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THE WHITE HOUSE

WASHINGTON

March 20, 2003

Dear Senator Boxer:

I write with respect to your March 6 letter to Chairman Hatch regarding the nomination of Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. I first will discuss the Senate's delays in considering Judge Kuhl's nomination and then will turn to Judge Kuhl's superb qualifications to be a judge on the Ninth Circuit. As I will explain, Judge Kuhl is a woman of exceptional experience, integrity, and intellect who represents the mainstream of American law and American values. Judge Kuhl should receive a prompt hearing and up or down vote, as should all judicial nominees.

I. Senate Confirmation Process

Judge Kuhl has been waiting nearly two years for a hearing despite the fact that the Judicial Conference has determined that this vacancy is a judicial emergency and that the Ninth Circuit currently is in need of *ten* additional judges (for a total of 35). In our judgment, such a lengthy delay -- which has become too common in recent years -- is inconsistent with the Senate's constitutional responsibility to vote on judicial nominations within a reasonable time. As the American Bar Association stated last summer when denouncing Senate delays in holding hearings and votes on judicial nominees, "Vote them up or down, but don't hang them out to dry." The Chief Justice, speaking on behalf of the Federal Judiciary, has similarly advocated a prompt up or down vote for all judicial nominees to end the vacancy crisis in the federal courts and restore order and dignity to the confirmation process.

We appreciate your statements on the Senate floor in recent weeks explaining your displeasure at the amount of time two of President Clinton's appointees to the Ninth Circuit, Judge Richard Paez and Judge Marsha Berzon, had to wait before they received their votes. President Bush has explained that too many nominees of both President Bill Clinton and President George H.W. Bush did not receive timely hearings and votes; indeed, many nominees never received votes at all (unlike Judge Paez and Judge Berzon, who ultimately did receive up or down floor votes and were confirmed). The Senate's delay with respect to Judge Kuhl is especially unfortunate because she took the step in 1998 of writing to Chairman Hatch to support Judge Paez, whom she knows and respects. Indeed, at the time, you cited Judge Kuhl's support for Judge Paez when you spoke in the Senate in support of Judge Paez. Judge Kuhl also strongly supported Margaret Morrow in her efforts to be confirmed after you recommended Judge Morrow for the federal bench. These episodes, of course, were just two of many examples in Judge Kuhl's career where she has shown herself to be concerned with law and fair process, not political gain.

Since the 2000 campaign, President Bush has repeatedly stated that every judicial nominee should receive a committee hearing and up or down floor vote within a reasonable time,

no matter who is President or which party controls the Senate. On October 30, 2002, after nearly two additional years of delays, the President advanced a specific plan involving all three Branches that would require, among other steps, the Senate to vote on nominees within 180 days of nomination. The plan would ensure a generous period of time for all Senators to gather information and have their voices heard and votes counted. Whether the nominee is Marsha Berzon or Carolyn Kuhl, whether the President is President Clinton or President Bush, whether the Senate is Republican- or Democrat-controlled, we believe that the procedures for fair and timely Senate consideration and votes on judicial nominations should be the same.

Like President Bush, you have indicated agreement with this important principle in your past statements. On May 14, 1997, for example, you stated: "According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor."

Your letter also refers to the tradition of Senatorial courtesy with respect to home-state Senators and contends that the White House did not engage in "meaningful consultation" with you before the nomination of Judge Kuhl. We respectfully disagree. As Chairman Hatch detailed in his March 4 letter to you, we engaged in an extraordinary degree of consultation with you and your staff over a period of nearly three months. Indeed, we arranged for you to meet personally with Judge Kuhl and to submit written questions to her before nomination -- steps that are quite unusual. Members of my staff also met personally with members of your staff to provide information and answer questions. We understand that you received a call from a reporter shortly after we first asked you for your views on Judge Kuhl; as you know, however, reporters often learn of names of people possibly under consideration for high-level government positions long before an actual decision or nomination has occurred. At the time that we informed you of Judge Kuhl's candidacy, you made clear publicly your opposition to another potential candidate, Representative Chris Cox. Representative Cox eventually withdrew from consideration. In deference to your views and to facilitate additional consultation, the President delayed the initially scheduled nomination date for Judge Kuhl and ultimately allowed you nearly three months to examine Judge Kuhl's record and provide us with your views. When Judge Kuhl's nomination was announced, you did not indicate opposition to her or state that there had been insufficient consultation. Rather, your contemporaneous statement explained that you would continue to evaluate the nomination. In sum, we consulted extensively with you and your staff for nearly three months before the President decided to nominate Judge Kuhl.

In your letter, you also point out that you have provided us with the names of three Republican candidates for the Ninth Circuit. We interviewed and reviewed the records of each of those three candidates and can assure you that they are strong candidates who remain under consideration for future openings on the Ninth Circuit.

It appears to us that, at bottom, your letter ultimately raises a different and important question -- namely, whether the tradition of Senatorial courtesy entails more than just consultation with home-state Senators, but also grants each home-state Senator a veto over a judicial nominee who would hold office in that State. The consistent Senate policy for at least the last 25 years, since Senator Kennedy was Chairman, demonstrates that the blue slip is not a

veto, but rather is a device to ensure adequate pre-nomination consultation with home-state Senators. Senator Kennedy explained the policy on January 29, 1981, at a committee organizational meeting: “If the sponsors of the nominee from a particular State came before the Judiciary Committee, and the Senators themselves wanted to appear before the committee to indicate their own positions or expressing reservations, that ought to be something to be considered by the committee itself rather than letting individual Senators ban, prohibit, or bar the Judiciary Committee from fair consideration of the nominee.” Senator Thurmond adhered to the same policy when he was Chairman, as did Senator Biden. Senator Biden explained in a letter of June 6, 1989, to President Bush that, even with the return of a negative blue slip, “[a] hearing and vote would be held.” He added that a negative blue slip “will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate.” Senator Hatch adhered to the same policy during his years as Chairman, as he stated in his March 4 letter to you.

Apart from the past statements and practices of Senators Kennedy and Biden, among others, several other Democrat Senators in recent weeks (including Senator Leahy) have argued that Jorge Rangel and Enrique Moreno, nominees of President Clinton to the Fifth Circuit, should have received hearings and votes notwithstanding what the committee deemed to be inadequate consultation with home-state Senators. By advancing this argument, these Democrat Senators have recognized (at least implicitly) that home-state Senators should not be allowed to veto a nominee.

In order to advise and assist the President regarding candidates for judicial office, we have engaged in significant consultation with home-state Senators throughout the country, including you and Senator Feinstein. These consultations serve a very valuable purpose for the President, as home-state Senators often provide insights into a prospective nominee that otherwise are difficult to obtain. We also agree strongly with the bipartisan policy maintained by Senators Kennedy, Thurmond, Biden, and Hatch as Chairs of the Judiciary Committee: The tradition of consultation does not and should not entail a veto for home-state Senators, particularly a veto wielded for ideological or political purposes. Rather, the intention of the Constitution and the tradition of the Senate require, in our judgment, that the full Senate hold an up or down vote on each judicial nominee. If the objections of home-state Senators to a nominee are persuasive, those objections either will deter the President from submitting the nomination in the first instance or, alternatively, will convince a majority of the Senate that the nomination should be rejected. As Senator Kennedy stated in 1981, however, the Senate has not allowed and should not allow “individual Senators [to] ban, prohibit, or bar” consideration of a nominee.

In sum, we very much respect your views on Judge Kuhl’s nomination, although we disagree very strongly with your assessment of her record for reasons summarized below. We will continue to ask Senators of both parties to ensure timely up or down votes for all judicial nominees, including Judge Kuhl.

II. Judge Kuhl

Your letter questions Judge Kuhl’s suitability for a seat on the Court of Appeals, arguing that she is outside the mainstream. We respectfully but strongly disagree.

Judge Kuhl has superb qualifications, experience, character, and integrity, as well as strong bipartisan support. She received a well-qualified rating from the American Bar Association, which Democrat Senators have referred to as the gold standard. She has extensive experience in federal and state government, in the Executive and Judicial Branches, in public service and private legal practice. She is a woman of character and accomplishment. Judge Kuhl has a combination of intellect, experience, and character that makes her ideally suited to be an excellent circuit judge.

Given her record, it is no surprise that Judge Kuhl has garnered bipartisan support from California and national leaders. Those supporters include people you know well: Vilma Martinez, who is an accomplished and nationally respected California attorney, a past President of the Mexican American Legal Defense and Educational Fund, and a past member of your judicial nomination advisory committee; Ron Olson, who is a renowned attorney and partner at Munger Tolles & Olson in Los Angeles; and Tom Girardi, one of the country's most accomplished plaintiff's lawyers. The officers of the Litigation Section of the Los Angeles County Bar Association (which has over 3000 members) have written in support of Judge Kuhl, stating that she has a "well-deserved reputation as being a fair minded judge who follows legal precedent. . . . On a personal level, we have come to know her as a warm, witty, and deeply caring person."

In addition, the people who best know her work and reputation as a judge -- a bipartisan group of approximately 100 judges who serve with Judge Kuhl on the Superior Court -- have signed an extraordinary joint letter to the Senate supporting Judge Kuhl. They wrote:

We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

Also, a group of 23 women judges who have served with Judge Kuhl have written a separate letter to the Senate. They wrote:

Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. . . . Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges She has helped promote the careers of women, both Republican and Democrat. . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.

Finally, more than a dozen Justices of the California Court of Appeal -- appointees of Democrat and Republican Governors who as appellate judges have worked directly with Judge Kuhl or have reviewed her work as a trial judge -- have written individual letters of support for Judge Kuhl. For example, Justice Paul Boland wrote:

[Judge Kuhl] has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair.

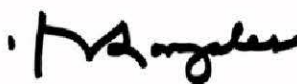
We understand that certain special-interest groups have raised questions about Judge Kuhl -- particularly about the fact that as a government lawyer in 1986 she worked on a Supreme Court brief that represented President Reagan's position that *Roe v. Wade* should be overruled. We do not know Judge Kuhl's policy views or moral views on abortion or on *Roe v. Wade*. We do not ask candidates their personal views on abortion or *Roe v. Wade*. But regardless of what her views may be, she was representing her client in that case, and we are confident based on her record that she would faithfully apply Supreme Court precedent as a court of appeals judge. Indeed, in the answers she submitted to you nearly two years ago, Judge Kuhl wrote as follows: "The constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been established by both *Roe v. Wade* and *Planned Parenthood v. Casey* [citations omitted]. As a judge I am fully committed to following the precedent established by these cases and would do so fairly and properly."

We believe that Judge Kuhl's statement fully and persuasively addresses any legitimate question on this subject. It also bears mention that the Senate already voted last year to unanimously confirm one nominee to the Sixth Circuit, John Rogers, who as a government lawyer worked on this same 1986 government brief with Carolyn Kuhl. The Senate also voted recently to confirm one circuit judge, Michael McConnell, who has written in the past that *Roe v. Wade* was wrongly decided. We do not believe the Senate should apply an unfair double standard to Carolyn Kuhl, particularly given that she was representing her client's position in that case.

* * *

In sum, I understand and appreciate your views on Judge Kuhl, but I respectfully suggest that all Senators should have their voices heard and their votes counted on this nomination. Although we have different views on Judge Kuhl, I am grateful that you are supportive of Judge Consuelo Callahan, who is another extraordinarily qualified pending nominee who will be a superb judge on the Ninth Circuit. Please do not hesitate to contact me with any questions or thoughts. I look forward to continuing to work with you and your staff on this and other issues.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Gonzales", with a stylized flourish at the end.

Alberto R. Gonzales
Counsel to the President

The Honorable Barbara Boxer
United States Senate
Washington, DC 20510

cc: The Honorable Dianne Feinstein
The Honorable Bill Frist
The Honorable Thomas A. Daschle
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable John Cornyn