

not even been trained for, but I think I am doing an ok job. Anyway I am sorry that I have not written you guys lately and I know I have been writing Val a bit more than you guys and that is something I really intend to change, I just want you guys to know that I miss you guys a lot and love you guys even more and I thank you both for the person you made me become and all of the things you have struggled to get me over the years. I really appreciate the support that you guys have given me and accepting my enlistment in the Army. I feel that if I can make a difference out here then I have done my part. If I can save one life, if I can do something that makes a family sleep easier at night without fear then I have done my purpose, cause I know now that's what my calling is in life, not to make money or be powerful and wealthy but to simply make a difference. And I thank you my loving parents for all that you have done to get me this far, but now I have to take the next step and make a difference for someone else out there. Well go ahead and pass this around to everyone in the family, Val too . . . And to the family my love and best wishes and prayers go out to you, little Veronica or shall I say big Veronica, I miss playing with her and being her big cousin but at least my being here will help keep her safe and grow up happy and full of life as she is already. So to my family, if you see a soldier one of my comrades in arms, please thank them for the service they give, pray for them because we as soldiers give up sooo much to come out here and in sometimes make the ultimate sacrifice in the name of freedom and soldiers could always use encouragement and a thanks. . . Well my love to you guys and I'll see you soon. . .

Love to all,

BRANDON.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF TIMOTHY M. TYMKOVICH, OF COLORADO, TO BE UNITED STATES CIRCUIT JUDGE FOR THE TENTH CIRCUIT

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session and proceed to the consideration of Executive Calendar No. 55, which the clerk will report.

The legislative clerk read as follows:

Nomination of Timothy M. Tymkovich, of Colorado, to be United States Circuit Judge for the Tenth Circuit.

The PRESIDING OFFICER. Under the previous order, there will be 6 hours of debate, with the time equally divided in the usual form.

The Senator from Colorado is recognized.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. ALLARD. Mr. President, I strongly support the confirmation of Tim Tymkovich as a Federal judge on the Tenth Circuit Court of Appeals. The nomination is before the Senate. I ask my colleagues to join me in supporting his confirmation.

Two years ago, one of the most talented lawyers in the State of Colorado faced a rather large but very exciting dilemma. Most of us would not look at his particular situation as a dilemma at all but, instead, view it as a welcome set of exciting career opportunities.

With the new administration filling vacancies and political appointments, he was offered the chance to serve the people of the United States, a chance to use his skills as a premier attorney through the Federal Government. This lawyer had practiced both civil litigation and appeals with an emphasis on regulatory and administrative law, particularly in the areas of telecommunications and public utilities. He served for 5 years as Colorado's solicitor general. He served as a law clerk to Justice William H. Erickson of the Colorado Supreme Court.

With all this experience under his belt, he had to decide whether to pursue a career with the Department of the Interior under the leadership of fellow Coloradan Gale Norton or to continue working in his successful law practice and to answer the call of his countrymen and President and to strive to serve the Nation as a judge on the Tenth Circuit Court of Appeals.

What choice did the attorney of whom I speak make? What path did Tim Tymkovich choose? He chose to pursue the Federal judgeship and to fulfill his sincere desire to lead a life of public service, a life dedicated to upholding the law and our Constitution.

On May 25, 2001, President Bush nominated Mr. Tymkovich to the Tenth Circuit Court of Appeals. On February 12, 2003, under the leadership of Senator ORRIN HATCH, the chairman of the Senate Judiciary Committee, Mr. Tymkovich finally received a hearing. Today, nearly 2 years later, the Senate has picked up his nomination for consideration by the entire body.

Today's actions, 23 months after his nomination, move us closer to fulfilling the Senate's duty as laid out in the Constitution through the advise and consent clause of article II. This vote has been a long time in the making. After several letters, several floor statements, and almost 2 years after the original date of his nomination, Tim Tymkovich is finally getting an up-or-down vote.

I thank Senator HATCH for moving his nomination out of the committee. I thank the majority leader, Senator FRIST, for scheduling this debate and the vote later on today.

The nominating process is a grueling one. To be confirmed, Mr. Tymkovich, along with his fellow nominees, put his

life on hold to await action by the Senate on his nomination. In Mr. Tymkovich's case, he had to endure 2 years of uncertainty, not knowing whether he should change his law firm partnership, pursue other options, or wait for the Senate to grind forward, with each step and every decision scrutinized by the Senate. Undoubtedly, he had other career opportunities, other choices that would have led to remarkable successes. As you will recall, I mentioned the Department of the Interior possibility at the beginning of my remarks. Yet he chose to pursue the Tenth Circuit court nomination.

As we have witnessed with the Miguel Estrada debate, the judicial nomination process has broken down into partisan politics and entrenchment, taking a heavy toll on the life of the nominee and on the quality of justice delivered to the American people.

Today we have the opportunity to begin to correct this dangerous path we have been traveling. Tim Tymkovich has my unqualified support. Confirmation of his nomination by this body will prove to be a great service to the people of the United States. His nomination has enjoyed broad bipartisan support—support from judges and colleagues, both Democrat and Republican policymakers.

I have a series of charts highlighting support for his confirmation, charts I would like to share with you today.

The first chart quotes Roy Romer, former Governor of Colorado, and, I might add, former Democratic National Committee chairman who served under the tenure of President Bill Clinton and who is now superintendent of the Los Angeles United School District. Mr. Romer is a strong supporter of Mr. Tymkovich and has expressed his sentiment to the Judiciary Committee.

Governor Romer, in a letter to the committee, wrote:

Mr. Tymkovich served the State of Colorado from 1991 through 1996 during the latter part of my tenure as Governor of the State of Colorado. He served with distinction and was a strong advocate in legal matters for Colorado. He also demonstrated a capacity to work closely with Colorado Democrats, as well as Republicans, as Solicitor General. . . . He was always a straight shooter in giving legal advice to me and my top staff.

Governor Romer believes his past legal experiences have given Mr. Tymkovich a broad understanding of the varied legal issues that may come before him on the Tenth Circuit. Governor Romer believes Mr. Tymkovich will bring strong legal credentials to the court and a judicial temperament that should garner the support of the Senate.

I ask unanimous consent that the letter from Governor Romer be printed in the RECORD.

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

LOS ANGELES UNIFIED SCHOOL
DISTRICT, BOARD OF EDUCATION,

September 6, 2002.

Re Nomination of Timothy M. Tymkovich to
the Tenth Circuit Court of Appeals.

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

DEAR MR. CHAIRMAN AND MEMBERS OF THE
COMMITTEE: I write this letter in support of
the nomination of Timothy M. Tymkovich to
the Tenth Circuit Court of Appeals in Colo-
rado. I have both worked with Mr.
Tymkovich in his capacity as Colorado's So-
licitor General or as a private practitioner in
Denver.

Mr. Tymkovich served the State of Colo-
rado from 1991 through 1996 during the latter
part of my tenure as Governor of the State of
Colorado. He served with distinction and was
a strong advocate in legal matters for Colo-
rado. He also demonstrated a capacity to
work closely with Colorado Democrats as
well as Republicans as Solicitor General,
both in my Administration and in Colorado's
General Assembly. He was always a straight
shooter in giving legal advice to me and my
top Staff. He is currently in private practice
in Denver and has represented Chris Romer's
Colorado Education Network on state tax-
ation and public policy matters. He recently
helped craft an analysis of Colorado's con-
stitutional budget law that could have im-
portant positive implications for our State
in a lean economic year.

Mr. Tymkovich is a native of Colorado and
I believe his past legal experiences have
given him a broad understanding of the var-
ied legal issues that may come before him in
the Tenth Circuit. In addition, he has served
Colorado in many ways in both the public
and private sectors. He presently serves as
Chairman of the Colorado Board of Ethics
(which advises the Governor and executive
branch on state ethics matters) and he re-
cently chaired a bipartisan task force on
civil justice reform. He currently is a mem-
ber of the American Bar Association's Amer-
ican Bar Foundation and the American Law
Institute, two important organizations dedi-
cated to the impartial administration of jus-
tice. The ABA has already found him quali-
fied to serve on the Tenth Circuit.

Mr. Tymkovich's nomination is currently
waiting review by the Senate Judiciary Com-
mittee. He has bipartisan support in Colo-
rado and both major newspapers in Colorado
have praised his nomination. I believe that
he will bring strong legal credentials and a
judicial temperament that should garner the
support of the United States Senate.

I urge you to favorably review Mr.
Tymkovich's nomination and refer it to the
full Senate of the United States.

Sincerely,

ROY ROMER,
Superintendent of Schools.

Mr. ALLARD. Mr. President, Mr.
Tymkovich is well respected for his ap-
proach to the law and for problem solv-
ing. He manages cases and clients with
civility and understanding, setting a
high example for the legal community.

On a second chart, I highlight ex-
cerpts from an editorial written by the
Rocky Mountain News. On June 3, 2001,
the paper editorialized:

If Senators give Tymkovich a serious look,
they'll find someone who combines intellec-
tual heft and steady temperament.

On February 16, 2003, the News re-
stated their endorsement of Mr.
Tymkovich, writing:

We wish him prompt confirmation.

Mr. President, I ask unanimous con-
sent that the two editorials from the
Rocky Mountain News be printed in
the RECORD.

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

[From the Rocky Mountain News, June 3,
2001]

GOOD CHOICE FOR COURT

It remains to be seen whether Tim
Tymkovich's nomination for the 10th Circuit
Court of Appeals will founder on U.S. Senate
partisanship. He once was, after all, state so-
licitor general under Gale Norton, now one
of President Bush's most controversial Cab-
inet members.

But if senators give Tymkovich a serious
look, they'll find someone who combines the
intellectual heft and steady temperament
that most senators profess to seek in a pro-
spective Federal judge.

Previously, Tymkovich's most visible mo-
ment involved the state's defense of voter-
passed Amendment 2, which the courts over-
turned. But however unsuccessful his defense
of that amendment may have been, his argu-
ments were measured and well-crafted—just
as they have been on many other legal top-
ics.

[From the Rocky Mountain News, Feb. 16,
2003]

TYMKOVICH'S HEARING

Tim Tymkovich, former Colorado Solicitor
General, waited nearly 21 months for a hear-
ing before the Senate Judiciary Committee
on his nomination for the 10th Circuit U.S.
Court of Appeals.

Why, that's just about long enough for an
elephant to give birth, which is no accident,
because the intolerable delays in judicial
confirmations is very much a matter of ele-
phants—and donkeys.

When Sen. Jim Jeffords of Vermont de-
fected from the Republican party and turned
over control of the Senate to the Democrats,
they made a determined effort to prevent
President Bush from naming philosophically
compatible judges, as presidents of both par-
ties have long done.

Tymkovich, nominated just days after Jef-
fords' switch, was caught in the political
gridlock.

He finally had his hearing Wednesday. We
wish him prompt confirmation.

Mr. ALLARD. Mr. President, the
Denver Post, a paper that endorsed Al
Gore over George Bush, stated on May
30, 2001, that Tim Tymkovich:

has gained a local reputation as a thought-
ful, insightful attorney who knows the law
and works hard to uphold it. . . . We urge the
Senate to confirm Tymkovich to fill a seat
that has sat vacant since 1999. . . .

I ask unanimous consent that the
Denver Post article be printed in the
RECORD.

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

[From the Denver Post, May 30, 2001]

TYMKOVICH SHOULD SERVE WELL

We hope the new Democratic majority on
the U.S. Senate will set aside partisan poli-
tics when it considers Denver attorney Tim
Tymkovich's nomination to serve on the
10th U.S. Circuit Court of Appeals.

But we also hope the American Bar As-
sociation will continue to voluntarily scruti-
nize all nominees headed to the Senate, even
though the Bush administration stripped the
ABA of its official role in screening judicial
candidates prior to their nomination.

Tymkovich should be no exception, though
he has gained a local reputation as a
thoughtful, insightful attorney who knows
the law and works hard to uphold it.

He first gained real notice when, as state
solicitor general, he was assigned to defend
amendment 2, a Colorado initiative that
would have banned laws to protect gays.

Then-Attorney General Gale Norton was
legally obliged to defend the amendment.
The fact that the U.S. Supreme Court re-
jected this sloppily worded and unconstitu-
tional amendment doesn't reflect on
Tymkovich's legal skills or politics.

Indeed, Jean Dubofsky, a former Colorado
Supreme Court justice who successfully led
the legal challenge against Amendment 2,
supports Tymkovich's nomination.

Tymkovich is only 44, but he has been
practicing law in the public and private are-
nas since 1982 and is a long-time member of
the American Bar Association, the American
Law Institute and the International Society
of Barristers.

He also is a member of the Federalist Soci-
ety, which comes as no surprise considering
how that group's conservative, Libertarian
orientation dovetails with the conservative
slant of the Bush administration.

Still, we don't expect Bush to be nomi-
nating liberal Democrats to lifelong posi-
tions on the federal bench anytime soon. And
Tymkovich is far less conservative than his
fellow nominee to the 10th U.S. Circuit
Court. Michael McConnell, a law professor at
the University of Utah, has defended vouch-
ers for religious schools and argued to rein-
terpret the Constitution's division between
church and state.

The conservative Christian's experience in
public law is far deeper than Tymkovich's,
but his reputation as an ideologue likely will
stymie his chances with the Senate.

While we cannot support McConnell, we
urge the Senate to confirm Tymkovich to
fill a seat that has sat vacant since 1999,
when Judge John Porfilio took senior status.

We also encourage the Senate to carefully
defend the Judiciary from any Bush efforts
at 'court packing,' whereby nominees are se-
lected for their political philosophy rather
than their legal expertise.

Federal judges and justices are obligated
to carefully apply the law of the land, not
the politics of the president in power.

Mr. ALLARD. Mr. Tymkovich under-
stands the West, its community, and
its past. He has traveled extensively
throughout the States of the Tenth
Circuit with his wife Suzanne, a west-
ern historian and novelist, as well as
an accomplished attorney in her own
right. Together they traveled near and
far, covering the old stomping grounds
of legendary western figures such as
Butch Cassidy and others.

Undoubtedly, this deep knowledge of
western heritage will aid in his duties
and his understanding of the law, as
well as the rich judicial history of the
Tenth Circuit.

Tim Tymkovich's commitment to
public service is unparalleled. I have
had many conversations with him, and
know him to be a man of keen intellect
and integrity. Through our many con-
versations, I have developed a strong
understanding of Tim's deep commit-
ment to public service and his strong
personal respect for the rule of law in
protecting people and the interests of
the State.

Tim Tymkovich's legal credentials
reveal a man who values independence

and fairness in the judicial process. A man who understands the implication of a lifetime appointment to our Nation's courts, a man who truly believes that there is no higher professional calling than to serve the American people through the impartial administration of the law. He will serve our Nation with the utmost of respect to our country and our Constitution, and for this reason, I urge my colleagues to vote favorably to confirm his nomination.

No one has a better understanding of the character and intellectual prowess of an attorney than his or her co-workers and peers. The legal profession is filled with practicing attorneys, lawyers who work in private firms, in the public sector, and who serve the public from the bench. The impression left on other attorneys by encounters with them at various stages of litigation and negotiation is obviously an important factor in determining whether a nominee is well suited for the bench. They work day-in and day-out with the nominee and have first hand knowledge about the type of judge a particular attorney will make. At this time, I would like to share some of the comments made by Mr. Tymkovich's colleagues.

In the third chart, I have reprinted a statement from William H. Erickson, former Chief Justice to the Colorado Supreme Court, and to whom Mr. Tymkovich served as a law clerk. Justice Erickson stated:

I served on the Colorado Supreme Court for twenty-five years and had the privilege of working with a number of outstanding law clerks. Tim was one of the finest clerks that served in my chambers. He has an outstanding legal background that qualifies him for service on the Tenth Circuit.

Justice Erickson has maintained a close relationship with Tim, his wife, and their two sons, and has expressed over and over again his strong belief that he would—and will—make a significant addition to the Tenth Circuit.

In a letter to the Senate Judiciary Committee, Justice Erickson wrote that,

As counsel to the Columbine Review Commission that investigated the Columbine High School shooting, Tymkovich served with great distinction and materially assisted the Commission's preparation of a report that hopefully will prevent other school shootings.

In a letter to Senator HATCH dated January 23, 2003, five former justices of the Colorado Supreme Court urged the Senate's timely consideration of his nomination. The justices, including Justice Jean Dubofsky, wrote:

Over the past nearly twenty years, each of us has had the opportunity to observe Timothy M. Tymkovich as a practitioner employed by or appearing before the Colorado Supreme Court. During that time, Mr. Tymkovich served as a law clerk employed by one of the justices of our court and later as counsel representing the State of Colorado before the Court. We have also had the opportunity to observe Mr. Tymkovich as an attorney serving in bar organizations such as the American Law Institute, the American Bar Foundation and as a staff attorney of

public commissions. Based on our professional experiences, we are of the unanimous judgment that he is well qualified and most able to serve as an appellate judge of the United States Court of Appeals.

This group of justices, coming from varied political backgrounds and differing professional experiences and diverse legal careers and different racial, gender and ethnic backgrounds, unanimously support the confirmation of Tim Tymkovich by the entire Senate. An endorsement of this kind cannot, and must not, be taken lightly. These justices, Jean Dubofsky, Joseph Quinn, William Neighbors, Gregory Scott, and Luis Rovira, consider Mr. Tymkovich to possess the necessary attributes of a Federal judge, and that Colorado and the Nation should no longer be subjected to undue delay on his nomination.

The justices' letter ends with this powerful statement:

... [W]e speak as one voice, resolute in our belief that the people are entitled to and that Mr. Tymkovich is most deserving of consideration ... Mr. Tymkovich's experience, practice, public service, temperament and skills will serve the people of the United States well.

Their unqualified support speaks volumes about Tymkovich's credentials. This powerful and unequivocal endorsement deserves repeating:

... [W]e speak as one voice, resolute in our belief that the people are entitled to and that Mr. Tymkovich is most deserving of consideration ... Mr. Tymkovich's experience, practice, public service, temperament and skills will serve the people of the United States well.

This statement deserves our attention and our respect.

I ask for unanimous consent that the letter from these five justices be printed in the RECORD.

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

JANUARY 23, 2003

Re Senate consideration of the nomination of Timothy M. Tymkovich as a Judge of the United States Court of Appeals for the Tenth Circuit.

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

DEAR MR. CHAIRMAN HATCH: We are all former justices of the Colorado Supreme Court. We write to express our personal and professional concern and seek the timely consideration of the nomination of Timothy M. Tymkovich as a Judge of the United States Court of Appeals for the Tenth Circuit. Ever mindful of the Separation of Powers Doctrine as well as the Supremacy Clause of the United States Constitution, we do not write to impose or suggest our will should prevail over that of the United States Senate. Instead, as private citizens with a unique perspective concerning the attitudes and abilities of Mr. Tymkovich, we write to petition your attention to our concern to urge that a hearing be scheduled for Mr. Tymkovich.

Over the past nearly twenty years, each of us has had the opportunity to observe Timothy M. Tymkovich as a practitioner employed by or appearing before the Colorado Supreme Court. During that time, Mr.

Tymkovich served as a law clerk employed by one of the justices of our court and later as counsel representing the State of Colorado before the Court. We have also had the opportunity to observe Mr. Tymkovich as an attorney serving in bar organizations such as the American Law Institute, the American Bar Foundation and as a staff attorney of public commissions.

Based on our professional experiences, we are of the unanimous judgment that he is well qualified and most able to serve as an appellate judge of the United States Court of Appeals.

Consistent with our professional assessments, the President of the United States has seen fit to nominate Mr. Tymkovich to serve as a judge on the Tenth Circuit Court of Appeals. However, while nominated more than a year ago, we understand that his nomination is currently awaiting consideration by the Senate Judiciary Committee that you chair. We do not propose to instruct the Chair in the conduct of the Senate's business, for we are not able nor do we intend to assume such a role or purpose. Nonetheless, we do ask that the President's nomination of Mr. Tymkovich be considered expeditiously.

Mr. Chairman, despite coming from varied political backgrounds and differing professional experiences as diverse legal careers and different racial, gender and ethnic backgrounds, we are of the unanimous opinion that Mr. Tymkovich should be considered by your Committee and confirmed by the entire Senate. We also conclude and share the opinion that he not only possesses the attributes we appreciate in judges, both federal and state, but that he is entitled to fair and civil treatment by the Senate Judiciary Committee. The citizens of Colorado and indeed our Nation should no longer be subjected to undue delay confronted by anything other than a full and fair review of his nomination in accordance with the rules of the United States Senate.

Without listing his considerable accomplishments as an attorney engaged in public service and private practice, we speak as one voice, resolute in our belief that the people are entitled to and that Mr. Tymkovich is most deserving of consideration by your Committee. The President's nomination is a considerate one and Mr. Tymkovich's experience, practice, public service, temperament and skills will serve the people of the United States well.

Together, therefore, we respectfully urge you to place his nomination before the Senate Judiciary Committee so that a fair and prompt review of Mr. Tymkovich's credentials can be made without much further delay.

Moreover, we most strongly recommend and heartily urge the Senate Judiciary Committee refer his nomination to the full Senate of the United States for a definitive vote as soon as practicable.

Very truly yours,

JEAN E. DUBOFSKY,
Justice.

JOSEPH O. QUINN,
Chief Justice.

WILLIAM D. NEIGHBORS,
Justice.

GREGORY KELLAN SCOTT,
Justice.

LUIS D. ROVIRA,
Chief Justice.

As the end of the second year of his nomination approaches, I sincerely hope that my colleagues will act today to fill the 4-year vacancy on the Tenth Circuit, so that the people of Colorado, Utah, New Mexico, Oklahoma and Nebraska, and indeed the Nation, will no

longer be short-changed by a vacant bench. While this seat has remained empty for nearly 4 years, the States that comprise the Tenth Circuit have experienced unprecedented population growth, and causing a docket overload at the Federal level. The vacancy must be filled, and Tymkovich is the proper person to fill the seat.

The events of September 11 clearly demonstrate an active effort by the enemies of the United States to destroy the liberties and freedom of our Nation. The most basic of our country's values and traditions came under attack, and now we are taking action against those perpetrators. In the wake of tragedy, Congress has enacted new laws that provide financial assistance to businesses, families and defense, and we are currently taking strong military measures to suffocate terrorists and destroy the hateful organizations that work to undermine our society and destroy our liberty.

I am sure that my colleagues will agree that a necessary component of providing justice and protecting liberty and freedom is an efficient court system, a court equipped with the personnel and resources that enable it to fulfill its constitutional role. Today, this body has another opportunity to restore the faith of the citizenry and to fill a 4-year vacancy. I urge the Senate to show the American people that the Senate is indeed interested in serving justice, in protecting our laws and our people, and to support the nomination of Tim Tymkovich. He is highly qualified and will serve his country with the utmost of patriotism, and respect for adherence to constitutional principles. He respects our laws. I strongly urge my colleagues to vote for the nomination of Tim Tymkovich to the Tenth Circuit Court of Appeals.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ALLARD. I ask unanimous consent the quorum call be rescinded.

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

Mr. ALLARD. I ask unanimous consent the time used during the quorum call time be charged equally to both sides.

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

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

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

Mr. FEINGOLD. Mr. President, I voted against the nomination of Timothy Tymkovich to be a judge on the U.S. Court of Appeals for the Tenth

Circuit in the Judiciary Committee, and I will do so again today. I would like to take a few minutes to explain my decision.

I cannot support the nomination of Mr. Tymkovich because I am not convinced that he will give all those who appear before him a fair and impartial hearing. I am concerned that he lacks a commitment to apply and uphold our Constitution's equal protection guarantees, especially in protecting gay Americans from discrimination.

In 1996, in a case called *Romer v. Evans*, the Supreme Court ruled unconstitutional a Colorado ballot initiative that sought to overturn city ordinances prohibiting discrimination based on sexual orientation. As solicitor general of Colorado, Mr. Tymkovich defended the ballot initiative on behalf of the State. Obviously, I know it was his job to do that. But I am concerned that it is his personal belief—his personal belief—that gay Americans do not have a right to equal protection and equal justice under the laws, and he did not convince me he would put aside those personal beliefs when he becomes a judge.

Mr. Tymkovich wrote a law review article that was published in 1997 by the University of Colorado about the *Romer* decision. In this article, which, I might add, he wrote and published after he left his job as Colorado's solicitor general, he, in my view, went beyond representing his client and actually presented his personal views. He forcefully promoted the view that laws against discrimination based on sexual orientation in activities like employment, housing, and education in places like Denver, Aspen, and Boulder somehow conferred "special rights or protections" on gays and lesbians. Let me quote a bit from his article. He wrote:

A number of governmental entities in Colorado had granted special rights or protections to homosexuals and bisexuals: the cities of Denver, Boulder, and Aspen enacted ordinances prohibiting discrimination based on sexual orientation in jobs, housing, and public accommodations; the Colorado Civil Rights Commission had moved to extend the state's civil rights act to ban discrimination based upon sexual orientation; the governor of Colorado issued an order prohibiting job discrimination for state employees based on sexual orientation and began to fashion "sensitivity" training for the state's executive branch; and public educational institutions had begun adopting policies prohibiting discrimination based on sexual orientation.

Mr. Tymkovich's view is that employers and landlords have the "liberty," or right, to discriminate against individuals based on their sexual orientation. He wrote:

Eliminating the liberty of landlords and employers to take account of homosexuality send the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality of this difficult and divisive moral issue, Amendment 2 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question.

I sought to question Mr. Tymkovich about this. And when I attempted to probe Mr. Tymkovich at his confirmation hearing about his view that civil rights laws like the city ordinances at issue in *Romer* somehow confer "special rights" on gay Americans, he was suddenly and, to me, almost inexplicably evasive. I was frustrated with Mr. Tymkovich's reluctance to answer questions that would reveal his thought process. I was interested in his views on an important issue for our Nation—civil rights and the distinction he saw between rights for African Americans and rights for gay Americans. Even though he had already shared his personal views on the question of gay rights in a law review article—a public forum—he suddenly seemed reluctant to discuss those views with the committee.

I asked Mr. Tymkovich a question as follows:

As you discussed in your article, you believe that the Supreme Court was wrong to be hostile to the political decision of a majority of Colorado voters who supported adoption of the Colorado amendment. You state that Colorado voters made "a seemingly good-faith policy choice."

If I understand you correctly, you agree with Justice Scalia's dissent in *Romer* and that the court improperly injected itself into a political debate. Is that your view?

That was the conclusion of my question. Here was Mr. Tymkovich's initial response:

Senator, that's an excellent question, and I appreciate the opportunity to clarify and reflect on the issue below.

As you know from your participation in this body, there are important issues of public policy debate that cross party lines or are bipartisan and very difficult issues. In Colorado, the question of whether or not to add sexual orientation to State and local anti-discrimination laws has been a very important and ongoing political debate in our State. And certainly, Amendment 2 was in part within that context and dialogue. And certainly many people respectfully disagreed with the legislative pronouncement there, and I think the point I was trying to make in those remarks and certainly in the case is that the courts were not a good forum for airing sort of political or legislative policy-type arguments, and that the courts are best able to address a constitutional principle when they have the concrete facts and law before them and not sort of rhetorical or legislative-type pronouncements.

The Amendment 2 case had a strong mix of sort of a policy debate in that sense, and I think my comment was that the policy debate and certainly the arguments we made to the courts is that that would be better left to the political process.

I then followed up by saying:

I am taking that as a yes, that you agree with Justice Scalia that the Court improperly injected itself into a political debate. Do you believe that the Court should have—is that fair?

Mr. Tymkovich responded:

Senator, I think Justice Scalia accepted some of the presentation of the State, but then rejected others. So I don't wholly agree or disagree with the dissent in the case, but it does reflect some of the arguments that were made.

I then asked:

Do you agree with that point?

Mr. Tymkovich responded:

I agree—the presentation that the state made to the Supreme Court was that it was a policy debate and not subject to the Supremacy Clause of the equal protections. But, again, as I testified earlier, that argument, that presentation was not accepted by the Court, and regardless of my personal views, I am perfectly capable and willing to impartially apply that precedent.

The reason I am going through this is that it is important to make a record for this point. Mr. Tymkovich and I then had a dialog that lasted quite a few pages of the transcript where I repeatedly asked him to discuss his personal views on this issue, not simply the position he had argued on behalf of the State, given that he had discussed them in the law review article. He essentially refused to answer the question.

I ask unanimous consent that the full transcript of my questioning of Mr. Tymkovich be printed in the RECORD.

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

Senator FEINGOLD. I will go back to the issue of gay rights and your involvement as Solicitor General of Colorado in the case that led to the U.S. Supreme Court's *Romer v. Evans* decision. As has been discussed by Senator Schumer and Senator Sessions, you defended the ballot initiative on behalf of the State of Colorado. It was, I agree, your job to do that and I accept that. But I do want to ask you a bit about what perhaps goes beyond the zealous advocacy for your client, and this is the article that we are discussing, the 1997 University of Colorado Law Review, that forcefully presents your view that laws against discrimination based on sexual orientation in activities like employment, housing, and education in places like Denver, Aspen, and Boulder somehow conferred special rights or protections on gays and lesbians.

Let me ask you this: Do you believe that title VII of the Civil Rights Act of 1964, the landmark legislation prohibiting employment discrimination based on race, confers special rights on African Americans?

Mr. TYMKOVICH. Senator, the anti-discrimination laws in Colorado and at the Federal level are important protections to minorities and others that have faced discrimination. So to the extent that the baseline was no, you know, Federal or State protections based on ethnicity or race, the addition of those laws to the legislative pronouncement provides a protection, an additional protection that would not be available under the common law. So in that sense, certainly under Colorado law, additional protections are provided through the discrimination laws, and I might add that's an important part of the legislative process to identify and protect injustices out there.

Senator FEINGOLD. But what about my question? Does Title VII of the Civil Rights Act of 1964 confer special rights on African Americans?

Mr. TYMKOVICH. I'm not sure exactly what you mean by "special rights," Senator, but I would say—

Senator FEINGOLD. Well, I am referring to the fact that your article seemed to say that the Colorado law conferred special rights or protections on gays and lesbians. I am asking you whether or not Title VII of the Civil Rights Act of 1964 in that same spirit in your view confers special rights on African Americans?

Mr. TYMKOVICH. No, Senator. I think it provides a civil remedy, some laws provide a criminal remedy, on behalf of discrimination, and certainly that's the intent and purpose of those laws.

Senator FEINGOLD. In that same spirit, do you think that Title VII wrongly protects Americans from employment discrimination based on race, ethnicity, national origin, religion, age, disability, or gender? Do you believe that an American who brings a claim of job discrimination based on any one or more of these categories is somehow enjoying special rights or protections?

Mr. TYMKOVICH. No, Senator. They're simply enjoying the protections that this body has provided to those particular groups.

Senator FEINGOLD. As you discussed in your article, you believe that the Supreme Court was wrong to be hostile to the political decision of a majority of Colorado voters who supported adoption of the Colorado amendment. You state that Colorado voters made "a seemingly good-faith policy choice."

If I understand you correctly, you agree with Justice Scalia's dissent in *Romer* and believe that the Court improperly injected itself into a political debate. Is that your view?

Mr. TYMKOVICH. Senator, that's an excellent question, and I appreciate the opportunity to clarify and reflect on the issue below.

As you know from your participation in this body, there are important issues of public policy debate that cross party lines or are bipartisan and very difficult issues. In Colorado, the question of whether or not to add sexual orientation to State and local anti-discrimination laws has been a very important and ongoing political debate in our State. And certainly Amendment 2 was in part within that context and dialogue. And certainly many people respectfully disagreed with the legislative pronouncement there, and I think the point I was trying to make in those remarks and certainly in the case is that the courts were not a good forum for airing sort of political or legislative policy-type arguments, and that the courts are best able to address a constitutional principle when they have the concrete facts and law before them and not sort of rhetorical or legislative-type pronouncements.

The Amendment 2 case had a strong mix of sort of a policy debate in that sense, and I think my comment was that the policy debate and certainly the arguments we made to the courts is that that would be better left to the political process.

Senator FEINGOLD. I am taking that as a yes, that you agree with Justice Scalia that the Court improperly injected itself into a political debate. Do you believe that the Court should have—is that fair?

Mr. TYMKOVICH. Senator, I think Justice Scalia accepted some of the presentation of the State, but they rejected others. So I don't wholly agree or disagree with the dissent in the case, but it does—

Senator FEINGOLD. Do you agree with that point?

Mr. TYMKOVICH [continuing]. Reflect some of the arguments that were made.

Senator FEINGOLD. Do you agree with that point?

Mr. TYMKOVICH. I agree—the presentation that the State made to the Supreme Court was that it was a policy debate and not subject to the Supremacy Clause of the equal protections. But, again, as I testified earlier, that argument, that presentation was not accepted by the Court, and regardless of my personal views, I am perfectly capable and willing to impartially apply that precedent.

Senator FEINGOLD. That isn't what I am asking. I have asked your personal view, and

I take it that your personal view is that the Court did the wrong thing here and improperly injected itself into the political debate. I understand that you would follow the law based on the Court's decision.

Mr. TYMKOVICH. I would follow the law.

Senator FEINGOLD. Do you believe that the Court should have given more consideration to the privacy, associational, and religious rights of persons who do not condone homosexual behavior?

Mr. TYMKOVICH. Senator, the lower courts in Colorado had identified that there were religious and associational factors that would be implicated by the laws that were preempted by Amendment 2. I think, again, that that, as I've tried to explain in my previous testimony, is part of the political give-and-take, the public policy give-and-take in crafting a gay rights law that would accommodate certain interests, and certainly that's part of the policy debate that we've seen in our State. Certainly the Amendment 2 provision would have required that debate to go at the statewide level, and as I recall, even during the judicial proceedings on Amendment 2, there was a move to enact a statewide initiative that would—

Senator FEINGOLD. Okay. I accept that, but I am asking you your personal view. You are an expert on this. Do you think the Court should have given more consideration—you, do you think the Court should have given more consideration to the privacy, associational, and religious rights of persons who do not condone homosexual behavior?

Mr. TYMKOVICH. Senator, I think that in that case, as others, as an advocate, as a representative of my client, we were presenting what we thought were the best arguments based on the applicable case law—

Senator FEINGOLD. I am asking your view right now.

Mr. TYMKOVICH [continuing]. To the Supreme Court.

Senator FEINGOLD. I am not asking in your role as an advocate. I am asking in your view should the Court have taken that more into account?

Mr. TYMKOVICH. I think, as I've testified earlier, indicated in my article, that I believe that we had strong arguments based on the existing precedent at the time and asked that the Court accept that.

Senator FEINGOLD. Well, you seem to be refusing to give your own view on this, and I don't know why. This isn't a pending case. This is a case that was resolved by the Supreme Court. You have strong opinions indicated I here, and I don't understand why you can't give me your personal view.

Mr. TYMKOVICH. I think I've reflected the views that we presented to the Court, and as I've testified—

Senator FEINGOLD. You did do that and that is all you have done, and you are not answering my question.

Throughout our Nation's history, proponents of racial discrimination have used the argument that they should be free to discriminate based on their privacy, associational, or religious rights. In *Brown v. Board of Education of Topeka, Kansas*, the Supreme Court injected itself into a contentious political debate where in some parts of the country separate but equal schools were defended to the point of literally spilling blood over the issue.

Do you believe that *Brown v. Board of Education* was wrongly decided and that the Supreme Court should not have injected itself into the policy question of maintaining school segregation?

Mr. TYMKOVICH. Senator, it's an important question because certainly the history of discrimination in this country has had a very mixed and very sorry record at times, and the *Brown* decision is certainly a reflection of part of that history.

One of the reasons I went to law school was the influence of a book I read about the *Brown* case called "Simple Justice" that traced the history of the legal development from *Plessy v. Ferguson* to the *Brown* decision, and a very powerful historical book about the legal and social and ideological aspects of discrimination in this country.

So certainly *Brown* is one of the cornerstones of American jurisprudence, and certainly its foundation is a very important part—

Senator FEINGOLD. So you obviously don't disagree with that decision, and that is why I want to ask you: What is the difference in your mind between African Americans and gay people in terms of whether laws protecting them from discrimination are permissible?

Mr. TYMKOVICH. Senator, I think that it's a very important part of the public policy debate to analyze the rationale and the reasons for a particular legislative judgment. I don't sit here today as having a legislative agenda. I do not. My goal as a Tenth Circuit judge, if confirmed, would be to impartially and fairly and open-mindedly apply the law. You're asking me for a legislative judgment, and I certainly—

Senator FEINGOLD. No. I am asking you your personal opinion, having studied this in law school, having the question of discrimination having been one of the inspirations for your going to law school, and doing extremely well, I might add, and being a very distinguished lawyer. I am asking you what your thought process is here. I am asking you what your thought process is here. What is the difference between discrimination against African Americans and gay people?

Mr. TYMKOVICH. Senator, I think that, you know, again, to answer your question from a public policy standpoint, I believe that this body, Congress, which has debated whether or not to add sexual orientation to Title VII or to Federal law, and certainly the debate at the State level would be to take the testimony and the experiences of gay and lesbian Americans and apply that to the particular circumstances at work.

In Colorado, that's an important dialogue that is ongoing about to what extent the laws ought to be modified and changed to prevent discrimination and violence and harassment against gay and lesbian people. I support that legislative debate in our State. I don't think it's appropriate for me to take a personal view to the Federal bench, and I can commit to the body that I'd be able to apply the discrimination laws faithfully and carefully as a Tenth Circuit judge—

Senator FEINGOLD.—Well, Mr. Chairman, my time is up, but let me just say that I certainly respect Mr. Tymkovich and wish him well. But this process where we can't even get at sort of the thought process of a nominee on something as simple and important as how you relate discrimination against African Americans to the issue of discrimination against gay people, to me, Mr. Chairman, this is the problem we are having, that we are really not being given a chance to examine how these individuals will simply go through their thought process as judges, not whether there is a right answer or a wrong answer, but how will they go through the judicial process and how will they go through that thought process.

I think that is legitimate, and, again, I respect you and certainly you have tried to respond to me. But it makes it very, very difficult to analyze, especially in light of the fact that this nominee wrote an article, an extensive article about this very important subject, and all I am trying to do is to get his thought process as it compared to another body of law that he obviously thinks is valid.

So, with that, Mr. Chairman, I conclude and thank you and thank Senator Kennedy.

Mr. FEINGOLD. Mr. President, this kind of evasive testimony only makes it more difficult to analyze whether or not a nominee is well suited for a position on a Federal appeals court.

I was also troubled by Mr. Tymkovich's insistence that the *Romer* case presented a political question and should not have been decided by the courts.

The courts have played an important role in ensuring civil rights for all Americans. If our Nation left all questions of civil rights to the legislatures, school segregation might still be practiced in parts of the country today. In *Brown v. Board of Education of Topeka, KS*, the Supreme Court did its job by injecting itself in a contentious political debate and protecting the right of African Americans to equal education.

I understand that these are President Bush's nominees and that he has the right to nominate whomever he wants to the bench. But as much as it is our duty to fill vacancies in the Federal judiciary, it is also our duty to give great scrutiny to those nominees who have a record that calls into question their ability to give all those litigants who would appear before them a fair and impartial hearing.

I am more than pleased to vote to confirm judicial nominees that are fair-minded and supported by a consensus of Senators and the legal community, and, once again, I urge the President to send such nominees to the Senate. I have voted in favor of three previous Bush nominees to the Tenth Circuit, but I do not believe that Mr. Tymkovich is the right person for this seat.

I yield the floor and suggest the absence of a quorum.

Mr. CRAIG. Mr. President, I ask unanimous consent that time under the quorum call be divided equally.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. CAMPBELL. Mr. President, I am pleased that Timothy Tymkovich's nomination to serve on the Tenth Circuit Court of Appeals has come before the full Senate for consideration here today.

Almost 7 weeks ago today, on February 12, 2003, along with my friend and colleague, Senator ALLARD, I was pleased to introduce Tim Tymkovich to the Judiciary Committee for his confirmation hearing.

Today, I am once again pleased to be able to speak in strong support of Tim Tymkovich's nomination to serve on the Tenth Circuit Court of Appeals.

Tim Tymkovich is well qualified to serve on the Tenth Circuit. He is a na-

tive Coloradan, an excellent jurist and an all-around outstanding person. I believe he will be a terrific addition to the Tenth Circuit Court of Appeals.

Since he earned his juris doctor at the University of Colorado's School of Law back in 1982, Tim has had an outstanding career, including a well-balanced combination of service in both the public sector and in private practice.

Tim's public service experience includes his service as a clerk to the former Colorado Supreme Court Chief Justice William Erickson from 1982 to 1983.

From 1991 to 1996, Tim Tymkovich skillfully served as Colorado's solicitor general.

In between these years of public service, Tim earned an excellent reputation in private practice with several leading law firms.

For the past 2 years, Tim has served as counsel to Colorado Governor Owen's Columbine Review Commission, which reviewed the public agency and law enforcement response to the tragic Columbine High School shootings of 1999.

At the same time, he co-chaired the Governor's Task Force on Civil Justice Reform, which has led to significant improvements in Colorado's civil justice and practice.

Tim currently serves as a partner in the prestigious Denver-based law firm, Hale, Hackstaff, & Tymkovich.

Two of Colorado's leading newspapers have positively endorsed Tim, saying among other things, that he has gained a local reputation as a thoughtful, insightful attorney who knows the law and works hard to uphold it. That was the *Denver Post*, May, 2002.

They have also commented that if the Senate gave Tim Tymkovich a serious look, we would find someone who combines intellectual heft and steady temperament.

I have taken a good look at Tim Tymkovich, and I fully agree with these insightful assessments.

Tim's nomination enjoys substantial bipartisan support, including the support of Colorado Attorney General Ken Salazar and Colorado's well-known former Governor, Roy Romer.

Tim Tymkovich's nomination for the Tenth Circuit Court of Appeals has been pending since he was first nominated for this position back on May 25, 2001.

It is now approaching 2 years since he was first nominated. Despite Tim Tymkovich's outstanding qualifications, it has not been an easy task for the Judiciary Committee to get this nomination to the floor of the Senate today.

I want to take a moment to say a special word of heartfelt appreciation for my good friend and Judiciary Committee Chairman ORRIN HATCH for his remarkably fair, evenhanded and steadfast stewardship of judicial nominees, including Tim Tymkovich's nomination. Senator HATCH deserves all of our appreciation.

It is time for the full Senate to complete our work and hold a straight up-or-down rollcall vote on Tim Tymkovich's worthy nomination.

I strongly urge my colleagues to vote in favor of Tim Tymkovich's nomination to serve on the Tenth Circuit Court.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. CAMPBELL. Mr. President, I ask unanimous consent that the time be charged equally to both sides.

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

Mr. CAMPBELL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. BUNNING. Mr. President, I ask unanimous consent to speak as in morning business for approximately 10 minutes.

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

(The remarks of Mr. BUNNING are printed in today's RECORD under "Morning Business.")

Mr. BUNNING. Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. LEAHY. Mr. President, I understand we are on the nomination of Timothy Tymkovich to the U.S. Circuit Court of Appeals for the Tenth Circuit.

The PRESIDING OFFICER. The Senator is correct.

Mr. LEAHY. I thank the distinguished Presiding Officer. As he knows, being a member of the Judiciary Committee, while the debate time was scheduled by the committee, at the same time they scheduled hearings on various judicial nominees, including a very controversial nominee to another circuit court. As have others, including the distinguished Chair, I have tried to balance my time from place to place and attend to both matters ongoing simultaneously. I am sorry that I could not be here to open the debate but was

at the hearing helping to open those proceedings.

Today we consider Mr. Tymkovich as the fourth of President Bush's nominees to this circuit to be considered by the Senate. Three of the nominees to the Tenth Circuit were given hearings and confirmed during the time I was chairman of the Judiciary Committee.

President Bush sent up Harris Hartz of New Mexico to the Tenth Circuit. I arranged to get him a hearing and vote on the floor. In fact, I voted for him.

President Bush sent up Terrence O'Brien of Wyoming. I arranged to get him a hearing and a vote on the floor. I voted for him. President Bush sent up Michael McConnell of Utah, a highly controversial, extraordinarily conservative nominee, heavily backed by the Federalist Society and others. I arranged to get a hearing for him, and I voted for him.

I mention that because it is in stark contrast to the treatment of President Clinton's nominees to vacancies on the Tenth Circuit. We were fair and took action on three of President Bush's nominees to the Tenth Circuit last year. Today the Senate is debating and voting on his last remaining nominee to that circuit.

Let us recall what happened when Republicans were in charge and there was a Democratic President. President Clinton nominated two outstanding lawyers to this vacancy, the one about which we talk today. James Lyons, whom I have known it seems forever, is a brilliant lawyer. He would have been an outstanding federal judge, one who in that position would be totally impartial, would fit the qualifications necessary for a judge—that is, when you walked in the court, you would know, whether you are Republican or Democrat, rich, poor, plaintiff, defendant, black, white or anything else, that you would be treated fairly. Mr. Lyons was not treated fairly. He was not even allowed to have a hearing let alone consideration by the Judiciary Committee or a vote by the Senate.

Then President Clinton nominated Christine Arguello, an outstanding Hispanic woman. She was not allowed to have a hearing either. It was not that she was not qualified. In fact, speaking of these two, Mr. Lyons was among the many Clinton nominees given the highest qualification by the American Bar Association. Like so many others who fit in that category, he was never allowed even to have a hearing. It was not a question of voting up or down. Republicans were in the majority. They could have voted him down. But both these well qualified nominees were not even allowed to have a hearing.

Ms. Arguello is a talented Hispanic attorney. Her nomination had widespread support from her community and State. Both Republicans and Democrats called and wrote to me on her behalf. But as with so many circuit court vacancies on the Tenth Circuit, the Fourth Circuit, the Fifth Circuit,

the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, the District of Columbia Circuit, and around the country, these qualified nominees, whose only sin was that they were nominated by a Democratic President, were not allowed to have hearings or votes.

The Republican-controlled Senate made it very clear: We will not hold hearings or vote on them. Someday there will be a Republican President, and then we will fill these seats in a campaign to stack the courts.

This was very clear. This happened during President Clinton's first term in the Senate—the Republican Senate blocking his nominations from even having a hearing because Republicans thought he would never get reelected and then they could put in Republicans to fill those judicial vacancies. It is very clear. Everybody here heard the comments in the cloakroom and in the Senators' dining room. Look at the record, in the 1996 session, the Republican Senate majority would not consider or confirm a single nominee to a circuit court anywhere in the country, not one. During that entire year only 17 judges were confirmed and all were to the district courts.

President Clinton then had a landslide reelection victory. We naively assumed that the Senate Republicans would work with us to help fill the many judicial vacancies that had been perpetuated. Not so. They thought maybe 4 years later they might have another chance and there might be a Republican administration and they could get the courts to do what we wanted. Despite vacancies that reached over 100, Republicans denied there was a vacancies crisis and insisted on slow and searching inquiries on those lucky nominees who were considered at all. Of course, more than 50 of President Clinton's judicial nominees were never given a hearing and a vote. Others, the lucky ones, were delayed for years and years before Senate Republicans would allow a vote.

Then in the most recent presidential election, as we know, Al Gore got half a million more votes but did not become President. I respect the electoral system. President Bush won the electoral vote, and there was a 1-vote margin in the Supreme Court determining that. All of a sudden, all these seats that have been kept open year after year because Republicans would not allow anybody to come forward, were valuable opportunities.

When Democrats were the Senate majority, we tried to help, to work with the administration and with Senate Republicans. Take, the Tenth Circuit. Even though President Clinton's nominees had been unfairly held up, we did not do the same thing to President Bush's nominees. We proceeded to confirm 100 of his judicial nominees in 17 months. We proceeded on three of his nominees to the Tenth Circuit and filled three of the four vacancies on that circuit by adjournment last year.

With respect to this remaining nomination, that of Timothy Tymkovich, I

must say—not just because of the shameful, inexcusable way James Lyons and Christine Arguello were treated by the Republicans—I have serious misgivings about this nomination. Mr. Tymkovich has worked to undermine environmental protections and other Federal programs in the name of States rights. He has a particular view of States rights, one that I believe will color his decision making and result in hostility to Federal legislation designed to protect all Americans' civil rights and all Americans' environmental rights.

In 1996, Mr. Tymkovich testified before the Senate Governmental Affairs Committee, where he made strident comments about his perceptions of States' rights. His testimony indicated that his support for "States' rights" was conveniently focused on rolling back Federal regulation in areas where he had substantive disagreements with Federal policy. He testified in favor of the so-called Tenth Amendment Enforcement Act, which called on Congress to eliminate implied preemption, a form of preemption that has been consistently recognized by the United States Supreme Court.

He claimed that the Federal Government had interfered in Colorado's State's rights. Mr. Tymkovich complained that the Federal Government had been "especially intrusive into State affairs in the area of the environment." He cited as examples of such interference and "overreaching" the EPA's opposition to a State "self-audit" program. That State program would have granted enforcement immunity to polluters that voluntarily came forward and agreed to address problems in the future. Immunity would have applied no matter how damaging the polluters' actions had been. The State legislation was opposed by the EPA because it violated State obligations under several Federal statutes—the Clean Air Act and Clean Water Act, among others. Mr. Tymkovich chided the EPA for refusing to give the same immunity to polluters. In addition to his statements about the self-audit program, Mr. Tymkovich protested the EPA's rejection of State programs in water and air quality programs that did not meet Federal standards.

Mr. Tymkovich also complained in his hearing testimony that the Federal Government violated States' rights by requiring Colorado to follow Federal Medicaid law if the State chose to accept Federal Medicaid funding. He argued that States should be allowed to accept Federal Medicaid funding and then refuse to use those funds as prescribed by Federal law; that is, to deny the termination of pregnancies in the limited situation where a Medicaid-qualified woman has been the victim of rape or incest. He argued that States should be allowed to accept Federal Medicaid funding, but absolutely refuse to use these funds—funds that come from all of us from the State of

Vermont, the State of Alabama, and every place else as prescribed by Federal law. He argued: We will use your money, but you have no say in how we use it.

Finally, Mr. Tymkovich claimed that the Federal "motor voter" law was an "intrusion" that "impose[d] special burdens." He called the law an "unfunded mandate" that "unquestionably interferes with the States' internal affairs." In summary, he argued that "Congress has long ignored State interests."

I am also concerned about Mr. Tymkovich's involvement in attempts to weaken Title IX. As State solicitor general, Mr. Tymkovich appealed a decision by a Federal District Court finding that Colorado State University had violated Title IX of the Education Amendments of 1972. The suit, *Roberts v. Colorado State Board of Agriculture*, was originally brought by members of the women's fast-pitch softball team, which had been cut by the university. The plaintiffs argued that the termination of support for the team was a violation of Title IX. The District Court issued a permanent injunction that required the university to reinstate funding for the program and to provide the team with equal benefits to other sports programs at the college.

Mr. Tymkovich appealed the case to the Tenth Circuit, arguing that additional evidentiary requirements should be placed upon Title IX plaintiffs. The Tenth Circuit affirmed the lower court's ruling, finding that the university had not shown that it had fully and effectively accommodated the interests and abilities of women athletes.

Title IX has been vital to the inclusion of women and girls in all facets of education, especially athletics. You do not have to be a parent or grandparent to know that now, if you go into any schoolyard and you look at those playing sports at the grade school and high school level, you see boys and girls playing. At the college level, you see both young men and young women playing sports. This has been important to all of us.

I am also concerned about the personal hostility Mr. Tymkovich has shown to Americans based on their sexual orientation, and about his failure to accept the importance of civil rights laws. As Colorado solicitor general, he argued a case before the Colorado and U.S. Supreme Courts, in which he unsuccessfully defended Colorado's 1992 ballot initiative that added a broadly-worded provision in the Colorado Constitution prohibiting any legal protections based upon sexual orientation. Ultimately, the Supreme Court of the United States found that the Colorado law was motivated by prejudice, not rationality, and thus ran afoul to the most basic premise of the equal protection clause.

So after he litigated the *Romer* case, and after a conservative Supreme Court ruled against him, he authored a bitter law review article both defend-

ing his position and chastising the decisions of the Supreme Court of the United States and of the Supreme Court of Colorado. He criticized Justice Kennedy's decision in *Romer* as "an important case study of the Supreme Court's willingness to block a disfavored political result—even to the point of ignoring or disfiguring established precedent." He also referred to the U.S. Supreme Court's oral argument process as "judicial histrionics." He concluded by saying this was "another example of ad hoc, activist jurisprudence, without constitutional mooring."

Mr. President, I say this because this is a man who claims he would be perfectly willing to follow the decisions of the Supreme Court. In fact, the most revealing aspect of his law review is his failure to acknowledge and respect the decision of the Supreme Court and the views and integrity of those on the other side of the argument from him.

I have voted for hundreds of judges nominated by both Republican and Democratic Presidents. My personal belief is that it is not whether they are Democrats or Republicans, liberal or conservative, pro-life or pro-choice, or whatever they might be; that is not the issue. The issue is whether, when somebody comes before that court, that they know that they are going to be treated with fairness, treated with respect, with courtesy, no matter which side they are on or what legal position they support in that litigation.

A Federal judge has an enormous amount of power. If somebody comes into court and they know the case is already decided, that the judge has already determined, based on who you are, how the case is going to be decided, then I think you have a real problem that goes to the integrity of the courts and certainly to the independence of the courts, and it determines which way those courts are going to be seen.

Why is that important in Mr. Tymkovich's case? Because he shows what type of a judicial temperament he would have. A most revealing aspect of his law review article is his failure to acknowledge and respect the views or integrity of those on the other side of the legal debate. His article made me ask myself why he felt compelled to continue to advocate for the positions he was taking once the case had been concluded, once the Supreme Court had determined what the law was.

He obviously feels very strongly personally about these matters. That is fine and that is his right. But that does not mean that he should be confirmed to a lifetime appointment on a Federal circuit court. Had he merely served as the attorney advocating a position in court, he could have chalked his involvement in the *Romer* case up to professional advocacy in support of a provision adopted in Colorado. Instead, he went well beyond professional legal advocacy. His advocacy went to the point of raising the question whether this

man will be able to be fair to all litigants. He wrote that "our society prohibits, and all human societies have prohibited, certain activity not because they harm others, but because they are considered, in the traditional phrase 'contra bonos mores', i.e. immoral."

In short, the article seems replete with heavy anti-homosexual rhetoric. The hallmark of a good judge is his or her ability to be fair to all who come before the court. I have very grave doubts that Mr. Tymkovich can or will act in an unbiased or fair manner involving civil rights. His expressions seem otherwise.

Equally disturbing about this incident is Mr. Tymkovich's apparent unwillingness candidly to admit error either to the courts or the Judiciary Committee. You have to wonder if he would be fair and impartial as a judge in a court.

In a case in which Mr. Tymkovich was involved in private practice, he represented the Republican and Libertarian parties, along with several State legislators, in their challenge to the constitutionality of Colorado's Fair Campaign Act. In the course of his representation, which saw him before both the trial court and the Tenth Circuit, Mr. Tymkovich erroneously agreed to consensual dismissal of one of his client's claims before the district court. While each court differed about the merits of the alleged claims, both agreed that Mr. Tymkovich voluntarily dismissed a claim that (1) there was no other means of challenging and (2) which he evidently still desired to litigate. In a case of such high importance, and for a person being nominated to a court of such significance, his actions in this case appear to include a rather serious mistake that reflects upon his competency.

Equally disturbing about this incident is Mr. Tymkovich's apparent unwillingness to candidly admit his error either to the courts or the Judiciary Committee. Mr. Tymkovich continued to argue the matter and assert that the District Court behaved improperly and without reason in dismissing his client's first amendment claim. So, too, did he fail to reveal his error in his Senate Questionnaire. Although he truthfully stated that he won some of the claims he pursued, his careful wording on his Senate Questionnaire seems particularly crafted to avoid this aspect of the case.

I note for those who have recently trumpeted the ABA ratings as an important indicator of professional competence—especially when a close friend of President Bush is in charge of those ratings—Mr. Tymkovich received a rating that was partially "not qualified," indicating that a number of evaluators did not consider him suited to the position on the Tenth Circuit in which he was nominated.

I am concerned that Mr. Tymkovich is yet another of President Bush's nominees to the circuit court who is

going to work to undermine Federal laws and programs designed to guarantee protection of civil rights and the environment. I will vote against him.

I will vote against him because I do not believe that people can walk into his court and believe they are going to be treated fairly. I fear that people who come into his court and see that the person on the other side fits into the judge's narrow view of who is acceptable and what is acceptable will think that other person is going to win and I am going to lose no matter what the merits are.

This is the last remaining vacancy on the Tenth Circuit. We had 7 years without a new judge of that circuit. Even though President Clinton tried, Republicans refused to allow his nominees to go forward to be considered.

When I became chairman, we moved three judges who were nominated by President Bush through to confirmation. None of them were people I would have ever nominated. I voted for all of them. I thought even though we were opposed and apart philosophically that they could be fair. I did it notwithstanding my own deep concern about the unreasonable unfairness of the Republicans in not allowing a vote, not even a hearing, on President Clinton's nominees. I was determined not to do that to President Bush. I thought it was absolutely wrong when it was done to President Clinton. So three of those four nominees went forward and they all sit on that court today as President Bush's lifetime appointments to the Tenth Circuit.

We have worked hard to reverse the growing number of vacancies on the Federal courts and on the circuit courts, vacancies that were maintained under the Republican Senate majority when President Clinton was in the White House. Even though President Clinton nominated qualified, moderate people, they were not allowed to have hearings. We tried to change that. Perhaps it is a case where no good deed goes unpunished. We tried to demonstrate to this new White House that we could be different.

In January 1995, when the Republican majority took control of the confirmation process, there were only 16 vacancies on the circuit courts. When I became chairman in the summer of 2001, there were 33 circuit court vacancies. At the end of last year, these vacancies had been cut by almost 25 percent, even though 9 new circuit vacancies arose during that time.

We held the first hearing for a nominee to the Fourth Circuit in 3 years, and confirmed him and another most controversial nominee, even though seven of President Clinton's nominees to that circuit never received a hearing.

We proceeded with the first hearing for a nominee to the Fifth Circuit in 7 years and confirmed her, even though three of President Clinton's nominees to that circuit were never given a hearing.

We proceeded with the first hearing on a nominee to the Sixth Circuit in almost 5 years, confirmed her, and another controversial nominee to that circuit, even though three of President Clinton's nominees to that circuit never received a hearing.

We proceeded with the first hearings on a nominee to the Tenth Circuit in 6 years. We confirmed three, even though two of President Clinton's nominees to that circuit were never allowed hearings.

There is today no current vacancy on the First Circuit to which we confirmed a conservative nominee last year. There are no current vacancies on the Eighth Circuit to which we confirmed 3 of President Bush's nominees in spite of the irresponsible treatment the Republican Senate majority had afforded Bonnie Campbell of Iowa.

I have been in the Senate with six Presidents, President Ford, President Carter, President Reagan, former President Bush, President Clinton, and the current President Bush. On judicial nominees, each of the five previous Presidents had their own views of who they wanted on the courts, and that is their prerogative whom they nominate. Each one of those Presidents sought to unite rather than divide when it came to the Federal judiciary. I think each understood that the integrity and independence of the Federal courts has to be protected. Each one of those five Presidents actually worked with Members of both parties in the Senate for nominees to go forward. I remember sitting in many meetings with Presidents of both parties.

This President is the first one in my experience in 29 years, who seems to have no interest whatsoever in working with the Senate. He seems perfectly happy with what was done in the past by members of his party, and now with members of his party willing to change the rules—ignore the rules and go forward and do things that have never been done before—so long as they win.

In the short run, you win. In the long run, you hurt badly the integrity and the independence of the Federal court. That is one thing we should think of. These are lifetime appointments. They are not the terms of Senators or Presidents. Presidents have 4-year terms. Senators have 6-year terms. The Federal bench has a lifetime term.

Finally, even though his term is approximately halfway over, I urge the President to try for a few months to be a uniter, not a divider and work with the Senate on nominating judges. We showed we were willing to move judges much faster for him when the Democrats were in control than the Republicans did when they were in control and there was a Democratic President.

Work with us. You are going to have better courts; all Americans will have better courts. You can still appoint a lot of Republicans—that is fine. But you could have an independent court, not courts that are going to be seen by a growing—and it is growing—number

around this country as an arm of the Republican Party. Professor Sheldon Goldman was recently quoted in an article by Stephanie B. Goldberg in *MS Magazine* as saying: "If courts are perceived as being governed by political ideology, they lose public support and are no longer seen as an independent branch of government. They're just an arm of the regime." Courts should not be an arm of the Democratic Party or the Republican Party. It is one branch of Government that should be independent. This White House seems to want to change that.

Over more than 200 years of history, Presidents occasionally have been unable to resist the temptation of court-packing schemes, such as in the case of John Adams or Franklin Roosevelt. Those were wisely rejected. If the White House is unwilling to have an independent judiciary, I hope the Senate will show enough courage to reject that.

Before observing the absence of a quorum I ask unanimous consent that the time run equally against both sides.

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

Mr. LEAHY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. In my capacity as the Senator from Alabama, I ask unanimous consent that the order for the quorum call be rescinded.

RECESS

The PRESIDING OFFICER. Hearing no objection, under the previous order, the hour of 12:30 having arrived, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:30 p.m., recessed until 2:16 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

The PRESIDING OFFICER. The Senator from Virginia.

ADDITION OF COSPONSORS—S. CON. RES. 31

Mr. WARNER. Mr. President, I would like to submit to the Chair a unanimous consent request.

Mr. President, pending at the desk is S. Con. Res. 31 relating to the subject of prisoners of war. I commend the Senator from Pennsylvania, Mr. SANTORUM, for his work on this resolution, approaching me and others about the need for this resolution days ago. By inadvertence, and I accept responsibility for that, he was omitted from the list of cosponsors.

At this time, I ask unanimous consent that the Senator from Pennsylvania, Mr. SANTORUM, be added as a cosponsor to S. Con. Res. 31, which is at the desk. I thank the Chair.

Mr. ALLARD. If the Senator from Virginia will yield?

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

Mr. ALLARD. I would also like to be listed as a cosponsor on that resolution.

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

Would you add the Senator from Ohio?

Mr. WARNER. Mr. President, I ask that the distinguished Presiding Officer, the Senator from Ohio, be added as a cosponsor.

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

Mr. WARNER. For the benefit of the Senate, it is being discussed now as to when this resolution might be brought up. It is bipartisan. Senator LIEBERMAN is one of the original cosponsors, together with the distinguished majority leader, Senator FRIST, Senator STEVENS, Senator INOUE, myself, and now the others.

So those Senators having an interest should so notify the Presiding Officer.

I yield the floor.

EXECUTIVE SESSION

NOMINATION OF TIMOTHY M. TYMKOVICH, OF COLORADO, TO THE UNITED STATES CIRCUIT JUDGE FOR THE TENTH CIRCUIT—Continued

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, the order of business on the floor, if I am not mistaken, is the nomination of Mr. Timothy Tymkovich for lifetime appointment to the United States Court of Appeals for the Tenth Circuit. I rise in opposition to that nomination.

Initially, it is worth noting that the Tenth Circuit is closely divided between Republican and Democratic appointees, and the seat for which Mr. Tymkovich was nominated is a seat that the Republican-controlled Senate has denied on more than one occasion. In fact, they have denied it to a moderate Hispanic-American Clinton nominee in the year 2000, Colorado Attorney General Christine Arguello. She would have been the first and only Hispanic-American judge on the Tenth Circuit, but the Republicans, then in control of the Senate, refused to give Ms. Arguello a hearing or a vote.

The Republican-controlled Senate also refused to give a hearing or vote to another Clinton nominee for the Tenth Circuit, James Lyons, thus ensuring that this vacancy which we debate today would be theirs to fill. That is what led us to this moment in time where this nomination is being considered on the floor of the Senate.

I asked Mr. Tymkovich some questions when he appeared before the Judiciary Committee, and I would like to relate to you some of his answers. One of them relates to his membership in the Federalist Society.

There is nothing illegal about the Federalist Society, nor any reason why

someone would deny their membership, but it has become a strange coincidence how many Bush administration nominees are members of the Federalist Society. I have said that when you chart the DNA of Bush administration judicial nominees, you are likely to find, more often than not, the Federalist Society chromosome.

So I started asking questions, and some of my colleagues are now joining me. Why? What is it about this organization that is becoming such an important element on a resume of someone seeking a judgeship in the Bush administration?

I asked Mr. Tymkovich, who is not only a member of the Federalist Society, but who is on its Colorado board of advisers, the following question:

One of the goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law."

I went on to ask him:

Which priorities do you believe need to be reordered? What is the role of federal judges and the courts in reordering such priorities? On which traditional values should there be a premium, and why? The Federalist Society also states that its objective "requires restoring the recognition of the importance of these norms among lawyers, judges, and law professors."

I asked Mr. Tymkovich:

If you are confirmed, how will you as a judge restore, recognize, or advance these norms?

I do not believe these were trick questions. I believe they were open-ended questions so Mr. Tymkovich could tell us what it is about the Federalist Society that he understands to be their mission, and whether he agrees or disagrees.

Mr. Tymkovich's entire response is the following:

I am not aware of the context of the quotations in the question, but all seem to address the role of a policy commentator as contrasted with the role of a federal judge. If confirmed as a judge to the Tenth Circuit, I would set aside any personal views and apply the precedent of the Supreme Court and the Tenth Circuit.

The quotations in my question are straight from the "Our Purpose" page of the Federalist Society Web site. They constitute the mission statement of the organization and are central to its identity.

Mr. Tymkovich's assertion that he is not aware of them raises important questions. His responses to this committee during the hearing indicate that he was, at times, evasive in other answers as well.

But there is one particular reason why I oppose Mr. Tymkovich, and it relates to the issue of discrimination.

I have said on the floor of the Senate and in the Judiciary Committee that several weeks ago I had a unique opportunity to visit the State of Alabama for the first time, to go there with Democratic and Republican Members of Congress, on a delegation led by our Congressman from Atlanta, GA, JOHN LEWIS, to visit some of the most important spots in America in the civil rights movement.