United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 108th CONGRESS, FIRST SESSION

Vol. 149 WASHINGTON, TUESDAY, FEBRUARY 11, 2003 No. 25

Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER

The guest Chaplain, Dr. Dale A. Meyer, Concordia Seminary, St. Louis, MO, offered the following prayer:

Enter into this chamber, O Spirit of God, this chamber of my heart and the hearts of all who sincerely pray with me. O Most High, You know the feelings and thoughts of our hearts before they ever come to our lips. Enter in and work in us the reverence that comes from a humble acknowledgment of Your Lordship. Enter in with the inspiration of Your love for each of us, a love to which prophets, evangelists, and apostles have borne witness for our temporal and eternal good. May that love constrain us to service in this Senate that will result in greater good for our beloved Nation.

Spirit of our Creator and Redeemer, deliver us, we pray, from every evil of body and soul, property and honor this day and until that day when we stand before Your eternal throne. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDING OFFICER (Ms. MURKOWSKI). The majority leader is recognized.

SCHEDULE

Mr. FRIST. Madam President, today the Senate will continue the consideration of the nomination of Miguel Estrada to be a DC Circuit Court judge. The deliberations on the Senate floor yesterday were hearty and robust, and I believe many Senators have now had an opportunity to express their views. It is my objective to reach an agreement with the Democratic leader regarding a time for vote on this nominee.

The schedule for this week, and until the Estrada nomination is completed, is dependent upon reaching an agreement with respect to the pending nomination. I will continue to discuss with the Democratic leader the options for completing work on this important nomination. In the absence of any agreement, the Senate should expect very late evenings. My objective is to complete this nomination process with a vote this week.

The Senate also needs to complete action on the omnibus appropriations conference report when it becomes available. The conferees worked well into last night on the conference report, and I will be speaking to the chairman of the Appropriations Committee as to their success in closing out that conference. These are two very important pieces of business which must be addressed this week.

As a reminder, the Senate will recess today from 12:30 to 2:15 in order to accommodate the weekly policy luncheons.

Finally, I would forewarn all Senators that the Senate will remain in session in order to complete the Estrada nomination as well as the omnibus conference report.

I thank all Senators for their attention and look forward to the debate over the course of today, and hopefully we can reach some agreement, either this morning or this afternoon, on a time certain for a vote.

Mr. REID. Madam President, while the majority leader is on the floor and also the President pro tempore is seated in the Chamber, the chairman of the Appropriations Committee—the same person—while one may disagree with some of the policy stands the chairman of the Appropriations Committee has taken, one has to admire the work he did last night. It was really remarkable that he had every chair and ranking member of the subcommittees there, including the chairs of the full committees and ranking members, and was able to work through that myriad of information. It is now down to where it is really close to something we can vote on this week.

While the chairman of the committee is here, I wanted to acknowledge in front of his leader the remarkable job he did last night. We look forward to some productive work this week. These are two most important matters. I am sure the Senator and our leader will have a conversation in the immediate future about the Estrada nomination.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA

The PRESIDING OFFICER. Under the previous order, the Senate will now go to executive session and resume consideration of Executive Calendar Order No. 21, which the clerk will report.

The legislative clerk read the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Madam President, I have heard so much misinformation

about Mr. Estrada here on the floor of the Senate for the past few days, I hardly know where to begin to correct the record. It is simply amazing to me that some of my Democratic colleagues claim they cannot support Mr. Estrada because he lacks judicial experience or because he hasn't been a law professor or because he has not published extensively. Let me remind my colleagues there are more than a few nominees confirmed as circuit judges whose record did not include judicial experience or extensive scholarly writings but whom they managed to vote for and confirm anyway. Yesterday I listed 26 circuit court of appeals judges who had no judicial experience when they were nominated but were confirmed anyway. That is just a small fraction of all those who never had judicial experience before the last number of years.

Don't get me wrong. Even though they have had no judicial experience, these are all very qualified judges who deserved confirmation. But I don't believe any of them clerked for a Supreme Court Justice or argued 15 cases before the United States Supreme Court, as has Mr. Estrada.

Take, for example, Clinton Ninth Circuit nominee Sidney Thomas. He graduated from the University of Montana Law School in 1978 and went straight into private practice with a firm in Billings, where he remained for his entire pre-judicial career. Of the 10 writings or speeches he listed in his questionnaire, four of them consisted of outlines of presentations. The fifth was copyrighted while he was still in college and so could not possibly present his legal views. Still another appears to be a study guide for a college class he taught. Given this record, I would not have expected a review of the hearings transcript to reveal demands by my Democratic colleagues for access to internal memoranda Judge Thomas prepared at his law firm, memoranda that are commonly known as attorney work product. Instead, a review of his hearing transcript reveals a grand total of less than two pages of questions, all of them asked by a Republican committee member. The Democratic committee member declined to ask Judge Thomas any questions, despite a record that includes no judicial experience and limited published writings.

Let me read you some of the exacting questions Judge Thomas was asked at his confirmation hearing and some of the answers he gave.

He was asked:

Would you state in detail your best independent legal judgments with regard to existing Supreme Court precedent on the constitutionality of capital punishment?

Judge Thomas replied:

Well, I believe that the Supreme Court has spoken, I think quite appropriately, on the death penalty. I do not possess any moral or religious convictions which would cause me to not apply the death penalty in an appropriate case.

This answer was apparently sufficient to satisfy the members of the committee that Judge Thomas would follow the law regardless of his personal convictions about the death penalty. But when Miguel Estrada gave similar answers to questions from Democratic committee members, he was accused of not being forthcoming. That is a double standard: We will treat President Clinton's nominees differently than we will treat President Bush's nominees.

Judge Thomas was also asked:

Do you believe the Federal Constitution contains . . . a right to privacy?

He replied:

Well, the Supreme Court, again, has spoken on that. There is no explicit right to privacy in the Federal Constitution. Montana has a constitutional protection for privacy. That is another area where I think the appellate courts have to proceed very carefully in light of the Supreme Court precedent in the area.

There were no followup questions demanding to know his personal opinion on whether there is a right to privacy in the Constitution. His acknowledgement of controlling Supreme Court precedent, coupled with his statement that ''courts ought to move very cautiously'' in this area, were deemed sufficient to confirm him, as I think they should have been.

I could go on to discuss other confirmed circuit judges with backgrounds similar to Judge Thomas's, but I think the point is clear: Miguel Estrada is being held to a different standard, even though his qualifications are similar to—or exceed—those of other confirmed circuit court of appeals judges.

Let me next turn to the allegation that Mr. Estrada was not sufficiently responsive to questions he was asked at his hearing.

Let's get to the heart of the matter. The real complaint of some of my Democratic colleagues is that no plausible reason to oppose Mr. Estrada's nomination exists. But instead of saying this, they complain that Mr. Estrada refused to criticize the reasoning of settled Supreme Court precedent.

Of course, if Mr. Estrada is confirmed as a lower court judge, he will be bound to follow Supreme Court precedent regardless of whether he is critical of it. This was what he testified he would do if confirmed, and this was the only responsible answer to the questions he was asked about specific Supreme Court cases.

During the course of this debate, I have already mentioned the statements Lloyd Cutler has made on this point, but I believe they are worth repeating because some of my Democratic colleagues keep resurrecting the spurious allegation that Mr. Estrada was not forthcoming at his hearing.

Mr. Cutler, as we all know, served this country well as counsel to Presidents Carter and Clinton. He also served on two national commissions that addressed problems in the confirmation process.

This chart I have in the Chamber shows what he actually said:

Candidates should decline to reply when efforts are made to find out how they would decide a particular case.

That is the leading Democrat lawyer in this town. He has been Chief Counsel to two Presidents, two Democratic Presidents. He is highly regarded as a constitutional expert and a great lawyer not only in the area of Washington, DC, but throughout the country. He is a fine man. I have always respected him, and I do today.

So regarding judicial nominees, he stated, in unequivocal terms, that:

Candidates should decline to reply when efforts are made to find out how they would decide a particular case.

In his opinion:

What is most important is the appointment of judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as ''judicial temperament.''

Mr. Estrada's academic achievement, his professional accomplishments, the letters of support we have received from his colleagues—both Democrat and Republican—and his unanimously well-qualified, highest rating by the American Bar Association, all indicate that Mr. Estrada fits this description and deserves our vote of confirmation.

At the same hearing at which Mr. Cutler made his statements about the appropriate scope of the inquiry for confirming judicial nominees, another legal luminary, Boyden Gray, testified. Mr. Gray, of course, served as White House Counsel in the first Bush administration. During his testimony, he told us that two Democratic Senators, who are former Judiciary Committee chairmen, met with him very early in the administration to let him know in no uncertain terms that if the White House were caught asking any potential nominee any questions about specific cases, that nominee would be flatly rejected. Now, that is arrogance at its height, to tell Boyden Gray that or to have that attitude. Surely, the White House should be able to talk to their potential nominees about what their viewpoints are before they nominate them.

On the other hand, Mr. Gray, of course, is one of the most respected people in Utah. Again, Boyden Gray is one of the great lawyers in Washington; like Mr. Cutler, he is highly respected, has been in very responsible positions, and has fulfilled his service to the U.S. Government very well.

As Mr. Gray pointed out, that same philosophy is reflected in the Judiciary Committee questionnaire, which all judicial nominees must complete before the committee will act on their nominations. The questionnaire asked the following:

Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such a case, issue or question?

The clear goal of this question is to deter any White House from getting commitments from potential nominees on how they would rule on specific cases, or commitments that they would overrule certain Supreme Court decisions.

I happen to know the Republican White Houses have acted honorably with regard to this responsibility. I remember during the Reagan years, some of our friends on the other side were constantly questioning whether the White House was trying to influence its judicial nominees during the Reagan administration to vote a certain way once they got on the courts.

I happen to know that that was totally irresponsible on the part of our colleagues because the person who vetted all of these nominees happened to be a former staffer of mine who is now on the Michigan State Supreme Court and one of the great jurists of this country. I know he never asked or told people what they should be doing with regard to their future, after confirmation, on any particular court.

It now appears that some Senate Democrats want to forbid the White House from asking nominees how they would rule on specific issues while reserving that right for themselves. Call it what you will, but this is a double standard if I have ever seen one. More fundamentally, it threatens the very independence of the Federal judiciary that our constitutional system of checks and balances was designed to preserve.

I cannot believe some of the questions that have been asked and some of the statements that have been made about how unresponsive Miguel Estrada was when they were asking him questions about how he would rule when he became a member of the Circuit Court of Appeals for the District of Columbia. Now, they might say, ''We did not directly ask that,'' but that is what was behind it.

A number of Senators on the other side have indicated they need to know the philosophy of these nominees. I think that is irrelevant, as long as the philosophy is that they will uphold the precedents of the courts above them. And to be honest with you, this is going way too far in some ways.

Let's face it, too many questions in the confirmation hearings of President Bush's judicial nominees seem calculated politically to manipulate the judicial selection process and to frustrate the appointment of judges who would refuse to follow a potentially popular course when the Constitution and settled judicial precedent provide otherwise. Miguel Estrada was right not to fall into the trap of criticizing particular Supreme Court cases that he may be called upon to rely upon as a sitting Federal judge.

My colleagues should be commending him for this, not proffering it as a reason to vote against his confirmation. Unfortunately, that is basically their argument, that they should vote against his confirmation because he has abided by what really are rules that have long been time honored in the Senate.

I yield the floor.

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. DURBIN. 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. DURBIN. Madam President, this is a historic debate on the floor of the Senate. It is rare in our history that the Senate has considered the nomination of the President of the United States for a circuit judgeship and at least the prospect of a filibuster is looming. It is an interesting issue historically that the Senate would reach this point that the minority in the Senate—in this case, the Democratic side of the aisle with 49 Members—would suggest to the majority party that we will stop this nomination by filibuster. I have asked my staff to take a look historically to find out how often that has occurred. It is extremely rare. Maybe the Senator from Utah can illuminate my knowledge. But I am told only in the case of Abe Fortas, who was being suggested as Chief Justice, was a filibuster suggested. The obvious question by those observing the debate is, Why? Why at this moment in time, with this nominee, is the Senate, maybe for the first or second time in its history, considering a filibuster?

Many of us who serve on the Judiciary Committee believe this nomination and this debate is so historically significant that we must consider an extraordinary response by the minority of the Senate. It certainly goes beyond the question of Miguel Estrada, although I will address what he has said and what he has testified during the course of our committee hearing. But it has been my good fortune to serve now for my fifth year on the Senate Judiciary Committee, both under President Clinton, a Democrat, and President Bush, a Republican; both under Chairman HATCH as Republican chairman of the committee and PATRICK LEAHY of Vermont as the Democratic chairman. I have watched the ebb and flow of this process.

I think we have to stop and reflect for a moment about why we are at this moment considering this nomination and taking it so seriously. It goes to our oath of office. When each of us is sworn into the Senate, we walk down this aisle and stand before the Vice President of the United States and swear to uphold the Constitution. And within that Constitution is an explicit delegation of authority to the Senate not to give blanket approval to any President's judicial nominees but to advise and consent. It is natural that the President's party in Congress will always say forget the advice part, just consent, and let us get on with business. But, like it or not, we understand the responsibility of the Senate is to ask the hard questions, to say if any nominee before you will receive a lifetime appointment to the Federal judiciary, particularly beyond the district level, the lower court level, to the circuit level where, in fact, many policy decisions affecting America are made, we want to know who you are. We want to know what you think. We want to make certain we are putting a person in this position of responsibility who can meet the challenge.

The obvious questions are there. We certainly ask whether a person has a background and a knowledge of the law, whether they have a reputation for honesty, and whether they have appropriate temperament. But other questions arise as well, questions as to whether this person seeking a policymaking position on the court who will stand in judgment of laws passed by the Congress is a person of moderation and is reasonable in their outlook. We cannot reach a conclusion on this simply based on press reports. We have to ask the questions and seek the answers. That has been done time and time again with nominees from Democratic Presidents as well as Republican Presidents.

What is troubling to most of us who come to this floor and suggest there is a problem with Miguel Estrada's nomination to the District of Columbia Circuit Court is he was so purposefully vague and so secretive in terms of his own point of view and his own philosophy. This is a man who has academic and legal credentials. He is not a newcomer freshman from a bar exam coming before us. He is a man who, across the street from this building, sat as a clerk in the Supreme Court. He has advised the Justices of the Supreme Court on some of the most important legal issues of our time.

Yet, when we asked him basic and fundamental questions, I was stunned by his efforts to really stonewall, to basically refuse to tell the Senate Judiciary Committee where he stands. In light of that, what is my responsibility as a Senator? When this nominee refuses to disclose the most basic information about who he is and what he believes and what is in his heart, am I at that point to step back and say let us give him the benefit of the doubt; if he doesn't want to answer the questions, so be it? I am not going to do that, and I will tell you why.

As a Member of the House of Representatives, I watched the Clarence Thomas hearings for the Supreme Court. I was stunned when then-nominee Clarence Thomas was asked his views on the issue of abortion, a major social policy and a major legal issue. He wasn't asked on a specific law whether he would rule one way or the other but just on the issue of abortion. Clarence Thomas said he had not really thought about that issue very much.

That is an incredible statement for a man seeking a position on the Supreme Court in two respects. Clarence Thomas was a Catholic seminarian who went to a Conception monastery in Missouri known as Conception Abbey. To think you could go through that training and never have a view on the issue of abortion is absolutely incredible. To think you can be a law student, as Clarence Thomas was when Roe v. Wade was decided, and never have discussed the issue just defies any credibility.

It, frankly, established a line of attack by those who want to go to the highest courts of the land and avoid the tough and hard questions.

The Clarence Thomas tactic and strategy is being followed today by Miguel Estrada. CHARLES SCHUMER, Senator from New York, asked him a basic open-ended question which you can ask any law student in their first or second year. When you look at the history of the Supreme Court of the United States and 200 years of decisions made by the men and women on the Supreme Court, is there one decision you would disagree with? Is there one you could point to and say the Court made the wrong decision? I hope most Americans would say some are fairly obvious; the Dred Scott decision, which basically recognized slavery in this country; Plessey v. Ferguson, which said separate but equal is a fair civil rights standard—the list goes on and on.

Yet, Miguel Estrada, with all of these academic decisions and all of his experience before the Supreme Court, refused to name one decision by the Supreme Court he would disagree with. What does that tell you? That this man is such a blank slate it has never crossed his mind that a decision by the Supreme Court over time has been found to be wrong for this United States, or a decision by the Supreme Court has been found to be violative of constitutional values and principles?

What is going through his mind? The Clarence Thomas tactic—don't answer anything, don't say a word.

I asked Mr. Estrada a question. I sent it in writing to give him a chance to think about it. I asked, In terms of judicial philosophy, please name several judges, living or dead, whom you admire and would like to emulate on the bench.

Listen. If that were a question in a constitutional law course, you would breath a sigh of relief saying, Thank goodness, this is easy. I ought to be able to find one Justice, either liberal or conservative, that I agree with, and maybe one on each side.

He said there is no judge, living or dead, whom I would seek to emulate on the bench in terms of judicial philosophy, or otherwise.

It is breathtaking. This man wants to be taken into the Federal judiciary in the second highest court of the land for a lifetime appointment and is so cautious and so careful he can't name one Supreme Court decision he disagrees with in the history of the United States, and can't name one judge, living or dead, whom he would seek to emulate on the bench.

What does that tell you? It tells you the Estrada nomination is making a mockery of our constitutional responsibility in the Senate.

He has refused to disclose the legal memoranda he has written as a person working at the Department of Justice and for the court. He has refused to answer the most basic questions. And he comes to us and says: Take it or leave it.

We hear that our opposition to him clearly must be because he is a Hispanic, maybe conservative in his views. Excuse me. As a member of the Judiciary Committee, I have repeatedly voted in favor of conservative nominees from the Bush White House. I understand this is the President's prerogative, but I have tried to find in each of them a reasonable approach to the law and a reasonable understanding of the philosophy of law which will give them a chance to be at least moderate in their approach on the bench. That is something all of us should seek to do.

I will have an opportunity later this morning to come to the floor.

Mr. REID. Will the Senator yield for a question?

Mr. DURBIN. I am happy to yield.

Mr. REID. I ask the Senator from Illinois, who had a long and impressive record in the House of Representatives, is he aware of the stand that the Hispanic caucus has taken on Miguel Estrada?

Mr. DURBIN. I am. It is instructive that this Hispanic nominee to such a high court is opposed by the Hispanic caucus. They have sat down with Mr. Estrada in private and asked him questions about his views on issues, and they have come out in opposition to his nomination. There are many—myself included, and I have appointed Hispanics to the Federal bench in Chicago—who believe there should be more Hispanic nominees. Under the Clinton administration, quite a few nominees were brought before the committee, and many were approved. That should continue. But doesn't it tell you something that this high level, high profile appointment is opposed by the Hispanic caucus?

Mr. STEVENS. Will the Senator yield for a question?

Mr. DURBIN. I am happy to yield.

Mr. STEVENS. Is the Senator aware that Republican Members of the House of Representatives who are not in that caucus because it is purely a Democratic caucus do support this nominee?

Mr. DURBIN. There are those who support this nominee.

Mr. STEVENS. I mean in the House of Representatives. The Senator is trying to leave the impression that people of Spanish background in the House of Representatives all oppose this nominee.

Mr. DURBIN. I didn't say that. I said, if you check the record, that the Hispanic caucus has come out in opposition.

Mr. STEVENS. Which is all Democrats.

Mr. DURBIN. At this point, the vast majority of those serving of Hispanic origin are Democrats.

Mr. STEVENS. It is all Democrats.

Mr. DURBIN. I am sure the Senator from New York will catalog all the Hispanic organizations that oppose this nominee. It is not just the Democratic members of the Hispanic caucus. I see my colleague has come to the floor. I yield to the Senator from New York.

The PRESIDING OFFICER (Mr. CORNYN). The Senator from New York.

Mrs. CLINTON. Mr. President, I appreciate the many points made by my colleagues with respect to this nomination. As I have listened to the debate, not having been a member of the Judiciary Committee, I have tried to educate myself on what this is all about. I put myself into the position of somebody at home who maybe just has turned on C–SPAN or is flipping channels and sees us talking about something. They are trying to understand what this is all about.

I thought I would come to the Chamber and perhaps talk a few minutes about what I think it is about and to try to answer some of the questions that might be in the minds of New Yorkers and Americans.

First, it is about the nomination of a gentleman to become a judge on what everyone, regardless of what party you are or where you live in the country or whether or not you are a lawyer, believes is the second most important court in our land. Everybody knows under our system of government the Supreme Court is the supreme court. It is the most important. But as we have gone through many decades of courts hearing cases, of new causes of action for people to be able to bring cases, what has emerged very clearly is that because the Supreme Court cannot take every case that has to be finally resolved one way or the other, many of the most important cases that are really significant to people living from one end of our country to the other are finally decided in the District of Columbia Court of Appeals.

This is the court that sits here, and it has some special jurisdiction about environmental matters and labor matters and energy matters. This is a really big deal court. This really matters. It is not just any court. It is the DC Court of Appeals.

All of our courts of appeals are important and because as you go up the Federal court system, you start with all of the district courts that are in every State and sometimes, depending upon the size of the State and many parts of the State and decisions there, if you are not satisfied with them, get appealed to the courts of appeal. It is like a pyramid. It starts narrowing because the numbers of cases that can be heard, the kinds of issues that can be heard begin to narrow because, clearly, choices have to be made.

Not everybody who starts a lawsuit in a Federal district court will be able to get to the court of appeals. Even fewer will get to the Supreme Court.

When we face a decision of giving someone a lifetime job, we have to take that seriously. We have to take it seriously whether it is a district court or a court of appeals or the Supreme Court. Actually, that is the way our Constitution set it up.

If the Constitution, which I think is, other than the Bible, the most amazing document the world has ever seen, if the Constitution meant for the President to say OK, this is who I want to sit on that bench, and just pick out any person who the President chose and just send them to the bench, the Constitution would have said that. But that is not what the Constitution says. The Constitution very clearly sets up what we call a balance of power. That is an important concept. That is critical to how successful we have been as a nation. It is absolutely fundamental as to our democracy continuing to function over all these many years because we have a balance of power.

We know human beings are fallible. We know that every one of us is flawed, and people get an idea that they are bigger than they should be; they want more power. And we get this balance of power in our Constitution which has worked extremely well for our country.

Critical to that balance of power is the role that the Senate plays in advising and consenting with respect to the President's nominees for the Federal court. It is right there in the Constitution. This is not something that Democrats or Republicans have made up for the purpose of this debate. It is fundamental to our Constitution.

As a result, those of us who are honored to serve in the Senate—and there haven't been very many over the course of our history; fewer than 2,000 people have sat in this most important deliberative Chamber in the history of the world—are bound by the Constitution. We take an oath to the Constitution. We want to defend and protect the Constitution.

Therefore, when we look at our duties, among our most important duties are advising and consenting when it comes to judicial nominees for lifetime positions on the courts established under our Constitution.

All of us take that responsibility seriously. But whether we are confronted by a nominee to the DC Court of Appeals or certainly, if we are confronted by a nominee to the U.S. Supreme Court, maybe it keeps us up a little longer at night. It makes us feel even more strongly that we have to make sure we are doing the right thing. We have to ask the hard questions. We have to get the information. Because once we sign off on it, that person is there for life.

It would be like somebody hiring someone to do an important job. You want to know that the person you are hiring to be a doctor or nurse in your hospital, or to supervise the construction of your house, that these are people qualified, able to answer your questions, that you confidently believe can get the job done.

That brings us to what we are debating today, a very important court, lifetime appointment, second only to the Supreme Court in the number of important cases decided, rooted in our Constitution where we as Senators, representing the constituents we serve, are required, are duty bound under our Constitution to advise and consent with respect to the President's nominations.

Now, I have voted for many judges since I have been in the Senate over the last 2 years, and those judges are not people, by and large, I ever knew personally or with whom I had any direct dealings. But the Judiciary Committee, which consists of Republicans and Democrats, is charged with the responsibility of doing the work of trying to figure out whether somebody is qualified and whether they should get this lifetime appointment. They are the first of our colleagues to advise and consent, or advise and not consent. I know the members of the Judiciary Committee on both sides of the aisle, and they take that responsibility very seriously.

With respect to Mr. Estrada, it has been a hard task to fulfill the responsibilities entrusted to us in the Constitution to advise and consent because there is no information. It is as though somebody walks into the hospital and says: I want the very best doctor you can give me for the condition that ails me, and I want to know where that person stands on the procedures he is going to use on me; I want to know what he thinks about postoperative treatment, I want to know what drugs he believes are best, and I want to know where he ranks in terms of his belief about whether or not I can be cured. Well, I am sorry we are not going to give you that information. Here is your doctor; you take him.

We are faced with a nominee who has thus far refused to answer legitimate questions about what kind of a judge he would be, where he stands on the great issues of our time and of the past, what his positions are in thinking about these fundamental rights we cherish as Americans, whom he respects or admires on the judiciary already, or with whom he would compare and contrast himself. We cannot get answers to any of those questions. I don't necessarily hold Mr. Estrada responsible for that. I know a little bit about the confirmation process. Having spent some time on the other end of Pennsylvania Avenue, I know he is doing what he has been told to do. He has been told to sit there, don't say anything, don't answer the questions, dodge, duck, don't leave any record, don't let anybody pin you down, and, boy, we are just going to go right through the opening that is given to us and make up this case that will get you on the circuit court.

Well, I suppose that is a strategy, but it is an unconstitutional strategy. It is a strategy that is absolutely contrary to what the Founders intended when they spent all those hot days in Philadelphia writing the Constitution. They expected advise and consent to actually be the responsibility of Senators. How can you advise and, certainly, consent if you cannot even get basic information about where someone you are going to give a lifetime job to stands on all these important issues?

It is not as though members of the Judiciary Committee didn't try. They certainly tried. Led by my colleague and friend from New York, Senator SCHUMER, they tried every which way they knew. You have already heard this morning from Senator DURBIN of Illinois how questions were phrased and, if he could not get an answer from Mr. Estrada, how they would be rephrased, trying to get some information. It was a classic stonewall; there is no information, no record, nothing to which anybody can point.

Now, that puts a Senator in a very difficult position. If you are just going to do what the White House tells you to do, what the President tells you to do, without regard to your constitutional duty to advise and consent, then it is an easy issue; you stand up, salute, and you vote, and that is it. But if you take seriously your constitutional duty, then it is not so easy. I have to go back to New York, and people will say: What kind of a judge do you think this will be on the court that hears all these important issues? I have to say I don't have a clue because we cannot get any information about him. We cannot discharge our constitutional duty to advise and consent.

I know my friends on the other side of the aisle say: Well, there is no information; this man is a blank slate; he has never been a judge; we have no record; he has never been a law professor; he hasn't put a lot of his thoughts down in writing; so you have to take what you see. Here is this gentleman, and you just have to take it on face value that he will fulfill the rather awesome responsibilities for which he has been nominated.

I just don't think that is good enough. I am just amazed that my friends on the other side of the aisle are willing to abdicate the Senate responsibilities embedded in the Constitution, because when you stonewall the Judiciary Committee, when you refuse to answer questions, when you act as if you just came out of nowhere and don't have an opinion on anything, everybody knows that is a charade. Everybody knows that. That is what you were told to do in the White House; therefore, you are sitting there, not giving an answer, because if you gave an answer, even some of the Republicans, people of the President's own party, might be disturbed.

I went back and looked at some of the questions that were asked. I have not been in law school for a very long

time, but I cannot imagine any law student who, with a straight face, could say I don't have an opinion on any Supreme Court case—not one since the beginning of our Republic. I don't think that is a person who belongs on the appellate bench. If you don't have an opinion, move out of the way and let somebody who has opinions, who understands the law, who understands the Constitution, who knows what the Supreme Court has decided—let that person take the position on the appellate bench.

It is hard to imagine someone sitting before the Judiciary Committee and saying he has no opinion on major Supreme Court cases. I find that, frankly, unbelievable. Nobody believes that. My colleagues on the other side are willing to go forward with this charade and pretend that the man has no opinions when everybody knows he has opinions. He could not be in the position he is in without opinions.

I pulled a quote from Chief Justice Rehnquist which I think really bears on this. Here is what Chief Justice Rehnquist had to say:

> Since most justices [you could substitute ''judges'' as well] come to this bench no earlier than the middle years, it would be unusual if they had not by that time formulated at least some tentative notion that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual but extraordinary if they had not at least given opinions as to constitutional issues in their previous legal careers.

Well, that is not me talking. That is Chief Justice Rehnquist. I think you could certainly conclude from that that this nominee must be, therefore, extremely unusual—so unusual that I don't think he deserves to be confirmed to the bench. Someone who has no opinions clearly does not deserve the kind of responsibility and honor that this appointment suggests.

Mr. DURBIN. Will the Senator yield for a question?

Mrs. CLINTON. Yes.

Mr. DURBIN. Is the Senator familiar with the statement made by the chairman of the Senate Judiciary Committee, Senator HATCH, before the Federalist Society when he said:

> Many of President Clinton's nominees tend to have limited paper trails. Determining which of the President's nominees will become activist is complicated and will require the Senate to be more diligent and extensive in its questions of a nominee's jurisprudential views.

Mrs. CLINTON. Mr. President, I have heard about that, I respond to my friend from Illinois. There is an old colloquial saying: What is good for the goose is good for the gander. It seems to me, if that is the standard the current chairman of the committee adopted in previous years, then for the sake of consistency that ought to be the standard today. But, of course, that is not what this is all about, as my good friend from Illinois knows.

What was an appropriate standard in the previous administration, when I believe the President nominated mainstream people willing to answer questions, willing to present opinions, is no longer applicable now that there is a different President. I think that is a very dangerous precedent, and I do hope that Americans understand this: That the Constitution does not change from administration to administration.

The advise and consent role stays there for the Senate to exercise. If the Senate willingly abdicates this role and decides, I have a President of my own party in the White House now, so I better not ask any questions because I may not like the answers, that is, I believe, a direct repudiation of our constitutional obligations.

I know my good friend from Illinois asked a number of questions of Mr. Estrada seeking some enlightenment, some information on the basis of which the Senator from Illinois could exercise his advise and consent role. The best I can determine, it is very hard to see that the Senator got any answers.

I know in previous years, with many of the same people on the committee, very specific, explicit questions were asked of nominees. I know that many of the nominees who were nominated by President Clinton were asked very detailed questions about their views of Supreme Court and circuit court cases, and to the best of their ability, those who received hearings which, of course, was not everyone who was nominated by the President, but those of President Clinton's appointments who received hearings felt duty bound to answer those questions, and they did so. They were asked questions such as: Please define judicial activism. Do you agree with the Supreme Court's decision in a specific case, such as United States v. Morrison? If you were a Supreme Court Justice, under what circumstances would you vote to overrule precedent in the Court? And on and on—very specific questions about the Constitution, about our Nation's laws, about Supreme Court decisions.

The nominees from President Clinton believed that was their obligation, and that is what they were instructed to believe from the other end of Pennsylvania Avenue.

Unfortunately, many of them were not even given hearings and many who were given hearings were not given votes, and even some who were given votes were never brought to the floor. That is then. What I am worried about is now and how we are going to discharge our constitutional responsibilities.

If one looks at the long list of people who have appeared before this committee in the past, it has always been the practice to seek information that committee members thought would be relevant to exercising their constitutional duties, to make sure this person at least had an opinion about the Supreme Court decisions, to make sure this person was not just someone sitting there to fill a chair, but could actually discharge the duties that were about to be considered for him.

What bothers me deeply is what I see: a developing of a difference in standards. We are a country that has lasted so long because, among other reasons, we believe in the rule of law. It is not people but laws. That is why we invest so much in our Constitution and setting up courts and ensuring people who serve on those courts for lifetime positions are of the right stuff—not that they are conservative or liberal but that they are people who will not be swayed by political or partisan considerations, but will do the best with their God-given ability the job with which they are entrusted, which is to continue the rule of law and to serve justice.

Therefore, it is troubling that when we had one President of one party, the same people in this body wanted to ask everything they could ask. They wanted to know what meetings you went to that had nothing to do with your law practice. They wanted to know how you stood on referenda as a citizen in States that use referenda to set laws. They wanted to know all this, and the people who were nominated complied. They thought: I do not see the relevance of it, but if this is what is requested, we will comply with it.

Now when we are just focusing on the core issues about the suitability of someone for a lifetime appointment to the second highest court in the land, we cannot even get information that one would expect to get from a first year law student.

Obviously, a political decision has been made by the administration that ''don't ask, don't tell'' applies to judicial nominees and, therefore, we are in a position where we cannot discharge our constitutional responsibilities.

It sort of surprises me, as well as disappoints me, that the administration is taking this position. I guess we have to expect it because time and again this administration has proving itself to flout the rule of law, to be very concerned with secrecy, unwilling to share information with the elected representatives of the American people, and, therefore, a pattern seems to be developing.

I do not care whether you are a conservative or liberal from New York, Texas, California, Alaska, Hawaii—wherever—it is not good for our country to be adopting a policy that elevates secrecy over openness when it comes to judicial nominations and many other matters.

On many grounds, therefore, I stand here today quite troubled about what is developing with respect specifically to Mr. Estrada, with respect to our Constitution, with respect to the refusal by this administration to provide information legally requested by the Senate to fulfill its obligations.

I do not understand why we are in this position. I really do not. I have gone back and read the quotes from the distinguished chairman of the Judiciary Committee, someone I consider a very thoughtful leader on legal issues,

and yet I do not follow the logic of having one standard for one administration's nominees and another standard for this administration, and the willingness of the Senate to cede our constitutional responsibilities. That strikes me as going right to the heart of what the Senate is and should be.

Before I arrived in the Senate, I knew it from a distance, as an admirer, a law student, a lawyer, and a law professor in my previous life. I understood the critical role the Senate played, but I have to confess until I actually came, sat in one of these chairs, looked around this august Chamber, and listened to my mentor and leader, Senator BYRD, describe to us how we happen to be here—not by some accident or bolt of lightning, but because of the genius of our Founders building on the ideas of those who came before, and that every generation of Americans has been obligated to continue this extraordinary experiment in constitutional democracy. We did not get it 100 percent right at the beginning. We had a lot of work to do. And the courts played a major role in saying, wait a minute, America, you say all these nice words. You act like these are your values, all men are created equal. What about black men? What about Native Americans? What about women? Do you not think we ought to kind of make reality coincide with rhetoric and really live up to this Constitution?

So for more than 200 years, that is what we have been doing. It has been a partnership: The executive branch, the legislative branch, the judicial branch. Decade after decade, we have taken stock of ourselves, determining what our real bedrock values are as a nation, and making it absolutely clear we would continue to try to perfect our Union, to live up to those extraordinarily high ideals that no nation in the history of the world had even put down on paper, let alone tried to fulfill.

Part of what we are facing today is an agenda by some to really change the direction of our country. Maybe it is a decision the people of the United States would support if they ever got to vote on it. Maybe it is a decision the people in this Chamber would support if we ever voted on it. But that is not how it is occurring. It really is by secrecy and stealth. It is by nominees to our second highest court who will not tell us what they believe on the most important issues facing us as a nation. It is a deliberate attempt to turn the clock back.

I read the documents that have come from organizations that work hand in hand with the administration about vetting and nominating nominees. I know they refer to the Constitution in exile. By that, I guess they mean the Constitution that expanded the civil rights, human rights, and opportunities of people in cases such as Brown v. Board of Education. That is really sad, that their view of America is so narrow. They want to close doors, take up ladders of opportunity, turn the clock back. I think that is very sad. Certainly they are entitled to their opinion, but their opinion should be explicit. If that is the agenda, then let us have a democratic argument about it. Let's have a vote about it. Let's know what we are voting on, so when decisions get reversed, rights get taken away, people know it was not just foisted on them by secrecy and stealth. It happened because of a debate, which is the heart of democracy, where people stood on both sides of this Chamber and said I do think we have gone too far and others could say, no, we have not gone far enough and where is the middle and how do we come to some resolution.

Why it is so important we focus on Mr. Estrada is because he is a stealth nominee, because he will not answer questions, and because of what we are attempting to determine as to our constitutional responsibilities.

I have reviewed the transcripts of Mr. Estrada's hearings in front of the committee. In a moment, I will relay several of the more concerning areas where we lack information. I want to highlight what two of my colleagues on the Judiciary Committee have said about both the written information, which is very limited, and the oral response to questions from Mr. Estrada. Senator KOHL from Wisconsin has said, and I quote, I personally have voted for 99 percent of the nominees that have come before this committee. In all of those cases, I felt that I knew what we were getting when we voted. There was some record of some writings that gave me an idea about how the nominee would perform as a judge. We do not have much of a public record or written record.

Addressing Mr. Estrada, Senator KOHL went on, you have opinions, of course, on many issues, I am sure, but we do not hardly know what any of them might be, and some of us might have a tough time supporting your nomination when we know so little.

Upon the eve of her vote on Estrada's nomination before the committee, Senator FEINSTEIN said: Over the last few days, I have been reviewing background materials about Miguel Estrada, talking to those who have concerns about him, and I have reread the transcript of Mr. Estrada's hearing. I must say that throughout this process, I have been struck by the truly unique lack of information we have about this nominee, and the lack of answers he has given to the many questions raised by members of this committee.

Let me take a minute or two to highlight some of the important issues that come before the DC Circuit and explain more fully why Mr. Estrada's answers are just not satisfactory. I do not expect to agree with the vast majority of the judges this administration sets forth. I have a different idea about the Constitution, about the philosophy that should govern the rule of law. I am fully prepared to say that. I have already voted for about 100 people I probably do not agree with on a lot of things, but they played by the rules. They respected the Constitution. They answered the Senators' questions, not my questions. I am not on the committee, but I trusted my Republican and Democratic colleagues who were on the committee would ask good questions, as they always do, get answers, and then they would make a judgment.

We have confirmed something like 100 judges in the last 2 years. I trusted the Judiciary Committee, which is the first line of defense on advise and consent, to do the hard work. I would then assess that and make my decision. I cannot do that in this case. I wish I could. I might still vote against the nominee because I might not agree with what he said in his opinions, but at least the process would be respected, the advice and consent clause of the Constitution would be honored.

That is not the case. If we look at the individual areas of concern, I think we begin to get an idea why Mr. Estrada does not want to answer questions and why the administration does not want him to answer questions, because even my colleagues on the other side of the aisle would have some really hard questions if the nominee were permitted to answer questions.

Let's start with the environment. The fact is the DC Circuit hears almost all of the cases challenging environmental rules and regulations issued by the Environmental Protection Agency. These are extremely significant decisions. The court decides issues of national importance. It decides issues of great local and regional importance. We may disagree about the best way to protect the environment, but if we are going to go down a road where we pack the DC Circuit with judges who do not have the idea that protecting the environment is a Federal responsibility, we should know that. We should know what we are getting. We are not buying blindly. We should know what we can expect. Maybe then the Congress, if it so chose, could rewrite laws or be clear about congressional intent, but in the absence of knowledge we do not know anything.

The court, in a 1999 decision, American Trucking Association v. EPA, demonstrated not only its deep division but its potential for circumventing the President and congressional intent. In that case, the DC Circuit decided not to review a ruling that struck down Clean Air Act protections against soot and smog. In fact, in the dissent, one of the judges said the court's ruling ignored the last half century of Supreme Court jurisprudence. When the case got to the Supreme Court, in a decision written by Justice Scalia, the DC Circuit was reversed. This was not a Republican or Democrat or liberal or conservative decision. This was a decision based on the precedence, the jurisprudence, the law.

Many of the cases that the circuit court of appeals decides in DC do not

go to the Supreme Court. Therefore, we have to be conscious of what a nominee's position is on environmental issues.

Across the board, environmental groups have opposed Mr. Estrada's nomination because he has consistently evaded questions on how he might consider cases of vital environmental interest.

With respect to labor decisions and the National Labor Relations Board, the DC Circuit hears many of those labor and worker-related cases. The court has decided more than 1,000 labor cases over the years. The National Labor Relations Board administers the National Labor Relations Act, which is the primary law that governs relationships between employers and employees. Of course, that is at the root of our economy. We want people to be productive and work, but we also want them not to be taken advantage of and mistreated. There is a balance of power, to go back to my favorite concept, embedded in the Constitution. The Congress has worked it out over the last 50 years where workers have some rights, employers have some rights, and there is a system for adjudicating disagreements and grievances. Time and time again, the Circuit Court of the District of Columbia has ruled on these decisions and has consistently said that if a decision from the National Labor Relations Board is supported by substantial evidence, the courts are supposed to uphold it.

Unfortunately, many people are concerned and have spoken out against Mr. Estrada's nomination because they have no way of knowing what, if any, opinions he has on these critical issues. It is a fair set of questions to ask and to receive answers about.

When it comes to energy, certainly one of the most important issues throughout our country, the DC Circuit has exclusive jurisdiction over cases coming from the Federal Energy Regulatory Commission. That is called FERK. These cases are often up in the court of appeals, trying to figure out what is a just and reasonable rate of return for oil, gas, and electric companies. Therefore, the cases coming out of the DC Circuit affect everybody who has any power that is generated by oil, gas, and electricity around our country.

In many of these cases, not only individuals but States have big stakes in their outcome. When we think about ruling on these cases, it is only fair, since it may affect my energy bill, that I have some understanding from the Judiciary Committee whether this nominee has opinions, past track records, clients, anything that might affect his rulings.

Similarly, the DC Court has exclusive jurisdiction over cases arising under the Federal Communications Commission. Again, that affects every one of us. Do you have a television? Do you have cable? Do you enjoy the mass media, the broadcast media? Do you have a telephone? Do you know what rates you pay ultimately for long distance? Do you have a wireless phone? All of these issues fall under the FCC. Without any written record, again, we cannot get answers to questions about matters that will affect every American.

Some of this may sound technical, and I understand that, but it is easily understood that the stark reality is the DC Circuit controls so many of the rules under which we live every single day in our homes and workplaces. This is not some abstract speculative concern about what might happen to somebody else. What happens in this DC Circuit affects each of us. That is why I am so concerned that in the absence of information, in the absence of the Judiciary Committee believing they have been able to make an informed decision and have not just done what they were told to do by the administration, we may be setting up the people we represent for all kinds of changes in their lives that were never aired publicly, were never given due consideration, but which will affect every one of us.

That is why this nomination cannot be handled lightly, why it cannot be rammed through, why the Constitution and the rule of law, the role of the Senate to advise and consent, need to be respected.

When we think about where we are right now in the 21st century, we know we have lots of big challenges ahead. We have national security challenges, homeland security challenges, economic challenges, challenges concerning health care, education, the environment, and energy. There is a lot that lies in front of us. We need to bring to our considerations the same thoughtful, careful analysis that our predecessors in this body brought to theirs.

I am very worried that we are making decisions at home and abroad that will affect our country and our children for generations to come. Certainly, judicial decisions fall into that category. The DC Circuit has served as kind of a bullpen for the Supreme Court. More judges have been appointed to the Supreme Court from the DC Circuit than from any court in the land. That is often where the President looks to find somebody qualified who understands the full range of constitutional and legal issues that will very well end up in the Supreme Court. In fact, the DC Circuit has given us three of the nine current Supreme Court Justices—Justices Ginsburg, Scalia, and Thomas.

Therefore, I have to be doubly careful about my vote. I don't know what will happen on the Supreme Court. I wish every one of the Justices good health and a lot of energy for decades to come, but none of us knows where we will be tomorrow. We have no way of predicting our fate. It could turn out that there might be an opening on the Supreme Court and it might very well be someone from the DC Circuit who could be chosen. So far as I know everyone else serving actually answered questions, offered opinions, went through the process, gave the Senate the opportunity to exercise our constitutional duty to advise and consent.

If Mr. Estrada joins the court and all of a sudden an opening were to occur and the administration said to themselves, this was so good, we got somebody through that nobody could even ask a question of or get a straight answer from, let's just nominate him for the Supreme Court and do the same thing, run the same drill, then I would hope my colleagues on both sides of this aisle would say, no, no, I cannot let that happen to my Constitution. I may love my President but I love my Constitution. Presidents come and go but the Constitution remains.

We, at our peril, undermine it, disrespect it, disregard it, and this body, at its peril, gives up its constitutional prerogative rendering it a debating society, at best, and irrelevancy, at worst. Here we are, debating not just a nomination but debating the Constitution, debating the rule of law, debating whether this Senate and its Judiciary Committee will be able to fulfill its constitutional responsibility. These are high stakes. Talking about many of the nominees to the district court of appeals, I just can't help but use a little history. I think those who do not know history are condemned to repeat it. I know there is always a lot of revisionist history that goes on to suit political, partisan, ideological—even commercial ends. But these are the facts.

The former President nominated highly qualified people for the DC Circuit. Unfortunately, of those three nominees, two of them were given a hearing, one was not; two were not given a committee vote, one was. It took from 15 to 18 months for no action, no vote, and one out of three was confirmed. We didn't even get the courtesy of a vote, even though tons of information was turned over on the first two of these nominees.

From my perspective, that is water under the bridge. But I think it is telling because the Constitution did not change. As far as I know, the same Constitution we had in 1990 is the Constitution we have in 2003. The advice and consent clause didn't change, as far as I know. The advice and consent responsibility was the same throughout the 1990s as it is now in the 21st century. Some nominees went to extreme lengths to provide every scrap of paper, every opinion requested, in order to demonstrate their good faith and their respect for the Senate, their respect for the Constitution.

In a previous time, I know my good friends on the other side of the aisle, were he to have sat there and said, I have no opinion about anything, would have said: You are not getting my vote. You should not even get a hearing. You don't deserve one. Because somebody

who comes before this committee and says he has no opinion about anything is clearly gaming the committee. Everybody knows that. I do not think the committee would have stood for it in the 1990s.

The Democrats this time voted unanimously against Mr. Estrada on the basis of his failure to answer questions and failure to appropriately and respectfully provide written material that was provided in previous instances with respect to Justice Rehnquist and Justice Bork. That material was not provided with respect to Mr. Estrada. So I think we really obviously have a double standard. It is an ideologically driven double standard.

I think that is a mistake. I think it is always a mistake when we try to push through something that in the long run undermines the balance of power, the constitutional framework, the role and responsibility of the Senate.

I have received countless letters, e-mails, and telephone calls about this nomination. Many of the people have expressed their concerns about the process in which we are engaged. A letter from a Utica, NY, constituent, Anna Maria Convertino, sums up the objections my office has been receiving. She gave me permission to quote from her letter. Here is what Anna Maria from Utica, NY, has to say:

I am writing to urge you to filibuster the nomination of Miguel Estrada for the District of Columbia Court of Appeals by voting no on cloture. Estrada has refused to answer questions about his commitment to abortion rights or basic civil rights. The burden should be on the nominee for a lifetime appointment to show that he deserves to serve as a Federal judge. Estrada's lack of an established record and unwillingness to answer questions means that he has failed to make this showing.

I certainly appreciate Anna Maria contacting me and summing up so well the problems with this nomination.

Many people who have followed this closely, many major Latino and Hispanic organizations across our country, and in New York, share those doubts. The Congressional Hispanic Caucus, which has members from New York City to LA, from Texas to Chicago, interviewed Mr. Estrada. After that interview and reviewing his credentials, they concluded that he failed to merit their endorsement. Today, the caucus again opposes his nomination along with the Mexican-American Legal Defense and Education Fund, the Puerto Rican Legal Defense Fund led by the able work of my constituent, Angelo Falcon; the National Association of Latino Elected and Appointed Officials, the California La Raza lawyers, the Southwest Voter Registration Project, the Illinois Puerto Rican Bar Association, and on and on and on.

Mr. REID. Mr. President, will the Senator from New York yield for a question?

Mrs. CLINTON. I certainly will.

Mr. REID. The Senator was on the floor this morning when there was a colloquy between this Senator and the senior Senator from Illinois. There was a question that arose as to the number of people in the Hispanic Caucus in the House. I have since checked that and determined there are 20 in the Hispanic Caucus in the House. The only Hispanic Members of the House of Representatives, I am told, who are not members of that Hispanic Caucus, are three in number. So it is 20 who are members of the Hispanic Caucus and 3 who are not.

Mrs. CLINTON. I appreciate the clarification from my good friend from Nevada. Certainly, having worked with the Congressional Hispanic Caucus over many years, I know they are a national organization, representing people throughout our country. They did not reach this conclusion lightly. They interviewed Mr. Estrada. They asked questions. They sought information. They talked to other people who knew him, had worked with him. They really tried to do due diligence. They tried to do the job that the Judiciary Committee should do, trying to get at what is it about this nominee that we can either oppose or support. At the end of their inquiry and investigation, they concluded that they could not support him.

I am sure that was a difficult decision, from talking with my friends in the Hispanic Caucus. It was a very tough decision because on the face of it, this looked like a no-brainer: Line up behind Mr. Estrada, vote for him, put him on the DC Circuit, and everybody can go home and say: Look what I did; I voted for this nominee.

But that is an abdication of responsibility. That is truly the kind of action that undermines faith in our democratic process—to abdicate your intelligent, careful analysis of someone just to be able to check a box. I thought it was very courageous of the Hispanic Caucus to say: We have looked into this, we have investigated it, and we cannot support him.

Therefore, please—please—at least try to find out what this man stands for, what he would do, what he believes in, because we have not been able to do so.

Part of why many of us are coming to the floor is that this is a troubling nomination on many grounds. I know there are those, such as my friends in the Hispanic Caucus, who are troubled by the nominee and what he stands for or doesn't stand for, what he would do or not do, and the failure to get information.

I know my colleagues on the Democratic side in the Judiciary Committee were extremely troubled—including people, as I have just quoted, who historically vote with a President on a nominee—and were very pained about having to say, I can't do it this time.

I know, too, that many of us are concerned because, if the Judiciary Committee cannot do the work, we can't do the work. We can't call Mr. Estrada into our office and put him under oath and ask him the questions that he wouldn't answer when my colleagues from Illinois and from New York and from Wisconsin and California and everywhere else could not get answers out of him.

But fundamentally, even beyond the procedures—the failure to answer, the kind of stealth campaign that the administration is running, the don't ask, don't tell—the nomination process is the Constitution. I think there are certain duties, whether you are a constitutionalist, an originalist, a Federalist—whatever you are, whatever the label you want to pin on yourself might be—there are certain duties that cannot be delegated. There are responsibilities embedded in the Constitution that were given to us by our Founders in Philadelphia, and among the most important is the importance of the role of the Senate to advise and consent.

Mr. HATCH. Mr. President, will the Senator yield for a question?

Mrs. CLINTON. Certainly.

Mr. HATCH. Is the Senator aware that Miguel Estrada has argued 15 cases before the Supreme Court?

Mrs. CLINTON. Yes, on behalf of clients—not on behalf of himself.

Mr. HATCH. He won 10 of them. Right?

Mrs. CLINTON. I am aware of that.

Mr. HATCH. Has the Senator from New York read any of those briefs that he filed in that court?

Mrs. CLINTON. I have reviewed a number of them. I certainly am no expert on the cases, but I concede the point to the chairman that Mr. Estrada has argued cases on behalf of clients whose positions he was advocating and has done so extremely well.

Mr. HATCH. And he has done it on behalf of clients as an attorney should.

Mrs. CLINTON. Indeed. But he is not representing his clients before the Judiciary Committee. He stands there as Miguel Estrada for a potential lifetime appointment to the second highest court in the land. Therefore, he can no longer speak for clients. He must speak for himself.

Mr. HATCH. He did.

Mrs. CLINTON. That is not the conclusion reached by the Democratic Senators, nor by the Hispanic Caucus, nor by many who have followed this nomination closely—to ask a man of his record before the Supreme Court whether he had an opinion about any Supreme Court decision and for him to say, no, he did not, is absolutely unbelievable.

Mr. HATCH. Is the Senator aware that the Hispanic Caucus in the House is made up of all Democrats because they would not meet the Republicans who were left out of the caucus?

Mrs. CLINTON. I am very well aware of the makeup of the Hispanic Caucus. I have worked with members of the Hispanic Caucus for many years.

I think it is also fair to look at the geographical diversity and the experience base of these people who represent Americans from New York to L.A. and from Texas to Chicago who went to the

trouble to interview the nominee and concluded by their own efforts that he was not going to be acceptable in part because they couldn't get adequate information on which to base a good decision.

Mr. HATCH. Is the Senator aware that the Democratic Hispanic Caucus in the House was actually almost equally divided as to whether or not to support Miguel Estrada, but the majority made the——

Mrs. CLINTON. I think what I judge is by what people say at the end of a conclusive discussion and what they determine based on their own consideration. Much of my concern is based on the Constitution and the role of this body—not on what people did or didn't do, although I think that is instructive, and I think it is very helpful. It does have sway with me because I don't believe we have developed an adequate record in the Judiciary Committee that would give even those of us who might end up opposing his nomination—I don't know that for a fact—an adequate basis on which to exercise our constitutional responsibility.

Mr. HATCH. Will the Senator yield again for a question?

Mrs. CLINTON. Yes. I will.

Mr. HATCH. I will try not to interrupt the Senator anymore, but the point I was making with the briefs in the Supreme Court—15 of them and more—is that there is a record from which you certainly can determine legal reasoning, as well as an extensive stack of records of the Judiciary Committee hearings. And let me say this. Those hearings were conducted by none other than the Senator's colleague from New York, Senator SCHUMER, and other Democrat Senators who said the hearings were fairly conducted. Is the Senator aware of all of that?

Mrs. CLINTON. I say to my good friend from Utah, I am aware of all that. But I have to respectfully point out several responses.

A long time ago I used to practice law. I represented a lot of clients of different kinds, all sorts of folks. Their views and their positions were not necessarily mine. I won some and I lost some in the trial court, in the appellate court, and in the administrative hearing room, but I do not believe that any of my clients spoke for me. My advocacy on behalf of clients was not the same as my positions about the law, about constitutional issues, and about many other matters. So the fact that someone has practiced law and that someone has argued cases is a factor to take into account. I certainly believe that is a significant factor. But that is not determinative. That is not in any way decisive when it comes to giving someone the opportunity to have a lifetime position on the second highest court in the land.

Mr. REID. Mr. President, will the Senator from New York yield for a question?

Mrs. CLINTON. Yes, I will.

Mr. REID. I want the Senator to know that I met with the chairman of the Hispanic Caucus and other members of the caucus, plus a number of people on a conference call a few days ago—in the last week or 10 days. Is the Senator aware that on that telephone call I was told that every member of the Hispanic Caucus—all 20 of them, every one of them—opposed the nomination of Miguel Estrada to be a member of the District of Columbia Court of Appeals?

Mrs. CLINTON. The Senator is absolutely correct. In fact, I have a copy of the September 25, 2002, letter written by the Congressional Hispanic Caucus to the then-chairman of the Judiciary Committee announcing the decision to oppose the nomination.

Mr. HATCH. Will the Senator yield on another point?

Mrs. CLINTON. Yes.

Mr. HATCH. Is the Senator aware that every Republican Hispanic member in the House is totally in support of Mr. Estrada?

Mrs. CLINTON. I am well aware that there are three Republican Hispanic Members in the House who are not members of the Hispanic Caucus. I understand that.

Mr. HATCH. And that there are four of them.

Mrs. CLINTON. I would be more than happy to have them send a letter explaining the reasons as to why they support him other than the fact they have been told to do so by the Republican leadership of the House and the administration.

What I have from the Congressional Hispanic Caucus is a very well reasoned letter setting out the decision as to why all 20 members of the Hispanic Caucus would not support this nomination. I think it is instructive.

It is instructive to read the thinking of the Hispanic Caucus. Of course, much of it rests on the fact that there is such a limited record. It is very hard to determine what it is this gentleman would do. I think the Hispanic Caucus raises some very telling points which have not been adequately addressed in the process up until now.

For reasons of our Constitution, of our rule of law, of our nomination process, of our Senate and its prerogative, as well as the decision apparently made by the administration to adopt a don't ask, don't tell policy when it comes to important lifetime appointments on the Federal judiciary, I certainly will have to oppose this nomination.

I yield the floor.

The PRESIDING OFFICER (Mr. ENZI). The Senator from Utah.

Mr. HATCH. Mr. President, I will speak more to the constitutional issues later.

I have to say that I totally disagree with the distinguished Senator from New York, much as I respect her. I don't think her analysis of the Constitution is anywhere near accurate.

Second, I was told by people for whom I have great respect that when the vote came up, when they were discussing whether or not the Hispanic Caucus in the House, all Democrats, were going to oppose Miguel Estrada, there was almost an equal split of those who thought it was inadvisable to do that. Of course, after the majority makes that decision, I suppose they went along with that. But that was my understanding. If it is incorrect, I would be happy to be corrected.

I also want to make it clear that the three Republican Hispanic Members of the House—all three very outstanding individuals, who have stood up for Hispanics all of their careers, all three of them speak fluent Spanish—they were basically not allowed to meet with the Democratic Hispanic task force or caucus in the House, and they are totally in favor of Miguel Estrada.

Having said those few things, I want to take a moment to talk about what we are seeing on the nomination of Miguel Estrada. What we are seeing is just another step in a campaign to stall action on President Bush's judicial nominees. It has gotten to the point that the tactics that some of my Democratic colleagues are using are so predictable that it is as if they are working from a handbook. I suspect that this handbook had its origins in the Democrats' April 2001 retreat, where leading liberal law professors—of course, most of the law schools in this country are filled with leading liberal law professors, or at least liberal law professors—they urged the Democrats in that conference to change the ground rules on judicial confirmations. What resulted from this retreat is something that can be called—if you will notice this chart—the Senate Democrats' ''weapons of mass obstruction'' handbook.

Let's take a look at some of the weapons in this handbook. Let me turn to the first bullet on the chart. The first weapon suggested by these liberal law professors was to bottle up nominees in committee.

We have seen a lot of that in the last 2 years, is all I can say, especially with regard to circuit court nominees. They have allowed a significant number of district court nominees to go through. These are the trial courts, where it is very unlikely to get into the major questions of law that have to be decided by appellate courts, although they certainly are important.

Since the judiciary is a separate, coequal branch of government to the President and to this Congress, this is important stuff. But their first weapon in their handbook was to bottle up nominees in committee.

When control of the Senate shifted to the Democrats in June 2001, we saw an immediate halt of nomination activity in the Judiciary Committee, especially of circuit court of appeals nominees. The President was not being treated as other Presidents have been. Even though other committees held nomination hearings prior to reorganization, and even though the Judiciary Committee held other hearings, no nomination hearings were held for more than

a month, despite the fact of a looming vacancy crisis and plenty of nominees awaiting a hearing. In fact, as we stand in the Chamber right now, we have a crisis of around 25 or 26 emergency seats, most of them circuit court of appeals seats, in this country today. It is a judicial crisis where people cannot get their cases decided.

Then, once we did start considering nominees, the committee considered only one circuit court nominee at a time. When I was chairman during the Clinton administration, I considered more than one circuit nominee at 11 different hearings. But not once during the 107th Congress did the Democrats hold a hearing on more than one circuit nominee at a time. So bottling them up in committee has been a definite practice that came out of that retreat.

The point is, as I have been making it here, the first weapon in the Democrats' handbook—that of bottling up nominees in committee—was something that worked only as long as the Democrats controlled the committee. Since this is no longer the case, and we are now holding orderly hearings, fair hearings, with expedition, because the Republicans were fortunate enough to be able to take over control of the Senate, the President is now being treated fairly, as I believe I treated President Clinton in almost every instance—in fact, in every instance as far as I was concerned.

We put through 377 Clinton judges, the second highest total in the history of the country for any President, and only five less than the highest total of Ronald Reagan. And Reagan had 6 years of a Republican—his own party—Senate to help him. President Clinton had 6 years with an opposition party—the Republicans—to help him. And we did. You can point to some instances where I wish we had done better, but as far as totality, as far as getting it done, we did the job for President Clinton, and we treated him fairly. And he, I think, knows it.

Let's look at some of the other weapons they have used that came out of that retreat. One of the most potent weapons of mass obstruction has been to try to inject ideology into the confirmation process—yes, try to inject ideology into the confirmation process. Miguel Estrada's nomination is a prime example of how that has worked.

Some of my Democratic colleagues claim they oppose Mr. Estrada's nomination because he allegedly was not responsive to their questions at his hearing. I think we just heard an hour's worth of that. This is a laughable assertion. Mr. Estrada's hearing, which was held while the Democrats controlled the committee, and chaired by the distinguished other Senator from New York, Mr. SCHUMER, lasted all day. Mr. Estrada was asked dozens and dozens of questions, all of which he answered.

The real problem that some of my Democratic colleagues have with Mr. Estrada is not that he did not answer their questions but that his answers did not give them any reason to oppose him. That is what the real problem is here. He testified that he would follow binding precedent—what more could you ask of a circuit court of appeals nominee—that nothing in his personal views would interfere with his ability to follow the law. What more could you ask of a circuit court of appeals nominee?

For some of my Democratic colleagues, this is not enough. They want to delve into Mr. Estrada's ideology to understand his personal views on whether Supreme Court cases were correctly decided, and use those personal views as the yardstick by which they measure whether he is worthy of confirmation.

Mr. DURBIN. Will the Senator yield for a question?

Mr. HATCH. I am delighted to yield.

Mr. DURBIN. Does the Senator recall a speech he made to the Federalist Society? I will quote from his statement there:

> [M]any of President Clinton's nominees tend to have limited paper trails. Determining which of the President's nominees will become activists is complicated and will require the Senate to be more diligent and extensive in its questions of a nominee's jurisprudential views. . . .

Does the Senator recall making that speech to the Federalist Society?

Mr. HATCH. I sure do. I agree with that statement to this day. I agree where there are no paper trails, you should ask questions. I am sure the Senator will agree with me, the Democrats controlled the committee, they controlled the hearing that day. It was a lengthy hearing. They asked every question they wanted to ask. They weren't happy with some of the answers, but that was probably par for the course. It was, certainly, when I was chairman of the committee.

But injecting ideology into the confirmation process is misguided, at best, and down right irresponsible at worst. It is not, as some Senators have suggested, essential to executing our duty of advise and consent. But do not merely take my word for it. My goodness, Heaven forbid.

During the course of this debate, I have already mentioned the statements that Lloyd Cutler made on this point. Again, I mention Lloyd Cutler because both sides of this body respect him. We both know he has been an excellent servant of the people. We both know he is a great lawyer, not just in the District of Columbia but throughout the country.

I have participated in forums with Lloyd Cutler, and I have nothing but respect for him. I have not always agreed with him—I have to admit that—but, by and large, we have agreed on most issues.

I have already mentioned statements Lloyd Cutler has made on this point, but I believe they are worth repeating because some of my colleagues keep resurrecting the spurious allegation that Mr. Estrada was not forthcoming at his hearing.

Mr. Cutler, as we all know, served this country as counsel to President Carter, and President Clinton, by the way. He also served on two national commissions that addressed problems in the confirmation process.

He said:

> Candidates should decline to reply when efforts are made to find out how they would decide a particular case.

That is just a rule that both sides have followed even before Mr. Cutler made that very erudite statement.

Mr. DURBIN. Will the Senator yield for a question?

Mr. HATCH. Sure.

Mr. DURBIN. Can the Senator point to any question asked of Miguel Estrada by either a Democratic or Republican Senator as to how he would rule in a particular case during the course of the confirmation hearing? Did any Senator violate the standard Lloyd Cutler enunciated in asking Miguel Estrada to tell us how he would rule in a particular case?

Mr. HATCH. One of the Democrats on the floor said, if I recall correctly, he asked the question, what is your belief about the first amendment. Gee whiz, I could teach law school class for over 3 months on that subject alone. Another—it may have been the same Senator—said he wanted to know in his questions whether he was going to overturn all of the clean air, clean water, and environmental rules, because this court is so important.

Mr. DURBIN. Does that relate to a particular case we are asking him to tell us about or rather his views on the Constitution?

Mr. HATCH. The Senator is an excellent lawyer. I know he is. I have tremendous respect for him. He sits on the committee. I enjoy him. But when you ask questions like that, those are areas where cases come before the Circuit Court of Appeals in the District of Columbia.

Mr. DURBIN. Is it the Senator's position we should not ask a question of a nominee in any area of law that might come up in any case a judge would rule on?

Mr. HATCH. No, I think the Senators on the committee can ask any questions they want to, but I think it is incumbent upon the nominee to follow Mr. Lloyd Cutler's suggestion that ''candidates should decline to reply when efforts are made to find out how they would decide a particular case.''

I suspect anybody can discuss general law, but that is not what the distinguished Senators were interested in.

Mr. DURBIN. I ask the Senator one last question: Can he point to any question asked by any Senator that went beyond general law and asked Miguel Estrada how he would rule on a particular case?

Mr. HATCH. I think I just gave two illustrations that certainly were questions of law that could come before the

court. I might add Mr. Estrada was asked to criticize Supreme Court cases. Here a Supreme Court advocate who has to appear before the nine Justices on the Court is asked to criticize Supreme Court cases that he will be bound to follow as a circuit court judge.

By the way, if I recall it correctly, the distinguished Senator from Illinois just a short while ago was criticizing Mr. Estrada because in the whole history of American jurisprudence, from the beginning to the end, he couldn't come up with cases like Dred Scott, Plessy v. Ferguson, but the question, if you read in the record was, in the last 40 years, could you tell us three cases you disagreed with.

I believe he could have, maybe. I don't know. But when you are under pressure and you are sitting there and you are trying to answer questions, I don't think we should hold him to a standard that he has to meet these questions head on and absolutely come up with spur-of-the-moment comments. I mean, I can come up with some, I am sure, right off the bat, but that was the last 40 years. There were three references to it, twice referring to 40 years. The middle one between the two I am sure he felt he was talking about the last 40 years, not the whole history of jurisprudence. The first case that has come to your mind perhaps would be Dred Scott; certainly Plessy v. Ferguson. Could you name a whole raft of others, perhaps. I don't know. I don't know how I would do if I was sitting there under pressure as Miguel Estrada was.

He is a young man. He has a lot of experience. He can talk about current Supreme Court law as well as anybody in our existence. The fact is, I thought it was kind of unfair to try and hold him to that particular standard. I am not criticizing my friend from Illinois, but to go back and read the record, you will find that was what the questions were.

Now, regarding judicial nominees, Mr. Cutler has stated in unequivocal terms that candidates should decline to reply when efforts are made to find out how they would decide a particular case.

I would have trouble with a nominee if the nominee did try to reply in those cases. In his opinion, that is Mr. Cutler's opinion, ''what is most important is the appointment of judges who are learned in the law''—certainly, Estrada is as learned in the law as anybody we have had before the committee—''who are conscientious in their work ethic''—my gosh, you can't find any fault with Mr. Estrada there; he is a hard worker—''and who possess what lawyers describe as judicial temperament.''

We have heard some criticize Mr. Estrada because they think he might have a temper. I think everybody in this body might have a temper. That is one heck of a poor allegation.

Mr. Estrada's academic achievement, his professional accomplishments, his letters of support we received from his colleagues, many of whom are Democrats and top Democrats at that, and his ABA rating, the highest the American Bar Association can give, ''unanimously well qualified,'' all indicate Mr. Estrada fits this description and deserves our vote of confirmation—this description of none other than Lloyd Cutler.

At the same hearing at which Mr. Cutler made his statements about the appropriate scope of the inquiry for confirming judicial nominees, another legal luminary, one of the great lawyers in this town, a man I think almost all of us look up to—certainly I do, and I think I am in a position to know great lawyers when I see them—Boyden Gray, testified for Mr. Estrada. Mr. Gray, of course, served as White House counsel in the first Bush administration.

During his testimony, he told us that two Democratic Senators who are former Judiciary Committee chairmen met with him very early in the administration to let him know in no uncertain terms that if the White House was caught asking any potential nominee any questions about specific cases, that nominee would be flatly rejected.

As Mr. Gray pointed out, that same philosophy is reflected in the Judiciary Committee questionnaire which all judicial nominees must complete before the committee will act on their nominations. It is an extensive questionnaire. The questionnaire asks:

> Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule in such a case, issue, or question?

The clear goal of this question is to deter the White House from getting commitments from potential nominees on how they would rule in specific cases or commitments that they can overrule certain Supreme Court cases. It now appears certain Senate Democrats want to forbid the White House from asking nominees how they would rule on specific issues while reserving that right for themselves. That seems a little inconsistent to me. Call it what you will, but this is a double standard if I have ever seen one.

More fundamentally, it threatens the very independence of the Federal judiciary that our constitutional system of checks and balances was designed to preserve.

Let's face it—too many questions in the confirmation hearings of President Bush's judicial nominees seem calculated politically to manipulate the judicial selection process and to frustrate the appointment of judges who would refuse to follow a popular or politically popular course when the Constitution and settled judicial precedent provide otherwise.

Miguel Estrada was right not to fall into the trap of criticizing particular Supreme Court cases that he may be called upon as a sitting Federal judge to uphold. My colleagues should be commending him for this, not proffering it as a reason to vote against his confirmation.

Another weapon in the Democrat handbook is to, as we can see here, seek all unpublished opinions. This all came from that retreat: Bottle up the nominees as much as you can in committee. I think that even goes further—bottle them up on the floor, too. We will get to that. Inject ideology into the confirmation process so you can say this fellow just isn't what we want on the court. Seek all unpublished opinions. Let's talk about that.

For some nominees who have been judges for a decade or more, this demand has resulted in the production of hundreds of opinions and required the expenditure of a significant amount of Federal dollars, of resources, of money, of effort, and of time. All the time judges spend producing unpublished opinions meant they were not spending that time adjudicating cases before them.

While demands for unpublished opinions were outstanding, the Democrats in control of the committee had a perfect excuse for not acting on their nominations. But the fact is that these nominees had ample records on which to evaluate their qualifications for the Federal bench without seeking their unpublished opinions and diverting them from doing their job to be judges to satisfy the whim of a few Democratic Senators.

I remember in the case of, I believe, Dennis Shedd—who is now confirmed to the circuit court of appeals in his district—they asked for all of his unpublished opinions which were, as I recall, in Atlanta, GA, and what was the reason? It was only to see if they could dig up something that would be against Dennis Shedd. Unpublished opinions? My gosh, I don't ever remember when we did that. But that was a tool that was used throughout the process to delay. It was an expensive tool to the taxpayers, with no real good fruit coming from it.

I will refer to the fourth one here. Another weapon is to demand that the nominee produce internal memoranda that are not within the nominee's control. Isn't that an interesting one? We Democrats demand that you produce your internal memoranda that you made, and did the research on, and that you wrote while you served the Federal Government—even though you don't control that and even though it is tightly controlled—or should I say those memoranda are tightly controlled.

We saw the debut of this weapon to obstruct the confirmation of Mr. Estrada, and I expect we will see it again. I don't believe a day of this debate has gone by without one Democratic colleague complaining that there is an ''incomplete record'' on him without the record he offered as an Assistant Solicitor General of the United States.

This complaint ignores many facts. First, every living Solicitor General opposes the Democratic efforts to obtain these memoranda. Second, both the Washington Post and the Wall Street Journal—many would say they are on opposite sides of the fence—also oppose these efforts. Third, this demand for internal Department of Justice memoranda is unprecedented, as the Department itself has explained in a lengthy letter.

Finally, this demand for internal memoranda ignores the abundant record of Mr. Estrada. This man has argued 15 cases before the U.S. Supreme Court. He won 10 of them. In each one of those cases, he authored a brief that anybody can get ahold of. In each one of those cases, there is a transcript of the oral arguments that anyone can get ahold of. Certainly, members of the Senate Judiciary Committee can get ahold of them. Surely, my Democratic colleagues can evaluate Mr. Estrada's legal reasoning and fitness for the Federal appellate bench by examining these briefs and transcripts.

Each weapon of obstruction that I have mentioned was most potent when the Democrats controlled the Judiciary Committee. Now things have changed. Democrats no longer control the committee and, as a result, Miguel Estrada's nomination is being debated on the Senate floor. This means that the Senate Democrats must turn to their ultimate weapon of obstruction. I am going to peel off that last one. The ultimate weapon is the filibuster.

Well, filibuster is a potent but extreme weapon to rely upon for the defeat of a judicial nominee. It is potent because it requires a supermajority of 60 votes by 60 Senators to end it. It is extreme because it unduly politicizes the Federal judiciary, the one branch intended to be insulated from political pressure. Let's go through these again. At the retreat, these law professors, who should have known better but are more interested in ideology, in partisanship, Democratic Party politics, in control of the judiciary, made these recommendations: Bottle up nominees in committee. We saw a lot of that when they were in control. Now they cannot do that anymore, except that I suspect that because the Judiciary Committee has a rule that once these nominees are put on a markup, any member of the committee can put them over for a week, we will see that right exercised in every case. At least, we have so far. So bottle them up in committee. Then inject ideology into the confirmation process because, by doing that, you can say I disagree with you and maybe you think you have a right to vote against him.

Look, we don't know how any nominee is going to vote once they become a judge; it is a lifetime appointment. It is important to ask questions and try to do what we can to understand whether the nominee is capable or should be confirmed. To inject ideology into the confirmation process is a very dangerous thing. Thirdly, seek all unpublished opinions. That is the ultimate delay tactic, at a tremendous cost to the taxpayers. I don't remember in the past where that was done, except it may have been done in a case where they were critical to the final determination. But it is done today because they want fishing expeditions, or they wanted them to see if they could find some reason to oppose. Then, seek privileged internal memoranda.

Can you imagine what would happen to the Solicitor General's Office if secret memoranda that were used to determine what the Solicitor General should do would be disclosed to the public in every case? Can you imagine how that would chill getting responsible, accurate, and honest opinions, so that the Solicitor General can rely upon them? Anybody who wanted to be a Federal judge would have to think, how can I write this so it won't come back to haunt me in the future rather than, how can I write this to do it right and help my Solicitor General. And then the ultimate weapon, if you cannot do anything else, is the filibuster.

Now, to filibuster a nominee would be an unprecedented, dangerous weapon to use. As best I can tell, a true filibuster has never been used to defeat a circuit court nominee. In fact, no filibuster has been used to defeat a circuit court nominee. Its contemplated use now against Miguel Estrada's nomination has been soundly criticized. I was told a short while ago that my colleagues on the other side have decided to filibuster. I don't believe the reasonable people on the Democratic side are going to resort to that type of a weapon. But if they do, they will be following the advice of these law professors who have never been Senators and who are from the far left of the political and legal spectrum.

The filibuster is an unprecedented and very dangerous weapon, never before used to defeat a circuit court nominee. In fact, it has never been used to defeat a district court nominee either. Let me go a little bit further here.

Just last week, the Washington Post, our local newspaper—but national in scope—declared:

> [A] world in which filibusters serve as an active instrument of nomination politics is not one either party should want.

That was February 5—last week. The Post is absolutely right. Once we go down that road, that works both ways. I would not want it to, but it naturally will.

The Wall Street Journal concurred in the Washington Post's sentiment. You can see the quote:

> Filibusters against judges are almost unheard of. . . . If Republicans let Democrats get away with this abuse of the system now, it will happen again and again.

Mr. President, copies of these editorials have been printed in the RECORD.

Filibusters of judicial nominees allow a few Members of this body to block the confirmation of any Federal judge, a prospective member of our third coequal branch of Government.

I have taken to the floor time and again for Democratic and Republican nominees alike to urge my fellow Senators to end debate by voting to invoke cloture which requires the vote of 60 Senators. Most, if not all, of these occasions did not represent true filibusters but were situations in which nominees were, nevertheless, forced to overcome a procedural obstacle of a cloture vote.

I am not alone in my disdain for forcing judicial nominees to a cloture vote. The distinguished minority leader himself once said, on this double standard for the use of the weapons, Democrat leader TOM DASCHLE, one of my friends and a person for whom I have a lot of respect:

> As Chief Justice Rehnquist has recognized: ''The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.'' An up-or-down vote, that is all we ask.

I think that was wise advice then, and I think it is wise advice now.

The ranking member of the Judiciary Committee, my friend Senator PATRICK LEAHY, said:

> I, too, do not want to see the Senate go down a path where a minority of the Senate is determining a judge's fate on votes of 41.

In other words, 41 Senators can stop any judge once that road is taken. And once we go down that path, that will be a doggone mess and a doggone tragedy to this country.

Another one of my Democratic colleagues, himself a former chairman of the Judiciary Committee and a friend of mine, Senator TED KENNEDY, had this to say:

> Nominees deserve a vote. If our Republican colleagues don't like them, vote against them. But don't just sit on them—that's obstruction of justice.

He was right then and that quote is right today. Of course, each of my Democratic colleagues made these remarks when a Democratic President was appointing judicial nominees. It appears that if they filibuster this nominee on the thinnest of excuses—in fact, I do not think they have any reasons to, other than their fear that he is a Hispanic conservative Republican who may not rule the way they want him to rule in the future and who may some day be considered for the Supreme Court of the United States of America—it appears there must be a double standard for the use of these weapons.

Let me tell you the origin of the word ''filibuster'' because that is an important word here today. It comes from the Spanish word ''filibustero,'' meaning a pirating or hijacking. It is just one more obstruction that has never been used in the case of Federal judges, for either the circuit court of appeals or for the district court.

That is exactly what an unprecedented filibuster of this nominee would

be: A hijacking of the Senate. What it amounts to is two more simple English words: More obstruction.

There was one true filibuster in the history of the Senate—I have to acknowledge that—and that was a filibuster of a Supreme Court nominee, Abe Fortas, back in 1968, if I recall it correctly. There was a bipartisan filibuster. There were plenty of Democrats and plenty of Republicans who voted against cloture in that case. I think they were wrong, whoever voted that way. Richard Nixon was for allowing the vote to go forward without a filibuster. But the Senate wisely has never utilized a true filibuster since that day. To use it on this nominee because some have said he is not Hispanic enough, to use it on this nominee because some have said he does not have any judicial experience—although Miguel Estrada was a clerk to Amalya Kearse of the Second Circuit Court of Appeals and a clerk to Justice Anthony Kennedy on the Supreme Court of the United States of America, and has argued 15 cases before that august body and numerous cases elsewhere. It seems to me he has a lot of judicial experience, though he has not sat on the bench.

If we take that opinion, then that virtually consigns almost every Hispanic in this country, probably most African Americans—in fact, probably everybody of a minority status—to never being a Federal judge because most Hispanics have never sat on a bench. There are those who have, admittedly. Most African Americans have never sat on a bench, although there have been some on lower court benches in the State courts particularly, and even in the Federal courts. But it basically says you cannot make it if you have to have served as a judge before, no matter how brilliant you are. There are brilliant African Americans. There are brilliant Hispanics. There are brilliant Native Americans. There are brilliant Asian Americans. And we have brilliant people who have never served as a judge who might have this opportunity some day that Miguel Estrada hopefully will have.

Others have used other phony arguments against Miguel Estrada, such as he did not answer all the questions. That is par for the course. I do not know many contested judicial nomination proceedings where all the questions have been answered the way the questioners expected them to be answered.

Then they say: We cannot get hold of all these documents because he did them confidentially while he worked at the Solicitor General's Office, even though four of those seven living Solicitors General who are opposed to that type of release of documents are leading Democrats in this country. They will not even listen to their own leading Democrats, let alone leading Republicans.

I am just imploring my colleagues on the other side: Do not go down the terrible path of filibustering this nominee or any other nominee. It is not only dangerous, it would establish a precedent that literally would be offensive to the country, offensive to the Constitution, offensive to the judicial system, offensive to the third branch of Government, and offensive to any reasonable person who believes the President's nominees ought to get a fair hearing and they ought to get a vote up or down on the Senate floor. That is where we make that determination.

If the Democrats have enough votes to defeat Miguel Estrada, I am not going to complain about it. I might feel badly about it, and I might say it was the wrong thing to do, but they have a right to do that. If we have enough votes on this side, with hopefully the help of a number of our friends on the other side, then that is the way it should be. Miguel Estrada should go on that bench.

Unfortunately, I believe one of the arguments that is flitting around in the background in the penumbras and emanations of the Senate is he might some day be asked to be the first Hispanic on the U.S. Supreme Court, and that is the real reason, among a few others that are not valid as well, for the slowdown in a vote on Miguel Estrada.

Mr. President, I do not think we should have a filibuster, or a pirating or hijacking of the judicial process. I think it would be a terrific mistake for Democrats to do. Every Republican is going to vote for Miguel Estrada, and I believe a number of Democrats will as well—I hope a great number of them will—and they ought to have that right, right here on the floor.

If my colleagues who disagree do not like it, they can speak out. They can give their reasons, and they can vote no. That will be what they should do if they feel sincerely about this. Politics ought to be left out of it. The fact that they suspect Miguel Estrada may not be exactly the way they would want a judge to act on their issues—I do not know whether he will or will not, to be honest, but if the mere suspicion is enough to vote against him without any real basis otherwise, then I think we are treading on some very dangerous ground.

I believe in Miguel Estrada. I believe this President is doing everything in his power to reach out to people of color in this country. I believe we ought to help him. He certainly has indicated his desire to do so, and he certainly has been doing it. This is a President who has put a number of Democrats on the Federal bench. I think he wants to make sure we fill these seats and we get them done as best we can. Naturally, any President worth his or her salt is going to try to appoint people who, hopefully, agree with him or her. I think that is the nature of the process, and that is what we get when we elect a President; we get that President's nominations to the various Federal courts.

This President is very sincere and has approached it probably less politically than Presidents, Republican and Democrat, whom I have seen in the past. He deserves support. He deserves to be treated fairly. His nominees deserve to be treated fairly. Above all, Miguel Estrada should be treated fairly. If the ''filibustero'' occurs, I guarantee he is not being treated fairly.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, this is an important debate. I acknowledge my colleague, friend, and chairman of the Senate Judiciary Committee, Senator HATCH, who has argued very vigorously day after day in support of the Miguel Estrada nomination.

For those who wonder why the Senate would be taking up time to discuss one man's nomination to one court, this debate goes to the heart of a very basic issue. The issue is the constitutional responsibility of the Senate. After most of us who serve in the Senate are long gone and forgotten, some will harken back to this debate and make reference to it to determine whether at this moment in history the Senate stood up for its constitutional authority and responsibility.

That constitutional authority and responsibility is found in article II, section 2, of the U.S. Constitution, which says that the Senate shall have the power to advise and consent to the nominees of the President to the courts of our land. That is an important responsibility from the very beginning of this Republic.

There are those in the President's party who might like to change the Constitution when it comes to President Bush's nominees, to take out the word ''advise'' and basically say ''consent''—just move on with it. If they could, we would move from a Senate to a rubber stamp. That is the choice: The Constitution or a rubber stamp.

I hope the Senate never reaches the point where we do not stop to ask important questions of nominees who are seeking a lifetime appointment to the Federal bench—no review by voters, no review by Congress. The judge is there for life, and, subject to malfeasance or the commission of a crime, they will stay in that position until they die or quit. That is what is at stake.

Miguel Estrada was nominated by President Bush to serve on the DC Circuit Court of Appeals, a lifetime appointment to the second highest court of the land. This is an important nominee, important because we know that when it comes to the DC Circuit Court of Appeals, it is the AAA team for the Supreme Court. The White House has made it clear that Miguel Estrada may be in line to move up to the major leagues. So Miguel Estrada is not just another judicial nominee.

If we look at him—and I have had a chance to sit down and talk to him—what a compelling life story he tells. Senator HATCH has recounted it, as others have. His legal credentials are

impressive, but his views are so suspect that he has consistently refused to say publicly what he believes.

I believe the decision of the Bush administration to affirmatively act to put a Hispanic nominee on the Federal bench is the right thing. A few weeks ago, President Bush said he was not in favor of affirmative action. With the nomination of Miguel Estrada, the White House is affirmatively acting to put a Hispanic on the bench. I support it. I salute it. It is the right thing to do. I have been honored to appoint a Hispanic to the district court in Chicago. I think it is important that that court reflect the diversity of my city, my State, and our Nation. The same thing is true on this court.

We have the question being raised by the Senator from Utah as to whether or not Miguel Estrada, during the course of his nomination hearing, should be asked questions about his views on the Constitution. Excuse me, but if this Senate decides that we cannot ask a nominee to the Federal court a question as basic as his views on our Constitution, then we have been transformed into a rubber stamp: Take it or leave it. The President sent the nominee. Vote for him or else.

A lot has been said of the quote from Lloyd Cutler, a man who is well respected, about whether or not a nominee should be asked how he would rule in a particular case. Lloyd Cutler is right. If one of the nominees came before us and we would ask that nominee, there is a case pending in the DC Circuit Court of Appeals, tell us how you would rule on that case if you sat on the bench, that is just plain wrong. We cannot do that. But it is not unfair to ask of a nominee his or her views on constitutional issues.

It is interesting to me that Senator HATCH would raise this point because only a week ago, three circuit court nominees, nominated by President Bush, came before the Judiciary Committee and we spent the better part of a day or more asking them probing questions about their views on constitutional issues. To their credit, they were forthcoming, honest, and candid in all of their answers. I did not agree with some of their points of view, but that is not what this is all about. They do not have to say what I need to hear.

I have voted over 100 times now for President Bush's nominees, many of whom I disagree with on constitutional issues and policy issues, but that is not what it is about. If they strike me as people who are moderate, honest, skilled, with good temperament, I am going to vote to put them on the bench, even if I do not agree with their political view. I think that is what the process should be.

When it comes to Miguel Estrada, when we asked him the most generic questions to open up and tell us his thinking about constitutional legal issues, he fended us off; he refused.

Justice Antonin Scalia on the U.S. Supreme Court was picked by President Bush as one of his favorite Justices. He likes his conservative bent. He may like him personally. Whatever reason, then-candidate Bush said Antonin Scalia was his kind of Supreme Court Justice. Do my colleagues know what Justice Antonin Scalia said about questions of judicial candidates regarding their political views? In the case of Republican Party of Minnesota v. White, in an opinion written by Justice Scalia which overruled restrictions against candidates for elective judicial office from indicating how they would rule on legal issues while campaigning, Justice Scalia said:

> Even if it were possible to select judges who do not have preconceived views on legal issues, it would hardly be desirable to do so. Proof that a Justice's mind at the time he joined the Court was complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the appearance of that type of impartiality can hardly be a compelling state interest, either.

Did you note the words of Justice Antonin Scalia, the favorite of President Bush and many of my Republican colleagues on the floor?

> Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Going back to Latin courses I took too many years ago to recount in this speech, tabula rasa is a blank slate. What the Justice has said in this opinion is, when nominees come before you saying they never thought about a certain issue, never reflected on a constitutional position, don't have an opinion to share with you, that's not evidence of lack of bias, that's evidence of lack of qualification. And that is what this debate is all about.

There is no doubt in my mind Miguel Estrada has his own point of view, understands constitutional issues, and would express it. But he has been carefully coached and managed by the Department of Justice and the White House to come before the Senate Judiciary Committee and, frankly, deny any opinion on any constitutional issue.

My colleague, Senator SCHUMER, asked him to just point out a Supreme Court case he disagreed with.

No, he said, if I didn't hear the arguments and I didn't read the briefs, I am not going to do it.

We asked him not only in the hearings but in written questions I sent to him afterwards, what is your view on Roe v. Wade, the landmark decision related to abortion in America.

Again he said, Well, since I didn't hear the arguments and I wasn't there, I am just not going to say what I understand when it comes to Roe v. Wade.

What a sharp contrast to John Ashcroft, the new Attorney General under President Bush who, when asked the same question in his confirmation hearing, said he would view that as established law and, unless it were overturned by the Supreme Court, would enforce it. Miguel Estrada would not even go that far.

I asked him as well to give the name of a judge, living or dead, whom you would emulate on the bench—a wide open, softball question. He could have picked the most conservative judge in history and the most liberal judge and said both of them brought the following qualities to the court and I hope to follow those qualities. He had been so carefully prepared, so cautioned by the Department of Justice, he wouldn't even go that far to suggest there was a Supreme Court Justice or a living judge, or one who has passed away, he would seek to emulate.

So what does that mean? Here is a man who will not tell us the most basic information about his views on the Constitution, on judicial philosophy, general questions you would ask of any nominee. And the Republican majority comes and tells us approve him anyway. Give him that lifetime appointment.

Roll the dice. Gamble he is going to be the right person. The Republican majority says to the Senate: Be a rubberstamp. Don't ask these questions. Now you are getting into ''advice.'' That is what the Constitution says, ''advice and consent.''

Let me point out some things that ought to be part of the record. I am proud to have named a Puerto Rican judge to the district court in Chicago. During President Clinton's tenure, 10 of his more than 30 Hispanic nominees were delayed or blocked from receiving hearings or votes by the Republican Senate Judiciary Committee, chaired by the Senator from Utah; 10 out of 30 Hispanic nominees.

Mr. REID. Will the Senator yield for a question?

Mr. DURBIN. I am happy to yield.

Mr. REID. The Senator recalls, I am confident, that one of the nominees, one of the 20 who made it through, a man named Paez from California, waited 4 years before he was able to get confirmed by the Senate?

Mr. DURBIN. Four years. And there was never any question raised about his qualifications or answers to questions.

Mr. REID. In fact, the Senator will recall he was a judge and had been for many years and had voluminous judicial opinions people could look at.

Mr. DURBIN. Absolutely. I might say to the Senator from Nevada, the Senator from Utah, in a speech to the Utah Federalist Society, said when you have a nominee like Miguel Estrada with no published opinions, then you have to really ask questions. Get to the bottom of his jurisprudential views, in the words of the Senator from Utah. In the case of Judge Paez, there was not only ample record about how he ruled, he answered the questions. Miguel Estrada has ducked the questions time and time again and believes if he can

hold us back long enough he will get a lifetime appointment to the Federal bench. That would be a dereliction of duty on the part of the Senate and that is why we are spending this time on this nominee. An important constitutional principle is at stake here, a principle of whether or not the Senate will have the right and the authority to ask the questions, to make a reasoned judgment before we give our advice and consent to a President's judicial nominees.

Mr. REID. Will the Senator yield for one more question?

Mr. DURBIN. I am happy to yield.

Mr. REID. I am not sure the Senator is aware from Congressional News, this publication that quotes what we say in the press every day—the distinguished chairman of the Judiciary Committee appeared on MSNBC Hardball last evening. Among other things, are you aware he said, talking about the Democrats in the Senate:

What they are really worried about is Estrada is so qualified and so good and he's Hispanic, that he's on the fast track to the Supreme Court. They think they don't want a Hispanic Republican, let alone a conservative, on the Supreme Court of the United States of America, and that's what this is all about.

What is the Senator's comment in that regard?

Mr. DURBIN. I can tell the Senator, as I said earlier, I was happy to appoint a Hispanic to the Federal District Court in Chicago. I hope sooner rather than later there will be a Hispanic on the United States Supreme Court. If you look at this nominee, Miguel Estrada, it is really instructive to me that the Hispanic Caucus of Congress has come out in opposition to his nomination. Some have dismissed that and said there are three Republican Hispanics in the House who favor his nomination. I am going to make that part of the RECORD. I ask unanimous consent if I might have a list of letters in opposition and concern to the nomination of Miguel Estrada be printed in the RECORD.

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

LETTERS OF OPPOSITION TO AND CONCERN ABOUT THE NOMINATION OF MIGUEL ESTRADA TO THE D.C. CIRCUIT COURT OF APPEALS

CONGRESSIONAL GROUPS

Congressional Hispanic Caucus, Congressional Black Caucus.

HISPANIC GROUPS

Mexican American Legal Defense and Educational Fund and Southwest Voter, Registration and Education Project, Letter of Opposition, January 29, 2002.

Mexican American Legal Defense and Educational Fund, National Association of Latino Elected & Appointed Officials, National Council of La Raza, National Puerto Rican Coalition, Puerto Rican Legal Defense & Education Fund, Washington, DC, Letter of Concern, May 1, 2002.

California La Raza Lawyers & Mexican American Legal Defense and Educational Fund, Letter of Concern, September 24, 2002.

Southwest Voter Registration Education Project, Letter of Concern, September 24, 2002.

Puerto Rican Legal Defense and Education Fund, Re-issue of Position Statement in Opposition, January 27, 2003; Position Statement in Opposition, September 17, 2002; Letter of Concern, June 11, 2001.

52 Latino Labor Leaders including the following: Linda Chavez Thompson, AFL–CIO, Washington, DC; Milton Rosado, President, LCLAA, Trenton, NJ; Eliseo Medina, Executive V.P., SEIU, Los Angeles, CA; Miguel Contreras, Exec. Sec. Treas., LA County AFL–CIO, Los Angeles, CA; Dennis Rivera, President, SEIU, 1199NY, New York, NY; Christina Vazquez, International VP, UNITE, Los Angeles, CA; Arturo S. Rodrijez, President, United Farm Workers, Keene, CA; Maria Elena Durazo, President, Local 11, HERE, Los Angeles, CA; Mike Garcia, President, SEIU Local 1877, Los Angeles, CA; Oscar Sanchez, Exec. Dir. LCLAA, Washington, DC; Debra Renteria-Styers, UAW, Macomb, MI; Maria Armesto, AFT, Washington, DC; Dionisio Gonzalez, USWA, Los Angeles, CA; Tony Padilla, TCU, Rockville, MD; Celestino Torres, USWA, Hayden, AZ; Guillermo Zeleya, IUPAT, Washington, DC; Al Ybarra, Exec. Sec-Treasurer, AFL–CIO, Orange County, CA; Ray Arguello, UAW, Detroit, MI; Patricia Campos, Pres., DC Metro LCLAA, Washington, DC; Rocio Saenz, President, SEIU Local 615, Boston, MA; Rose Rangel, SEIU, South Pasadena, CA; Salvador Aguilar, USWA, Griffith, IN; Jose A. Caez, IBEW, Farmington, CT; Elsa Lopez, AFT, Miami, FL; Lorenzo Rivera, UAW, Oxford, MI; Heriberto (Ed) Vargas, UNITE, New York, NY; Henry Gonzalez, UAW, South Gate, CA; Gerardo Becerra, ILA, Miami, FL; Jorge Rodriguez, SEIU, Los Angeles, CA; E.J. Himenez, USWA, Corpus Christi, TX; Hector Figueroa, Secretary Treasurer, SEIU Local 32BJ, New York, NY; Roberto Jordan, UNITE 62–32, New York, NY; Gary R. Allen, IAM, Albuquerque, NM; Joe Calvo, UAW, Lombard, IL; Susie Luna Saldana, AFT, Corpus Christi, TX; Johnny Rodriquez, UFCW, Dallas, TX; Baldemar Velasquez, FLOC, Toledo, OH; Henry (Hank) Lacayo, UAW, Newbury Park, CA; Lawrence Martinez, GCIU, Washington, DC; Jimmy Matta, Kent Co. WA LCLAA, Seattle, WA; A Polinar Quiroz, USWA, Chicago, IL; Walter Hinojosa, Texas AFL–CIO, Austin, TX; Maria Portalatin, AFT, New York, NY; Manuel Armenta, USWA, AZ; Santos Crespo, Jr., AFSCME, Brooklyn, NY; Angela Mejia, CWA, Channelview, TX; Jose Rodriquez, IAM, Ontario, CA; Armando Vergara, UBC, South Pasadena, CA; Jack Otero, CTC, TCU, Washington, DC, Rudy Mendoza, CWA, Santa Barbara, CA; Tania Rosario, Kent Co. WA LCLAA, Seattle, WA; and Chuck Rocha, USWA, Pittsburgh, PA.

National Council of La Raza (NCLR), Letter of Concern, September 24, 2002.

National Association of Latino Elected and Appointed Officials (NALEO), Letter of Concern, September 25, 2002.

Puerto Rican Bar Association of Illinois, Letter of Opposition.

LABOR

AFL–CIO, Letter of Opposition, January 29, 2003; Letter of Concern, September 26, 2002.

UAW, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Letter of Opposition, February 3, 2003.

CIVIL RIGHTS ORGANIZATIONS

Leadership Conference on Civil Rights, Letter of Opposition, January 29, 2003.

Alliance for Justice; Letter of Opposition, January 24, 2003.

Leadership Conference on Civil Rights, Alliance for Justice, Letter of Concern, September 26, 2002:

Signed by: Leadership Conference on Civil Rights; National Association for the Advancement of Colored People; National Organization for Women; National Black Women's Health Project; Mexican American Legal Defense and Educational Fund; Lawyers' Committee for Civil Rights Under Law; Alliance for Justice; People for the American Way; National Council of Jewish Women; National Family Planning and Reproductive Health Association; and Feminist Majority.

Sierra Club, Letter of Opposition, January 31, 2003.

Friends of the Earth, Letter of Opposition, February 3, 2003.

National Association for the Advancement of Colored People (NAACP), Letter of Opposition, October 24, 2002.

People for the American Way, Letter of Opposition, January 29, 2003, Letter of concern, September 25, 2002.

National Women's Law Center, Letter of Opposition, January 29, 2003.

National Partnership for Women and Families, Statement of Opposition, January 30, 2003.

American Association of University Women, Letter of Opposition, January 23, 2003.

Planned Parenthood Federation of America, Inc., Statement of Opposition, January, 2003.

NARAL Pro-Choice America, Letter of Opposition, January 29, 2003.

National Organization for Women, Letter of Opposition, January 29, 2003.

National Family Planning and Reproductive Health Association, Letter of Concern, January 31, 2003.

National Council of Jewish Women, Letter of Opposition, February 3, 2003.

Others Opposed to Confirmation, Statement, January 31, 2003: ADA Watch/National Coalition for Disability Rights; Americans for Democratic Action; Earthjustice; Feminist Majority; Moveon.org.; NAACP Legal Defense and Educational Fund, Inc.; National Fair Housing Alliance; and Working Assets.

Consumer Federation of America, Letter of Concern, September 25, 2002.

LAW PROFESSORS

Society of American Law Teachers, Letter of Concern, October 9, 2002.

Rodriquez, Marc, Princeton University, Princeton, NJ.

CITIZENS

University of Virginia Law Democrats; Urging no vote until production of documents, February 3, 2003.

Mark and Debra Loevy-Reys, Shrewsbury, VT.

Harry Callahan, Ft. Lauderdale, FL.

Eugene Hernandez, San Fernando, CA.

Paul Moreno, Mission Viejo, CA.

Hall, George, Manhattan Beach, CA.

Lizbeth Stevens, Los Angeles, CA.

Christopher Chase, Lansing, MI.

Mr. DURBIN. The list of organizations that oppose Miguel Estrada is extremely long. It goes on for pages. Congressional Hispanic Caucus and Black Caucus—but listen to these. The Mexican-American Legal Defense and Education Fund—this is the premier Hispanic civil rights organization in America—opposes the nomination of Miguel Estrada. Frankly, I hope we do have a nominee of Hispanic origin who is on the Supreme Court as quickly as possible, as soon as there is a vacancy and a qualified candidate. But I hope Members will take pause to realize that just having a Hispanic surname is not enough. We need to bring a person

to the highest court of the land who really understands that responsibility and is not so cagey and careful when it comes to explaining his point of view. That has been the case with Miguel Estrada.

He is, in fact, a stealth candidate. It's an effort by the Bush White House to put in a secret judiciary, judicial nominees who do not share their point of view with the public so you, frankly, have to gamble, when they come to the bench, that they will be moderate and reasonable in their judicial views. That is not the case with Miguel Estrada.

Let me make note, too, of the Federalist Society, to which Mr. Estrada belongs. He appears to be following the advice of DC Circuit Judge Lawrence Silberman, who recently told the Federalist Society that he provided key advice to Antonin Scalia in 1986 that led to his smooth confirmation. Lawrence Silberman told the great Federalist Society that he said to Antonin Scalia: Don't answer any questions about judicial philosophy or views.

It goes back to the Clarence Thomas model. When Clarence Thomas, like Miguel Estrada, told the Senate Judiciary Committee at the time that he had no opinion on the issue of abortion—that is a red flag. There have been judicial nominees from the Bush White House who disagree with my position on this important issue, but they have been honest enough to say that, regardless of my personal and private points of view, when it comes to my responsibility as a judge, I will follow Roe v. Wade until it is overruled by the Supreme Court. As John Ashcroft, another person who opposes Roe v. Wade, has said, it is the established law of the land until overturned. Why couldn't Miguel Estrada, who has been a Supreme Court clerk, go that far—to acknowledge that point of law, that stare decisis and precedent would guide him on an issue as important as Roe v. Wade?

His refusal to do that has caused alarm on this side of the aisle, among the majority of the Members.

Let me speak to you about some of the other issues that have been raised by some of my Republican colleagues during the course of this debate. We have heard from a Republican Senator in the Dallas Morning News that if we deny Mr. Estrada the position on the DC Circuit, it would be to shut the door on the American dream of Hispanics everywhere.

The reality is that until last week, Mr. Estrada was the only Latino nominated by President Bush to any of the 42 vacancies that have existed on the courts of appeal. In contrast, President Clinton nominated 11 Latinos to our appellate courts, and he also nominated 21 to district courts. Republicans blocked several of these, including Enrique Moreno, Jorge Rangel, and Christine Arguello.

Let me also note this argument about Estrada which Senator TRENT LOTT said to the Associated Press last year, that they—the Democrats—don't want Miguel Estrada because he is Hispanic. The reality is that 8 of 10 Hispanic appellate court judges were appointed by President Clinton. Three other nominees of President Clinton to the courts would apply, as well as others for the district courts.

Mr. Estrada, in his background, has never in his legal career provided any pro bono legal expertise to the Latino community. He has never joined, supported, volunteered for, or participated in events of any organization dedicated to serving and advancing the Latino community. He has never made any effort to open the doors of opportunity to Latino law students or junior lawyers.

Let me refer to another comment made by some of the Republicans in the Chamber. Senator RICK SANTORUM said this on Fox News on April 10 of last year:

> They don't want any examples out there for America to see of somebody who is conservative and also minority. . . . [I]f you are a conservative, we don't like it. But if you are a minority and a conservative, we hate you.

Under Senator LEAHY, then chairman of the Judiciary Committee, the committee approved the following Bush nominees: Phillip Martinez, Jose Martinez, Alia Ludlum, Randy Crane, and Judge Jose Linares.

Time and again, when Republicans controlled the Senate, the Judiciary Committee has approved these judges who are conservatives and minorities.

The point made by our colleague, Senator SANTORUM, just does not wash.

Let me note some of the other statements that have been made.

They argue that requesting Mr. Estrada to produce his writings is unprecedented.

Here is a man who has not been a judge but is in the Solicitor General's Office who had a bounty of legal writings, and we are asking that he present them so we can have an insight into his thinking—not unlike a judicial nominee who has served as a judge and we read his opinions to try to understand where this judge is coming from. It is not unusual, frankly, in the Judiciary Committee to point out that a judge has been overruled a certain number of times to know whether or not they have clear thinking and whether or not they understand the law. But when it comes to Miguel Estrada, the Bush White House under Republicans refused to give us the documentation so we can see into the mind of Miguel Estrada who has carefully avoided answering direct questions on judicial philosophy.

The Department of Justice provided memos by attorneys during the nominations of William Bradford Reynolds, nominated to be Associate Attorney General; Robert Bork, nominated to be a Supreme Court Justice; Benjamin Civiletti, nominated to be Attorney General; Stephen Trott, nominated to the Court of Appeals for the Ninth Circuit; and even Judge William Rehnquist when he was nominated to be Chief Justice of the Supreme Court.

So asking for this documentation is certainly not unprecedented. In fact, there is ample precedent. When we look at the Estrada nomination, we see a clear effort to stonewall. Mr. Estrada has refused to say whether he would strictly interpret the U.S. Constitution.

Listen carefully to what I say here. There is not a single Clinton nominee who would have made it past this question before the Republican Senate Judiciary Committee. They were each asked point blank that question. If they did not answer in a fashion acceptable to the Judiciary Committee, it was over, their nomination was finished.

Miguel Estrada comes before us and refuses to even answer the question. I think I know what his answer would be. But why is he so afraid to share his judicial philosophy with us? Is it so radical, so unusual, is it so out of the ordinary that he is afraid people across America will be worried about putting him on the second highest court in the land for a lifetime appointment? That is the only conclusion I can draw from that.

When it came to Mr. Estrada, he refused to discuss the judicial or legal philosophy of any current Supreme Court Justice.

When I asked nominees for district court judgeships in my State to give me an insight into their thinking about Supreme Court Justices—which you think is good or somebody you disagree with—I got really interesting answers from Democrat and Republican nominees. Sometimes I am surprised by the things they pick out. It gives you an insight into what they are looking for and perhaps the role model on whom they might model their own judicial career.

When it comes to Estrada, a man on the fast track to the Supreme Court, he wouldn't discuss the judicial or legal philosophy of any current Supreme Court Justice. When we asked him to name any Supreme Court decision in history with which he disagreed—as I reflect on this question, this is not about a particular case. This is about a case that was decided 20 or 30 or 40 years ago. In this case, we have a situation where Miguel Estrada refused to answer the question.

So what we have before us, unfortunately, is a situation where we have a candidate who has not brought before us the kind of background, the kind of answers to questions which can give us solace that we are appointing to the second highest court in the land a man who has the qualifications and the temperament and the skill to handle the job.

Our colleagues have emphasized that Mr. Estrada received a well-qualified rating from the American Bar Association. The ABA committee rating of Mr.

Estrada, as for all nominees, is advisory and not binding. But it is interesting to look at that rating and what it has meant in the past.

Last fall, a number of Republicans complained that a Bush nominee with a well-qualified rating from the ABA received votes against their confirmation, but there was no acknowledgment that many of these same Republicans had voted against Clinton nominees who received well-qualified ratings.

While the Republicans were in control of the Senate, and when the Judiciary Committee was chaired by Senator HATCH, the following nominees received well-qualified ratings, and many Republicans voted against them:

Judge Merrick Garland, the last judge confirmed to the DC Circuit; Judge Gerald Lynch, of the Southern District of New York; Judge Rosemary Barkett—who is, incidentally, a Latina—who was found well-qualified for the Ninth Circuit was voted against by the Republicans; Judge William Fletcher of the Ninth Circuit; Judge Ray Fisher of the Ninth Circuit; Marcia Berzon of the Ninth Circuit; Sonia Sotomayor, another Latino, a nominee found well-qualified by the ABA and voted against in the Second Circuit by Republicans; Judge Margaret McKowen, of the Ninth Circuit; Richard Paez, to whom the Senator from Nevada just made reference, another Latino, to the Ninth Circuit, and was held up for 4 years, was found well-qualified, not voted for by Republicans; Judge Margaret Morrow, of California, voted well-qualified.

Incidentally, the line of inquiry on Margaret Morrow I thought was the most intrusive I have ever heard. Under the Republican-controlled Senate Judiciary Committee, Margaret Morrow, with the most amazing legal credentials and who answered every question, finally in her frustration, when the Republican majority on the Senate Judiciary Committee said to her: We want you to tell us how you voted throughout your life on propositions on the California ballot. Did you vote yes or no, and why?—we are asking Miguel Estrada what his position is on Roe v. Wade, and the Republican majority on the floor here is saying: You are going too far.

When it came to Clinton nominees such as Margaret Morrow, they wanted her to violate the secrecy and sanctity of her vote in the polling place and explain how she voted on a proposition before the California electorate. That shows you how far they were going to go—way too far in the extreme to stop the well-qualified nominee.

All we are asking of Miguel Estrada is the basics: What is your position on basic constitutional issues? When it comes to Supreme Court decisions, discuss one of them you might have disagreed with in the last 40 years, or in the history of the Supreme Court.

Mr. HATCH. Will the Senator yield for a question?

Mr. DURBIN. In one moment.

Asking him: Give us the name of one Supreme Court Justice, living or dead, whom you would emulate as a member of the bar or as a member of the bench. He refuses to answer any of those questions.

I will yield to the Senator from Utah.

Mr. HATCH. Does the Senator remember—you may or may not have been there at the time—he was asked about Roe v. Wade, and he said it was settled law and that he would apply it? Does the Senator remember that?

Mr. DURBIN. I am happy to read exactly what he said when I asked the question because I sent it to him in the written questions that came.

Mr. HATCH. That is what it said in the transcript.

Mr. DURBIN. If the Senator will bear with me.

Mr. HATCH. It is on page 128 of the transcript. Specifically asked, he said it is settled law and he would apply it. I do not know what more he could say.

Mr. DURBIN. I am looking for it.

Mr. HATCH. I certainly do not know what more he should have said. If you go to page 128——

Mr. DURBIN. This isn't what I am referring to. These are written questions which were sent to him. I just read his answer. It was curious to me, I say to the Senator from Utah, when he was given an opportunity to say just that, he did not. He did not.

Mr. HATCH. Well, he did. In his oral questions he was asked about Roe v. Wade, and he said it was settled law, he would apply it. Maybe he did not say exactly what you wanted him to at the time, but that is what he did say.

Mr. DURBIN. Let me read my question:

> You and I met privately before your hearing—
>
> I addressed this to Miguel Estrada—
>
> and I asked you for your views on Roe v. Wade. You indicated you considered the answer to that question to be a private matter, but your answer suggested you do have an opinion. Do you have an opinion on the merits of Roe v. Wade? If so, have you read the briefs and transcripts of the oral argument?

This is Miguel Estrada's response:

> I stated during our meeting, like many Americans, I have personal views on the subject of abortion, which views I consider a private matter that I was unprepared to share or discuss with you. I also stated I do not harbor any personal views of any kind that if I were a judge would preclude me from applying controlling Supreme Court law in the area of abortion. I did not state that I have private views on whether Roe v. Wade was correctly decided. As I stated during my hearing, it would not be appropriate for me to express such a view without doing the intensive work that a judge hearing that case would have to undertake, not only reading briefs and hearing the arguments of counsel but also independently investigating the relevant constitutional text, case law, and history.

Had he answered exactly as the Senator from Utah had said—it is controlling law, and that is what I will apply, or this is my view on the general issue of privacy—I think it would have opened our eyes to an insight into what he was thinking. But again, he was careful to avoid——

Mr. HATCH. Will the Senator yield again?

Mr. DURBIN. I am happy to yield.

Mr. HATCH. Senator FEINSTEIN asked him about Roe v. Wade. He basically said that he should not discuss his views on it, but he said, on page 128:

> I have had no particular reason to go back and look at whether it was right or wrong as a matter of law as I would if I were a judge that was hearing the case for the first time. It is there. It is the law as it is subsequently refined by the Casey case. And I will follow it.

And Senator FEINSTEIN said:

> So you believe it is settled law?

Mr. Estrada said:

> I believe so.

So maybe he did not answer exactly the way you wanted him to in the written questions, but in the oral testimony he made it very clear that he would follow the law and that he believes it is settled law. I do not know what more he should have said.

Mr. DURBIN. I say to my colleague from Utah, I thank him for the question. And I just say that I cannot quite understand how we could get so many different versions of answers from this nominee. That is troubling to me. It concerns me. And I think it raises the question of whether or not he was coached in terms of avoiding or trying to avoid expressing his personal point of view.

I see other colleagues in the Chamber seeking recognition at this time. I have spoken earlier, and I will just say, before closing, I hope that those following this debate will understand the historic nature of the debate. What is at stake here is the question of the constitutional authority and responsibility of the Senate when it comes to the advice and consent given on judicial nominees.

We believe, on this side of the aisle—at least many of us do—that Miguel Estrada should be more forthcoming, should give us his writings so we can understand what is in his mind and what he would bring to this bench so we would have better answers to the basic questions we should ask every nominee from every President. To do otherwise is to relegate us to a minority status in terms of our major responsibility under the Constitution.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, it is my understanding the Senator from Mississippi wishes to speak now. He told me earlier that he wishes to speak for 10 or 15 minutes. That would take us past 12:30. I ask unanimous consent that the distinguished Senator from Mississippi be recognized for up to 15 minutes, and following that the Senate recess for its normal Tuesday recess.

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

The Senator from Mississippi.

Mr. LOTT. Mr. President, I thank the Senator from Nevada for making that

request. I believe I can make my remarks in that time.

Mr. President, I take this occasion to speak on behalf of this nominee. I think he certainly deserves to be confirmed by the Senate, in a normal vote which would require a majority of the Senators, and that this matter not be subject to a protracted debate, which could, in fact, turn it into a filibuster.

I wish to speak first in support of this specific nominee, but then also as one who has viewed the judicial nominations and the debate that has taken place over the past 7 years.

There has been a lot of interesting discussion. It is amazing that when the majority changes, the debate seems to shift sides, both ways. Some of the arguments we are hearing now we were criticized for making in the past. But I do not want to get into statistics or what may have happened with this judge or that judge.

At the beginning, I want to talk about this nominee, this outstanding man who has lived the American dream in an incredible way. I am pleased and honored to be able to come to the floor and express my support for Miguel Estrada to be a U.S. circuit judge for the District of Columbia Circuit Court of Appeals.

I think he is highly qualified to be a Federal judge. Beyond that, however, his American success story exemplifies what the American dream is really all about. It is about hard-working immigrants who moved to the United States and searched for a better life. It is people, such as Mr. Estrada, who have made our country stronger by contributing to our society with their strong work ethic and desire to achieve. Others have made those points, but I want to be on record talking about them myself.

First, Miguel Estrada was born and raised in Honduras, and immigrated to the United States at age 17, speaking little English at the time. He quickly learned English, however, and excelled in academics, graduating with a bachelor's degree magna cum laude and Phi Beta Kappa from Columbia College. Then he went on to earn his J.D. degree magna cum laude from Harvard Law School. I might add, he was editor of the Harvard Law Review, a high honor and great achievement.

He had valuable opportunities to learn the intricacies of the Federal appeals court system by clerking for a Second Circuit court of appeals judge—who was a Carter appointee—and serving as a clerk for U.S. Supreme Court Justice Anthony Kennedy.

He has built a distinguished record as an attorney in private practice, as a Federal prosecutor in New York, and as an Assistant to the Solicitor General under both President Clinton and President George H.W. Bush.

Mr. Estrada has argued 15 cases before the U.S. Supreme Court, including a death penalty case in which he represented a death row inmate pro bono. The point was made that maybe he had not done any pro bono work for Hispanics specifically, but when you do pro bono work, you do not always check that kind of background. You do this work on behalf of a client who would not be represented if you were not willing to serve without pay on behalf of this individual.

It is rare to see an attorney or judge with such an outstanding record even at the time of retirement. The experience this young man has had is incredible in terms of his background, his education, the variety of the experience he has with the judiciary and with the application of law—and even before the Supreme Court, both as a clerk and also in appearances he has made. So, clearly in terms of experience and education, Miguel Estrada is highly qualified.

I find it very curious and exacerbating, quite frankly, that some Members of the Senate are questioning whether or not he is qualified. After all, he was rated unanimously well-qualified by the American Bar Association, a rating that has been considered—I believe Senator HATCH and others have described it as the ''gold standard'' for the Democrats as to whether or not a man or woman should be qualified to serve on the Federal judiciary. So certainly to get a unanimously well-qualified rating from the ABA should make a tremendous difference here as to this nominee.

He does have the support of a lot of people in the Hispanic community. In fact, I know Hispanics all across America are asking the question: What is the problem here?

This is a well-qualified man who is Hispanic and has the educational background and experience. Why are they still opposing him? Is it because he is brilliant? I suspect maybe that is part of the problem. Is it because he has a conservative philosophy of strict construction and interpretation of the Constitution? Maybe that is part of it, too. Is it because he is Hispanic? I don't understand the basis for the opposition.

The only thing I heard is that maybe he hasn't revealed enough of what he might do in a hypothetical case or the argument just being made, or that he would not name a decision with which he disagreed. It is a catch-22. If you begin to speculate or if you begin to identify a particular case, then you are attacked because you identified that particular case.

We have a right and an obligation to ask any question we want to ask. Judicial nominees have a right to have their own private views, but they also, as he has done, have to speak up and say they will support the law as it exists. They should state that they will support the rulings of the Supreme Court. He has done that.

No, there is something more going on. It probably has something to do with the debate that just took place, with speculation or suspicion as to what his position privately may be on Roe v. Wade. That is partially what is going on here.

We have argued back and forth over the years about what should be the basis for our votes. I talked to my senior colleague from Mississippi, Senator COCHRAN, who served on the committee and is a senior Member of this body, about what should be the basis of these votes. Generally speaking, the nominee is selected by the President of the United States, who won an election. A lot of people understand one of the most important things a President does is to select the men and women who will go on our Federal judiciary and the Supreme Court. They make that selection. If that man or woman is qualified by temperament, by education, and by experience, and unless there is some ethical limitation or something of that nature, generally speaking you ought to give them the benefit of the doubt and vote for them.

That is why I stood here in the Senate and explained why I would vote for Justice Ruth Bader Ginsburg. I knew I wouldn't agree with a lot of her decisions. I didn't agree with her philosophy. But she didn't have a conflict of interest. She didn't have an ethical problem. She was qualified. I voted for her, even though philosophically I had problems with the nomination. There were others where that situation applied, where I wound up voting for them even though I would not agree with the decisions that they would make. That is the way we should do it.

Other times I spoke against nominees and I voted against them, even though as the Majority Leader, I had the responsibility sometimes to call them up. I remember two very controversial judges nominated to the Federal bench, Paez and Berzon from California. Senator HATCH and I were criticized because we, in fact, moved them through the process. They wound up coming before the Senate and were voted on. I voted against them both, but I helped move the process forward. I stated my problems with them and voted against them. I wouldn't dare, however, try to filibuster them because I had some concerns about how they would rule in the Federal judiciary positions for which they had been nominated.

If a decision is made to prolong debate and turn it into a filibuster and we wind up having to have votes on a cloture petition, we will be on the verge of setting a very dangerous precedent, one that has not happened, in fact, in 35 years or so.

I remember a couple of years ago there was a nominee supported, as a matter of fact, during the Clinton years by Senator HATCH, I believe it was. We started having the movement toward a filibuster. I think we maybe even had a cloture vote. I remember the discussion across the aisle. Both sides were saying: Wait a minute, do we want to set this precedent; do we want to do this? Does the Senate want to start voting on judges requiring 60

votes to get a confirmation? The Senate responsibly, wisely, backed away from that position.

I urge my colleagues, come to the floor, state your concerns. If you have additional questions, I guess there is still time to get some answers. But we need to have an up-or-down vote on this nominee this week. He has been pending since May 9, 2001, as have some other very qualified nominees for the Federal judiciary. How long is enough? How much time do you need to review the record and look at the credentials, the qualifications of a nominee?

It is actually embarrassing, the way the questions are being raised about this nominee, that we wouldn't give this nominee an overwhelming and perhaps unanimous confirmation to this position. Is it a fear that this brilliant, young Hispanic who has lived and taken advantage of the American dream might some day be recommended for the Supreme Court? Is that what is going on here? If it is, why don't we at least wait and worry about that when he gets nominated to the Supreme Court.

He is qualified. He will be an outstanding Federal judge. I urge my colleagues to stop using very weak arguments about how maybe he didn't answer detailed questions about what his rulings might be in a hypothetical case. That is not usually the basis we use for voting against a nominee.

I thank Senator HATCH for the job he has done on the committee. I am glad this process is beginning to break loose now for men and women, minorities, who have been pending for close to 2 years and who deserve to be considered by the Senate. I wholeheartedly endorse this nominee and look forward to seeing the leadership he will provide on this particular circuit court of appeals.

I yield the floor.

RECESS

The PRESIDING OFFICER (Mr. SESSIONS). Under the previous order, the hour of 12:30 having arrived, the Senate will stand in recess until 2:15 p.m.

Thereupon, at 12:37 p.m., the Senate recessed until 2:15 p.m., and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT—Resumed

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I have listened with great interest, and even great concern, to the debate that has taken place in this Chamber on the issue of Miguel Estrada's nomination to serve on the DC Circuit Court of Appeals, and I feel impelled to stand and explain the reasons why I think not only Miguel Estrada deserves confirmation by this body—indeed, he deserves a vote—but why I think the judicial confirmation process is broken and has fallen into a state beneath the dignity of this institution and this body.

Indeed, I think if you could characterize what has been going on with regard to this confirmation process, you could talk about ''delay''—the fact that Miguel Estrada's name had been sent up for consideration by the Senate some 18 months ago, on May 9, 2001.

Second, I would choose the word ''defeat'' in talking about this nomination. It is clear the overarching objective of those who choose to oppose this nomination are those who wish to defeat President Bush on any and every front they can find, where they don't believe they will have to pay a political price.

You could also talk about ''deny''—denying an opportunity for immigrants like Miguel Estrada, someone who is living the American dream, to serve in a position of public trust.

Finally, I will use the word ''dispirit.'' Clearly, there is an attempt to dispirit those who would offer themselves for public service, to make it so burdensome and so distasteful that they will choose not to offer themselves for public service.

So I believe much of this debate encompasses these four concepts: Delay, defeat, deny, and dispirit.

Now, how have opponents to Miguel Estrada's confirmation chosen to approach their opposition? First, I believe they have used scare tactics. The Senator from Massachusetts said the other day:

> When this or any other administration nominates judges who would weaken the core values of our country and roll back the basic rights that make our country a genuine democracy, the Senate should reject them.

And then we heard from the Senator from Vermont:

> We see an emboldened executive branch wielding its rising influence over both Houses of Congress and ever more determined to pack the Federal courts with activist allies, to turn the independent judiciary into a political judiciary.

Mr. President, if either one of those statements were true, if I believed those accusations were supported by the evidence, I would not support this nomination, nor would, I believe, any Senator, Republican or Democrat, support this nomination. But I believe more than anything else that sort of rhetoric, unsubstantiated in fact, is proof positive this confirmation process is broken. And I say enough is enough.

Opponents of Miguel Estrada's confirmation claim he has an inadequate record. They claim he has little relevant practical experience. They claim because he would not engage with them in a debating tactic, asking him whether there is any Supreme Court decision with which he disagreed, and finally, they claim that he has not clearly stated his judicial philosophy.

In my remarks over these next few minutes, I hope to address each one of those objections and show they are merely pretext for what is really going on here.

The American people know what is going on here, though, regardless of what Members may claim. They realize the judicial confirmation process in the Senate has become a game of political football, where the participants think they are going to score points against their opponent—Republicans against Democrats, Democrats against Republicans. But while the people who engage in this game of political football may believe they are scoring points, it is the American people who lose.

Again, I want to associate myself with the thoughtful remarks made the other day by the senior Senator from Pennsylvania who called for an end to the fingerpointing, the recriminations and the faultfinding. He called for the beginning of a new protocol, a new process that befits the dignity of this institution, one that would provide a timely, comprehensive, and efficient way to evaluate and vote on judicial nominees, regardless of which party is in power in the White House.

First of all, I want to address the objection that has been noted about Mr. Estrada's refusal to state a political position or ideological position on a whole range of issues that will, in all likelihood, come before him on the bench.

Everyone knows judges are not supposed to be politicians, running on the basis of a party platform, and, worse yet, everyone knows judges are not supposed to prejudge cases that may come before them. Why have a trial? Why have the adversaries in a court of law argue about what the facts are or what the application of the law to those facts should be if a judge is going to prejudge that case? That is not justice; that is the antithesis of justice and the dispassionate impartiality we expect from judges.

Every lawyer—and this body is chock full of lawyers—knows that cases are decided on the basis of the facts and the law, not—in a court of law, at least—on the basis of a political persuasion or an ideological position. Of course, Mr. Estrada is well within his rights to say, I am not going to prejudge a case because I do not know exactly how the facts may come before me; I do not know how the jury may decide the facts, and therefore I cannot tell you how the law may apply to that particular set of facts on a case-by-case basis.

Under our system of government, judges hold a very different job from that held by a member of the legislature or even the President, a member of the executive branch. Judges, if they are going to be true to their oath, if they are going to interpret the law, not make law, are bound by what this body says the law should be when we pass a bill or the President signs a bill into law, by the Constitution, and by precedents; that is, earlier decisions made by high court.