

income is a poor proxy for determining both State resources and the low-income population. The Feinstein amendment will give States the option to choose a formula that is based on a combination of the State's total taxable resources and population below the poverty level.

The PRESIDING OFFICER. The Senator from Alabama.

MIGUEL ESTRADA

Mr. SESSIONS. Madam President, it is a sad day for the Senate today. Miguel Estrada, after having been nominated by the President to the Court of Appeals of the DC Circuit, after having waited 28 months, almost 2½ years, felt it imperative that he get on about his private business, his law practice. He has asked the President to withdraw his name. It is with great sadness that occurred.

For many in this body, Miguel Estrada is one of the finest nominees to come before this Senate. The American Bar Association evaluated him. This is certainly no rightwing group. They evaluated him and unanimously concluded he was well qualified for the Court of Appeals. Indeed, he is.

The sad thing about it was the ground rules of Senate confirmation have been changed. Miguel Estrada was a victim of a sustained filibuster. It was for the first time in history that a sustained filibuster had defeated a circuit or district court judge. He was the first one subjected to a filibuster in this Congress. He is the first one to be forced to withdraw because he has to get on with his life. And he had 55 votes in the Senate for an up-or-down vote and a like number, I am sure, for confirmation.

For the first time, 45 Senators have blocked and defeated a nominee. This is an unprecedented change in our Senate policy. It is something that is not good for this Senate. It has diminished the independence of the judiciary. It has diminished the power of the executive branch to nominate and it has harmed the Senate when we change the historical rule from 50 votes to 60 votes for a confirmation. It is not good public policy.

I ask why it is that this Senate, for all these years since the founding of this Republic, has not had a filibuster for one of these nominees? The reason is pretty clear. The Senators believe the Constitution suggests confirmation should be by majority vote. For example, the Constitution says the Senate shall advise and consent on treaties provided two-thirds agree and shall advise and consent on certain nominees, including judges. From that implication it is clear that two-thirds were required for advice and consent on treaties but only a majority for the judicial nominees. That is what we have done until this year. This plan to block nominees was designed after President Bush was elected and the Democrat Senators had a retreat with a number

of liberal law professors, including Lawrence Tribe, Cass Sunstein, Marcia Greenberg. These liberal professors they talked of changing the ground rules for confirmation and Democrat Senators decided to change the historic rules of this Senate and block more nominees.

Of course, President Bush nominated nine judicial candidates when he took office. Two were Democrats. One was a renomination of a Clinton nominee, a Democrat, and the renominated Clinton nominee was promptly confirmed. Nine out of the 11 sat. The Democrats had the majority in the Senate and they refused to bring those candidates up for hearing in the Judiciary Committee.

Finally, when the election occurred and one of the issues in the election was the obstructionism in the Senate by the Democratic majority and a new majority was constituted with the Republicans in the majority, they moved some of these nominees forward. Estrada was moved out of committee, Priscilla Owen and others were moved forward. We then found ourselves facing for the first time in history a filibuster of Miguel Estrada.

Let me mention some things about this extraordinary nominee. He was born in Honduras and came here as a teenager. He struggled with the language. He was able to get himself into Columbia University where he finished and graduated with honors. He then went to Harvard Law School where he was an editor of the Harvard Law Review, one of the highest honors for any graduating law senior. He then clerked for the Court of Appeals, the same level court he was nominated to. He served as a law clerk to a Court of Appeals judge in New York, as I recall, and then clerked for the Supreme Court. Very few lawyers ever get selected to clerk for a Justice of the United States Supreme Court. What a great honor. He was selected by Justice Anthony Kennedy, one of the moderate swing justices in the Supreme Court, as he is viewed.

After that, he took a position with the Department of Justice and he was in the Solicitor General's Office of the Department of Justice. The Solicitor General's Office is where the Department of Justice has the top appellate lawyers arguing the position of the United States of America in circuit courts and in the United States Supreme Court. What a great position. Most lawyers say the Solicitor General of the United States is the greatest lawyer position in the world. Every day you go to court and represent the United States of America in the highest court in the land.

Miguel Estrada was there for 6 years. Every year he was there he got the highest possible rating the Department of Justice evaluators give to an employee. This is particularly important to note. In 5 of the 6 years he was in the Solicitor General's Office, it was in the Clinton Department of Justice. He

served by far the great majority of his time in the Clinton Department of Justice and was given each year the highest possible ratings. Since then, he has been highly successful in law practice. He has argued as many as 10 or 15 cases before the Supreme Court. Most lawyers in America will never argue a case before the United States Court of Appeals, much less have 15 cases before the Supreme Court. He was selected for those arguments because he was known to be an extraordinarily skilled appellate lawyer.

I saw his testimony. He was open and candid and brilliant in his answers. I remember one Senator tried to pin him down and said, you are a strict constructionist, aren't you? Mr. Estrada said, I am not sure I would call myself that. And he said, the President wants to nominate strict constructionists and President Bush has nominated you so you must be one. First, he said, the President didn't say anything to me about that, but I would call myself a fair constructionist. I believe we ought to fairly construe the law as it comes before us. I don't use the word strict constructionist. He was open and candid with the people asking questions.

Then there was constructed an event and a circumstance that put Mr. Estrada in a bad light. It was deliberate and premeditated and calculated, in my view. The Democrat said, well, you served on the staff of the Solicitor General and you wrote all kinds of memoranda that were relevant to important issues before America. We demand you produce every memoranda you wrote while you were in the Solicitor General's Office. And he answered this exactly correctly, but I am not sure the American people and the press and those who asked questions paid attention to his answer. His answer was, Senator, those are not my papers. I was a lawyer in a law firm of the Department of Justice. The papers I prepared belong to the Department of Justice. I do not have the power to reveal to the public such private, legal memorandum from my client, the United States of America.

So the question was, then, well, let's have the Department of Justice produce them. And the Department of Justice was absolutely correct in saying unequivocally, no, we are not going to produce those documents. The reason is that those are confidential, internal memoranda of the U.S. Government involving litigation in cases in the United States.

In fact, it outraged former Solicitors General of the United States of both parties. All four former Solicitors General of the United States who had served under Democrat administrations wrote a letter that the Department of Justice should not reveal those memoranda, that it was work product and would chill free debate by young lawyers who were asked to submit written memoranda. And every other Solicitor General I know of, who is alive, Republican and Democrat,

agreed that the Department of Justice should not produce them.

So now we have this viewed as Mr. Estrada wasn't open with the committee because he wouldn't produce all these documents. How bogus can that be? That is really unfortunate, that Members of this Senate would actually suggest that Mr. Estrada somehow has the authority and should, even if he did have the authority, produce and turn over to the public documents that remain part of the work product of the Department of Justice. It would be unethical for him to do so. He should not do so.

So that is how we got into this, I suppose. But surely that is not a basis to turn down a nominee of this extraordinary ability. Why would they pick on him? Why would they construct this idea that he is somehow unqualified? It really baffles me. It is a matter I find difficult to fathom.

But I would just share a few things that strike me. Yes, he was a Hispanic. Does that mean Democratic Members of this body are prejudiced against Hispanics? I hope not. I would never accuse them of that and don't believe that is so. What I do believe is that President Bush had made clear that he would like to give Hispanics an opportunity to be judges and he would like to see a Hispanic on the Supreme Court of the United States. He made that clear. Everybody knows he would like to see that occur, if possible.

Here we were, 2½ years ago, nominating one of the most brilliant Hispanic lawyers, one of the most brilliant lawyers in America of any background, Miguel Estrada. He was nominated, and had he been confirmed back then as he should have been according to the American Bar Association, rating him unanimously well qualified, their highest qualifications, well qualified; he would have already had 2½ years of experience writing opinions, proving his skill and ability. At that point, I submit, he would clearly be one of the pre-eminent nominees under consideration for appointment to the U.S. Supreme Court. This is the quality of this man.

So, he has been denied an opportunity to achieve a prestigious appointment to the court of appeals, and that has in fact denied him the opportunity to again prove his excellent integrity, legal skill, and ability on that bench. And, who knows, maybe that is why some of those thought he would be a perfect nominee for the bench and they would just block him now. If that is so, that is wrong and should not have occurred. I am very frustrated about it.

I would also, just one more time, note that he had a majority of the Members of this Senate prepared to vote to confirm him—55 votes he had. Prior to this year, throughout the history of this country, that would have confirmed him easily to this position. So it was by a filibuster. We voted closure I think six, seven, eight times to try to get him up for an up-or-down vote, blocked each time by the proce-

dural technique of a filibuster that was never before used on a circuit judge in the history of this country. It is just really sad that that has occurred.

Let me just say this finally. President Bush wants judges on the bench who follow the law. He wants judges on the bench who care about the law, who believe they are not postmodernist relativists. He believes we have judges who can read words and give those words plain meaning and follow those words. That is what a judge should do. A judge is not empowered to make law. A judge is not empowered to impose their political views or to set public policy. That is not what a judge does. A judge rules on the law.

Make no mistake, a Federal judge is a lifetime appointment. They are not able to be voted out of office, as we can if we pass a bad law. We can be voted out of office. We are subject to the will of the public. But a judge is not. So what we want in a judge is one who follows the law and has the history and the discipline to show that he or she will follow the law. Miguel Estrada has that. In fact, that is his guiding legal philosophy, that a judge should show restraint, should follow the law and do the right thing, whether they agree with it or not. That is what we need.

Now we have judges who have declared the California three strikes law unconstitutional. They have been in effect for 20 years and no doubt are a major factor in the plummeting of crime rates in California and other States that had those laws. They are helping to reduce crime there. So we have Federal judges saying that is unconstitutional.

We have a Federal judge in the Ninth Circuit saying the Pledge of Allegiance is unconstitutional.

We have Federal judges just recently overturning 170 death penalty matters after juries and judges and appellate courts have ruled on them. They just blithely come in and say: We don't like the way you do this now, and we are just going to wipe out those death penalty decisions.

We have bizarre verdicts on litigation. Everybody knows about the coffee case and other things.

We are having hearings now on asbestos. The litigation over asbestos has gotten completely out of hand. What is occurring there is one of the saddest eras in legal history, in my view. Only 40 percent of the money paid out by the asbestos companies is getting to the victims. What a horrible stain on the legal system in America. We cannot defend that. These kinds of things impact the American economy. They drive up the cost of insurance. They drive up the cost of doing business. No nation in the world has the legal costs on their economy that this country has.

So we need judges with common sense. We need judges who will follow the law. We need judges who show fidelity to the rule of law. That is what President Bush wants. That is what Miguel Estrada is. That is what he has

committed his life to. And that is why they don't like him. It will mess up the game where people want the courts to do for them what they cannot win at the ballot box with elected representatives.

Now we have Priscilla Owen, also under filibuster. She made the highest possible score on the Texas bar exam, was one of the greatest lawyers in Texas, was elected this last time to the Texas Supreme Court with 87 percent of the vote, and is serving her second term, endorsed by every major newspaper in the State of Texas. She was rated unanimously well qualified by the American Bar Association. And they are filibustering her?

I will tell you something else. Priscilla Owen is quite capable of serving on the U.S. Supreme Court. Is that why they are picking on her? And Bill Pryor, the attorney general of Alabama, whom I know and have seen operate, one of the finest, most brilliant people I have known. I have never met a person who has more commitment to the rule of law, doing the right thing, evaluating matters on a legal basis, and doing what the law says regardless of politics, which is why he has, for example, the support of most of the Democrats in leadership in the State.

He has the support of four of the very top African-American leaders in the State, including Joe Reed, a member of the Democratic National Committee and vice president of the Teachers Union, Alvin Holmes, one of the most outspoken African Americans in the State legislature, Congressman ARTUR DAVIS, and Chris McNair, former county commissioner in the State's largest county and whose daughter was killed in that tragic church bombing event many years ago.

Those are the kinds of people who support Bill Pryor. He was editor in chief of the Tulane Law Review—a brilliant lawyer of the highest possible ethics and integrity, a man of deep religious faith, a man who has proven that he will follow the law regardless of what his personal beliefs are and has handled himself again in recent days in a very difficult situation involving the chief justice of the State of Alabama and the Ten Commandments. He has agonized over it. I know.

He has studied the law and he simply has done what Bill Pryor has always done. He has followed the law regardless of what people may say about it. That is his life. That is what he believes in. And that is what he will do if he is put on the bench. You can't find a person in America better qualified.

These filibusters unprecedented in the history of this Senate.

It is a very sad day that we are here today to see the success of the first filibuster of a circuit judge in history—to be successful with the withdrawal of Miguel Estrada. What a sad, sad day.

This Senate needs to think through what we have done. This knife can cut both ways. We do not need to establish this as a policy of this Senate.

I urge my colleagues to reevaluate what they have been doing and not to continue down this road because it is not going to go away lightly. Those on this side will use that same knife and use those same tactics in the future. We are not going to go away quietly on this when we see nominees of this ability and of this character and integrity—with sound judicial philosophies that believe in following the law and not using the bench as a forum for a personal agenda.

I conclude by expressing my appreciation to Miguel Estrada for offering himself in service. I hope he will have an opportunity in the future to serve this country which he has adopted in some other capacity—maybe even in this capacity in the future. He certainly is qualified. He would make a great judge at any number of levels. My respect for him after watching him testify and after seeing how he handled this difficult time has only increased.

I thank the President. I yield the floor.

The PRESIDING OFFICER. The Democratic whip.

Mr. REID. Madam President, I echo the statement I made earlier today following the statement by Senator ALLEN with simply this caveat: I would say that statement is totally accurate with the exception of the fact that we now have approved an additional judge.

Now the record stands at 146 judges approved during President Bush's Presidency, and 3 have been rejected. One hundred and forty-six to three is not a bad record.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Madam President, I would add that during the 8 years President Clinton was President, 377 judges were confirmed. This Senate voted down only one. Most of the time the Republicans were in the majority and we did not vote down his nominees. Forty-one were left pending when President Clinton left office. There were 54 left pending when former President Bush left office.

But anyway, I know we can talk about that off and on. But I did want to make that point.

MORNING BUSINESS

Mr. SESSIONS. Madam President, I ask unanimous consent that there now be a period of morning business.

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

APPOINTMENT OF CONFEREES—H.R. 6

The PRESIDING OFFICER. Under the order of 5-31-03, the Chair appoints conferees on H.R. 6.

The Presiding Officer appointed Mr. DOMENICI, Mr. NICKLES, Mr. CRAIG, Mr. CAMPBELL, Mr. THOMAS, Mr. GRASSLEY, Mr. LOTT, Mr. BINGAMAN, Mr. DORGAN, Mr. GRAHAM of Florida, Mr. WYDEN, Mr. JOHNSON, and Mr. BAUCUS conferees on the part of the Senate.

HONORING GENERAL RAYMOND G. DAVIS

Mr. MILLER. Madam President, I rise today to reflect on the life of a great American, a legendary marine, and a native Georgian. I refer to GEN Raymond G. Davis, who passed away yesterday in Georgia at the age of 88.

General Davis was one of this country's greatest military heroes. He courageously served his country as a marine in World War II, in Korea, and in Vietnam during his 33 years of military service. General Davis was a noble veteran, tireless advocate, and distinguished recipient of the Medal of Honor.

I know we have a lot of very important things going on in this Chamber today, but I don't think it is too much to take 3 or 4 minutes to remember one of the great battles in military history and the role this man played in it. I refer to the Chosin Reservoir in Korea, known as the Frozen Chosin. In the biggest shock of the war, 300,000 Chinese Communist soldiers crossed the Yalu River from China into North Korea and trapped 8,000 members of the first marine division at the Chosin Reservoir. There was only one way out, an icy road that twisted around steep mountains. If the Chinese gained control of it, all of the marines would be annihilated.

Then LTC Raymond Davis was a 35-year-old Georgia Tech graduate with already two Silver Stars for heroism in Korea, and the Navy Cross, our second highest award, for gallantry at Peleiu. He commanded a battalion of marines faced with an impossible task: to get the marines on Fox Hill linked up with them or the thousands would be trapped at the reservoir and would be doomed.

That afternoon, at 24-below-zero weather, the battalion began struggling up the side of a steep ridge. Davis's men climbed 1,000 yards before the Chinese opened up. The marines kept clawing their way, inch by inch, up the icy slopes. They battled enemy soldiers who seemed tucked into every crevice. Atop the first ridge, the men's sweat froze on their eyebrows and beards. They put their wounded on stretchers and pushed on. The men rose and trudged toward still another ridge. All along, snipers picked at the slow exposed line, but there was no time for the marines to stop and fire back. They went downhill by sliding on the ice. Davis was so numb that three times he forgot a compass reading taken only moments before.

At 4 a.m. this great Georgian halted his unit. The battalion was close to Fox Company, but it lost radio contact. Trying to reach that unit in the darkness without communication might get them caught in a crossfire. They would rest until daybreak. As Davis started to nap, a sniper's bullet pierced his sleeping bag and grazed his head. He tried again to sleep.

By first light there was still no radio contact with Fox Company and Davis

feared the unit had been overrun. Then came word from his radio operator: Colonel, he announced, we have Captain Barber on the radio.

As the two officers talked, still hundreds of yards apart, both fought back tears. Late in the morning, Davis's battalion arrived atop Fox Hill. The Chinese had lost the battle for Toktong Pass.

Within hours, two marine battalions were moving through the pass away from the Frozen Chosin. Many icy miles and more bitter fighting lay ahead before the marines reached the port, but the stand at Toktong Pass had opened the way.

In 5 days, Fox Company had killed 1,000 of the enemy. Only 82 of the 220 marines were able to walk off that hill. In 2 weeks, the first marine division moved over icy roads and ridges through eight Chinese divisions. The Americans brought out all their wounded, their dead, and the equipment. On the way, they killed 25,000 of the enemy. The marines lost 730 of their numbers.

Such is the legacy of GEN Raymond Davis and those brave marines. General Davis received the Medal of Honor, a symbol of unusual human courage above and beyond the call of duty for his valiant efforts during the war. Over 1 million Americans served in Korea, and 131 of those were named recipients of the Medal of Honor. After the general's passing, only 36 of them live to wear it today. That medal is a tribute to perhaps the only thing truly noble in the horror of war.

Although General Davis earned this Nation's highest military honor for valor while on active duty, his service to the country was far from over. Over the last 30 years, in a civilian capacity, General Davis has continued to lead in ways that few other Americans could match. Since his retirement, General Davis became a pillar of the community, working diligently on behalf of all of our Nation's veterans.

Beginning in 1987, first as vice chairman and then later as chairman, General Davis was the one who directed the efforts of the Korean War Veterans Memorial Advisory Board, and it was his determination and personal initiative that led to the approval of the Korean War Veterans Memorial design and its construction and finally its dedication in July of 1995.

The Nation's citizens, and in particular all Korean war veterans and marines and their families, are indebted to Raymond G. Davis for his inspired leadership and service. In war and in peace, as an active duty marine and as a private citizen, GEN Raymond Davis' outstanding courage, unswerving devotion to duty, inspiring leadership, and sound judgment have represented the highest traditions of military service and citizenship. This man was a true American hero.