

or defensive. I am not, not for a moment. I am simply saying that is a fact, and I can tell you, since those bombs exploded in India and Pakistan, it is a very ominous sign, and I can tell you the threat to civilization has gone up exponentially.

When the President is going to visit a country which has signed the Comprehensive Test Ban Treaty, which has signed the Conventional Weapons Treaty, Conventional Weapons Convention, and which has agreed to quit shipping any information of any nuclear value to Iran, those are things that would never have happened if the Hutchinson amendment was in place. I feel quite sure the Hutchinson amendment will be defeated. I hope so.

He is my colleague, and I regret taking a position opposite him on any issue, but on this one, I can tell you, in my opinion, common sense dictates that the President do exactly what he is doing. I wish him well. I yield the floor.

EXECUTIVE SESSION

The PRESIDING OFFICER (Ms. COLINS). Under the previous order, the hour of 3 p.m. having arrived, the Senate will now proceed to Executive Session to consider the nomination of Susan Oki Mollway to be United States District Judge for the District of Hawaii, which the clerk will report.

NOMINATION OF SUSAN OKI MOLLWAY, OF HAWAII, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF HAWAII

The bill clerk read the nomination of Susan Oki Mollway to be United States District Judge for the District of Hawaii.

The PRESIDING OFFICER. Under the previous order, there are 2 hours for debate on the nomination, equally divided.

The Senate proceeded to consider the nomination.

Mr. INOUE addressed the Chair.

The PRESIDING OFFICER. The Senator from Hawaii is recognized.

Mr. INOUE. Madam President, before I proceed, I thank my dear friend from Utah, the distinguished chairman of the Judiciary Committee, Mr. HATCH, for reporting out the nomination of Susan Oki Mollway. I also thank my friend from Vermont, the ranking Democrat on the committee, Mr. LEAHY, for his encouragement throughout this process. And, if I may, I acknowledge and thank the majority leader of the Senate, the distinguished Senator from Mississippi, Mr. LOTT, for scheduling this matter this afternoon. I am certain the people of Hawaii are most grateful for this.

Madam President, I am pleased to recommend to my colleagues for their approval the President's nominee to the U.S. district court for the district of Hawaii, Ms. Susan Oki Mollway. Ms.

Mollway was nominated to fill a vacancy created more than 3 years ago by the untimely and unexpected death of the Honorable Harold F. Fong.

An empty judgeship is considered a judicial emergency after 18 months. This seat has been vacant for more than twice that time. In 1990, under Public Law 101-65, the Congress determined that Hawaii's Federal caseload called for increasing its Federal bench from three to four positions. However, the Honorable Helen Gillmor was not confirmed for that fourth seat until October 31, 1994.

Then Judge Fong passed away on April 20, 1995, returning Hawaii to three sitting district judges. Thus, Hawaii has had the benefit of the fourth judgeship for less than 6 months since its authorization in 1990.

For the year 1997, the weighted case filings for the three sitting district judges in Hawaii was 706 cases per judge. To give you a sense of what this means, the Federal Judicial Conference's standard indication of the need for additional judgeship is 430 weighted case filings per judge. Ours is 706. Needless to say, Hawaii has justifiably requested that a fifth judgeship be approved.

When Judge Fong passed away, Senator AKAKA and I undertook the job of interviewing and considering nearly 40 candidates for this judgeship. After personally meeting with these candidates and reviewing their individual backgrounds, Senator AKAKA and I were pleased to recommend Ms. Susan Oki Mollway to the President.

Ms. Mollway is ready for the position of U.S. district judge, and I believe she is absolutely worthy of your favorable consideration. The majority of the American Bar Association Standing Committee on the Federal Judiciary has given her the highest rating of "well qualified" for this judicial position.

By way of professional background, Ms. Mollway graduated at the top of her class from the University of Hawaii with a degree in English literature. She received later her master's degree in the same field. Then Ms. Mollway went on to Harvard Law School where she graduated cum laude in 1981.

For the past 17 years, Ms. Mollway has had a very successful litigation practice with one of the largest and most respected law firms in the State of Hawaii. She has been a partner in that firm's litigation department since 1986. Her impressive litigation experience includes a wide array of areas from Federal labor law to contract disputes to lender liability and appearances before every level of the State and Federal courts, as well as a successful appearance before the U.S. Supreme Court in 1994.

Ms. Mollway has also taught appellate advocacy at the University of Hawaii's William S. Richardson School of Law and has participated as an arbitrator with Hawaii's court-annexed arbitration program. I have no hesitation

in giving my highest recommendation to Ms. Susan Oki Mollway.

Questions have been raised about Ms. Mollway's former membership on the board of directorship of the American Civil Liberties Union of Hawaii. More particularly, she has been asked to give her personal views on such matters as same-sex marriage, mandatory minimum sentencing, the death penalty, and employee drug testing. Ms. Mollway has responded to these questions and I believe has given a complete account of her own activities with the ACLU. With respect to her personal views, in most instances, Ms. Mollway has stated that she has not formed any personal opinions.

More important, as one who may become a Federal trial judge, she clearly understands that her personal opinions are not relevant to the decisions she will make as a judge. Rather, Ms. Mollway has unambiguously and repeatedly recognized in her responses the authority of the Constitution, Federal statutes as passed by the Congress, and case precedent from higher courts.

Furthermore, Ms. Mollway has unwaveringly stated that there is nothing whatsoever that prevents her from abiding by and applying applicable law and precedent in cases that may come before her as a Federal district judge. I am certain she will do just that and serve the Federal judiciary and the State of Hawaii with reason, balance, and integrity.

Madam President, on a more personal note, I would like to make a few comments about Ms. Mollway's family background, because I have known Susan Oki Mollway virtually all her life.

The question that comes before us is why did she join the ACLU? People do things because of background or some experience in life.

As a young law student, she began to research the life of Japanese-Americans in the United States. And she came across rather strange decisions made by the Court and also by the Congress of the United States. These are chapters in the history of the United States that many of us would like to forget. But I think it might be well if we reviewed them at this moment.

Ms. Mollway found out, for example, that in 1922 the Supreme Court of the United States declared that Japanese were not qualified for citizenship; in other words, they were singled out among all the peoples of the United States and said, "You cannot be a naturalized citizen." Everyone else could be.

Then in 1924, the Congress of the United States, in enacting the immigration laws, declared that if people are not qualified for citizenship, they may not immigrate to the United States. So once again the Japanese were singled out and told that they may not come here as immigrants.

Then we all know that on December 7, that day of infamy, the Japanese attacked Pearl Harbor. Soon thereafter,

on February 19, 1942, an Executive order was issued authorizing the Army of the United States to establish, throughout the United States, 10 concentration camps and to place in these camps, for the duration of the war, all Japanese, whether they be citizens or not; and the vast majority were citizens. They were never tried. They were never charged with any crime. Due process was totally ignored. But there they were.

Then on March 17 of that year, 1942, a strange decision was rendered and made known. The Selective Service System declared that Japanese-Americans would be designated 4-C. Most Americans may not be aware of what 4-C stands for. Madam President, 1-A is that that person is physically and mentally fit to put on the uniform; 4-F is just the opposite. 4-C is the designation for "enemy alien." And so on March 17, 1942, I was declared an enemy alien. Ms. Mollway's father was also declared an enemy alien. But we proceeded to petition the Government, and I am glad to report that, about 9 months later, the President of the United States issued an order saying that Americanism is not a matter of race or color, Americanism is a matter of mind and heart, and authorized the formation of a special combat team of volunteers.

The response was astounding to everyone. In Hawaii, over 85 percent of those eligible to put on the uniform volunteered. What is more astounding than that, hundreds of men who were behind barbed wires in these camps also stepped forward to volunteer to be given the opportunity of demonstrating their Americanism and their loyalty.

Many Americans may not be aware of this, but this combat team, at the end of the war, was declared to be the most decorated in the history of the United States Army. There is no evidence or history of any subversive activity on the part of any member. Furthermore, in all of the investigations that were held since the end of that war, they could find not one instance of Japanese involvement in sabotage of fifth column activities.

Ms. Mollway read these things, and she did research. And it is obvious for any young person who comes across information of that nature to be quite concerned. And she found that the ACLU was an organization that was concerned about the Constitution, to preserve and defend that most sacred of documents of Americans. And she was especially concerned about the Bill of Rights. So it was natural for her, just as I joined the ACLU because of my concern about the Constitution. But that does not make me any less an American.

But this chapter in our lives ends with a burst of glory. I am certain Americans will remember that for the first time a mighty nation, a superpower, admitted their wrong and apologized, and apologized to the 120,000

Americans of Japanese ancestry who were incarcerated without due process of law.

I am pleased to tell you that Susan Oki Mollway's father and I volunteered and we served in this regiment. And Susan could have no better role model to guide her life, professionally or personally, than her own father, who happens to be a lawyer also. I am certain that she mirrors her father in her love of country, in her commitment to the Constitution, and in her patriotism.

Once again, Madam President, I wish to thank my distinguished friend from Utah, the chairman of the committee, for reporting this measure. I also wish to thank Mr. TRENT LOTT, the majority leader of the U.S. Senate, for scheduling this matter. We will be forever grateful.

Thank you very much.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Madam President, I thank my dear colleague for his kind remarks on the floor. I just want to again express my regard for him and for the service he has given to his country, not only being an effective and very important and powerful U.S. Senator, but also as a hero, in my eyes, having served our country in the war and having sacrificed greatly for our country.

From my point of view, if he wants a judgeship nominee, he is going to be given the benefit of the doubt in every way. And I have to say, in the case of Susan Oki Mollway of Hawaii, I do support her for this position as a United States district court judge. I plan to vote for her nomination, as I did in committee. If confirmed—and I believe she will be confirmed—Ms. Mollway will be the 270th Clinton judicial nominee to be reported by the Judiciary Committee and confirmed by the Senate.

In light of this record of accomplishment and in light of some recent remarks made on the floor of the Senate, I thought it would be appropriate for me to spend a few minutes reviewing our record in processing President Clinton's nominees.

I have been working with White House Counsel Chuck Ruff to ensure that the nomination and confirmation process is a collaborative one between the White House and the Members of the Senate. I think it is fair to say that after a few bumpy months in which the process suffered due to inadequate consultation between the White House and some Senators, the process is now working rather smoothly. I think the progress is due to the White House's renewed commitment to good-faith consultation with Senators of both parties.

I strongly believe that we must do our best to reduce the 73 current vacancies in the Federal courts. But, frankly, there are limits to what we can do given the administration's performance so far. The fact of the matter

is that, of the 45 nominees currently pending, 15 of those were received during the last month alone. And it takes 3 to 6 months just to process Federal district and circuit court judges. These are very tough positions. These are positions that are lifetime appointments, and they deserve the scrutiny that we have always applied on the committee, whether the committee has been controlled by Democrats or Republicans.

Of the 45 total judicial nominees that are pending, 10 are individuals simply renominated from last Congress. Last year, the administration renominated a total of 23 nominees from the 104th Congress. Thirteen of them have been confirmed, but some of the others have some problems. That is why they were held over.

Of those 73 vacancies, 28 have not yet received a nominee, and it was only a few months ago when better than half of the total vacancies of around 81 or 82 did not have a nominee. Like I said, we have received 15 nominees within the last month. So, many of the vacancies come as a result not of the committee's slow pace but of the administration's inaction.

Moreover, of the 115 judicial nominees sent forward to the committee this Congress, 82 of them have had hearings. Of the 82 nominees who have had hearings, 74 have been reported out of the committee. Of those 74 nominees reported out of the committee, 66 have been confirmed and 7 are pending on the Senate floor. One of those seven will be confirmed shortly, I hope, in the form of Susan Oki Mollway.

Assuming most of these nominees the committee has processed are confirmed, I think you will see that our efforts compare quite favorably to prior Congresses in terms of the number of judges confirmed at this point in the second session of the Congress, especially if you look at the recent Democrat-controlled Congresses. For example, during the second session of the 102nd Congress, when President Bush was in office and the Democrats controlled the Senate and therefore the Judiciary Committee, guess how many nominees had been confirmed by July of 1992? Thirty. That is all. How many Clinton nominees this year will we have confirmed were we to stop confirming judges after today? Thirty-one. And we are not through with this session yet. As of July 1, 1990, the Democratic Senate had only confirmed 25 of the Bush nominees nominated that year. As of July 1, 1988, only 21 of Reagan nominees confirmed that year had been confirmed by the Democrat-controlled Senate. So the plain fact is that we are right on track, if not ahead of previous Congresses.

Now, while I am concerned that some vacancies need to be filled, I think there has been considerable distortion of the overall situation. There is by no means an unprecedented level of vacancies. In fact, there are more sitting judges today than there were throughout virtually all of the Reagan and

Bush administrations. As of today, we have 767 active Federal judges. In addition, there are also well over 400 senior judges who can, and often do, hear cases.

Keep in mind that the Clinton administration is on record as having stated that 63 vacancies—a vacancy rate just over 7 percent—is considered virtual full employment of the Federal Judiciary. They were right; when we have around 60 vacancies, we have virtually full employment. It is natural that there will always be some vacancies in light of the turnaround time involved in receiving and reviewing nominees. That is as it should be. Seventy-three vacancies, however, is a vacancy rate of 9 percent. Now, how can a vacancy rate from 7 percent to 9 percent convert “full employment” into a “crisis”?

Moreover, compare today’s 73 vacancies to the vacancies under a Democratic Senate during President Bush’s Administration. In May 1991 there were 148 vacancies, and in May 1992 there were 117 vacancies. I find it interesting that at that time I don’t recall a single news article or floor speech on judicial vacancies. So, in short, I think it is quite unfair and, frankly, inaccurate to report that the Republican Congress has created a vacancy crisis in our courts.

While the debate about vacancy rates on our Federal courts is not unimportant, it remains more important that the Senate perform its advise and consent function thoroughly and responsibly. Federal judges serve for life and perform an important constitutional function, without direct political accountability to the people. Accordingly, the Senate should never move too quickly on nominations before it. I do not believe that we are moving too quickly on this nominee. This nominee is getting considered today, and I hope that she passes.

Just this past year, we saw two examples of what can happen when we try to move nominations along perhaps too quickly. In one instance, a sitting Federal district judge nominated for a very important Federal appeals court was forced to withdraw the nomination after he had a hearing in the Judiciary Committee when it was discovered that he had lied about certain details of his background.

In another instance, a nominee for a Federal district court was reported out of the Judiciary Committee before all the details of her record as a judge on a State trial court were known. As it happens, the district attorney in the nominee’s city and the district attorneys’ association in her home State have all recently come to publicly oppose the nomination, setting forth facts demonstrating a very serious antiprossecution bias in her judicial record.

It is cases like these that underscore the importance of proceeding very deliberately with nominations for these most important life-tenured positions.

Even so, you can be too deliberate; you can delay these too much. I think under my tenure as chairman of the committee we have not done that. I hope that our colleagues on the other side realize that.

In closing, I feel I should respond to some unfortunate remarks made recently on the floor of the Senate. I am referring to a speech where one of my colleagues accused the Senate majority of “stalling Hispanic women and minority nominees” because of “ethnic and gender biases.”

Day in and day out, the Judiciary Committee routinely has evaluated and reported on literally hundreds of Clinton judicial nominees without any regard whatever to the nominee’s race, gender, religion, or ethnic origin. And the Senate has gone on to confirm those Clinton nominees—269 of them, up until today. Should Susan Oki Mollway be confirmed, the number will be 270 judges. Indeed, according to statistics compiled by the liberal judicial watchdog group, the Alliance for Justice, no fewer than 70 of these nominees were women, 42 were African Americans, 13 were Hispanics, and 4 were Asian Americans. These figures do not include the more than 235 Department of Justice and White House nominees—non-judicial nominees, if you will—approved by the Senate Judiciary Committee whom Republicans have confirmed for President Clinton.

Anyone can cite individual isolated examples of unexpedited consideration but I flatly reject that these amount to what my colleague called a “disturbing pattern” of “ethnic and gender bias.” I do not think it would be appropriate for me at this point to discuss why each of his examples fails to support his point. Suffice it for me to say here that members of the Judiciary Committee are well aware that many nominees lack the support of home-State Senators, have a record that raises serious questions of character and judicial temperament, or have some other background difficulty that necessitated further investigation.

I do not believe it does the Senate well, nor do I believe it does the Committee well, to engage in this sort of “wedge” politics. I hope my colleagues will refrain from such unproductive attacks. They are not only unproductive, they are unfair and, in my opinion, somewhat vicious.

To suggest that the Committee or this majority is motivated by improper bias of any kind is simply wrong, and the record shows it. In addition, I will not allow such accusations to force us to abdicate the Senate’s responsibility to ensure that the Senate adequately and fully discharges its constitutional advise and consent function for nominees for life-tenured judicial office.

Having said all of this, I would like to lend my support for Susan Oki Mollway and to the distinguished Senators from Hawaii, both of whom I admire very much. I have to say that the distinguished Senator from Hawaii,

Senator INOUE, has known Susan Oki Mollway virtually all her life. He has known her father, who also, likewise, is a hero.

I examined her record, and, yes, there are things that naturally raised the hackles of some on the committee, but I have to say that she is an extremely intelligent woman with an extremely well balanced background. I have to say that I believe she ought to be supported here on the floor today, and I intend to do everything I can to support her.

Susan Oki Mollway was nominated for district judge from the District of Hawaii on January 7 of last year. I personally apologize to my two colleagues for this having taken so long to get to the floor. She has a B.A. and an M.A. in English from the University of Hawaii. That alone is pretty impressive, but she received her J.D. cum laude from Harvard University in 1981. That is also pretty impressive.

Currently, she is a partner with the Honolulu firm of Cades, Schutte, Fleming and Wright. She also currently serves as director to the Hawaii Justice Foundation and the Hawaii Women’s Legal Foundation, both unpaid positions, organizations that focus on local issues and/or raise money for charitable organizations. In addition, she was the recipient of the Outstanding Woman Lawyer of the Year award in 1987. She is an exceptional person—in my opinion, one who should be able to fill this position in a way that will bring honor to the Federal courts. I hope that is true. I have no way of being absolutely sure, but I am relying on the recommendations of our two colleagues from Hawaii and the extensive background investigation the Committee performed on Susan Oki Mollway. I hope our colleagues in the Senate will support her. I believe she is worthy of support.

I think my colleagues know that I take these nominations very seriously. We look at them very seriously. We do extensive background checks and investigations, as did our friends on the other side when they were in control of the committee. I try to be down the line, down the middle, and I try to make sure people are treated fairly. Naturally, I resent it when somebody indicates in any conversation that there may be some impropriety or improper bias involved with regard to some of the nominees who have been or are currently pending before the Senate and/or the Judiciary Committee.

I am very concerned, as Judiciary Committee chairman, that we do our jobs well. I am very concerned that we do them in a way that is fair. I am very concerned that we get the best people we can on the Federal bench. After all, these are lifetime appointments. It is often said that Federal judges are the “closest thing to God” in this life because they have so much power, and once they are there, you really can’t

get rid of them. They are not really politically accountable or directly accountable to the American people because they don't have to stand for reelection, which I think is a very good thing because that keeps the Federal judicial system above politics, hopefully, or at least less involved in politics than any other branch of our Government. I think the judiciary has served our country well. I have seen great liberal judges and great conservative judges, and I have seen lousy liberal judges and lousy conservative judges on the Federal bench. Ideology isn't necessarily the determining factor as to whether a judge will serve in the best possible manner as a member of the Federal bench.

So it is important that we find people of high caliber, high quality, high ethics, with good work habits, that are honest and decent, to fill these positions. I believe Susan Oki Mollway fits all of those categories.

I yield the floor.

Mr. INOUE addressed the Chair.

The PRESIDING OFFICER. The Senator from Hawaii, Mr. INOUE.

Mr. INOUE. Madam President, I thank my distinguished friend from Utah for his warm and generous remarks. I am most grateful.

I yield to my colleague from Hawaii.

The PRESIDING OFFICER. The Senator from Hawaii, Mr. AKAKA, is recognized.

Mr. AKAKA. Madam President, it is with great pleasure that I take the floor today to speak on behalf of Ms. Susan Oki Mollway, the President's nominee to the U.S. District Court for the District of Hawaii.

I wholeheartedly support Ms. Mollway, who, if confirmed, will fill the fourth seat on the Hawaii court. I also want to join with the remarks of my senior Senator, who eloquently and passionately spoke about Susan Oki Mollway and her family. He also spoke about our interviewing her for this position and how impressed we were with her caliber, the kind of person that she is. I also want to thank chairman ORRIN HATCH of Utah for his support and for reporting this out of committee, and also Senator PAT LEAHY, the ranking member from Vermont on the committee, and members of the committee for reporting this nominee out to the floor. I also want to thank our majority leader, TRENT LOTT of Mississippi, for permitting it to be on the floor today.

This has been a long journey for us. This position has been vacant since the untimely passing of Judge Harold Fong in April of 1995. As the senior Senator from Hawaii noted, the caseload in the District of Hawaii continues to increase. This has been very, very difficult for Hawaii. The recently adjusted 1997 Federal Court Management Statistics Report found that the U.S. District Court, District of Hawaii, is the eighth busiest court out of 91 in the country, and the third busiest in the ninth circuit.

Therefore, it is critical that the vacancy on the Hawaii court is filled. Senator INOUE and I believe that Susan Oki Mollway is the most qualified candidate for this position.

Ms. Mollway enjoys the highest rating of "well qualified" from the majority of the American Bar Association's Standing Committee on the Federal Judiciary. To quote some of her colleagues in Hawaii, "We have come to know her as a highly ethical, careful, dedicated, intelligent, articulate, caring, and energetic lawyer." Ms. Mollway is known for her professional skills, her sense of ethics, and a moral compassion—qualities needed for service on the Federal bench.

Senator INOUE has already recounted Ms. Mollway's education, professional, and family background. However, I do wish to point out that, as a Harvard Law School graduate, she could have stayed on the mainland like so many of Hawaii's young people. Instead, she returned to Hawaii, the home of her parents, where she joined one of Honolulu's best-known law firms—Cades Schutte Fleming & Wright.

As a specialist in civil litigation, Ms. Mollway handles a wide range of cases and has appeared before every level of the State and Federal courts, including a successful appearance before the U.S. Supreme Court in 1994.

Ms. Mollway has responded fully to those who have questioned her on her former position on the board of directors of the Hawaii chapter of the American Civil Liberties Union. Senator INOUE has mentioned this about her. Prior to her board membership, the ACLU-Hawaii filed a friend of the court brief in support of plaintiffs in the Hawaii same-sex marriage case. Although she was aware of ACLU-Hawaii's position and activities in the same-sex marriage case, as a board member Susan Mollway was never called on to play an active role.

Furthermore, Ms. Mollway understands that her personal opinions are not relevant to the decisions she would make as a Federal judge. She has stated that she recognizes the authority of the Constitution, Federal statutes as passed by the Congress, and case precedent from higher courts as the judicial guidelines to follow in court deliberation.

I believe my colleagues will agree with me that Susan Mollway's credentials are impressive. She is an individual of the highest integrity, whose dedication to her profession is admired by all. I am pleased to lend my support to Ms. Mollway and urge my colleagues to vote in favor of this nominee whose confirmation will bring the U.S. District Court in Hawaii to its full complement.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. Madam President, I am honored to have the opportunity to make some remarks on the occasion of this nomination. First, I want to say

how much I respect both of the Senators from Hawaii. I believe that they take very seriously the nomination of a U.S. district judge, and I believe they have sought to fulfill their responsibilities well in that regard.

Having been a practitioner in Federal court myself—full-time as a U.S. attorney for 15 years, and another 5 years or so in private practice—I have a deep feeling about the judiciary, what it needs to be, and the standards it ought to uphold. I believe it ought to be a disinterested applicator of the law, regardless of politics, ideology, and those sorts of things. I believe we ought to look for nominees that do that. Both for my respect for the distinguished Senators from Hawaii and my respect for this nominee make it difficult for me to stand here and suggest, as I will, that we ought not to confirm this nominee for the Federal bench. I have no doubt that she is a person of integrity and character. But I want to share some concerns that I have about this nomination, and why I think it ought not be confirmed.

Also, let me express my respect for the distinguished chairman of the Senate Judiciary Committee. There is no finer constitutional lawyer in this body than Senator HATCH. He is a man of integrity and ability. He works hard every day in our committee to make sure nominees are given a fair shake, and that the nominations are moved along at a steady pace, as they continue to do. I know that he considered carefully the problems that this nominee had before he agreed to vote in favor of this nominee. I know he respects the opinion of both Senators from Hawaii.

I note that the committee voted 12 to 6, with six Senators voting against the nomination. I think that suggests that there was a genuine unease by a considerable number of the committee with regard to this nominee.

It is impossible to know for sure what anyone will do on the bench. This nominee may turn out to be a very restrained and rigorous judicial nominee and judge, consistent with some of the great judges in history. But we have to look at the nominees' backgrounds and the positions they have taken over the years to try to analyze how they might perform on the bench.

The Senate is given under the Constitution the power to advise and consent with the President. These nominees are lifetime appointees. They will serve throughout their entire life making decisions day after day, week after week, month after month, year after year. And, as Senator HATCH said, they are not accountable to the people. It is really the most anti-democratic aspect of our entire American government, but I support it. I am not in favor of electing Federal judges. I therefore believe it is our responsibility to give careful thought to those to whom we give that position.

First, let me note one thing. It does appear that the district of Hawaii is in

need of a judge. Their caseload is 700 weighted cases per judge. It is a heavy caseload. We have a judicial circuit in Alabama that has a higher caseload, and it is, indeed, a high caseload. I am sure another judge is needed to do that work. I know all of us are active in various activities. And I think it is appropriate that we be asked about those activities when we are nominated for a position like this.

What do we know about this nominee? We know that she was a voluntary member of the American Civil Liberties Union for a number of years—may still be—and was an active member of the board of directors and a fundraiser for the Hawaii ACLU during 1995 and 1996.

During that time, the Hawaii ACLU took a number of positions. I am certain that as a board member she did not sign those pleadings, and maybe did not personally conduct in-depth research. In fact, I think she suggested she has not researched each one of these issues. But I think it is appropriate for us to ask about those positions, as we did on the committee. She did not disavow any of them.

In 1996, in Hawaii, an ACLU executive or administrator stated, "The laws that discriminate based on sexual orientation are as reprehensible as laws that at one time protected segregation."

The point of that discussion was testimony on the recognition of homosexual marriages. And, in fact, the ACLU official was taking the position that Hawaii should take on the question of affirming, ratifying, respecting, and acknowledging homosexual unions. He was suggesting that those who would oppose it would be the same as those who opposed integration.

I would have to say that is outside the mainstream of law. As attorney general of Alabama, I had the occasion to have my staff do some research on this. We found no place in the history of America that any State or government agency ever recognized a homosexual union. It is not recognized, to my knowledge, any place in any culture in the world and reflects an odd and historically inaccurate view of the law. But that was the organization's position, of which she was a board member and a fundraiser.

In 1995, the ACLU opposed legislation that would have required HIV testing for persons indicted for sexual crimes. I would suggest that there is an extreme anxiousness and justifiable concern about these kinds of activities.

When a person is arrested for a sexual crime and there is a victim that may have been infected with HIV, I think it is perfectly appropriate for a judicial authority require as a condition of the suspect's release that person to be tested to see if they have passed on such a horrible disease to the victim.

Also, I suggest that we have a large number of people in the ACLU active in opposing all drug testing. That is a

very, very important matter of public interest. It is unfounded in constitutional law and at least in most properly applied cases of drug testing. We will have more drug testing in the future, because we are concerned about young people and others who are using drugs.

In 1995, the ACLU in Hawaii, of which this individual was a board member and fundraiser, opposed an ordinance that banned overnight sleeping in parks.

We have learned in recent months pretty clearly that it is important and necessary for a city and police departments to take control of their streets. We learned in New York that the panhandlers and those who are in the parks can, in fact, undermine public safety. Mayor Guiliani in New York has taken great leadership in that regard, and has substantially driven down the crime rate in New York.

It is small matters like this which sometimes turn into much larger matters. This is the kind of frustration that cities and counties and police departments around the country feel when they are challenged about the steps they have to take to preserve public safety.

In 1965, the Hawaii ACLU, of which this nominee was a board member and fundraiser, opposed drug testing in the workplace, saying, "The ACLU opposes random and indiscriminate drug testing in the workplace, not only on privacy grounds but also because such drug testing does not detect current impairment."

Madam President, one of the most beneficial acts that has been done to fight drugs in America, in my opinion, is drug testing in the workplace. A businessman who cares about his employees, who sets a high standard, who wants to eliminate theft, who wants to reduce accidents, who wants to protect the health of his or her employees sends out a clear message that drug use is not acceptable in their company, and they drug test fairly and objectively. The tests are very reliable today and make the workplace safer by protecting the lives and safety of employees, eliminating and reducing crime and theft by the employees, and avoiding injury to those who come into contact with those employees. Furthermore, they also encourage employees to stay drug free. You are encouraging them by insisting on a high standard. And perhaps that employee when they go home will tell their wife or husband who suggests that they might use drugs, "No, we shouldn't do it. I am going to be tested at work."

Drug testing has been a great success. But it has been a long, hard legal fight. In case after case, the ACLU position has been rejected.

I must admit, as a person who has been involved in the fight against drugs, that it concerns me that our nominee is a person who was a board member of an organization that voluntarily went out and tried to obstruct workplace drug testing.

In 1995, the Hawaii ACLU opposed another common occurrence in America, the very popular minimum sentence in criminal cases. State after State after State has followed the Federal law that says that under certain circumstances, crimes with certain prior convictions will be punished with at least a minimum sentence if convicted. And that process has worked; I believe it has helped us identify repeat offenders, to lock them up for longer periods of time, and I am confident that that is one of the primary reasons we have seen a reduction in crime among adults. We are doing a better job of identifying serious, repeat, violent offenders through these "three strikes you're out" laws and mandatory sentencing laws, and it is no small concern to me as a prosecutor, a Federal and State prosecutor, that our nominee for this position has supported the position of the ACLU that mandatory minimum sentences ought not to be approved.

In addition, the Hawaii ACLU has opposed a Federal Stop Turning Out Prisoners Act and the Community Notification of Sex Offenders Act. Those are some of the positions that they have taken during the 1995 period in which this nominee was a member of the board and a fundraiser. Now, when asked at our confirmation hearing if there were any policy positions of the Hawaii ACLU that she disagreed with while on the board of directors, Ms. Mollway answered, "I cannot think of any."

Now, I believe that is a sufficient basis for a Senate Member to have a serious concern about this nominee, and that is why at least six members of the Judiciary Committee cast a "no" vote. We respect those who have nominated her; we respect her; but we have serious concerns about her nomination to the Federal bench.

In addition, in recent years the ACLU has taken other positions that are outside the mainstream of legal and current American thought. They oppose the death penalty. They oppose three-strikes sentencing laws around the country. They oppose school vouchers for sectarian schools. They have opposition to V chips in televisions to screen out violence. They oppose voluntary labeling of music albums as to their content. They support the legality of partial-birth abortion. They support the constitutionality and use of racial preferences and oppose some of the laws that eliminate that. And they support the decriminalization of drugs; that is, the legalization of drugs.

Such positions are not mainstream thought in this country. That is not mainstream law that is being advocated. They have done some good things over the years. They have taken some positions that were courageous and were proved to be right and furthered our country, but this nominee in the last few years was an active member of an organization that took some of the positions I just mentioned, in court.

Now, I have voted for an ACLU member, maybe more than once, to be confirmed, but I want to share some other things that concern me and affect my decision, and I hope other Senators will consider this as they decide what standard they will use when they consider whether to consent to this nomination.

This nominee will be a district judge within the Ninth Circuit Court of Appeals that includes Hawaii, California, Oregon, Washington, Idaho, Arizona, Nevada and Alaska. Over the years that circuit has been recognized as the most liberal circuit in America. It has also been recognized as a court that has been out of touch with mainstream American law. In the last term of the U.S. Supreme Court, the Supreme Court reviewed 28 cases that arose from the ninth circuit, and of those 28 cases, they reversed 27 of them. This has been a pattern over quite a number of years.

Just last month, the ninth circuit became the first circuit in America to rule that the Prison Litigation Reform Act is unconstitutional. That was passed by this Congress. It was a magnificent act to eliminate this repetition of appeals by prisoners that have clogged courts for years, and I have seen it personally, and so many of them are extraordinarily frivolous. But it was carefully considered by this body. Every other circuit that has addressed this issue has upheld the constitutionality of the Prison Litigation Reform Act, including the 1st circuit, the 4th circuit, the 6th circuit, the 8th circuit, and the 11th circuit. They have upheld it as constitutional, but once again the ninth circuit is out of step with that group.

Recently, in the last month or so, the Supreme Court harshly criticized the ninth circuit for granting a habeas corpus petition—that is, a petition by a prisoner—that had overturned the death sentence of a convicted rapist and murderer. In reversing this conviction, the ninth circuit opinion reversed a conviction that had gone to the California Supreme Court four times, that had gone to the U.S. Supreme Court two times. The defendant had been on death row for well over 10 years and there was little dispute about his guilt or innocence. And so the Supreme Court really was frustrated by this. This was a midnight stay of execution, within 24 or 48 hours of the carrying out of this death penalty case that had been on death row for years and was reversed by them.

Some would say, as Ms. Mollway did, I will follow the laws. Sometimes we have to wonder what the law is in the ninth circuit. We know that they have been extraordinarily sensitive to death penalty cases beyond, in my opinion, rationality. We know that in many cases the court-appointed attorneys' fees in death cases in California or in the ninth circuit have exceeded \$1 million for the court-appointed attorneys to defend those who have been charged, since the appeals go on for years and

years. And, as I recall, the amount of money spent on that in the ninth circuit matches all the other circuits in America in expense.

So we have a problem with that, and we need judges who know what the law is, who make every effort to guarantee that the innocent are found innocent, their convictions reversed if need be, and are given a fair trial. That is absolutely guaranteed by our Constitution and should never be denied. But, Madam President, when you have these kinds of appeals, it makes a mockery of the law, it undermines the public respect for the law, it places the courts in disrespect, and I think this circuit is rightly criticized for that.

Recently, the New York Times referred to the ninth circuit as "the country's most liberal circuit" and noted that it was viewed by a majority on the Supreme Court as "a rogue circuit."

I would say that is a serious matter. I believe, based on this nominee's background, her positions on issue after issue, her activities with the ACLU in Hawaii, that we have indications that instead of being a part of a renaissance in the ninth circuit, to improve the ninth circuit and bring it back into the mainstream of American law, that she would, in fact, be more of the same: the same liberal, activist, anti-law-enforcement mentality that has gotten this circuit out of whack with the rest of the Nation.

District judges are not circuit judges; I don't mean to suggest that they are; but they are part of the circuit. It was a district judge recently who ruled the California Proposition 209, the civil rights initiative that would eliminate racial preferences, violated the Constitution of the United States. Fortunately, a panel of even the ninth circuit unanimously agreed that was not correct and the court found there is no doubt that Proposition 209 was constitutional. And the Supreme Court refused to reverse that—in effect, affirmed that decision.

So I would just say to my distinguished friends from Hawaii, we do need to be careful about what is happening on our benches. We do have, in certain parts of this country, courts that are going beyond the traditional role of judges, going beyond the traditional role of courts. It is breeding a disrespect, it is undermining law enforcement, it is delaying the carrying out of justly imposed sentences, and we need to make sure that we do something about that. I, for one, have stated publicly for some time now that I feel a special obligation and a special concern to look at the nominees for the ninth circuit, to make sure that those nominees are going to be part of a solution to this problem rather than part of the problem.

Based on my analysis and my sincere belief about it, I have concluded that I should vote "no," and I will urge my fellow Senators also to vote no.

This nominee is a person of quality and intellect, but I believe she is not

the right nominee at this time for this position.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Hawaii is recognized.

Mr. INOUE. I am most grateful to the distinguished Senator from Alabama for his reasoned argument on the matter before us.

In order to further clarify the record, if I may, Madam President, I ask unanimous consent that a letter dated March 9, 1998, addressed to the chairman of the Committee on the Judiciary, with responses to additional questions from Senator THURMOND and Senator SESSIONS, be printed in the RECORD.

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

CADES SCHUTTE FLEMING & WRIGHT,
Honolulu, HI, March 9, 1998.

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

DEAR SENATOR HATCH: Thank you very much for giving me the opportunity to respond to additional questions from Senators Thurmond and Sessions. I am enclosing my responses to the questions delivered to me on March 9, 1998.

Very truly yours,

SUSAN OKI MOLLWAY.

Attachments.

ANSWERS OF SUSAN OKI MOLLWAY TO ADDITIONAL QUESTIONS FROM SENATOR SESSIONS

1. In your legal opinion, is the Prison Legal Reform Act constitutional?

Yes. This law is presumed to be constitutional. It has been upheld by several appellate courts (*e.g.*, *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *Cert. den.*, 117 S. Ct. 2460 (1997)). I have no personal views that would prevent me from following applicable law in this or any other area.

2. In your legal opinion, is the 1995 Habeas Corpus Reform constitutional?

Yes. This law is presumed to be constitutional. It has been upheld as constitutional in *Felker v. Turpin*, 116 S. Ct. 2333 (1996). Again, I have no personal views that would prevent me from following applicable law in this or any other area.

If confirmed, you will preside over many employment discrimination cases as a federal judge.

3. In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 *Adarand v. Pena* decision and subject that racial preference to the strictest judicial scrutiny?

Yes, if confirmed, I will follow *Adarand v. Pena* and subject any government racial preference, quota, or set-aside to the strictest judicial scrutiny.

4. In your legal opinion, how difficult is it for any government program or statute to survive strict scrutiny?

It is extremely difficult for a government racial preference, quota, or set-aside to survive strict scrutiny. The program or statute must be narrowly tailored to meet a compelling state interest. *Adarand v. Pena* makes it clear that this is a very heavy burden to overcome.

5. Is the California Civil Rights Initiative constitutional?

Yes. In *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th Cir.), *Cert. den.*, 118 S. Ct. 397 (1997), the Ninth Circuit upheld the initiative.

6. Is there a constitutional right to homosexual marriage under the U.S. Constitution?

Bowers v. Hardwick, 478 U.S. 185 (1986), and the Defense of Marriage Act, which is presumptively constitutional, indicate that there is no constitutional right to homosexual marriage under the United States Constitution. I have no personal belief that would prevent me from following applicable law in this or any other area.

Mr. KENNEDY. Madam President, I strongly support Susan Oki Mollway's nomination to the federal district court in Hawaii. Her nomination has now been pending before the Senate for two-and-a-half years. It is long past time to confirm this able nominee.

Ms. Mollway's credentials are impressive. She is a Harvard Law School Graduate and a partner at a prestigious Hawaii law firm, where her practice has included complex civil litigation. In 1987, she was voted Outstanding Woman Lawyer by the Hawaii Women Lawyers. She successfully argued a case before the Supreme Court of the United States in 1994.

Ms. Mollway has the support of every member of Hawaii's congressional delegation, and the federal judges in Hawaii hold her in the highest regard. She would be the first Asian-American woman to sit on the federal bench.

Some of our colleagues oppose this nomination because Ms. Mollway served on the Board of Directors of the ACLU in Hawaii, at a time when the ACLU was active in the same-sex marriage debate in that state. In fact, much of the ACLU's involvement in that debate took place long before Ms. Mollway became a member of the Board of Directors. In addition, Ms. Mollway has emphatically stated that she never voted on the position the ACLU should take on this issue or on any other litigation or legislation. The opposition to her nomination is unjustified, and it is no basis for denying confirmation.

Unfortunately, Ms. Mollway is just one of the many well-qualified women and minority nominees who have been arbitrarily delayed by the Senate and subjected to unfair ideological hazing.

In fact, in this Republican Senate, women are four times more likely than men to be held up for more than a year. Forty-three percent of the nominees currently on the Senate calendar are women. In the last three months, the Senate Republican leadership has allowed only one woman to be confirmed to the federal bench, while confirming 15 men. And, 16 out of 21—that's 76 percent—of the nominees carried over from last year's session are women or minorities.

I urge my colleagues to support Ms. Mollway's nomination. It is time to end the logjam of qualified women and minority nominees. It is time to provide relief to the federal district court in Hawaii, whose caseload has doubled in the last five years. It is long past time to confirm Susan Oki Mollway. Her qualifications are outstanding and I am confident that she will serve with

great distinction on that court. Frankly, the Senate should confirm her—and apologize to her as well.

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

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

Mr. DASCHLE. Madam President, I want to say a couple of words about this nomination. I am very pleased that Susan Mollway's nomination has finally reached the Senate floor. As others have noted, it is a long, long time in coming. I am told that it has taken 2½ years. But today she is finally going to get a vote, and I am confident that she will be confirmed.

I think it is quite an impressive story. Susan Mollway, first nominated for the U.S. District Court for the District of Hawaii in December of 1995, was reported favorably by the Senate Judiciary Committee on April 25 of 1996. Nothing happened, of course, with that nomination, and she was renominated again on January 7 of 1997 and again reported out favorably by the Judiciary Committee.

She must be the most patient woman in the world. For all this time, with all this uncertainty, with all of the implications professionally, it has been a long wait, not only for her, but for Hawaii.

The seat which Ms. Mollway has been nominated to has been vacant now for 3 years, since April of 1995. Were it not for the extraordinary persistence of our colleagues from Hawaii, the senior Senator, DANIEL INOUE, and the junior Senator, DANIEL AKAKA, we would not be here this afternoon. It is only their persistence and the extraordinary credibility and, frankly, persistence that they have demonstrated for all this time that we are now celebrating this moment.

Their persistence is well invested. Susan Mollway is fully qualified and will be an extraordinary credit to the bench. She is a partner in the Honolulu law firm of Cades, Schutte, Fleming and Wright where she went upon graduation from Harvard Law School.

She has practiced in a broad range of areas, including a successful argument before the U.S. Supreme Court. She has won numerous awards, including the Hawaii Women Lawyers' Outstanding Woman Lawyer Award in 1987.

The granddaughter of a "picture bride" and a plantation worker in Hawaii, Ms. Mollway and her family have learned strength and commitment from their story. Her father left high school during World War II to join a Japanese-American unit of the U.S. Army. Together with Senator INOUE, he fought in Europe as part of the 442nd Regiment Combat Team, the most decorated military unit of its size in World

War II. At the same time, people he knew were among the thousands of Japanese-Americans interned by our own Federal Government. Later, Ms. Mollway's father used his veteran's benefits to attend Harvard. Clearly, his daughter now understands the great joy and honor of being an American, but also the burdens and barriers faced by some in our society.

We are all proud of the distance we have come as a society in ending the kind of discrimination faced by Japanese-Americans of Ms. Mollway's father's generation, but the confirmation of this judge to be now U.S. district judge will mark yet another step in this progress. Susan Mollway is an outstanding nominee and deserves to be confirmed.

I, again, congratulate my two colleagues from Hawaii, and I call upon all of my colleagues to vote in her favor in 40 minutes.

I yield the floor.

Mr. INOUE. Madam President, I ask unanimous consent that Senator SESSIONS and I be permitted to yield back the remainder of our time and that at the hour of 5 p.m., a rollcall vote be taken on this matter.

The PRESIDING OFFICER. Is there objection to the unanimous consent request?

Mr. INOUE. Madam President, may I change that to 5:10?

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

Does the Senator wish to request the yeas and nays at this time?

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

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

MORNING BUSINESS

Mr. INOUE. Madam President, I ask unanimous consent that there now be a period for the transaction of morning business.

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

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

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

Mr. WYDEN. Thank you very much, Madam President.

SECRET HOLDS ON NOMINATIONS AND LEGISLATION

Mr. WYDEN. Madam President, only 52 legislative days remain in this session. Dozens of nominations are pending, and more than 400 items are on the calendar. Being an election year, this