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**Folder Title:** Supreme Court Consultation

# United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

June 18, 2003

The Honorable Alberto R. Gonzales  
Counsel to the President  
The White House  
Washington, D.C. 20500

Dear Judge Gonzales:

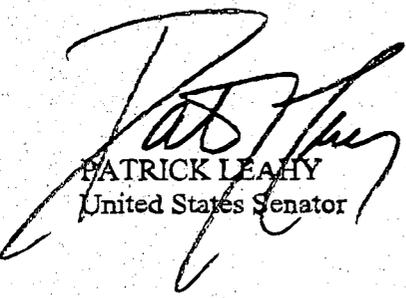
This letter follows up on our meeting earlier today. I reiterate my offer to consult with the President directly and in advance of any nomination he might make to the Supreme Court in order to try to help identify nominations that might unite the country and be confirmed with 95 to 100 votes by the Senate. I asked you to sound out the President whether he would be willing to sit down and talk about this and my interest in telling him directly not to make the Supreme Court into a partisan issue. An important part of his legacy as President will be whether the American people's respect for the Supreme Court is strengthened or diminished.

I know that you were uncomfortable talking about specific names and I tried to make clear that I am not asking that the President name anyone in particular. I do think it important that we begin a dialogue about those the President is considering and not leave it until after a vacancy arises or minutes before the President's selection is announced. Real consultation will take time.

I was disappointed to see reports early this afternoon that "President Bush today rejected an overture from Democratic senators who offered to head off a bitter fight over a future Supreme Court vacancy with a collaboration." You acknowledged that whether there is to be a big fight is up to the President. I hope that the White House press briefing was wrong and that the President has not decided against consultation and is not determined, instead, to precipitate a confrontation that will be bad for the Supreme Court and bad for the country.

It is disconcerting to see that the White House press secretary is saying that the President has already declined to meet with Democrats on this important matter even before my requests from our meeting were conveyed to him. It is also disturbing to have the White House indicating that you were dispatched to placate me rather than to engage in serious consultation. I enjoy our talks but they seem not to be reflected in the President's actions. Today is a perfect example of you saying one thing in private and the White House taking a diametrically opposed position.

Sincerely,



PATRICK LEAHY  
United States Senator

June 10, 2003  
The Honorable George W. Bush  
The White House  
1600 Pennsylvania Ave, NW  
Washington, DC 20500

Dear Mr. President:

The Constitution dictates that federal judges be nominated by the President with the advice and consent of the Senate. I write to begin the process of fulfilling that Constitutional mandate.

In recent history, Presidents have announced their intention to nominate candidates to fill Supreme Court vacancies shortly after the positions have become available. The short time between the creation of a Supreme Court vacancy and the announcement of a potential replacement leaves little time for Senators to fulfill their constitutional duties to advise the President on whom to nominate.

Recent press reports have indicated that the White House is actively vetting potential nominees in preparation for Chief Justice Rehnquist's or any other Supreme Court justice's retirement. Because it appears you are actively engaged in this process and because I hold so important my constitutional obligation to advise you on these matters, I write to offer my input at this stage.

I start by encouraging you to use the same principles that guide me in evaluating judicial nominees. I consider three criteria: excellence, diversity, and moderation. I am confident that excellence will be a primary consideration for you because I know we agree that judges should be among the best lawyers the bar has to offer. I also know that you will consider the importance of diversity, as you have especially in working with me to put judges on the bench in New York.

When it comes to moderation, I am disappointed that we diverge with increasing frequency. I do not want judges who are too far Left or too far Right, because I believe judges who come to the bench with extreme ideologies are likely to make law, not interpret it. You, more than any other President in history, have chosen judges through an ideological prism. The White House's reliance on ideology when it has come to selecting lower court nominees has led to conflict that has frustrated both of us. If you were to select a mainstream nominee, you would do the process, the Judiciary, and the nation a real service.

I would add a fourth consideration: the willingness to answer questions forthrightly. For the Senate to perform its constitutional role properly, we must have answers to appropriate questions. Several of your nominees have refused to answer questions that legal ethicists have said are clearly appropriate. The same questions were asked by Republican Senators and answered by Democratic nominees when President Clinton was in office, and the same questions have been answered by several of your own nominees. Clearly, there is nothing inappropriate about a nominee discussing his or her views on already decided Supreme Court cases, on the First Amendment, the Second Amendment, the Fourth Amendment, the Eleventh Amendment, the Fourteenth Amendment, the right to privacy, the Commerce Clause, the Spending Clause, or any of the other pressing constitutional issues of the day.

As you know, I have voted for well over 90% of the judges you have nominated, most of them Republicans, most of them conservatives (but mainstream conservatives), and many if not most of them pro-life. I have no litmus test when it comes to what a nominee believes, but if a nominee refuses to answer my fair and reasonable questions and I am unpersuaded that the nominee will preserve balance on the court to which he or she is nominated, I am compelled to vote no.

Having outlined the criteria I would hope you would consider, I want to offer the names of five potential Supreme Court nominees for your consideration. There is a rich tradition of Senators offering specific advice to Presidents on Supreme Court nominations. Most recently, when President Clinton was considering judicial nominees, he received advice from Senator Hatch.

According to Senator Hatch in his book, *Square Peg*, he advised President Clinton to consider nominating both Justice Ginsburg and Justice Breyer to the Supreme Court. He believed that both would win easy Senate confirmation and, while left of center, were "highly honest and capable jurists," and "far better than the other likely candidates from a liberal Democratic administration." My advice is offered in the same manner and with the goal of helping you identify a nominee who could win 100 Senators' votes, not just 51.

While there are scores of Democrats whom I would hope you would consider, I am offering only individuals who either are Republicans or have previously been nominated by Republican Presidents. The candidates I would advise you to consider are:

The Honorable Arlen Specter, Republican Senator from Pennsylvania.

The Honorable Ann Williams, Judge, Seventh Circuit Court of Appeals, nominated by President Ronald Reagan to the Northern District of Illinois.

The Honorable Edward Prado, Judge, Fifth Circuit Court of Appeals, nominated by you and unanimously confirmed by the 108th Senate.

The Honorable Michael Mukasey, Judge, Southern District of New York, nominated by President Ronald Reagan.

The Honorable Stanley Marcus, Judge, Eleventh Circuit Court of Appeals, nominated by President Ronald Reagan.

All of these individuals appear to be legally excellent, ideologically moderate, and several of them would add diversity to the Court. All of them have a history of bipartisan support, are within the mainstream, and have demonstrated a commitment to the rule of law. While I would need to do additional research on them and question them personally before announcing my unqualified support, my initial review of their records is promising.

This is far from an exhaustive list and I appreciate that you may have other individuals in mind should a vacancy arise. I would welcome the opportunity to evaluate any candidates you are considering and provide input before any nomination is made, consistent with the Constitution's mandate that the Senate advise the President on judicial nominations.

My profound hope is that, should there be a Supreme Court vacancy this summer, you will nominate a candidate who will unite us, not divide us. I am confident that by working together we can achieve that goal. I look forward to hearing from you soon.

Sincerely,  
 Charles E. Schumer  
 United States Senator

562252

# United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

May 14, 2003

The Honorable George W. Bush  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, DC 20500

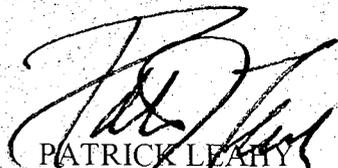
Dear Mr. President:

Since you assumed the office of the Presidency, I have stressed the need for consultation and moderation as two guiding principles for selecting judicial nominees. Nowhere is this more important than if a vacancy were to arise on the United States Supreme Court. The Senate has already confirmed 124 of your judicial nominees, and the federal court vacancy rate is down to 5.45%, the lowest it has been in 13 years.

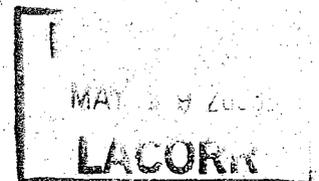
Should a Supreme Court vacancy arise in the coming months, I believe you should use the two most recent confirmations – those of Ruth Bader Ginsburg and Stephen Breyer -- as models for your own selection process. We saw a President reach out to leaders in the Republican Party in an attempt to find consensus nominees who would not pit Republicans against Democrats and, far more importantly, would not divide the American people.

The spectacle of a divisive nomination and confrontational confirmation process is not something any of us desire. I am confident that a favorable consensus and a rapid confirmation process could be developed on a bipartisan basis if we work together. The country and the Supreme Court would be best served by better consultation and closer coordination between the White House and the Senate with regard to judicial nominations.

Sincerely,

  
PATRICK LEAHY  
United States Senator

*all the best*



562252

# United States Senate

COMMITTEE ON THE JUDICIARY  
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1600 Pennsylvania Avenue, N.W.  
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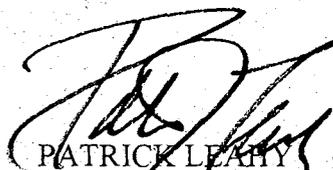
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Sincerely,

  
PATRICK LEAHY  
United States Senator

*all the best*

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THE WHITE HOUSE

WASHINGTON

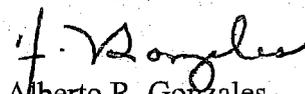
June 18, 2003

Dear Senator Daschle:

Thank you for your letter of June 17 to the President. As I have informed Senator Leahy and Senator Schumer, if a Supreme Court vacancy arises during his Presidency, President Bush will nominate an individual of high integrity, intellect, and experience. The Senate will have an opportunity to assess the President's nominee and exercise its constitutional responsibility to vote up or down on the nominee.

I have already visited with Senator Leahy about this matter and would be pleased to visit with you about the process and to consider suggestions you or others may have.

Sincerely,



Alberto R. Gonzales  
Counsel to the President

The Honorable Thomas Daschle  
United States Senate

Copy: The Honorable Bill Frist  
The Honorable Orrin Hatch  
The Honorable Patrick Leahy

TOM DASCHLE  
SOUTH DAKOTA

**United States Senate**  
**Office of the Democratic Leader**  
**Washington, DC 20510-7020**

June 17, 2003

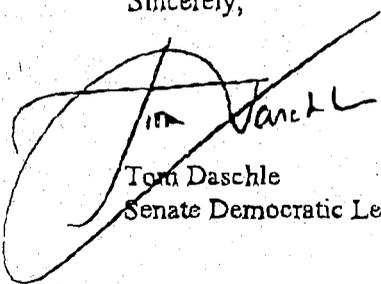
The Honorable George W. Bush  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Mr. President:

I know that Senator Leahy, the Ranking Democrat on the Senate Judiciary Committee, and Senator Schumer, the Ranking Democrat on the Courts Subcommittee, have written to you over the last several weeks to indicate Democratic Senators' desire to consult with you should a vacancy arise on the United States Supreme Court. On behalf of the entire Senate Democratic Caucus, I want to emphasize that we remain hopeful that we would have meaningful, bipartisan consultation in advance of any Supreme Court nomination. We believe that it is not necessary to have a divisive confirmation fight over a Supreme Court appointment. If there are vacancies, we would like to see them filled by nominees who unite all Americans.

Should you be willing to convene a meeting of Senate leaders from both parties to begin a bipartisan process of consultation, I stand ready to participate in good faith in such a process and know that Senator Leahy and others would do so as well.

Sincerely,



Tom Daschle  
Senate Democratic Leader

THE WHITE HOUSE  
WASHINGTON

June 17, 2003

Dear Senator Leahy:

Thank you for your letter of May 14 to the President, which we received recently due to screening procedures for regular White House mail.

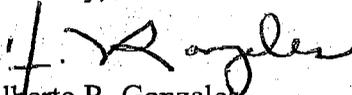
Your letter first suggests that the Senate has moved with appropriate dispatch in considering the President's judicial nominees. We respectfully disagree with respect to appeals court nominees. While the Senate has confirmed 105 district court judges, the Senate has voted on only 26 of the President's 42 appeals court nominees. Of the 16 appeals court nominees who still have not received votes, 8 have been waiting since 2001. More than 10% of the 167 regional appeals court seats still remain vacant, including a dozen that have been declared "judicial emergencies" by the Judicial Conference of the United States.

Delays in Senate votes on appeals court nominees are not new: In the last three Administrations, too many appeals court nominees have had to wait years for a vote, and some have never received votes. As President Bush has stated repeatedly since the 2000 campaign (and as the Chief Justice and the American Bar Association have also advocated), every judicial nominee should receive a timely hearing and vote. In speeches on the Senate floor, you agreed with then-Governor Bush on this principle in 2000. But the problem of delayed and denied votes for appeals court nominees unfortunately has not improved in his Administration. More appeals court nominees had to wait at least a year for a hearing in the 107th Congress than in the last 50 years combined. Only 53% of President Bush's appeals court nominees in the 107th Congress received votes, compared to more than 90% in the last three Presidents' first two years. Judicial historian Sheldon Goldman independently examined the statistics and concluded that the 107th Congress was the least efficient in modern history in holding hearings and votes on appeals court nominees.

We acknowledge the work of the Senate on district court nominees, but more has to be done to address circuit vacancies and to end the delays in consideration of appeals court nominees, which have been the persistent problem in the last three Administrations. To ensure a fair and orderly process no matter who is President or which party controls the Senate, the President has respectfully urged the Senate to seek bipartisan agreement on a process that will provide every judicial nominee a timely up or down vote.

Your letter also references the possibility of a Supreme Court vacancy. If such a vacancy arises during his Presidency, President Bush will nominate an individual of high integrity, intellect, and experience. The Senate will have an opportunity to assess the President's nominee and exercise its constitutional responsibility to vote up or down on the nominee. I would be pleased to visit with you about the process and to consider suggestions you or others may have.

Sincerely,



Alberto R. Gonzales  
Counsel to the President

The Honorable Patrick J. Leahy  
United States Senate  
Washington, D.C. 20510

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