of Defense. I went over and visited with him in his office as ranking member of the Armed Services Committee, where we discussed the coming Desert Fox operation, a form of consultation between the executive and legislative branch. That was December of 1998.

Kosovo, there was preemption. I will hand this to the Senator. That was March of 1999.

International law recognizes the concept of anticipatory self-defense. That is a phrase known in international law—if a country is imminently threatened.

I think the record at this point is replete with facts, where we could be in imminent threat of the use of weapons of mass destruction by Saddam Hussein, and more likely his surrogates—any one of which in this international coalition of terrorists.

Mr. SPECTER. Mr. President, without going through the entire litany, I agree that those are all illustrations of anticipatory self-defense. The Afghanistan missile attack on August 20 of 1998 was in response to al-Qaida because of the destruction of our embassies in Africa at about that time. I don't think you could call the Grenada incident a matter of anticipatory self-defense. I don't think you can call it self-defense at all. I think what the Senator from Virginia referred to is not a case of anticipatory self-defense—action by the United States, but not anticipatory self-defense. The quarantine of Cuba, as I said before, certainly does qualify, but under very different circumstances.

But I thank my colleague from Virginia. During the course of the coming days, I think we are going to have very extended discussions on these issues as we debate this resolution.

Mr. WARNER. Mr. President, I say to my good friend we have been fortunate to serve in this institution for many years together, and I hope, with luck perhaps, a few more. But the Senator has always been very careful, very thoughtful, and well prepared. While I haven't always agreed with the Senator, it is not for lack of a strong case that he has worked up on his side. I hope in due course he can see the wisdom of joining in this resolution which I and three others—Senators MCCAIN, LIEBERMAN, and BAYH—have put together. We really believe—and it is the one which is before the House of Representatives right now—that this is the wisest course of action for this Congress to take to support the President, and do it in a way that leaves no doubt in anyone's mind—Saddam Hussein or any other nations in the United Nations—who are thinking that a different course should be taken.

Mr. SPECTER. Mr. President, I thank my colleague from Virginia for those comments. We form a long-time mutual admiration society. The Senator from Virginia was elected in 1978, and I was elected 2 years later. So he has been here finishing up his 24th year, and I, 22. We have worked together on many matters.

I am raising questions only because I think it is in the tradition of what they call the world's greatest deliberative body. I am not sure that is accurate. But when we face an issue of this sort, we ought to be considering it very carefully. That is what I intended to do with this very brief colloquy today along that line.

Mr. WARNER. Mr. President, I thank my colleague for his kind remarks. We have had a very healthy debate here for 4½ hours on Friday afternoon—Senator BYRD, Senator KENNEDY, Senator DODD, and myself. We resumed today with, I think, seven colloquies on both sides of the aisle addressing this issue. I think we are going to perhaps even exceed the thoroughness, the thoughtfulness, and the strength in the debate we had in 1991 on a similar resolution that I dealt with at that time, along with my distinguished friend and colleague, Senator LIEBERMAN.

I thank the Senator.

Mr. SPECTER. Mr. President, it is true that in 1991 we had a debate which was characterized as historic. I recall the occasions when I was in the Chamber with the Senator from Virginia seated over there on the right-hand side. Senator Nunn was in the Chamber. We were debating that extensively in the Chamber today. I think it will be reassuring to the American people to see this kind of analysis and this kind of discussion—that we are not rushing to judgement.

Mr. WARNER. They deserve no less. I thank the Senator.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. I thank the Chair.

(The remarks of Mr. SPECTER pertaining to the introduction of S. 3068 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

NOMINATION OF MIGUEL ESTRADA

Mr. SPECTER. Mr. President, I now will comment on the pending nomination of a very distinguished lawyer to the Court of Appeals for the District of Columbia Circuit, Miguel A. Estrada, who has been nominated by President Bush for the Court of Appeals for the District of Columbia Circuit.

Mr. Estrada has an extraordinary background. He received his law degree from Harvard, magna cum laude, in 1986. He received his bachelor's degree, magna cum laude, from Columbia College.

Mr. President, I ask unanimous consent to have printed in the RECORD his employment record, which shows the very outstanding work he has done.

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

MIGUEL ESTRADA, NOMINEE TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA—BIOGRAPHY/EXPERIENCE

Miguel A. Estrada is currently a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, where he is a member of the firm's Appellate and Constitutional Law Practice Group and the Business Crimes and Investigations Practice Group.

Mr. Estrada has broad appellate experience—he is widely regarded as one of the country's best appellate lawyers, and has argued 15 cases before the U.S. Supreme Court.

The American Bar Association—the Democrats' ''gold standard'' for judicial nominees—unanimously rated Estrada ''well qualified.''

If confirmed, Estrada would be the first Hispanic-American ever to sit on the Court of Appeals for the D.C. Circuit.

From 1992 until 1997, he served as Assistant to the Solicitor General of the United States. From 1990 to 1992, he served as Assistant U.S. Attorney and Deputy Chief of the Appellate Section, U.S. Attorney's Office, Southern District of New York.

Mr. Estrada served as a law clerk to the Honorable Anthony M. Kennedy of the U.S. Supreme Court from 1988–1989, and to the Honorable Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit from 1986–1987.

He received a J.D. degree magna cum laude in 1986 from Harvard Law School, where he was editor of the Harvard Law Review. Mr. Estrada graduated with a bachelor's degree magna cum laude and Phi Beta Kappa in 1983 from Columbia College, New York. He is fluent in Spanish.

Mr. SPECTER. Mr. President, during the course of the hearings on Mr. Estrada, the issue was raised about obtaining memoranda which Mr. Estrada had worked on in the Solicitor General's office from 1992 to 1997, internal memoranda which would be very troublesome for disclosure because of the need for candid expressions by lawyers who work in the Solicitor General's office.

A letter, dated, June 24, 2002, was submitted by a former Solicitor General, Seth P. Waxman, on behalf of all seven living ex-Solicitors General, objecting to the request by the Judiciary Committee for these internal memoranda, signed by Mr. WAXMAN, on behalf of Walter Dellinger; Drew S. Days, III; Kenneth W. Starr; Charles Fried; Robert H. Bork; and Archibald Cox. It is apparent, on the face of those signatories, that you have people from a broad spectrum, from very liberal to very conservative.

But of more importance than the range of Solicitors General on the political spectrum are the reasons set forth in the letter. And the essence is contained in a couple of paragraphs:

As former heads of the Office of the Solicitor General—under Presidents of both parties—we can attest to the vital importance of candor and confidentiality in the Solicitor General's decision-making process.

Then, in a later paragraph, it continues:

It goes without saying that, when we made these and other critical decisions, we relied on frank, honest, and thorough advice from our staff attorneys, like Mr. Estrada. Our decision-making process required the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decision-making requires

candor, and candor in turn requires confidentiality.

Mr. President, I ask unanimous consent that the full text of this letter be printed at the conclusion of my statement. That will abbreviate the time of the statement.

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

(See Exhibit 1.)

Mr. SPECTER. Mr. Estrada was questioned about an article which appeared in The Nation, which referred to anonymous sources on the subject that Mr. Estrada was questioning prospective clerks for Justice Kennedy and was applying a litmus test. This is what is set forth in the article in The Nation in the October 7, 2002, issue:

Perhaps the most damaging evidence against Estrada comes from two lawyers he interviewed for Supreme Court clerkships. Both were unwilling to be identified by name for fear of reprisals. The first told me: ''Since I knew Miguel, I went to him to help me get a Supreme Court clerkship. I knew he was screening candidates for Justice Kennedy. Miguel told me, 'No way. You're way too liberal.' I felt he was definitely submitting me to an ideological litmus test, and I am a moderate Democrat. . . .''

A second unnamed person in the article said:

''I was a clerk for an appeals court judge,'' the professor told me, ''and my judge called Justice Kennedy recommending me for a clerkship with him. Justice Kennedy then called me and said I had made the first cut and would soon be called for an interview. I was then interviewed by Miguel Estrada and another lawyer. Estrada asked most of the questions. He asked me a lot of unfair, ideological questions, a lot about the death penalty, which I told him I thought was immoral. I felt I was being subjected to an ideological litmus test. . . .''

And it goes on, but that is the pertinent part.

During the course of the Judiciary Committee hearings, Mr. Estrada was questioned about these two unidentified sources. He said he had not asked such questions, and then later responded to further questions saying that he couldn't remember if it had ever happened, that it might have been possible but he had no recollection.

His answer was:

Now, that you have drawn that to my attention, it is possible that interviewing a candidate—I can't think of any now, but it is possible that I may have come to the conclusion that the person's ideology was so strongly engaged in what he thought as a lawyer that he would not be able to follow the instructions in the chambers as set forth by Justice Kennedy.

Then, when the questions are pursued, Mr. Estrada says candidly he can't remember ever having said that but would not rule out the possibility.

It seems to me that when someone is being questioned, and being questioned from sources which refuse to reveal their identify, that it is impossible for a witness, a nominee for a judgeship, to give a responsive answer.

One of the very basic principles of American jurisprudence is that an individual is entitled to confront his accuser. That is a basic constitutional requirement, of course, in a different context in the fifth amendment of right to confrontation. But as a matter of basic fairness anywhere, if a person is to have an opportunity to focus on a question, to focus on the event, he or she should be told who it was who made the statement, so there can be an appropriate focus of attention.

And a prospective nominee ought not to be ruled out, ought not to be criticized, or ought not have it held against him if people are challenging him who will not be disclosed.

And the article in The Nation magazine says specifically it came from two lawyers, both unwilling to be identified by name for fear of reprisals. It is a little hard to see what the reprisals would be.

If somebody has something to say about a judicial nominee, let him come forward. If they are not going to be identified, how can you expect a responsive answer to be given by an individual, which is apparent on its face, as Mr. Estrada tries to respond to these questions without knowing precisely what they are?

Other issues were raised as to Mr. Estrada because of clients he represented and causes he undertook. I regrettably could not be present for all of the Estrada hearings because we were debating homeland security on the day his hearing was up, and I was there for part of it but not there for all of it.

It was reported to me that Mr. Estrada was questioned about comments which he had made in representing a client, trying to have the case of Miranda v. Arizona overruled, a 1966 decision where the Supreme Court laid down certain requirements for warnings and waivers.

The Omnibus Crime Control Act of 1968, passed by the Congress, sought to change the Miranda rule by providing that the confession be judged on the totality of the circumstances. An act of Congress is presumptively constitutional, and it was a matter for argument. The Supreme Court considered the issue and decided that Miranda would not be overruled, considered it, many years later.

Shortly after the Omnibus Crime Control Act was passed in 1968, I was asked by the National District Attorneys Association to argue a case captioned Frasier v. Cupp where there was a confession at issue under Escobedo. I appeared in the Supreme Court and argued that the confession which was given, the statements which were given should be judged under the 1968 Omnibus Crime Control Act which said voluntariness should be decided on the basis of the totality of circumstances.

In a State prosecution, the due process clause picks up the right to counsel of the sixth amendment and the privilege against self-incrimination of the fifth amendment. The argument which I made was there ought not to be a higher standard imposed on the States under the due process clause than on the Federal Government.

Under the 1968 statute gauging the admissibility on the totality of the circumstance, the act was presumptively constitutional. The Supreme Court did not reach the issue in deciding the case of Cupp v. Oregon where the confession was upheld. But I had appeared before a congressional committee, the McClellen committee, in 1966 and said I agreed with Miranda and that I thought as a matter of public policy Miranda was the correct decision. I said that not withstanding the fact that I was a district attorney at that time and had to deal with the limiting effects. It seemed to me it placed the suspect on an equal par with the interrogators for them to be required to say you have a right to counsel, you have a right to remain silent.

But notwithstanding my own personal view that Miranda was the correct decision, I felt entirely free to argue to the Supreme Court the position that the 1968 act ought to govern, and the totality of the circumstances ought to prevail.

This is just one of what I understood to be a number of concerns expressed by some members of the Judiciary Committee. I think there ought to be a sharp distinction between what an individual believes as a matter of judicial philosophy or ideology and what an individual does by way of presenting a case for argument.

Under our adversarial system, all sides are to be presented, both sides are to be presented, and the court is to make the decision. An attorney has the liberty of making arguments which he thinks are good-faith arguments for resolution by the court.

It is my hope that the Judiciary Committee will report out Mr. Estrada. Frankly, it looks as if they are not going to do so. The reason, really, the excuse will be given that the Solicitor General's opinions will not be forthcoming. But they realistically cannot be forthcoming for reasons set forth by the Solicitor General's letter that if they are to be able to have honest and frank discussions, they have to have the honest opinions of their lawyers.

And if you are going to make public disclosure in the context of a judicial confirmation proceeding, the lawyers are always going to be worried about that and are not going to give their frank opinions.

Ultimately, I hope we are able to adopt a protocol. Perhaps the year 2004 would be a good time. We have a Republican President now and a Senate controlled by Democrats and nominations were being held up. I am candid to say and have said, when we had a President who was a Democrat and the Judiciary Committee was controlled by Republicans, that nominations were held up.

I crossed party lines and voted for President Clinton's nominees when I thought they were qualified. In the spirit of reciprocity, I have been able to get Pennsylvania judges confirmed. But perhaps in the year 2004, when no

one knows exactly what 2005 will bring, we can end this politicization of the Judiciary Committee process and adopt a protocol which I have submitted but which would say that after so many days after a nomination, the committee would consider it with a hearing; so many days after the hearing, the committee would vote; and so many days later, it would come to the floor. We could get rid once and for all of this politicization of the nomination process.

I ask unanimous consent that the text of my resolution of protocol be printed in the RECORD at the conclusion of my remarks.

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

(See Exhibit 2.)

Mr. SPECTER. I yield the floor.

EXHIBIT 1

WILMER, CUTLER & PICKERING,
Washington, DC, June 24, 2002.

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

DEAR CHAIRMAN LEAHY: We write to express our concern about your recent request that the Department of Justice turn over ''appeal recommendations, certiorari recommendations, and amicus recommendations'' that Miguel Estrada worked on while in the Office of the Solicitor General.

As former heads of the Office of the Solicitor General—under Presidents of both parties—we can attest to the vital importance of candor and confidentiality in the Solicitor General's decisionmaking process. The Solicitor General is charged with the weighty responsibility of deciding whether to appeal adverse decisions in cases where the United States is a party, whether to seek Supreme Court review and adverse appellate decisions, and whether to participate as amicus curiae in other high-profile cases that implicate an important federal interest. The Solicitor General has the responsibility of representing the interests not just of the Justice Department, nor just of the Executive Branch, but of the entire federal government, including Congress.

It goes without saying that, when we made these other critical decisions, we relied on frank, honest, and thorough advice from our staff attorneys, like Mr. Estrada. Our decisionmaking process required the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reasons to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking requires candor, and candor in turn requires confidentiality.

Any attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests—a cost that also would be borne by Congress itself.

Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process.

Sincerely,

SETH P. WAXMAN.
WALTER DELLINGER.
DREW S. DAYS, III.
KENNETH W. STARR.
CHARLES FRIED.
ROBERT H. BORK.
ARCHIBALD COX.

EXHIBIT 2

S. RES. ____

Whereas there has been a continuing controversy with the political party of the President protesting the process on confirmation of Federal judges by the Senate when the Senate is controlled by the opposite political party; and

Whereas there is a concern about a lack of public confidence in the Senate's judicial confirmation process when different parties control the White House and the Senate: Now, therefore, be it

Resolved,

SECTION 1. PROTOCOL FOR NONPARTISAN CONFIRMATION OF JUDICIAL NOMINEES.

(a) TIMETABLES.—

(1) COMMITTEE TIMETABLES.—The Chairman of the Committee on the Judiciary, in collaboration with the Ranking Member, shall—

(A) establish a timetable for hearings for nominees to the United States district courts, courts of appeal, and Supreme Court, to occur within 30 days after the names of such nominees have been submitted to the Senate by the President; and

(B) establish a timetable for action by the full Committee to occur within 30 days after the hearings, and for reporting out nominees to the full Senate.

(2) SENATE TIMETABLES.—The Majority Leader shall establish a timetable for action by the full Senate to occur within 30 days after the Committee on the Judiciary has reported out the nominations.

(b) EXTENSION OF TIMETABLES.—

(1) COMMITTEE EXTENSIONS.—The Chairman of the Committee on the Judiciary, with notice to the Ranking Member, may extend by a period not to exceed 30 days, the time for action by the Committee for cause, such as the need for more investigation or additional hearings.

(2) SENATE EXTENSIONS.—

(A) IN GENERAL.—The Majority Leader, with notice to the Minority Leader, may extend by a period not to exceed 30 days, the time for floor action for cause, such as the need for more investigation or additional hearings.

(B) RECESS PERIOD.—Any day of a recess period of the Senate shall not be included in the extension period described under subparagraph (A).

(c) REPORT OF NOMINATION TO SENATE.—

(1) NOMINATION TO SUPREME COURT.—Regardless of the vote of the Committee on the Judiciary, a nomination for the Supreme Court of the United States shall be reported by the Committee for action by the full Senate.

(2) NOMINATION TO DISTRICT COURT OR COURT OF APPEALS.—If a nomination for the United States district court or court of appeals is rejected by the Committee on the Judiciary on a party line vote, the nomination shall be reported by the Committee for action by the full Senate.

UNANIMOUS CONSENT REQUEST—S. 2949

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 623, S. 2949, the aviation security legislation; that the Smith-Boxer amendment at the desk be considered and agreed to; the committee amendment be agreed to; the bill, as amended, be read three times, passed, and the motion to reconsider be laid on the table, without any intervening action or debate.

This legislation is sponsored by Senators BOB SMITH and BARBARA BOXER, an unlikely pair, you would think, to sponsor legislation. But they agree, as a majority of the Senate agrees, we should move forward on this legislation to allow certain pilots in commercial aviation to be armed. That is what the legislation is all about.

The PRESIDING OFFICER. Is there objection?

Mr. SPECTER. Mr. President, on behalf of the leader, Senator LOTT, I have been asked to lodge a formal objection to the unanimous consent request. I know the Senator from Nevada had expected that.

I want it plain that I express none of my own views on the pending legislation in lodging this formal objection. I am the last Republican available to represent the leader, who has asked that a formal objection be lodged on behalf of other Members.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. Mr. President, I understand my friend from Pennsylvania entering the objection. This measure has been cleared on this side, the Democratic side, for approximately 2 weeks. I understand the Commerce Committee staff has been working diligently on this matter. It is something we should complete. It has widespread support. I appreciate the statement of my friend from Pennsylvania.

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business with Senators permitted to speak therein for a period not to exceed 5 minutes each.

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

AMERICAN ECONOMY

Mr. DOMENICI. Madam President, it isn't often that a Senator from New Mexico and a Republican quotes an editorial by the Washington Post regarding economics and economic activity and America's economic future. This morning I caught an editorial in that newspaper which I have here behind me. It is from Saturday, October 5. It is styled ''Negative Al Gore.''

I didn't put it up here to be negative to Al Gore. I put it up here because the editors of this newspaper have come to the conclusion, and have come to it rather firmly, that the President of the United States, George Bush, is not responsible for the current state of the American economy, nor did he do anything to cause the recession—how mild it was, how deep it was, how long it has lasted. He didn't cause it.

I would like to start first with a statement which I will print in the