

to a better paying career. In other words, service jobs are presented as great jobs for people who do not really need them, in many instances. The truth is, people do need these jobs, and many of the holders of these jobs are adults who depend on that paycheck to pay rent or child care. Many are former industrial workers simply trying to exist in the new economy.

Studies of counties in Colorado, Missouri, and Mississippi found a declining standard of living for workers and their communities as they moved from manufacturing jobs to service jobs.

Martha Burt of the Urban Institute found that the growth of homelessness in the United States in the 1980s was not, as commonly supposed, the result of drug addiction, or the deinstitutionalization of the mentally ill, nor the cutbacks in social programs during the Reagan administration, but the shift from an industrial economy to a service economy. With the decline in manufacturing jobs in the 1970s, she explains, huge numbers of former full-time factory workers earning union wages were replaced with part-time workers in retail stores, restaurants, and other service jobs, where wages are too low to enable them to afford the price of housing.

The facts are, as the Stearns Trustee Professor of Political Economy at Northeastern University, Barry Bluestone, emphasizes, even workers who retain manufacturing jobs also face a bleak future, a future of a declining standard of living, if we do not revise our trade policies and insist upon effective labor and environmental standards in our trade agreements. This is because competition from countries which lack, or do not enforce, labor and environmental standards, continues to have a large, negative impact on employment in key sectors of our economy, and on American wages and living standards across the board.

With the rise of international competition and the shift to lower wage service jobs in the United States, real wages have stagnated, making life much more difficult for all American workers. Real average weekly earnings peaked in 1972 at \$315.44. Today, even with some recovery in real wages due to the rapid growth in the economy in the 1990s, the average weekly wage is nearly 12 percent less than at its peak.

This decline in real wages is forcing American workers to work longer hours than ever before in order to maintain their living standards. They are running in place—sweating on a treadmill operated by the hyper zealots of free trade regardless of consequences. In fact, the United States is the only major developed country that has experienced an increase in the average workweek and the average work year. Since 1982, the average workweek among prime-age workers in the United States has increased from 39.6 hours to 41.3 in 2000.

This means that the average work year has increased from around 1,840

hours to over 2,020. Put simply, stagnating wages are forcing Americans to work longer and longer hours just to maintain their standard of living. They are not getting ahead. They are simply maintaining what they have worked so hard for, if, indeed, they are even maintaining that.

This is why the Congress must protect and exercise its right to amend trade agreements. Why do we give away Congress' power to amend trade agreements?

We must insist on establishing universal labor and environmental standards. We must insist on protecting American industries from even more devastation by unfair competition from firms operating abroad, exploiting cheap labor pools, and tolerating working conditions which are unacceptably harsh, and environmental standards which are nonexistent.

These essential universal labor and environmental standards can be extracted only through our trade agreements.

In the 1930s, the United States instituted a range of laws and regulations to protect workers and the environment. We did this at the Federal level so that individual States could not take unfair advantage of other States by lowering their minimum wages, permitting child and prison labor, ignoring occupational and safety provisions, eliminating or reducing unemployment benefits, or disregarding environmental standards. We leveled the playing field domestically. No one could manipulate for advantage.

Now we must level the playing field in international competition, where American workers are too often forced to play by the rules in a rigged game. In our new, globalized economy, we run the risk of undermining our own hard won labor and environmental standards if other countries choose to have none of their own or refuse to enforce reasonable requirements. Congress, which has the constitutional power, and therefore the duty "to regulate commerce with foreign nations," must have the means to insist on reasonable labor and environmental standards as part of any and all trade agreements. This is to the benefit not only of American workers, but also of workers, both children and adults, who are laboring under oppressive, unsafe, and unhealthy conditions in other lands.

Over the years, I have seen administrations—Republican and Democratic—repeatedly negotiate trade agreements that reflected priorities other than those of the American people. I say that with a background of 50 years in Congress, the House of Representatives and the Senate, so let me say it again. I have seen administrations—Republican and Democratic—repeatedly negotiate trade agreements that reflected priorities other than those of the American people. I have seen this Nation genuflect at the altar of big business interests. I have witnessed the holy battle cry of "free trade" become

a club by which to beat into submission any voice that expressed an argument for balance and fairness. That is understandably the outcome of trade talks that ignore the constitutional role of the Congress in international commerce.

While it is not surprising that Republican and Democratic administrations would attempt to enter into trade agreements that reflect their own priorities, it is absolutely distressing—it is extremely puzzling to this Senator—that the Members of Congress would willingly give up their right to shape trade agreements that reflect the priorities of the American people, and the best interests of the United States. It just demonstrates how cowed and how intimidating we in public life have become by the absolute terror of bumper sticker politics. Free trade is the battle cry. Don't complicate it with real world concerns.

As a U.S. Senator from West Virginia, I am always—first, last, and all the time—for the protection of the interests of this country, of this Nation's workers, and this country's manufacturing industries and I am going to continue being that way by opposing the granting of blanket fast track authority for this or any other President.

Call it trade promotion authority, if you will—it is still fast track—to give away American interests when it comes to trade.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HATCH. Mr. President, I ask unanimous consent the order for the quorum call be dispensed with.

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF PAUL G. CASSELL, OF UTAH, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF UTAH

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session and proceed to the consideration of Executive Calendar No. 815, which the clerk will report.

The legislative clerk read the nomination of Paul G. Cassell, of Utah, to be United States District Judge for the District of Utah.

The PRESIDING OFFICER. Under the previous order, the time until 6 p.m. will be for debate on the nomination, equally divided between the

chairman and ranking member of the Judiciary Committee or their designees.

Who yields time?

The Senator from Vermont.

Mr. LEAHY. Mr. President, I yield myself 1 minute.

I know Professor Cassell is a friend of the distinguished senior Senator from Utah, who has urged his confirmation. I do not know whether, as a courtesy, the senior Senator wanted to go first.

Mr. HATCH. Whatever the distinguished chairman prefers.

I thank the chairman.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I rise to voice my strong support for Professor Paul G. Cassell, who is President Bush's nominee to the District Court for the District of Utah.

This nomination is very important to my home State of Utah. In fact, the chief judge of the Federal District Court in Utah is sitting in the audience. This is so important for them, for everyone in Utah, and to me personally. I would like to take a few minutes to introduce this exemplary lawyer to the Senate, and to explain why Professor Cassell is one of the most qualified people ever nominated to the district court bench.

Listen to the highlights of Professor Cassell's résumé: He graduated from Stanford Law School, where he was president of the Stanford Law Review and a member of the Order of the Coif—the highest honors you can have in law school. He served as a law clerk to then-Judge Antonin Scalia on the U.S. Court of Appeals for the D.C. Circuit, and to Chief Justice Warren E. Burger of the U.S. Supreme Court. He then went to the Justice Department, where he served as an Associate Deputy Attorney General, handling a variety of complex legal issues—including the efforts to defend the constitutionality of the United States Sentencing Guidelines, passed by Congress to regulate unwarranted sentencing disparity. Next, he worked as an assistant U.S. attorney in the Eastern District of Virginia. In that position, Cassell tried more than a dozen jury trials in felony criminal cases, obtaining guilty verdicts in every case that reached the jury.

I would like to highlight a couple of cases he tried there. Cassell successfully prosecuted the CEO of a failed savings and loan for theft of \$500,000; two investors and a real estate agent who had defrauded a HUD program; a drug dealer who was smuggling guns and a federally licensed firearms dealer who had aided him in this effort; and the notorious "yellow glove" bank robber, who had perpetrated a string of armed robberies in Virginia and Maryland. He also successfully prosecuted the largest seizure of crack cocaine in the history of National Airport at that time. For his efforts in cases such as these, Cassell was recognized by the Attorney General with a Special Achievement Award.

Professor Cassell's impressive résumé and his experience in court are no doubt the reason why a substantial majority of the ABA review committee rates Professor Cassell "well qualified" to be a federal judge. It is also the reason why a number of people who know Professor Cassell's work and character have written to me in support of his nomination.

Mr. President, I ask unanimous consent to have a selection of such letters printed in the RECORD following my remarks.

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

(See Exhibit 1.)

Mr. HATCH. Mr. President, I apologize for my laryngitis. I have had it for about 2 weeks.

Professor Cassell's educational achievements, Department of Justice experience, and successes in trial are just a warm-up, in my opinion, for an even more important chapter of his career. In 1992, Cassell and his wife, Trish, returned to the West after he accepted a teaching position at the University of Utah College of Law. It was there that he unleashed his intellect and tremendous work ethic for the benefit of his students, the faculty, the citizens of Utah, and the Nation's victims of crime.

Professor Cassell quickly became one of the students' favorite teachers. He has always prepared well for his classes, he uses relevant real-world examples from his career as a prosecutor, and he teaches with an approachable demeanor—and even a sense of humor. These are some of the qualities that led, in 1997, to Professor Cassell's being one of the youngest law professors ever to receive the Faculty Achievement Award for Teaching Excellence—the "teacher of the year" award. Three years later in 2000, Cassell became one of the youngest chaired faculty members at the University of Utah when he was awarded the James I. Farr Professorship of Law.

As a scholar, Professor Cassell has become a national expert on criminal procedure and evidence. His scholarship includes over 25 law review articles, which have been published in such prestigious journals as the Stanford Law Review, the Michigan Law Review, the UCLA Law Review, the Brigham Young University Law Review, and the Utah Law Review. He has also made presentations at law schools around the country, including Harvard, Stanford, Berkeley, Michigan, Northwestern, and UCLA. He has shared his knowledge and expertise with Congress, testifying numerous times before congressional committees on issues pertaining to criminal justice, including testimony on victims' rights, capital punishment, Miranda, and criminal cases in the United States Supreme Court.

Unlike many scholars, however, Professor Cassell has also put his intellect to practical use in his community. For example, Professor Cassell has been ac-

tively involved in fighting domestic violence and sexual assault in Utah. He has served as the chair of the Legislative Committee of the Utah Council on Victims of Crime as well as a member on the Utah Supreme Court's Advisory Committee on Rules of Criminal Procedure.

Professor Cassell has donated an extraordinary amount of time advocating on behalf of his fellow Utahns in court. In fact, he has done as much or more pro bono legal work as anyone I can remember ever appearing before the Judiciary Committee. He has represented dozens and dozens of crime victims, all without charge.

Let me give just one example—a case that came to my attention because of the moving letter I received from the victim's mother. It is the case called *State v. Casey*, in which Cassell argued on behalf of a 12-year-old Utah boy who had been victimized by sexual assault. When the boy was denied his right to speak in opposition to a plea bargain reducing the charge from a first-degree aggravated felony to a misdemeanor, Cassell had the case certified to the Utah Supreme Court as one involving an issue of "exceptional importance" and argued the issue on the boy's behalf. The boy's mother wrote me a letter about Cassell's work in that case, saying that Cassell:

... was the first attorney who listened to us with interest and understanding.

She explained that:

Paul worked long and late hours on our case ... at no financial gain for himself.

Because of Cassell's work, she said her family:

... can now start to move forward with our lives, putting the tragic past behind us.

It is not only Utahns who can say such things about Paul Cassell, because in addition to his work in our home State, Cassell has worked free of charge on behalf of crime victims all across the country. For example, in 1996, Cassell undertook to represent 89 victims of the Oklahoma City bombing. They had been ordered not to watch court proceedings in the case if they were going to provide so-called impact testimony at the death-penalty phase of Timothy McVeigh's trial. This order appeared to contravene the requirements of the victims bill of rights, a Federal statute passed by Congress to guarantee crime victims the right to attend court proceedings. Cassell appealed to the tenth circuit, which rejected the petition on the grounds that crime victims lacked standing to present their claims to an appellate court. Cassell's petition for rehearing in the case was supported by 49 Members of Congress—of both political parties—as well as the United States Department of Justice, all six State Attorneys General in the tenth circuit, and some of the leading crime victims' groups in the country, such as Mothers Against Drunk Driving and the National Crime Victims Constitutional Amendment Network. When the petition for rehearing was denied, Cassell

helped crime victims come to Congress to obtain remedial legislation. Congress passed the Victims' Rights Clarification Act of 1997 by a margin of 418 to 19 in the House and unanimously here in the Senate. That would not have happened but for Professor Cassell. When President Clinton signed the act into law, he endorsed Cassell's position, explaining "when someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."

Again, all of that work was done by Professor Cassell without any compensation. Those victims would not have had any voice at all in the criminal justice system if it weren't for the selfless sacrifice and dedication of Professor Cassell.

In sum, Mr. President, Professor Cassell's record demonstrates everything that this body should hope for in a judicial nominee: unquestioned competence; a track record of hard work; a personal dedication to justice; and a commitment to public service. To that, I would like to add my personal opinion. I know Paul Cassell, and I know him to be not only an extraordinary lawyer and an extraordinary scholar, but also one of the most decent, honest, honorable, and fairminded people I have ever known. He is going to be an absolutely great judge, and an excellent addition to the Utah District Court bench. I urge my colleagues to vote in favor of his confirmation.

I thank the Chair and reserve the remainder of my time.

Mr. President, I yield the floor.

EXHIBIT 1

U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, VIOLENCE AGAINST WOMEN OFFICE,

Washington, DC, March 18, 2002.

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

DEAR CHAIRMAN LEAHY: I am writing to express my strong personal support for the appointment of Professor Paul Cassell to the Federal District Court of Utah. I believe, based on my past association with Professor Cassell, that he will make an excellent judge.

Professor Cassell and I have worked together for over five years as co-members of the Utah Council on Victims of Crime and I have come to respect his integrity, great knowledge of the law, and ability to assist others in the comprehension of the often complex issues at hand. Often in my work as State Coordinator for the Utah Governor's Cabinet Council on Domestic Violence, Professor Cassell was of invaluable assistance in analyzing legislation as it was being proposed and many times provided an expert opinion on existing federal and state statutes. Issues of confidentiality, victim notification and courtroom video taping became more understandable as he worked to provide a solid, legal foundation for others to follow.

It is my belief that Professor Cassell is exactly the right kind of balanced individual that will make him an exceptional Federal District Court Judge.

Respectfully,

DIANE M. STUART,
Director.

STATE OF UTAH,
OFFICE OF THE ATTORNEY GENERAL,
Salt Lake City, UT, September 27, 2001.
Re judicial nominee Professor Paul G. Cassell.

Hon. ORRIN HATCH,
U.S. Senate, Senate Russell Building, Washington, DC.

DEAR SENATOR HATCH: I am writing to you in your capacity as ranking member of the Senate Judiciary Committee to express my strong support for the nomination of Professor Paul G. Cassell to the United States District Court for the District of Utah. He is an active practitioner, prolific scholar, and fervent advocate for victims' rights.

Professor Cassell is not "anti-defendant" as some have charged, but pro-victim. As a national leader of the victims' rights movement, Professor Cassell was instrumental in achieving reforms in Utah law that have given voice to victims of crime. Professor Cassell has exposed shoddy scholarship attacking capital punishment and advocated for moderating Miranda's sweeping exclusionary rule. However well supported and reasonable, these positions have understandably not won him points in the defense community. But in the larger community, Paul Cassell is highly regarded for his service in the public interest.

In addition, I personally know Paul Cassell to be a man of absolute integrity and fairness. He personifies the principal of "justice." He has the ability to put personal opinion and bias, and fairly and impartially adjudicate the issues brought before him.

In sum, Professor Cassell is well respected in Utah and would be a credit to the federal bench in this State. I urge you to support his nomination.

Very truly yours,

MARK L. SHURTLEFF,
Attorney General.

MARCH 18, 2002.

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR SIR: I am writing this letter to you today to express my deep support for the nomination of Paul Cassell to a position as a Federal Judge.

I have had the pleasure of working with Mr. Cassell over a long period of time on a very important case involving my family and our rights as victims. During that time I had many conversations with Paul and I felt that I came to know him reasonably well as both a person and an attorney.

As an attorney, Paul's accomplishments are many, and I am sure that you have already been made aware of the many great experiences and achievements of his distinguished career. I wish to speak more intimately of my personal experience with Mr. Cassell's handling of our own case.

Our case was probably the most difficult and emotionally draining experience of our lives. My family was forced to deal with a tragedy that we never imagined would happen to us. We were confronted with many obstacles that we never anticipated and we grew increasingly frustrated with the confusion, and seeming contradictions of the Justice System as we were lied to, and misled, by many different people throughout the process, including people that we thought were supposed to be on our side.

During the height of our frustration with the handling of our case we began to search for someone to provide us with legal help and representation and we were fortunate enough to find Mr. Cassell. Paul agreed to help us without ever charging us a penny as he tirelessly worked to resolve our case in a favor-

able and just way. He was always honest and upfront with us about our case, even when the answer was not what we wanted to hear. Paul had a gift for being able to wade through all the legal confusion and explain things clearly and understandably to us. Paul impressed me as a person who is able to see things fairly from all different perspectives and help opposing sides find the right solution to a problem. Our case did not end with exactly the decision that we hoped for, but thanks to Paul Cassell we were able to find some measure of justice and closure, and we feel much better about the outcome of our case. It is my firm belief that you would be very hard pressed to find any better attorney than Mr. Cassell!

As a person, Paul is a very honest, fair-minded, and compassionate man. In today's world it has become increasingly hard to find people whose judgement you can completely trust and rely upon, but Paul Cassell is just such a person. At a time when more and more people are becoming jaded about the law and losing confidence in our Justice System, Paul Cassell is the right type of person to help bring integrity back into the legal profession and restore the faith of the American people in their courts, both victims and defendants.

I hope I never again find myself or my family in the position of having to deal with our legal system in such a personal way. But if I do, I hope that the Judge who hears our case and the attorney's on both sides of the issue are people like Paul Cassell, because if they are then I know we'll be in the best possible hands.

I sincerely hope that you will support Paul Cassell's nomination as a Federal Judge. Please don't reject him over something so trivial as political party affiliation or ideology. Accept him because he's a very good person who truly has Americans best interests at heart. Now, more than ever, America desperately needs great leaders, like Paul Cassell, and I know that you will not find a better candidate for the job!!

Thank you for your careful consideration,
STERLING JAMES POLL.

MARCH 18, 2002.

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR SIR: I am writing you today to make you aware of why I feel Paul Cassell would make an excellent choice for a Judge.

Life brought circumstances to my family and I that we had never imagined we would have to deal with. We found ourselves thrust into the U.S. legal system. We were totally unprepared for this. We found the legal system to be confusing, contradictory and unsympathetic. We were in great need of help. Help to get us through, help to understand, and help to find justice. We began calling attorneys on the phone in search of the information that we needed. Many phone calls later, we did find someone who recommended Paul Cassell.

We called Paul Cassell, and he was the first attorney who listened to us with interest and understanding. He advised us with no hesitation, and immediately said he would take our case—Pro-Bono. We then began our relationship with Paul.

Paul worked long and late hours on our case. We found him to be honest and forthright about what was going on with our case. He explained in plain terms what exactly would happen at our hearings. He made us aware of all possibilities, from both perspectives of the case. He saw our case through to the Utah Supreme Court.

Our case did not have the results that we had hoped for, however, we are a family, now

have some closure to a very tragic situation. We all feel that due to the work Paul Cassell did for us, at no financial gain for himself, we did everything that could possibly have been done to get the justice we feel we deserved. We can not start to move forward with our lives, putting the tragic past behind us. In particular, my fourteen-year-old son, is now starting to make progress and feel good about himself. He knows that he has helped to make the pathway a little easier for other people in the same situation.

I feel that Paul has all the qualities a judge for our country should have. He is honest, forthright, concerned about whether or not justice has been served. We spent time with him, had many conversations with him, where we came to a clear understanding of how much he cares for the people of our country. We could see how important the justice system is to him. There are not many attorneys that would take on a case Pro bono, where he is going to have to spend many hours of his own personal time, just to help people in need.

I recommend Paul Cassell highly, for a judgeship. If you are interested in what is going to be best for the people of our country, I truly feel that you are not going to find any better man for the job.

Thank you for your time and consideration,

CYNTHIA F. CASEY.

NATIONAL ORGANIZATION OF
PARENTS OF MURDERED
CHILDREN, INC.,
Cincinnati, OH, March 18, 2002.

Senator ORRIN HATCH,
C/O Alex Dahl.

DEAR SENATOR HATCH: On behalf of the National Organization of Parents Of Murdered Children, Inc., and its over 100,000 members, I am writing to strongly support Paul Cassell's confirmation for the Federal District Court for the District of Utah. Paul has been a tremendous asset to POMC and its members.

Sincerely,

NANCY RUHE-MUNCH,
Executive Director.

VIAD CORP.,
Phoenix, AZ, July 19, 2001.

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary,
Dirksen Senate Office Building, Wash-
ington, DC.

DEAR SENATOR HATCH: I am writing to express my strong support for the confirmation of Prof. Paul Cassell's nomination to the United States District Court for the District of Utah.

I have known Prof. Cassell through our work together in the cause of establishing and enforcing rights for crime victims. Paul is a person of compassion and fairness. He has deep respect for the rule of law and for the role of the judiciary in preserving and protecting it. He is at all times respectful of others and displays a temperament that will always remain faithful to the obligations of a federal judge. He has a strong work ethic and will clearly be able to meet the rigors of a busy trial court.

Paul is a person of intellectual and moral integrity; he will serve with distinction on the District Court when he is confirmed, giving equal justice to all who appear before him. I urge you and all of your colleagues to confirm the nomination of Prof. Paul Cassell.

Thank you for considering these views.

Sincerely,

STEVE TWIST,
Assistant General
Counsel, Viad Corp;
Chief Counsel, Na-

tional Victims Con-
stitutional, Amend-
ment Network.

RUTGERS
UNIVERSITY SCHOOL OF LAW,
Newark, NJ, March 16, 2002.

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

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary,
Dirksen Senate Office building, Wash-
ington, DC.

DEAR SENATORS LEAHY AND HATCH: I write to support enthusiastically and without reservation the nomination of Professor Paul G. Cassell to be a federal district judge. I have known Paul for many years, and I believe he will make a highly capable judge. I wrote a letter supporting his tenure at the University of Utah College of Law several years ago, and he has continued to shine as a legal thinker and writer.

Professor Cassell is intelligent, thoughtful, and willing to explore different approaches to problems that arise in the law. He writes extremely well and is top flight in his analysis of cases and doctrines. Indeed, he has on occasion pointed out an analytical flaw in a doctrinal argument I was making, thus allowing me to reshape the argument before publishing it. Professor Cassell has continued the tradition of Justice John Harlan and Professor Grano by holding the premises of *Miranda v. Arizona* up to the light and asking why the Constitution should consider police interrogation such a threat to autonomy and free will.

We have "dueled" in a friendly way in print (Volume 43 of the UCLA Law Review, pages 821-959), before a TV camera (in the PBS Debates-Debates series), before the Senate Subcommittee on Criminal Justice Oversight, and at the University of Michigan symposium on *Miranda* and *Dickerson* (November, 2000).

Professor Cassell and I disagree on some issues and yet respect each other. This fact alone says volumes. I think, about how effective he will be as a judge in dealing with lawyers and others in his courtroom. I predict that Paul Cassell will research the law energetically, understand it as well as anyone can, and apply it fairly and consistently.

Should you wish further details, please let me know.

Sincerely yours,

GEORGE C. THOMAS III,
Professor of Law,
Judge Alexander P.
Waugh, Sr. Disting-
uished Scholar.

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, DC, March 25, 2002.
Re judicial nominee Paul Cassell (U.S. Dis-
trict Court, District of Utah).

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

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

DEAR SENATOR LEAHY AND SENATOR HATCH: I understand that my colleague in teaching, Professor Paul Cassell of the University of Utah Law School, has been nominated by President George W. Bush to serve as a United States District Judge for the District of Utah. I know Paul very well, and I recommend him enthusiastically. (I write in my personal capacity as a professor of civil rights law at Georgetown University Law Center for the past twenty-seven years. I have previously been privileged to contribute to the work of the Senate Judiciary Committee by consulting with or advising

Senators from both parties, including Senator Joseph Biden of Delaware regarding judicial nominations, Senator Orrin Hatch of Utah concerning technical perfections to a civil rights act, and Senator Charles McC. Mathias of Maryland concerning substantive provisions of several proposed bills expanding civil rights. I write this letter at my own initiative after seeing Professor Cassell by chance last week and learning of his then-pending hearing. I am sending a courtesy copy of this letter to my former colleague Professor Viet Dinh, now Assistant Attorney General.)

I have known Paul Cassell for over twelve years. I met him after he married one of my former students, Georgetown University Law Center graduate Patricia Cassell. Because he and I are both interested in constitutional law and civil rights, I have followed his academic work for many years, including his writing concerning the *Miranda* case and other related issues in criminal law. Although Paul's academic work has engendered some political criticism because it challenges a hallmark case from the Warren era, it is wholly and completely within the mainstream of American academic discourse. Paul's arguments have been challenging, well-reasoned, and broadly judicious in their criticism of the established order. His writings have not been narrowly focused on political considerations but have considered what works best for society and the legal order (such as whether *Miranda* actually protects society's victims), in the best tradition of American legal scholarship. It is true that Paul's work calls for the disestablishment of a court-declared "constitutional right," but the same was true of attacks on *The Dred Scott Case*, which recognized a constitutional right to hold slaves, and *Lochner v. New York*, which recognized a right to be free of government regulation of the employment contracts of workers. I disagree with some positions Paul has taken, including his distrust of the *Miranda* decision itself, but disagreement with the courts' declarations of "rights" is a part of the job of every American law professor, and Paul has handled his part of that discussion with rectitude and complete fidelity to our academic tradition and to the rule of law.

I also respect Paul quite highly because, though he fits within the broad academic mainstream, he has shown independence and has resisted pressure to conform for conformity's sake, especially regarding currently prevailing majority positions that strongly favor the criminal-law decisions of the 1960's. In my view this shows an independent mind that is very desirable in a federal judge, especially one sitting at the district level where conformist local pressure may often make it difficult to rule on contentious subjects. Yet even with his independent thinking, Paul's emphasis in public discussions has also been marked by a desire to bring balance to the public debate, such as by recognizing the interests of victims of crime as well as defendants charged with crimes. The ability to see countervailing values, and to listen to them, is a valuable asset for any judge, especially a federal judge sitting with life tenure. In all my dealings with Paul, airing many difficult issues of public policy, I have never heard him raise his voice or denigrate the personal commitment or integrity of an opponent. His personality and temperament are ideal for a federal district judge.

I have been privileged to attend an academic workshop with Paul and to meet his family and children on several occasions, and even skied with him and his family on one occasion when my family vacationed in Utah. He is a wonderfully kind and generous

person, completely unpretentious and unaffected despite his high standing in his community and his nationwide renown in academia. He commands strong respect from his colleagues at the University of Utah and elsewhere. He leads a balanced life that includes much pro bono work for the public interest and other community activities. Far from being an ideologue or a single-issue activist, Paul is a multi-dimensional person with solid American values and an admirable commitment to making life better for all Americans.

Finally, I realize that there has been some criticism of Paul for his critical views on the *Miranda* case, especially his representation of the Fourth Circuit and Congress in a Supreme Court case challenging the *Miranda* rule. But Paul's role in that case showed his usual fidelity to the rule of law, not a challenge to it. In all my years of knowing Paul, I have never seen an indication that he would try to subvert the system to achieve his goals; his work has always been entirely open and direct, using the traditional methods of persuasion and openness that characterize both honest professors and honest judges. Most pertinently for potential future trial-court judges, I have complete confidence that Paul would never intentionally mis-find facts to protect his rulings from the bench or otherwise manipulate the process to accomplish personal goals. My narrow disagreement with Paul on *Miranda* does not alter one essential point: if my rights were at stake, or the rights of any of my traditional civil-rights clients when I practiced many years ago, I would affirmatively want Paul Cassell to judge the facts and the law of my case. His confirmation and appointment could do nothing but strengthen my trust in the American judiciary.

With much respect and admiration, I remain

Yours truly,

CHARLES F. ABERNATHY.

NORTHWESTERN SCHOOL OF LAW
OF LEWIS & CLARK COLLEGE,
Portland, OR, March 15, 2002.

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: I write to voice my support for the appointment of Professor Paul Cassell to the Federal District Court of Utah. Professor Cassell and I have worked together on many legal matters involving the rights of crime victims, particularly sexual assault and domestic violence victims. He is extraordinarily intelligent and a tireless advocate who through his down-to-earth style can distill complex legal theories into simple and persuasive arguments.

As a Democrat and a feminist, I may not always agree with professor Cassell. However, as an academic activist with a specialty in violence against women issues, I am unaware of a single instance where professor Cassell and myself disagreed on the legal issues or strategy involved in our many collaborations. As the Director of the Crime Victim Appellate Clinic and the founder of its Violence Against Women Project, I have had the privilege to collaborate with Professor Cassell on a variety of violence against women cases. I can say without hesitation that Professor Cassell is one of the preeminent leaders in safeguarding the rights of sexual assault and domestic violence survivors in the criminal justice system.

During our two years of working together, Professor Cassell and my organization, the National Crime Victim Law Institute (NVCLI), have represented many survivors of sexual assault and domestic violence. For ex-

ample, just last year in *Hagen v. Massachusetts*, No. SJC-08627 (Mass. 2001), we helped file an amicus brief on behalf of Jane Doe, Inc., Massachusetts Coalition Against Sexual Assault and the National Alliance of Sexual Assault Coalitions, defending a rape victim's right to have the convicted rapist begin serving his sentence thirteen years after the sentence was imposed. The issue is currently pending before the Massachusetts Supreme Judicial Court.

In *Cronan v. Cronan*, 774 A.2d 866 (R.I. 2001), representing a battered woman with the support of the Rhode Island Coalition Against Domestic Violence and the National Alliance of Sexual Assault Coalitions, Professor Cassell and the NCVLI successfully argued that a battered woman had properly initiated criminal charges against her husband.

Just two weeks ago, in *State v. Gomez* (Utah Supreme Court March 4, 2002), Professor Cassell and the NCVLI filed a brief on behalf of the Rape Recovery Center (the largest rape crisis center in Utah) with the support of the National Alliance to End Sexual Violence defending the privilege for confidential communications to rape crisis counselors.

Just last week, in *State v. Blake* (Utah Supreme Court March 14, 2002), Professor Cassell filed a brief on behalf of the Rape Recovery Center with the support of the National Alliance to End Sexual Violence defending the right of a rape victim to keep confidential communications made to a mental health therapist.

Notwithstanding our areas of disagreement, I believe that Professor Cassell has the temperament, integrity and commitment to follow the letter and spirit of established law that will make him an exceptional Federal District Court Judge.

Respectfully,

GINA S. MCCLARD,
Clinical Professor of
Law, Lewis & Clark
Law School, Associate
Director, National
Crime Victim
Law Institute.

NEW ENGLAND SCHOOL OF LAW,
Boston, MA, March 7, 2002.

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: I write to voice my support for the appointment of Professor Paul Cassell to the Federal District Court of Utah. Professor Cassell and I have had occasion to work together on several legal matters involving the rights of crime victims. He is an exceedingly bright and thoughtful advocate with a superior ability to synthesize complex ideas into a simple and persuasive argument.

Professor Cassell has a keen understanding of the limits of law while fiercely defending the unique role law plays in promoting civility. This is a particularly appropriate characteristic for any judicial nominee.

As an academic activist with a focus on women's rights, I do not always agree with Professor Cassell but he has frequently provided pro bono legal services to rape crisis centers, domestic violence advocates, and other victims' organizations who are advancing the cause of justice for women. For example, Professor Cassell and I recently worked together to file briefs protecting the confidentiality of rape crisis counseling records in Utah.

Notwithstanding areas of disagreement, I value Professor Cassell's integrity, his willingness to debate openly and his commitment to the idea that the law works best

with many diverse voices at the decision-making table.

Sincerely,

WENDY J. MURPHY,
Mary Joe Frug Visiting,
Assistant Professor of Law.

STEPTOE & JOHNSON LLP,
ATTORNEYS AT LAW,
Washington, DC, March 22, 2002.

Re nomination of Professor Paul Cassell.

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

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS LEAHY AND HATCH: I am writing on behalf of Professor Paul G. Cassell to support his nomination to the United States District Court for the District of Utah. I have known Professor Cassell for more than 17 years, both as a close personal friend and a professional colleague. He is without peer in either category.

I came to know Professor Cassell professionally in 1984 when we clerked at the same time for the United States Court of Appeals for the District of Columbia Circuit. From the beginning, Paul distinguished himself as a brilliant writer, a thoughtful legal scholar, and a decent and honorable person.

Subsequently, I worked with Paul at the United States Attorneys Office for the Eastern District of Virginia. There I had the privilege of trying my first federal criminal jury trial as a federal prosecutor with Paul serving as lead counsel. Later I enjoyed the even greater privilege of serving as the best man at Paul's wedding. Although in recent years our families have seen less of each other since his move to Utah, we remain in close contact and my family had the pleasure of hosting Paul, his wife Trish, and their three daughters during his recent trip to Washington for the confirmation hearing.

Based on this lengthy personal and professional relationship, I can say without hesitation or reservation that Paul would be a tremendous asset to the federal bench. Paul would bring to the bench an incisive legal mind as well as a fundamental decency and respect for all who appear before him, without regard to their status as plaintiff or defendant, lawyer or client, accused or accuser. In my conversations with Paul since his nomination, he has emphasized how proud he is to have been honored by this nomination and how committed he is to serve with honor and distinction. Given that Paul's intellectual prowess is exceeded only perhaps by his humility and decency, I have no doubt that given the opportunity he will so serve.

In observing Paul's confirmation hearing, it was clear that many of the questions focused on his ability and willingness to accept and consider different points of view and to put aside his views as an advocate and follow the laws as a Judge. In that regard, I would make the following observations: I am a lifelong Democrat and sine leaving the United States Attorneys Office I have worked as a criminal defense counsel. I regularly appear before district judges throughout the country on behalf of those accused with a wide variety of offenses. Although I routinely find myself in disagreement with Paul on numerous legal issues including the death penalty (which I oppose) and *Miranda* (which I support), I have no doubt that we in the defense bar and our clients, would receive fair and even-handed treatment in Paul's courtroom. For although Paul undoubtedly views my beliefs with the same skepticism as I view his, he is unfailingly receptive to my differing

views, courteous in addressing our differences, and respectful of my positions. Indeed, he accords respect to everyone that crosses his path, lacks even a touch of arrogance or conceit and is unfailingly polite even in situations where something less might be appropriate. I do not worry that as a judge, Paul might be high-handed, discourteous or have any difficulty following the principles of *stare decisis*. Given his decency and abiding integrity, I do not think it is in Paul's nature to act other than honorably and courteously.

I hope that the foregoing is of assistance in your consideration of Professor Cassell's nomination to the bench. If I can provide further information or answer any questions, please do not hesitate to contact me.

Sincerely,

MARK J. HULKOWER.

The PRESIDING OFFICER. Who yields time?

The Senator from Vermont.

Mr. LEAHY. Mr. President, how much time is available to the Senator from Utah and the Senator from Vermont?

The PRESIDING OFFICER. The Senator from Utah has 3 minutes 43 seconds. The Senator from Vermont has 12 minutes 40 seconds.

Mr. LEAHY. Mr. President, with last week's votes, the number of Federal judges confirmed since the change in Senate majority 10 months ago now totals 56. Under Democratic leadership, the Senate has confirmed more judges in 10 months than were confirmed by the Republican-controlled Senate in the 1996 and 1997 sessions combined.

Today's vote is on the nomination of Paul Cassell to the United States District Court for the District of Utah. After a great deal of thought, I will not be voting for this nominee today. Although this nomination is supported by my good friend from Utah, Senator HATCH, we disagree on his suitability to serve as a Federal judge. Senator HATCH has been an admirable and stalwart advocate for this nomination, and I certainly mean him no disrespect in voting against Professor Cassell.

The constitutional responsibility to advise and consent to the President's selection of lifetime tenured judicial nominees should not be devalued to advise and rubber stamp. When the President sends us a nominee whose qualifications, judgment or background raise concerns or who has a misunderstanding of the appropriate role of a Federal judge, I intend to make my concerns known. This is one of those times. The nomination of Professor Paul Cassell raises several areas of serious concern to me.

I think it is important to note that we have not engaged in a game of tit for tat for past Republican practices, nor have we delayed proceedings on this nomination, as so many nominations were delayed in past years of Republican control of the Senate. Instead, the Committee has seriously considered the nomination and worked hard to complete the Committee's record of information about this nominee. We have given the nominee an opportunity to be heard, promptly scheduled a Com-

mittee vote, and reported this nomination to the floor, although not unanimously. This is far more fairness, courtesy and orderly process than was provided so many nominees during prior years. Professor Cassell, in his nomination to the District Court, has been given a fair hearing and a fair process before the Committee and the Senate.

I am proud of the work the Judiciary Committee has done since the change in the majority. I am proud of the way we have considered nominees fairly and expeditiously and the way we have been able to report to the Senate so many qualified, nonideological, consensus nominees. We also have held hearings for a number of controversial nominees, such as Professor Cassell. Controversial nominations take more time and effort, but we are making that effort and taking that time to be fair and thorough in our consideration of those nominations, as well. One measure of our fairness is the fact that we are proceeding even on controversial nominations such as this one.

After thoroughly considering the record of this nominee, chosen for lifetime appointment by President Bush, I find that I cannot in good conscience vote in favor of Professor Cassell's confirmation. I have voted in favor of 56 other Bush judicial nominees, many of whom had been involved in partisan politics or ideological groups. I also voted in favor of the last person confirmed to the District Court in Utah, Judge Ted Stewart, a controversial nominee, and I did so even in the immediate aftermath of the Republicans' unprecedented party-line vote against Justice Ronnie White of Missouri, because I made a commitment to Senator HATCH.

At Senator HATCH's request, the Senate Judiciary Committee gave Professor Cassell a hearing on his nomination in March and the Committee voted on his nomination in the beginning of May. That is fairer treatment than more than 50 of President Clinton's judicial nominees ever got, those who never got a hearing and never got a vote by the Committee when the Republicans were in charge. Many others waited for months or years for a vote on their nominations. Our Judiciary Committee, however, accorded Professor Cassell a hearing although his nomination is quite controversial and even though he received a partial "not qualified" rating from the ABA.

Professor Cassell is a highly intelligent man, with an admirable passion for teaching and advocacy. But his written work, the record established at our hearing, and the answers he submitted to written questions raise grave doubts about his intellectual forthrightness and his capacity and willingness to put aside the extreme views he has long held. A judge who lacks the open-minded ability to hear both sides of a case cannot be depended on to administer justice impartially. I am concerned that he will be unable to set aside his personal views and that he

has, in his work on legal issues, shown a strong tendency already to be motivated by the outcomes he seeks rather than by the facts.

In 1992, Professor Cassell launched what became an 8-year campaign against *Miranda v. Arizona*, the Supreme Court's landmark ruling that police must provide certain warnings before questioning a suspect in custody. As part of this campaign, he generated a series of statistical studies to try to show that *Miranda* harms law enforcement.

At the same time, he filed briefs in *Miranda*-related cases around the country seeking to convince courts to uphold a 1968 law—18 U.S.C. section 3501—that purported to overrule *Miranda* and make "voluntariness" the sole test for the admissibility of confessions in Federal criminal cases.

Let me emphasize at the outset that I do not fault Professor Cassell for holding opinions with which I may disagree, or for the zealotry of his advocacy. While most criminal justice experts made their peace with *Miranda* decades ago, reasonable minds can certainly differ as to the wisdom and practicality of this venerable precedent. What troubles me about the nominee's campaign against *Miranda* is the manner in which he waged it.

In article after article, Professor Cassell overstated the anti-*Miranda* position, citing his own flawed empirical studies as evidence that *Miranda* harms law enforcement.

These one-sided attacks on *Miranda* drew unusually sharp criticism for their failure to meet standard scholarly norms. Academics who reviewed this nominee's research took him to task for being partisan and ideologically driven while masquerading as an objective scholar. They called his methods unsound, and accused him of manipulating data to reach his preferred result.

Professor Cassell's work on *Miranda* was not restricted to, or even primarily aimed at, the world of academia. Based on his arguably flawed statistical studies, he made several empirical claims to the Senate Judiciary Committee and to various Federal courts, including the United States Supreme Court. Clearly, this raises the stakes from simple academic discourse. It is one thing to write something in a law review article—you can write whatever you want in a law review article. But it is an entirely different matter to represent something to a congressional committee or to the Supreme Court. A lawyer should have a great deal of confidence in any information that he presents to one of those bodies. At a minimum, it would be unethical for a lawyer to present information that he knew was unreliable. Professor Cassell's use of his own questionable data to try to influence legislators and judges on an issue of profound national importance raises serious questions about his judgment and integrity.

I am also concerned by the partisan spin of Professor Cassell's campaign

against Miranda. In his congressional testimony and writings, Professor Cassell was sharply critical of the Clinton Justice Department for avoiding litigation regarding the constitutionality of 18 U.S.C. section 3501. Among other things, he actually suggested the Department had deliberately and repeatedly misled the courts with respect to Miranda, and that its defense of Miranda was driven by politics and not by legal analysis. In a 1997 article entitled "Another Law Janet Reno Doesn't Like," Professor Cassell took specific aim at the former Attorney General, accusing her of "impeding the enforcement" of a statute, and "team[ing] up with defense lawyers to let armed felons and other criminals escape prosecution."

Yet Professor Cassell himself had acknowledged in a 1995 article that prior Republican Administrations had also failed to defend section 3501. Although Republican Attorneys General like John Mitchell and Ed Meese were cognizant of 18 U.S.C. section 3501, Professor Cassell wrote, "no serious efforts were undertaken . . . to secure any determination of the constitutionality of the law." In addition, "[A] recommendation by the Justice Department's Office of Legal Policy in 1987 that an aggressive effort be made to test the law was never adopted as the result of opposition by other agencies within the Department."

At the nomination hearing, I asked Professor Cassell to explain his criticism of Attorney General Reno regarding section 3501 in light of his earlier acknowledgment that prior Attorneys General had taken a similar position. At first he distanced himself from his comments regarding Attorneys General Mitchell and Meese by implying that the magazine in which they appeared had somehow misrepresented his words. He then suggested that because the quote appeared in a popular magazine, the *National Journal*, it should be given less credence than, say, a law review article.

Recall that I am not referring to a situation in which Professor Cassell was quoted out of context. I am referring to an article that Professor Cassell co-wrote with a colleague. That is why his responses to my oral questions in the hearing seemed so slippery. I gave him another chance to explain his comment in answers to written questions. Finally, Professor Cassell grudgingly acknowledged, "it does not appear that any Administration made aggressive efforts to invoke 3501." In sum, Professor Cassell's record of ultra-zealous, partisan advocacy regarding Miranda raises serious questions about his ability to serve as an unbiased decisionmaker.

Another cause to which Professor Cassell has dedicated himself is the defense of the death penalty. Indeed, he has been called "the academic world's foremost defender of capital punishment." At the hearing on his nomination, in response to questions from

Senator DURBIN, Professor Cassell asserted, "my experience with the death penalty is rather limited." This statement confounds reason.

Relying on the list of publications and presentations that Professor Cassell submitted to this committee, I count the following references to capital punishment, dating back to 1987: three substantial articles; four appearances before committees of the U.S. Congress, and one each before the Utah House and Senate; three submissions to popular publications; and three debates. One of those debates took place just 18 months ago: Professor Cassell squared off against Stephen Bright, one of the nation's preeminent defenders of those accused of capital crimes. These examples do not even include the large number of interviews he has given to the press on the topic. He has written and spoken widely on this fundamental matter, but now terms his experience with it "limited."

Despite mounting evidence that our death penalty system is riddled with error and desperately in need of reform, Professor Cassell has doggedly maintained that there is no more accurate sanction in the world than capital punishment as it is practiced in the United States, and that the chance of an innocent being put to death is an "urban legend." He supports this position by asserting that there is no definitive proof that an innocent person has been executed in the past 50 years despite the shameful fact that since 1973, 100 condemned persons have had their convictions vacated by exonerating evidence.

Professor Cassell has been highly critical of studies that show significant rates of error in the imposition of capital punishment.

More than once, he has attacked a study showing errors in capital cases by declaring that the author is an avowed opponent of the death penalty, thereby attempting to undermine the credibility of the study's findings. He has also engaged in vitriolic and occasionally personal attacks against those with whom he disagrees on this issue, often skewing details in his own favor and publishing half-truths. His actions on this matter likewise call into question his ability to rule fairly on this most important legal issue.

Professor Cassell's views on habeas corpus tell a similar story. In April 1993, Professor Cassell testified before the Judiciary Committee in opposition to a bill that would have allowed death row inmates to raise new claims of actual innocence. The bill was a response to the Supreme Court's decision in *Herrera v. Collins*, which upheld a Texas rule barring courts from considering new evidence of innocence that is uncovered more than 30 days after conviction. In his testimony, Professor Cassell argued that an innocent defendant, "will be fully aware of the circumstances surrounding his innocence and can present them at trial." He further asserted that evidence that be-

comes available after conviction is, "almost invariably unreliable." It is troubling to imagine a district court judge with such biases, especially given the strong likelihood that he would be called upon to review claims of innocence based on newly discovered evidence.

Professor Cassell has also advocated limiting habeas review of claimed violations of *Batson v. Kentucky*, which prohibits the exercise of peremptory challenges on the basis of race or gender. In a 1992 law review article, he argued that *Batson* violations should be treated as harmless error, meaning that a new trial would never be an appropriate remedy for a *Batson* violation discovered for the first time on appeal. As an alternative remedy, he proposed notifying excluded jurors that had been unfairly excluded from the previous trial and inviting them to join the panel from which jurors are selected in a subsequent case. But such a "remedy" would do little to cure the structural flaw in the defendant's trial. Notably, although the Supreme Court has not ruled whether *Batson* violations are subject to harmless error analysis, the consensus among the Courts of Appeals is that they are not.

I am aware of Professor Cassell's work with regard to crime victims' rights. We still have more work to do to ensure that our criminal justice system is one that respects the rights and dignity of crime victims, rather than one that presents additional ordeals for those already victimized. Professor Cassell helped draft the Utah victims rights amendment in the mid-1990s. He also worked on, and testified in support of, some of the more than 60 versions of a Federal constitutional amendment that has been proposed, in recent Congresses, by Senators KYL and FEINSTEIN.

It is no secret that, as a longtime advocate of victims' rights, I believe it is preferable to broaden these rights by statute than by amending the Constitution. I do not, however, fault Professor Cassell, or anyone else, for supporting this approach. The treatment of crime victims certainly is of central importance to a civilized society. The question is not whether we should help victims, but how. I continue to believe that crime victims legislation is the preferable course to amending the Constitution.

That being said, Professor Cassell's work on behalf of this cause has occasionally exceeded the bounds of fair advocacy. For example, when testifying before this Committee in support of the proposed constitutional amendment, he has repeatedly cited the Victims Rights Clarification Act of 1997—VRCA—as evidence that statutes are not adequate for protecting crime victims, and that nothing but a constitutional amendment will do. While he has the right to favor an amendment to the constitution, Professor Cassell grossly distorted the impact of the VRCA.

Congress passed the VRCA in response to a pretrial order by the trial

judge in the Timothy McVeigh case—Judge Matsch. The order excluded from the trial any victim who wanted to testify at the sentencing hearing. The VRCA clarified that a court may not prohibit a victim from testifying at a sentencing hearing solely because the victim has witnessed the trial, although a judge may exclude a victim from testifying at a sentencing hearing if the judge found—independent of the fact that the victim witnessed the trial—that the testimony would create unfair prejudice.

One week after President Clinton signed the VRCA, Judge Matsch reversed his pretrial order and permitted victims to watch the trial, even if they were potential penalty phase witnesses. In other words, Judge Matsch did what the statute told him to do. Beth Wilkinson, one of the prosecutors in the case, testified before this Committee that in the end, not one victim was prevented from testifying at the sentencing hearings for McVeigh on the ground that he or she had observed part of the trial. Moreover—and perhaps more importantly—with all issues regarding the VRCA resolved during the McVeigh case, there were no problems implementing the statute during the Terry Nichols case—victims were free to watch the trial and testify at the penalty phase hearing. Ms. Wilkinson characterized the VRCA as a textbook example of how statutes can and do work to protect victims.

When the Judiciary Committee considered the proposed constitutional amendment two years ago, many of us had serious concerns about that approach. We believed it possible to give crime victims strong and enforceable rights, and assure them a greater voice in the criminal justice system, without cutting back on the fundamental rights of defendants. Together with the Justice Department, we pushed for the addition of language that would expressly preserve existing rights of the accused as guaranteed by the Constitution.

Professor Cassell steadfastly opposed the addition of such language, claiming that it, “would have perpetuated the very problem we were trying to solve.” This suggests that the “problem” as he saw it, was not that the judicial system mistreats victims, but that it is unduly deferential to the rights of defendants.

Professor Cassell now claims that the problem with “adding specific language about defendant’s rights is that it creates . . . the misimpression that victims’ rights and defendants’ rights actually collide.” This is a convenient “spin” on Professor Cassell’s past statements, coming at a time when those remarks have come under scrutiny, and is clearly inconsistent with “the problem” he was “trying to solve” 2 years ago.

Once again, it raises the question whether Professor Cassell, if confirmed, would exercise judgment fairly and impartially or would do so in a way that would seek to further his own personal views.

I have no doubts about Professor Cassell’s intelligence and his passion and commitment to how he thinks the law should read. I am sure that he is a fine professor of law. I suspect he may be an effective advocate. But when viewed as a whole, his career has been one of a results-oriented advocate, who has worked forcefully to push the law to the far right. His one-man war on Miranda, his aggressive defense of our flawed system of capital punishment, and his work on other matters place him outside the mainstream of modern American jurisprudence. Even more troubling is his clear track record of manipulating sources and data to promote his ideological agenda.

I have voted for 56 of the President’s judicial nominees so far, and I will surely vote for many, many more, but on the basis of all I have seen in connection with the nomination of Paul Cassell, I cannot and will not vote in favor of this nomination. My judgment is that he is not likely to be the kind of fair and impartial judge that is essential to our Federal courts.

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

The PRESIDING OFFICER. The Senator from Vermont has 6½ minutes.

Mr. LEAHY. I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. Mr. President, I yield 2 minutes to the distinguished Senator from California.

The PRESIDING OFFICER. The Senator from California is recognized for 2 minutes.

Mrs. FEINSTEIN. Mr. President, I thank the ranking member.

Mr. President, I am very proud to rise in support of Professor Paul Cassell who is nominated to be a judge for the district court in Utah.

I think one of the best ways to learn about a person is to work with them on an issue. I have had the pleasure, along with Senator KYL, of working with Paul Cassell on a constitutional amendment to protect victims of violent crime.

In the course of several meetings, I have found Professor Cassell to be bright, sensitive, and evenhanded, with a very deep concern for those victimized by crime.

I am not the only one. I would like to quickly read the opening paragraph from Doug Beloof of Northwestern School of Law at the Lewis & Clark College:

I am an associate professor of law at Lewis & Clark law school in Portland, Oregon. I am a registered Democrat. It has been my pleasure to know Professor Paul Cassell personally and professionally for several years. I am writing to urge you to confirm him. As his resume reflects, he is brilliant. He is one of the quickest conceptual thinkers and writers I have ever met. There is no question that he is well qualified for the district court position.

I find myself strongly in agreement. I have found in my course in public life that very few care really to be identi-

fied with victims of crime. In this sense, Paul Cassell is really a jewel. I have seen him come forward time after time on behalf of victims of violent crimes. On a pro bono basis, he represented the victims of the Oklahoma City bombing in their unsuccessful efforts to ensure they could observe the trial and still testify at the sentencing proceedings.

He has worked on behalf of sexual assault victims. This month he is filing briefs in the Utah Supreme Court on behalf of the Rape Recovery Center to protect the confidentiality of rape crisis victims.

Because of his tireless work on behalf of crime victims, Professor Cassell’s nomination has earned the support of victim’s groups around the country including: the Klaas Kids Foundation; Crime Victims United of California; the National Victims Constitutional Amendment Network; Memory of Victims Everywhere; National Organization for Victim Assistance; and Justice for Murder Victims.

Let me read just a couple excerpts from his letters of support:

John Stein, Deputy Director of the National Organization for Victim Assistance describes him as

. . . a fair, ethical, and highly competent attorney and colleague. [Professor Cassell] has demonstrated a balanced commitment to the cause of justice for all Americans including crime victims.

Douglas Beloof, a Professor of Law at Lewis and Clark school in Portland, Oregon wrote:

Professor Cassell’s character and temperament . . . are extremely well suited for the District Court position. The citizens of Utah could not find a better legal mind or a more decent human being.

Professor Cassell also comes before the Senate with impressive academic credentials.

Professor Cassell graduated from Stanford University and from Stanford Law School, where he was Order of the Coif and president of the Stanford Law Review.

He clerked for then-Judge Antonin Scalia on the U.S. Court of Appeals for the D.C. Circuit, and subsequently Chief Justice Warren Burger of the U.S. Supreme Court.

After a successful career in the Department of Justice, Mr. Cassell entered academia and became a professor of law at the University of Utah. His scholarship includes over 25 published law review articles.

In sum, I thank Chairman LEAHY for setting this nomination for a vote, and I urge my colleagues to vote to confirm Professor Cassell to the Utah District Court.

I ask unanimous consent to print in the RECORD a series of letters from national organizations supporting victims and also supporting Dr. Paul Cassell for appointment to the district court.

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

NATIONAL ORGANIZATION
FOR VICTIM ASSISTANCE,
Washington, DC, March 18, 2002.

Hon. DIANNE FEINSTEIN,
Hon. JON KYL,
U.S. Senate,
Washington, DC.

DEAR SENATORS FEINSTEIN AND KYL: On behalf of the National Organization for Victim Assistance, we are writing to express our strong support for the confirmation of Professor Paul Cassell to the Federal District Court for the District of Utah.

We have worked with Professor Cassell for many years, and have come to know him as a fair, ethical, and highly competent attorney and colleague. Paul has demonstrated a balanced commitment to the cause of justice for all Americans, including crime victims. We are honored by his longstanding association with NOVA. In his work on the Crime Victims' Rights Amendment he has shown his ability to understand many different points of view, as is evidenced by his collaboration with another NOVA friend, Professor Lawrence Tribe.

We strongly believe that Professor Cassell will be a credit to the Federal Judiciary and we urge your unqualified support for his confirmation.

Very Truly Yours,

JOHN H. STEIN,
Deputy Director.

STEVE TWIST,
Vice President—Public
Affairs.

CRIME VICTIMS UNITED
OF CALIFORNIA,
Sacramento, CA, March 14, 2002.

Re request for your support for Paul G. Cassell for confirmation to the 10th Federal District Court.

Senator DIANNE FEINSTEIN,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR FEINSTEIN: In keeping with yours and our tireless push for the "U.S. Constitutional Amendment for the rights of victims," we ask for your strong support of Paul G. Cassell for confirmation to the 10th Federal District Court for the District of Utah.

Mr. Cassell stands for everything that we are attempting to accomplish. He is a man totally dedicated to public safety and victims rights and will be an asset in making the justice system fair and honest for the law-abiding citizens who just happen to become a crime victim.

We thank you for continuing to be a strong crime victim's advocate. We appreciate your great effort on behalf of victims of crime.

Please feel free to call on us anytime we may be of assistance.

Sincerely,

HARRIET SALARNO,
President/Chairperson.

JUSTICE FOR
HOMICIDE VICTIMS, INC.,
Malibu, CA, March 15, 2002.

Senator DIANNE FEINSTEIN,
Hart Senate Office Bldg.,
Washington, DC.

DEAR SENATOR FEINSTEIN: In keeping with your tireless pursuit of justice for crime victims and advocacy for a Victims' Rights Constitutional Amendment, we urgently request that you support Professor Paul G. Cassell's confirmation to the 10th Federal District Court. A graduate of Stanford, he was an Assistant U.S. Attorney for the Eastern District of Virginia. Professor Cassell writes, lectures and testifies extensively in the areas of criminal justice reform and the rights of crime victims.

Thank you very much.
Sincerely,

ROBERT W. LEACH,
President.

KIAASKIDS FOUNDATION,
Sausalito, CA, March 20, 2002.

Re confirmation of Paul G. Cassell.

Hon. DIANNE FEINSTEIN,
U.S. Senate, Hart Senate Office Building,
Washington, DC.

DEAR SENATOR FEINSTEIN: On behalf of crime victims everywhere, please support the confirmation of Paul G. Cassell to the Federal District Court for the District of Utah. Historically, Professor Cassell has long been one of America's most active and vocal advocates of victim's rights.

As one who has been victimized by violent crime I understand how difficult it can be to find articulate, educated advocates for our position. Professor Cassell is one such person: a leader whom goes to battle for the rights of the innocent, especially crime victims. We need more, not less individuals of Professor Cassell's caliber working on behalf of all honest Americans.

Please support and vote 'aye' to confirm Professor Cassell. He will be a continuing asset to a federal court system that too often prioritizes the rights of the wrong individual.

Thank you for your consideration on this matter.

Sincerely,

MARC KLAAS.

JUSTICE FOR MURDER VICTIMS,
San Francisco, CA, March 14, 2002.

Re request for your support of Paul G. Cassell for confirmation to the 10th Federal District Court.

Senator DIANNE FEINSTEIN,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR FEINSTEIN: In keeping with yours and our tireless push for the "U.S. Constitutional Amendment for the rights of victims," we ask for your strong support of Paul G. Cassell for confirmation to the 10th Federal District Court for the District of Utah.

Mr. Cassell stands for everything that we are attempting to accomplish. He is a man totally dedicated to public safety and victims rights and will be an asset in making the justice system fair and honest for the law-abiding citizens who just happen to become a crime victim.

We thank you for continuing to be a strong crime victim's advocate. We appreciate your great effort on behalf of victims of crime.

Please feel free to call on us anytime we may be of assistance.

Sincerely,

HARRIET SALARNO,
President/Chairperson.

MEMORY OF VICTIMS EVERYWHERE,
San Juan Capistrano, CA, March 14, 2002.
Re please give strong support to Paul G. Cassell for confirmation to the 10th Federal District Court.

Senator DIANNE FEINSTEIN,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR FEINSTEIN: As one of the hardest hit crime victims in the Nation, I extend my appreciation for your great effort on behalf of the victims of violent crime. Thank you for continuing to be a strong crime victim's advocate. We value your hard work and continued loyalty to bring forth a "U.S. Constitutional Amendment" for the rights of crime victims. [You may have been advised that after fourteen years an arrest has finally been made on one of the killers of my brother and sister-in-law.]

Knowing of Paul Cassell's wonderful work in the justice area, we would guess that you plan to support him for confirmation to the 10th Federal District Court. We do request your very strong support for him.

If you know of Mr. Cassell, you are aware he is a man totally dedicated to making our justice system fair for the honest, law-abiding citizen, who just happens to become a victim of crime.

In April 1996, I had the privilege of meeting Paul as we both testified before the U.S. Senate Judiciary in support of your U.S. Constitutional Amendment. Paul Cassell is a leader, doing battle for the rights of the honest people (especially crime victims). Paul has great integrity, fairness and we victims are proud to support him for the Federal District Court of our great Nation.

Thank you again and again for your great effort on behalf of victims of crime.

My kindest personal regards and with sincerity and appreciation,

COLLENE (THOMPSON) CAMPBELL
Former mayor, San Juan Capistrano.

NATIONAL VICTIMS'
CONSTITUTIONAL AMENDMENT NETWORK,
Denver, CO, March 13, 2002.

Hon. DIANNE FEINSTEIN,
Senator for California, Hart Senate Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: On behalf of the National Victims' Constitutional Amendment Network (NVCAN), I wish to express our strong support for Paul Cassell, Esquire, who has been nominated to serve as a federal judge. Those of us who have been privileged to know and work with Mr. Cassell have deep respect and admiration for his leadership and service to the criminal justice system and the society it serves.

Paul Cassell has a distinguished record of outstanding service to others. He is currently a Professor of Law at the University of Utah College of Law, where he teaches criminal procedure. He has written and lectured extensively regarding crime victims' rights, serving on the Utah Council on Victims, where he was instrumental in obtaining the passage of the Utah State Victims' Rights Amendment. He worked with total commitment and dedication on behalf of 89 victims of the Oklahoma City bombing in their efforts to obtain their lawful rights to watch proceedings in that case.

His career includes a wealth of experiences that reflect his exceptional ability to strive for balance and fairness in the criminal justice system so that true justice is achieved. Clearly, those qualities have been demonstrated in abundance as NVCAN has worked for the passage of the U.S. Constitutional amendment for crime victims' rights.

Paul Cassell is a man of honor and integrity who will bring a keen intellect, ethical conduct and distinction to the federal bench. We in NVCAN have witnessed him as one of our most active contributors and a passionate advocate for equal justice under the law. We hope you will carefully consider our strong support for his confirmation.

Sincerely,

ROBERTA ROPER,
ROBERT PRESTON,
Co-Chairpersons.

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

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I will vote against the nomination of Professor Paul G. Cassell to be a Federal district judge in Utah. Mr. Cassell's nomination is the first of President

Bush's judicial nominations that I have voted against on the Senate floor. Although Professor Cassell is a highly intelligent and forceful advocate of his views on criminal justice, he clearly lacks the temperament and moderation required for a life-tenured Federal judgeship.

Professor Cassell is perhaps best known for his longstanding criticism of and campaign to overturn the Supreme Court's decision in *Miranda v. Arizona*. *Miranda* held that police must provide certain warnings to suspects held in custody if their statements are to be later admitted into evidence. As the Supreme Court recently observed, *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture." Across the Nation, law enforcement agencies have concluded that *Miranda* generally does not hinder their ability to investigate and prosecute crime.

Professor Cassell believes otherwise. He has written numerous law review articles arguing that *Miranda* was "an undeniable tragedy"—"the most damaging blow inflicted on law enforcement in the last half-century." Cassell's scholarship, however, has received withering criticism from his colleagues. For example, Professor Stephen Schulhofer has described Cassell's methodology as "inconsistent and highly partisan" and "junk science of the silliest sort." Professor Charles Weisselberg stated that his conclusions were based on "foolhardy assumptions" and "flawed methodologies." Professors Richard Leo and Richard Ofshe criticized Cassell for advancing "logically flawed and empirically erroneous propositions" that "appear to stem from his ideological commitments."

In addition to publishing law review articles, Professor Cassell filed amicus curiae briefs around the country seeking to convince courts that a Federal statute passed in 1968 effectively overruled *Miranda* and made voluntariness the sole test for the admissibility of confessions in Federal criminal cases. At the time of this statute's enactment, I stated that it was "so squarely in conflict with the recent decision of the Supreme Court in *Miranda* that it will almost certainly be declared unconstitutional as soon as it is tested in the courts."

Fully aware of this infirmity, the Justice Department, from the Johnson administration onward, Democratic and Republican administrations alike, made no serious effort to test the statute's constitutionality in court. Nevertheless, in the 1990's, Professor Cassell singled out the Clinton Justice Department for vigorous attack, the same Department that saw the overall crime rate in the United States decline for 8 out of 8 years, and violent crime drop to its lowest point in two decades. Because the Clinton Justice Department failed to endorse his flawed scholarship, Cassell accused it of "a clear constitutional abdication." He declared

that Attorney General Janet Reno had "team[ed] up with defense lawyers to let armed felons and other criminals escape prosecution." Imagine that, stating that about an Attorney General. At his nomination hearing before the Judiciary Committee, Cassell declined to express any regret for these outrageous and unfounded statements.

In June 2000, in *Dickerson v. United States*, the Supreme Court vindicated the Justice Department's longstanding position. In an opinion written by Chief Justice Rehnquist, seven justices of the Supreme Court held that *Miranda* was a "constitutional rule" that may not be overruled by a statute. Professor Cassell described the Court's ruling as a "remarkable example of the imperial judiciary." He proceeded to argue, in both a law review article and a Federalist Society newsletter, that the ruling lacked precedential value. He described as "a silver lining" in the "dark cloud of the decision" the extraordinary statement by Justice Scalia and Justice Thomas, in dissent, that they would continue to apply the unconstitutional statute in all future cases. Cassell wrote, "Perhaps the view of the *Dickerson* dissenters will become a majority. Truth, after all, is hard to keep buried forever. . . ."

Thus, in his scholarship and in his public statements on *Miranda*, Professor Cassell has shown himself to be intemperate and one-sided. He refuses to admit that his opponents might have a case even after their position has been vindicated by seven justices of the Supreme Court. Furthermore, his criticism of the Court calls into question his commitment to the principle of *stare decisis* and his ability to separate his view of the "truth" from settled law. Is this the kind of person we want to serve as a Federal judge?

I am equally troubled by Professor Cassell's views on the death penalty. Reasonable minds can disagree about the death penalty, and we have confirmed and continue to confirm many nominees who believe that capital punishment is an appropriate response to crime. My opposition to Professor Cassell's nomination is based not on his support for the death penalty, but instead on his refusal to even acknowledge the evidence showing that serious problems exist in its implementation.

Since 1973, 100 people have been released from death row in the United States because of innocence. In many cases, fatal mistakes were avoided only because of discoveries made by students or journalists, not the courts. This high number of exonerations has led many observers, both liberal and conservative, to express concern about the fairness of the death penalty's administration. For example, Justice O'Connor has observed that "if statistics are any indication, the system may well be allowing some innocent defendants to be executed." There are now death penalty moratoriums in two States, Illinois and Maryland, imposed after leaders in each state recognized

serious concerns about racial disparities and the possibility that an innocent person might be executed.

Professor Cassell has spent his academic career minimizing and dismissing such concerns. In spite of the 100 death-row exonerations, Cassell has described the chance that an innocent might be put to death as an "urban legend." He has asserted again and again that there is no definitive evidence that any innocent person has been executed in the last 30 years: "Thus," he has argued, "the most important error rate—the rate of mistaken executions—is zero." Elsewhere, Cassell has trivialized the danger of fatal error in the Government's administration of the death penalty by comparing it to the risk involved in driving on a highway, stating that even though innocents may die in traffic accidents, "we all agree that our highways should remain open because of the social benefits they produce."

In 1993, Professor Cassell testified in opposition to a bill that would allow death-row inmates to raise new claims of actual innocence in habeas corpus proceedings, arguing that "[i]f a defendant is truly innocent, he will be fully aware of the circumstances surrounding his innocence and can present them at trial." Evidence discovered after trial, he stated, is "almost invariably unreliable." As a district judge, Cassell will be charged with the duty of reviewing post-trial petitions by State and Federal prisoners, many of which raise claims of innocence. His unorthodox view of the reliability of newly discovered evidence is inconsistent with that fundamental duty.

Regardless of how we feel about the death penalty generally, there is one thing that we can all agree on. People on trial for their lives must have effective assistance of counsel, not lawyers who sleep through the trial. Professor Cassell, however, has expressed a different view. In October 2000, a divided panel of the Fifth Circuit Court of Appeals upheld the death sentence in one such case, in which the defense lawyer had repeatedly slept through the trial for substantial periods of time. Professor Cassell defended this decision in an interview on National Public Radio, emphasizing that there was "no real suggestion" that the defendant was innocent. The en banc fifth circuit later reversed the panel's decision and reinstated the district court's grant of habeas corpus relief. It held that "when a state court finds on the basis of credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial." Cassell's willingness to affirm a death sentence in a case where the defense lawyer slept through the trial raises fundamental questions about his suitability to serve as a Federal judge.

A number of lawyers from Utah have written letters to the Judiciary Committee regarding Professor Cassell's

nomination. They have expressed concern about his lack of ties to Utah and limited courtroom experience. Ronald J. Yengich wrote that Cassell has not been "intellectually honest in his assessment of the problems of crime in our society and the response that the Courts should take to them," and that he has shown "an unwillingness to view both sides of any legal argument." L. Clark Donaldson wrote that Cassell's legal scholarship has elevated "partisan considerations over careful and deliberate analysis of data." Kristine M. Rogers stated that his comments have led her "to conclude that he views our justice system as a mechanism with which he can manipulate our Government with an agenda for ever increasing governmental power and ever decreasing individual rights." Stephen M. Enderton, a self-described Republican, believes that Cassell "would use his position to push his personal ultra conservative agenda to the detriment of all of those who appear before his court."

I hope that my concerns and the concerns of these Utah lawyers are misplaced, and that as a judge Professor Cassell will be able to set aside ideology and apply the law fairly and impartially. His record, however, indicates otherwise. I therefore oppose this nomination, and I urge my colleagues not to approve it.

Mr. HATCH. Mr. President, I want to respond to remarks made by my colleague from Massachusetts about criticism of Professor Cassell's scholarship.

Academic debate about such issues as Miranda and the death penalty is robust and uninhibited. It is part of that debate that scholars will criticize the work of other scholars. The validity of that criticism depends, of course, on the merits of the particular claims.

Professor Schulhofer and Professor Cassell have engaged in a particularly long-running debate about the merits of Miranda and its potential costs to law enforcement. Schulhofer has criticized Cassell's work in various law review articles, and Cassell has responded in other articles. The full debate spans dozens of pages in various law reviews. Some of the relevant articles are as follows: Paul G. Cassell, *Miranda's Costs: An Empirical Reassessment*, 90 Nw. U.L. Rev. 387 (1996) (suggesting that confession rates fell after Miranda); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. Rev. 500 (1996) (agreeing that rates may have fallen modestly, but arguing against significance of this fact); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U.L. Rev. 1084 (1996) (responding to Schulhofer's criticisms, noting decline in crime clearance rates after Miranda); Stephen J. Schulhofer, *Bashing Miranda is Unjustified—and Harmful*, 20 Harv. J. of Law and Public Policy 347 (1997) (arguing that post-Miranda clearance rate decline is explainable by

other factors); Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 Harv. J.L. & Pub. Policy. 327 (1997) (responding to Schulhofer's criticisms); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998) (multiple regression analysis of crime clearance rates suggesting structural drop in clearance rate function after Miranda). As explained in greater detail in those articles, Cassell believes that it is important to attempt to calculate the costs of the Miranda decision, even though the data that may be available for such a calculation is limited.

Professors Richard A. Leo and Richard J. Ofshe have criticized Cassell's work on false confessions, often in particularly strong terms. Unlike the other academic exchanges in which Cassell has been involved, this dispute has been litigated in several court cases. Criminal defendants have offered the paid "expert" testimony of Professors Leo and Ofshe in support of their defenses. Prosecutors have presented Cassell's writings in response, arguing that Leo and Ofshe are not sufficiently reliable to be allowed to testify. Several courts have agreed with my critiques of their work. For example, in one fairly recent case, a Federal district court concluded that proffered testimony on false confessions by Professor Leo would not satisfy the reliability requirements for scientific evidence. The court held: "Therefore the motion to call Dr. Leo will be denied. I find there is inadequate showing that the reasoning or methodology underlying the proffered testimony is reliable nor has it gained acceptance in the relevant scientific community." See *United States v. Juan Carlos Higuera-Cruz* No. 99CR 2975-TW (S.D. Cal. Feb. 8, 2000), tr. at 145. The court cited Cassell's research as one reason for reaching its conclusion. After reviewing Cassell's article in the *Harvard Journal of Law and Public Policy*, the court explained: "Professor Cassell . . . concluded that all nine people were in fact, likely guilty. . . . That, at the very least, casts doubt on the methodology o[f] the study that Dr. Leo conducted and whether or not it is substantially or scientifically reliable or valid." See id. at 142-43.

In a similar ruling handed down recently, a State district court judge in New Mexico also found Professor Leo to be unreliable. Tracking arguments that Cassell made in his article, the court explained: "While the area of specialty of Dr. Leo is an important area of study, nevertheless, as recognized by Dr. Leo, there are considerable limitations which presently exist for the analysis of interrogation techniques and their bearing upon false confessions." *State v. Lance Four Star*, No. D-0101-CR-2000000276, op. at 1-2 (1st Jud. D.C. of New Mex., Aug. 23, 2001). Moreover, the court explained: "The

conclusions of Dr. Leo are arrived at from an analysis of a small number of cases (sixty) which are not randomly selected. . . . Even if one were to concede the methodology of determining whether a confession is false to a high probability, the numbers used are extremely small." Id. at 2. There are other cases to similar effect (both in the United States and Canada) finding either Professor Leo's or Professor Ofshe's work to be insufficiently reliable to be admitted in court.

Professor George Thomas and Professor Cassell have enjoyed debating the Miranda issue in various fora. Their most extensive debate appeared in the *UCLA Law Review*. See George C. Thomas III, *Is Miranda A Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. Rev. 821 (1996) (calling for empirical research on Miranda); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839 (1996) (providing empirical research on Miranda); George C. Thomas III, *Plain Talk about the Miranda Empirical Debate: A "Study-State" Theory of Confession*, 43 UCLA L. Rev. 933 (1996) (noting that "Cassell and Hayman have performed a great service to the criminal justice community by gathering, categorizing, and presenting the Salt Lake County data. Though I interpret some of the data differently than Cassell and Hayman do, the debate is richer because of their data," offering critique of the study). Professor Thomas has sent a letter to the Judiciary Committee strongly endorsing Cassell's nomination.

Professor Charles D. Weisselberg has also critiqued Cassell's work. His critique, however, is really more of a summary of the critiques of other scholars. He also said that he was analyzing Cassell's work "because it represents the most detailed and determined empirical effort to measure Miranda's costs." He also notes that Cassell's regression analysis was replicated, for two crime categories, by Professor John Donohue and that, after "careful study, Donohue could neither substantiate nor reject Cassell's and Fowles' claims." Because Weisselberg is summarizing the critique of Cassell's research, more extensive responses are found in the law review articles responding to those critiques.

Professor Welsh White has critiqued Cassell's use of an estimate of wrongful convictions from an Ohio judge. Professor White has found Cassell's work sufficiently meritorious to devote significant parts of a book to responding to his views. See Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices* After *Dickerson* 72 (2001) (noting that chapter 7 of the book will discuss my empirical arguments and chapter 8 will discuss my constitutional arguments). It may be relevant to note that Professor White teaches at the University of

Pittsburgh School of Law. In September 200, Cassell delivered the Mellon Lecture at his school.

Finally, in considering criticisms of Cassell's work, it might also be useful to consider praise of his work. Some of the published favorable comments on Cassell's work include: Yale Kamisar, Can (Did) Congress "Overrule" *Miranda*, 85 Cornell L. Rev. 883 (200) (noting "the compelling presence on the scene of Professor Paul Cassell"); Judge Alex Kozinski, The Fourth Annual Frankel Lecture: The Relevance of Legal Scholarship to the Judiciary and Legal Community: Who Gives a Hott About Legal Scholarship?, 37 Hous. L. Rev. 295 (2000) (reviewing Cassell's academic research on *Miranda*, which lead to the Dickerson decision; concluding "this strikes me as a monumental academic achievement . . . Cassell, through his academic writings, has given this issue legitimacy, and an argument that a mere five years ago would have been received with a chuckle may now turn out to be the law of the land"); Michael Edmund O'Neill, Undoing *Miranda*, 2000 BYU L. Rev. 185 (noting doctrinal uncertainties about *Miranda* and concluding "Professor Cassell has offered perhaps the best answer to this perplexing question").

Thank you, Mr. President. I yield the floor.

Mr. LEVIN. Mr. President, I cannot support the confirmation of this nominee for the Federal district court. To cite just one instance of his intemperate remarks, Mr. Cassell wrote in a published article that the U.S. Department of Justice "team(ed) up with criminal defense lawyers to let armed felons and other criminals escape prosecution." Statements such as this, and there are others, show an absence of the judicial temperament necessary to warrant a lifetime appointment to the Federal court.

Mr. BENNETT. Mr. President, I rise today to express my support for President Bush's nomination of Paul G. Cassell for the U.S. District Court for the District of Utah. The Judiciary Committee approved Professor Cassell by voice vote on May 2, 2002, and I would urge my colleagues to vote in favor of this nomination.

Paul Cassell has excellent academic credentials. He graduated from Stanford University Law School, where he was president of the Stanford Law Review. Following law school he served two clerkships, one for then-Judge Antonin Scalia on the U.S. Court of Appeals for the D.C. Circuit, and one for Chief Justice Warren Burger of the U.S. Supreme Court. Cassell's professional experience includes service as an Assistant U.S. Attorney and also Associate Deputy Attorney General at the U.S. Department of Justice. As a professor at the University of Utah College of Law, he distinguished himself as a popular and well-respected teacher. His scholarship includes over 25 published law review articles, as well

as numerous articles in major newspapers and periodicals.

Professor Cassell has become a national expert on criminal procedure and evidence and one of the Nation's leading experts on victims' rights. He has represented victims of crime across the country, always on a pro bono basis. For instance, he represented victims of the Oklahoma City bombing in their efforts to observe the trial and sentencing proceedings. His advocacy is the reason why those families did not lose the right to observe the McVeigh trial. Recently, his pro bono efforts resulted in a significant victory for victims of crime in the Utah Supreme Court. On March 12, 2002, in *State v. Casey*, the court agreed with Professor Cassell that crime victims have the right to be heard before any plea bargain is accepted by the court and the right to appeal issues relating to that right. As a result of Cassell's efforts, this opinion recognized that victims have an important role to play in our criminal justice system and that their rights must be respected by courts and prosecutors.

Professor Cassell has also been actively involved in fighting domestic violence and sexual assault in Utah. In April 2002, Professor Cassell filed briefs in the Utah Supreme Court on behalf of the Rape Recovery Center and the National Alliance to End Sexual Violence to protect the confidentiality of rape crisis counseling records. Additionally, Professor Cassell has been an active participant in legal affairs in Utah. For many years, he has served as the chair of the Legislative Committee of the Utah Council on Victims of Crime as well as a member on the Utah Supreme Court's Advisory Committee on Rules of Criminal Procedure.

In previous weeks many of my colleagues have highlighted the need to address the vacancy crisis in the Federal courts. I am concerned that there are some in the Senate who are perpetuating this vacancy. The Senate must do its part to act swiftly on the President's nominees. I have voiced concern in the past that certain Senators have made it known that they will require that a nominee be recommended by the American Bar Association. While I believe that this is an unnecessary requirement and an extra-constitutional test, Paul Cassell has, nonetheless, passed this test and a substantial majority of the American Bar Association review committee rates him "well qualified" to be a Federal judge.

Paul Cassell's long list of credentials indicate his preparedness to serve as a Federal judge. I strongly urge my colleagues to vote in favor of the nomination of Paul G. Cassell for the U.S. District Court for the District of Utah.

The PRESIDING OFFICER. Who yields time?

Mr. LEAHY. How much time remains?

The PRESIDING OFFICER. The Senator from Vermont has 56 seconds. The Senator from Utah has 1 minute.

Mr. LEAHY. Mr. President, I have told the Senator from Utah I will let him go last.

I have no doubts about Professor Cassell's intelligence, his passion, and his commitment to how he thinks the law should read. I am sure he is a fine professor of law. I suspect he is an effective advocate. But viewed as a whole, his career has been one of a results-oriented advocate where he has worked forcefully to push the law to the far right. His one-man war on *Miranda*, his aggressive defense of our flawed system of capital punishment, even though 100 people have been released because of mistakes, and his work on other matters place him outside the mainstream of modern American jurisprudence. Even more troubling is his clear track record of manipulating sources and data to promote his ideological agenda.

I have voted for 56 of the last 57 of the President's judicial nominees so far, and I will surely vote for many, many more, but on the basis of all I have seen in connection with the nomination of Paul Cassell, I cannot and will not vote in favor of this nomination. My judgment is that he is not likely to be the kind of fair and impartial judge that is essential to our Federal courts.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, it seems ironic to me that my colleagues are attacking Paul Cassell for having used yeoman efforts to uphold a Federal statute that was passed by the Congress of the United States in 29 U.S.C. 3501 which basically said that voluntary confessions will be admitted into evidence if there is just a technical mistake. I have to say I believe that is ridiculous. I think he had every right to try to uphold that statute. Personally, I think he was right in his arguments, but the Supreme Court found otherwise. He made it very clear that that is the law now and he will abide by it.

I also disagree with my colleagues who characterize him again as manipulating statistics and figures. There are people who disagree with Paul Cassell, as is the case in academia. He disagrees with them. But I happen to know this is one of the most honorable, honest people who lives in our society today. I personally don't appreciate his being treated this way.

It pains me to hear my colleagues attacking Paul Cassell, one of the most stellar nominees this body has ever had the privilege of considering for confirmation to the district court bench.

I have to say that, even before those disparaging remarks were made, it was already an embarrassment to me that the Judiciary Committee and Senate leadership have taken nearly a year—328 days to be exact—to bring Professor Cassell's nomination to a floor vote. This is by far the longest time that any district court nominee has had to wait for a vote during this Congress. In fact,

this vote has been delayed so long that the Administrative Office of the Courts declared the seat to which Professor Cassell was nominated a judicial emergency several months ago.

But rather than just register my disbelief and disappointment, I would like to address the two issues that the critics and nay-sayers are bringing up: Professor Cassell's work in the areas of capital punishment and the so-called Miranda warning.

Mr. President, don't let anyone fool you: The fact is that Cassell's views on these topics reflect thoughtful, responsible, mainstream legal ideas. And Cassell's work in these areas has been driven by nothing other than a deeply felt desire to improve the justice system for the benefit of all Americans. So, rather than let my colleagues misstate and mis-characterize those views, I would like to explain what Professor Cassell really thinks on these topics.

First, capital punishment. Professor Cassell, like many scholars, jurists, and a majority of the population of the United States, supports capital punishment in appropriate cases. Cassell has argued that Congress and the States have the power to impose capital punishment for those who have committed the most serious offenses representing the wanton, willful, and reckless disregard for innocent human life. The fact that he has had the courage to say so in today's monolithic academic culture should be taken as evidence of his ability to think independently in the face of peer pressure—a quality we want in judges. But that courage has led people who disagree with him to attempt to reduce his views to mere caricatures. His critics are trying to make believe that he has a callous attitude toward anyone wrongly sentenced to death. But nothing could be further from the truth. Cassell's support for capital punishment is tempered by his expressed commitment to ensure that innocent persons are not executed. Professor Cassell has said so in his writings and proven so by his actions. For instance, Professor Cassell has helped his law school, the University of Utah College of Law, raise funds for its recently formed Rocky Mountain Innocence Project, whose goal is to identify defendants who have been wrongfully convicted of capital or other crimes. Cassell has also offered the Project his legal services, pro bono, to help pursue the first case that the Project identifies. Cassell has also supported Utah's recently enacted Post-Conviction Testing of DNA Act. The act, one of the first in the country, provides for state-financed testing of potentially exculpatory DNA evidence when DNA testing was not available at trial. As you can see, Mr. President, Professor Cassell is a thoughtful and principled mainstream legal thinker whose views are entirely consistent with the majority of Americans.

The second area of Cassell's advocacy and scholarship that I would like to address concerns the so-called Miranda

warnings. But Mr. President, before I explain the underlying issues here, I think it is even more important to note that, even those who have disagreed with Cassell on the specifics of Miranda recognize that he would fairly and mindfully follow the law. Michigan Law Professor Yale Kamisar, the nation's leading academic defender of Miranda, has said: "Cassell's a smart guy, and even though he doesn't like Miranda, I think he'd apply it conscientiously as a judge." This observation—that Cassell is committed to following the law, is really all that any Senator should need to know. But let me explain further.

Many people know that Professor Cassell argued in the Supreme Court last year in support of a statute enacted by Congress that purported to modify some of the complex rules that have grown up around the Miranda holding. The case was called *Dickerson v. United States*. In *Dickerson*, FBI agents questioned an armed bank robber and obtained incriminating statements. It was undisputed that these statements were given voluntarily. However, there was a dispute as to whether the Miranda warnings had been given to the bank robber before or after the questioning. After the district court ruled that these voluntary statements could not be used as evidence against the defendants, Cassell briefed and argued the matter in the fourth circuit as a friend of the court.

Cassell's position was that Congress, in enacting a law known as §3501, had validly required these voluntary statements to be admitted into evidence, even if there was a technical dispute over the timing of the warnings. The Fourth Circuit agreed with Cassell. The Supreme Court later asked Cassell to argue that position on appeal, which he did. After considering the argument, a majority of the Supreme Court disagreed with Cassell's position and ruled for the other side. As Cassell told the Judiciary Committee, because of his personal involvement in that case, there's probably no one who understands the settled law on Miranda better than Cassell.

Mr. President, any one who knows anything about law knows that a lawyer's arguments in court do not always necessarily reflect his or her own personal views on the topic. In fact, it is a very important principle in our legal system that clients on both sides of an issue deserve forceful advocates for their position. So it is simply specious for anyone to pretend that every argument in *Dickerson* reflects Professor Cassell's personal opinion. In fact, it is worse than specious—it is downright misrepresentation. That's because Professor Cassell has written law review articles—not for a client, but on his own—in which he argues for a more modest public policy change than he advocated in the *Dickerson* case. Cassell's own article urge that police officers should continue to give most of the Miranda warnings, but suggests that some of the warnings should be

modified and replaced with the requirement that police officers videotape interrogations as better insurance that constitutional rights are respected. After all, a true record of police interrogations is much better evidence of voluntariness than the simple fact that the policeman remembered to read the Miranda warning. This argument has been adopted by many civil libertarians, who agree with Cassell that videotaping would more effectively protect against police abuses and suspects who are wrongfully persuaded to falsely confess.

In other words, Mr. President, Professor Cassell's position on the Miranda warnings could actually offer more, rather than less, protection for Americans against possible abuse by police. So any attempt to pigeon-hole Professor Cassell as not supporting the rights of criminal defendants is a gross caricature of his reasoned and thoughtful analysis of how best to reform the criminal justice process in order to protect the very rights that some accuse him of disregarding.

Mr. President, I urge my colleagues not to be taken in by inaccurate or false representations of Cassell's record. It is one thing for people to disagree—which I certainly respect. But it is quite another to carelessly or purposely mislead others into misunderstanding the real arguments. In the case of Professor Cassell, his positions on capital punishment and the Miranda warnings are thoughtful and reasonable views, held by many mainstream legal thinkers like himself. And the most important fact of all is that Professor Cassell knows the difference between the roles of the advocate and the judge, and he has committed to follow the law. I again urge my colleagues to vote to confirm Paul Cassell, who, I am convinced, will be a principled and fair-minded judge who applies the law impartially as written and interpreted.

Mr. LEAHY. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Paul G. Cassell, of Utah, to be U.S. District Judge for the District of Utah? The clerk will call the roll.

The legislative clerk called the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from Iowa (Mr. HARKIN), the Senator from Hawaii (Mr. INOUE), the Senator from Vermont (Mr. JEFFORDS), the Senator from Massachusetts (Mr. KERRY), the Senator from Louisiana (Ms. LANDRIEU), the Senator from Connecticut (Mr. LIEBERMAN), the Senator from Maryland (Ms. MIKULSKI), the Senator from Georgia (Mr. MILLER), the Senator from Nebraska (Mr. NELSON), and the Senator from New Jersey (Mr. TORRICELLI) are necessarily absent.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr.

HELMS) and the Senator from Alabama (Mr. SESSIONS) are necessarily absent.

I further announce that if present and voting the Senator from North Carolina (Mr. HELMS) would vote "yea."

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

The result was announced—yeas 67, nays 20, as follows:

[Rollcall Vote No. 108 Ex.]

YEAS—67

Allard	Domenici	McCain
Allen	Dorgan	McConnell
Baucus	Edwards	Murkowski
Bayh	Ensign	Murray
Bennett	Enzi	Nelson (FL)
Bond	Feinstein	Nickles
Breaux	Fitzgerald	Reid
Brownback	Frist	Roberts
Bunning	Graham	Rockefeller
Burns	Gramm	Santorum
Byrd	Grassley	Shelby
Campbell	Gregg	Smith (NH)
Cantwell	Hagel	Smith (OR)
Carnahan	Hatch	Snowe
Carper	Hollings	Specter
Chafee	Hutchinson	Stevens
Cleland	Hutchison	Thomas
Cochran	Inhofe	Thompson
Collins	Kohl	Thurmond
Craig	Kyl	Volnovich
Crapo	Lincoln	Lott
DeWine	Lott	Warner
Dodd	Lugar	

NAYS—20

Akaka	Dayton	Reed
Bingaman	Durbin	Sarbanes
Boxer	Feingold	Schumer
Clinton	Johnson	Stabenow
Conrad	Kennedy	Wellstone
Corzine	Leahy	Wyden
Daschle	Levin	

NOT VOTING—13

Biden	Kerry	Nelson (NE)
Harkin	Landrieu	Sessions
Helms	Lieberman	Torricelli
Inouye	Mikulski	
Jeffords	Miller	

The nomination was confirmed.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is laid on the table. The President will be notified.

LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate will return to legislative session.

ANDEAN TRADE PREFERENCE EXPANSION ACT—Resumed

The PRESIDING OFFICER. The clerk will report the pending business.

The legislative clerk read as follows:

A bill (H.R. 3009) to extend the Andean Trade Preference Act, to grant additional trade benefits under that Act, and for other purposes.

Pending:

Baucus/Grassley amendment No. 3401, in the nature of a substitute.

The PRESIDING OFFICER. The Senator from Montana.

AMENDMENT NO. 3405 TO AMENDMENT NO. 3401

Mr. BAUCUS. Mr. President, I ask an amendment at the desk be called up relating to investor—State relationships with respect to chapter 11.

The legislative clerk read as follows:

The Senator from Montana [Mr. BAUCUS], for himself, Mr. GRASSLEY, and Mr. WYDEN,

proposes an amendment numbered 3405 to amendment No. 3401.

Mr. BAUCUS. I ask unanimous consent the reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To clarify the principal negotiating objectives of the United States with respect to foreign investment)

On page 229, line 23, strike all through "United States," on line 25, and insert the following: "foreign investors in the United States are not accorded greater rights than United States investors in the United States,".

Mr. BAUCUS. This is an amendment I am offering on behalf of myself, Senator GRASSLEY, and Senator WYDEN. Our amendment concerns an investor-State dispute settlement. That is the "chapter 11 question" as it has come to be called. It is based on the placement of investor-State provisions in NAFTA.

This is not bankruptcy chapter 11. It has nothing to do with bankruptcy. When I say "chapter 11," it sometimes causes confusion, but this is chapter 11 in NAFTA.

Our amendment modifies the objective on investment in the trade bill to make clear that foreign investors in the United States should not be accorded a higher level of protection of their rights than U.S. citizens in the United States.

There has been a lot of discussion of NAFTA chapter 11 in recent days. In particular, a number of Senators have expressed legitimate concerns about the impact that chapter 11, and other similar provisions in other agreements, may have on the ability of State and local governments to regulate—that is, to adopt and enforce laws that protect the public health, safety, and welfare.

There is a growing consensus that we need to make sure that new trade and investment agreements don't give foreign investors in the United States greater rights than we give our own citizens. International agreements must not become a back door for expanded protection of foreign investors at the expense of protection of our environment, health, and safety.

This view has been strongly and consistently expressed by various State and local government organizations, as well as environmental organizations, in recent weeks.

For example, a resolution adopted by the National Association of Attorneys General at their March meeting encourages Congress:

... to ensure that in any new legislation providing for international trade agreements foreign investors shall receive no greater rights to financial compensation than those afforded to our citizens.

A letter last week from a large coalition of environmental groups, including Defenders of Wildlife, Friends of the Earth, the Sierra Club, and the National Wildlife Federation, urged the Senate to:

... require that trade and investment agreements do not provide foreign corporations

with greater rights than U.S. citizens have under the Constitution.

Similarly, a recent letter from the president of the National Wildlife Federation to Ambassador Zoellick states:

An important step to restore consensus would be to make clear in fast track legislation and in investment agreements that those brining expropriation challenges under investment rules will not be granted rights greater than those provided under the takings jurisprudence of the U.S. Constitution.

The United States Conference of Mayors has expressed its concern that the bill as now drafted:

... would allow trade officials to include investor protection standards in future trade agreements that go beyond U.S. law and that effectively grant foreign investors greater rights than U.S. citizens enjoy.

In another letter, the National Association of Counties expresses its concern that under the trade bill:

... foreign investors operating in the U.S. would have greater legal rights against our government than our own citizens possess.

Each of these organizations makes an excellent point. We have heard their message, and that is why we have offered the present amendment. We want to make sure that in protecting the rights of U.S. citizens abroad, our negotiators do not inadvertently encroach on the prerogatives of Government here at home. This amendment seeks to strike the right balance between these different sets of interests.

The bill's objective on investment opens with a statement recognizing that—on the whole—U.S. law provides a level of protection of investment that is:

... consistent with or greater than the level required by international law.

It goes on to state that our negotiators should ensure that:

United States investors in the United States are not accorded lesser rights than foreign investors in the United States.

Some have read this language to imply that negotiators might seek to give foreign investors more rights than U.S. citizens now enjoy, and then seek to amend U.S. law to enhance the rights of U.S. citizens. In other words, they read this language as a mandate to expand individual property rights in the U.S. through the back door of international negotiations.

Let me be very clear in stating that that was not what the language at issue was intended to accomplish. The committee report on the bill emphasizes that obligations the U.S. undertakes in investment agreements:

... should not result in foreign investors being entitled to compensation for government measures where a similarly situated U.S. investor would not be entitled to relief.

In other words, the rights of U.S. investors under U.S. law define the ceiling. Negotiators must not enter into agreements that grant foreign investors rights that breach that ceiling.

The amendment we have laid down is intended to foreclose any doubt on this question. It is our objective to negotiate agreements that protect the