to change their medication to a different kind of medication, one that would be within the generic equivalent or a different brand name than the one that the physician had prescribed for them. That is an invasion of personal privacy. Yet it is allowed under the rules of the new administration.

Take, for example, the case 2 weeks ago in Fort Myers, FL. Suddenly a dumpster was overflowing with tax records, bank records, Social Security numbers, all kinds of personally identifiable financial information not properly disposed of by the bank subsidiary. The bank says there is no such law. So I filed a bill to protect individual's personal financial privacy.

Lo and behold, another invasion of privacy, identity theft, one of the big things, more recently, in Orlando, FL—another dumpster. Now all of a sudden, one of the two large pharmaceutical drugstore chains dumps all of the prescriptions in the dumpster, along with the bottles. As a result, the personally identifiable medical information is there for the public to see from someone pilfering the dumpster.

I think I have made my case. Privacy is something we better be concerned about.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, we have before us the nomination of United States District Court Judge Dennis Shedd of South Carolina to the Court of Appeals for the Fourth Circuit.

Judge Shedd's nomination was reported out of the Judiciary Committee last Thursday on a voice vote. Nine Democratic Senators, including myself, voted against him. As I noted before, I told Senator THURMOND I intended to bring this matter to a vote by the committee this year. My concern at the penultimate meeting, the meeting before last week, a meeting we held in October, was that we had very little time to debate this controversial nominee and that threatened to prevent a committee vote on 17 other of the President's judicial nominees before the committee.

Incidentally, those 17 district court nominees and 2 circuit court nominees were confirmed by the Senate last week. Those 17 district court nominees were on the Senate Calendar because the Senate Judiciary Committee was able to report those nominees despite unparalleled personal attacks by Republicans on me as chairman. Those attacks have included everything from saying I am not bringing up nominees—although I am and we are at a record rate that far outpaces the Republican rate during their six and one-half years of control—to even attacks in these recent months on my religious beliefs as well as the religion of several of the members of the Democratic majority on the Senate Judiciary Committee.

Notwithstanding these unprecedented attacks on both our religious beliefs and our actions, the confirmations last week bring to 99 the number of President Bush's judicial nominees confirmed by the Democratic-led Senate in the past 16 months.

I mention this because before that, during the 6½ years when the Republican majority controlled the Senate, they averaged 38 judicial confirmations per year. In fact, in the year 1996, over the whole year, they allowed only 17 district court judges to be confirmed all year and did not confirm a single circuit court nominee—not a single one. We had 17 district court judges in 1 meeting and those 17 nominees of President Bush were confirmed on one day last week by the Democratic-led Senate.

I put this in the record so the people understand the historic demonstration of my bipartisanship toward the President's judicial nominees in perspective with the recent history of judicial confirmations. The fact is that in addition to the 83 district court nominees confirmed, the Senate has also already confirmed 16 of his circuit court nominees. That is in sharp contrast to the fact that the Republicans allowed only 7 circuit court nominees to be confirmed per year, on average, during their control of the Senate. For example, more than half of President Clinton's circuit court nominees in the

106th Congress were defeated through such obstruction—more than half.

In fact, the Fourth Circuit—to take one at random—is one of many circuits affected by the other party's obstruction of President Clinton's judicial nominees. In the Fourth Circuit, seven of President Clinton's nominees to that circuit were never given a hearing or a vote in committee or on the floor—seven out of that one circuit alone.

James Beaty, one of the Fourth Circuit nominees of President Clinton, did not get a hearing or a vote in 1995, or 1996, or 1997, or 1998. Another Fourth Circuit nominee, Judge Richard Leonard, did not get a hearing or vote in 1995 or 1996.

Another Fourth Circuit nominee, James Wynn, did not get a hearing or a vote in 1999, 2000, or 2001. Other Fourth Circuit nominees—Elizabeth Gibson, Judge Andre Davis, or Judge Roger Gregory—also did not get hearings or votes during the period of Republican control of the Senate.

Indeed, the first hearing the Judiciary Committee held last year on a judicial nominee was for an earlier Fourth Circuit nominee, Judge Roger Gregory. He had been nominated initially by President Clinton when the Republicans were in control. They did not act on him. He was brought back by President Bush, and he became the first judge confirmed to the Fourth Circuit in several years. He was also the first African American confirmed to the Fourth Circuit in American history. That is because our committee in the Senate acted in the summer of 2001. Judge Gregory was the first of 20 circuit court nominees on whom we proceeded to hold hearings in our 16 months in the majority.

So the partisan rhetoric about the Judiciary Committee having blockaded President Bush's judicial nominees and having treated nominees unfairly might be a good stump speech on the circuit, but it is belied by the facts. Frankly, I think the staff at the White House who have put those kinds of misstatements in the President's speeches have done the President a disservice, as they have the Senate.

Turning to the nomination of Judge Dennis Shedd to the United States Court of Appeals for the Fourth Circuit, I cannot fail to note that it is not without controversy. In fact, it is quite controversial. Issues in his judicial record raised cause for concern among many Senators on the Judiciary Committee as well as with many citizens who live in the jurisdiction of the Fourth Circuit and elsewhere in the country who have written to the Senate in opposition to his elevation and confirmation.

While considering the information gathered in the hearing process, I placed Judge Shedd's nomination on the committee agenda in September. That was my effort to show Senator THURMOND courtesy as a former chairman and to signal that I expected this committee to proceed to consider the nomination before the year was out. Several Senators asked to hold the nomination over, and under the rules any Senator can.

On October 7, when I hoped to be able to list his name for consideration again, I was told there would be a debate so lengthy that we would not even be able to consider the 17 other judicial nominations of President Bush that were on the agenda or, for that matter, the legislative matters we were trying to take up before the election. So I told Senator THURMOND, and other Senators before that markup, it was for this reason that I would not list Judge Shedd's nomination on the agenda for the October 8 markup, but I explained to Senator THURMOND and others that I hoped we would be able to consider it at our next opportunity, as we knew at that point we would have a lame duck session. So now, having the lame duck session, I scheduled as soon as we came back and Senators would be here a markup on Judge Shedd and one other judicial nominee.

The committee has received more than 1,200 letters from individuals and organizations, both in and out of South Carolina, expressing concerns about elevating Judge Shedd. In fact, right here, it stands about 2 feet high—the stack of letters we got against it. These letters raise serious issues. What I heard about the nominee from the citizens of South Carolina and from others around the country was and is troubling.

I ask unanimous consent to have printed samples of letters such as those from citizens of South Carolina in the RECORD.

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

SOUTH CAROLINA
LEGISLATIVE BLACK CAUCUS,
Columbia, SC, September 4, 2002.

Re Fourth Circuit Nomination of Judge Shedd.

Hon. PATRICK J. LEAHY,
Chair, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY: The South Carolina Legislative Black Caucus (SCLBC) was formed in 1975 soon after the Civil Rights Movement in the 1960's. Presently, the SCLBC has 31 members: seven senators and 24 representatives, including four women. The SCLBC is dedicated to the struggle for fairness, equality and justice for all South Carolinians, and to the civic and political involvement of African-Americans, women and other racial and ethnic minorities.

We seek to preserve the civil rights strides that occurred in South Carolina over the decades, and we fight to prevent any regressive step that threatens to rollback civil rights and constitutional rights of American-Americans, women and other racial and ethnic minorities. The nomination of U.S. District Judge Dennis W. Shedd to the U.S. Court of Appeals for the Fourth Circuit represents such a regressive step, and accordingly, we strongly oppose the nomination.

African-Americans constitute a full one-third of South Carolina's population, yet there is only one active African-American federal judge in the state. And, there are only two South Carolinian female federal judges, one on the federal District Court and the other on the Fourth Circuit. This is unfair and unjustified because there are many well-qualified African-American and women jurists and lawyers who deserve an opportunity to serve this nation on the federal judiciary.

Because African-Americans are one-third of South Carolina's population and the Fourth Circuit has a greater number of African-Americans than any circuit, it is critical that any nominee, especially one from South Carolina, be an unabashed champion of civil rights. The appointee should have a record that demonstrates fairness and justice to all people. Based on our careful review of Judge Dennis Shedd's performance on the U.S. District Court for the District of South Carolina, we have concluded that his record shows a serious hostility to civil rights and constitutional protections.

Since his appointment to the federal bench in South Carolina, Judge Shedd has engaged in right-wing judicial activism by imposing strict and exacting standards when reviewing employment discrimination cases brought by African Americans and women. He has dismissed almost every employment discrimination, sexual harassment, civil rights and disability case that has come before him. Judge Shedd seems to believe that discrimination is not an actionable offense even when the Equal Employment Opportunity Commission has found ''reasonable cause'' that discrimination has occurred. Judge Shedd, however, seems to apply a more lenient standard in reviewing discrimination cases brought by white men. Judge Shedd has allowed four out of five ''reverse'' discrimination cases to proceed beyond the summary judgment phase of litigation.

This record shows that Judge Shedd does not have an abiding concern for civil rights and fairness. It further shows that Shedd lacks the requisite moderate reasoning to bring balance to the Fourth Circuit. In fact, his membership to the Fourth Circuit would push it further beyond the mainstream of American values and would subject South Carolinians and residents of other states within the Fourth Circuit to an extreme right-wing interpretation of this nation's civil rights laws and constitutional protections.

Accordingly, we oppose Judge Shedd's nomination without reservation. His values represent the Old South, where African Americans and women were judged by different and unequal standards.

We appreciate your attention. If you have any questions, please contact me at the address and telephone number above.

Sincerely,

JOSEPH H. NEAL,
Chairman.

SOUTH CAROLINA STATE CONFERENCE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Columbia, SC, June 24, 2002.

Senator PATRICK LEAHY,
Chairman, Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY: We write to oppose the nomination of Dennis Shedd to the Fourth Circuit Court of Appeals.

By now, you must be familiar with the importance of the Fourth Circuit to the African American community. Almost a quarter of the Fourth Circuit's residents are African American. The Fourth Circuit, with over 6 million African Americans in the five states, has the greatest number of African Americans of any Circuit Court in the country. The Latino population within the Fourth Circuit now at more than one million persons, has nearly tripled in the last decade. Based on

these demographics, more may be at stake here for the future of civil rights than in any other Circuit Court in the country.

The Fourth Circuit is already an extremely conservative Court on civil rights and Constitutional issues. This Circuit ruled that federal law-enforcement officials need not follow the Miranda decision, only to be reversed by the Supreme Court. This Circuit authorized drug testing for pregnant women without their consent, which was reversed by the Supreme Court. This Circuit ruled that the Equal Employment Opportunity Commission was limited to remedies contained in employee arbitration agreements, and again, was reversed by the Supreme Court. The Circuit also has been reversed recently in capital habeas corpus cases and citizen suits under environmental laws. The Fourth Circuit has issued numerous other opinions that are hostile to affirmative action, women's rights, fair employment, and voting rights.

This is also the Court to which moderate African American nominees were repeatedly denied membership. No fewer than four African Americans were nominated to this Court by President Clinton, only to have their nominations languish for years due to Senatorial obstruction. Thus, if a nominee *is* to be confirmed to this Court, the nominee must be a jurist who will bring moderation and ideological balance to this Court. It is our strongly held view that this nominee is not Dennis Shedd.

Judge Shedd's judicial record reveals a deep and abiding hostility to civil rights cases. A review of Shedd's unpublished opinions reveals that Judge Shedd has dismissed all but very few of the civil rights cases coming before him. In nearly thirty cases involving racial discrimination in employment, he granted summary judgment for the employer in whole or in part in all but one case; most of the cases were dismissed altogether. Many of these cases were strong cases with compelling evidence and litigated by experienced civil rights lawyers.

Gender and disability discrimination cases before Judge Shedd fare no better. He has granted summary judgment on every sexual harassment claim on which summary judgment was requested. Collectively, these rulings leave us with the distinct impression that, in Dennis Shedd's view of the world, discrimination does not exist, and just as importantly, a jury should never be asked even to decide that question.

We are profoundly disturbed by the mounting evidence of Judge Shedd's zealous efforts to assist the defense in civil rights cases. There are repeated instances of Judge Shedd's intervention in civil rights cases—without prompting by the defendant—in ways that are detrimental to the plaintiff case. In a number of cases, Judge Shedd, on his own motion, has questioned whether he should dismiss civil rights claims outright or grant summary judgment. He has invited defendants to file for attorneys' fees and costs against civil rights plaintiffs. These are not the actions of an impartial decision-maker.

We are extremely concerned about Judge Shedd's rulings promoting ''States' rights,'' and view these as a fundamental encroachment on Congress's ability to enact civil rights and other legislation. Judge Shedd has a very restrictive view of Congressional power. He struck down the Driver's Privacy Protection Act of 1994 as legislation beyond Congress's power, although this legislation was an ''anti-stalking'' measure designed to prohibit public disclosure of drivers' license information. In an opinion authored by Chief Justice Rehnquist, the Supreme Court unanimously overturned Judge Shedd's ruling and refuted his reasoning. This stands as one of the few occasions in which the Supreme Court rejected unanimously a holding that Congress exceeded its power in enacting a statute.

The question of judicial temperament is raised by Judge Shedd's offensive remarks during a judicial proceeding about an issue that strikes at the heart of many—the Confederate flag. Judge Shedd presided over a federal lawsuit seeking the removal of the Confederate flag from the dome of the South Carolina Statehouse. According to press accounts of a hearing held in the case, Judge Shedd made several derogatory comments about opposition to the flag. First, he attempted to marginalize opponents to the flag by questioning whether the flag matters to most South Carolinians. (It does, and thirty percent of South Carolina's population is African American.) He also minimized the deep racial symbolism of the flag by comparing it to the Palmetto tree, which appears in South Carolina's State flag.

Our membership in South Carolina, deserves to be represented on the Circuit by a nominee who has a record of judicial impartiality, is committed to the progress made on civil rights and individual liberties, and has a deep respect for the responsibility of the federal judiciary to uphold that progress. Dennis Shedd is not that nominee. We urge you and the Senate Judiciary Committee to vote against his nomination.

Sincerely,

JAMES GALLMAN,
President.

Mr. LEAHY. We received a letter from the Black Leadership Forum, signed by many well-respected African Americans, including Joseph Lowery, and more than a dozen more internationally known figures, as well as letters from other African American leaders.

I ask unanimous consent that these letters be printed in the RECORD.

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

BLACK LEADERSHIP FORUM, INC.,
Washington, DC, September 16, 2002.

Hon. ERNEST F. HOLLINGS,
Member of the Senate, Senate Russell Office Building, Washington, DC.

DEAR SENATOR HOLLINGS: We are writing to share with you a letter which the Black Leadership Forum, Inc. (BLF), whose members are listed on the left side of this page, delivered several weeks ago to members of the Senate Judiciary Committee. The attached letter strongly opposes the nomination of Judge Dennis Shedd to a seat on the Fourth Circuit Federal Court of Appeals, for the reasons stated in substantial detail.

It has come to our attention that you are actively supporting Mr. Shedd's nomination and are aggressively pressing the Judiciary Committee for speedy approval of a hearing on his nomination by the full Senate. Therefore, we feel that it is urgent for you to be directly informed by BLF of the bases for our objections to this nomination. We reflect in this letter the deep concern in the African American community about this nomination because Mr. Shedd's judicial record undercuts our closely guarded values of equal justice and threatens the maintenance of our civil rights advances and constitutional protections.

Conversations with numerous African Americans who also are resident-constituents of your District, indicate that they, too, believe that this nomination should not go forward. We sincerely hope, therefore, that we can meet with you regarding our objections to Mr. Shedd's nomination and that until we have had this discussion, you will forego any further actions supporting his nomination. We have called your office requesting such a meeting prior to a vote by the Judiciary Committee on this issue.

Love Embraces Justice,
DR. JOSEPH E. LOWERY,
DR. C. DELORES TUCKER,
YVONNE SCRUGGS-LEFTWICH, PH.D.

RAINBOW PUSH COALITION
Chicago, IL, August 24, 2002.

Senator PATRICK LEAHY,
Member, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: Let me lend my voice of opposition to the chorus of discontent surrounding the nomination of Judge Dennis Shedd to the Fourth Circuit Court of Appeals. I urge you to oppose the Shedd nomination, based on the merits, and the merits alone. A seat on the Fourth Circuit is too important to the nation's judiciary not to be heavily scrutinized.

As a native of South Carolina, I am deeply disturbed by the direction taken by the Fourth Circuit in recent years. As a Judicial Circuit with considerable influence on the Supreme Court, those elevated to the Court should reflect the highest American ideals of inclusion and equal protection under the law. Moreover, the states included in the Fourth Circuit are comprised of the highest percentage of African Americans, than any other Circuit, thus judges on the Court must be sensitive and respectful for the civil rights laws for which we fought so hard.

Currently, the Fourth Circuit is the most extremist court in the nation on civil rights issues, criminal justice issues, and those involving the power of the federal government, to enact legislation, which holds States accountable for civil rights violations. The nomination of Dennis Shedd threatens to take the Court in a further extremist direction. For example, Judge Shedd's opinion in the Condon v. Reno case suggests that he favors disempowering Congress. American judges, and their rulings should protect rights, rather than restrict the balance of power.

To preserve this nation's ideals of inclusion, and to ensure equal protection under the law for all Americans, I urge you, and other members of the members of the Senate Judiciary Committee to vote ''No'' on the nomination of Dennis Shedd.

Sincerely,

REVEREND JESSE L. JACKSON, SR.

NATIONAL BAR ASSOCIATION,
Washington, DC, September 4, 2002.

Re Nomination of Judge Shedd, United States Court of Appeals for the Fourth Circuit.

Hon. PATRICK LEAHY,
Chairman Senate Judiciary Committee, Dirksen Office Building, Washington, DC.

DEAR SENATOR LEAHY: The National Bar Association hereby submit this letter in strong opposition to the confirmation of Dennis Shedd to the United States Court of Appeals for the Fourth Circuit. We strongly urge you to vote to defeat his appointment to this critical Court.

The National Bar Association, established in 1925 is the oldest and largest organization of minority attorneys, judges, legal scholars and law students in the United States and in the world. During our 77 year history we strive to obtain equal justice for all persons within the jurisdiction of these United States of America. Real diversity can only be achieved as a result of equal justice for all which directly results in equal opportunity. Real diversity, equal justice, and equal opportunity does not currently exist in our federal judiciary.

The National Bar Association maintains a watchful eye on federal judicial nominations, as part of its' historical mission. We

have a duty and obligation to support or oppose any nomination which directly affects our struggle for equal justice and equal opportunity for all. During these difficult times, the United States of America must set an example to the world by assuring equal justice and equal opportunity to a truly diverse nation.

The National Bar Association feels, confirmation of Dennis Shedd to the United States Court of Appeals for the Fourth Circuit will severely undermine and inhibit its' goals of equal justice for all, equal opportunity for all, and real diversity. In our opinion the one thing which insulates the United States of America from anarchy, civil strife, etc. is our Construction (as currently amended), which provides an open judiciary, where *any* citizen regardless of race, creed, color, gender, economic status, social status, etc. can seek redress. Absent an open federal judiciary, citizens will seek other less civil means to voice their concerns and seek redress. An open judiciary is the balance for the scales of justice.

The essential element of an open judiciary is our constitutional right to trial by jury. This right provides some assurance of fair and equitable treatment in resolution of disputes, without political influence of the government. Therefore, we must oppose federal judicial nominees, when their actions or beliefs, in any way reduce complete access to the courts, right to trial by jury, or in any way discourage access and right to trial by jury.

A review of Dennis Shedd's record appears to indicate a judicial philosophy to reduce and discourage access to the courts and exercise of each citizens right to trial by jury. For these reasons, the National Bar Association strongly opposes nomination of Dennis Shedd to the United States Court of Appeals for the Fourth Circuit.

Sincerely,

MALCOLM S. ROBINSON,
President.

THE NATIONAL BLACK CAUCUS
OF STATE LEGISLATORS,
Washington, DC, September 19, 2002.

Re Fourth Circuit Nomination of Judge Shedd.

Hon. PATRICK J. LEAHY,
U.S. Senate, Chair, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY: The National Black Caucus of State Legislators (NBCSL) is the body that represents some 600 African American state legislators in 44 states, the District of Columbia and the U.S. Virgin Islands. Last year, we celebrated our 25th year of involvement and dedication to many of the most pressing social issues and policies that impact our legislators' districts and the nation at large. Our commitment is to our constituents as well as the national agenda. Our dedicated work is to maintain the highest values of civil and human rights insuring that African Americans are a fair and representative part of the political and social equations of this great nation.

In their letter to you, dated September 4, 2002, members of the South Carolina Legislative Black Caucus have spoken clearly and definitively in opposing the nomination of Judge Dennis Shedd to the Fourth Circuit. In reviewing the information presented therein and having also researched the history and record of Judge Shedd, we find it woefully deficient regarding the issues of fairness, equality and justice. Moreover, as has been pointed out by our colleagues in South Carolina ''African Americans constitute a full one-third of South Carolina's population yet there is only one active African American federal judge in the state.'' In that there are unquestionably ''many, well-qualified African American . . . jurists'' in South Carolina, this is rightly seen an unfair and unequal treatment in the sight of fair representation. Further, considering the existent disproportionate representation of jurist of Color, certainly an effort must be made to insure that any South Carolina nominee be a strong advocate of civil and human rights. Rather, Judge Shedd's performance on the U.S. District Court for the District of South Carolina demonstrates what could be construed as hostile to civil and constitutional rights.

We have learned that Judge Shedd's insensitivity to fairness has been demonstrated in his review of employment discrimination cases brought by African Americans and in fact, women, even in such cases when the Equal Opportunity Commission has found ''reasonable cause.'' But, we have also found that in furtherance of this questionable action, when white men bring cases of ''reverse'' discrimination, those cases proceed. We also note that there have been concerns raised about the number of unpublished opinion issued by the Judge and further that such concerns regarding the decisions were reversed or vacated by the Fourth Circuit Court of Appeals.

The Fourth Circuit must have a judge who is mindful of the rightful place that African Americans have in this nation, and be a strong advocate of civil rights, human rights and constitutional rights. Any nominee should have demonstrated his dedication to such virtues and ideals. No other individuals should be considered for this important position.

For these reasons among others raised by our South Carolina Legislative Black Caucus, we cannot support the nomination of Judge Dennis Shedd for the Fourth Circuit and would ask that the opinion of our body be strongly considered in this matter. Should you have any questions, or require additional comment, please contact me.

Very truly yours,

JAMES L. THOMAS,
President.

CONGRESSIONAL BLACK CAUCUS
OF THE UNITED STATES CONGRESS,
Washington, DC, July 26, 2002.

Hon. PATRICK LEAHY,
Chairman, Senate Judiciary Committee, Washington, DC.

DEAR SENATOR LEAHY: On behalf of the Congressional Black Caucus, we write to express our strong opposition to the confirmation of Dennis Shedd to the United States Court of Appeals for the Fourth Circuit. We urge you to vote to defeat his appointment to this critical court.

The Fourth Circuit has the highest percentage of African-American residents of any federal circuit in the nation. As you know, President Clinton tried in vain for many years to integrate the Fourth Circuit by nominating no fewer than four moderate African-Americans to the court, only to see their nominations languish. James Beaty and James Wynn from North Carolina, Andre Davis from Maryland and Roger Gregory from Virginia were never given hearings before the Judiciary Committee at any time during the Clinton presidency. It was not until President Clinton took the extraordinary step of giving Roger Gregory a recess appointment in the final days of his Presidency that the last all-White circuit court in the nation was finally desegregated.

The Fourth Circuit is also the most conservative of the federal circuits. Its rulings on the rights of those accused of crimes, employees who face discrimination, and individuals with disabilities are far outside the judicial mainstream. Given the importance of the Fourth Circuit to the African-American community and the current ideological imbalance on the Court, it is imperative that any nominee to this Court be a jurist of moderate views who will protect the civil and constitutional rights of all Americans. Dennis Shedd is not that nominee.

Above all, we are concerned that any nominee to the Fourth Circuit be committed to the rigorous enforcement of federal civil rights laws. We are particularly troubled by Dennis Shedd's record in this area. Throughout his eleven years on the federal district court, Judge Shedd has demonstrated a propensity to rule against plaintiffs in civil rights cases. Based on our review of Judge Shedd's record, we doubt seriously whether he can fairly and impartially adjudicate the claims of persons protected by the federal civil rights laws.

Despite the fact that employment discrimination cases comprise a large portion of Judge Shedd's civil rights docket, Judge Shedd has allowed only few discrimination plaintiffs to have their day in court. In almost every case, Judge Shedd has dismissed some or all of the claims of civil rights plaintiffs before they have a chance to be heard by the jury. By all evidences, Judge Shedd utilizes an extremely high threshold of evidence necessary to allow a discrimination claim to get to the jury. For example, in the one race discrimination case in which Judge Shedd did not dismiss at least some of the plaintiff's claims, a White manager terminated an African-American female employee after directing racial epithets at her in the presence of a co-worker. Even with this evidence, Judge Shedd said it was an ''extremely close question'' whether the case should be dismissed. Given Judge Shedd's characterization of the evidence in this case, we question his commitment to following decades of case law recognizing that discrimination often occurs in much more subtle but no less pernicious forms and therefore may proven circumstantially. In contrast to Judge Shedd's systematic dismissal of claims by African-American plaintiffs, Judge Shedd has allowed ''reverse discrimination'' claims by White men to proceed to trial in four of the five cases in which summary judgment was requested.

Also, in a number of cases, Judge Shedd has overruled a magistrate's recommendation to allow claims to be tried to a jury. In one case, a magistrate concluded that a female corrections officer could pursue her claim for ''outrageous conduct'' where her supervisor subjected her to repeated requests for sex, lewd language, and physical contact, and told her co-workers that he was having an affair with her and that she was pregnant with his child. The conduct occurred not only in the workplace but by telephoning the plaintiff at home and by visits to the plaintiff's house, which the supervisor said he could visit ''anytime he wanted.'' Judge Shedd dismissed the claim, stating that while the defendant's actions were ''certainly disgusting and degrading,'' they did not rise to the level of outrageous conduct.

Judge Shedd's narrow and restrictive view of civil rights claims is also evidenced by his dismissal of several cases in which the Equal Employment Opportunity Commission had found ''reasonable cause'' to believe that discrimination occurred. A finding of ''reasonable cause'' by the EEOC is extremely rare (occurring in fewer than 10 percent of the cases filed). Thus, the fact that Judge Shedd has refused to allow many of these claims to get to the jury strongly suggests that Judge Shedd utilizes an exceedingly high threshold for proving unlawful discrimination. The endorsement of such a

restrictive standard that is far outside the mainstream of federal jurisprudence has devastating implications for all civil rights plaintiffs if Judge Shedd is confirmed to the Fourth Circuit.

At his June 27 hearing, Judge Shedd admitted that, during his eleven years on the bench, a plaintiff has never won an employment discrimination jury trial in his court. He defended this record by asserting that he could not recall a plaintiff ever winning a jury trial in a discrimination case in any court in South Carolina. However, we have subsequently learned that during Shedd's tenure on the bench, there have been at least twenty-one jury verdicts favorable to discrimination plaintiffs in other federal courts in South Carolina, yielding over $7 million in damages. Shedd's lack of awareness of the outcome of these numerous cases evidences a troubling indifference toward the type of civil rights cases with which, by virtue of his docket, he should be the most familiar.

Another area of grave concern to us is Judge Shedd's narrow view of Congressional power to enact protective legislation. We believe that Judge Shedd has the worst federalism record of any nominee considered by the Judiciary Committee thus far. At the same time, the Fourth Circuit has been the most active federal circuit in curtailing federal power, invalidating many portions of important federal legislation in recent years. Judge Shedd's record in this area signals he will join this Circuit's aggressive efforts to alter the balance of federal and State power in a way that threatens enforcement of our most cherished civil rights laws.

Judge Shedd authored the original district court opinion in Condon v. Reno, striking down the Driver's Privacy Protection Act based on his belief that the federal government did not have the power to require States to ensure that State driver's license records would remain private. Although the Fourth Circuit affirmed Judge Shedd's decision, the Supreme Court unanimously reversed the holding in a decision by Chief Justice Rehnquist. In an unpublished opinion, which usually signifies a routine decision, Judge Shedd struck down part of the Family and Medical Leave Act, holding that the Eleventh Amendment doctrine of state sovereign immunity prevents an employee from suing a State agency for a violation of that statute. This issue—because it calls into question Congress's power to remedy sex discrimination in the workplace—has profound implications for Congress's authority under Section 5 of the 14th Amendment.

Judge Shedd has demonstrated a reluctance to sanction law enforcement for crossing the line. In a recent criminal case, a deputy sheriff and a State prosecutor videotaped a constitutionally protected conversation between a lawyer and a defendant charged with a capital crime. The defendant was convicted in state court, but the South Carolina Supreme Court overturned the conviction on the basis of the videotape, calling it ''an affront to the integrity of the judicial system,'' and stating that ''[t]he right to counsel would be meaningless without the protection of free and open communication between client and counsel.'' Judge Shedd presided over the federal cases arising from a grand jury's investigation of the matter. When the deputy offered a guilty plea, Judge Shedd reportedly questioned it because he did not believe a civil rights violation occurred. Judge Shedd imposed only a $250 fine on the deputy and remarked at his sentencing hearing that ''[the deputy] is caught up in a situation in which there's at least part of the criminal defense bar trying to get prosecutors and law enforcement punished. That's what's going on in the law.'' In contrast, when the defense attorney was convicted of perjury for denying he leaked the videotape to the press after learning of its existence before trial, Judge Shedd sentenced the lawyer to prison and a $20,000 fine, accompanied by a lecture about the serious consequences of committing perjury.

Judge Shedd has also exhibited a high level of insensitivity on issues of race. Judge Shedd made several insensitive comments as he dismissed a lawsuit aimed at removing the Confederate battle flag from the South Carolina statehouse dome. According to press accounts, Judge Shedd suggested that South Carolinians—thirty percent of whom are African-American—''don't care if that flag flies or not.'' (''Judge Dismisses Most Flag Defendants, The Greenville News, June 11, 1994). He also analogized the Confederate battle flag, to many a symbol of support for slavery and racist acts of terror directed at African-Americans, to the Palmetto tree, which is on the State flag: ''What about the Palmetto tree?'' What if that reminds me that Palmetto trees were cut down to make Fort Moultrie and that offends me?'' (''U.S. Judge Dims Hope of Battle Flag's Foes,'' The State, June 11, 1994.) It is shocking that Judge Shedd, who was raised in South Carolina during the 1950s and 1960s, could compare—even hypothetically—being ''offended'' by the representation of the Palmetto tree to the reaction of the African-American community to the Confederate battle flag.

Dennis Shedd's opinions in his eleven years on the federal bench reflect hostility toward plaintiffs in civil rights cases, a desire to limit Congress's authority to enact legislation that is applicable to the States, and a general insensitivity on issues of race. The Fourth Circuit desperately requires a voice of moderation and commitment to core civil and human rights values. We believe that Judge Shedd is not that voice and that the Committee should therefore reject his nomination to this important court.

Sincerely,
Eddie Bernice Johnson, Chair;
John Conyers;
E. Towns;
Stephanie Tubbs Jones;
James E. Clyburn;
Albert R. Wynn;
Corrine Brown;
Barbara Lee;
Sheila Jackson-Lee;
Bobby L. Rush;
Elijah E. Cummings;
Melvin L. Watt;
Earl F. Hilliard;
Danny K. Davis;
Eva M. Clayton;
Julia Carson;
William J. Jefferson;
Gregory W. Meeks;
Donald M. Payne;
John Lewis;
Sanford D. Bishop, Jr.;
Benny G. Thompson;
Carrie P. Meek;
Alcee L. Hastings;
Diane E. Watson;
Chaka Fattah;
Wm. Lacy Clay;
Major R. Owens;
Carolyn C. Kilpatrick;
Maxine Waters;
Juanita Millender-McDonald;
Jesse Jackson, Jr.;
Harold E. Ford, Jr.;
Cynthia McKinney;
C.B. Rangel.

Mr. LEAHY. We received a letter from the Mexican American Legal Defense and Educational Fund, in the interest of many Latinos in the Fourth Circuit, expressing opposition to Judge Shedd as well as correspondence from others expressing concern.

I ask unanimous consent that these be printed in the RECORD.

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

MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND,
Washington, DC, September 30, 2002.

DEAR SENATE JUDICIARY COMMITTEE MEMBER: On behalf of the Mexican American Legal Defense and Educational Fund (MALDEF), I urge you to oppose the nomination of Dennis Shedd to the 4th Circuit Court of Appeals. MALDEF is a Latino civil rights organization that was founded in Texas in 1968. Since that time, we have expanded our work across the nation and represent all Latinos. In our more recent history, we opened a community outreach office on the census in Atlanta, Georgia prior to the 2000 census. Due to the growth of the Latino community in the Southeast and the pressing legal needs of our community in that region, we expanded our office this year into a full regional office handling litigation, advocacy and community education within the 4th Circuit states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Many people still are not aware of the rapid growth of the Latino community in this region of the country. The following is a sample of the Latino growth rates over that the last decade in 4th Circuit states. In Maryland, Howard County's Latino population grew at a rate of 104%, Anne Arundel County saw its Latino population grow at a rate of 76%, Baltimore County's Latino population grew by 65%, and Prince George's County experienced 37% growth of Latinos. In Virginia, Prince William County's Latino population grew by 94%, Fairfax County experienced 71% growth of the Latino population, Virginia Beach City's Latino population grew by 65%, and Arlington county experienced 46% Latino growth. In North Carolina, Wake County's Latino population grew by 190%, Mecklenburg County saw its Latino population grow by 163%, and Cumberland County experienced Latino growth at a rate of 97% in the last decade. In South Carolina, Richland County saw its Latino population grow at a rate of 66%.

In addition, much of the Latino growth in these states is being driven by the movement of Latino immigrants. What many of these Latino immigrants face in these southeastern states are barriers to housing, jobs, education, and health, as well as targeting by local law enforcement similar to what many Latino immigrants faced decades ago in states like California, Texas and New York. While barriers and improper law enforcement tactics still occur in states like California and New York, these traditionally high-immigrant states also now have a built-in infrastructure to serve the needs of immigrants and help them find recourse if their rights are trampled upon. Unfortunately, similar infrastructures do not exist in most of the region covered by the 4th Circuit. As such, ensuring that only nominees who will be fair to the new Latino community in the southeast is particularly important.

MALDEF's evaluation of Dennis Shedd uncovered a demonstrated lack of commitment

to protect the civil rights of ordinary residents of the United States and to preserve and expand the progress that has been made on civil rights and individual liberties. In every respect, Dennis Shedd has demonstrated that he would likely decide cases in a manner that run counter to the core principles and rights we believe are necessary to protect Latinos, particularly the most vulnerable who live within the 4th Circuit.

Throughout his eleven years on the federal district court, Judge Shedd has dismissed almost all of the civil rights cases that have come before him; thus, preventing the merits of these cases to be heard by a jury. Based on his handling of race, gender, age, and disability claims, we conclude that Judge Shedd would not give Latino plaintiffs seeking legal remedies for civil rights violations a fair day in court.

In the area of upholding federal statutes, Judge Shedd's rulings regarding federalism are also troubling and follow the Fourth Circuit's bold attempts to narrow the powers of Congress in its protection of the rights of all Americans. We conclude that Judge Shedd, as a judge on the circuit court, would continue attempts to limit the powers of Congress to pass legislation that protects the rights of Latinos and other protected groups.

Judge Shedd has also exhibited a high level of insensitivity or poor judgment in commenting on issues about race—while serving as a federal district judge in a state with a population that is 30% African-American. For example, in a recent unpublished case, Judge Shedd was reported in the press as making several insensitive comments as he dismissed a lawsuit aimed at removing the Confederate battle flag from the South Carolina statehouse dome.

Dennis Shedd's eleven-year record as a federal district judge reflects hostility towards plaintiffs in civil rights cases, a desire to limit authority to enact legislation that is applicable to states, and insensitivity to issues of discrimination. Further, Judge Shedd's extremist views on these issues render him unsuitable to serve on the Fourth Circuit. For these reasons, we urge you to oppose his nomination to the Fourth Circuit Court of Appeals.

Sincerely,

ANTONIA HERNANDEZ,
President and General Counsel.

Mr. LEAHY. Mr. President, hundreds, probably thousands, of letters from South Carolina citizens arrived in my office urging a closer look at Judge Shedd's nomination to serve in the Fourth Circuit.

So we don't have a CONGRESSIONAL RECORD tomorrow morning that will be several hundred pages long, I will not include all of them with my remarks today. However, I ask unanimous consent that a list of the letters of opposition to the nomination of Dennis Shedd to the Fourth Circuit Court of Appeals be printed in the RECORD.

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

LETTERS OF OPPOSITION TO THE NOMINATION OF DENNIS SHEDD TO THE 4TH CIRCUIT COURT OF APPEALS

LOCAL CIVIL RIGHTS GROUPS

NAACP of South Carolina State Conference, June 24, 2002; May 21, 2002.

NAACP of Andrews Branch, August 7, 2002.

NAACP of Eutawville, South Carolina, August 7, 2002.

NAACP of Newberry, South Carolina, August 7, 2002.

NAACP of Hilton Head Island/Bluffton, South Carolina, NAACP, August 24, 2002.

NAACP of Moncks Corner, South Carolina, August 7, 2002.

NAACP of Kershaw, South Carolina, September 17, 2002.

NAACP of Clarendon County Branch, August 12, 2002.

Urban League of the Upstate, Inc., South Carolina, September 24, 2002.

NAACP of North Carolina, June 24, 2002; June 26, 2002.

NAACP of Maryland State Conference, September 4, 2002.

Progressive Maryland, August 8, 2002.

NAACP of California State Conference, September 9, 2002.

NAACP of Mississippi State Conference, August 24, 2002.

NAACP of Delaware State Conference, August 14, 2002.

Public Justice Center, October 7, 2002.

NAACP of West Virginia State Conference, August 14, 2002.

Quad County (IL) Urban League, September 27, 2002.

Birmingham Urban League, Inc., September 24, 2002.

Advocates for Ohioans with Disabilities, August 31, 2002.

National Organization for Women, Western Wayne County (MI), October 8, 2002.

NATIONAL CIVIL RIGHTS GROUPS

Black Leadership Forum, September 16, 2002, November 12, 2002 (Dr. Joseph E. Lowery).

NAACP, September 17, 2002 (Kweisi Mfume).

Mexican American Legal Defense and Educational Fund, Sept. 30, 2002 (Antonia Hernandez).

People for the American Way, June 24, 2002; September 4, 2002.

American Association of University Women, June 20, 2002; November 14, 2002.

National Council of Jewish Women, August 15, 2002.

Rainbow/Push Coalition, August 24, 2002 (Reverend Jesse L. Jackson, Sr.).

Alliance for Justice, November 15, 2002 (Nan Aron).

People for the American Way, November 15, 2002 (Ralph Neas).

Leadership Conference on Civil Rights & Alliance for Justice, July 11, 2002, coalition letter signed by the following groups: Alliance for Justice and Leadership Conference on Civil Rights August 30, 2002, NARAL, NAACP Legal Defense and Educational Fund, NAACP, American Association of University Women, ADA Watch, National Council of Jewish Women, AFL–CIO, NOW Legal Defense and Education Fund, People for the American Way, Feminist Majority, National Partnership for Women and Families, National Organization for Women, and Disability Rights Education and Defense Fund.

Alliance for Justice and Leadership Conference on Civil Rights, September 18, 2002, coalition letter signed by the following groups: Leadership Conference on Civil Rights, Alliance for Justice, People for the American Way, NARAL, Planned Parenthood Federation of American, Human Rights Campaign, National Organization for Women, American Association of University Women, NOW Legal Defense and Education Fund, National Family Planning and Reproductive Health Association, National Council of Jewish Women, National Abortion Federation, and The Feminist Majority.

Alliance for Justice and Leadership Conferee on Civil Rights, November 15, 2002, coalition letter signed by the following groups: Leadership Conference on Civil Rights, Alliance for Justice, NARAL, NAACP Legal Defense and Educational Fund, NAACP, People for the American Way, American Association of University Women, Feminist Majority, ADA Watch, National Partnership for Women and Families, National Council of Jewish Women, National Organization for Women, AFL–CIO, NOW Legal Defense and Education Fund, and Disability Rights Education and Defense Fund.

ELECTED OFFICIALS

National Black Caucus of State Legislators, September 25, 2002.

South Carolina Legislative Black Caucus, September 4, 2002.

North Carolina Legislative Black Caucus, September 26, 2002.

Legislative Black Caucus of Maryland, Inc., September 9, 2002.

Wisconsin Legislative Black & Hispanic Caucus, August 21, 2002.

Margaret Rose Henry, State Senator, State of Delaware, September 19, 2002, November 12, 2002.

Maryland State Delegate Howard ''Pete'' Rawlings, August 21, 2002.

Congressional Black Caucus, July 26, 2002, October 2, 2002.

BAR ASSOCIATIONS

National Bar Association, September 4, 2002.

Old Dominion Bar Association, September 11, 2002.

North Carolina Association of Black Lawyers, August 30, 2002.

Alliance of Black Women Attorneys of Maryland, Inc., August 30, 2002.

National Employment Lawyers Association, September 17, 2002, November 15, 2002.

North Carolina Academy of Trial Lawyers, September 26, 2002.

LAW PROFESSORS

UNC—Chapel Hill School of Law: John Carles Boger, Lissa L. Broome, Kenneth S. Broun, John O. Calmore, Charles E. Daye, Eugene Gressman, Ann Hubbard, Daniel H. Pollitt, and Marilyn V. Yarbrough.

Duke University School of Law: Christopher H. Schroeder and Jerome Culp.

North Carolina Central University School of Law: Renee F. Hill, David A. Green, Irving Joyner, Nichelle J. Perry, and Fred J. Williams.

LAW SCHOOL STUDENTS

Howard University School of Law Students, September 11, 2002, signed by 58 Howard University Law Students.

ATTORNEYS

Tom Turnipseed, Columbia, South Carolina, June 26, 2002.

Walt Auvil, Attorney, Parkersburg, West Virginia, June 19, 2002.

Neil Bonney, Attorney, Virginia Beach, Virginia, June 20, 2002.

Timothy E. Cupp, Attorney, Harrisonburg, Virginia, June 21, 2002.

Devarieste Curry, August 31, 2002.

Joseph D. Garrison, Attorney, New Haven, Connecticut, June 18, 2002.

Stephen B. Lebau, Richard P. Neuworth, Anna L. Jefferson, Carrie D. Huggins, Attorneys, Baltimore, MD, June 20, 2002.

David M. Melnick, Attorney, Rockville, MD, June 20, 2002.

Gabriel A. Terrasa, Attorney, Owings Mills, MD, June 20, 2002.

Cathy Ventrell-Monsees, Attorney, Chevy Chase, MD, June 20, 2002.

Salb, Shannon, Attorney, Washington, DC, September 19, 2002.

RELIGIOUS LEADERS

South Carolinians, September 30, 2002.

Ms. Elvira Faulkner—McIlwain, Lancaster District Pee Dee Conf. AME Zion Church.

Rev. Dr. Lloyd Snipes, Presiding Elder, Lancaster District Pee Dee Conf. AME Zion Church.

Rev. Matthew L. Browning, Pastor, David Stand AME Zion Church.
Rev. Dr. Reid R. White, Paster, El Bethel AME Zion Church.
Rev. Harold Jones, White Oak AME Zion Church.
Rev. Dr. Marion Wilson, Steele Hill AME Zion Church.
Rev. R.A. Morrison, Pastor, Salem AME Zion Church.
Rev. Albert Young, Pastor, Mt. Zion AME Zion Church.
Rev. Theodis Ingram, Pastor, Warner Temple AME Zion Church.
Rev. Henry I. Dale, Pastor, North Corner AME Zion Church.
Rev. Eldren D. Morrison, Pastor, Pleasant Hill AME Zion Church.
Rev. Beatrice H. Massey, Pastor, Mt. Nebo AME Zion Church.
Rev. Dorothy N. Wallace, Pastor, New United AME Zion Church.
Rev. Deborah Waddell, Pastor, Gold Hill AME Zion Church.
Rev. Thomas R. Moore, Mt Carmel, AME Zion Church.
Rev. Gloria Stover, Pastor, Greater Frazier AME Zion Church.
Rev. Toby L. Johnson, Pastor, Clinton Chapel AME Zion Church.
Rev. Len Clark, Pastor, Bingham Chapel AME Zion Church.
Rev. James R. Thomas Jr., Pastor, Camp Creek AME Zion Church.
Rev. James E. Gordon, Pastor, St. Paul AME Zion Church.
Rev. Dr. Roy H. Brice, Pastor, Mt. Moriah AME Zion Church.
Rev. Albert Tucker, Pastor, Centennial AME Zion Church.
Rev. Roosevelt Alexander, Mt. Tabor, AME Zion Church.

CITIZENS

Marlin Maddoux, Host, Point of View Radio Talk Show.
Gladys W. Wallace, Elgin, SC, April 1, 2002.
Kathy Moore, Charleston, SC, June 24, 2002.
Salvador V. Acosta, Jr., North Charleston, SC, June 21, 2002.
Henderson and Gwen Beavers, Charlottesville, VA, August 29, 2002.
Florence Brandenburg, Shedrick Knox, Birmingham, AL August 1, 2002.
Barbara Burgess, Marshall, Virginia, November 14, 2002.
James T. McLawhorn, October 2, 2002.
Judith Polson, New York, NY, September 14, 2002.
Gloria Washington, Stone Mountain, GA, September 11, 2002.
Keith Washington, Stone Mountain, GA, September 11, 2002.
And letters from more than 1,200 other citizens.

Mr. LEAHY. Mr. President, there is a reason, when you look at Judge Shedd's record, that many believe he has a reputation for assisting the defense in civil cases and for ruling for the defense in employment civil rights cases, for example. His holding in Condon v. Reno shows that his view of the constitutional allocation of powers between the States and the, Federal Government goes even beyond what we have seen from a very conservative activist Supreme Court across the street. They are busily rewriting the law in this fundamental area. And Judge Shedd goes beyond the U.S. Supreme Court. His actions in a case involving serious prosecutorial and police misconduct also raise serious questions about his fairness in criminal cases.

His record as a whole raises serious concerns about whether he should be elevated to a court that is only one step below the U.S. Supreme Court and whether he should be entrusted with deciding appeals there.

Every litigant, every defendant, every person, every plaintiff who comes before a judge in the Federal courts must be assured that the judge will give a fair and unbiased hearing to the case at hand. The test of a judge, especially a lifetime appointment, goes beyond just the question of competence. When we are talking about our Federal courts—remember, our Federal courts are admired around the world for their independence and their fairness, but that means that whether you or I, or anybody else walks into a Federal court, no matter what our case is, whether we are plaintiff or a defendant, whether we are the Government or one responding to the Government, whether we are rich or poor, no matter what our political background is, when we walk into the courtroom door, we have to be able to have confidence that this judge, this Federal judge, will hear our case—he or she will hear it fairly.

Litigants in our federal courts should be able to have confidence to say and believe that it makes no difference what my political background is, what the color of my skin is, where I am from, or anything else. I will win or I will lose based on the merits of the case, not based on the individual prejudices of the judge.

Unfortunately, when one looks at Judge Shedd's record, one has to say that somebody coming in to his court could not have that assurance. One has to say unless they fit into a narrow category that Judge Shedd has routinely favored in his cases, you are probably pretty unlucky to be before his court.

Let me go through these concerns in a little more detail. First, Judge Shedd has a reputation for assisting in the defense in civil cases, raising issues sua sponte (on his own motion, without a motion from the lawyers for the litigants), in essence making himself the third litigator and not leaving it up to the parties—the plaintiff or defendant—to litigate the case, but actually stepping in and taking sides and making it very clear to the people in the courtroom that he is taking sides.

He has ordered defendants to make motions for summary judgment whether they wanted or planned to or not. He has resolved issues before they are even raised and fully briefed, having made up his mind before the case is even heard, having made up his mind on behalf of one of the litigants. This shows a pattern of a judge injecting himself into litigation, particularly in the shoes of corporations and others if they are being sued, if they are defendants in civil litigation. Here are some specific cases that illustrate these interventions by Judge Shedd to the benefit of one of the parties.

In McCarter v. RHNB, a case alleging gender discrimination, Judge Shedd granted summary judgment. He did not even wait for the company to raise these grounds. He raised it for them and summarily ruled in their behalf on an issue they had not even raised.

In Shults v. Denny's Restaurant, a case involving a claims of employment discrimination under the Americans with Disabilties Act, Judge Shedd raised an issue on his own, saying he was doing it ''for possible resolution by summary judgment.'' In other words, putting himself on the side of Denny's and in essence advocating for their interests.

Again, deciding how best the defense should execute their litigation strategy, he noted that three of the defenses asserted are potentially dispositive of certain claims—in other words, three of the defenses could settle the case right there—and said ''these issues do not appear to necessitate much, if any, discovery on the part of the plaintiff.'' He mentioned, almost as an afterthought at the close of his order, that defendants ''may also file a memorandum'' if they want.

It does not help when you are litigating a case if you know the judge has already made up his mind for the other side. It helps even less if, having made it clear he has made up his mind for the other side, he actually steps in and helps the other side.

What kind of an image does that give to people who are expecting fairness and impartiality in our Federal courts? What does that say to people who are being told by all of us, as we always are, that our Federal courts are impartial? What does it say when they watch cases being tried by a judge who takes sides openly and clearly and continuously in his courtroom?

In Lowery v. Seamless Sensations, a case where an African American woman brought claims under Title VII for employment discrimination on the basis of race, Judge Shedd turned to the person she was suing and said: Make a motion to dismiss. Then he quickly granted it. I bet you that woman walked out of there wondering why she ever even bothered coming into court when it was so obvious the judge made up his mind.

Take Coker v. Wal-Mart, in which it appears the judge wanted to get rid of this case. He wanted to make a motion on his own to send it back to the State court, but he did ask Wal-Mart: Give me a memo to show me I can really do that which, of course, is what Wal-Mart wanted.

In Gilmore v. Ford Motor Company, a product liability case, Judge Shedd outlined four factors he must consider before dismissing an action for failure to prosecute. He found that the defendants had not set forth evidence addressing these four factors, but nevertheless went on to ''glean certain pertinent information from the record.''

In other words, he said: Here is what you need to win this case. You have not raised these issues yourself. I have gleaned them from somewhere in the record. So do not worry, buddies, I

have taken care of you; I am on your side. I will argue your case for you and, in doing this, I can dismiss the case against you.

You almost wonder if the winning side feels they should pay their attorneys when the judge has stepped in to help them win the case.

In Simmons v. Coastal Contractors, both parties were appearing without a lawyer, or pro se. Judge Shedd noted that ''this civil action . . . is before the court sua sponte.'' While he must have meant the motion itself was before him sua sponte, or on his own motion, he brought up deficiencies in the plaintiff's complaint and ordered that an amended complaint be filed or the action would be dismissed on the judge's own motion. In other words, he essentially indicated I am going to decide the case. You litigants go have coffee if you want, but I am going to make up my mind, make your arguments for you, and settle the case for you.

In another substitution for his strategic litigation judgment for that of the defendants, Tessman v. Island Ford-Lincoln-Mercury, Judge Shedd threatened to dismiss the plaintiff's Title VII action on his own unless the plaintiff could show cause why he should not. He said the plaintiff had not alleged that she had presented her claim to, or received a right-to-sue letter from the EEOC and decided that rather than letting the defense move for dismissal, he would do so on his own. In other words: I am going to make the arguments on the other side and get rid of the case.

Additionally, of the 11 cases relating to employment discrimination available in the public record, Judge Shedd held for the employer in every single one, including one case where he sat by designation on the Fourth Circuit. Judge Shedd granted summary judgment after summary judgment and found for the employer and against the employee in a wide range of employment discrimination claims.

Of the 54 fair employment cases included in the unpublished opinions he provided to the Committee, more than 80 percent of them grant summary judgment to the defendants. That does not appear to be a fair record. It strongly indicates plaintiffs are not receiving fair hearings. Employment cases are often fact-specific disputes that would not seem likely to result in an overwhelming majority of summary judgment decisions for defendants because under the summary judgment standard, the evidence must be viewed in the light most favorable to the nonmovant—the plaintiff under these circumstances—and the judge must find that there are no disputes about material facts and that judgment as a matter of law is warranted for the moving party the defendants.

Certainly when I look at the mail I get from South Carolina and from litigants and others there, there is a pervasive feeling that unless you fit the right category when you come before that court, you are not going to get a hearing favorable to you—actually, an overwhelming feeling that the hearings will not be fair. They will be slanted to one side. That is not how we maintain the integrity and independence of the Federal bench. For example, the National Employment Lawyers Association reviewed Judge Shedd's public record. They sent a letter opposing his confirmation. I ask unanimous consent that the letter be printed in the RECORD.

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

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
September 17, 2002.

Re Dennis Sheed—Appointee for United States Court of Appeals.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: On behalf of the National Employment Lawyers Association (NELA), I am writing you to express our organization's strong opposition to the nomination of Judge Dennis Shedd to the Fourth Circuit Court of Appeals. We urge the members of the Senate Judiciary Committee to vote against his nomination. We further urge the Administration to nominate a person for that seat who will apply federal employment and labor laws in a fair and even-handed manner, and who will interpret those laws in keeping with the intent of Congress.

DURING HIS HEARING, JUDGE SHEDD OFFERED MISLEADING INFORMATION

Judge Shedd's employment law decisions have been, almost without exception, in favor of employers. At his Committee hearing earlier this year, Judge Shedd claimed that was unable to recall any employment case in his courtroom that had gone to trial resulted in a verdict or judgment in favor of the plaintiff. By way of explanation, Judge Shedd told the Committee that no judge in his district had an employment case where the employee had won at trial. This statement was untrue, and several other judges in the district presided over trials which were won by the plaintiffs. Shedd's statement is not only indicative of his anti-employee bias, but also demonstrates a cavalier attitude toward the truth and a willingness to offer erroneous information to the Committee.

In addition, NELA is concerned that Judge Shedd may not have opened his entire judicial record for scrutiny by the Senate Judiciary Committee and the public. Shedd turned over unpublished opinions only after his hearing, and never provided the Committee with a full docket of his cases. Without a full docket, it is impossible to determine whether all of Judge Shedd's unpublished opinions have been released. Your Committee is considering Judge Shedd's lifetime appointment to a court where his rulings would carry enormous precedential force. In light of the importance of this appointment, the Committee and the full Senate should not be forced to make a decision based on a record that may be incomplete.

JUDGE SHEDD'S EMPLOYMENT DECISIONS REVEAL A STRONG ANTI-EMPLOYEE BIAS

NELA has analyzed dozens of Judge Shedd's unpublished and published decisions in employment cases. These decisions reveal a willingness to bend the law and ignore precedent in order to reach results-oriented rulings.

JUDGE SHEDD FREQUENTLY IGNORED THE FINDINGS OF HIS OWN MAGISTRATE JUDGE IN ORDER TO RULE AGAINST EMPLOYEES

In the federal district courts, Magistrate Judges often evaluate a case and recommend to the judge whether the plaintiff has presented sufficient evidence for the case to go to trial. The decisions of Magistrate Judges are typically affirmed, as the Magistrate Judge usually has had an opportunity to fully review the facts of the case. Judge Shedd has frequently ignored uncontradicted evidence and overruled the recommendations of Magistrate Judges.

In *Cleary* v. *Nationwide Mutual Insurance Co.*, the Magistrate Judge has found that there was sufficient evidence for a trial where a female employee was fired in retaliation for filing a sexual harassment case. The employer forced the female employee to take administrative leave and then fired her after she filed a sexual harassment claim, but the harasser was allowed to keep working. Judge Shedd rejected the Magistrate Judge's recommendation, and refused to let the case go to trial. By viewing each of the seven or eight incidents of harassment as a separate incident rather than as a whole, Judge Shedd concluded that there was no evidence that the female employee was forced to take leave and then terminated for retaliatory reasons (contrary to the Magistrate Judge's findings). Judge Shedd's analysis—viewing each incident in isolation—is contrary to established Supreme Court precedent. Judge Shedd also excused some of the defendant's acts as mere ''mistakes.''

In *Dinkins* v. *Blackman*, Judge Shedd rejected a magistrate Judge's recommendation and granted summary judgment on a sexual harassment claim and other claims by the employee, even though Judge Shedd found that the sexual harassment was ''gross behavior.'' Judge Shedd refused to give the employee the opportunity to seek further information for her case in discovery, ignoring a new Supreme Court case which was decided after Dinkins filed her case.

In *Ellis* v. *Speaks Oil Co.*, Judge Shedd granted summary judgment in favor of the employer on an age discrimination claim, contrary to the Magistrate Judge's recommendation, because he concluded that the plaintiff, a truck driver, was not performing his duties up to his employer's expectations of driving two trips per day. He disregarded evidence found by the Magistrate Judge which showed that the plaintiff, who was 62 years old, was driving two trips per day until the company let him go.

In *Roberts* v. *Defender Services*, Judge Shedd ignored the Magistrate Judge's recommendation to deny the employer's motion for summary judgment in a sexual harassment case. Judge Shedd agreed that the harassment in this case was severe, but ruled that the woman did not prove that she was really upset by the harassment, which should have been a question for the jury to decide.

JUDGE SHEDD IGNORED CLEAR AND ESTABLISHED PRECEDENT IN ORDER TO RULE IN FAVOR OF CORPORATE EMPLOYERS AGAINST INDIVIDUAL EMPLOYEES

In *Ephraim* v. *Paul Harris Stores, Inc.*, Judge Shedd held that a claim of invasion of privacy (false light) was not cognizable under South Carolina law, despite two South Caroline Supreme Court decisions that had recognized this as a valid claim under state law.

In *Rector* v. *Rainbow Shops, Inc.*, Judge Shedd disregarded South Carolina state-court decisions that had held that a mere insinuation is actionable in a defamation case if it is false and malicious and the meaning is plain. Instead, he decided that employee's termination while the store was experiencing cash shortages was not reasonably capable of

a defamatory meaning. Judge Shedd also allowed the employer to read and sign the form, even though the employer offered no reason for doing this. Judge Shedd did not even require the employer to explain why it was necessary for the termination meeting to occur in public, in the presence of other store employees.

In *Storms* v. *Goodyear Tire & Rubber Co.*, Judge Shedd held that an employee could not bring a claim for breach of contract based on language contained in the company's own personnel documents because there was no evidence of ''mutual assent'' to those documents. He did not explain why the company had not assented to the promises contained in its own documents. He refused to follow precedent by the South Carolina Supreme Court on this and related issues. Later, in *Truesdale* v. *Dana Corp.*, Judge Shedd cited his own opinion in *Storms* and again failed to follow precedent. In this case, an employee was fired in violation of the company's own disciplinary policies and procedures. By interpreting the employer's personnel documents in a selective, extremely pro-employer manner, Judge Shedd determined that the employer's policies did not protect the employee.

JUDGE SHEDD DISREGARDED OR MISCONSTRUED EVIDENCE TO THE BENEFIT OF EMPLOYERS

In *English* v. *Kennecott Ridgeway Mining Co.*, an injured employee claimed that he was fired in retaliation for filing a workers' compensation claim. Judge Shedd dismissed the retaliatory discharge claim despite uncontradicted evidence (summarized in his own opinion) which demonstrated the employer's hostility toward the injured worker because of his workers' compensation claim. In fact, while the plaintiff ''was still under the care of the company's physician, coworkers informed English that his superiors were complaining that English was milking the system, that he was not really hurt, and that he should be returned to full duty.''

In *Givens* v. *South Carolina Health Insurance Pool*, Judge Shedd allowed the state insurance pool to exclude AIDS/HIV from health insurance coverage. Judge Shedd held that the §501(c) insurance underwriting exclusion (safe harbor provision) of the Americans with Disabilities Act (''ADA'') exempted the Insurance pool from coverage under that statute, even though the State did not do any of its own actuarial studies or underwriting studies to evaluate the expensive and risks of insuring persons with AIDS/HIV. Since the State failed to do any of its own studies, it should have been barred from being able to claim the §501(c) exemption.

In *Gregory* v. *Chester County Sheriff's Dept.*, Judge Shedd accepted a poorly reasoned recommendation from a Magistrate Judge against an employee. The Magistrate Judge had found that the employee could not prove that her demotion was an ''adverse action'' by the employer. This ruling is contrary to precedent that demotions are adverse job actions. *Gurganus* v. *Beneficial North Carolina, Inc.*, 2001 U.S. App. LEXIS 26943 (4th Cir. 2000). Although Judge Shedd stated that he was supposed to review the Magistrate Judge's recommendation de novo, he issued only a one-page summary order.

In *Richberg* v. *Glaston Copper Recycling*, Judge Shedd refused to consider evidence presented by the plaintiff that showed the existence of genuine issues of material fact when he granted summary judgment for the employer. For example, he claimed that the plaintiff had failed to challenge the employer's affirmative defense that the plaintiff was terminated for failing to meet ''established work standards,'' although the plaintiff had submitted a positive performance evaluation from his personnel file. Judge Shedd also refused to follow a state court decision that had held that a sixteen-day proximity in time between a workers' compensation filing and a drug screen was prima facie retaliation, on the grounds that the drug screen in the *Richberg* case was ordered 50 days after the filing.

JUDGE SHEDD'S APPOINTMENT TO THE FOURTH CIRCUIT WOULD STACK THE COURT WITH PRO-EMPLOYER JUDGES

NELA members who practice in the states within the Fourth Circuit repeatedly have reported that they do everything they can to avoid filing employment cases in federal court and avoid filing federal claims in state court, for fear of removal. As a result, federal statutes prohibiting discrimination in employment—Title VII, the ADA, the Age Discrimination in Employment Act, the Reconstruction-era civil rights acts—are largely not enforced in those states because the Fourth Circuit has created a hostile environment for those claims. As Committee members are aware, the Fourth Circuit has been reversed even by the current Supreme Court on a number of occasions, in cases involving employment and other matters. See, e.g., *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002) (reversing the Fourth Circuit decision by a 6–3 vote, and holding that the EEOC is not bound by arbitration agreements between an employee and employer); *Ferguson* v. *City of Charleston*, 531 U.S. 67 (2001) (by a 6–3 vote, holding that coerced drug testing of pregnant women is unconstitutional); *Dickerson* v. *United States*, 530 U.S. 428 (2000) (by a 7–2 vote, the Court refused to overrule *Miranda* v. *Arizona*).

NELA STRONGLY OPPOSES THE CONFIRMATION OF JUDGE SHEDD

Judge Shedd's record shows a cavalier attitude toward evidence, legal precedent, and an alarming tendency to deny working men and women who appear before him their day in court. Judge Shedd is dismissive toward the rights of workers who face harassment and mistreatment by their employers. Unlike his colleagues in the District of South Carolina, there has never been a pro-employee verdict in any civil rights trial in Judge Shedd's courtroom. If fairness and a commitment to equal justice are expected of appointees to the United States Court of Appeals, then Judge Shedd has proven that he cannot satisfy these expectations. For these reasons, NELA urges you to oppose the confirmation of Judge Dennis Shedd.

Very truly yours,

FREDERICK M. GITTES,
President, National Employment Lawyers Association.

Mr. LEAHY. Mr. President, I mentioned that Judge Shedd tends to go even beyond where an activist U.S. Supreme Court has gone. In a 1997 case challenging the constitutionality of the Driver's Privacy Protection Act, Judge Shedd made a federalism ruling that went way beyond even the extreme federalism rulings of the U.S. Supreme Court, and it was so bad that the U.S. Supreme Court in a 9-to-0 opinion reversed Judge Shedd's ruling.

In Condon v. Reno, Judge Shedd ruled on the constitutionality of the Driver's Privacy Act, which essentially prohibited States from selling and sharing personal information gleaned as they were picking up driver's license information. He said that the Act violated the 10th Amendment as interpreted by the courts in New York v. United States and Printz v. United States. Three years later, Chief Justice Rehnquist wrote for the Court explaining that, to the contrary, neither of the cases applied. He did not get just one of them wrong, he got them both wrong. The Chief Justice wrote that because the Act did not require the States in their sovereign capacity to regulate their own citizens, but instead regulates the States as the owners of the databases. Therefore, the Act was consistent with the constitutional principles enunciated in New York v. Printz.

In Crosby v. South Carolina, he found the Family and Medical Leave Act unconstitutional on the grounds that it was not properly enacted under Congress's power. I mention this case because it is the second time Judge Shedd ruled in such a way in an important federalism case. He also ruled this way because he just took a magistrate judge's very brief report and did not put in any significant analysis of his own.

In this case, it is almost impossible to figure out his reasoning for why this important law with bipartisan support would be unconstitutional, especially when acts of Congress are entitled to a presumption of constitutionality. One would think if somebody really cared about the courts of appeal and the Supreme Court, they would have at least given us rigorous analysis instead of making what appears to be a somewhat arbitrary ruling.

In addition, he issued several opinions relating to a murder case where a privileged conversation between the defendant and his attorney was monitored and recorded on videotape by the county sheriff's department. Present in the room where the conversation was being monitored were several of the sheriff's deputies and the county prosecutor who subsequently handled the case. The defendant was convicted and sentenced to death but the Supreme Court of South Carolina reversed because of the nature of the videotaping. In its opinion, the Supreme Court of South Carolina—not one considered the most liberal of courts—used very strong language that condemned the failure to disqualify the local prosecutor's office. They cited the prosecutor's special responsibilities to do justice. And the South Carolina Supreme Court said it would not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice. That is about as strong a condemnation by any state Supreme Court of a prosecutor's actions as I have ever heard.

So the federal prosecutions relating to the videotaping were then brought to Judge Shedd's courtroom. Both the prosecutor, Fran Humphries, and the defense attorney, Jack Duncan, were brought before a federal grand jury investigating these constitutional violations.

Mr. DUNCAN testified that he had not given a copy of the tape to a television reporter, while Mr. Humphries testified he had not immediately known the taping was taking place. Now each of them

was charged with perjury based on these statements. As I mentioned, the prosecutor and several of the sheriffs, were there watching the taping. So it was obvious he was not telling the truth.

Mr. DUNCAN, the defense attorney, was found guilty and sentenced to 4 months in prison. Even though the information seemed overwhelming against the prosecutor, Judge Shedd dismissed those charges.

This is enlightening because if anybody was hurt by the improper taping, it was the defendant and the defense attorney. If anybody truly committed a wrongdoing, as the South Carolina Supreme Court said in the strongest language against a prosecutor I can remember, it was the prosecutor. But having them both before his court, Judge Shedd in effect exonerated the prosecutor and sentenced the defense attorney to 4 months.

Think of yourself as the litigant before his court. Look at all of these cases I have talked about, and so many others. I do not fall in the category of the sides he tends to rule with. I am on the other side. It would be an awful sinking feeling to go in there knowing how good your case is but you are probably going to lose.

This particular decision shows disregard for the rights of Americans who, no matter what they have been accused of, should be able to expect privacy and not to be videotaped by the government when they are talking to their attorneys. The law is settled in this country that with attorney-client privilege you can sit down and talk with your attorney without the prosecutor videotaping what you are saying, without them listening to or eavesdropping on you.

There are a couple of people you are able to talk to with a reasonable expectation of privacy. You are able to talk to your spouse. You are able to talk to your attorney. You are able to talk to your priest in a penitent relationship. Here, the prosecutor violated that—something that every prosecutor's handbook in America says is wrong, something that hornbook law says is wrong, every ethics course says is wrong, and every bar association says is wrong. The Supreme Court of South Carolina unanimously said it was wrong but Judge Shedd said to the prosecutor: It is okay; we will get the other guy. Well, that calls into question his ability to be fair in criminal cases.

So I am concerned when I see his record as a Federal district judge, and I ask myself: If this is his record as a Federal district judge, how is he going to be as a circuit judge on the court of appeals? So I share some of the same concerns about his fairness that we have heard expressed from South Carolina and from throughout the Fourth Circuit.

I know arguments will be made on the other side, and this will be disposed of however the Senate decides to vote, but for me, I could not in good conscience vote aye on this nomination. I will vote no.

I ask unanimous consent that letters from the Leadership Conference on Civil Rights, Alliance for Justice, and others be printed in the RECORD.

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

LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND ALLIANCE FOR JUSTICE,

Washington, DC, August 30, 2002.

Hon. PATRICK J. LEAHY,
Chair, Senate Judiciary Committee, Washington, DC.

DEAR SENATOR LEAHY: We, the undersigned civil and human rights organizations, write to express our strong opposition to the confirmation of Dennis Shedd to the United States Court of Appeals for the Fourth Circuit.

First, we want to comment on the Judiciary Committee's level of review of this particular nomination. On July 11, we sent a letter expressing concern that the Committee had not received all of the information required to make a fully informed decision about whether to elevate Judge Shedd to the Fourth Circuit. We urged the Committee to take steps to complete the record on this nominee, and to hold another hearing to allow the Committee to fully examine the complete record.

It now appears as if the Committee has declined to ensure that it has obtained the complete judicial record and has decided not to hold a second hearing on the nomination. We are deeply troubled that the Committee may vote on the Shedd nomination without first obtaining a complete record and then providing an opportunity to publicly explore that record. The many concerns that we have identified in Judge Shedd's record produced thus far and which give rise to our opposition only strengthen our conviction that a vote on the nomination should occur only after a full record is obtained and examined.

We strongly believe that the composition of the federal judiciary is a civil rights issue of profound importance to all Americans, because the individuals charged with dispensing justice in our society have a direct impact on civil rights protections for us all. As you know, the role of the federal judiciary in protecting the rights of the powerless is particularly acute in the Fourth Circuit, which has the highest percentage of African-Americans of any federal circuit in the nation.

The Fourth Circuit is also arguably the most conservative of the federal circuits. Several of its most conservative decisions have been subsequently reversed by the Supreme Court as too extreme, including Condon v. Reno, a challenge to Congress's power to protect the privacy of drivers' license information; an attempt to overrule the Miranda rule; and Virginia's attempt to limit the right of reproductive choice. Because of the high percentage of minority citizens in the circuit and the very conservative nature of the court, it is imperative that any new appointment to this court be a person of moderate views who is wholly committed to the goals of equality and equal opportunity for all Americans. After an extensive review of Judge Shedd's record, it has become clear that he is not that nominee.

We are deeply concerned about Judge Shedd's reluctance to follow the law in support of vigorous enforcement of legal protections against discrimination for women and minorities. During Judge Shedd's time on the bench, at least forty African-Americans have filed employment discrimination cases that were assigned to Judge Shedd's court. Of those, Judge Shedd granted summary judgment for the employer in whole or in part in almost every case. In one case, Bailey v. South Carolina Dep't of Social Services, Judge Shedd granted summary judgment to the employer, even though the EEOC had determine there was reasonable cause to believe that the plaintiff was not promoted due to his race. In another case, McMillan v. Department of Corrections, the plaintiff alleged discrimination in the denial of a pay increase by the Department of Corrections. The plaintiff's supervisor had requested a pay increase for the plaintiff. At the same time, another State agency conducted an investigation into racially discriminatory employment practices within the Department of Corrections and concluded that White employees tended to do significantly better than Black employees in performance pay increases. Nevertheless, Judge Shedd refused to let this case go to trial. In contrast to cases involving African-American plaintiffs, in four out of five discrimination cases filed by White male plaintiffs, Judge Shedd has denied summary judgment and paved the way for trial.

Judge Shedd has an equally poor record in cases involving gender discrimination. In one case, Roberts v. Defender Services, Inc., he granted summary judgment to an employer in a sexual harassment case, even after concluding that the supervisor's conduct ''clearly was, from an objective standpoint, sufficiently severe and pervasive to constitute a hostile and abusive work environment.'' Despite that finding, Judge Shedd concluded that the plaintiff had not provided any evidence that she ''subjectively perceived the environment to be abusive,'' reaching this conclusion despite the fact that the record contained evidence that the plaintiff's supervisor made sexual comments to her on a daily basis, that she told him these comments were offensive, that she and a female manager took steps to report the conduct to corporate headquarters, and that she resigned from her job.

Judge Shedd has also exhibited a disturbing tendency to resolve cases on summary judgment in favor of defendants, even where genuine issues of material fact were clearly presented. For example, in Alston v. Ruston, Judge Shedd granted summary judgment on a Section 1983 complaint after concluding, as a matter of law, that a prison guard had not used excessive force—despite an affidavit and a well-pleaded complaint from the plaintiff alleging that the officer had sprayed him in the face with tear gas without justification, advanced toward him ''swinging his fists and punching [plaintiff] in the mouth,'' and wielded a broomstick until another officer intervened. Given the evidence presented, there was no room for Judge Shedd to conclude that excessive force had not taken place as a matter of law. Nevertheless, Judge Shedd made such a ruling and dismissed the plaintiff's case.

In other cases, Judge Shedd has exhibited hostility toward plaintiffs in civil rights claims involving allegations of misconduct by law enforcement officers. For example, in Joye v. Richland Co. Sheriff's Dep't., Judge Shedd dismissed a Section 1983 claim brought by a person wrongfully arrested by sheriff's deputies under a bench warrant issued for his son. Despite the fact that the arrest warrant described a 31 year old man, standing 5′ 11″, the officers arrested the plaintiff who was 61 years old and stood 5′ 7″ tall. The plaintiff argued that the officers had acted unreasonably in arresting him, in violation of his 4th Amendment rights. Judge Shedd, however, concluded that the plaintiff had not stated a valid 1983 claim because the officers had a ''reasonable, good

faith, belief, that they were arresting the correct person.'' He therefore rejected, as a matter of law, the contrary conclusion of the magistrate that the officers were not entitled to a ''good faith'' defense on these facts.

Judge Shedd's record also displays a consistent disregard for the rights of people with disabilities. He has ruled against disability rights plaintiffs in almost every instance, departing from settled law and adopting tortured interpretations of disability rights laws. In one case, Judge Shedd approved a state health insurance pool's complete exclusion from coverage of a man who was HIV positive. The plaintiff who filed the case sought to have it decided on an expedited basis, but died eight months later before any decision was rendered. In another case, a magistrate had found no evidence that the plaintiff's disability interfered with his ability to do his job and recommended that the plaintiff be permitted to proceed with the claim. Nevertheless, Judge Shedd dismissed the plaintiff's claim, concluding, without citing any evidence, that the disability rendered the plaintiff unable to do his job.

We are also very concerned about Judge Shedd's views on ''state's rights'' which would limit Congress's power to pass laws that are applicable to the States. Shedd authored the original district court opinion in Condon v. Reno, striking down the Driver's Privacy Protection Act based on his belief that the federal government did not have the power to require States to ensure that State driver's license records would remain private. Although the Fourth Circuit affirmed Judge Shedd's decision, the Supreme Court unanimously reversed the holding in a decision by Chief Justice Rehnquist. We are unaware of any other instance in the last 50 years where a district court judge has struck down an act of Congress on federalism grounds only to be unanimously reversed by the Supreme Court. Judge Shedd also struck down part of the Family and Medical Leave Act (FMLA), in Crosby v. South Carolina Dep't of Health and Envtl. Control, holding that the 11th Amendment doctrine of state sovereign immunity prevents an employee from suing a State agency for violation of the FMLA. This issue—because it calls into question Congress's power to remedy sex discrimination in the workplace—has profound implications for Congress's authority under Section 5 of the 14th Amendment.

Judge Shedd has also exhibited a high level of insensitivity on issues of race. In a recent case, Judge Shedd made several insensitive comments as he dismissed a lawsuit aimed at removing the Confederate battle flag from the South Carolina statehouse dome. According to press accounts, Judge Shedd suggested that South Carolina, 30% of whom are African-American, ''don't care if that flag flies or not.'' He also analogized the Confederate battle flag, to many a symbol of support for slavery and racist acts of terror directed at African-Americans, to the Palmetto tree, which is on the State flag, stating: ''What about the Palmetto tree? What if that reminds me that Palmetto trees were cut down to make Fort Moultrie and that offends me?'' Judge Shedd's hostility to the lawsuit in open court provides strong evidence of a poor judicial temperament. His attempt to minimize the symbolism of the Confederate flag to the African American community and suggest it is comparable to an image of the Palmetto tree reflects a stunning insensitivity to the injurious impact this particular symbol still has on many of our citizens.

In sum, Dennis Shedd's eleven-year record on the federal district bench reflects hostility towards plaintiffs in civil rights cases, including minorities, women and persons with disabilities, a desire to limit Congress's authority to enact protective legislation that is applicable to the states, and insensitive to issues of race. Judge Shedd's view on these issues render him a poor choice for the Fourth Circuit and we therefore urge you to oppose his confirmation.

Sincerely,

Wade Henderson, Executive Director, Leadership Conference on Civil Rights; Nan Aron, President, Alliance for Justice; Kate Michelman, President, NARAL; Elaine R. Jones, President and Director-Counsel, NAACP Legal Defense and Educational Fund; Hilary Shelton, Director—Washington Bureau, NAACP; Ralph Neas, President, People for the American Way; Nancy Zirkin, Director of Public Policy, American Association of University Women; Eleanor Smeal, President, Feminist Majority; Jim Ward, Executive Director, ADA Watch; Judith L. Lichtman, President, National Partnership for Women and Families; Marsha Atkind, National President, National Council of Jewish Women; Kim Gandy, President, National Organization for Women (NOW); William Samuel, Director—Department of Legislation, AFL–CIO; Patrishia Wright, Director of Government Affairs, Disability Rights Education and Defense Fund; Liza M. Maatz, Vice President of Government Relations, NOW Legal Defense and Education Fund.

PEOPLE FOR THE AMERICAN WAY,
Washington, DC, September 4, 2002.

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

DEAR SENATOR LEAHY: On behalf of the more than 500,000 members and supporters of People For the American Way (PFAW), we write to express our strong opposition to the elevation of Judge Dennis Shedd to the United States Court of Appeals for the Fourth Circuit.

Judge Shedd's views on federalism are of grave concern. Judge Shedd authored the original district court opinion in Condon v. Reno, which struck down the Driver's Privacy Protection Act based on his analysis that the federal government did not have the power to require states to ensure that driver's license records remain private. Although the Fourth Circuit Court of Appeals agreed, an a unanimous decision authored by Justice Rehnquist, the Supreme Court unanimously reversed. PFAW is unaware of any other instance in the last 50 years where a district court judge has struck down an act of Congress on federalism grounds only to be unanimously reversed by the Supreme Court.

In Crosby v. South Carolina Dept. of Health and Envtl. Control, Judge Shedd also struck down part of the Family and Medical Leave Act (FMLA), holding that the 11th Amendment doctrine of state sovereign immunity prevents an employee from suing a State agency for violation of the FMLA. This issue—because it calls into question Congress's power to remedy sex discrimination in the workplace—has profound implications for Congress's authority under Section 5 of the 14th Amendment.

Judge Shedd has a troubling record on civil rights enforcement. Throughout his eleven years as a federal district court judge, Judge Shedd has dismissed almost every civil rights case on behalf of minority claimants that has come before him, thereby preventing the merits of these cases from being heard by a jury.

For example, in Bailey v. South Carolina Dept. of Social Services, Judge Shedd granted summary judgment to the employer, even though the Equal Employment Opportunity Commission (EEOC) had determined there was reasonable cause to believe that the African American plaintiff was not promoted because of his race. In McMillan v. South Carolina Dept. of Corrections, a case involving allegations of race discrimination, Judge Shedd refused to allow the plaintiff's claim to go to trial, despite a finding by another state agency that Caucasian employees tended to receive higher performance pay increases than African-American employees.

In contrast, in four of the five cases filed in his court by Caucasian plaintiffs alleging ''reverse discrimination'' in employment, Judge Shedd denied summary judgment and allowed the case to proceed to a jury trial.

Judge Shedd's record also reflects insensitivity in civil rights cases alleging discrimination based on gender. For example, in Roberts v. Defender Services, Inc., a recommendation of the federal magistrate and granted summary judgment to the defendant. In Roberts, the record contained evidence that the plaintiff's supervisor made sexual comments to her on a daily basis, that she told him these comments were offensive, that she and a female manager took steps to report the conduct to corporate headquarters, and that she resigned from her job. Despite this evidence, Judge Shedd stated that while the supervisor's conduct ''clearly was, from an objective standpoint, sufficiently severe and pervasive to constitute a hostile and abusive work environment,'' the plaintiff had not provided any evidence that she ''subjectively perceived the environment to be abusive.''

A number of Judge Shedd's opinions reflect a disregard for laws protecting the disabled. For example, in Payette v. Westinghouse Electric Corp., Judge Shedd effectively read the right of employees to ''reassignment,'' a crucial protection for those with disabilities, out of the Americans with Disabilities Act (ADA). Congress explicitly included reassignment to a vacant position, when the person is no longer able to do his or her job, as one type of accommodation required by the ADA. In Givens v. South Carolina Health Insurance Pool, Judge Shedd ignored the plain meaning of the ADA when he approved a state health insurance pool's refusal of coverage for a man who was HIV positive. No other medical condition was excluded, and the state had done no actuarial analysis to justify the exclusion of individuals with HIV/AIDS. While many courts have held that the ADA does not prevent insurance plans from providing lesser benefits for treatment of particular types of disabilities, this ruling goes beyond those decisions.

Judge Shedd has exhibited a high level of insensitivity on issues of race. In a recent case, Judge Shedd made several insensitive comments as he dismissed a lawsuit aimed at removing the Confederate battle flag from the South Carolina statehouse dome. According to press accounts, Judge Shedd suggested that South Carolinians, 30% of whom are African-American, ''don't care if that flag flies or not.'' He also analogized the Confederate battle flag, to many a symbol of support for slavery and racist acts of terror directed at African-Americans, to the Palmetto tree, which is on the South Carolina State flag, stating: ''What about the Palmetto tree? What if that reminds me that Palmetto trees were cut down to make Fort Moultrie and that offends me?''

Given the importance of the Fourth Circuit and the current ideological imbalance on the court, it is imperative that any nominee to this court be a jurist of more moderate views who will protect the civil and constitutional rights of all Americans. Judge Shedd's record demonstrates that he is not

the nominee. PFAW urges the Judiciary committee to reject his nomination.

Sincerely,

RALPH G. NEAS,
President.

NATIONAL HEADQUARTERS,
Chicago, IL, August 24, 2002.

Senator PATRICK LEAHY,
Member, U.S. Senate,
Washington, DC

DEAR SENATOR LEAHY: Let me lend my voice of opposition to the chorus of discontent surrounding the nomination of Judge Dennis Shedd to the Fourth Circuit Court of Appeals. I urge you to oppose the Shedd nomination, based on the merits, and the merits alone. A seat on the Fourth Circuit is too important to the nation's judiciary not to be heavily scrutinized.

As a native of South Carolina, I am deeply disturbed by the direction taken by the Fourth Circuit in recent years. As a Judicial Circuit with considerable influence on the Supreme Court, those elevated to the Court should reflect the highest American ideals of inclusion and equal protection under the law. Moreover, the states included in the Fourth Circuit are comprised of the highest percentage of African Americans, than any other Circuit, thus judges on the Court must be sensitive and respectful for the civil rights laws for which we fought so hard.

Currently, the Fourth Circuit is the most extremist court in the nation on civil rights issues, criminal justice issues, and those involving the power of the federal government, to enact legislation, which holds States accountable for civil rights violations. The nomination of Dennis Shedd threatens to take the Court in a further extremist direction. For example, Judge Shedd's opinion in the *Condon v. Reno* case suggests that he favors disempowering Congress. American judges, and their rulings should protect rights, rather than restrict the balance of power.

To preserve this nation's ideals of inclusion, and to ensure equal protection under the law for all Americans, I urge you, and other members of the members of the Senate Judiciary Committee to vote ''No'' on the nomination of Dennis Shedd.

Sincerely,

REVEREND JESSE L. JACKSON, SR.

SOUTH CAROLINA LEGISLATIVE
BLACK CAUCUS,
Columbia, SC, September 4, 2002.

Re Fourth Circuit Nomination of Judge Shedd.

Hon. PATRICK J. LEAHY,
Chair, Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR LEAHY: The South Carolina Legislative Black Caucus (SCLBC) was formed in 1975 soon after the Civil Rights Movement in the 1960's. Presently, the SCLBC has 31 members; seven senators and 24 representatives, including four women. The SCLBC is dedicated to the struggle for fairness, equality and justice for all South Carolinians, and to the civic and political involvement of African-Americans, women and other racial and ethnic minorities.

We seek to preserve the civil rights strides that occurred in South Carolina over the decades, and we fight to prevent any regressive step that threatens to rollback civil rights and constitutional rights of African-Americans, women and other racial and ethnic minorities. The nomination of U.S. District Judge Dennis W. Shedd to the U.S. Court of Appeals for the Fourth Circuit represents such a regressive step, and accordingly, we strongly oppose the nomination.

African-Americans constitute a full one-third of South Carolina's population, yet there is only one active African-American federal judge in the state. And, there are only two South Carolinian female federal judges, one on the federal District Court and the other on the Fourth Circuit. This is unfair and unjustified because there are many well-qualified African-American and woman jurists and lawyers who deserve an opportunity to serve this nation on the federal judiciary.

Because African-Americans are one-third of South Carolina's population and the Fourth Circuit has a greater number of African-Americans than any circuit, it is critical that any nominee, especially one from South Carolina, be an unabashed champion of civil rights. The appointee should have a record that demonstrates fairness and justice to all people. Based on our careful review of Judge Dennis Shedd's performance on the U.S. District Court for the District of South Carolina, we have concluded that his record shows a serious hostility to civil rights and constitutional protections.

Since his appointment to the federal bench in South Carolina, Judge Shedd has engaged in right-wing judicial activism by imposing strict and exacting standards when reviewing employment discrimination cases brought by African Americans and women. He has dismissed almost every employment discrimination, sexual harassment, civil rights and disability case that has come before him. Judge Shedd seems to believe that discrimination is not an actionable offense even when the Equal Employment Opportunity Commission has found ''reasonable cause'' that discrimination has occurred. Judge Shedd, however seems to apply a more lenient standard in reviewing discrimination cases brought by white men. Judge Shedd has allowed four out of five ''reverse'' discrimination cases to proceed beyond the summary judgment phase of litigation.

This record shows that Judge Shedd does not have an abiding concern for civil rights and fairness. It further shows that Shedd lacks the requisite moderate reasoning to bring balance to the Fourth Circuit. In fact, his membership to the Fourth Circuit would push it further beyond the mainstream of American values and would subject South Carolinians and residents of other states within the Fourth Circuit to an extreme right-wing interpretation of the nation's civil rights laws and constitutional protections.

Accordingly we oppose Judge Shedd's nomination without reservations. Hi values represents the Old South, where African Americans and women were judged by different and unequal standards.

We appreciate your attention. If you have any questions, please contact me at the address and telephone number above.

Sincere

JOSEPH H. NEAL,
Chairman.

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
Baltimore, MD, September 17, 2002.

Re Fourth Circuit Nomination of Judge Shedd.

U.S. Senate, Washington, DC.

DEAR SENATOR: On behalf of the NAACP, the nation's oldest, largest and most widely-recognized grass roots civil rights organization, I am writing to let you know of the Association's strong opposition to the nomination of District Court Judge Dennis W. Shedd to the Fourth Circuit Court of Appeals. Delegates from every state in the nation, including the five states comprising the Fourth Circuit, unanimously passed a resolution from the South Carolina State Conference in opposition to the nomination at the NAACP's annual convention in Houston in early July.

Members of the NAACP believe that the Federal judiciary, as the final arbiter of the U.S. Constitution, is the branch of government primarily charged with protecting the rights and liberties of all Americans. In many instances in our nation's history, the courts have been the only institution willing to enforce the rights of minority Americans. We cannot afford to permit the Federal judiciary to retreat from its constitutional obligation and resort to the type of judicial activism that threatens civil rights and civil liberties.

No other federal circuit reflects this extreme right-wing activism more than the Fourth Circuit Court of Appeal, which is home to more African Americans than any other circuit. The Fourth Circuit Court of Appeals' hostility to civil rights, affirmative action, women's rights, voting rights and fair employment is unrivalled. Its decisions are so far out the mainstream that the Supreme Court has reversed the Fourth Circuit on basic constitutional protections such as Miranda warnings.

Judge Shedd's addition to the Fourth Circuit would further relegate that court to the periphery of judicial mainstream. His judicial record and testimony before the Judiciary Committee reflect a disposition to rule against the plaintiff in employment and discrimination cases. Moreover, his restrictive view of federal legislative authority, as indicated in Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997), which struck down the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–25 and was later overturned in a 9-to-0 decision by the Supreme Court, confirms our perspective that Judge Shedd's judicial philosophy and temperament would further push the Fourth Circuit to the right-wing.

Accordingly, as unanimously passed by the over 1,200 delegates to the 2002 NAACP National Convention, I ask that you oppose the nomination and that you use your influence to encourage the Senate Judiciary Committee to not vote him out of Committee. However, if the nomination makes it to the Senate floor, we ask you to vote against it.

I appreciate your attention and interest in this important matter. Please do not hesitate to contact me or Hilary Shelton, Director of the NAACP Washington Bureau at (202) 638–2269, if we can be of assistance.

Sincerely,

KWESI MFUME,
President & CEO.

SOUTH CAROLINA STATE CONFERENCE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Columbia, SC, June 24, 2002.

Senator PATRICK LEAHY,
Chairman, Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY: We write to oppose the nomination of Dennis Shedd to the Fourth Circuit Court of Appeals.

By now, you must be familiar with the importance of the Fourth Circuit to the African American Community. Almost a quarter of the Fourth Circuit's residents are African American. The Fourth Circuit, with over 6 million African Americans in the five states, has the greatest number of African Americans of any Circuit Court in the country. The Latino population within the Fourth circuit now at more than one million persons, has nearly tripled in the last decade. Based on these demographics, more may be at stake here for the future of civil rights than in any other Circuit Court in the country.

The Fourth Circuit is already an extremely conservative Court on civil rights and Constitutional issues. This Circuit ruled that

federal law-enforcement officials need not follow the Miranda decision, only to be reversed by the Supreme Court. This Circuit authorized drug testing for pregnant women without their consent which was reversed by the Supreme Court. This Circuit ruled that the Equal Employment Opportunity Commission was limited to remedies contained in employee arbitration agreements, and again, was reversed by the Supreme Court. The Circuit also has been reversed recently in capital habeas corpus cases and citizen suits under environmental. laws. The Fourth Circuit has issued numerous other opinions that are hostile to affirmative action, women's rights, fair employment, and voting rights.

This is also the Court to which moderate African American nominees were repeatedly denied membership. No fewer than four African Americans were nominated to this Court by President Clinton, only to have their nominations languish for years due to Senatorial obstruction. Thus, if a nominee *is* to be confirmed to this Court, the nominee must be a jurist who will bring moderation and ideological balance to this Court. It is our strongly held view that this nominee is not Dennis Shedd.

Judge Shedd's judicial record reveals a deep and abiding hostility to civil rights cases. A review of Shedd's unpublished opinions reveals that Judge Shedd has dismissed all but very few of the civil rights cases coming before him. In nearly thirty case involving racial discrimination in employment, he granted summary judgment for the employer in whole or in part in all but one case; most of the cases were dismissed altogether. Many of these cases were strong cases with compelling evidence an litigated by experienced civil right lawyers.

Gender and disability discrimination cases before Judge Shedd fare no better. He has granted summary judgment on every sexual harassment claim on which summary judgment was requested. Collectively, these ruling leave us with the distinct impression that, in Dennis Shedd's view of the world, discrimination does not exist, and just as importantly, a jury should never be asked even to decide that question.

We are profoundly disturbed by the mounting evidence of Judge Shedd's zealous efforts to assist the defense in civil rights cases. There are repeated instances of Judge Shedd's intervention in civil rights cases—without prompting by the defendant—in ways that are detrimental to the plaintiff's case. In a number of cases, Judge Shedd, on his own motion, has questioned whether he should dismiss civil rights claims outright or grant summary judgment. He has invited defendants to file for attorney's fees and costs against civil rights plaintiffs. These are not the actions of an impartial decision-maker.

We are extremely concerned about Judge Shedd's rulings promoting ''States' rights,'' and view these as a fundamental encroachment on Congress's ability to enact civil rights and other legislation. Judge Shedd has a very restrictive view of Congressional power. He struck down the Driver's Privacy Protection act of 1994 as legislation beyond Congress's power, although this legislation was an ''anti-stalking'' measures designed to prohibit public disclosure of drivers' license information. In an opinion authored by Chief Justice Rehnquist, the Supreme Court unanimously overturned Judge Shedd's ruling and refuted his reasoning. This stand as one of the few occasions in which the Supreme Court rejected unanimously a holding that Congress exceeded its power in enacting a statute.

The question of judicial temperament is raised by Judge Shedd's offensive remarks during a judicial proceeding about an issue that strikes at the heart of many—the Confederate flag. Judge Shedd presided over a federal lawsuit seeking the removal of the Confederate flag from the dome of the South Carolina Statehouse. According to press accounts of a hearing held in the case. Judge Shedd made several derogatory comments about opposition to the flag. First, he attempted to marginalize opponents to the flag by questioning whether the flag matters to most South Carolinians. (It does, and thirty percent of South Carolina's population is African American.) He also minimized the deep racial symbolism of the flag by comparing it to the Palmetto tree, which appears in South Carolina's State flag.

Our membership in South Carolina, deserves to be represented on the Circuit by a nominee who has a record of judicial impartiality, is committed to the progress made on civil rights and individuals liberties, and has a deep respect for the responsibility of the federal judiciary to uphold that progress. Dennis Shedd is not that nominee. We urge you and the Senate Judiciary Committee to vote against his nomination.

Sincerely,

JAMES GALLMAN,
President.

THE NATIONAL BLACK CAUCUS
OF STATE LEGISLATORS,
Washington, DC, September 19, 2002.

Hon. PATRICK J. LEAHY,
U.S. Senate, Chair, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

Re Fourth Circuit Nomination of Judge Shedd.

DEAR SENATOR LEAHY: The National Black Caucus of State Legislators (NBCSL) is the body that represents some 60 African American state legislators in 44 states, the District of Columbia and the U.S. Virgin Islands. Last year, we celebrated our 25th year of involvement and dedication to many of the most pressing social issues and policies that impact our legislators' districts and the nation at large. Our commitment is to our constituents as well as the national agenda. Our dedicated work is to maintain the highest values of civil and human rights insuring that African Americans are a fair and representative part of the political and social equations of this great nation.

In their letter to you, dated September 4, 2002, members of the South Carolina Legislative Black Caucus have spoken clearly and definitively in opposing the nomination of Judge Dennis Shedd to the Fourth Circuit. In reviewing the information presented therein and having also researched the history and record of Judge Shedd, we find it woefully deficient regarding the issues of fairness, equality and justice. Moreover, as has been pointed out by our colleagues in South Carolina ''African Americans constitute a full one-third of South Carolina's population yet there is only one active African American federal judge in the state.'' In that there are unquestionably ''many, well-qualified African American . . . jurists'' in South Carolina, this is rightly seen as an unfair and unequal treatment in the sight of fair representation. Further, considering the existent disproportionate representation of jurists of Color, certainly an effort must be made to insure that any South Carolina nominee be a strong advocate of civil and human rights. Rather, Judge Shedd's performance on the U.S. District Court for the District of South Carolina demonstrates what could be construed as hostile to civil and constitutional rights.

We have learned that Judge Shedd's insensitivity to fairness has been demonstrated in his review of employment discrimination cases brought by African Americans and in fact, women, even in such cases when the Equal Opportunity Commission has found ''reasonable cause.'' But, we have also found that in furtherance of this questionable action, when white men bring cases of ''reverse'' discrimination, those cases proceed. We also note that there have been concerns raised about the number of unpublished opinions issued by the Judge and further that such concerns regarding the decisions were reversed or vacated by the Fourth Circuit Court of Appeals.

The Fourth Circuit must have a judge who is mindful of the rightful place that African Americans have in this nation, and be a strong advocate of civil rights, human rights and constitutional rights. Any nominee should have demonstrated his dedication to such virtues and ideals. No other individuals should be considered for this important position.

For these reasons among others raised by our South Carolina Legislative Black Caucus, we cannot support the nomination of Judge Dennis Shedd for the Fourth Circuit and would ask that the opinion of our body be strongly considered in this matter. Should you have any questions, or require additional comment, please contact me.

Very truly yours,

JAMES L. THOMAS,
President.

Mr. LEAHY. Before yielding the remainder of my time, I first say to my friend from Utah, he has been very patient but then he has told us before he is a patient man.

I yield the floor.

Mr. HATCH. I thank my colleague.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have been listening to this recitation of various cases involving Judge Shedd, and I have to say I certainly have a different viewpoint. Let me go through those cases in approximately the order that the distinguished Senator from Vermont listed them.

My colleague referred to Shults v. Denny's Restaurant. This was an Americans with Disability Act and slander case where Judge Shedd sua sponte considered summary judgment and ordered the plaintiff to file a memorandum in opposition to the court's sua sponte motion for summary judgment. This action by Judge Shedd was again based on jurisdictional defenses raised in the defendant's answer: Failure to file within the 2-year statute of limitations and failure to exhaust the administrative Equal Employment Opportunity Commission review.

In the order, requesting the plaintiff to file a memorandum, Judge Shedd wrote:

> Although the express language of rule 56 provides only for the parties to move for summary judgment, Federal district judges possess the inherent power to raise, sua sponte, an issue for possible resolution by summary judgment.

Therefore, Judge Shedd had the right to bring this motion under the Rules of Civil Procedure.

My colleague refers to Lowery v. Seamless Sensations. This was a title VII case in which the defendant raised the defense that the plaintiff failed to timely file both a charge of discrimination with the EEOC and the lawsuit.

Both are jurisdictional prerequisites to any Federal court action.

Since that defense called into question the court's subject matter jurisdiction, Judge Shedd expedited consideration of those defenses. Remember, it would serve no purpose for the court to proceed on the merits where the court had no jurisdiction. In order to expedite consideration of the issues, Judge Shedd ordered the defendant to file a motion to dismiss based on those defenses. Judge Shedd further ordered that motion should be filed in his court instead of the magistrate court assigned to the case. Ultimately, the defendant was granted summary judgment on the grounds that the plaintiff could not establish a prima facie case. Therefore, the case survived the above-discussed motion to dismiss, evidencing that although he raised the issue, Judge Shedd fairly evaluated the merits of the case.

In another matter, my colleague makes a special mention of Coker v. Wal-Mart. Let's look at this case to see where again my colleague gets it wrong. In this case, the defendant removed the case from State to Federal court. Judge Shedd sua sponte questioned whether removal was appropriate, as it appears the motion for removal had been filed outside the 30-day time limitation established in 28 U.S.C. section 1446(b). Doubting whether he had the authority to remand the case sua sponte, Judge Shedd stated he would permit the defendant to file a brief addressing whether removal was timely and whether the court had authority to remand.

Rather than assisting the defense, Judge Shedd raised the issue of remand, and held the defendant to the proper burden of showing that removal was proper. He aided the plaintiff, who had apparently failed to raise the issue, this is exactly the opposite of what the distinguished Senator from Vermont has said. Judge Shedd had a duty to raise the removal issue, a purely jurisdictional matter, and he gave the defendant the opportunity to challenge his sua sponte action, which is what a good judge would do.

My colleague also refers to Gilmore v. Ford Motor Company, a product liability case. In that case, Judge Shedd sanctioned the plaintiff for failure to prosecute the action by dismissing the case. He made that determination after he properly evaluated each of the factors established by the Fourth Circuit in Ballard v. Carson. Indeed, my colleague in the Senate worries more about this case than did the plaintiff. The plaintiff failed to respond to this motion to dismiss for failure to prosecute after earlier failing to respond to the defendant's motion to compel discovery.

Notably, my colleague did refer to Simmons v. Coastal Contractors, Inc., a discrimination and retaliation employment case in which both parties represented themselves pro se. Judge Shedd sua sponte brought the petitioners before the court and ordered the plaintiff to cure specific deficiencies in his complaint or face dismissal. This decision was an attempt to aid the plaintiff in properly drafting his complaint.

My colleague refers to Tessman v. Island Ford-Lincoln-Mercury, a title VII case, where Judge Shedd sua sponte challenged the court's subject matter jurisdiction, given the plaintiff's apparent failure to allege that she had first presented her claim to the EEOC and received a right-to-sue letter. He ordered the action dismissed unless the plaintiff could show cause why that action should not be taken by the court. This is a wholly appropriate approach and probably the only approach that could have been taken by any good judge.

My colleague refers to Smith v. Beck, a 1983 gender discrimination case in which several women alleged discrimination when they were not admitted, without male escorts to a nightclub featuring nude female dancers. Judge Shedd sua sponte questioned whether the plaintiffs' allegation sufficed to establish the defendant private club's actions were under color of State law. Based on his conclusion that merely operating an establishment that has a State liquor license does not transform a club into a State actor, Judge Shedd dismissed the case. In other words, he analyzed the law, as he should.

In short, my colleague has suggested that Judge Shedd ''assists the defense.'' That is so highly misleading a charge it is hard to take it seriously. But I suppose I must since it has been raised. The truth is that a judge's discretion in assisting either side to get their case right is fairly wide, but within bounds that Judge Shedd has not crossed. The Supreme Court of the United States has written:

> [D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.

The Fourth Circuit Court of Appeals held that:

> It is a fundamental precept that Federal courts are courts of limited jurisdiction, constrained to exercise only the authority confirmed by Article III of the Constitution and affirmatively granted by Federal statute. A primary incident of that precept is our duty to inquire, sua sponte, whether a valid basis for jurisdiction exists, and to dismiss the action if no such ground appears.

The truth is that in each of the cases in which Judge Shedd acted sua sponte, he provided the proper notice and opportunity to respond to the plaintiff.

Perhaps my colleague will be less troubled than he appears to be when he learns that none of the cases he refers to where Judge Shedd supposedly assisted the defense were reversed on appeal. Not one. It seems it would be best to leave the litigation of cases to the parties, lawyers, and judge involved rather than second-guess them on the floor of the Senate.

I, for one, am getting a little tired of some of our colleagues on the other side acting as if every plaintiff's case has to be won no matter what the facts and the law support. Actually, some of those cases have to be lost because they are not good cases.

Now let's just be honest about it. Cases are decided by judges and jurors—judges in nonjury cases and juries in jury cases. I have seen a lot of cases where plaintiffs have not won because they should not have won. To criticize judicial nominees for ruling against plaintiffs is nonsensical because every judge should decide against plaintiffs when they are wrong. It does not take brains to figure that out. But I guess for some on the other side, unless the plaintiff wins there is an injustice.

My colleague criticizes Judge Shedd's ruling in Condon v. Reno with the aim of characterizing his judicial ideology in the process.

I was shocked to learn by one of Judge Shedd's detractors that he is a ''sympathetic participant in [a] judicial campaign to disempower Congress,'' and that he is a judge who ''resort[s] to outdated and reactionary views of federal power.''

I am sure this came as a surprise to Judge Shedd as well.

Condon v. Reno concerned the Driver's Privacy Protection Act. Judge Shedd held in Condon that the Act violated the Tenth Amendment in that it improperly commanded states to implement federal policy.

The 4th Circuit affirmed Judge Shedd's ruling, while the Supreme Court ultimately reversed it. But this was clearly a difficult call to make; in fact, the lower federal courts that addressed the issue split evenly before the Supreme Court ruling, eight finding the Act constitutional and eight finding it unconstitutional.

Those finding the Act unconstitutional together with Judge Shedd included Judge Barbara Crabb, Chief Judge of the Western District of Wisconsin, a Carter appointee, and Judge John Gobold of the 11th Circuit, a Johnson appointee. Several Democrat Governors across the nation, including Democrats Jim Hunt of North Carolina, Jeanne Shaheen of New Hampshire and Don Siegelman of Alabama permitted their respective State Attorneys General to sign onto an amicus brief urging the Supreme Court to find the Act unconstitutional.

In addition, the Democrat Attorney General of Wisconsin also signed the amicus brief. So, reasonable minds can differ on these matters.

It seems to me that either the vast right wing campaign to ''disempower'' Congress is either much larger than previously supposed, or that this was a case in which thoughtful, and respected judges could, and indeed did, disagree.

Of course, my colleagues ignore another federalism case of Judge Shedd's United States v. Brown. That case involved the Gun Free School Zones Act.

The defendant challenged the constitutionality of the Act on federalism

grounds. Judge Shedd allowed the prosecutor to prove facts at trial that the Act was a valid exercise of Congressional power.

The Supreme Court later invalidated the Gun Free Zones Act in United States v. Lopez. Unlike the Condon v. Reno, Judge Shedd upheld the exercise of federal power, yet not surprisingly, his critics point us to the Condon case but not to the Brown case.

That is amazing to me.

My colleague again comments on Judge Shedd's ruling in Crosby v. South Carolina Department of Health.

Interestingly he did not raise the same objections to Judge Roger Gregory who ruled to uphold Judge Shedd's ruling when he was before us last year. One wonders why?

Judge Shedd is criticized for adopting a magistrate report striking down as unconstitutional part of the Family Medical Leave Act after a state agency cited 11th amendment sovereign immunity against an employee lawsuit.

Of course, the fact that eight of nine Circuit Courts have agreed with his ruling seems not to concern my colleagues, including the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits.

In fact, numerous Democrat-appointed judges agreed with Judge Shedd, including Carter appointees Amalya Kearse of the First Circuit, Richard Arnold of the Eighth, and Robert Anderson of the Eleventh; and Clinton nominees Sandra Lynch and Kermit Lipez of The First Circuit, Theodore McKee of the Fourth, Kermit Bye of the Eighth, Jose Cabranes of the Second Circuit, and Roger Gregory of the Fourth Circuit. Those are able, distinguished judges.

It should not come as any surprise that the Ninth Circuit is the only Circuit Court which has ruled the other way.

One would think from this near universal agreement that Judge Shedd's ruling in Crosby would seem reasonable one, one well within the judicial mainstream, no matter how we look at it. And yet he is criticized for it here on the floor.

In the area of Criminal Justice, my colleague makes special mention of the Quattlebaum murder case. Let's look at that case to see where my colleague gets it all wrong.

In that case, officers took into custody a murder suspect, Mr. Quattlebaum. During police questioning of Quattlebaum, which Quattlebaum was informed was being videotaped, the deputy sheriff left the room. Soon after the deputy sheriff left the room, he went to the room where the videotaping was being done and noticed that an attorney was now in the room with Quattlebaum, despite the fact that no one was to have access to that room other than law enforcement. The deputy sheriff immediately consulted with superiors and legal advisors as to what to do about the running videotape, but the damage—i.e., recording an attorney-client conversation—had already been done.

In response to the videotaping, prosecutors indicted the deputy sheriff for a civil rights violation. Mr. Quattlebaum's attorney, on the other hand, about whom my colleague appears concerned, ended up being indicted for perjury based on his grand jury testimony that he had not released the protected videotape to the media, and spent 4 months in prison.

The deputy sheriff pled guilty to charges based on the videotaping of the attorney-client conversations.

My colleague has expressed concern that the deputy sheriff who conducted the improper videotaping was not more heavily penalized by comparison to the defendant's attorney who perjured himself after releasing the protected tape to the media.

That concern is easily assuaged. The sentencing range in the guidelines for the offense to which the deputy sheriff pled guilty was zero to six months imprisonment, one year of supervised release, and a fine of $1,000 to $10,000. The Government moved for a downward departure of the zero to six months jail time for the police officer based on his assistance in the prosecution of related matters.

As Judge Shedd acknowledged during the sentencing hearing, in order to depart downward, he had to issue a sentence that was less than the minimum in the guidelines range, i.e., since less than zero time in prison is not possible, Judge Shedd, in accepting the downward departure request had to impose a fine that was less than $1,000 and could not impose any jail time on Mr. Grice.

Judge Shedd's sentencing decisions were controlled by the crimes charged and the related sentencing guidelines enacted by Congress. Judge Shedd's sentence of a fine without jail time was mandated by the guidelines once the government's request for downward departure was accepted.

My colleague's concern for the trail lawyer who served 4 months for perjury, after releasing a privileged videotape to the media, is not altogether clear to me, especially since that unethical conduct caused a convicted murderer to escape his sentence.

The concern is also strange given that my colleague expressed the opposite concern with regard to Judge Charles Pickering for questioning the inequitable result of mandatory sentencing guidelines.

Look, let me just bring this to an end by reading a letter of one of the attorneys involved in that case. This is a letter to me by E. Bart Daniel, attorney at law in Charleston, SC. It is regarding the nomination of Dennis W. Shedd to the Fourth Circuit Court of Appeals.

DEAR SENATOR HATCH: I have been a practicing attorney in South Carolina for over 22 years. During my career, I have served as an Assistant State Attorney General, an Assistant U.S. Attorney, a United States Attorney under the previous President Bush and an active federal trial attorney. My practice over the years has developed into primarily a ''white collar'' criminal defense practice. I have appeared many times in court before Judge Shedd and found him to be courteous and fair. He has exhibited great integrity and a strong character while on the bench.

One of the most difficult cases in which I appeared before Judge Shedd was in *United States* v. *John Earl Duncan* (3:99–638–001). Mr. Duncan was a practicing attorney who was convicted of perjury. Judge Shedd sentenced him to four months in a federal penitentiary and four months in a community confinement center (halfway house). He fined him $33,386.92. Judge Shedd's decision was a difficult one, but fair. As his counsel, we recognized that Judge Shedd would be compelled to sentence Mr. Duncan to an active term of incarceration since he was a practicing attorney who had been convicted of lying to a federal grand jury.

During the sentencing phase of the Duncan case, Judge Shedd was courteous and patient and listened intently to the many people who spoke on our client's behalf including my co-counsel Dale L. DuTremble and me.

I know of no judge more qualified for the position than Judge Shedd. If you have any questions or I can be of any further support, please do not hesitate to call.

That ought to put that to bed.

In all honesty, the charges against Judge Shedd that have been raised are shameful; absolutely shameful. It makes you wonder. Why? Why are we putting a really fine Federal district court judge who served almost 13 years on the bench with a distinguished record through this type of bitter and I think shameless set of accusations?

We had originally agreed with the Democrat leadership to confirm Judge Shedd late last week along with other judicial nominees by unanimous consent, but instead, base politics appears to have intervened. I am hopeful we can get this done tomorrow.

According to an article by Byron York in National Review Online on Friday afternoon, it is clear what happened. He writes that, after the Shedd vote in the Judiciary Committee on Thursday, the usual left-wing groups, including, he writes, People for the American Way, Leadership Conference on Civil Rights, Alliance for Justice, and the National Abortion Rights Action League, all urged Democrat Senators ''to continue the fight against Dennis Shedd in the full Senate.'' He quotes one leader as warning that, ''controversy will follow these nominations to the Senate floor.''

Here we are about to engage in the longest debate on a Senate nominee on the Senate floor this year. The special interest groups said jump, and so today we will jump high, and I guess tomorrow as well.

I am not complaining entirely. I am grateful to the distinguished chairman. I know it is a tough job to be chairman of the Judiciary Committee, and I hope this is not his fault. I am not shy of any debate on the President's superbly qualified judicial nominees.

But I do fear that, once again the American people will roll their eyes that, when we have as much to do in the Senate that is still undone, the leadership would think that a divisive

and lengthy debate on a judicial nominee is a good idea.

But I understand why it is happening. I am not a newcomer here. It appears to be happening because of the Louisiana Senate election.

It has been rumored and reported that the Northern liberals who hold the money strings and the liberal special interest groups here in Washington who claim to represent African American interests—have said that the money won't flow and folks won't help get out the vote in Louisiana unless Judge Dennis Shedd, Senator THURMOND's former counsel gets slowed down yet again.

(Mr. ROCKEFELLER assumed the Chair.)

Mr. HATCH. Now, look, most of us who have served on the Judiciary Committee for a number of years have known Judge Dennis Shedd. He was chief of staff to Senator THURMOND when he was chairman of the committee, and his chief counsel when he was not chairman.

I have known him for most of my time in the Senate. He is one of the finest people I have ever known. He is also one of the better Federal district court judges in the country. Judge Shedd is a decent man. I resent his being dragged through this process for months, as he has been. Senator THURMOND's last request has gotten slowed down again.

Now, I am grateful we are going to have a vote on him tomorrow, up or down. I surely hope my colleagues will look at his record, and not look at the distortions of his record, and will vote for him and will support Senator THURMOND and those of us who know him, and know him well.

I think some have trouble getting the message. The message I got from the recent election is perhaps different than what my colleagues across the aisle received. As far as I see it, the President took three issues to the American people: his Iraq policy, homeland security, and his judicial nominees. Of course, he had other issues, but those were the three primary issues.

The election showed that Americans trust this President, including in his selection of judicial nominees. The election indicated voters rejected the obstruction in the Senate we experienced this last year, including on judicial nominees. Voters especially rejected the shrillness and the distortions of reputations they read and heard about in hundreds of news stories, scores of editorials, and dozens of op-eds, and those they saw on TV. Voters sent us a clear message, it seems to me, that we should end the obstruction and maltreatment of judicial nominees, and yet here we are about to engage in hours of debate that will largely see the race card played, and the role of judges—and one judge, in particular—distorted and mischaracterized.

Today, at the behest of the so-called Washington civil rights lobby, now a wholly owned subsidiary of plaintiffs' trial lawyers, my friends on the other side will spend a business day describing an experienced judge as biased, as pro this and anti that, and now I am afraid some of my Democratic colleagues can no longer evaluate judges as unbiased umpires who call the balls and strikes as they are, not as they alone see them, and not as they want them to be.

Now, it is silly to suggest an umpire is pro bat or pro ball or pro batter or pro pitcher, but, of course, trial lawyers, and those who shill for them, have an interest in exactly such scorekeeping. To say all plaintiffs have to win all cases is just nuts, but yet that is what we have been getting lately.

But even this is not what bothers me the most about the debate that has been scheduled today. I am reminded of what my friend Senator KENNEDY said in 1982 about those who opposed extending the Voting Rights Act. Senator KENNEDY lamented in 1982 that ''there are those among us who would open old wounds . . . [and] refight old battles.''

Mr. President, they say the more things change, the more they stay the same—well, almost the same.

Now, with that regret expressed, I wish to express my great satisfaction that the Judiciary Committee has favorably recommended the nomination of Judge Dennis Shedd of South Carolina for a vote of the full Senate.

Mr. President, Senators feel very strongly about their staffs. Our legal counsels make uncounted sacrifices to work for us and for the American people. We are surrounded by very talented lawyers who forego larger salaries for the sake of public service. Sometimes they put their personal opinions aside to advocate ours.

We Senators take it very personally when they are nominated and given the opportunity for yet higher public service. It has been the tradition of the Judiciary Committee to give great courtesy to former staffers. I certainly take it very personally, and know Senator THURMOND does, too, that we have not done so in the case of Dennis Shedd, who has served with distinction for the last 12 years as a Federal district court judge in South Carolina.

When Judge Shedd was nominated to the Federal trial bench, Chairman BIDEN had this to say to him:

> I have worked with you for so long that I believe I am fully qualified to make an independent judgment about your working habits, your integrity, your honesty, and your temperament. On all these scores, I have found you to be beyond reproach.

Now, this is high praise indeed from a colleague on the other side of the aisle for whom we all have the greatest respect. Judge Shedd has strong bipartisan support in his home State as well, and not only from Senator THURMOND and Senator HOLLINGS—a Republican and a Democrat—he is also strongly supported by Dick Harpootlian, South Carolina State chairman of the Democratic Party, and himself a trial lawyer.

Let me just say that again. Judge Shedd is not only supported by my distinguished Democrat colleague, Senator HOLLINGS, but also by the Democratic Party chairman in South Carolina. This suggests a reality far from the slogans and distortions launched against President Bush's nominees, and in particular Judge Shedd.

First, it has been suggested that Judge Shedd will add to what liberals and plaintiffs' trial lawyers perceive as conservative appeals court—or at least on the issues that profit them. But contrary to the divisiveness card that his detractors are playing, Judge Shedd will add diversity to that Court.

Mr. President, Dennis Shedd has served as a federal jurist for more than a decade following nearly twenty years of public service and legal practice. While serving the Judiciary Committee, Judge Shedd worked, among many other matters, on the extension of the Voting Rights Act, RICO reform, the Ethics in Post-Employment Act, and the 1984 and 1986 crime bills.

As Senator BIDEN put it: ''His hard work and intelligence helped the Congress find areas of agreement and reach compromises.''

That leads me to address a few issues that have been raised by his detractors.

Mr. President, the last five Fourth Circuit confirmations have all been Democrats.

What seems to me more important to focus on—and what the American people want us to focus on—is that when Judge Shedd joins the other members of the Fourth Circuit, he will not only have unmatched legislative experience, he will also have the longest trial bench experience on the Fourth Circuit Court of Appeals.

Interestingly, by way of disproving some of my colleagues' diversity-mania, the last Democrat confirmed to the Fourth Circuit Court of Appeals, Judge Gregory, has affirmed Judge Shedd's rulings in 11 appeals. Notably, Judge Gregory agreed with Judge Shedd's ruling in the Crosby case, which found that the Family and Medical Leave Act was improperly adopted by Congress, a case which the liberal groups seem worked up about when it comes to Shedd but not when it came to Judge Gregory. No one asked Judge Gregory about his ruling in Crosby when he was before the Judiciary Committee last year. But may Democrat colleagues drilled Judge Shedd on it. Talk about discrimination.

Mr. President, Judge Dennis Shedd has heard more than 5,000 civil cases, reviewed more than 1,400 reports and recommendations of magistrates, and has had before him nearly 1,000 criminal defendants.

Judge Shedd's record demonstrates that he is a mainstream judge with a law reversal rate. In the more than 5,000 cases Judge Shedd has handled during his 12 years on the bench, he has been reversed fewer than 40 times—less than 1 percent.

Detractors have made much of the fact that he has relatively few decisions he has chosen to publish. But, in fact, he falls in the middle of the average for published opinions in the Fourth Circuit. One Carter appointee has published all of 7 cases, one Clinton appointee has published only 3, and another Carter appointee has published 51, only one more than Judge Shedd, despite being on the court for 10 years longer.

Judge Shedd is known for his fairness, for his total preparation, and for showing no personal bias in his courtroom. This is not just my opinion; this reflects the opinions of lawyers who practice before him. Judge Shedd is well-respected by members of the bench and bar in South Carolina. According to the Alamanc of the Federal Judiciary, attorneys said that Judge Shedd has outstanding legal skills and an excellent judicial temperament.

Here are a few comments from South Carolina lawyers: ''You are not going to find a better judge on the bench or one that works harder,'' ''He's the best federal judge we've got.'' ''He gets an A all around.'' ''It's a great experience trying cases before him.'' ''He is polite and businesslike.''

Let me take a moment also to address one of the more ludicrous attempts to discredit Judge Shedd that has been raised: that when he was confirmed to the District Court bench he had little experience in the practice of law.

I have to say that to ignore the remarkable experience Dennis Shedd had in legislation practice crafting historic laws while serving the Judiciary Committee is some chutzpah. To raise an objection like that almost 13 years after the fact is just plain silly. But it goes to show what we have to put up with in the obstruction and distortions of this past year.

Let's be clear, when Judge Shedd joins the other members of the Fourth Circuit, he will not only have unmatched legislative experience, he will also have the longest trial bench experience on the Fourth Circuit. He will also add some diversity to that court. The last five Fourth Circuit confirmations have all been Democrats.

I have to say that the most misleading criticism raised about Judge Shedd involves his employment cases.

Downright deceptive is that Judge Shedd's detractors, the outside liberal groups, have now taken to grouping and describing employment cases as civil rights cases.

They want us to believe that every quarrel between an employee and her employer rises to a Rosa Parks significance. No doubt every plaintiff's trial lawyer would like to think of themselves as a Thurgood Marshall. But this deception is unfortunate and a disservice to the cause of civil rights that I have longed championed in this Chamber.

Cloaking every small, perhaps even frivolous, employment case with the mantle of the civil rights movement, Washington's professional nominee detractors have been particularly misleading on Judge Shedd's employment cases.

They have misleadingly pointed out that the Judge seldom grants summary judgment in employment cases in favor of the employee. Of course, they fail to point out that few judges do. Any good lawyer knows that. Summary judgment is a judgment without a jury, and every good lawyer knows that employment cases are inherently fact-laden and go to trial by a jury or more often they settle. Or in many cases, the employee fails to state a claim and the case has to be dismissed.

Of course, Judge Shed's detractors could have noticed that he has only twice been reversed in his decisions in employment cases. But of course, they did not notice that.

They might have pointed out that in one of the appeals that he was invited to hear for the Fourth Circuit, he reversed a summary judgment and remanded for trial a political discrimination case against a worker who was a Democrat. But they did not do that either.

Judge Shedd's detractors have also made irresponsible claims as to the Judge's criminal case record.

In fact, in criminal cases, Judge Shedd has strongly defended citizens due process rights from violation by the state. He has frequently chastised law enforcement for errors in search warrants an the questionable use of seized property. In fact, he has sanctioned the State for discovery problems. He is known for aggressively informing defendants and witnesses of their fifth amendment rights.

Remarkably, Judge Shedd has never been reversed on any ruling considered before or during trial, or on the taking of guilty pleas. His detractors have somehow failed to note this.

The cases that come before a judge are often difficult. Judge Shedd has not been exempted. In one prisoner's case, Judge Shedd allowed a detainee to engage in a hunger strike and ruled against government's attempt to force feed him.

Although some would seek to question Judge Shedd's respect for privacy in criminal cases, into cases he protected HIV blood donor's confidentiality. In another case, he ordered special accommodations to an HIV positive defendant to ensure his continued clinical treatment.

These are not the rulings of a judge who is insensitive to prisoners and criminals, but this is the record of a judge who works hard to get the work of law enforcement right.

Of course, no smear campaign against a Bush judicial nominee, paid for plaintiffs' trial lawyers, and carried out by their left-wing lobbyists, is complete without the suggestion that the nominee is foe of environmental rights.

Of course, in their paint-by-the-numbers attack, Judge Shedd's detractors have ignored the wetlands protection case where he handed down tough sanctions against a violator and ordered expensive wetlands restoration.

The left-wing detractors skipped over Judge Shedd's decision in favor of National Campaign to Save the Environment.

They missed his ruling to grant standing to a plaintiff challenging a road construction project on its environmental impact.

They missed his ruling in favor of a woman protesting possible waste dumping in her community.

The well-paid, left-wing lobbyists who have turned attacking President Bush's judicial nominees into a small cottage industry see only what they want to see and not what the truth would show them.

The most breathtaking charge against Judge Shedd was first made by the NAACP that Judge Shedd has—''a deep and abiding hostility to civil rights.''

I must admit that was outraged by this when I first read it, and I still am. It is a distortion far beyond the pale of decency, and I call on my colleagues once again to repudiate such rabid practices.

In part, I am outraged because there are some who would profile Judge Shedd as merely a white male from the South and start from there to give him a certain treatment.

If Judge Shedd's record working for civil rights legislation on the Judiciary Committee were not enough of an accomplishment for one lifetime for any man or woman, the truth is that in each of the cases that have come before Judge Shedd involving the Voting Rights Act of 1965, plaintiffs have won their claims.

In the Dooley case, a one person/one vote case, Judge Shedd gave the plaintiff a clear and strong decision. In another political rights case, he ruled to protect the plaintiff's right to make door-to-door political solicitations.

Of course, Mr. President, you know a lot about a judge by how they conduct their courtroom. As you know, I have been a strong advocate for the protection of religious practices in the public square. It says a lot about Judge Shedd, especially in these times, that he has allowed religious headdress in his courtroom.

Judge Shedd also led efforts to appoint the first African American woman ever to serve as a magistrate judge in South Carolina and has sought the Selection Committee to conduct outreach to women and people of color in filling such positions. He pushed for an African American woman to be chief of pretrial services. He has actively recruited persons of color to be his law clerks.

And because of Judge Shedd's work in an award-winning drug program that aims to reverse stereotypes amount 4,000 to 5,000 school children, he was chosen as the United Way's School Volunteer of the Year.

The Judiciary Committee received a very touching letter from one of Judge Shedd's former law clerks, Thomas Jones, that we have blown up here. Perhaps the Presiding Officer will be able to read it from the chair.

The letter says:

Dear Senator LEAHY: My name is Thomas W. Jones, Jr. I am an African American attorney currently practicing as a litigation associate in Baltimore, MD. Upon my graduation from the University of Maryland School of Law, I had the distinct pleasure of serving as a judicial clerk for the Honorable Dennis W. Shedd on the U.S. District Court for the District of South Carolina. During my 18 months of working with Judge Shedd, I never encountered a hint of bias, in any form or fashion, regarding any aspect of Judge Shedd's jurisprudence or daily activities. It is apparent to me that the allegations regarding Judge Shedd's alleged biases have been propagated by individuals without the benefit of any real, meaningful interaction with Judge Shedd, his friends or family members. I trust the accusations of bias levied against Judge Shedd will be given the short shrift they are due, and trust further that this honorable committee will act favorably upon the pending nomination of Judge Shedd for the United States Court of Appeals for the Fourth Circuit. Thank you for your attention regarding this matter. Respectfully, Thomas W. Jones, Jr.

That was written on June 25 of this year to Senator LEAHY.

I will read another letter into the RECORD as well. This is a letter from Phyllis Berry Myers, President and CFO of the Center for New Black Leadership. I believe we received it today. It reads as follows:

DEAR SENATOR HATCH: The Centre for New York Leadership (CNBL) believes the Senate's judicial nomination system is broken and needs repairing.

We have watched with great trepidation as the Senate's role of ''advise and consent'' for Presidential nominations, especially judicial nominations, has become increasingly, ''search and destroy,'' ''slander and defame.'' It is a wonder that reasonable, decent people agree to go through the confirmation process at all.

The confirmation process has become particularly brutal if the nominee is labeled ''conservative.'' Traditional civil rights groups mass to castigate and intimidate, as they do now, attempting to thwart the confirmation of Judge Dennis W. Shedd to the U.S. Fourth Circuit Court of Appeals.

Once again, we are witnessing the new depth to which public discourse and debate has sunk when fabrications, statements taken out of context, misinformation and disinformation can pass as serious political deliberation and debate. The vitally needed discussion about continued civil rights progress in a 21st Century world gets lost in the cacophony. Our nation and true civil rights advocates are poorer because of this.

The Senate can restore to itself, at least a modicum, a sense of fair play, honor, and trust in its own policies and procedures, a commitment to guarding the civil rights of all, as well as advancing the rule of law by swiftly confirming Judge Shedd.

Sincerely,

PHYLLIS BERRY MYERS,
President & CEO.

Of course, the liberal groups starkly ignore Judge Shedd's ruling in the Vanderhoff case. In that case, Judge Shedd dismissed the claim of a fired employee who repeatedly displayed the Confederate flag on his toolbox in violation of company policy. Judge Shedd rejected the plaintiff's contention that he was dismissed because of his national origin as a ''Confederate Southern American.''

Perhaps my colleagues have sympathy for that plaintiff, too. After all, the plaintiff was represented by a trial lawyer in this employment case—or as they would like us to see it, a civil rights case—even though it was brought on behalf of a true racist.

I looked at a letter that the NAACP sent to the Judiciary Committee, a letter all the other copycat groups have repeated.

I ask unanimous consent that the letter be printed in the RECORD so everybody can see how fake the Washington NAACP has become when they carry the plaintiffs' trial lawyers' water.

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

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Baltimore, MD, September 17, 2002.

Re Fourth Circuit nomination of Judge Shedd.

U.S. SENATE,
Washington, DC.

DEAR SENATOR: On behalf of the NAACP, the nation's oldest, largest and most widely-recognized grass roots civil rights organization, I am writing to let you know of the Association's strong opposition to the nomination of District Court Judge Dennis W. Shedd to the Fourth Circuit Court of Appeals. Delegates from every state in the nation, including the five states comprising the Fourth Circuit, unanimously passed a resolution from the South Carolina State Conference in opposition to the nomination at the NAACP's annual convention in Houston early July.

Members of the NAACP believe that the federal judiciary, as the final arbiter of the U.S. Constitution, is the branch of government primarily charged with protecting the rights and liberties of all Americans. In many instances in our nation's history, the courts have been the only institution willing to enforce the rights of minority Americans. We cannot afford to permit the federal judiciary to retreat from its constitutional obligation and resort to the type of judicial activism that threatens civil rights and civil liberties.

No other federal circuit reflects this extreme right-wing activism more than the Fourth Circuit Court of Appeal, which is home to more African Americans than any other circuit. The Fourth Circuit Court of Appeals' hostility to civil rights, affirmative action, women's rights, voting rights and fair employment is unrivalled. Its decisions are so far out the mainstream that the Supreme Court has reversed the Fourth Circuit on basic constitutional protections such the Miranda warnings.

Judge Shedd's addition to the Fourth Circuit would further relegate that court to the periphery of judicial mainstream. His judicial record and testimony before the Judiciary Committee reflect a disposition to rule against the plaintiff in employment and discrimination cases. Moreover, his restrictive view of federal legislation authority, as indicated in *Condon* v. *Reno,* 972 F.Supp. 977 (D.S.C. 1997), which struck down the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§2721–25 and was later overturned in a 9-to-0 decision by the Supreme Court, confirms our perspective that Judge Shedd's judicial philosophy and temperament would further push the Fourth Circuit to the right-wing.

Accordingly, as unanimously passed by the over 1,200 delegates to the 2002 NAACP National Convention, I ask that you oppose the nomination and that you use your influence to encourage the Senate Judiciary Committee to not vote him out of Committee. However, if the nomination makes it to the Senate floor, we ask you to vote against it.

I appreciate your attention and interest in this important matter. Please do not hesitate to contact me or Hilary Shelton, Director of the NAACP Washington Bureau at (202) 638–2269, if we can be of assistance.

Sincerely,

KWESI, MFUME,
President & CEO.

Mr. HATCH. They describe their so-called civil rights complaint, and it boiled down to something not having anything to do with Judge Shedd's civil rights record. They project on to Judge Shedd their complaints about the Fourth Circuit as it currently stands. Though personally I believe that these charges are unfounded.

Well, Judge Shedd is not on the Fourth Circuit yet.

The NAACP's well-funded complaint is about appellate decisions Judge Shedd has had nothing to do with. That is remarkably irresponsible for an organization once so distinguished. Thurgood Marshall would be very displeased with this sort of sloppy advocacy.

Then the NAACP got to the heart of the matter. In the letter signed by Kwesi Mfume they show who is paying the bills. On behalf of plaintiff's trial lawyers, the NAACP complains about Judge Shedd's employment rulings—not his civil rights or voting rights rulings which are unimpeachable, but employment rulings. As I have said before, we know such a complaint has no basis in the reality of how employment cases are litigated and resolved.

Of course they, too, fail to note that Judge Shedd has only been reversed twice in employment cases during his 12-year career on the Federal bench.

The truth is the so-called civil rights attack on Judge Shedd is nothing but a campaign paid by and for the plaintiff's trial lawyers. They stoop so low to get their profits that they have put the NAACP, that once great organization, and other civil rights groups up to do their dirty work. That bothers me a lot.

Just so I set the record straight, I know a lot of really good trial lawyers in this country. I know a lot of them who fight for justice, for rights for the oppressed and for those who are down trodden. I am not referring to them. I am talking about those who are funding these vicious left-wing attacks on President Bush's judicial nominees, and there are plenty of them. They are loaded with dough, and they seem to want to manipulate the Federal bench like they have some of the State court benches. It is wrong.

Dennis Shedd is well qualified to serve on the Fourth Circuit Court of

Appeals. I think so, and the American Bar Association, hardly a bastion of conservative politics, has said so.

In supporting his confirmation, I for one express my gratitude on behalf of the American people for an entire life spent in public service.

One other letter I will read is a letter from the Congress of Racial Equality. It is written to Senator DASCHLE as of today's date. It reads as follows:

Dear Senator Daschle: This is an open letter in the interest of justice. The Congress of Racial Equality, CORE, enthusiastically endorses Judge Dennis Shedd for the Fourth Circuit Court of Appeals. Despite a Democratic filibuster against Judge Shedd—

And, of course, I am pleased there is not going to be a filibuster. I think that is very unwise, and I hope we do not stoop to that level on either side of the aisle. I thought we had overcome that propensity in the last number of years. There have been so few in the history of this body, I hope we do not stoop to that again.

The letter reads as follows:

DEAR SENATOR DASCHLE: This is an open letter in the interest of justice. The Congress of Racial Equality (CORE) enthusiastically endorses Judge Dennis Shedd for the Fourth Circuit Court of Appeals. Despite a Democratic filibuster against Judge Shedd, it is the strong opinion of CORE that Judge Shedd is a more than worthy candidate for the Fourth Circuit Court of Appeals.

Judge Shedd's character has been under attack without merit and without fair scrutiny of his service to the American legal system.

Prior to serving the bench, Judge Shedd served faithfully from 1988–1990 as Chairman of the South Carolina Advisory Committee to the U.S. Commission on Civil Rights. A fair and honest review of Judge Shedd's unpublished opinions would show that he has sided numerous times with plaintiffs in cases of race, gender and disability rights without falter or hesitation. In each case, his decisions have allowed employment discrimination lawsuits to go forward in the interest of fairness and truth.

Judge Shedd has shown his commitment to employment rights for minorities and women, particularly within the court. His efforts have championed the efforts to recruit and elect the first African-American U.S. Magistrate Judge in the South Carolina District, Margaret Seymour. He was actively sought minority and female candidates for other Magistrate Judge positions, and has directed the Selected Commission in South Carolina to bear in mind diversity in the selection of candidates for these positions.

Judge Dennis Shedd's accomplishments and service have transcended bi-partisan support even from his home state Senators, notably, Senators Strom Thurmond and Senator Ernest Hollings who wholly support his nomination.

In the interest of fairness, balance we ask you to look past the unfounded partisan attacks of propaganda against Judge Shedd and fairly examine his work for yourselves. We strongly believe Judge Shedd's accomplishments and contributions to justice and civil rights speaks for itself.

We hope that you would join CORE in our support of Judge Dennis Shedd and urge Senate Democrats to end the unfair filibuster against him. Let Judge Shedd have his day on the Senate floor

Sincerely,

NIGER INNIS,
National Spokesman.

Again, I am pleased there will be no filibuster against this worthy Federal district court judge who has served with distinction for the last 12 years. I caution this body, I hope we do not resort to filibusters on judicial nominees, as has been recommended by some notable left-wing law professors. Filibustering judicial nominations should not be done lightly, if at all. When we elect a President, we elect a President who will have the power to choose his or her judicial nominees. Senator's have a right to raise any issues against those nominees, so long as they are honestly raised.

In Judge Dennis Shedd's case, the outside groups have raised a lot of issues that are not honestly raised. I have not heard any criticisms against him that are valid in my judgment, and I know Judge Shedd personally and I have reviewed his complete record.

Just this morning, I received a letter from Joseph Anderson, chief judge for the District of South Carolina. It is noteworthy that Chief Judge Anderson was a Democratic member of the South Carolina Legislature before his appointment to the Federal bench. He served as a district court judge for 16 years and chief judge for the last 2 years. He and Judge Shedd have been suite-mates in the Federal courthouse in Columbia. For all of these reasons, he writes, he believes he is qualified to comment on Judge Shedd's abilities, qualifications, and reputation. Judge Anderson writes:

I can say without hesitation that Judge Shedd has a reputation for fairness, both in his community and on our court. As Chief Judge, I have received no complaints about his courtroom demeanor, his decisions, or his procedures. It is my considered opinion that all people who appear in his court receive a fair hearing, regardless of the type of cases involved, or the status of the parties in the case (plaintiff or defendant.)

The letter continues:

Judge Shedd is scrupulous in his dealings on the court. If there is any remote suggestion of the appearance of impropriety, he will not hesitate, and has not hesitated, to recuse himself and he is very consistent about this.

Chief Judge Anderson then addresses the quality of Judge Shedd's decisions. He says:

I regularly review the advance sheets of the United States Court of Appeal for the Fourth Circuit, and it would appear to me that Judge Shedd has an extremely good affirmance rate in that court.

He continues:

In regard to the issue of granting summary judgment or otherwise dismissing cases short of trial, it appears to me that Judge Shedd's record is no different from any other judge in this district. That is to say, some of his cases are ended by a ruling on summary judgment. Those that are not are then set for trial, and a great number of those eventually settle—which means that the plaintiff and defendant agree on the outcome. In regard to summary judgment decisions, settlements, and actual trials, Judge Shedd's statistics are not significantly different from any other judge in this district.

It is ridiculous to say that, because a judge has not granted summary judgments for plaintiffs, that he was not fair. In employment cases, often the entire contest is whether the plaintiff survives summary judgment, after which the case settles. And that is true in Judge Shedd's cases. Once a summary judgment is refused, that means the case is going to be tried by a judge or jury, and then the parties settled.

I ask unanimous consent that the letter from Chief Judge Anderson be printed in the RECORD.

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

U.S. DISTRICT COURT,
DISTRICT OF SOUTH CAROLINA,
Columbia, S.C., November 18, 2002.

In re Dennis W. Shedd, Nominee to Fourth Circuit Court of Appeals.

Senator ORRIN HATCH,
Ranking Republican Member, Judiciary Committee, U.S. Senate, Dirksen Senate Office Building, Washington, DC

DEAR SENATOR HATCH: This in response to your request that I provide information regarding Dennis W. Shedd, a judge on our court, who has been nominated for a position on the United States Court of Appeals for the Fourth Circuit. I have served as a United States District Judge for 16 years, the last two as Chief Judge for our district. I knew Judge Shedd prior to his appointment as U.S. District Judge, and, subsequent to his appointment, he and I have served as suite mates in the courthouse here in Columbia. I therefore, feel that I am qualified to comment on his abilities, qualifications, and reputation.

In response to your specific inquiries, I can say without hesitation that Judge Shedd has a reputation for fairness, both in his community and on our court. As Chief Judge, I have received no complaints about his courtroom demeanor, his decisions, or his procedures. It is my considered opinion that all people who appear in his court receive a fair hearing, regardless of the type of cases involved, or the status of the parties in the case (plaintiff or defendant).

Judge Shedd is scrupulous in his dealings on the court. If there is any remote suggestion of the appearance of impropriety, he will not hesitate, and has not hesitated, to recuse himself and he is very consistent about this.

I regularly review the advance sheets of the United States Court of Appeal for the Fourth Circuit, and it would appear to me that Judge Shedd has an extremely good affirmance rate in that court.

In regard to the issue of granting summary judgment or otherwise dismissing case short of trail, it appears to me that Judge Shedd's record is no different from any other judge in this district. That is to say, some of his cases are ended by a ruling on summary judgment. Those that are not are then set for trial and a great number of those eventually settle before the trial can be conducted. In regard to summary judgment decisions, settlements, and actual trials, Judge Shedd's statistics are not significantly different from any other judge in this district.

I hope this letter is responsive to your inquiry and if you need any additional information, please do not hesitate to let me know.

With kind personal regards.

JOSEPH F. ANDERSON, Jr.,
Chief United States District Judge.

Mr. HATCH. I believe this letter speaks volumes about Judge Shedd's fairness and dispels the completely unfounded criticism that Judge Shedd's

reversal rate or dismissal rate is somehow out of sync or cause for concern.

I have been on the Senate Judiciary Committee for 26 years. Most of my colleagues will say I have acted with fairness, honesty, and candor during those 26 years. Most would say I have done so as chairman of the committee when I have been chairman. I know Dennis Shedd. I know him very well. I worked closely with him and Senator THURMOND, as did many on the committee. I saw in Dennis Shedd a very scrupulously honest and decent man. I never saw one iota of evidence that he was anything but an honest and decent, honorable human being, with the respect for all people, regardless of race, religion, or origin—or any other reason. I can say this man served the committee well. He was chief of staff for the committee when Senator THURMOND was chairman. He got along well with everyone. He did his job, and did it well.

He has had experience in private practice. He has had experience in this legislative body that I don't think many staffers could match. He has had 12 years of experience on the Federal district court bench in South Carolina where the chief judge himself says he has distinguished himself.

I have bitterly resented some of the outside attacks which have come to be the norm in the case of President Bush's nominees. If a person is considered moderate to conservative or conservative, then automatically these groups start to attack some of these people. It is not right. I have had respect for a number of these groups in the past, but I have lost respect for them in the last couple of years with some of the arguments they have made and some of the cases they have tried to make and some of the distortions they have foisted upon the Senate Judiciary Committee. It is time to quit doing that. I would like to see the outside groups argue their cases well, argue their ideology well, do what they are organized to do, but do it honestly, do it fairly; do not destroy a person's reputation, as I think many have attempted to do here, and especially a person against whom you can find no real fault.

I know Dennis Shedd. He is an honorable, honest, competent, intelligent, former chief of staff of this committee but now Federal district judge in South Carolina. He deserves some respect in this body, and he deserves the vote of this body. I hope my colleagues will look past some of these unfortunate criticisms that are, in my opinion, dishonest, that we have shown to be distortions, and vote for Dennis Shedd tomorrow so that he can bring a greater element of ability to the circuit court of appeals.

Mr. President, contrary to some of the arguments made here today, it is clear to me that this debate is not so much about Judge Shedd, as it is about the purposeful delaying and denying of President Bush's judicial nominations.

The delay and speechmaking about Judge Shedd fits right into the pattern we have been seeing for almost two years.

Under Democrat control, the Senate has undertaken a systematic effort to treat President Bush and his judicial nominees unfairly. Some have attempted to justify this unfair treatment as tit-for-tat, or business as usual, but the American people should not accept such a smokescreen. What the Senate is doing is unprecedented.

Historically, a president can count on seeing all of his first 11 Circuit Court nominees confirmed. As you can see on this chart, Presidents Reagan, Bush and Clinton all enjoyed a 100 percent confirmation rate on their first 11 Circuit Court nominees. In stark contrast, 7 of President Bush's first 11 nominations are still pending at the close of President Bush's first Congress.

History also shows that Presidents can expect almost all of their first 100 nominees to be confirmed swiftly. Presidents Reagan, Bush and Clinton got 97, 95 and 97, respectively, of their first 100 judicial nominations confirmed. But the Senate has confirmed only 83 of President Bush's first 100 nominees.

Some try to blame Republicans for the current vacancy crisis. That is bunk. In fact, the number of judicial vacancies decreased by three during the 6 years of Republican leadership. There were 70 vacancies when I became chairman of the Judiciary Committee in January 1995, and there were 67 at the close of the 106th Congress in December 2000.

Some try to justify wholesale delays as payback for the past. That is also untrue. Look at the facts: During President Clinton's 8 years in office, the Senate confirmed 377 judges—essentially the same (5 fewer) as for Reagan (382). This is an unassailable record of non-partisan fairness, especially when you consider that President Reagan had 6 years of a Senate controlled by his own party, while President Clinton had only 2.

Finally, some might suggest that the Republicans left an undue number of nominees pending in Committee without hearings at the end of the Clinton administration. Well, we left 41, which is 13 less that the Democrats left without hearings in 1992 at the end of the Bush Administration.

So you see, Mr. President, what is happening to Judge Shedd fits into a pattern of unfairness that is not justified by any prior Republican actions.

President Bush deserves to be treated as well as the last three Presidents.

NOMINATIONS RECORD OF THE 107TH CONGRESS

My Democrat colleagues are apparently proud that in this Session, so far, the Senate has confirmed 99 judges. There is much eagerness in their voices in asserting that this number compares favorably to the last three sessions of Congress during which Republicans were in control of the Senate.

Although it is flattering that the Republican record under my leadership is being used as the benchmark for fairness, I am afraid that this does not make for a correct comparison because Republicans were never in control during President Clinton's first 2 years in office.

Let me repeat that, we were never in control during President Clinton's first 2 years in office. The proper comparison is not to the Republican record of the last 6 years of President Clinton, but to his first 2 years.

Despite the numbers that my colleague throws out in their comparison of apples to oranges.

Now, Mr. President I brought a visual. Here you see apples and oranges. It is fair to say that they are difficult to compare and that a comparison only leads the listener to conclude that they are both fruit. But they are not at all the same kind.

The fact remains that the Democrat achievement in this Session fails noticeably when properly compared, apples to apples.

During President Clinton's first Congress, when Senator BIDEN was the Chairman of the Judiciary Committee, the Senate confirmed 127 judicial nominees. And Senator BIDEN achieved this record despite not receiving any nominees for the first 6 months—in fact, Senator BIDEN's first hearing was held on July 20th of that year, more than a week later than the first hearing of this Session, which occurred on July 11, 2001.

Clearly, getting started in July of Year One is no barrier to the confirmation of 127 judges by the end of Year Two. But we have confirmed only 99 nominees in this Session.

Senator BIDEN's track record during the first President Bush's first 2 years also demonstrates how a Democrat-led Senate treated a Republican president. Then-Chairman BIDEN presided over the confirmation of all but 5 of the first President Bush's 75 nominees in that first two-year session. Chairman THURMOND's record is similar. The contrast to the present could hardly be starker.

We are about to close President Bush's first 2 years in office, having failed the standards set by Chairman BIDEN and Chairman THURMOND. That is nothing over which to be proud.

Mr. HOLLINGS. Mr. President, in South Carolina, Senator THURMOND and I have a long tradition of working cooperatively to nominate judges. Senator THURMOND has made good choices in the past, and he has done so again, with Judge Dennis Shedd, for elevation to the Court of Appeals for the Fourth Circuit.

Judge Shedd is familiar to many Members, having staffed the Judiciary Committee for several years, and of course serving as chief counsel and administrative assistant to Senator THURMOND himself.

He is a very smart and capable man. For more than a decade, he has been a

judge on the United States District Court for South Carolina, based in Columbia. He has a reputation as a hard worker on the bench, as a straightshooter, and one who is up-to-date on the laws. By special designation, he has sat on the Fourth Court on several occasions.

No judge now sitting on the Fourth Circuit has as much Federal trial experience. On the bench, he has handled 5,000 cases, and he has been reversed less than one percent in that entire time, an outstanding record of sound judgment.

I can say he has the support of a wide array of lawyers in South Carolina, and has received a well qualified rating by the American Bar Association.

I have a letter from Joseph Anderson, chief United States District Judge, who writes:

''I can say without hesitation that Judge Shedd has a reputation for fairness, both in his community and on our court. As Chief Judge, I have received no complaints about his courtroom demeanor, his decisions, or his procedures. It is my considered opinion that all people who appear in his court receive a fair hearing, regardless of the type of cases involved, or the status of the parties in the case.

And here is a letter from nine faculty members of the University of South Carolina School of Law, from which Judge Shedd graduated. After analyzing several of his cases they conclude: ''Judge Shedd's record on the Federal bench demonstrates that he is fair and impartial in all matters that come before him, including to plaintiffs in employment discrimination and civil rights cases. . . . In our view he will make an excellent addition to the Fourth Circuit.''

Let me acknowledge that the NAACP, and some others, have concerns with him. But I have looked into those situations, and I find them wanting with respect to specific inappropriate actions by Judge Shedd.

We in the law know that you never have a character witness come up and tell what he knows of his own association, but rather you bring witnesses who give testimony to his reputation in the particular community.

In that regard, having checked it out, Judge Shedd is my kind of judge. He is hard, he is tough, but he is hard and he is tough on both sides.

We who have practiced law before the courts, and know the score, and don't play games appreciate a judge who is not going to allow any games to be played on you.

I have said often that as much as we need a balanced budget, we need some balanced Senators, and some balanced judges.

I hope we can garner bipartisan support, and to see that this Judge is confirmed.

I ask unanimous consent to print the letters in the RECORD.

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

U.S. DISTRICT COURT,
DISTRICT OF SOUTH CAROLINA,
Columbia, SC, November 18, 2002.

In re Dennis W. Shedd, Nominee To Fourth Circuit Court of Appeals.

Senator ORRIN HATCH,
Ranking Republican Member, Judiciary Committee, U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This in response to your request that I provide information regarding Dennis W. Shedd, a judge on our court, who has been nominated for a position on the United States Court of Appeals for the Fourth Circuit. I have served as a United States District Judge for 16 years, the last two as Chief Judge for our district. I knew Judge Shedd prior to his appointment as U.S. District Judge, and, subsequent to his appointment, he and I have served as suite mates in the courthouse here in Columbia. I, therefore, feel that I am qualified to comment on his abilities, qualifications, and reputation.

In response to your specific inquires [I can say without hesitation that Judge Shedd has a reputation for fairness, both in his community and on our court. As Chief Judge, I have received no complaints about his courtroom demeanor, his decisions, or his procedures. It is my considered opinion that all people who appear in his court receive a fair hearing, regardless of the type of cases involved, or the status of the parties in the case (plaintiff or defendant).]

Judge Shedd is scrupulous in his dealings on the court. If there is any remote suggestion of the appearance of impropriety, he will not hesitate, and has not hesitated, to recuse himself and he is very consistent about this.

I regularly review the advance sheets of the United States Court of Appeal for the Fourth Circuit, and it would appear to me that Judge Shedd has an extremely good affirmance rate in that court.

In regard to the issue of granting summary judgment or otherwise dismissing cases short of trial it appears to me that Judge Shedd's record is not different from any other judge in this district. That is to say, some of his cases are ended by a ruling on summary judgment. Those that are not are then set for trial and a great number of those eventually settle before the trial can be conducted. In regard to summary judgment decisions, settlements, and actual trials, Judge Shedd's statistics are not significantly different from any other judge in this district.

I hope this letter is responsive to your inquiry and if you need any additional information, please do not hesitate to let me know.

With kind personal regards,

JOSEPH F. ANDERSON, Jr.,
Chief United States District Judge.

JUNE 26,2002.

Hon. JOHN R. EDWARDS,
U.S. Senate,
Washington, DC.

DEAR SENATOR EDWARDS: We write to you as individual members of the faculty at the University of South Carolina School of Law. We are concerned that professors from law schools in your state recently may have provided you with inaccurate information regarding United States District Court Judge Dennis Shedd, whose nomination to the Fourth Circuit Court of Appeals is scheduled for a hearing in the Senate Judiciary Committee this week. As members of the academic legal community in South Carolina, we wish to set the record straight on Judge Shedd's record on the bench, and to urge your approval of this well-qualified nominee.

Contrary to claims made by his opponents, Judge Shedd's record in cases involving state sovereignty and the scope of congressional authority reflects that he has taken a fair and balanced approach to these issues and is well within the accepted mainstream among federal judges. On the difficult issue of whether Congress had authority under the Commerce Clause to enact the Driver's Privacy Protection Act (DPPA), Judge Shedd concluded, after careful analysis of existing case law, the DPPA violated the Tenth Amendment in that it commanded states to implement federal policy in violation of Supreme Court precedent, *New York v. United States*, 515 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). *See Condon v. Reno*, 972 F.Supp. 977 (D.S.C. 1997).

While the Supreme Court ultimately ruled that DPPA represented a valid exercise of Congress' Commerce Clause power, 7 of the other 15 lower court judges to consider the issue prior to the Court's decision agreed with Judge Shedd. Among those were Judge Barbara Crabb, the Chief Judge of the Western District of Wisconsin and an appointee of President Jimmy Carter, and John Godbold of the 11th Circuit, a Johnson appointee. In addition, several governors, including Governor Jim Hunt of North Carolina, authorized their attorneys general to file amicus briefs in *Condon* urging the Supreme Court to uphold Judge Shedd's ruling and to declare the law unconstitutional. To us, the disagreement among lawyers, judges and scholars regarding whether DPPA was constitutional in the wake of the Supreme Court's decisions in *Printz* and other opinions reflects the difficult question presented in this case. Judge Shedd's opinion represents a reasoned (albeit later overruled) approach to that question.

On the issue of state immunity under the Eleventh Amendment, opponents have cited Judge Shedd's opinion in the case of *Crosby* v. *South Carolina Dep't of Heath*, C.A. No. 3:97–3588–19BD, as an example of his ''highly protective views'' of state sovereignty. In *Crosby*, Judge Shedd in an unpublished opinion found that the 11th Amendment protected states from lawsuits in federal court under the Family and Medical Leave Act (FMLA). Contrary to the claims of his critics, Judge Shedd's opinion in *Crosby* is well within the mainstream of recent Eleventh Amendment jurisprudence. In fact, eight of the nine Circuit Courts of Appeals to decide the issue of whether the FMLA applied to state agencies have agreed with Judge Shedd's ruling in *Crosby*. *See Laro v. New Hampshire*, 259 F.3d 1 (1st Cir 2001); *Hale v. Mann*, 219 F.3d 61 (2nd Cir 2000); *Chittister v. Dept. Community and Econ. Dev.*, 226 F.3d 223 (3rd Cir 2000); *Lizz v. WMATA*, 255 F.3d 128 (4th Cir 2001); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir 2000); Sims v. Cincinnati, 219 F.3d 559 (6th Cir 2000); *Townsell v. Missouri*, 233 F.3d 1094 (8th Cir 2000); *Garrett v. UAB Board of Trustees*, 193 F.3d 1214 (11th Cir 1999). In fact, the Fourth Circuit opinion on this issue was joined by recent Bush appointee Roger Gregory, who was unanimously approved by the Judiciary Committee and unanimously confirmed by the full Senate. *See Lizzi v. WMATA*, 255 F.3d 128 (4th Cir 2001).

Those less familiar with Judge Shedd's record also may not be aware of his opinion in another case involving the scope of Congress' authority under the Commerce Clause. In *United States v. Floyd Brown*, Crim. No. 94–168–19, Judge Shedd in an unpublished opinion rejected a criminal defendant's constitutional challenge to the Gun Free School Zones Act, finding that the prosecution could prove facts at trial that would support some basis for federal jurisdiction under the statute. Consequently, Judge Shedd found that the Act represented a valid exercise of congressional authority under the Commerce Clause. The Supreme Court later disagreed with Judge Shedd and struck down the Act

in a controversial 5–4 decision. See *United States v. Lopez*, 514 U.S. 549 (1995). Nonetheless, Judge Shedd's opinion in *Brown* demonstrates that he is far from the ''sympathetic participant in the campaign to disempower Congress'' that his detractors have alleged.

Even more disturbing than their criticism of Judge Shedd's record on federalism issues is the North Carolina law professors' distortion of his record in civil rights and employment discrimination cases. While we will not address each and every mischaracterization contained in their recent letter to you, suffice it to say that those professors clearly have not provided you with the full picture of Judge Shedd's record.

For example, the assertion that Judge Shedd has never granted relief in an employment discrimination case and that he inappropriately uses Rule 56 summary judgment in these cases in misleading and inaccurate. As you must know from your career as a litigator, when a case proceeds beyond the summary judgment stage, the likelihood of settlement in that case increases exponentially. Moreover, an extremely high percentage of employment discrimination cases around the country are disposed of by summary judgment either because the courts consider the claims not to be meritorious or because the plaintiff failed to meet the minimal requirements set by statute and judicial precedent. We understand that Judge Shedd has repeatedly denied summary judgment to defendants in employment discrimination and civil rights cases. In addition, we are aware of only two instances in which the Fourth Circuit has overturned Judge Shedd in employment discrimination cases during his almost twelve-year career on the bench.

For your information, we wanted you to be aware of a few of the cases (among many) where Judge Shedd allowed plaintiffs to proceed past the summary judgment stage in civil rights and employment cases:

In *Miles v. Blue Cross & Blue Shield*, C.A. No. 3:94–2108–19BD, Judge Shedd denied defendant Blue Cross & Blue Shield's motion for summary judgment in a case brought under Title VII of the Civil Rights Act, where an African-American employee alleged that she was fired because of her race. The case included allegations that the plaintiff's supervisor used racially disparaging remarks on several occasions. The supervisor also allegedly stated that he did not want an African-American to hold the position held by the plaintiff.

In *Davis v. South Carolina Department of Health*, C.A. No. 3:96–1698–19BD, Judge Shedd refused to dismiss a Title VII lawsuit by an African-American employee who claimed that she was denied a promotion because of her race. The case involved allegations that the company promoted an unqualified white employee, and that a supervisor who participated in the decision not to promote the plaintiff had made racially disparaging remarks to her.

In *Ruff v. Whiting Metals*, C.A. No. 3:98–2627–19BD, Judge Shedd refused to dismiss a Title VII race discrimination case brought by an African-American welder after he was laid off. The case involved allegations that supervisors repeatedly made racial statements in the workplace, and that one supervisor claimed that he was going to use the pending layoffs to ''get rid of some'' African-American employees.

In *Black v. Twin Lakes Mobile Homes*, C.A. No. 0:97–3971–19, Judge Shedd denied summary judgment for the defendant, an owner of a mobile home park who sought to evict an HIV-positive tenant because of his medical condition. Shedd's ruling allowed the plaintiff's lawsuit alleging discrimination under the Fair Housing Act to go forward.

In addition to the above cases, Judge Shedd also has presided over three cases where the NAACP has alleged violations of the Voting Rights Act in which the NAACP prevailed. *NAACP* v. *Lee County*, C.A. No. 3:94–1575–17; *NAACP* v. *Holly Hill*, C.A. No. 5:91–3034–19; *NAACP* v. *Town of Elloree*, C.A. No. 5:91–3106–06. Far from displaying a hostility to civil rights and employment discrimination cases, Judge Shedd's record demonstrates that he is a judge who keeps an open mind, applies the law to the facts, and treats all parties fairly.

In sum, as members of the academic legal community in South Carolina [we can unequivocally state that Judge Shedd's record on the federal bench demonstrates that he is fair and impartial in all matters that come before him, including to plaintiffs in employment discrimination and civil rights cases. In addition, his career on the bench and as a staff member of the United States Senate shows that he has a clear understanding of and appropriate deference to Congress' legislative powers. In our view, he will make an excellent addition to the Fourth Circuit, and we urge you to support his nomination.

Sincerely,

F. Ladson Boyle; David G. Owen; S. Allen Medlin; Howard B. Stravitz; William J. Quirk; Randall Bridwell; Ralph C. McCullough II; Dennis R. Nolan; Robert M. Wilcox.

Mr. COCHRAN. Mr. President, I support the confirmation of Judge Dennis W. Shedd of South Carolina as U.S. Circuit Judge for the Fourth Circuit.

Judge Shedd has served more than 10 years as a United States District Judge for the District of South Carolina where he has earned a reputation for sound judgement and fairness. Prior to his appointment to the Federal bench, Judge Shedd spent nearly 20 years in the practice of law and public service, including ten years as a staff member of U.S. Senator STROM THURMOND. During his tenure in the Senate, Judge Shedd served as Counsel to the President Pro Tempore as well as Chief Counsel and Staff Director of the Senate Judiciary Committee.

While serving on the Federal bench, Judge Shedd has been a member of the Judicial Conference Committee on the Judicial Branch and its subcommittee on Judicial Independence. He has also participated in community activities where he has helped organize and promote drug education programs in the Columbia, SC public schools.

Judge Shedd has handled more than 4,000 civil cases and over 900 criminal matters. No judge currently sitting on the Fourth Circuit has as much Federal trial experience. In the thousands of cases Judge Shedd has handled, he has been reversed fewer than 40 times—less than one percent. In addition, a majority of the ABA's Standing Committee on the Judiciary rated Judge Shedd ''Well Qualified.''

I believe Judge Shedd has demonstrated the character, wisdom, and judicial temperament needed to be an outstanding judge on the Federal appellant bench. I encourage my colleagues to support his nomination.

Mr. THURMOND. Mr. President I am greatly pleased that the full Senate is considering the nomination of Judge Dennis Shedd to the United States Court of Appeals for the Fourth Circuit. Judge Shedd is a man of impeccable character who will make an outstanding addition to the Federal appellate bench. He possesses the highest sense of integrity, a thorough knowledge of the law, and a good judicial temperament. These qualifications have earned Judge Shedd widespread respect and bipartisan support in my home State of South Carolina. In addition to Republican support, Senator ERNEST HOLLINGS and State Democratic Party chairman Dick Harpootlian have endorsed his nomination.

I am exceedingly proud of Dennis Shedd. He was a loyal employee of mine for 10 years and is very deserving of this high honor. Judge Shedd has been successful at every stage of his professional life and has dedicated most of his career to public service. Upon graduation from the University of South Carolina School of Law, he joined my staff and eventually served as administrative assistant. Thereafter, during my tenures as chairman and ranking member of the Judiciary Committee, he served as the committee's chief counsel and staff director. As a staff member, he gained a well-deserved reputation for honesty and hard work.

Upon returning to South Carolina, Judge Shedd entered the private practice of law and also served as an adjunct law professor at the University of South Carolina. In 1990, President Bush nominated Dennis Shedd to the United States District Court for the District of South Carolina, and he has served ably for more than a decade. On numerous occasions, Judge Shedd has been given the honor of sitting on the Fourth Circuit by designation.

Judge Shedd's performance on the district court has been marked by distinction. He has been assigned more than 5,000 cases during almost 12 years on the bench. Out of all these cases, he has only been reversed 37 times, resulting in a reversal rate of less than 1 percent. These numbers indicate both the skilled legal mind and the thorough preparation that he will bring to the Fourth Circuit. Judge Shedd also possesses a good judicial temperament, treating all litigants in his courtroom with dignity and respect.

Unfortunately, some groups have portrayed Judge Shedd's judicial career in a negative light. I would like to take a moment to address these allegations and concerns. An examination of Judge Shedd's record indicates that he is not only fair and impartial, but personally dedicated to upholding the constitutional rights of all people.

Judge Shedd has been criticized for his handling of Alley v. South Carolina, a lawsuit wherein the plaintiffs sought to remove the Confederate flag from atop the statehouse dome in Columbia, SC. The South Carolina NAACP has asserted that Judge Shedd ''made several derogatory comments about those opposing the flag, and

minimized the deep racial symbolism of the Confederate flag by comparing it to the Palmetto tree, which appears in South Carolina's state flag.''

These allegations are misleading and inaccurate. A close look at the transcript of the hearing reveals that Judge Shedd made a point of saying that his comments were not meant to be disparaging. In fact, he said, ''I'm not going to denigrate the constitutional claim abut the Confederate flag.'' Furthermore, Judge Shedd never ruled on the merits of the case. Rather, he abstained to allow a claim to go forward in State court, arguably the forum better equipped to handle the issue.

Additionally, it is important to note that Judge Shedd's comments about the Palmetto tree were made during his examination of the lawyer's legal argument in the case. The argument hinged on the offensive nature of the Confederate flag, and Judge Shedd pointed out that many symbols could be perceived as offensive, such as the Palmetto tree on the State flag. Judge Shedd then stated, ''I'm not determining now on whether or not the flag should be there at all. I'm just doing what—you lawyers have been with me before know, I'm exploring your legal theory.'' In this case, Judge Shedd was simply engaging in the Socratic method with the lawyers, and his words should not be twisted to insinuate any personal feelings about the propriety of flying the Confederate flag over the statehouse dome.

I would like to point out the case of Vanderhoff v. John Deere, the one case involving the Confederate flag in which Judge Shedd did rule. In that case, an employee was fired because he refused to comply with company policy and remove the Confederate flag from his toolbox. The employee sued under title VII, a statute designed to prohibit workplace discrimination based on race, sex, religion, and national origin. He argued that his national origin was a ''Confederate Southern American'' and that he had been the subject of discrimination. Judge Shedd rejected this argument and dismissed the plaintiff's claim. Thus, on the one Confederate flag case where he ruled on the merits, Judge Shedd's decision went against a flag proponent.

In recent weeks, Judge Shedd has been the subject of vicious attacks based on his handling of employment discrimination cases. Over and over again, we have head the accusation that Judge Shedd shows a bias towards defendants. A review of Judge Shedd's record indicates that he has been fair to the civil rights claims of plaintiffs in his courtroom. In fact, Judge Shedd has only been reversed two times in employment discrimination cases. With such a low reversal rate, I am disappointed that some groups have insisted on attacking this fine judge.

One commonly cited case is Roberts v. Defender Services, in which Judge Shedd dismissed a plaintiff's sexual harassment claim. In this case, Judge Shedd merely followed the law as established by the Supreme Court, which held in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), that the work environment must be both objectively and subjectively offensive. While the plaintiff had clearly shown that the work environment was objectively offensive, Judge Shedd determined that she had not made a showing that she perceived it to be offensive. He based his determination on the fact that she had recommended the position to someone else and stated that the employer was ''a nice person'' who was ''pretty good to work for.'' These comments by the plaintiff demonstrate that Judge Shedd's decision was reasonable under the circumstances of this case.

The truth is that Judge Shedd has issued rulings that have benefitted plaintiffs on numerous occasions. For example, in Miles v. Blue Cross & Blue Shield, C.A. No. 3:94–2108–19BD, an action was brought under title VII of the Civil Rights Act by an African-American employee who alleged that she was fired because of her race. There was ample evidence that the plaintiff had been subjected to racial slurs before being fired. Judge Shedd appropriately denied the defendant employer's motion for summary judgment.

In another case, Davis v. South Carolina Department of Health and Environmental Control, C.A. No. 3:96–1698–19BD, an action was brought under title VII by an African-American employee who alleged that she was denied a promotion because of her race. There was evidence that an unqualified white employee had been promoted and that racially disparaging remarks had been made. Judge Shedd followed the law and denied the defendant employer's motion for summary judgment. Again in Ruff v. Whiting Metals, C.A. No. 3:98–2627–19BD and Williams v. South Carolina Department of Public Safety, C.A. No. 3:99–976–19BC, Judge Shedd denied a defendant's motion for summary judgment on race discrimination claims.

In the case of Treacy v. Loftis, C.A. No. 3:92–3001–19BD, Judge Shedd, overruling a magistrate judge's recommendation, declined to grant summary judgment on a fired employee's claim of intentional infliction of emotional distress. In that case, the plaintiff claimed that her job was terminated due to her involvement in an interracial relationship. Judge Shedd, in refusing to grant summary judgment, allowed the case to go forward.

There are many other cases like these. Judge Shedd's record reveals that he has upheld important rights protected by the Constitution. If elevated to the Fourth Circuit, Judge Shedd will continue to protect civil liberties.

In addition to Judge Shedd's proven record of protecting civil rights, he has personally dedicated himself to providing equal opportunities for women and minorities. As an example, Judge Shedd served as chairman of the South Carolina Advisory Committee to the U.S. Commission on Civil Rights. He also played an instrumental role in the selection of Margaret Seymour as the first female African-American U.S. magistrate judge in the district of South Carolina. When Judge Seymour was nominated by President Clinton to the district court, Judge Shedd fully supported her nomination. Furthermore, Judge Shedd has hired both African-American and female law clerks.

I would like to turn to another accusation that has been leveled against Judge Shedd. He has been accused of espousing an unreasonably narrow interpretation of congressional power based on his decision in Condon v. Reno, 972 F.Supp. 977 (1997), in which he struck down the Driver's Privacy Protection Act. The act regulated the dissemination of State motor vehicle record information, and the State of South Carolina challenged its constitutionality. Judge Shedd ruled that under Supreme Court precedent, the act violated the 10th amendment by impermissibly commandeering State governments, forcing them to regulate in a specific fashion. The Fourth Circuit upheld this decision, Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), but the Supreme Court ultimately reversed. Reno v. Condon, 120 S.Ct. 666 (2000).

I stress that this case was one of first impression. Given the U.S. Supreme Court opinions in New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997), Judge Shedd's ruling was entirely reasonable. In a very persuasive opinion, he compared the Drivers Privacy Protection Act with those acts invalidated in New York and Printz and found it to have similar constitutional defects.

Judge Shedd was not alone in his analysis. At least one liberal commentator, Erwin Chemerinsky, concluded that the Supreme Court's distinction of the Drivers Privacy Protection Act from the statutes struck down in New York and Printz was unconvincing. While Chemerinsky agreed with the final outcome of the case, he has argued that the Supreme Court should have overruled both New York and Printz in order to reach its decision in Reno. Professor Chemerinsky's argument lends support to the proposition that Judge Shedd, in striking down the statute, was correct in his interpretation of the law at that time.

In addition, of the 16 lower Federal court judges who considered the constitutionality of DPPA, 8 determined that the statute was unconstitutional. In short, there is nothing to indicate that Judge Shedd's decision in this case was out of the mainstream.

Another case that has been cited is Crosby v. U.S., in which Judge Shedd held that the plaintiff's claim under the Family and Medical Leave Act was barred by the 11th amendment to the Constitution. Judge Shedd's detractors have argued that this case is another example of his narrow view of congressional power. However, this accusation

is unfair and unwarranted. In this case, Judge Shedd sought to follow the law as established by the Supreme Court. He was not attempting to make new law, but was instead seeking to apply the law correctly. Furthermore, Judge Shedd was not alone in his decision. Out of nine circuit courts that have considered this same question, eight have agreed with Judge Shedd. It is worth noting that Judge Roger Gregory, originally appointed by President Clinton, joined the Fourth Circuit's opinion that agreed with Judge Shedd's ruling.

Judge Shedd has also been criticized as being antiplaintiff for disposing of matters sua sponte, or on his own motion. This charge is without merit for a number of reasons. First, Federal judges face enormous caseloads. If an area of the law is clear, it is completely proper for the judge to act on his own motion, helping to move litigation along and clear the dockets. Second, the law clearly allows for district court judges to consider matters without prompting from lawyers. The Supreme Court has acknowledged this, stating in Celotex Corp. v. Catrett, 830 F.2d 1308 477 U.S. 317, 326 (1986), that district courts may grant summary judgment sua sponte to a party that has not moved for summary judgment. As long as a judge is acting properly, which Judge Shedd has always done, sua sponte decisions are entirely appropriate.

I have known Judge Dennis Shedd for over 24 years and can personally vouch for his integrity and high moral character. He is truly a man of knowledge, ability, and superior ethical standards. Judge Shedd will bring a wealth of trial experience to the Fourth Circuit, having handled more than 4,000 civil cases and over 900 criminal matters. In addition, he possesses unmatched legislative experience. It is no surprise that the American Bar Association gave Judge Shedd a rating of ''Well Qualified.'' I am proud to support my friend, Dennis Shedd, and I hope to see him confirmed to the United States Court of Appeals for the Fourth Circuit. I ask unanimous consent that the attached materials be printed in the RECORD.

DENNIS W. SHEDD—NOMINEE TO THE FOURTH CIRCUIT COURT OF APPEALS

Background. Appointed by President George H.W. Bush to the United States District Court for South Carolina in 1990, Dennis W. Shedd has served as a federal jurist for more than a decade.

In addition to his service on the District Court, he sat by designation on the Fourth Circuit Court of Appeals on several occasions. Shedd also has served on the Judicial Conference Committee of the Judicial Branch and its Subcommittee on Judicial Independence.

From 1978 through 1988, Judge Shedd served in a number of different capacities in the United States Senate, including Counsel to the President Pro Tempore and Chief Counsel and Staff Director for the Senate Judiciary Committee.

Judge Shedd is well-respected by members of the bench and bar in South Carolina. According to South Carolina plaintiffs' attorney Joseph Rice, ''Shedd—who came to the bench with limited trial experience—has a good understanding of day-to-day problems that affect lawyers in his courtroom. . . . He's been a straight shooter.'' Legal Times, May 14, 2001.

According to the Almanac of the Federal Judiciary, attorneys said that Shedd has outstanding legal skills and an excellent judicial temperament. A few comments from South Carolina lawyers; ''You are not going to find a better judge on the bench or one that works harder.'' ''He's the best federal judge we've got.'' He gets an A all around.'' It's a great experience trying cases before him.'' ''He's polite and businesslike.''

Plaintiff lawyers commended Shedd for being even-handed; ''He has always been fair.'' ''I have no complaints about him. He's nothing if not fair.'' Almanac of the Federal Judiciary, Vol. 1, 1999.

Judge Shedd would bring unmatched experience to the Fourth Circuit. He has handled more than 4,000 civil cases since taking the bench and over 900 criminal matters. In fact, no judge currently sitting on the Fourth Circuit has as much federal trial experience as Judge Shedd, and none can match his ten years of experience in the legislative branch.

Shedd's record demonstrates that he is a mainstream judge with a low reversal rate. In the more than 5,000 cases Judge Shedd has handled during his twelve years on the bench, he has been reversed fewer than 40 times less than one percent). Since taking his seat on the Fourth Circuit in 2001, Judge Roger Gregory (a Democrat appointed by President Bush) has written opinions affirming several of Judge Shedd's rulings. Judge Gregory also agreed with Judge Shedd's holding in Crosby v. South Carolina Dep't of Health (case cited by Judge Shedd's opponents) that Congress did not effectively abrogate State sovereign immunity in the Family and Medical Leave Act. See Lizzi v. WMATA, 255 F.3d 128 94th Cir. 2001.

Judge Shedd has been completely forthcoming with the Senate Judiciary Committee's requests for information. Earlier this year, Judge Shedd sent nearly one thousand unpublished opinions to the Committee for review immediately after Chairman Leahy requested them. Judge Shedd has continued to provide additional unpublished opinions, as well as all other information the Committee has requested regarding his rulings, opinions and judicial record generally.

Judge Shedd has bi-partisan support from his home state Senators; Senators Thurmond and Hollings support his nomination.

A majority of the ABA's Standing Committee on the Judiciary rated Judge Shedd ''Well Qualified.'' Democrats have called the ABA rating the ''gold standard'' for judicial nominees.

ROSENBERG PROUTT FUNK & GREENBERG, LLP,
Baltimore, MD, June 25, 2002.

Senator PATRICK LEAHY,
Chairman, U.S. Senate Judiciary Committee, the Dirksen Building, Washington, DC.

DEAR SENATOR LEAHY: My name is Thomas W. Jones, Jr. I am an African-American attorney currently practicing as a litigation associate in Baltimore, Maryland.

Upon my graduation from the University of Maryland School of Law, I had the distinct pleasure of serving as a judicial clerk for the Honorable Dennis W. Shedd (''Judge Shedd'') on the U.S. District Court for the District of South Carolina. During my eighteen months of working with Judge Shedd, I never encountered a hint of bias, in any form or fashion, regarding any aspect of judge Shedd's jurisprudence or daily activities.

It is apparent to me that the allegations regarding Judge Shedd's alleged biases have been propagated by individuals without the benefit of any real, meaningful interaction with Judge Shedd, his friends or family members. I trust the accusations of bias levied against Judge Shedd will be given the short shrift they are due, and trust further that this honorable Committee will act favorably upon the pending nomination of Judge Shedd for the United States Court of Appeals for the Fourth Circuit.

Thank you for your attention regarding this matter.

Respectfully,

THOMAS W. JONES, JR.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, September 13, 2002.

JAMES GALLMAN,
President, SCNAACP,
Columbia, SC.

DEAR PRESIDENT GALLMAN: Thank you very much for your interest in the nomination of Judge Dennis Shedd to the United States Court of Appeals for the Fourth Circuit. I want to assure you that Judge Shedd is an outstanding Federal Judge, and he is committed to upholding the rights of all people under the Constitution. Rather than being hostile to civil rights, as his detractors have claimed, Judge Shedd is committed to the ideals of equal justice under the law. I am confident that upon an examination of his record, you will find that Dennis Shedd is eminently qualified, applies the law fairly, and exhibits an appropriate judicial temperament.

I would like to address your concerns regarding Judge Shedd's civil rights record. I believe that it is commendable in all respects. First of all, Judge Shedd has been accused of granting summary judgment for defendants in almost every case. This accusation is false. A review of Judge Shedd's record indicates that he has been fair to the civil rights claims of plaintiffs in his courtroom. In fact, he has issued rulings that have benefitted plaintiffs on numerous occasions. For example, in Miles v. Blue Cross & Blue Shield, C.A. No. 3:94–2108–19BD, an action was brought under Title VII of the Civil Rights Act by an African-American employee who alleged that she was fired because of her race. There was ample evidence that the plaintiff had been subjected to racial slurs before being fired. Judge Shedd appropriately denied the defendant employer's motion for summary judgment.

In another case, Davis v. South Carolina Department of Health and Environmental Control, C.A. No. 3:96–1698–19BD, an action was brought under Title VII by an African-American employee who alleged that she was denied a promotion because of her race. There was evidence that an unqualified white employee had been promoted and that racially disparaging remarks had been made. Judge Shedd followed the law and denied the defendant employer's motion for summary judgment. Again in Ruff v. Whiting Metals, C.A. No. 3:98–2627–19BD and Williams v. South Carolina Department of Public Safety, C.A. No. 3:99–976–19BC, Judge Shedd denied a defendant's motion for summary judgment on race discrimination claims.

In the case of Treacy v. Loftis, C.A. No. 3:92–3001–19BD, Judge Shedd, overruling a magistrate judge's recommendation, declined to grant summary judgment on a fired employee's claim of intentional infliction of emotional distress. In that case, the plaintiff claimed that her job was terminated due to her involvement in an interracial relationship. Judge Shedd, in refusing to grant summary judgment, allowed the case to go forward.

Judge Shedd has also been accused of making insensitive remarks about the Confederate flag during proceedings in the case of

Alley v. South Carolina, C.A. No. 3:94–1196–19. a lawsuit in which the plaintiffs sought to remove the Confederate flag from atop the Statehouse dome. These allegations are misleading and inaccurate. A close look at the transcript reveals that Judge Shedd made a point of saying that his comments were not meant to be disparaging. In fact, he said, ''I'm not going to denigrate the constitutional claim about the Confederate flag.'' Judge Shedd went on to say, ''I'm not determining now on whether or not the flag should be there at all. I'm just doing what-you lawyers have been with me before know, I'm exploring your legal theory.''. The transcript clearly indicates that Judge Shedd was questioning the lawyers about their arguments in this case, something that is done every day in courtrooms across the nation. Furthermore, Judge Shedd never ruled on the merits of the case. Rather, he abstained to allow a claim to go forward in state court, arguably the forum better equipped to handle the issue.

I would like to point out the case of Vanderhoff v. John Deere, C.A. No 01–0406–19BD, the one case involving the Confederate flag in which Judge Shedd did rule. In that case, an employee was fired because he refused to comply with company policy and remove the Confederate flag from his toolbox. The employee sued under Title VII, a statute designed to prohibit workplace discrimination based on race, sex, religion, and national origin. He argued that his national origin was a ''Confederate Southern American'' and that he had been the subject of discrimination. Judge Shedd rejected this argument and dismissed the plaintiff's claim. Thus, in the one Confederate flag case where he ruled on the merits, Judge Shedd's decision went against a flag proponent.

In addition to Judge Shedd's demonstrated fairness in the civil rights arena, he has shown that he is personally committed to ensuring equal opportunities for women and minorities. He was instrumental in the selection of Judge Margaret Seymour, now a Federal District Court Judge, as the first African-American female magistrate judge in the District of South Carolina. He has also made an effort to hire African-American and female law clerks. In fact, Thomas Jones, an African-American man who clerked for Judge Shedd, wrote a letter to Senator Leahy in which he said that the allegations made against Judge Shedd should ''be given the short shrift they are due . . . .''

Next, I would like to address the concerns raised by the case of Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997), in which Judge Shedd held that the Driver's Privacy Protection Act (DPPA) was unconstitutional. He was eventually reversed by the Supreme Court. Reno v. Condon, 528 U.S. 141 (2000). It is important to stress that this case was one of first impression. Given the United States Supreme Court opinions in New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997), Judge Shedd's ruling was entirely reasonable. In a very persuasive opinion, he compared DPPA with those Acts invalidated in New York and Printz and found it to have similar constitutional defects.

While the Supreme Court ultimately disagreed with Judge Shedd, his opinion was not outside of the mainstream. Of the 16 lower Federal court judges who considered the constitutionality of DPPA, 8 determined the statute unconstitutional. Some of these judges, such as Judge Barbara Crabb and Judge John Godbold, were nominated by Democratic presidents.

In summary, I believe that Judge Shedd is a highly qualified candidate who will make an excellent addition to the United States Court of Appeals for the Fourth Circuit. It is a shame that he has been characterized as a judge with an agenda to curtail civil rights. On the contrary, Judge Shedd has demonstrated that he will apply the law fairly to all people. In addition, he has received a rating of ''Well Qualified'' by the American Bar Association, and he has the support of South Carolina Democrats, such as Senator Fritz Hollings and state Democratic Party Chairman Dick Harpootlian.

I hope that this information is helpful during your further consideration of Judge Shedd, and I hope that you will join me in support of this fine man. I have known Judge Shedd for a long time, and he is in all respects an honorable public servant. Again, thank you for your interest.

With kindest regards and best wishes,

Sincerely,

STROM THURMOND.

U.S. SENATE
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 30, 2002.

LETTERS TO THE EDITOR,
The New York Times,
New York, NY.

DEAR EDITOR: This letter is in response to the editorial that appeared in your paper on July 28, 2002, entitled ''The Secret History of Judges.'' The piece questioned whether Judge Dennis Shedd, whom President Bush nominated to the U.S. Court of Appeals for the Fourth Circuit, has adequately supplied the Senate Judiciary Committee with all relevant information regarding his 11 years as a Federal District Court Judge. I can assure you that Judge Shedd has been thoroughly responsive to Committee requests and has provided an extraordinary amount of material. In fact, to the best of my knowledge, there is simply nothing left for him to hand over. This tired call for more information is nothing more than a delay tactic being utilized by political groups that oppose most of President Bush's judicial nominees, even when the nominees are, like Judge Shedd, extremely well-qualified.

All interested parties have had ample time to examine Judge Shedd's record. On June 27, 2002, Judge Shedd testified before the Committee for more than two hours, during which time he answered all questions asked of him. After the hearing, individual Senators had the opportunity to submit questions, and Judge Shedd prepared written responses to questions from six Senators.

Previously, on March 22, 2002, the Committee requested all of Judge Shedd's ''unpublished'' opinions. To fulfill this extremely broad request, as many as a dozen district court employees were required to undertake an extensive and time-consuming manual search of case files within the district as well as an electronic search of available computer records. Within 12 days, Judge Shedd provided a first set of documents to the Committee. As Judge Shedd was able to secure additional documents from out-of-state court storage, he supplemented his initial response with a second set of documents on May 20, 2002. In summary, Judge Shedd expeditiously supplied the Committee with more than 13,000 pieces of paper. Therefore, all documents responsive to this request have been available to Committee members for a significant period of time.

Although it has been suggested that Judge Shedd had not provided the appropriate documentation, the record will reflect that Judge Shedd has diligently worked to produce all documents, of which he and other court employees are aware, that satisfy the Committee request. While Judge Shedd has been assigned some 5,000 civil cases, many of these cases included routine matters, such as foreclosures, and have ended without any substantive ruling by Judge Shedd. Likewise, cases are often referred to Federal magistrate judges who make reports and recommendations to the District Court Judge. While Judge Shedd has received some 1,400 reports from magistrate judges, many of these are on non-substantive issues. I can assure you that the opinions Judge Shedd has supplied represent, to the best of his knowledge, all of his substantive ''unpublished'' opinions.

Your editorial asserts that civil rights groups have identified ''important rulings by Judge Shedd that have not been handed over.'' I have previously requested that these groups identify the particular cases in which they are interested, but they have yet to do so. I would once again urge these groups to identify the cases that cause them concern, and Judge Shedd will be happy to locate any information on these cases that will assist Committee members as they evaluate his nomination.

In short, Judge Shedd has acted promptly, professionally, and in good faith in his dealings with the Senate Judiciary Committee. His record is as complete as any other circuit nominee we have ever had before the Committee. There simply is no justifiable basis to clam that he has failed to respond to Committee requests.

It is my sincere hope that Judge Dennis Shedd will soon be confirmed as a Federal Circuit Court Judge. He is a fine man who has performed ably on the Federal bench for more than a decade. He has responsively provided the Senate Judiciary committee with documentation that chronicles his career as a distinguished jurist. Quite simply, Judge Shedd's record is complete, and it proves that he is committed to upholding the rights of all people under the Constitution.

Sincerely,

STROM THURMOND.

FAIRNESS: JUDGE SHEDD'S ABA ''WELL QUALIFIED'' RATING—THE ABA RATED JUDGE SHEDD ''WELL QUALIFIED'' FOR THE FOURTH CIRCUIT

According to the ABA Standing Committee on Federal Judiciary, a nominee is evaluated on ''integrity, professional competence, and judicial temperament.''

''Integrity is self-defining. The prospective nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence.''

''In investigating judicial temperament, the Committee considers the prospective nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.''

''To merit Well Qualified, the prospective nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, wide experience, the highest reputation for integrity and either have shown, or have exhibited the capacity for, judicial temperament, and have the committee's strongest affirmative endorsement.''

Source: The ABA Standing Committee on Federal Judiciary: What It Is and How It Works, American Bar Association (July 1999) (pages 4 and 6).

[From the Post and Courier, Nov. 15, 2002]

SHEDD'S ADVANCE A WELCOME SIGN

President Bush's nomination of U.S. District Court Judge Dennis Shedd of Columbia to the 4th U.S. Circuit Court of Appeals finally was sent to the full Senate by the Senate Judiciary Committee Thursday. That overdue action represents an important step forward in breaking the partisan logjam on federal judicial appointments.

It also represents a potential step away from what Sen. Strom Thurmond aptly described as ''destructive politics'' last month

after Judiciary Chairman Patrick Leahy, D–VT, reneged on his promise to send Judge Shedd's nomination to the full Senate. Sen. Thurmond, who's retiring after a long, distinguished career in politics, vividly expressed his outrage at this violation of personal trust, telling his colleagues: ''In 48 years in the Senate, I have never been treated in such a manner.''

And the Judiciary Committee's growing habit of blocking presidential appointments to the Federal bench has reached critical mass over the last year and a half. Democrats' protests that Senate Republicans had subjected President Clinton to the same mistreatment don't hold up when the rates of rejection are considered, particularly at the appeals court level. That blatantly party-line obstruction of judicial appointments became a campaign season liability for the Democrats in some states, including South Carolina, where Republican Lindsey Graham repeatedly stressed the need to break that pattern by giving President Bush a GOP Senate—and a GOP-controlled Judiciary Committee—in his winning campaign to replace Sen. Thurmond.

Recognizing the incoming Senate's intentions on this issue, and the voting public's message, Sen. Leahy didn't call for a committee roll-call vote on the nominations of Judge Shedd and Professor Michael McConnell to the appeals courts Thursday, instead allowing them to advance.

And despite familiar objections from special-interest groups that seem intent on branding any judge who has ever issued a purportedly conservative ruling as a reckless ''extremist,'' Judge Shedd has the support of not just leading Republicans, but of Sen. Ernest F. Hollings, D–SC. The senator has been openly critical of the Judiciary Committee's previous attempts to derail this nomination.

Thursday's Judiciary Committee decision was not merely a victory for Judge Shedd, President Bush, Sen. Thurmond and Sen. Hollings. It was a victory for fairer, more efficient consideration and confirmation of presidential judicial appointments by the Senate.

[From the Greenville News, Oct. 15, 2002]

INSULTING THURMOND

Senate Judiciary Committee Chairman Patrick Leahy, a Democrat from Vermont, did a number last week on retiring South Carolina Sen. Strom Thurmond, and in the process thumbed his nose at both the Constitution and any sense of fair play. Highly partisan Democrats don't want Thurmond's choice for the 4th U.S. Circuit Court of Appeals, U.S. District Judge Dennis Shedd, to get a well-earned promotion to the appeals court.

Shedd is eminently qualified, but he has been painted as an opponent of civil rights, the disabled and common workers. The case hasn't been made, but then, the Democrats who oppose his nomination aren't interested in making the case with facts. They have conveniently used Shedd as an election issue.

With the U.S. Senate in the hands of Democrats, it has become something of a sport in Washington to prevent President Bush from getting his top choice for federal judges. But Sen. Leahy sunk to a new low last seek by refusing to allow a vote on the Shedd nomination, and in doing so, it became obvious he had flat-out lied to Sen. Thurmond. Leahy had promised South Carolina's 99-year-old senior senator a Judiciary Committee vote on Shedd, but that was before word leaked that a committee Democrat would vote for Shedd. If his nomination got to the full Senate, he would be approved, especially with South Carolina's Sen. Fritz Hollings wholeheartedly supporting this nomination.

The Senate Judiciary Committee has become a graveyard for Bush's top choices for seats on the federal appeals court. The Democrats have flexed their muscles to prevent the nomination of reputable choices—such as Charles Pickering and Priscilla Owen—from making it to the Senate floor for a vote they probably would win. But now the powerful Leahy has proven he can go lower—by denying a vote, even after he made a promise to allow one.

Thurmond was indignant last week, making a rare Senate speech in which he said about Leahy, ''In my 48 years in the United States Senate, I have never been treated in such a manner.'' Thurmond is leaving a Senate in which a man's word is no longer his honor.

[From the Orangeburg Times and Democrat, Oct. 13, 2002}

NOMINATION OF SHEDD HELD HOSTAGE

The continuing battle over federal judgeships grows more frustrating.

It's a partisan and philosophical battle that has gone beyond what was ever intended by the framers of our Constitution. The founders gave presidents appointment power for judges, with the Senate's role being advice and consent.

Particularly since the Clinton years of the 1990s, the process has been paralyzed by politics. A Republican Senate left Clinton nominees hanging, never even giving them a hearing and a vote. The Democratic Senate has been doing the same thing with President Bush's nominees.

On Tuesday, partisanship got closer to home when Cordova native and S.C. U.S. District Judge Dennis Shedd was denied a vote by the Senate Judiciary Committee on his nomination to the 4th Circuit Court of Appeals.

The decision to delay the vote prompted S.C. Republican Sen. Strom Thurmond, for whom Shedd once served as a top aide, to react angrily at the committee and its Democratic leader, Sen. Patrick Leahy of Vermont. Leahy said the vote on Shedd was too contentious for the session and would have sparked a debate delaying action on other judicial candidates.

That may be, but Thurmond was taking the rejection personally, addressing the Senate Judiciary Committee himself in a rare appearance.

''In my 48 years in the U.S. Senate, I have never been treated in such a manner. You assured me on numerous occasions that Judge Shedd would get a vote, and that is all that I have ever asked of you. I have waited patiently for 17 months, and I have extended every courtesy to you,'' Thurmond said to Leahy.

The judgeship battles are likely to trample on more Senate decorum, particularly when judges meet vocal opposition as has Shedd. Despite endorsements by the American Bar Association and others, Shedd has faced criticism from the NAACP and other organizations contending his record shows no sympathy for those in discrimination cases. Sixth District Congressman Jim Clyburn is among opponents.

But Shedd enjoys the support of both Republican Thurmond and Democrat Ernest F. Hollings from South Carolina. And he is former chief legal counsel to the Senate Judiciary Committee, which Thurmond formerly chaired.

Thurmond's anger over the delay of Shedd's nomination probably won't change the equation.

A vote probably will not come until next year—and may not come then unless the Republicans regain control of the U.S. Senate in November's election. That would mean that Thurmond, who will soon turn 100 and is not seeking re-election, won't be voting on a judicial candidate he recommended and President Bush nominated way back on May 9, 2001.

In all, Bush has nominated 126 U.S. Appeals Court and U.S. District Court nominees, and the senate has confirmed 80: 14 judges to appeals courts and 66 to district courts. Most of the others haven't been put to a vote.

Shedd should not be one of them. His record is a good one, and it is that record that should be the test of his approval, not what others believe about his personal or political philosophy.

Shedd is certainly not out of the judicial mainstream and his opinions are not rooted in controversy.

Sen. Hollings is known for his candid if not controversial assessment of people. The S.C. Democrat is solidly behind Shedd, being the one to introduce him initially to the Senate Judiciary Committee.

Saying Shedd ''has an outstanding record of sound judgment,'' Hollings told the Judiciary Committee that Shedd is ''my kind of judge—hard and tough, but hard and tough on both sides.''

His nomination should be brought to a vote by the Senate committee and then the full Senate, where we're confident he will win approval.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I will speak today in morning business briefly.

The PRESIDING OFFICER. The Senator may proceed.

HOMELAND SECURITY

Mr. DORGAN. Mr. President, I rise to say a few words about the issue of homeland security. I will not talk at the moment about the bill itself, which we will vote on tomorrow, but a couple of issues dealing with homeland security that are very important, that have been raised in recent days and need to be discussed.

One issue deals with something that is happening in the Defense Department. My colleague Senator NELSON from Florida spoke of it earlier today. That is the creation of an Information Awareness Office and the prospect of having an agency that would amass your most personal information—credit card purchases, travels, medical information, and so on—and put it into a single database. That concerns me greatly. I will speak about that in a moment.

But first I will speak about another issue relating to homeland security. This is an issue that was recently highlighted by a task force headed by former Senator Warren Rudman and former Senator Gary Hart.

That task force included former Secretaries of State Warren Christopher and George Shultz, retired Admiral William Crowe, former Chairman of the Joint Chiefs of Staff, and others. There is a very significant blue ribbon task force.

They issued a report that was sponsored by the Council of Foreign Relations. The report was titled ''America Still Unprepared, America Still In Danger.''

The task force found that 1 year after the September 11 attacks, America remains—according to them—dangerously unprepared for another terrorist attack. At the top of the list of concerns in this task force was this:

650,000 local and State police officials continue to operate in a virtual intelligence vacuum without access to terrorist watch lists that are provided by the United States Department of State to immigration consular officials.

Why is this important? Well, consider that 36 hours before the September 11 attack, one of the hijackers who piloted the plane that crashed in Pennsylvania, named Ziad Jarrah, a 26-year-old Lebanese national, was actually pulled over by the Maryland State Police for driving 90 miles an hour on Interstate 95. If this fellow's name had been on the State Department terrorist watch list—and it happens that it was not—there would have been no way for that Maryland State trooper to know it. That Maryland State trooper can type a name into the system and go to the NCIC where they have the database of convicted felons, but that trooper has no access to the watch list that the Immigration Service has courtesy of the State Department.

You have all of these people around the country—law enforcement officials—who are actually the first line of defense and the first responders in the event something happens. And they are out there stopping people with traffic stops and stopping suspicious people who are driving automobiles without license tags, and so on. They don't have any idea whether someone they have just stopped is a known terrorist on a watch list prepared by the State Department and given to the Immigration Service and given to the consular offices. Why? Because they currently have no mechanism to access it.

Right now, a county sheriff somewhere in a northern county in North Dakota is patrolling a road. If down that road for some reason would come a terrorist who crossed over a remote section on the border between the United States and Canada and a county sheriff stops that known terrorist who is on the watch list for driving 90 miles an hour on Highway 22, there isn't any way that county sheriff is going to be able to access that watch list and know that he or she has pulled over a known terrorist.

That is wrong.

Let me read an excerpt from the Hart-Rudman report, discussing what they regard as a top concern:

With just 56 field offices around the nation, the burden of identifying and intercepting terrorists in our midst is a task well beyond the scope of the Federal Bureau of Investigation. This burden can and should be shared with 650,000 local county and State law enforcement officers. But they clearly cannot lend a hand in the counterterrorism information void that now exists. When it comes to combating terrorism, the police officers on the beat are effectively operating deaf, dumb and blind.

That is from the report.

Again, quoting from the report:

Terrorist watch lists provided by the United States Department of State to immigration and consular officials are still out of bounds for State and local police. In the interim period, as information sharing issues get worked out, known terrorists will be free to move about to plan and execute their attacks without any bother from local law enforcement officials because they can't know their names and they can't access the list.

My staff has been in contact with this task force. We have also been in contact with the State Department and the White House, asking when something is going to be done to connect the dots here. Since we made these contacts, the administration is apparently looking for ways to integrate that terrorist watch list—called the Tipoff database—with the National Crime Information Center which is accessible by State and local law enforcement officers. I call on the administration to expedite, as much as is possible, the effort to make this happen. We can't waste another day in this regard, as all of us know.

The head of the CIA said the other day that we are in as much risk from a terrorist act as we were the day before September 11. If that is the case, then we ought to expect that all law enforcement officials around this country would have access to that terrorist watch list.

Let me go now to the second issue. I just spoke of the need for law enforcement to have access to a list of known terrorists and those who associate with known terrorists for purposes of protecting this country.

Well, one can certainly go to the other extreme in gathering information in the name of homeland security. And a good example of that is a project that is being developed in the Department of Defense, by the Information Awareness Office.

The Information Awareness Office is developing a long-term plan for what is called data mining. A master plan would be developed by which all of the information that moves around electronically in our country—every purchase you make with a credit card, every magazine subscription you buy, every medical prescription you fill, every Web site you visit, every e-mail you send or receive, every academic grade you ever received, every bank deposit you made, every trip you book - would go into a massive database. And the Federal Government would use the database to identify suspicious behavior.

That is not what we ought to be doing in this country. We ought to have a war on terrorism. But we ought not, in our zeal to engage in this war on terrorism, in any way break down the basic civil liberties that exist in our Constitution. The right to privacy is one of the most basic rights in America—the right to expect there is not a Big Brother with a massive computer system gathering all the information about everything everyone is doing in this country and evaluating it, perusing it, and moving it back and forth to try to determine who might or might not be doing something maybe suspicious.

That is not, in my judgment, in concert with the basic civil liberties that we expect in this country and that are guaranteed to the citizens in this country. We must stop this before it starts.

I understand that a change in law—specifically a change in the 1974 Privacy Act—would be required to implement this data mining program. That, in my judgment, is not going to happen in the Congress. I would not support such a change, and I think most of my colleagues would oppose a change of that type.

(Mrs. MURRAY assumed the chair.)

Mr. BYRD. Will the Senator yield?

Mr. DORGAN. I am happy to yield.

Mr. BYRD. The Senator says he is confident that the Congress will do no such thing? I say most respectfully to the Senator, I would not count on what the next Congress might do. I am very much afraid of what the next Congress might do in many areas. Doesn't the Senator share that feeling?

Mr. DORGAN. Well, I happen to——

Mr. BYRD. I say, Congress normally would not do that. But I am not too sure what the next Congress might do.

Mr. DORGAN. Madam President, I understand the concern expressed by my colleague. Let me say, there is a great disinfectant in this country, and that disinfectant is sunlight. If we can shed some light on these kinds of proposals, I do not think there is any question the American people will demand—will demand—of this Congress to preserve the basic rights, and especially the basic right to privacy that exists and that they expect to continue in the life of this country.

So I understand the point that the Senator from West Virginia makes, but I believe the more we disclose the efforts of those who would suggest that it is all right to snoop about everybody and everything that goes on in this country, the more we will expose, in my judgment, the great, great concern and anger of the American people to demand their right to privacy and demand that we not amend the 1974 Privacy Act in order to accommodate this kind of activity.

Mr. BYRD. Madam President, will the Senator yield?

Mr. DORGAN. Of course I will yield.

Mr. BYRD. I am not going to detain the Senator. My colleague here wishes to get the floor, and I am not going to detain him, but I still have to say that I am surprised at some of the things we do here.

The distinguished Senator from North Dakota is one of the brightest Senators I have ever seen over my good many years in this institution. But let's take the war, the resolution on a war with Iraq. I took the position that if we are, indeed—I was against that resolution, but I said, if, indeed, we are going to shift this kind of power to the President, a power to declare war, then

shouldn't we put a sunset provision in, shouldn't we stop that, at least give him 2 years, and then say that we have to take another look at that?

Was the Senator surprised, as I was, to see this very body—and even more surprisingly to see our own party—oppose that provision, a sunset provision, when the Constitution says Congress shall have the power to declare war, and we were shifting that power to the Chief Executive to determine how and when our military forces would be used, for how long and where? And he has that power in perpetuity. The next President after him will have that same power.

I was surprised. I am surprised to see where this Senate, which has been the great protector of the American people and the constitutional system for over 200 years, is going of late. I have been very bitterly disappointed in this Senate, of which I am a part, to see where it is going. It seems to have lost its nerve, lost its way, lost its vision, lost its understanding of its role under the Constitution.

Well, I thank the Senator and yield the floor.

Mr. DORGAN. Madam President, let me conclude by saying, I understand the angst and the concern expressed by my colleague.

After September 11, a day that this country experienced a terrible, terrible tragedy—we have come together and we have worked together to try to protect our homeland. But there have also been, in this period, instances where we have gone overboard. We should not sacrifice privacy rights in the name of homeland security. We need to find an appropriate balance between the two.

There is much we can do, and much we should do, and much we will do, in my judgment, to improve law enforcement capabilities, but we can do that without injuring the American people, without diminishing the right to privacy.

I understand the point that the Senator from West Virginia makes. But my point is, if someone is creating an office with the expectation that Congress will amend the 1974 Privacy Act so that the Federal Government can track where you shopped, where you spent money, where you traveled, what airline you ride on, how much you owe, what kinds of grades you received—if someone thinks that the Congress is going to allow that to happen, that someone is sadly mistaken.

I do not think Congress is going to allow that to happen. I am not going to allow that to happen. My colleague from Florida spoke on the floor earlier today and it prompted me to want to come to say, as one Member of the Senate, I think there will be many of us who come to the floor of the Senate and say, this isn't something that will be allowed. This is not something that Congress will entertain in any serious way. The right to privacy is critical. It is important. And we must respect it.

So I spoke about two things: One is the need for law enforcement officials around the country to access the State Department terrorist watch list. That is important, and it is necessary. I also spoke about the prospect of gathering raw data about everybody in the country, about everything they do, to identify ''suspicious'' behavior. That is dangerous, and we ought not to consider it.

Madam President, others want to speak. I yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Mr. President, I ask unanimous consent to speak in morning business.

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

THE CHILDREN'S HEALTH INSURANCE PROGRAM

Mr. ROCKEFELLER. Madam President, I rise today to ask unanimous consent for a bill which has been hotlined on our side and which relates to improved protection for children under the Children's Health Insurance Program. And it is not a bill which I will hand to the clerk at the time that I have completed my remarks, nor will I ask unanimous consent that it be printed in the RECORD, although it is ready and being hotlined, because we want to try to resolve a few remaining problems from several States on our side, which I do not think we are going to be able to do. We have tried in every way to do it.

Fundamentally, the Senator from West Virginia is on his feet trying to convince those States, whether they are here or not, whether their staff members perhaps are, not to try and do what has happened so often before under the Children's Health Insurance Program, and that is a State at the last moment using the leverage of the final seconds of Congress to try to leverage a better deal for itself.

The House is coming back to pass homeland security. There was one objection made on that side in the House. That person is being worked with at this time. If that objection is not raised and there is not an objection raised here, then the Children's Health Insurance Program could get funding for another 2 years. If not, funds will be returned to the Federal Government. Children will not get health insurance, and there will be a very dramatic effect which this Senator does not want to see happen.

This bill, which I will not ask unanimous consent to report, is very much bipartisan. It has been worked on for a very long period of time. It started back in 1992, something of that sort. It had a slow evolution because Senator John Chafee and myself wanted very much for the bill to be done under Medicaid. The Governors struggled strenuously to have the entire matter handled on a State-by-State basis, which was in effect a mistake because it meant some States that were very aggressive picked it up, and in others that were not so aggressive—my own being one of those—it took a number of years for the program to get going. That was lost time, lost health care for children.

It is very much a bipartisan, bicameral agreement that we believe is in the best interests of our constituents and that we can do it on the Children's Health Insurance Program this year.

The budget situation clearly is going to get a lot worse, starting in January. We need to protect the CHIPS funds before they are spent on other matters, as indeed they will be because, as I indicated, the money will be returned to the Federal Government. Don't expect that to come back into children's health insurance.

It is my understanding there are a number of Senators who have expressed concern and have stated their intention to hold up this bill in an effort to get the best possible outcome for their State. I do understand that. I have been through that a number of times even this year with individual States, now two or three States, one or two States, where they are trying to use a formula, which has been worked out, which applies to all States equally, to increase that formula to allow them to do other things which are outside of the Children's Health Insurance Program.

The Children's Health Insurance Program is obviously larger than any one State. My State does not get what it needs. There are only 20,000 children on a regular basis who are covered, although 55 have come in and out of that program, but I cannot say in all conscience that 55 are covered. The Children's Health Insurance Program is in a situation that if we do not act now, this money will be lost from the Children's Health Insurance Program for good.

It will happen. We have a new administration, new priorities, new budget, and the same OMB director who has very firm views about this.

This is not, however, a permanent solution. I am trying to stanch the drain, the bleeding for these next 2 years. I am trying my level best to do that.

This bill actually has a chance to pass in the Senate and in the House and to be taken up and passed in its entirety. I only ask with all of my heart that Senators give it a chance, that Senators not try to leverage the last possible variety or program outside of the CHIP program or extension of or some particular addition which will bring down, in fact, if an objection at this very late stage, with a day or so remaining, which will obviously work, is held. If that objection is held, then there will be no bill at all.

Earlier this year I worked in a bipartisan manner to develop a very comprehensive proposal based on a basic and fundamental philosophy that no child should go without needed health care. I was pleased at the time to be joined by my good friend Senator LINCOLN CHAFEE, Senator KENNEDY, and Senator HATCH to introduce the

Children's Health Insurance Improvement and Protection Act of 2002. Unfortunately, no action has been taken on that proposal, and I am left worrying that we will end this session in a day or two having forgotten our children.

Therefore, I am introducing a proposal that will at least protect the Children's Health Insurance Program for the next 2 years. This is not a permanent solution. This can change. But it is a solution for the next 2 years so money does not have to be returned. Children will be left behind.

The Children's Health Insurance Program, as the Presiding Officer knows very well, has been an unqualified success. It has been an amazing success. Last year 4.6 million children across America were enrolled in the Children's Health Insurance Program and the percentage of children without health insurance has declined in recent years by reason of the Children's Health Insurance Program. In my State of West Virginia, the CHIP program provides health coverage on a permanent basis to over 20,000. And, of course, it needs to do much better than that. As I indicated, we were slow in starting a number of years ago. We have picked up our pace more recently.

Health insurance coverage is key to assuring children's access to all kinds of health care. I need not go into this. Uninsured children who are injured are 30 percent less likely than insured children to receive medical treatment, 3 times more likely not to get a needed prescription. Health outcomes are affected in all respects. As children do eventually become adults, they carry with them the legacy of what they didn't get as children in the way of health insurance.

However, the continued success of the CHIP program is now, as I have indicated—I hope soberly enough—in very serious jeopardy. On September 30 of this year, $1.2 billion in unspent children's health insurance funds was sent back to the General Treasury. It is gone. In addition, some $1.5 billion of these funds are projected to revert back to the Treasury next September 30. If we do not act to protect this money for children and send money to the States that can in fact use it, we will have failed our children.

A 2-year fix is only a first step. There is much more that we need to do. The Bush administration projects that 900,000 children will lose their health insurance coverage between fiscal years 2003 and 2006 if we do not take action this year.

The bill I am discussing, that I hope will not be blocked by any individual Member, is tremendously important. It is called the CHIP Dip. Federal CHIP funding has dropped by more than $1 billion this year, and this reduction has no underlying health policy justification whatsoever. I cannot honestly imagine that with so many children at stake in so many different States, that one would look at the last moment to leverage a particular advantage.

I have been through this before even this year with a Senator from another State. And in formulas, there are various ways, technical ways, of things happening. Those can be brought up in a very careful and effective way at the last moment, and people can dig in their heels. But I beg Senators to look at the overall results for our children.

If we do not get this bill, it will affect the next 2 years. All of this, I might say, resulted in something that took place during the budget compromises that we had in 1997. These programs all have sort of obscure beginnings, but there are very large consequences.

As a result, a number of States will have insufficient Federal funding to sustain their enrollment. They just won't have that money. They will have no choice but to scale back or limit their Children's Health Insurance Programs. I cannot imagine anything worse.

We have talked about judges this afternoon while I was presiding. We talked about homeland security. I am talking about children's health insurance. I would not put that second to either of the previous two discussions. I care passionately about it. I remember precisely when the Senate got together and asked all the staff to leave, and 20 of us with very different points of view sat around a number of years ago and we worked out a children's health insurance budget, which passed very easily. Some people had never talked about health insurance at all, and we said this cannot do for children. It passed and it has been moving along ever since.

The biggest problem will result in enrollment cuts in the CHIP Program and the future health problems, as I indicated, of adults who, as children, could have received benefits under the CHIP Program but who did not because we were unable to take action, or the program was fundamentally insufficient.

We are trying to do the best we can. I am introducing this concept of the bill. It is being hotlined on our side. It has not been hotlined on the Republican side yet.

Again, it is only a first step that we need to take. We need a comprehensive and reasonable approach to shore up CHIP financing and avert a devastating enrollment. I cannot think of anything more important that we can do as a nation.

I conclude by saying we need to put more money into this program. However, this legislation—at least for the short period—will protect $1.2 billion that should be spent on children's health insurance rather than on roads or other matters, and will put money into States that can use it now to cover children. It is the least we can do.

I urge my colleagues to support this legislation, and I urge my colleagues on the other side to support it in the last days when it is hotlined on their side of the aisle. I urge my colleagues on this side of the aisle to support it for the protection of 4.6 million children across America and giving us a chance to do more.

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. BYRD. Madam President, I see two of my distinguished colleagues on the floor of the Senate who want to speak. At this moment, I am in no great hurry to get away. I am happy to accommodate both of them.

I ask unanimous consent that I may yield to either Senator SPECTER or Senator FRIST—Senator FRIST first. How much time would the Senator like?

Mr. FRIST. Less than 15 minutes.

Mr. SPECTER. I would like 10 minutes.

Mr. BYRD. For not to exceed 25 minutes—15 and 10—and that I then regain my right to the floor, even though I may walk away from the floor in the meantime.

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

Mr. SPECTER. I thank our distinguished President pro tempore for accommodating our schedules.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. FRIST. Madam President, I ask unanimous consent to speak in morning business, if that is necessary.

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

HOMELAND SECURITY

Mr. FRIST. Madam President, I rise to address a homeland security issue that we will be voting on tomorrow morning. Specifically, I would like to discuss the Lieberman amendment. This amendment strips out certain provisions which Senator LIEBERMAN and other proponents of the provision believe are unrelated to the underlying homeland security bill.

More specifically, I want to address the issue of vaccines. There are three claims that have been made by the proponents of the Lieberman amendment, as they relate to the vaccine provisions. For my colleagues who were not on the floor Friday, I refer them to some of my underlying comments on the policy of the homeland security bill and the vaccine provisions which I mentioned on the floor Friday.

This afternoon, what I would like to do specifically is examine these three claims. First, the proponents of the Lieberman bill say that the underlying vaccine provisions in the bill remove individual rights to sue. Their second claim is that Thimerosal, contained in vaccines, causes autism. The third claim I would like to refute is that these vaccine provisions do not belong in the homeland security bill.

Claim No. 1: The proponents of the Lieberman amendment say the vaccine provisions remove individual rights to sue. They are saying these provisions are an example of Republicans fronting for special interests; that they take away individual rights to sue and provide legal immunity from liability for vaccine makers.

My response is that these provisions do nothing more than require injuries that are related, or allegedly related, to a vaccine to first proceed through the Vaccine Injury Compensation Program (VIC program). The VIC program was very specifically established in the mid-1980s for all injuries that are allegedly related to a vaccine.

Since the mid-1980s, all such injuries alleged to be caused by a vaccine are collected and channeled quickly and appropriately first through this Vaccine Injury Compensation Program. A no-fault, efficient alternative to our tort system; very quickly.

That requirement is law today. The provisions that are in the underlying homeland security bill simply restate and clarify what that law is and what that law does. If there is an alleged vaccine-related injury, you first go to the Vaccine Injury Compensation Program. After a period of time, whether or not the program decides in your favor, whether or not there is what you regard as adequate compensation, at the end of that program, you can simply state that you still want to go to court. Whatever that program decides, you are free to go to court. You are free to sue, and there are no caps in terms of liability.

The provisions in this bill take away no one's right to sue. The provisions in the underlying homeland security bill provide no immunity from liability.

A little perspective: There are currently about 875 cases alleging injury due to the presence of a preservative called Thimerosal that is no longer used in vaccines. Right now, these 875 cases are in front of the Vaccine Injury Compensation Program, consistent with the law since the 1980s. These cases are in no way affected by the provisions in the homeland security bill. I want to repeat that. These 875 cases that are in the Vaccine Injury Compensation Program are being dealt with in an orderly process that was outlined several months ago, and they are in no way affected by the provisions in the underlying bill.

If individuals are unsatisfied with what the Vaccine Injury Compensation Program decides, at the end of it, you can say: Forget what you have concluded from me; I am going straight to court. Anyone can do that today, and one can still do that with the provisions of this bill.

The only people who are really affected by the language in this underlying homeland security bill are the trial lawyers who are trying to circumvent the very law this body passed in the mid-1980s—a law which has worked very well since that point in time. The trial lawyers basically are trying to create a loophole in the current law.

The provisions in the underlying homeland security bill state very simply that you first go to the Vaccine Injury Compensation Program, and for good reason. After which, you can still go to court and sue with no caps or no limits.

Claim No. 2—and this one probably bothers me as much as any because it is twisting medical science. I am not sure exactly what the reasons are, but this claim is Thimerosal-containing vaccines cause autism. Additionally, proponents claim that Thimerosal as an additive in a vaccine has a causal relationship to the autism, a disease with increasing incidence. The incidence of autism is increasing. We do not know why, and that is why it is important for us to conduct the appropriate research.

There has been a lot of misrepresentation about the various vaccine provisions in the bill, but this one really irks me the most. It is grandstanding which crosses the line because it is not what science says. It is not what the medical community says. It is not what medical science in the broadest sense says. In fact, it is the exact opposite of what the Institute of Medicine has said.

Last week on the floor one of my colleagues said these provisions in the underlying homeland security bill—saying why they must be stricken—said specifically:

> Liability protection for pharmaceutical companies that actually make mercury-based vaccine preservatives that actually have caused autism in children. . . .

That is scientifically wrong. Science does not validate it. Let me tell you what science says. I quote the October 2001 Institute of Medicine record. The report is called ''Thimerosal-Containing Vaccines and Neurodevelopmental Disorders.'' That report concluded:

> The hypothesis that Thimerosal exposure through the recommended childhood immunization schedule has caused neurodevelopmental disorders is not supported by clinical or experimental evidence.

The argument that is being used in support of the Lieberman amendment as the reason to support stripping these provisions is based on a false premise, a totally false premise, according to medical science today. What bothers me about it, and the reason this bothers me more than any of the other three claims, is probably because it scares parents. It says vaccines are going to hurt your children, and that demagoguery is going to mean these parents are not going to let their children get these childhood vaccines. These vaccines fight diseases that have caused pandemics and epidemics, diseases that will kill children if we do not make the vaccines available. Epidemics will occur, and death will ensue.

I challenge my colleagues to go to the American Academy of Pediatrics and to the Institute of Medicine and ask that question: Does Thimerosal, according to the scientific literature, cause autism? The answer is no.

A number of the people on the floor have also held up a New York Times magazine article quoting it as further proof that the preservative Thimerosal causes autism. I do not want to spend a lot of time on it, but I do want to read what the people who are quoted in the article are saying.

I ask unanimous consent that two letters be printed in the RECORD.

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

> INSTITUTE FOR VACCINE SAFETY,
> JOHNS HOPKINS UNIVERSITY,
> BLOOMBERG SCHOOL OF PUBLIC HEALTH,
>
> *November 11, 2002.*

Proposed title: Misleading the public about autism and vaccines.

TO THE EDITOR: The unfortunate use of a sensationalized title in the article published November 10, 2002 in the New York Times Magazine ''The not so crackpot autism theory: reports of autism seem to be on the rise. Anxious parents have targeted vaccines as the culprit. One skeptical researcher thinks it's an issue worth investigating,'' absolutely misrepresents my opinion on this issue. Also, the caption under the photograph of me ''Neal Halsey says that vaccinologists have no choice but to take the thimerosal threat seriously'' is not a statement that I ever made. There is no ''threat'' as thimerosal has been removed from vaccines used in children. The headline, the press release issued prior to publication, and the caption are inappropriate. I do not (and never did) believe that any vaccine causes autism.

I stated to the author on at least two occasions that the scientific evidence does not suggest any causal association between vaccines and autism and he reaffirmed that the article would reflect my opinion. Unfortunately, the title implies the opposite opinion. A ''fact checker'' employed by the New York Times asked me several questions and minor corrections were made, but I was never shown the text of the article and no questions were asked about the title that implies a belief that I do not hold. It was my expectation that the title would be about thimerosal and the difficult decisions that were made during the past three years that have resulted in the removal of thimerosal as a preservative from vaccines administered to infants and young children. Changes in the use of thimerosal were made by the Food and Drug Administration and the vaccine industry with urging by the American Academy of Pediatrics and the Public Health Service in a concerted effort to make vaccines as safe as possible.

The sensationalized title sets an inappropriate context for everything in the article. Readers are led to incorrectly believe that statement in the article refer to autism. I have expressed concern about subtle learning disabilities from exposure to mercury from environmental sources and possibly from thimerosal when it was used in multiple vaccines. However, this should not have been interpreted as a support for theories that vaccines cause autism, a far more severe and complex disorder. The studies of children exposed to methylmercury from maternal fish and whale consumption and the preliminary studies of children exposed to different amounts of thimerosal have not revealed any increased risk of autism.

Inappropriated reporting has contributed to public misunderstanding of vaccines and other health care issues. The use of deceptive title is one of the primary means that newspapers have misled the public. The New York Times and other newspapers need to conduct self-examinations into this role in misleading the public and modify procedures accordingly to help prevent future major misrepresentations of scientific data and opinions. Another disserve to the public comes

when scientists become reluctant to talk with the media for fear of being misquoted or misrepresented. I have already spent a great deal of time correcting the misinformation in the Sunday's NYT Magazine article. Naturally, the next reporter from the NYT who contacts me will be met with skepticism and reluctance unless changes are made to prevent recurrences of this debacles.

Apparently, editors, not authors, write most titles. To avoid misinterpretations authors should propose titles and assume responsibility for making certain that titles do not misrepresent the opinions of individuals or information presented in the article. Proposed titles and subtitles should be included in the review by ''fact checkers''' when interviewing people whose opinions are included in the title. The best way to avoid these problems would be to permit individuals referred to in articles an opportunity to read a draft of the text before it is to late to correct mistakes or misunderstandings.

The New York Times and other newspapers and magazines should have policies requiring authors, editors and fact checkers to disclose personal associations with issues covered in articles they are involved in preparing and they should be relieved from their responsibility for articles where they have personal issues or conflicts of interest.

The general public and parents of children with autism have been misled by the title of this article and the news release. This is a disservice to the public and the value of my opinion has been diminished in the eyes of physicians, scientists, and informed members of the public. I encourage interested readers to review my scientific publications and to read objective reviews of this and under other vaccine safety issues conducted by the Institute of Medicine (www.iom. edu).

NEAL HALSEY, M.D.,
Director.

DEPARTMENT OF PEDIATRICS, DUKE UNIVERSITY SCHOOL OF MEDICINE,
Durham, NC.

Subject: Thimerosal issue.

TO THE EDITOR: As one of the two authors of the July 7, joint PHS/AAP 1999 statement that you cite in your article on ''The Not-So-Crackpot Autism Theory'' it is appropriate that several misconceptions in your article be rectified. The EPA guidelines on mercury levels related to methyl mercury, a very different compound from ethyl mercury which is the metabolite of thimerosal. Three other guidelines issued by federal and World Health Organization agencies were not exceeded by the vaccine levels.

Nevertheless we chose to recommend the removal of thimerosal, not because there was any evidence of its toxicity to vaccine recipients, but to enhance public confidence in vaccines. To the credit of the pharmaceutical industry, within 1 year all vaccines for children were free of thimerosal.

The only possible exception is influenza virus vaccine which is not recommended for children less than 6 months of age and for which a newly licensed product is now available free of thimerosal. Despite the absence of thimerosal from these products over the past two years, there has been no decrease, in fact an alleged increase, in the incidence of autism among our childhood population—strongly suggesting other factors involved in its etiology. Regrettably this exemplifies another issue where the best-intentioned actions have served to benefit no one other than the liability lawyers who feed on events of this sort as sharks in bloodied waters.

Yours sincerely,

SAMUEL L. KATZ, MD,
Wilburt C. Davison Professor and Chairman Emeritus.

Mr. FRIST. Madam President, I will quote a couple paragraphs from each.

The first is from Dr. Neal Halsey, who is profiled in the article in the New York Times and who is characterized as being concerned about the Thimerosal threat. Dr. Halsey heads up the Johns Hopkins University Institute for Vaccine Safety, and he wrote saying that this story

absolutely misrepresents my opinion on this issue. . . .There is no ''threat'' as thimerosal has been removed from vaccines used in children. The headline, the press release issued prior to publication, and the caption are inappropriate. I do not (and never did) believe that any vaccine causes autism.

He continues:

I stated to the author on at least two occasions that the scientific evidence does not suggest—

Does not suggest—

any causal association between vaccines and autism and he reaffirmed that the article would reflect my opinion. Unfortunately, the title implies the opposite opinion.

He concludes:

The general public and parents of children with autism have been misled by the title of this article and the news release. . . .I encourage interested readers to review my scientific publications and to read objective reviews of this and other vaccine safety issues conducted by the Institute of Medicine.

The second letter is from Dr. Samuel Katz, Professor and Chairman Emeritus at the Department of Pediatrics at the Duke University School of Medicine. Dr. Katz writes:

As one of the two authors of the July 7 joint PHS/AAP 1999 statement that you cite in your article . . . it is appropriate that several misconceptions in your article be rectified. . . .we chose to recommend the removal of Thimerosal, not because there was any evidence of its toxicity to vaccine recipients, but to enhance public confidence in vaccines. To the credit of the pharmaceutical industry, within 1 year all vaccines for children were free of Thimerosal.

Dr. Katz concludes:

Despite the absence of Thimerosal from these products over the past two years, there has been no decrease, in fact an alleged increase, in the incidence of autism among our childhood population—strongly suggesting other factors involved in its ideology. Regrettably, this exemplifies another issue where the best-intentioned actions have served to benefit no one other than the liability lawyers who feed on events of this sort as sharks in bloodied waters.

The final statement is from Every Child by Two, the Rosalynn Carter-Betty Bumpers Campaign for Early Childhood Immunizations in a statement released today:

Most importantly, we are concerned that the Senate may be inadvertently fueling fears that vaccines cause autism. In fact, well-respected studies concluded that the evidence is inadequate. Much research is available to support these conclusions.

Madam President, the third claim—and I will be brief on the third claim—we have heard on the floor from the advocates of the Lieberman amendment, which I encourage my colleagues to oppose, is that the vaccine provisions do not belong in the homeland security bill. I would argue just to the contrary. If we do not have a stable manufacturing base for vaccines, there is absolutely no way we can prepare our communities and our Nation in the event there is a biological warfare attack on our soil.

We talk a lot about smallpox, and we all know today we are inadequately protected because today we are inadequately vaccinated against smallpox. We cannot destroy the manufacturing base for our vaccines today. We started with 12 vaccine companies in this country, companies that made vaccines. In large part because of the liability issue, the number of companies making vaccines has decreased to four vaccine manufacturers in the world. Only two vaccine manufacturers are in this country, and at the same time, the National Institutes of Health is embarking upon a new initiatives to develop a vaccine for botulinum toxin, a major initiative on their part. If we vote to strike these provisions, we are putting at risk our manufacturing base which we absolutely must have to be a prepared Nation. Vaccine development cannot be ramped up quickly because manufacturing is a highly complex process. These important provisions further stabilize the vaccine supply system, and thus, are key to our ability to establish appropriate homeland security.

Those are the three claims we have heard over the last 2 to 3 days. I encourage my colleagues to look at earlier statements on what the vaccine provisions are specifically.

I urge my colleagues to vote against the Lieberman amendment tomorrow and to move forward on this important homeland security bill.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. How much time remains of the 25 minutes identified by the Senator from West Virginia?

The PRESIDING OFFICER. The Senator from West Virginia has 10 minutes.

Mr. SPECTER. I thank the Chair.

NOMINATION OF DENNIS SHEDD

Madam President, I will briefly comment on two matters: First on the confirmation of Judge Shedd, and second on the pending Lieberman amendment to the homeland security bill.

I support confirmation of Judge Shedd for a number of reasons. First, he has been found well qualified by the American Bar Association, the highest rating which can be given. I knew Judge Shedd when he served as chief counsel, chief of staff, to the Judiciary Committee from 1981, when I came to the Senate and started to serve on the Judiciary Committee, until 1988. I believe he is a fair, equitable, and competent jurist. I know Judge Shedd's record on the U.S. district court where he has served since 1991. I asked Judge Shedd some questions, and he responded in some detail.

I ask unanimous consent that Judge Shedd's written response be included at the conclusion of my comments.

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

(See exhibit 1.)

Mr. SPECTER. In those written comments he pointed out that in civil demonstration cases he has been fair and equitable: One bench trial verdict of over $2 million and another over $1 million; he has employed both female and African-American law clerks; and, in general, set forth the specifics to show that he has not been discriminatory in his judicial practices. These comments have been checked out by staff and found to be accurate.

Judge Shedd has been criticized for circumventing the authority of Congress under the commerce clause in a very celebrated case, United States v. Brown, involving the Gun-free School Zones Act. Judge Shedd found that it was constitutional and was later reversed by the Supreme Court of the United States under United States v. Lopez. In brief, it is a complicated subject, but Lopez, the Supreme Court decision of 1995, curtailed the authority of Congress under the commerce clause.

Judge Shedd has been said to have limited what Congress can do on States' rights. Here is a case where he found congressional authority. It was a close case. He was reversed—or later the Supreme Court decided he was in error. But I think it illustrates the point that Judge Shedd did give latitude for congressional enactments.

It is my hope that Judge Shedd will not be part of the so-called payback theory. I did not like what happened to President Clinton's nominations when Republicans controlled the Senate. As the RECORD will show, I supported Judge Roger Gregory for the Fourth Circuit. We have had some of the payback consideration on the Fifth Circuit I think fairly stated with Judge Pickering, and I hope that will not occur with Judge Shedd. It is my hope we will soon have a protocol which will take politicization out of judicial selections when there is a Democratic President, such as President Clinton, with a Republican Senate. Now the shoe is on the other foot, and we have a Republican President, President Bush, and a Senate controlled by the Democrats. We ought to move away from that.

As the RECORD will show, I have supported qualified nominees submitted by President Clinton and was pleased to note that there was reciprocity. All 11 of Pennsylvania's district court judges have been confirmed, as has Judge Brooks Smith, the one contested circuit judge.

EXHIBIT 1

RESPONSE OF JUDGE DENNIS SHEDD TO SENATOR SPECTER'S QUESTION

During my June 27, 2002, hearing before the Senate Judiciary Committee, Senator Specter asked me if I believed that the NAACP's opposition to my nomination was fair. I responded that I do not think it is fair. Senator Specter then asked me to provide a written answer explaining my position. I trust that this will be responsive to the Senator's request.

In lodging its opposition to me, as I understand it, the NAACP has focused on a relatively small number of cases—primarily employment discrimination cases—in which the plaintiffs did not prevail. Relying on these cases, and ignoring my complete record, the NAACP has attempted to create the impression that I do not treat civil rights plaintiffs fairly. However, this is a complete mischaracterization of my record as a district judge, and it is based on a very limited—and misleadingly selective—sampling of my casework. My complete record as a district judge demonstrates that the charge is not accurate.

I do not wish to belabor this response with a case-buy-case rebuttal of the employment cases for which, to my knowledge, I have been criticized. Of course, people are entitled to disagree bout the outcome of a particular case depending on their viewpoint. However, as an initial matter, I would note that I have not been made aware of any criticism which suggests that my decisions in these cases are legally incorrect or improper. I do not claim to have been correct on every issue that has come before me, but I can tell you that I have conscientiously endeavored to be correct.

Moreover, contrary to the misimpression that the NAACP has attempted to create, I have on many occasions denied defendants' motions for summary judgment (or to dismiss) in employment cases. I have done so when a magistrate judge has recommended that I grant the motion, and I have done so over the defendant's vigorous objection. Typically, once a plaintiff defeats a summary judgment motion in this type of case, the case settles, and that has happened often in my cases. However, I have also had employment cases, in which I denied the defendant's motion, thereafter process to verdict. Further, sitting by designation with the Fourth Circuit, I joined with Judge Sam Ervin in reversing a summary judgment and remanding a case in order to allow the employment discrimination plaintiffs to proceed to trial. I believe these examples alone refute the NAACP's criticism of me.

As I am sure you are aware, an individual's civil rights may be implicated in federal litigation in many contexts outside the realm of employment discrimination. I have been presented with countless cases of various types in which an individual's civil rights were implicated, including (but not limited to) criminal cases, voting rights cases, habeas corpus cases, and cases involving allegations of governmental misconduct of some type. My complete record in these types of cases further reflects the fact that I do not have any type of anti-civil rights bias.

For example, I have presided over trials in which civil rights plaintiffs have won jury verdicts or gained a settlement at trial. I have granted relief in at least five habeas corpus cases. I ruled in favor of the plaintiff and upheld the one-person/one-vote principle in a case in which the plaintiff challenged the method of electing members to a local school board, and I have handled a number of Voting Rights Act cases in which (to my recollection) the plaintiffs in each case succeeded on their claim of a violation.

I have always endeavored to be vigilant in ensuring the protection of civil rights in criminal cases as well. I have, for example, granted judgment of acquittal on numerous occasions to defendants where I believed, as a matter of law, that the government failed to meet its burden of proof. I have also disallowed the government from using evidence at trial when I thought that its use would improperly disadvantage the defendant. It is also my practice during trial to ensure very specifically that defendants are aware of their constitutional right to testify or not to testify. Similarly, it is my practice to ensure that witnesses who I believe may incriminate themselves by their testimony are aware of their rights, and I have appointed counsel in some instances to advise these witnesses before they testify.

I would also note that my overall record in civil cases demonstrates that I do not have any bias against plaintiffs. I have, for example, awarded a bench trial verdict of over $2,000,000 in one case, and over $1,000,000 in another case. In addition, I have presided over jury trials which led to substantial verdicts in a plaintiff's favor, and I have on at least one occasion directed a verdict of liability in a plaintiff's favor. I have also raised, sua sponte, the propriety of the removal of cases from state court, thereby setting in motion the procedure by which the plaintiffs could return to their chosen forum (i.e., state court). I have also assisted parties in civil cases in reaching a settlement, and often this has occurred where it appeared as though the plaintiff would otherwise gain no recovery.

Apart from my case record, I believe that my commitment to ensuring fairness for all persons is exhibited by my conduct in other matters. For example, I have employed female and African-American law clerks. I have also actively recruited and support minority and female candidates for magistrate judgeships.

Now in my twelfth year on the district court. I have handled thousands of civil and criminal cases in which I have issued countless rulings, all of which are public record. During this time, my concerted effort has been to ensure that all litigants are treated fairly according to the law. I do not approach any case, or any litigant, with any type of bias, and I do not decide issues before me on anything other than the pertinent law. I am gratified that I have earned a reputation among lawyers in this district (as reported in the Almanac of the Federal Judiciary) for being fair and impartial. I believe my impartiality is reflected by the low number of cases in which I have been reversed, as one could reasonably expect that any type of bias on the part of a district judge would manifest itself over time in appellate response to judge's work.

I would like to point out an incident that occurred earlier this year, as I believe it is akin to the current accusations against me. On May 3, an article appeared in the Washington Post stating, in essence, that I was insensitive to disabled persons because I would not allow a blind woman to be present in the courtroom during a trial over which I presided. That article was printed without anyone from the newspaper contacting me to verify the allegation, which I readily could have refuted. However, after the article ran, I was able to obtain a transcript of the trail in question, and it very clearly confirmed what I already knew; I had made special efforts to accommodate the woman in question, and I only ordered her to leave the courtroom (as I was required to do by the Federal Rules of Evidence) after the parties identified her as a potential witness and requested that all trial witnesses be sequestered. In other words, the woman was required to leave the courtroom because she was a potential witness, not because she was blind. Fortunately, when the actual facts came to light, the newspaper ran another story setting the record straight.

I mention this story not as a complaint, but as an example of how a perfectly legitimate set of facts can easily be misused to

portray a false impression. I believer that this has occurred in this instance, and I am very appreciative to the Committee for providing me the opportunity to set the record straight about my judicial career.

In closing, I would add a personal comment. In my life, I have seen first hand the unfair and unequal treatment of disadvantaged people in society. That is one reason I have always cared so deeply for doing my best to treat all people fairly and with respect. Those who know me would emphatically agree that I have an abiding concern for fairness. I believe my record as a judge underscores my dedication to his principle and I will continue to show fairness and respect to all in my judicial actions, as well as in my public and private life.

Mr. SPECTER. How much time remains, Madam President, of the 10 minutes?

The PRESIDING OFFICER. The Senator has 5 minutes 50 seconds.

HOMELAND SECURITY

Mr. SPECTER. Madam President, we face a very difficult situation on homeland security in a number of respects. I spoke last week about my concern that there was not sufficient authority in the Secretary to direct the intelligence agencies and my concern about the labor-management provisions. I did not offer amendments because when the House of Representatives has, in effect, gone home, if we pass amendments, there will have to be a conference and the bill will be brought down.

I believe it is vitally important that homeland security be passed, that we move ahead to put all the so-called dots on the screen, as I spoke at length on last week. Had all the dots been on the screen, I think 9/11 might well have been prevented. I do not accept the assertion of CIA Director George Tenet that another 9/11 is inevitable.

The House-passed bill from last Wednesday, which has come over, is a voluminous bill, hundreds of pages long. As we start to consider it, there are seven provisions now which Senator LIEBERMAN has sought to strike: Provisions on childhood vaccines; protections for qualified antiterrorism technologies; the university of homeland security advancement, which seems to pinpoint Texas A&M; the extended duration of the advisory committee; the exemption for FACA; the airport security liability protections; the provision on contracting with offshore entities, which Senator Wellstone had added, to prohibit the Secretary from contracting with inverted domestic corporations.

All of these provisions, I think, require very extensive consideration and analysis. I am very distressed to see them added on the bill, with no hearings and no chance for consideration. Now we are faced with a homeland security bill which is very heavily weighted with provisions which are undesirable. It makes it difficult.

Candidly, I am not sure how I would vote on all of these provisions if they were presented individually. I do think that on a matter of this importance, it would have been orderly procedure to have these provisions submitted for hearings and consideration. It may well be that by the time we add up all of the provisions, the disadvantages may well outweigh the advantages of this bill on homeland security.

Ultimately, the need to have homeland security, to have a Secretary who will be able to put all of the investigative agencies under one umbrella, is so important that we will have to swallow hard. This is really a case where it is a matter of take it or leave it on a bill which is undesirable in many aspects, but the importance of protecting America from terrorist attacks outweighs so many of these provisions which are highly undesirable.

There is an old expression about not wanting to see either legislation or sausage made. This homeland security bill is problemsome in so many respects that it is giving sausage a bad name. It goes very far. However, it is so important to have a Secretary with authority on homeland security to act to protect against terrorism. This bill is very weighty and has undesirable aspects, and there are amendments which would have improved the bill tremendously.

I lodge these objections that the procedural posture really of legislative blackmail, with the House having gone home, a take-it-or-leave-it proposition, puts this Senator in a very difficult position. Ultimately, I think the necessity for homeland security outweighs these disadvantages, but barely.

I again thank my colleague from West Virginia for arranging this sequence, and I yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. BYRD. I yield whatever time he may wish to consume to the distinguished Senator from Vermont, Mr. LEAHY, with my retaining the floor.

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

The Senator from Vermont.

Mr. LEAHY. Madam President, I thank the distinguished senior Senator from West Virginia. He has been my friend for nearly 30 years, and his constant courtesy is one of the reasons for it.

Mr. BYRD. And will be for the next 30.

Mr. LEAHY. I thank the Senator.

TRIBUTE TO EMMYLOU HARRIS

Madam President, last week, at the Birchmere Music Hall in Alexandria, VA, there was a concert that honored one of the most distinguished songwriters and singers I know, Emmylou Harris. Emmylou Harris was honored because of the work she has done to aid victims of landmines and to help stop the scourge of landmines throughout the world. In honoring her, some of the best artists of this country came and sang for her. They honored both her work and, of course, they honored her amazing talent.

My wife Marcelle and I, and our daughter Alicia, and Emmylou's daughter, mother, and friends were there to hear this. She received the award from the Vietnam Veterans of America Foundation, the Patrick Leahy Humanitarian Award. I can't think of anything that gave me more pleasure than to give it to her.

I ask unanimous consent that an article from Rolling Stone magazine of November 13, 2002, speaking of Emmylou being honored in Washington, DC, be printed in the RECORD.

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

[Rolling Stone, Nov. 13, 2002]

EMMYLOU HONORED IN D.C.

(By Lynne Margolis)

MUSICIANS, POLITICIANS PRAISE HARRIS FOR LANDMINE CHARITY WORK

When Senator PATRICK J. LEAHY presented singer-songwriter Emmylou Harris with his namesake humanitarian award Tuesday night at the Birchmere Music Hall in Alexandria, Virginia, he said her work on behalf of landmine victims might have touched more lives—in more important ways—than her vast body of beloved music.

Harris, who received the award from the Vietnam Veterans of America Foundation for her creation and continued support of the Concerts for a Landmine Free World benefits, said it merely represented how blessed she is to be able ''to give something back'' in exchange for a career that brings her so much joy that ''you really can't call it work.''

Harris seemed even more humbled than usual by the shower of accolades from LEAHY, VVAF president Bobby Muller and some of her closest musical friends including Steve Earle, Buddy and Julie Miller, Patty Griffin, Nanci Griffith, Guy Clark, Rodney Crowell, John Prine and Jamie O'Hara, all of whom performed at the benefit concert. Pal Mary Chapin Carpenter was unable to attend because of back problems, but sent flowers that adorned the stage of the intimate, 500-seat venue. Most of the artists had participated in earlier Landmine Free World concert tours and, like Harris, have visited countries devastated by landmines that still remain years after military conflicts have ended. LEAHY has spearheaded efforts for a global landmine ban; VVAF aids civilian victims of those conflicts.

During a night that focused on the purest of musical elements—lyrics, wooden guitars, and frequently, Harris' angelic soprano soaring in harmony with her equally talented friends—she gave as much praise to her fellow activists and performers as they did to her.

''Really what I have done has been given the opportunity to reflect, or deflect, some of the light that shines on me because of the nature of my work, and shine it on these people, these causes, these situations,'' she said backstage.

''I'm so, so grateful for the opportunity to be able to do that. Because that's the only way I know to be really thankful for my blessings. This is a really wonderful moment for me. And I'm so grateful to all my fantastic friends who made it possible.''

The night contained a few overtly political references or anti-war proselytizing, though Prine performed ''Your Flag Decal Won't Get You Into Heaven'' and his 1970 tearjerker gem, ''Hello in There,'' with its reference to parents who lost a son in Korea. Harris noted that her father was a World War II veteran and Korean War POW, and that the show was occurring one day after Veterans Day as well as the twentieth anniversary of the Vietnam Veterans Memorial dedication. She talked about playing at the memorial's fifteenth

anniversary five years ago and how listening to O'Hara sing his ''50,000 Names'' was ''the most cathartic experience I've ever had in my career.'' As he performed the tune again, sniffles could be heard in the audience. Later, at Harris' request, Earle did ''a song about faith,'' the title track from his new album, Jerusalem.

Earlier, LEAHY cracked that everybody in Washington was in the room except U.S. Attorney General John Ashcroft, who ''listens to Steve Earle all the time.'' The outspoken Earle has made his anti-war and anti-death penalty views well known in Washington.

Harris noted that ''Jerusalem'' provided a necessary note of hope, adding ''we're in a very difficult time right now.'' Backstage she said, ''I don't know whether [war is] inevitable or not. Certainly, the world is gonna change in some way pretty soon. I can't see the status quo staying the same.''

But this was a night for positivity and humor, despite the profusion of sad love songs and achingly beautiful hormonies delivered on tunes such as Harris' ''Prayer in Open D'' (performed by the Millers as ''Prayer in D'' because, Buddy explained, ''I can't play an open D'').

For the encore, Harris brought out John Starling and Mike Auldrige, original members of the D.C.-area bluegrass band the Seldom Scene, for the Louvin Brothers' classic ''Satan's Jeweled Crown,'' which she recorded on Elite Hotel.

The evening was probably best represented by comments delivered by LEAHY. ''There are people in Southeast Asia, in Africa, in Central America, around the world, who are going to be helped by what you have done,'' he said. ''They will never know you, they'll never hear your songs, they'll never know your fame. They'll never be able to do anything to help you, but because you've helped them, their lives are immeasurably better. And how many people in life can say that?''

Mr. LEAHY. I yield the floor, and I thank the Senator from West Virginia.

The PRESIDING OFFICER (Mr. DAYTON). The Senator from West Virginia.

Mr. BYRD. The distinguished Senator from Vermont is welcome, and I congratulate him.

FAREWELL TO SENATOR ROBERT SMITH

Mr. BYRD. Madam President, last year when my beloved little dog Billy passed away, many people came to me to express their condolences. It was like losing one of the family. My wife and I have shed many tears over little Billy. There is never a day that I don't pass his little box of ashes that is sitting up in my bedroom, never a day that I don't touch that little box and think of little Billy. He has been with us 15 years.

We have a new dog now, one which is a very sweet little female dog. She is a lap dog. She is a Shi Tzu, a dog that came out of Tibet. It was bred to be a lap dog in the palace, extremely friendly, knows no person is not a friend. She just smothers my wife's face with kisses—and mine, too. So we love her.

But I said to Erma the other night: Erma, if Billy could come back tomorrow, would he still be No. 1? And both she and I said yes; even though we love this little dog, the little dog we have now, the female—she is called Trouble; I think my wife saw me coming when she named the little dog Trouble. I said to Erma, if Billy came back tonight, would he still be No. 1, and she said yes. And we both agreed that Billy would still be No. 1.

Last year, when our beloved dog Billy Byrd passed away, many people came to me to express their condolences. But one who really, really touched me was a big, hulking Navy combat veteran who came to my office and showed a personal compassion in that moment of sorrow. That person came to talk about the little dog that I had lost. He had read about the passing of our little dog Billy. He read the story in the newspaper, and he came to my office to express his sorrow.

Who was he? That person was the senior Senator from New Hampshire, Mr. ROBERT SMITH. He would make about two of me, ROBERT BYRD. Here he came to my office, took his own busy time to come to my office. This was back in April of this year. He came to my office, paid a special visit to my office to tell me how sorry he was to hear about my little dog Billy.

So once again, as I have many times in my long years with which God has blessed me, I came to realize that the people with whom we work here in the Senate often have a personal side that we do not get to know or understand in our working relationships on the Senate floor. Our colleagues are usually much more complex than their public persona would lead one to believe and have facets to their characters that are not often seen in their daily official activities.

But Senator ROBERT SMITH'S thoughtful expression of sympathy gave me a better understanding and appreciation for this man who for several years now has proudly represented his State in the Senate. He is on the Armed Services Committee with me. I have served on that committee now with him these many years. Senator SMITH possesses an admirable quality of perseverance. As a young man, he had to work his way through college. Although he was the son of a naval aviator who was killed in combat during World War II, when ROBERT SMITH was old enough, he enlisted in the Navy and he proudly served our country in combat in Vietnam. He is a person who had to run for Congress three times before being elected. As a Senator, his tenacious adherence to his independent ways eventually cost him his Senate seat.

He has often been portrayed as a fierce conservative, but I came to perceive him as the ''citizen legislator'' that he promised to be when he was first elected to Congress in 1984. In his twelve years in the Senate, he has been a forceful advocate of the many and various causes in which he believes, and he has never been deterred by the labels others may place on those views.

BOB SMITH'S politics is not easy to characterize, from his support for a constitutional amendment to balance the budget to helping to preserve and protect our environment, he has defied easy labels. Senator SMITH has also been a strong advocate for modernizing his state's and the nation's infrastructure, and for that I sincerely applaud him. He has also tenaciously fought to gain a thorough accounting of American MIAs and POWs.

I have probably opposed Senator SMITH more than I have agreed with him, but I have consistently been impressed with his independence of spirit and thought, and his dedication to the causes in which he believes. I am confident that in his future efforts he will continue to demonstrate the steadfastness, courage, and integrity that he has exemplified during his twelve years in this chamber. I wish him well in his future endeavors.

I hope he will, indeed, come back and visit those who are his colleagues of this date.

RECONSTRUCTION OF AFGHANISTAN

Mr. BYRD. Mr. President, on another matter, it was just over one year ago, on November 12, 2001, that Afghanistan's government of religious extremists fled Kabul. The rule of the Taliban soon collapsed in the rest of the country, and a new government, endorsed by the United Nations, took shape. Despite this new government, the United States still has more than 8,000 troops in Afghanistan performing a number of important missions, from tracking down al-Qaida terrorists who have taken to the hills to providing security to the new Afghan President. In other words, from tracking down al-Qaida terrorists, who have taken to the hills on the one hand, to providing security to the new Afghan President on the other hand.

But the situation in Afghanistan is anything but stable. Our troops still face hit-and-run attacks from al-Qaida and Taliban fighters. The leadership of the new Afghan government has been targeted for assassination. Warlords that control portions of Afghanistan's countryside have questionable allegiance to the central government. Two million Afghan refugees have returned to their homes in the past year, many finding that their homes had been destroyed by war and their fields ravaged by drought.

But with the Administration gearing up for a new war in Iraq, important questions must be asked. What is our plan for Afghanistan? How great is the risk that we will lose the peace after winning a war in a poor, landlocked Central Asian country? Is the potential for war with Iraq shifting our attention from unfinished business in Afghanistan?

Recent press reports on the situation in Afghanistan are not encouraging. On November 8, the Washington Post carried an article which quotes the Chairman of the Joint Chiefs of Staff, General Richard Myers, as saying that we have ''lost a little momentum'' in tracking down terrorists in Afghanistan. With al Qaeda adapting to our