

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

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 President, I ask unanimous consent the order for the quorum call be rescinded.

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

#### EXECUTIVE SESSION

#### NOMINATION OF MICHAEL CHERTOFF, OF NEW JERSEY, TO BE UNITED STATES CIRCUIT JUDGE FOR THE THIRD CIRCUIT

The PRESIDING OFFICER. Under the previous order, the hour of 5:15 having arrived, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The assistant legislative clerk read the nomination of Michael Chertoff, of New Jersey, to be United States Circuit Judge for the Third Circuit.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I rise today in support of the nomination of Michael Chertoff to the U.S. Court of Appeals for the Third Circuit. I happen to be admitted to the bar of the Third Circuit. I can't imagine a better person we can put on that circuit than Michael Chertoff.

This is not the first time this body has had the opportunity to consider Mr. Chertoff's qualifications. In May 2001, my colleagues and I voted to confirm his nomination to the post of Assistant Attorney General for the Criminal Division of the United States Department of Justice. He has worked tirelessly in that position on behalf of our country prosecuting those whose specific goal is to harm America, and we are grateful for his service.

The same credentials and experience that paved the way for Mr. Chertoff's confirmation as Assistant Attorney General demonstrate that he will make an exceptional Federal appellate judge. He graduated magna cum laude from Harvard College in 1975 and magna cum laude from Harvard Law School in 1978. After his graduation, he served as a law clerk to United States Supreme Court Justice William J. Brennan, Jr.

Following his clerkship, he embarked on a long and distinguished professional career dedicated to fighting crime and corruption that began in the United States Attorney's Office for the Southern District of New York in 1983, where he served as a line prosecutor. In 1987, he was promoted to First Assistant U.S. Attorney for the District of New Jersey. In 1990, former President Bush appointed him to be the United States Attorney for the District of New Jersey.

During his time as a Federal prosecutor, Mr. Chertoff gained extensive experience in all phases of criminal investigations and prosecutions. He handled major organized crime, fraud, and corruption prosecutions. Here are a few examples:

Mr. Chertoff successfully prosecuted a RICO murder case involving the third ranking member of the Genovese La Cosa Nostra family and others. The principal defendants were convicted of conspiring to murder John Gotti and murdering a mob associate. They each received 75-to-80 year prison terms.

Mr. Chertoff successfully prosecuted the Mafia commission case, which charged the bosses of all five New York La Cosa Nostra families with operating a national commission through a pattern of racketeering acts such as extortion, loan sharking, and the murders of a mafia boss and two associates.

Mr. Chertoff successfully prosecuted the mail fraud, bank fraud, and tax evasion trial of the mayor of Jersey City, NJ. The case arose out of an investment fraud perpetrated by the mayor while he was in office. The defendant was convicted of 14 felonies, sentenced to jail, and removed from office.

Mr. Chertoff also successfully prosecuted Arthur and Irene Seale for the 1992 kidnapping and murder of Exxon executive Sidney Reso, a tragic case which garnered substantial media attention.

This record alone demonstrates that Michael Chertoff has the experience and qualifications to serve as a judge on the Third Circuit. However, his public service is not limited to holding high level government positions. For example:

Mr. Chertoff served as special counsel to the New Jersey Senate Judiciary Committee in its investigation of racial profiling. Under his counsel, the Committee held nine hearings examining racial profiling allegations, concluding that the former attorney general had misled the Committee and had attempted to cover up the extent of racial profiling in New Jersey from the U.S. Department of Justice.

After a convicted rapist was mistakenly released from prison, Mr. Chertoff again served as Special Counsel for the New Jersey Senate Judiciary Committee during its hearings into the application of Megan's Law, which requires State correction officials to notify prosecutors 90 days prior to the release of a sex offender, and the reasons why it was not being systematically employed by the State.

Mr. Chertoff also represented three indigent defendants on death row in Arkansas through a program operated by the NAACP legal defense fund. The death sentences of all three defendants were overturned on the appeal that he handled.

Mr. Chertoff has received numerous awards and honors, including an honorary law degree from Seton Hall University in 2002; the Anti-Defamation

League Distinguished Public Service Award in 1992; and in 1987 the U.S. Department of Justice John Marshall Award for Outstanding Achievement in Trial.

These are but a few examples of public service that reinforce the true nature of Michael Chertoff's character. Recognizing this level of excellence, the American Bar Association has given Mr. Chertoff a unanimous well-qualified rating, the highest possible designation.

Plenty of others share the ABA's view of Mr. Chertoff. In a joint press release, New Jersey's two Democratic Senators, JON CORZINE and FRANK LAUTENBERG, expressed their strong support for Mr. Chertoff, stating, "We are pleased that the President has selected a distinguished New Jerseyan for this important seat on the U.S. Court of Appeals for the Third Circuit. Michael Chertoff is a highly intelligent and competent lawyer with a long and impressive record of public service."

In a March 11, 2003 editorial, the Bergen Record endorsed Mr. Chertoff's nomination, calling it "a refreshing change." The newspaper continued, "Mr. Chertoff is exactly the type of nominee the nation needs for federal judgeships," and concluded, "Mr. Chertoff is the type of smart, non-ideological high achiever whom Presidents of both parties should consider for the bench."

Mr. President, I have touched on only some of the attributes and accomplishments that demonstrate Michael Chertoff's overwhelming qualifications for the Third Circuit. He will be an outstanding Federal appellate judge, and I urge my colleagues to vote in favor of his nomination.

Mr. President, I notice the distinguished Senator from Pennsylvania is here. Both he and I are admitted to the bar of the Third Circuit Court of Appeals. I am also admitted to the bar of the Tenth Circuit Court of Appeals.

I yield the floor so the distinguished Senator from Pennsylvania can make his statement.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, it is especially appropriate for members of the Court of Appeals for the Third Circuit to have a little special understanding of the needs of that court, and the Court of Appeals for the Third Circuit is very badly overworked at the present time and very much in need of judicial replacements. The court has served under the superb leadership of Chief Justice Edward R. Becker, and I know personally from my discussions with him and the new Chief Judge, Anthony Scirica, the tremendous backlog and tremendous pressures the court of appeals has for the very busy States of Pennsylvania, New Jersey, and Delaware. I am pleased to see that Michael Chertoff is now coming up for a vote before the Senate. He has an extraordinary record—Harvard undergraduate, Bachelor's degree, magna cum laude,

1975; Harvard Law School, again magna cum laude, in 1978. He has been engaged in the private practice of law. He has served as assistant U.S. attorney for the Southern District of New York, which is one of the toughest, most complicated jurisdictions. They handle very difficult cases. Then he became an assistant U.S. attorney for the District of New Jersey, moved up the ranks to be first assistant, and then later U.S. attorney for the District of New Jersey. Again, that is a jurisdiction which has very complicated cases.

He has served as minority counsel for the Banking Committee. He has been the Assistant Attorney General in charge of the Criminal Division. He has had very wide experience in both civil and criminal law, and I think he comes to the position for the Court of Appeals for the Third Circuit with extraordinary qualifications.

It is my hope the vote which we are having today on Michael Chertoff might be an indication the so-called logjam on filibusters will be broken. The Rules Committee last week held a hearing on a variety of ways to deal with the filibuster. It had been my hope during the 107th Congress, before the filibuster was tried, that we might find a protocol, which would work regardless of who controlled the White House, and regardless of who controlled the Senate.

When President Clinton was in the White House and Republicans controlled the Senate, it was my view, stated on the floor at the time, that we should have handled President Clinton's nominations differently. We should have processed them in a more expeditious manner. Finally, we did handle quite a number of the judges who moved through after some judicial delays—Judge Berzon, and others.

When the Democrats controlled the Senate in 107th Congress and President Bush was in the White House, the situation was reversed. It was my hope at that time we might find some protocol which I had proposed, one specifically which would establish a timetable: Sixty days after the nomination was submitted to the Senate there would be a hearing by the Judiciary Committee; Sixty days later there would be action by the Judiciary Committee voting up or down; Sixty days later there would be floor action in the Senate.

Those timetables were not written in stone. They could have varied. They would be subject to a modification if cause was shown by the chairman of the committee upon notice to the ranking member or by the majority leader listing it for the full Senate action upon notice to the leader of the minority party.

It was my view at that time that we had so many votes which were party line that if it was a party-line vote the matter would then go to the full Senate for resolution. That was before advent of the filibuster. The filibuster cut new ground. It was unprecedented in the Senate for a filibuster to be lodged

against a Court of Appeals judge. Once before in the history of the Senate was there a filibuster, and that was when Associate Justice Abe Fortas was considered for Chief Justice of the United States. That was a bipartisan filibuster. There were integrity issues there which were very different from the filibusters which have been mounted during the 108th Congress where, as I say, this unprecedented action has been taken. That caused a good deal of consternation on this side of the aisle, and I think a good deal of consternation in the country.

A number of options were considered where the rule might be changed. One proposal has been to have the first vote require 60 votes and on subsequent votes down to 51. My frank view is that is unlikely to be accepted because it isn't very difficult to have a series of cloture motions filed.

For those who may be wondering and for anyone watching C-SPAN II, a cloture motion is a motion filed to cut off debate. The current rule requires 60 votes to cut off debate.

When the logjam continues, there has been the suggestion of what we refer to colloquially as the "nuclear option" where there might be a ruling of the Chair that requires 60 votes, and that ruling could be challenged. On a 51-vote majority, that ruling could be overturned as a matter of Senate precedent. That has been done on occasion in the past. But it is an alternative which I think would be unwise and undesirable if any other alternative can be found. But if we were faced with the unprecedented cloture proceeding, the Senate may be driven to that alternative.

What is really under consideration in many minds is whether the filibuster on the two circuit nominees pending is really a preliminary for a Supreme Court nominee. I think if that were to be the case it would be really most unfortunate for the judicial selection process and very unfortunate for the Senate, which really turns on collegiality for us to do our job—traditional collegiality which has been sorely tempted in the recent several years.

If there had been an occasion for a filibuster on a Supreme Court nominee, I think that would have occurred with the nomination of Justice Clarence Thomas. And it was not attempted. I think it should not have been attempted. But that was the most hotly contested Supreme Court nomination during my tenure here, and I think perhaps the most hotly contested nomination short of the Fortas nomination in the history of the Court with the arguments which were raised during the hearings, with the arguments which were raised on the Senate floor, the delay, the second round of hearings, and the entire difficulties which surrounded that nomination. Had there been an occasion for a filibuster, I think that would have been the ultimate test. I repeat that I don't think a filibuster should have been attempted.

None was. Justice Thomas was confirmed 52-48, which I think was a very firm imprimatur of regular procedure for the Senate not to filibuster but to vote on a majority vote.

It is my hope that what we are doing here with Michael Chertoff will be a bellwether of a change of landscape and a sea change in the Senate, so that this confirmation is, I think, pretty much assured. I hope it will set the stage for affirmative votes in the Senate.

I see other colleagues who have come to the floor with only 15 minutes before the scheduled vote. I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. Mr. President, I thought we were going to be discussing the candidate for office. I am sorry we kind of got off into another discussion. We are not filibustering this appointment. We are happy about this appointment. I want the chance to say that, and take what has happened as an indication of what can happen.

I rise today to support the confirmation of Michael Chertoff, whom I know well, to the Third Circuit Court of Appeals.

I am pleased that President Bush has selected this distinguished New Jerseyan for this important seat on the court of appeals. I hope that tells us where, in fact, we might be going with future appointments.

Mr. Chertoff is a highly intelligent and competent lawyer who has compiled a long and impressive record of accomplishment in both the public and private sectors.

Mr. President, I ask the Chair, if I could, to remind me if I run past, let's say, 8 minutes so that my colleague, JON CORZINE, has a chance to speak.

The PRESIDING OFFICER. The Chair will do so.

Mr. LAUTENBERG. Mr. President, Mr. Chertoff was born in Elizabeth, NJ, and distinguished himself academically as an undergraduate and law student at Harvard University. After law school, he served as a law clerk to Judge Murray Gurfein on the U.S. Court of Appeals for the Second Circuit.

After he clerked on the Second Circuit, Michael Chertoff served as a clerk to a legendary jurist from the great State of New Jersey—U.S. Supreme Court Justice William J. Brennan.

Justice Brennan was appointed to the Supreme Court in 1956 by President Dwight D. Eisenhower, and he spent 34 years on the Court. He is universally regarded as one of the most influential Justices of the second half of the 20th century.

If Mr. Chertoff follows the legacy of his mentor, the Third Circuit is going to be in great hands.

In 1990, Mr. Chertoff became the U.S. attorney for the District of New Jersey. He remained there until 1994. During his able tenure, he aggressively tackled organized crime, public corruption, health care, and bank fraud.

He also played a critical role in helping the New Jersey State Legislature

to investigate racial profiling. "Driving while Black," as they say, should not be a crime in any State in the Nation, and I know Mr. Chertoff agrees. That is why I introduced the first bill in the Senate to ban racial profiling. And I am grateful to Mr. Chertoff for the interest he took in this matter at the State level.

As a result of Michael Chertoff's contribution, I am proud to report that just a couple of months ago New Jersey enacted the strongest antiracial profiling law in the Nation. The Third Circuit Court of Appeals is one of the most impressive courts in the country. Based on his past performance, I am confident Mr. Chertoff will fit right in.

As you know, I have strongly opposed some of the President's judicial nominees. I believe some of them are not appropriate for the Federal bench, not simply because they may not have compiled the kind of record that speaks to fairness and balance on the bench but because of a refusal, let's say, to even discuss the views they hold and what their background might be. I think it is inappropriate.

Again, I did not want to discuss the process. I want to discuss the individual. And that is where I think we ought to go. But in this case, we have a candidate, and I stand here as an American, as a Democrat as well, to fully support the appointment of Michael Chertoff because he has the talent and ability to render justice fairly.

I believe some of the nominees who came up were on a mission to curtail fundamental civil rights laws and protections. Others, as I said, have simply refused to answer important questions that would permit Senators to execute their constitutional duty for advice and consent.

The fact is, there are many highly qualified candidates that the President could nominate to the circuit courts, the appeals courts, who would enjoy broad support in the Senate from both Democrats and Republicans. Mr. Chertoff is one such candidate.

So I enthusiastically support his nomination to the Third Circuit. I urge my fellow Senators to support this consensus nominee who will serve the people of New Jersey and the Third Circuit ably and competently.

I thank you, Mr. President, and yield my remaining time to my colleague from New Jersey.

The PRESIDING OFFICER. The junior Senator from New Jersey.

Mr. CORZINE. Mr. President, it is my pleasure to also speak today in support of Michael Chertoff, a nominee for the U.S. Circuit Court of Appeals for the Third Circuit. The Third Circuit Court of Appeals is one that includes my home State of New Jersey. It is a very distinguished court and handles a diverse range of issues reflecting, frankly, the diversity of the people, the economy, the society of that circuit. It deserves a highly qualified candidate.

I believe the White House, in cooperation and dialog with the Senators

from those areas that are attendant to the Third Circuit, has been fortunate, in working in that cooperative manner, to have a nominee as superb as Michael Chertoff.

He has ably served the citizens of New Jersey in a number of capacities, as my colleague from New Jersey, Senator LAUTENBERG, mentioned. Indeed, he has served the Nation and the Department of Justice, where he is No. 3 today in the criminal justice system. We will all be privileged to have his sound judgment and legal skills serving in this critical judicial position.

Mr. Chertoff has impeccable credentials. That is why we support him. And they are fully disclosed, fully responsive to the kinds of questions one would raise. You have heard he attended Harvard College, then Harvard Law School where he was editor of the Law Review. He then served as a Supreme Court law clerk to Justice Brennan.

He has had a remarkable private practice. In private practice and public service he has served, in every case, with excellence. He has developed a reputation of being brilliant. He has an equal reputation for being tough and fair. And he is a world class litigator and has earned the respect of his peers and adversaries in court, regardless of their political background.

While I will acknowledge that I might not always agree with Mr. Chertoff on every issue—I may have philosophical differences—I find that no excuse for a loss of support when he is prepared to speak to the issues about how he will deal with the judgments he will make and how he will go about forming those judgments in the context of legal study and the context of constitutional and legal precedent.

While there have been even serious concerns that a number of us have expressed regarding the prosecution of the war on terrorism, as at least implemented by the Justice Department—and I share some of those concerns—I do not believe that impacts a judge when they are willing to address how they will deal with constitutional precedent. And Michael Chertoff clearly has done so. I think he is truly a qualified candidate.

Once again, I mention he was a U.S. attorney, a tough one. He combated organized crime, public corruption, health care fraud, and bank fraud. Unlike many of his predecessors—and people who now fill the position of U.S. attorney—as a U.S. attorney he continued to try cases himself. He went to court; he took on the highest profile cases himself. He is actually one of those people who did the work to go into the courtroom and carry the case.

So I think we have a terrific candidate whom we all can support. I think there is a precedent here to which all of us can look. Frankly, this nomination process worked the way it is supposed to work. There was dialog and consultation with the White House. And when there were differences

of view, there was discussion with those who were involved. I compliment the White House for how they have worked with the Senators involved in the process. We have gotten to a positive conclusion because there has been the kind of dialog and mutual seeking of support that we look for.

I urge my colleagues to support this nomination. I urge all of us to look for a more cooperative manner in how we approach the selection of judges, particularly in the circuit courts, as we go forward.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. LEAHY. How much time do I have remaining?

The PRESIDING OFFICER. Four minutes 45 seconds.

Mr. LEAHY. Mr. President, today, we vote to confirm Michael Chertoff to serve on the United States Court of Appeals for the Third Circuit. With this confirmation, the Senate will have confirmed 128 judges, including 25 circuit court judges, nominated by President Bush.

One hundred judicial nominees were confirmed when Democrats acted as the Senate majority for 17 months from the summer of 2001 to adjournment last year. After today, 28 will have been confirmed in the other 12 months in which Republicans have controlled the confirmation process under President Bush. This total of 128 judges confirmed for President Bush is more confirmations than the Republicans allowed President Clinton in all of 1995, 1996 and 1997 the first 3 full years of his last term. In those three years, the Republican leadership in the Senate allowed only 111 judicial nominees to be confirmed, which included only 18 circuit court judges. We have already exceeded that total by 15 percent and the circuit court total by almost 40 percent with 6 months remaining to us this year.

Today's confirmation makes the eighth Court of Appeals nominee confirmed by the Senate just this year. That means that in the first half of this year, we have exceeded the average for an entire year achieved by Republican leadership from 1995 through the early part of 2001. The Senate has now achieved more in fewer than 6 full months for President Bush than Republicans used to allow the Senate to achieve in a full year with President Clinton. We are moving two to three times faster for this President's nominees, despite the fact that the current appellate court nominees are more controversial, divisive and less widely-supported than President Clinton's appellate court nominees were.

If the Senate did not confirm another judicial nominee all year and simply adjourned today, we would have treated President Bush more fairly and would have acted on more of his judicial nominees than Republicans did for President Clinton in 1995-97. In addition, the vacancies on the Federal

courts around the country are significantly lower than the 80 vacancies Republicans left at the end of 1997. Indeed, we have reduced vacancies to their lowest level in the last 13 years. Of course, the Senate is not adjourning for the year and the Judiciary Committee continues to hold hearings for Bush judicial nominees at between two and four times as many as we did for President Clinton's.

I hope that the Republican leadership will see fit to schedule Richard Wesley's nomination to the Second Circuit for a vote this week. When he is confirmed, he will be the 26th circuit court nominee of this President to be confirmed by the Senate. I expect that we will also proceed this week on the nominations of J. Ronnie Greer to be a Federal trial judge in Tennessee, Mark Kravitz to be a Federal trial judge in Connecticut and John Woodcock to be a federal trial judge in Maine. When they are all confirmed, as I expect they will be, the Senate will have confirmed more than 130 judges in less than 2 years.

As a followup to what the distinguished Senators from New Jersey have said, this is a case where on paper this could be a controversial judge, surely for Democrats, as someone who was actively involved in the Clinton impeachment matters and others. But I have worked with Mr. Chertoff. I have found him to be fair. I found him to be honest with me. I also am aware of the fact that the White House took the time—something they normally don't do, or do not often do, I should say—to actually consult with the Senators from his home State. That makes a big difference because we have had problems, of course, where that hasn't been done or where there has not been consultation or where a nominee has been sent up to divide us, not unite us.

Mr. REID. Will the Senator yield for a question?

Mr. LEAHY. I will vote without any reservation for Mr. Chertoff.

Of course, I yield.

Mr. REID. Would the distinguished Senator from Vermont confirm that this is the 128th judge approved during this Bush administration? Is that a fair statement?

Mr. LEAHY. That is true. That includes 25 circuit judges.

Mr. REID. And the vacancy rate, as I understand it, is extremely low now on the Federal court system generally; is that a fair statement?

Mr. LEAHY. It is extremely low. Actually the vacancy rate is lower than the unemployment rate in the country. It probably wouldn't be any, had it not been for the fact that 60 of President Clinton's nominees were blocked because 1 or more Republican Senators opposed them—1 or more. So they never got a vote. And had they gotten a vote, there would be no vacancy at all.

Mr. REID. It is also true that all this furor created with changing the rules and all this involves two judges whom

the Democrats have prevented from coming to a vote; namely, Miguel Estrada and Priscilla Owen. So the count is 128 to 2. Is that a fair statement?

Mr. LEAHY. That is right. We have stopped 2 so far; we have confirmed 128. I would note that friends on the other side of the aisle, when President Clinton was here, stopped 60, not by votes but by just simply having 1 or 2 Republicans object so they were never even allowed to have a vote. In fact, when the Republicans were in charge in 1995 and 1996 and 1997, when President Clinton was here, Republicans allowed 111 judicial nominees to be confirmed and only 18 circuit court judges. In 2½ years, we have done 128 judges for President Bush and 25 circuit court judges. So crocodile tears have been shed. Unfortunately, it is embarrassing when you tell the other side the numbers.

Is there any time remaining on both sides?

The PRESIDING OFFICER. The Senator from Vermont has 1 minute 15 seconds. The Senator from Utah has 30 seconds.

Mr. LEAHY. I withhold my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, all I will say, in yielding back the remainder of my seconds, is that I have been around here 17 years. I don't know that I have ever seen a better nominee for any circuit court in the country. This is one very great lawyer, great human being, good family man, person with a record that all of us should emulate if we could. I hope all of our colleagues will vote for Michael Chertoff. He deserves our vote.

No raw number of confirmations means anything, in and of itself, while there are not one but two filibusters of exemplary nominees going on now, potentially more to come, and emergency vacancies continue to exist. Are we supposed to be grateful that only a few of President Bush's nominees are being filibustered? Is there an acceptable filibuster percentage that the Democratic leadership has in mind? The mere fact that we have to ask these questions makes it crystal clear that we have a broken process. Even one filibuster of a judicial nominee is one too many.

As for the allegation that two nominees have been defeated, well, I for one would not be as quick as some of my Democratic colleagues to declare that the nominations of Miguel Estrada and Priscilla Owen have been defeated. We will continue to fight for the confirmation of these nominees and continue to file for cloture on their nominations. They are exemplary nominees who deserve to be confirmed.

And as for the implication that it is somehow acceptable to filibuster two judicial nominees in light of the others that have been confirmed, I must ask my Democratic colleagues who are leading these filibusters: Would you ever argue that it is permissible to

break two criminal laws just as long as all the rest are being followed? Of course not. Nobody would make that argument any more than they would argue that it is permissible to disregard two of the constitutional amendments that comprise our Bill of Rights simply because there are eight others. The confirmation of other Bush judicial nominees in no way excuses or justifies the shabby treatment inflicted on Miguel Estrada and Priscilla Owen.

Mr. KENNEDY. Mr. President, I will vote for the nomination of Michael Chertoff to be a judge on the United States Court of Appeals for the Third Circuit. Mr. Chertoff has a fine reputation as a prosecutor, special counsel, and defense attorney. Fellow members of the bar in New Jersey and the district of Columbia have described him as intelligent, fair-minded, and hard-working. Furthermore, in his role as the head of the Justice Department's Criminal Division, certain aspects of his performance have impressed me. For example, his testimony before our committee in November 2001, expressing confidence in the ability of our Federal courts to deal with terrorist suspects, has been important to the debate over the need for military tribunals.

However, other policies and decisions involving criminal justice matters during Mr. Chertoff's tenure as assistant Attorney General have raised serious concerns. At his hearing, I asked Mr. Chertoff extensive questions about the Justice Department's advocacy on behalf of the Freeney amendment to the AMBER Alert bill. This Amendment has nothing to do with protecting children, and everything to do with handcuffing judges and eliminating fairness in our federal sentencing system. Its provisions effectively strip Federal judges of discretion to impose individualized sentences, and transform the longstanding sentencing guidelines system into a mandatory minimum sentencing system. As Chief Justice Rehnquist has said, they "do serious harm to the basic structure of the sentencing guideline system and . . . seriously impair the ability of courts to impose just and responsible sentences."

On April 4, 2003, the Justice Department sent a five-page letter to Senator HATCH expressing its "strong support for Congressman FEENEY's amendment to the House version of S. 151." This letter was sent only a few days before the House-Senate conference on the bill and was influential in persuading the conferees to accept the Feeney amendment. At his hearing, Mr. Chertoff declined to say how involved he was in developing the Department's position on the Feeney amendment or whether he supported it. In his subsequent answers to my written questions, Mr. Chertoff stated that he "personally had no part in drafting" the Department's April 4 letter and did not "review it before it was sent."

While I appreciate the more forthcoming nature of Mr. Chertoff's written answers, I find it remarkable that the head of the Justice Department's Criminal Division Division did not participate in the drafting or review of the Department's letter. The Feeney amendment was very important legislation which substantially altered sentencing policy for the Federal criminal justice system. It was vigorously opposed by the Judicial Conference of the United States, the American Bar Association, the U.S. Sentencing Commission, and many prosecutors, defense attorneys, law professors, civil rights organizations, and business groups. As a Federal appellate judge, Mr. Chertoff will soon be responsible for applying its provisions. He will need to explain to his new colleagues why he did not do more at the Justice Department to stop this ill-advised legislation—or at least support Chief Justice Rehnquist's call for a "thorough and dispassionate inquiry into the consequences" of the Feeney amendment before its enactment.

I was similarly surprised to learn, as Mr. Chertoff acknowledged in his most recent set of written answers, that neither he nor anyone else in the criminal division was involved in the decision to deny the Federal Bureau of Investigation the authority to investigate the recent gun purchases of suspected terrorists after September 11. This decision was made in spite of the legal opinion issued by the Office of Legal Counsel on October 11, 2001, stating that there is "nothing in the NICS regulations that prohibits the F.B.I. from deriving additional benefits from checking audit log records." The F.B.I. had previously conducted such investigations for years. Furthermore, the Justice Department was at the time aggressively expanding its investigative and prosecutory powers in response to the 9/11 attacks. Mr. Chertoff could have, and should have, done more to help the F.B.I. agents investigating those vicious attacks. As with the Feeney amendment, this was an example of ideology trumping smart and effective law enforcement at the Department of Justice.

Finally, I am concerned about inconsistencies in the responses Mr. Chertoff provided with respect to the debate over the legality of the interrogation of John Walker Lindh. According to reports in Newsweek and the New Yorker, John DePue, an attorney in the Terrorism and Violent Crime Section of the Criminal Division, which Mr. Chertoff heads now and headed then, called the Professional Responsibility Advisory Office in December 2001 and requested its opinion on the propriety of having the F.B.I. interview Lindh. At his hearing, Mr. Chertoff testified:

[I have to say, Senator, I think the Professional Responsibility [Advisory] Office was not asked for advice in this matter. I am familiar with the matter. I was involved in it.]

In response to my first set of written questions, Mr. Chertoff stated:

[T]hose at the Department responsible for the Lindh matter before and during the time of Lindh's interrogation did not to my knowledge seek PRAO's advice.]

Then, in response to my second set of written questions, Mr. Chertoff acknowledged that the e-mails published in Newsweek "indicate that Mr. DePue initiated contact with PRAO about whether the FBI should question Walker Lindh and that Ms. Radack responded to that inquiry"—and that he first learned about these e-mails in early 2002. I understand that Mr. Chertoff does not believe that Mr. DePue played a major role in the Lindh investigation and prosecution, and does not understand why DePue asked PRAO for its opinion on this matter. Nevertheless, Mr. Chertoff should have fully shared his knowledge regarding this situation from the outset, rather than deny that PRAO was asked for its opinion.

According to the New Yorker article published on March 10, 2003, 2 weeks after the Justice Department filed charges against Lindh, Ms. Radack, a highly qualified employee who received a merit bonus the previous year, received a "blistering" performance evaluation which severely questioned her legal judgment, and she was advised to get a new job. Mr. Chertoff has told me that has no knowledge of the facts surrounding Ms. Radack's employment, performance, or departure from the Department, and I take him at his word. Nevertheless, I remain very concerned about Ms. Radack's situation. According to press reports—and the Department has never issued any statement disputing them—Ms. Radack was in effect fired for providing legal advice on a matter involving ethical duties and civil liberties that high-level officials at the Department disagreed with. Furthermore, after Ms. Radack notified Justice Department officials that they had failed to turn over several e-mails requested by the Federal court, Department officials notified the managing partners at Ms. Radack's new law firm that she was the target of a criminal investigation. I submitted questions to Attorney General Ashcroft regarding this matter in March, and I await his response.

Notwithstanding my concerns about Mr. Chertoff's performance as head of the criminal division—as well as initial failure, later corrected, to provide serious, consistent, and responsive answers to the questions asked by members of the Judiciary Committee—I am supporting his nomination to the Third Circuit. I am doing so based on his fine reputation as a lawyer, his achievements as a prosecutor and special counsel to the New Jersey legislature, and his assurances that as a judge he will apply the law with independence, integrity, and a commitment to due process and the core constitutional values embedded in the fabric of our democracy. My support for Mr. Chertoff's nomination today, however, should not be interpreted as an endorsement or approval for any other position.

Mr. LEAHY. Mr. President, I know Mr. Chertoff is waiting, biting his nails, wondering if he will get through this. I would mention for those of my colleagues who might actually be watching this, I will vote for him. I will support him. I urge them to do the same.

I yield back the remainder of my time and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be.

The question is, Will the Senate advise and consent to the nomination of Michael Chertoff, of New Jersey, to be a United States Circuit Judge for the Third Circuit? On this question, the yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. I announce that the Senator from Colorado (Mr. CAMPBELL), the Senator from Alaska (Ms. MURKOWSKI), the Senator from Oregon (Mr. SMITH), the Senator from Alaska (Mr. STEVENS), and the Senator from Missouri (Mr. TALENT) are necessarily absent.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from North Carolina (Mr. EDWARDS), the Senator from Hawaii (Mr. INOUE), the Senator from Massachusetts (Mr. KERRY), the Senator from Louisiana (Ms. LANDRIEU), and the Senator from Connecticut (Mr. LIEBERMAN) are necessarily absent.

I further announce that if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "aye."

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

The result was announced—yeas 88, nays 1, as follows:

[Rollcall Vote No. 211 Ex.]

#### YEAS—88

Akaka	Dodd	Lott
Alexander	Dole	Lugar
Allard	Domenici	McCain
Allen	Dorgan	McConnell
Baucus	Durbin	Mikulski
Bayh	Ensign	Miller
Bennett	Enzi	Murray
Bingaman	Feingold	Nelson (FL)
Bond	Feinstein	Nelson (NE)
Boxer	Fitzgerald	Nickles
Breaux	Frist	Pryor
Brownback	Graham (FL)	Reed
Bunning	Graham (SC)	Reid
Burns	Grassley	Roberts
Byrd	Gregg	Rockefeller
Cantwell	Hagel	Santorum
Carper	Harkin	Sarbanes
Chafee	Hatch	Schumer
Chambliss	Hollings	Sessions
Cochran	Hutchison	Shelby
Coleman	Inhofe	Snowe
Collins	Jeffords	Specter
Conrad	Johnson	Stabenow
Cornyn	Kennedy	Sununu
Corzine	Kohl	Thomas
Craig	Kyl	Voinovich
Crapo	Lautenberg	Warner
Daschle	Leahy	Wyden
Dayton	Levin	
DeWine	Lincoln	

#### NAYS—1

Clinton

## NOT VOTING—11

Biden	Kerry	Smith
Campbell	Landrieu	Stevens
Edwards	Lieberman	Talent
Inouye	Murkowski	

The nomination was confirmed.

## LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate will resume legislative session.

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

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

## MORNING BUSINESS

Mr. MCCONNELL. Madam President, I ask unanimous consent that there be a period of morning business with Senators speaking for up to 10 minutes each.

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

Mr. MCCAIN. Madam President, where is Aung San Suu Kyi? Burma's political crisis grows, and much of the world is outraged. Burma's democratically elected leader, winner of the Nobel Peace Prize and world-renowned icon of freedom, remains imprisoned. Burma's ruling generals so far have prevented both the U.N. special envoy, who has been in Rangoon for 3 days, and the International Committee for the Red Cross, to visit her. The generals seem unmoved by the world's condemnation, and their peoples' suffering. It is time for all respectable members of the international community to put weight behind their words and take active measures to secure the freedom of Aung San Suu Kyi and the Burmese people.

Most of the world sees the Burma crisis in staggeringly different terms than do its military rulers. Despite the regime's denials, the May 30 assault on Aung San Suu Kyi and her supporters was a well-organized, premeditated attack by members of the Union Solidarity Development Association, a militia of the ruling, and misnamed, State Peace and Development Council. Given Aung San Suu Kyi's stature within Burma and around the globe, we know Burma's top generals, led by General Than Shwe, would have had to personally approve a physical attack on her and her delegation. We know that Than Shwe would never let his conscience interfere with any calculation of what is in the best interests of the junta's continued ability to repress the democratic aspirations of its people.

Aung San Suu Kyi's associates, including several who witnessed the May 30 attacks, say that at least 70 and perhaps 100 members of her National for

Democracy were slaughtered by the regime's militia in the most violent crackdown since the junta crushed the August 1988 popular uprising against the regime—and we know the junta's claim that only four people died on May 30 in what they call a spontaneous clash with the opposition is false. We know that Suu Kyi is not in "protective custody," as the junta insists, but that she is being held because her national popularity and clear democratic mandate ultimately make rule by generals impossible to sustain. We know the generals are holding her incommunicado because, if she were free to speak, she would speak the truth about their brutality, and about the ruin they have brought to their country. What's so dangerous about these obvious sentiments is that the generals themselves know they are true, and that it is they who are to blame for this devastation, exposed as they are before their people and the world.

The irony is that by crushing the democratic opposition, the generals have once again demonstrated to their people and the world the fragility of their rule, which no amount of repression will legitimize. That one woman, unarmed and leading only an army of citizens who believe in her, can so rattle a group of uniformed officers who control every instrument of national power is testimony to what Vaclav Havel called the power of the powerlessness. As Havel and many other brave dissidents behind the Iron Curtain knew, no amount of repression can provide a regime the democratic legitimacy that is the only basis for regime survival. No leader or leaders can systematically repress their people and loot their country and get away with it forever. The Burmese military has been doing it for 40 years, and their time is running out.

Another sad truth the current crisis has exposed is how little the leaders of Burma's neighbors, including the democracies, seem to care for the most basic rights of the Burmese people. The Prime Minister of Thailand arrives in Washington today: I hope he is prepared for a barrage of questioning—and criticism—of Thailand's warm embrace of the dictatorship next door since he assumed office in 2001. Under Prime Minister Thaksin, Thailand has moved aggressively to deepen Thai business ties with Burma, provide substantial economic assistance to the junta, collaborate with the Burmese military against Burmese ethnic groups who oppose rule by the generals, arrest and repatriate exiled Burmese democrats across the Thai-Burma border, and pursue a policy of cooperation and conciliation with a regime that is opposed by the vast majority of its people and known to much of the world as an outlaw.

Bangkok's coddling of Rangoon has gone well beyond passive acceptance of the regime next door to something approaching active sponsorship of the junta. Thailand has made no effort to

reach out to the Burmese opposition, which is especially unfortunate since some of its most fearless leaders reside in the Thai-Burma border region. Under Prime Minister Thaksin, Thailand has supported and sustained its historic enemy, at the very time when it could use its influence to help bring about the negotiated transition to democracy in Burma.

India's government also appears to have made a strategic decision to "constructively engage" Rangoon out of fear of growing Chinese influence in Burma. India has legitimate concerns about China's interest in using Burma as an outlet for Chinese commerce and military forces in the Andaman Sea. But given China's pervasive influence in Burma, India cannot hope to compete with Beijing for the junta's affection. A more effective strategy would be to support the Burmese opposition's campaign for a free Burma. I don't know what policies a Burma led by Aung San Suu Kyi would pursue towards China, but I'm quite confident she wouldn't choose to pursue a strategic partnership with an Asian dictatorship. Democratic India would be a natural ally of a free Burma, and I believe Delhi would be wise to help move Burma in that direction, rather than curry favor with the generals.

China's unreconstructed policy towards Burma following the attack of May 30 was best expressed by China's ambassador to Rangoon, who told U.N. envoy Razali Ismail that China considers the crisis to be Burma's "internal political affair." Interestingly, China has been helpful in dealing with the North Korean nuclear crisis, I hope because Beijing understands the costs of tying itself too closely to a regime that is actively alienating the rest of the world. Perhaps it is wishful thinking to hope that China's rulers will reach a similar conclusion about their support for the Burmese junta: that in their increasing repression and devastation of their country, the generals are fighting a battle they can't win, and that undermines the stability and prosperity China seeks in Southeast Asia. Perhaps Beijing would take a more resolution line with the generals if Southeast Asia were united in condemnation of their assault on the Burmese people.

The Association of Southeast Asian Nations will hold its annual ministerial summit and security meetings next week in Phnom Penh. Secretary of State Powell is scheduled to attend the meetings of the ASEAN Regional Forum and the ASEAN Post-Ministerial Conferences from June 18–20. I urge Secretary Powell to reconsider his plans to travel to Southeast Asia unless the ASEAN nations, excluding Burma, agree to address the crisis in Burma as their central agenda item; agree to forcefully condemn the crackdown on democracy in Burma; agree to require the release of Burma's detained democracy leaders in order for Burma