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.

Any judge who presumes to take on the role of a lawmaker is, I submit, a lawbreaker. A judge should not be a politician campaigning for confirmation, and I applaud Mr. Estrada for refusing to submit himself to that sort of process and refusing to prejudge cases or to act like a politician campaigning for confirmation.

During the Judiciary Committee hearing and during the executive sessions in which I participated as a member of the executive committee, Mr. Estrada was asked: Do you disagree with any previous decision of the U.S. Supreme Court? I am afraid that demonstrates again what the judicial confirmation process has degenerated into. It should not be trivialized, and it should not be reduced to a law school classroom where narrow and provocative points of law are debated.

Does anyone really doubt that if any nominee disagreed with a Senator's view on policy issues, no matter how wrong under the law, we would see nothing but further degeneration of the confirmation process?

I believe that Mr. Estrada, being a good lawyer and highly qualified to serve on the DC Court of Appeals, is following the dictum of a Supreme Court Justice who said the Supreme Court is not final because it is always right; it is right because it is final. In other words, the way the Supreme Court decides a case puts it to rest unless, in the legislative area, Congress comes back and passes a statute that, in effect, overrules that decision by changing the law and making it perhaps clearer what its intent is, or even, in the rarest of circumstances on a constitutional point, that the people choose to amend the Constitution and say that does not represent what we, the people, want the Constitution to reflect or it does not reflect our values. And there is a process, of course, for that as well.

One of the most extraordinary arguments I have heard by opponents to Miguel Estrada's confirmation is that he does not have the experience to sit on the DC Court of Appeals.

I have been honored during my career to serve as a judge at a trial court level, at a State supreme court level, and I have been honored to serve as an attorney general of my State, the State of Texas, before I came to the Congress. I will tell you that Mr. Miguel Estrada has exactly the kind of experience that has prepared him better than virtually anyone could possibly be for service on this court.

Of course, we all know his record, a distinguished academic record. We know he served in the Solicitor General's Office during the Clinton administration and argued 15 cases before the U.S. Supreme Court. As attorney general of Texas, I had the honor of arguing twice before the U.S. Supreme Court myself, and I must tell you that is the Super Bowl for someone in my profession and someone in Miguel Estrada's profession. That is the peak of your career. That is the highlight of your legal experience, and to do it 15 times, it is as if he had Super Bowl rings on every finger of both hands, and to claim he is not qualified is preposterous.

Of course, you cannot have the experience of being a judge until you have actually been one. People have to start somewhere. Even the senior Senator from New York has stated that Miguel Estrada passes his self-styled test for excellence. He said: Excellence is legal excellence, the quality of the mind. We don't want political hacks on these important courts. No one disputes that Mr. Estrada passes this point with flying colors. He comes highly recommended in this regard. When the ABA, the American Bar Association, recommends him, that is all they are evaluating.

I believe it is a red herring to argue that Miguel Estrada has insufficient experience to serve on this important court.

What is really going on? I think a comment in the CONGRESSIONAL RECORD on February 5, 2003, by the ranking minority member of the Judiciary Committee, the Senator from Vermont, is very telling, and I want to read this twice so there is no missing what he said.

He said:

> I have friends who range across the political spectrum. But I think I also would be willing to state what my political philosophy is, or certainly what my judicial philosophy is, if I am going to ask for a lifetime appointment to the bench, just as I have to state what my political philosophy is when I ask the people of Vermont to elect or reelect me.

So it is clear, what the Senator is saying is he expects a person nominated by the President, before this body for confirmation, to express a political philosophy, just like he or any other Member of this body would running for the Senate.

I believe that demonstrates exactly how wrong the concept is of what the advice and consent function of the Senate should be under our Constitution, and how wrong the concept is of what a judge should be under our Government of separated powers. I want to talk about that in a moment.

When I think about the scare tactics that have been employed over the last few weeks with regard to Miguel Estrada, it becomes crystal clear to me why our Government has a difficult time recruiting talented individuals to leave the private sector and offer themselves for public service. Why would anyone in Miguel Estrada's position, a successful lawyer, someone who, as I said, has been to the Super Bowl 15 times, subject himself to such a spectacle?

Mr. Estrada is very good at what he does. He has a successful law practice as a partner in a prestigious firm. In the 16 years he has practiced law, his reputation is unblemished. For the first time in his career, his professionalism, his temperament, his willingness to put his hand on the Bible and take an oath and abide by that in performing the job of a judge are all being called into question. Again, I ask: Why would he or anyone else like him subject himself to this broken process?

If he were here today, he would say, as he told me in my office, that accepting this nomination to serve on the DC Court of Appeals is not about personal accomplishment, personal achievement, but it is a sense of duty and obligation to our country, his adopted country.

This country took in his mother and his sister, and himself. At age 17, he came from Honduras to America, barely speaking English. Working together and at great sacrifice, his mother put Miguel through law school, with his help. He worked odd jobs. It is also worthwhile to note, they put his sister through medical school.

These immigrants, one a distinguished lawyer, another a distinguished doctor, by dint of hard work, access to a good education, have achieved what we all recognize as the American dream and what every immigrant hopes for. Indeed, we are a nation of immigrants. Through education and hard work, they have found prosperity, and this opportunity, this hope, is the best civil right this country can give to any immigrant.

Miguel Estrada sees this as an opportunity to contribute to a way of life that provided him a way out, an opportunity for great achievement and success, and an opportunity for public service. Only under our broken, destructive judicial confirmation process, as it has now become in this body, someone can be demonized, not just criticized but demonized, for such an honorable goal. It is a shame.

America has always been, and God willing will always be, a land of opportunity. Yes, despite our imperfections, despite our mistakes, millions have flocked to these shores seeking a better life for themselves, their children, and their grandchildren. America is, of course, a land of immigrants, where those who come look for freedom to speak as they wish, to associate with whom they choose, to worship according to the dictates of their conscience and, yes, to seek justice. Those who have come have spared nothing, sometimes even their own lives, seeking opportunities for those who come after. At different times during the course of this Nation's history, they have come from England, Italy, Ireland, Spain, Mexico, Canada, Asia. They have come by the thousands and tens of thousands. What has drawn them irresistibly to this country is their hope and their ambition, not just for themselves but for those who would come after them.

It is that diversity, that desire, that dedication, that is the bedrock of American strength and resilience, and which has made America a beacon of hope for the rest of the world.

To me, one of the most amazing things about Miguel Estrada's story is in many ways it is not unique. It is exemplary, but it is not unique. His learning to speak English at 17, his subsequent admission and outstanding accomplishment at the premier institutions of higher learning in this country, have all been remarkable, but the simple immigrant story that is his life has been repeated time and again over the course of this Nation's history. People have come to work in this country with little but their hopes and their dreams, and by dint of faith, hard work, determination, sacrifice, they achieve the American dream. Each time this happens, and it has happened time and again during the course of this Nation's history, America redeems a promise it makes to all who would come here: Liberty and justice for all.

Too often, we focus on what is wrong with our country. No doubt we should strive to correct our mistakes, strive to overcome our shortcomings whenever and however we can, but we would be a cynical people, knowing the costs of everything and the worth of nothing, if we did not also celebrate what is right in America. We should celebrate occasions like this when the hopes, dreams, and aspirations of an immigrant family from Honduras have become a reality, confirming once again America is indeed the last best hope of mankind, where all who come here and who are willing to work hard to sacrifice can live up to their God-given potential.

We have heard it said Mr. Estrada has not laid out his judicial philosophy. I was surprised to hear that in the Senate Judiciary Committee the other day, when the senior Senator from New York made that charge, and said all he has told us is he will follow the law, he has not told us what his judicial philosophy is. Well, I think Mr. Estrada has articulated the best judicial philosophy that we as Americans could possibly hope for, a judicial philosophy and a dedication to the law that the American people who appear before the bench require.

What he has said is he will not pursue his own agenda. He will not pursue a social or political agenda. He will not try to make the law according to his liking. He will give the legislatures' enactments and the acts of Congress deference and will seek to determine our intent as policymakers and as those in the political branch who run for office based on a platform saying what we are for and then are voted for by the people of our State to come here. By saying he would follow the law, he is saying he would not only honor legislative acts, he would follow judicial precedence. That is the decisions by the highest court in the land.

As legislators, as those in the Senate who have the awesome responsibility of advice and consent, we should want to hear that. We should embrace it. There is no role for advocacy of personal beliefs or political agendas on the part of a judge under our Constitution. Judges are bound to follow Supreme Court precedent, whether they agree with it or not as a personal matter. If there is such a thing as the rule of law as opposed to the rule of men, judges are bound to follow the acts of the legislature and judicial precedent, whether they agree with them or not. Mr. Estrada has committed to follow the law, whether he agrees with it or not. Personal views and ideology have no role whatsoever to play. I believe that under our Constitution—and I believe that is what is taught in our classrooms in civics every day across this Nation—this is the appropriate role for a judge and for our judicial branch. We don't want them making legislative policy. We do not want judges who are legislators in robes.

My colleagues across the aisle in this Chamber know, we all know, that is our job. We stand accountable to the American people and to the voters of our States for doing that job. That is what we have accepted by coming here and agreeing to represent our States.

A lot of the debate we are hearing today, this week—and who knows how long this will go on—is not just about Miguel Estrada but about what is the appropriate role for our three branches of Government. Heaven knows, this is not a brandnew debate. But I would think most of the country would have thought that matter already settled. Indeed it was. Alexander Hamilton wrote about it in the Federalist Papers, of course, as the President knows, when the people of New York were considering this new Constitution, whether to ratify it. He was explaining the various provisions of this new Constitution to the people at that ratifying convention in New York. It is addressed in Federalist No. 78, what is the role we expect of the judiciary and how does that relate or compare to the role we have for the legislature or for the executive branch—the President.

He said:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous [branch] to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive [on the other hand] not only dispenses the honors, but holds the sword of the community.

In other words, the executive's job is to execute the laws passed by the legislature.

> The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.

In other words, the legislature makes policy, makes the law.

He goes on to say:

> The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

I would like to address one other comment that is made from time to time about the role of the Senate in performing its advice and consent functions. Some Senators I have heard say they perceive their role as seeking to achieve balance of the courts, by which I take them to mean they believe that a court, the District of Columbia Court of Appeals, must be evenly split with judges of different philosophies.

That concept is completely alien to our Constitution. Balance and independence, in our judicial branch, are not meant to be determined by Republicans and Democrats choosing their respective champions. The President has a right granted to him under the Constitution to appoint judges of his choosing, subject to the advice and consent of the Senate. That is one of the reasons we vote for a candidate to serve as President of the United States. All we should rightly do as Senators is determine whether or not a nominee has the qualifications and the temperament to be a judge. Included, of course as an element of that temperament, we should expect that nominees will pledge to a sound judicial philosophy, to uphold the law, by giving the legislature deference and by following judicial precedent. Miguel Estrada has pledged to do exactly that, and we should ask no more and no less of any nominee.

I said earlier I believe our judicial confirmation process is broken, that the kind of things we see going on in the process—delay, defeat, denial, and a dispiriting of those who would offer themselves for public service—has created a terrible situation. The process has become so politicized that we find ourselves in situations such as this, where Senators on the other side of the aisle are now talking filibuster, to deny this President the prerogative, granted to him under the Constitution, to appoint a highly qualified individual such as Miguel Estrada to serve on the District of Columbia Court of Appeals.

It is obvious to any reasonable person that the Senate needs a fresh start. We need a fresh start on judicial nominees and on the judicial confirmation process. Miguel Estrada, like other nominees, has waited for an inordinate amount of time—18 months so far. We owe it to the men and women who are nominated by the President to do our job on a timely basis, and to do it applying constitutional standards, not those that we make up or which we perhaps prefer, or those which serve the political interests of some constituency. The truth is, we owe it not only to the men and women who are nominated, we owe it to the American people to do our job, to do it on a timely basis, and to apply correct constitutional standards, because we know, and common sense will tell us, that the failure of this body to timely act on the President's nominees means that

very real human beings with real live cases and controversies that they need to have resolved are simply being told there is no room for their case. Justice delayed is justice denied.

As someone new to this body, I hope a new system can be devised enabling us to consider, on a bipartisan basis, new rules, a new agreement, a new paradigm, a new protocol that will guide us in the manner in which we consider the President's nominees. That is not just for this President, but anyone elected by the people to serve in that important office, regardless of who is in power, whether it is a Republican or a Democrat.

The result of this fresh start should be timely consideration of a nominee's qualifications and an up-or-down vote by the Judiciary Committee—and certainly no one is suggesting that any Senator ought to do anything other than to cast their vote either for or against a nominee. But they ought to do so on a timely basis. We should not have the kind of delay which we have had in this case. But if a nominee is voted out of the Judiciary Committee, then, of course, there ought to be that timely vote by the entire Senate regardless of who is President. Let us not hold to the delays and obstructions of the past as methods for treating judicial nominees in the future.

In closing, I urge my colleagues to confirm Miguel Estrada. I believe we ought to have a vote today on his nomination. We have had many days of debate. We have had 18 months since the President first proposed his name. Mr. Estrada has been scrutinized and questioned. His background has been investigated by the FBI. I believe he deserves a vote either up or down today.

Of course, I will, for the reasons I have just stated, vote for his confirmation. I believe the Nation will benefit from his experience, and he will be given the opportunity to give back to his adopted country through this position of honorable public service.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, first, I have enjoyed the presentation of the Senator from Texas. But I would suggest that my experience here over for now more than two decades indicates that the problem isn't a matter of whether it is a Democrat or a Republican President. The process is broken down there. It is not up here. The advice and consent role which we have under the Constitution is something that should work and should continue to work.

I suggest here on the floor myself that we need to do something to speed up the process down there. When these people apply for judgeships, the work is unending. For people who want to have Cabinet or sub-Cabinet jobs, the process is unending, and we have to do something to get that speeded up. The problem is not up here.

The Senator from North Carolina wishes to speak for up to 10 minutes. Following that—I always want to refer to Senator BYRD as the leader, and he is a leader but he is now the President pro tempore emeritus—I ask unanimous consent that Senator BYRD, the distinguished Senator from West Virginia, be recognized following the remarks of Senator EDWARDS.

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

The Senator from North Carolina.

Mr. EDWARDS. Mr. President, I believe judges have no greater responsibility than to ensure fair treatment and equal justice under the law. I also believe one of our greatest responsibilities as Senators is to advise and consent on the President's nominees to the bench. I, for one, take this responsibility very seriously. It is not our duty as Members of the Senate to just rubber stamp the President's nominees—particularly nominees who we doubt are committed to protecting equal rights for every single American.

Having read the record of this nominee very carefully, I feel compelled to oppose the nomination of Miguel Estrada for two reasons. First, what we know about his record raises serious questions about his commitment to protecting equal rights under the law.

Second, and more importantly, his refusal to answer reasonable questions during the confirmation process makes it impossible to examine his views of the law and determine whether his personal views would overrule law and legal precedent.

Federal judges wield enormous power and have a huge impact on the rights of individuals all across America. Given the fact that the Supreme Court reviews fewer than 100 cases per year, circuit courts, such as the DC Circuit where Miguel Estrada is being nominated to, ends up as the courts of last resort for nearly 30,000 cases each year.

Let me repeat that. Fewer than 100 cases are reviewed before the Supreme Court, and 30,000 cases are decided at the circuit court level.

These cases affect the interpretation of the Constitution as well as statutes enacted by us to protect equal rights. The circuit courts are the courts where Federal regulations will be upheld or overturned, where many personal rights will either be kept or lost, and where invasions of freedom will be allowed or curtailed. They are the courts where thousands of individuals will have a final determination in matters that affect their financial future, their health, their liberty, and their lives.

The District of Columbia Circuit is an especially important court in our judicial system. It is the most prestigious and powerful appellate court below the Supreme Court level because it has exclusive jurisdiction over critical Federal constitutional rights.

About Mr. Estrada: The little that we know of Miguel Estrada's approach to the law is troubling. But Mr. Estrada's record is not the main reason I can't support his nomination at this time. The main reason is that he has not explained his views. Before his hearing, I looked forward to hearing Mr. Estrada discuss his views, but he refused to do so. Instead, he stonewalled serious and valid questions—serious and valid questions that have been answered by many other nominees who have appeared before the committee.

Other judicial nominees of President Bush have discussed at length their views in hearings before the Senate Judiciary Committee. For example, Michael McConnell, whom I voted for and who was recently confirmed to the Court of Appeals for the Tenth Circuit, thoroughly discussed his views on subjects such as Roe v. Wade and the Supreme Court's recent ''federalism'' or ''States rights'' decisions limiting the authority of Congress.

But with Mr. Estrada, it is very different. The Justice Department refused to produce any legal memoranda written by Mr. Estrada during his 5 years as a lawyer in the Solicitor General's office. In this position, Mr. Estrada researched the law, he wrote memoranda, pleadings, and briefs on behalf of the Federal Government on critical and constitutional and statutory questions that were before the U.S. Supreme Court.

I understand the administration has concerns about executive privilege, but there are ways to strike a balance between the privileges of the executive and the rights of the Senate to learn about a nominee before we make a decision about him. That is what has happened during the judicial nomination process of other nominees who have worked in the Solicitor General's office, including Robert Bork and Chief Justice William Rehnquist. We tried to discuss Mr. Estrada's views with him during the hearing, but instead of being forthcoming in answering our questions, Mr. Estrada was extraordinarily evasive. Time after time, Mr. Estrada refused to answer our questions because he claimed not to have an opinion since he has not been personally involved, read the briefs, listened to oral arguments, or independently researched the case.

Anybody who has attended law school, including myself, knows that law students and lawyers express opinions about Supreme Court cases every day because of their ramifications for current cases with similar issues.

Nine times during his testimony Mr. Estrada refused to name any Supreme Court case with which he disagreed. And time after time after time, Mr. Estrada just flat out refused to offer us any explanation of or insight into his view of his judicial philosophy.

For example, we have heard the President state on many occasions that he intended to appoint judges who are strict constructionists—a term commonly used in describing judicial philosophy and often applied to Justices Scalia, Thomas, and Rehnquist. I asked Mr. Estrada a simple question of whether he considered himself within that category; did he consider himself

a strict constructionist? But he refused to provide a straight answer.

Question to Mr. Estrada:

Are you a strict constructionist?

Answer:

I am a fair constructionist, I think.

Question:

Do you consider yourself to be a strict constructionist?

Answer:

I consider myself to be a fair constructionist. I mean, that is today. I don't think that it should be the goal of our courts to be strict or lax. The goal of the courts is to get it right. . . .

I tried again.

Question:

Let me ask the same question a little differently. The President gave a speech last night at a fundraiser and specifically referred to your nomination, among others. The President said, ''For a stronger America, we need good judges. We need people who will not write the law from the bench, but people who''—and I am quoting him now—''strictly interpret the Constitution.''

Do you fall within the President's definition?

Mr. Estrada's answer:

I have not spoken with the President about this or any other subject. I don't know what he meant. If I had to take his text as a statute, I would want to know more about the circumstances in order to figure out whether I can answer your question.

Question:

You haven't been asked that question by anyone during the course of your nomination process?

If I can interject here, this is something the President talks about regularly—appointing judges who are strict constructionists.

He has now been asked several times by me in the hearing whether he is a strict constructionist. His answer was artifice language without answering the question.

I asked the question whether he is a strict constructionist. I asked:

You haven't been asked that question by anyone during the course of your nomination process?

Answer:

No. I was asked very similar questions, and they generally had to do with how I go about generally interpreting the Constitution and statutes—and I gave the answer that I gave you a few minutes ago.

In other words, ''none of your business'' was the answer.

Other Senators tried to get a straight answer from Mr. Estrada.

Question:

Of the current members of the Supreme Court, who would you characterize as a strict constructionist? Who would you characterize as a fair constructionist?

That was his language.

How would you characterize the remaining Justices?

Answer:

I would characterize each member of the current Court as a ''fair constructionist.''

The people on the Supreme Court today have totally different philosophies. Everyone knows that. You have a broad spectrum from someone such as Justice Scalia to someone such as Justice Stevens. But Mr. Estrada said they were all ''fair constructionists,'' which basically meant the term had no meaning at all.

It is like asking someone, ''Which Member of the Senate has your philosophy?'' and the answer being, ''Well, they all do.'' We do not all have the same philosophy in the Senate. I do not think anyone would question that.

He refused to answer a question about his views of any judge, living or dead.

Question:

In terms of judicial philosophy, please name several judges, living or dead, whom you admire and would like to emulate on the bench?

Answer:

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

Again, ''none of your business.''

As a judge on the D.C. Circuit, Miguel Estrada would have an enormous impact on the lives of millions of Americans. The American people deserve to know about this man who will have such an effect on their lives. They deserve to know whether he will respect and protect their civil rights. They deserve to know this before he dons the cloak of silence he will get once he is on the bench. The American people deserve more from Miguel Estrada than ''none of your business.''

I look forward to working on a bipartisan basis to elevate qualified, moderate nominees to the Federal bench. In particular, in the Fourth Circuit, where North Carolina is, I have high hopes President Bush will nominate a highly qualified candidate whom I will be able to support.

But, based upon Mr. Estrada's record, this is clearly not the right man. I will not just rubberstamp nominees who have not proven they are qualified for the extraordinary responsibilities of a Federal judge, and particularly the extraordinary responsibilities of a judge who would sit on the DC Circuit Court of Appeals. As a result, I urge my colleagues to oppose this nomination.

I thank you, Mr. President.

The PRESIDING OFFICER (Mr. CRAPO). The Senator from West Virginia.

Mr. BYRD. Mr. President, parliamentary inquiry. Is the Senate in executive session?

The PRESIDING OFFICER. The Senate is in executive session.

Mr. BYRD. I thank the Chair.

Mr. President, I ask unanimous consent to speak as in legislative session.

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

(The remarks of Mr. BYRD are printed in today's RECORD under ''Morning Business.'')

Mr. REID. Mr. President, the Senator from Minnesota is here. I am holding the floor now because the Democratic leader has been waiting since 2:15 to come and speak. I am wondering how long the Senator from Minnesota wishes to speak?

Mr. COLEMAN. Mr. President, I say to the Democratic whip, I have about 2½ pages typed, probably no more than 10 minutes, 5 to 10 minutes maximum.

Mr. REID. Why don't you go ahead and speak for, what did you say, up to 10 minutes?

Mr. COLEMAN. At the maximum.

Mr. REID. I ask unanimous consent that following the statement of the Senator from Minnesota, the Democratic leader be recognized.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Minnesota is recognized.

Mr. COLEMAN. Mr. President, this morning the distinguished Senator from New York made some statements about the Senate's constitutional advice and consent responsibility. I would like now to respond to those statements because some of her views of the Senate's appropriate role in judicial nominations are different from mine.

I speak as a former solicitor general of the State of Minnesota. I had an opportunity to argue on many occasions before the highest courts in my State. I have a great love and appreciation for our Constitution and its history.

In its enumeration of the President's powers, the Constitution has provided a role for the Senate in the appointment of various Federal officials, including Federal judges. The relevant text, which is set forth in article II, section 2, of the Constitution, reads:

The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law[.]

As one scholar has noted:

a reasonable reading of the text suggests that because the Senate's role in the appointments process is outlined in Article II enumeration of presidential powers, rather than described in the Article I enumeration of congressional powers, the Senate plays a more limited role in the appointment of judges.

A reading of Alexander Hamilton's commentary on the Appointments Clause sheds some additional light on how the Framers viewed the Senate's duty of advise and consent. Hamilton acknowledged the danger that the Senate's advise and consent role could create an overly indulgent Senate relationship to appointed officeholders engaged in malfeasance. Hamilton rebutted this point by arguing that the Senate would have a strong interest in appointing qualified leaders and in protecting its reputation for appointing quality officeholders. He further pointed out—and this is important—that the Senate does not have the power to choose officeholders, but only to advise and consent. In a moment of amazing prescience, he stated that he felt that Senators might have political reasons for confirming or rejecting a nominee. He nevertheless observed—or perhaps hoped—that since the President alone

makes the nominations, Senators would be somewhat constrained in their voting decisions and that self-interested decisions would be offset by other Senators. He predicted that voting decisions on the merits would become much more the norm.

I wonder what Alexander Hamilton would say about the debate we have had over Miguel Estrada's nominations. I can't imagine that he would be pleased.

Hamilton believed that the appointments powers were wisely vested in the hands of two parties, the President and the Senate. On one hand, Hamilton believed the President, acting alone, would be the better choice for making nominations, as he would be less vulnerable to personal considerations and political negotiations than the Senate and more inclined, as the sole decision maker, to select nominees who would reflect well on the presidency. On the other hand, he argued that the Senate's role would act as a powerful check on unfit nominees by the President. As he put it, Senate confirmation ''would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.''

So there you have it, straight from Alexander Hamilton himself. The role of the Senate is a limited one of protecting against the appointment of nominees who are unfit for the federal bench. I agree that the Senate owes some deference to the President's choices.

Hamilton also believed that the Senate would act on judicial nominees with integrity in order to avoid public disapproval. Now, the last thing I want to do is cast aspersion on the integrity of my colleagues who oppose Mr. Estrada's nomination. But I must say that the amount of misinformation being repeated here on the Senate floor about Mr. Estrada, and the manner in which his opponents have ignored his vast legal experience and record, is cause for grave concern.

Historically, deliberation by the Senate on judicial nominations was quite short, especially when compared to what we are seeing on the Senate floor on Mr. Estrada's nomination. Take, for example, the 1862 nomination and confirmation of Samuel F. Miller to the United States Supreme Court. The Senate formally deliberated on the nomination for only 30 minutes before confirming him. Confirmations on the same day, or within a few days of the nomination were the norm well into the 20th century.

Contrast this with what we are seeing on Mr. Estrada's nomination. We are now on our fourth day of debate with no end in sight. The Republicans have offered at least two generous time agreements to set a vote for Mr. Estrada's nomination, but the Democratic leadership rejected both of them.

I have taken the time to share with my colleagues some of the historical details of the judicial confirmation process in order to put the debate over Mr. Estrada's nomination into perspective. What was enumerated in the Constitution as ''advice and consent'' has in practice devolved to ''negotiation and cooperation'' in the best cases, and ''obstruct and delay'' in the worst cases, aided and abetted by the liberal Washington special interest groups. I fear that we are seeing the latter at work in Mr. Estrada's case.

I was recently elected to get things done. I was elected, and I heard my voters say: Put aside the bitter partisanship that is stopping the Senate from moving forward and that has prevented the Senate from getting a prescription drug benefit and Medicare for seniors, that stopped us from getting disaster relief assistance, that stopped us from getting a budget and appropriations bills passed.

Now we are facing the first partisan filibuster of a circuit court judicial nominee. Now we are facing a new standard—not the gold standard of the American Bar Association but talks about qualified, or well-qualified, of which Mr. Estrada has received the highest ranking—a new Federal standard. But, instead, we are facing a standard of political acceptability. Our Constitution is being tested. It is being tested by the reaction to Mr. Estrada's nomination.

He is someone who comes to us as an immigrant who worked his way up, who became the top of his class in college, the top of his class in law school, magna cum laude from Harvard, editor of the Law Review, clerked for Federal judges, clerked for Supreme Court Judges, and comes to us with the highest qualification rating by the American Bar Association. But now we are facing a new standard.

I urge my colleagues on both sides of the aisle to reject the political considerations and get back to that view and that perspective on whether they are fit, whether they are qualified, and whether they have the right kind of judicial temperament. Let us put an end to this debate. Let us support and confirm Mr. Estrada's nomination.

I yield the floor.

The PRESIDING OFFICER (Mr. CHAFEE). The Democratic leader.

Mr. DASCHLE. Mr. President, last night the Senate voted on three judicial nominations. And we voted unanimously—Republicans and Democrats. We voted unanimously, recognizing that those nominations were very likely ones with which we had perhaps even broad philosophical differences. But we voted. We didn't delay. We had debate. We all had an opportunity to make our evaluation. We came to some conclusion.

That is how it should work. That is what our Founding Fathers had envisioned. That is what the distinguished Senator from Minnesota was just alluding to—advise and consent. When it works, there are very few glitches. When it works, Republicans and Democrats can come together and make their best judgment.

It worked in this case. Why did it work? It worked in part because these nominees came before the Judiciary Committee and they did their best to answer the questions presented to them. They did their best to offer as much information as they could about their past, about their record, about others' judgments, and about their record. Having presented their information, having made their case, the Judiciary Committee voted, they were passed out of committee, they came to the floor, and the Senate voted.

Not one Republican Senator has mentioned that process today. They say that somehow we are abrogating our responsibilities in requesting exactly the same information from Miguel Estrada—not any more but not any less.

So this is not a question about disallowing conservative judges. We do that. We actually do it fairly regularly. It is my view that there are times when judges we view to be outside the mainstream—extreme, in other words—ought to be considered on the basis of their philosophical points of view. But if they fall within what we view to be, as best as we can tell, the philosophical mainstream in spite of their conservatism, I think a President has a basic right to nominate those in whom he has confidence.

There are those who have argued in the last couple of days that this is really about our opposition to diversity, that somehow we are opposed to Hispanic judges. That is not only unfortunate and not only in error, but I think it does a disservice to this debate. Frankly, they ought to know better than to resort to that kind of rhetoric which demeans the debate. If this were about diversity, if this were about some concern for Hispanic judges as some have asserted, we would be hard pressed to find one, much less virtually the entire Congressional Hispanic Caucus, in opposition. Yet that is what we find. Virtually every member of the Hispanic Caucus in the House of Representatives has opposed this nomination. Why? In large measure for the same reasons we oppose this nomination, unless we have more information. They don't know either where Mr. Estrada stands. They have no record either. In spite of their best efforts, there is a shroud of secrecy around this nominee that is very disconcerting.

Why is it that nominee after nominee comes before the Judiciary Committee and provides the information required? Why is it we have access to the information, the records of virtually every other nominee? Why is it, with that record of performance, that when it comes to this nominee—whether it is before the Judiciary Committee or before the Hispanic Caucus or before anybody else seeking information—we come up with nothing?

Mr. President, either this nominee knows nothing or he feels he must hide something. It is one or the other: He knows nothing or feels the need to hide something.

Now, I suppose if this were a temporary nomination, if this were something within the administration, with a beginning and an end to the term—a commission, even a Secretary—perhaps we could let this go by, perhaps we should not feel quite as troubled by this lack of willingness to be more forthcoming. But this is for the second highest court in the land. And not only the second highest court in the land, this is actually for, arguably, the most important court in all of the circuits in this country.

It is within this circuit that we find perhaps the single most complex, the most serious, the most hotly debated, the most contentious issues to come before the courts. Those who will serve on this court will decide the future of title IX, the future of workers rights, the future of campaign finance, the status of toxic waste cleanup. Those and many more issues will be decided in the D.C. Circuit.

So we are left with a very serious dilemma: Do we vote on what is essentially a blank slate or do we say: ''Look, we will vote, we will be prepared to move forward on this and any other nomination so long as that information can be provided''?

Today, Senator LEAHY and I have sent a letter to the President asking that the documentation that has been provided on numerous other occasions—the Solicitor General records—be provided as they were with Mr. Bork, Mr. Rehnquist, Benjamin Civiletti, and many others. That precedent has long since been established. We have asked for the same information provided to the Senate that was provided on those nominees. Why? Because there is no record. Why? Because there is no basis upon which to make a public judgment unless we have that information.

That is all we are asking: Give us some record upon which to make our judgment, No. 1. And, No. 2, let us just ask Mr. Estrada to present to us the answers to the same questions that have been asked by Republican colleagues to nominees in past Congresses and by Democratic and Republican Senators to nominees in this Congress.

Why is it we should give some exclusion to this particular nominee? What is it about this nominee that gives him that right to say: ''No, I'm above that. I don't have to provide that information. I don't have to provide the same information that Mr. Bork provided or that Mr. Rehnquist provided. I don't have to do that. I'm unique''?

There is nothing unique about defying the Senate. Others have attempted to do so. But when one defies the Senate, defies the Constitution, when someone undermines the constitutional obligation we have to advise and consent, we take that seriously.

So we have no choice. We have an obligation to live up to the same standard with this nomination that we have with all the others. All we are suggesting is that our colleagues live up to it as well. Provide us with the information. Answer the questions. Once that happens, we will make our judgment on this nomination. Some already have. But there are many others who deserve the right to make a proper evaluation.

I must say, based on the limited information available to us, there already are serious questions about Mr. Estrada's qualifications. His immediate supervisor at the Justice Department said: I cannot, in good conscience, recommend this man to serve on the Circuit Court of the United States of America. I cannot do that. In fact, he went on to say: I can't even trust this person. That is from the supervisor, the person who probably knows this man the best.

Mr. President, if a supervisor at the Justice Department cannot find within himself to support this nominee, how in the world is it we say we know better?

If Mr. Estrada has more information he can share that would shed some light on what it is that has caused his supervisor to be as concerned as he was to oppose this nomination, then I would say it would be in his interest to bring it forward, to let us look at it. And that is why the Solicitor General papers are so critical.

So, Mr. President, I do not know how long this debate will go on, but I will say this: We have thought about this very carefully now for many days. And it is not without a great deal of concern and disappointment that I come to the floor with the report I have just shared.

Our colleagues feel as strongly about this as anything that has been presented to us. There is no doubt we have the votes to sustain whatever procedural efforts are made to bring this debate to a close. I would hope that would not be necessary.

This matter can be resolved if we simply have access to the documents and have answers to the questions.

Mr. President, I ask unanimous consent that the letter Senator LEAHY and I sent to the President be printed in the RECORD.

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

U.S. SENATE,
*Washington, DC, February 11, 2003.*

The PRESIDENT,
*The White House,*
*Washington, DC.*

DEAR MR. PRESIDENT: We are writing in reference to your nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia Circuit. Pursuant to the Constitution, the Senate is to act as a co-equal participant in the confirmation of judges to the federal bench. Unlike nominations made by a President for Executive Branch appointments, judicial nominees are reviewed by the Senate for appointment to lifetime positions in the Judicial Branch.

The Senate has often requested and received supplemental documents when it is considering controversial nominations or when evaluating a candidate with a limited public record. The Chairman of the Senate Judiciary Committee wrote to your Administration on May 15, 2002 to request such supplemental documents to assist in Senate consideration of the Estrada nomination. In particular, the request was made for appeal recommendations, certiorari recommendations, and amicus recommendations that Mr. Estrada worked on while at the Department of Justice.

Prior Administrations have accommodated similar Senate requests for such documents. Such documents were provided during Senate consideration of the nominations of Robert H. Bork, William Bradford Reynolds, Benjamin Civiletti, Stephen Trott, and William H. Rehnquist.

Your Administration has refused to accommodate the Senate's request for documents in connection with the Estrada nomination. That refusal was a matter of inquiry at the confirmation hearing held on this nomination on September 26, 2002. Following the hearing, Senator Schumer wrote to the Attorney General on January 23, 2003, to follow up on the request.

In addition to requests for documents, Senators frequently question judicial nominees during their confirmation hearings to determine their judicial philosophy, views and temperament. For example, then-Senator John Ashcroft asked nominees: ''Which judge has served as a model for the way you would conduct yourself as a judge and why?'' Mr. Estrada refused to answer a similar question.

During consideration of President Clinton's judicial nominees, Republican Senators asked repeated questions regarding nominees' judicial philosophy, views or legal matters, and approaches to interpreting the Constitution. They insisted on and received answers. During his consideration before the Senate Judiciary Committee, Mr. Estrada failed to answer these kinds of questions. These questions have not only been routinely asked by the Senate, they have been routinely answered by other nominees—including other nominees from your Administration.

For the Senate to make an informed decision about Mr. Estrada's nomination, it is essential that we receive the information requested and answers to these basic legal questions. Specifically we ask:

1. That you instruct the Department of Justice to accommodate the requests for documents immediately so that the hearing process can be completed and the Senate can have a more complete record on which to consider this nomination; and

2. That Mr. Estrada answer the questions that he refused to answer during his Judicial Committee hearing to allow for a credible review of his judicial philosophy and legal views.

We would appreciate your personal attention to this matter.

Sincerely,

TOM DASCHLE.
PATRICK LEAHY.

Mr. DASCHLE. Answer the questions. Provide the information. Let's move this debate forward. Let's do the right thing. Let's live up to our constitutional obligation. Let's respect the advice and consent clause of the United States Constitution. Let's do what our forefathers expected of us. Let's not carve out an exemption for Mr. Estrada or anybody else. Let us make a wise decision about this nomination, as we have in so many other cases.

I yield the floor.

The PRESIDING OFFICER. The Democratic whip.

Mr. REID. Mr. President, earlier today there was a colloquy between the junior Senator from New York and this Senator, following remarks of the distinguished Chair of the Judiciary Committee, who said the Congressional Hispanic Caucus was divided on their feelings about the nominee now before this body.

I mentioned to the Senator from New York I had been privy to a conversation just a few days ago with the chairman of the Hispanic Caucus and other members of that caucus who said they unanimously oppose Miguel Estrada to be district judge for the District of Columbia.

I will now read into the record a statement of the Chair of the Hispanic Caucus, Congressman CIRO D. RODRIGUEZ, dated today, which reads:

''It is disheartening to see that Members of the Republican Senate continue to make misleading and unfound statements regarding the Congressional Hispanic Caucus's opposition to Bush judicial nominee Miguel Estrada,'' said Congressman Ciro D. Rodriguez, chair of the Congressional Hispanic Caucus. ''The CHC will continue to stand by its unanimous opposition to this unqualified nominee and will not waiver.''

''Senate Republicans continue to hit below the belt, insulting Hispanic Members of this Congress who have been elected to serve as a voice for the people in their community,'' continued Congressman Rodriguez. ''Today, Senate Judiciary Chairman Orrin Hatch continues to make misleading, partisan swipes. He incorrectly claims that the CHC is split in its opposition, and he mischaracterizes our arguments. Yesterday, the CHC released a letter to Senator Hatch demanding an apology for comments he made during Senatorial debate, likening Members of the CHC 'to the lioness eating her cubs . . .' We have yet to receive an apology or even an acknowledgment from the Senator that his comments were out of line and insulting.''

''The CHC has supported numerous highly qualified Hispanic appointees by the Bush Administration,'' noted Congressman Rodriguez. ''We oppose Mr. Estrada, however, based on our review of his inadequate qualifications for what is viewed as the second most powerful court in the nation.''

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HATCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mrs. DOLE). Without objection, it is so ordered.

Mr. HATCH. Mr. President, I have been on the Senate floor since the debate on the Miguel Estrada nomination commenced last week. I have stated in the strongest terms my support for his qualifications. I am not alone. Virtually anybody who knows him, anybody who has any background on Miguel Estrada, feels the same way. I have stated in the strongest terms this support. The record is replete with reasons why he would be an excellent addition to this DC Circuit and with facts dispelling the specious arguments of his detractors.

I will now address the procedural tactic that is being used against Miguel Estrada, and I am talking about a filibuster of this nomination. A filibuster of Mr. Estrada's nomination will require a cloture vote by the Senate to end debate, unless reasonable minds on the Democratic side can prevail.

I know there are some who are working to try to prevail, just like I had to work on our side to prevail over those who wanted to filibuster some of President Clinton's nominees. I am hoping reasonable people on the Democrat side will prevail. They simply must prevail because we really do not want to start down the road of a filibuster.

As I say, a filibuster of Mr. Estrada's nomination will require a cloture vote by the Senate to end debate. This means that a supermajority of 60 votes will be required to allow us to proceed to an up-or-down vote on Miguel Estrada's nomination. That is an insult to Miguel Estrada. It is an insult to the Senate. It is an insult to Hispanic people all over this country who are watching what is happening. Actually, it is an insult to this coequal branch of government, the judiciary.

I have taken the Senate floor on more than one occasion to decry the tactic of enforcing judicial nominees through a cloture vote. My position has been the same, regardless whether the nominee was appointed by a Democratic or Republican President. I am proud to say during my nearly 30 years in the Senate, I have never voted against cloture for a judicial nominee, even on the rare occasion when I opposed a judicial nomination and ultimately voted against that nomination.

An example in point is the nomination of Lee Sarokin to the Third Circuit. Even though I voted against his nomination, I voted in favor of cloture because I strongly believed his nomination deserved to succeed or fail on the basis of the votes of a simple majority of the Senate, not on the will of merely 41 Senators who vote against cloture. I argued strenuously in favor of invoking cloture on two of President Clinton's judicial nominees, Marcia Berzon and Richard Paez.

There are times when legislators must, to be effective, demonstrate mastery of politics, but there are also other times when politics, though available, must be foresworn. This is one of those times. There is a quote of Disraeli that addresses this situation perfectly. To paraphrase, next to knowing when to seize an opportunity, the most important thing is knowing when to forgo an advantage.

I hope my colleagues will forgo their perceived advantage of a filibuster of Miguel Estrada's nomination. Forcing a supermajority vote on any judicial nominee is a maneuver that needlessly injects even more politics into the already overpoliticized confirmation process. I believe there are certain areas that should be designated as off limits from political activity. The Senate's role in confirming lifetime appointed article III judges and the underlying principle that the Senate perform that role through the majority vote of its Members are such issues. Nothing less depends on the recognition of these principles than the continued untarnished respect for our third branch of Government, the one branch of Government intended to be above political influence, the Federal judiciary.

On the basis of principle, I have always tried to be fair to judicial nominees, regardless of the political affiliation of the President making the nomination. The opposition to now Judge Berzon and now Judge Paez, two Clinton nominees, was led by members of my own party. They believed very deeply that Marcia Berzon, with her very liberal philosophy, would become an activist judge. They knew, in their eyes—and I think they were pretty right—that Judge Paez as a Federal district court judge was an activist judge, writing activist decisions. I met Judge Paez, and he said he would be very careful not to be activist in the future. It did not take him long on the Ninth Circuit Court of Appeals, in the eyes of some, to go back to his activist ways. Activism means acting as a superlegislator on the bench, making laws that should be made by those who have to stand for reelection—Members of Congress and the President.

When members of my own party fought against Judge Berzon, now Judge Berzon, and then Judge Paez, during that time I stood against the use of cloture to attempt to thwart a vote on their nominations, and I was successful. Now it is my friends across the aisle first subjecting Miguel Estrada's nomination to a cloture vote. I stand just as firmly today against the use of this tactic to prevent his nomination from coming to the floor of the Senate for an up-or-down vote, which is what the President deserves. If we are going to be fair to the President of the United States, whoever the President may be, we should always provide that opportunity to have an up-or-down vote on these nominees.

To be sure, this body has on occasion engaged in the dubious practice of filibusters of judicial nominees, but forcing the filing of cloture on a judicial nominee remains the exception rather than the rule. We have always been able to thwart the attempted filibuster by some who I think at the time did not fully realize the import of their actions.

We have always been successful. Overall, these episodes have been infrequent and they have been unfortunate in each case. I hope they will remain as such and that what we are seeing today is not the beginning of a long battle of fighting filibuster threats against President Bush's judicial nominees. There is real cause for concern that is not to be taken lightly in the wake of the November elections. Leading liberals hit the newspapers to urge my

Democratic colleagues to use the filibuster as a tool to defeat President Bush's judicial nominees.

On November 11 of last year, the Legal Times published an article: ''A Major Shift in the Battle for the Bench.'' The article was subtitled: ''With GOP steering the Judiciary Committee, liberal advocates turn to more desperate measures.'' The article reported on the plans of liberal interest groups to refocus their energies against President Bush's judicial nominees on the Senate floor where ''filibusters and legislative horse trading may give liberal interest groups their best shot at influencing the process.''

The senior legislative counsel of one liberal group called the filibuster a ''plausible weapon.''

Also on November 11, two liberal law professors published an op-ed in the Los Angeles Times entitled: ''No to a Far-Right Court: Use Filibusters.'' In an implicit nod to the rarity of the use of a filibuster to defeat a judicial nominee, the article urged ''courageous Democrats'' that a filibuster is the only way to thwart President Bush's nominees.

The New York Times on November 10 similarly urged Democrats ''not [to] be afraid to mount a filibuster,'' which, again, implicitly acknowledges the extremity of filibustering a judicial nomination.

On November 14, the Madison Capital Times reported that a Federal feminist group was targeting Wisconsin for a grassroots campaign to drum up support for the filibustering of Bush Supreme Court nominees. The paper candidly reported:

The tactic would call on Senators to filibuster in order to block [pro-life] nominees. A filibuster is a parliamentary technique that allows a majority of Senators to keep a vote from being taken. Defeating a nominee requires a majority vote in the Senate, but only 41 of the 100 Senators are needed to sustain a filibuster.

The rallies in Madison and Milwaukee were only 2 of 12 such campaigns by this group on college campuses nationwide to drum up support for filibustering judicial nominees based on the single litmus test issue of abortion.

Madam President, I ask unanimous consent editorials be printed in the RECORD.

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

[From Capital Times, Nov. 14, 2002]

ACTIVIST: URGE SENATORS TO SAVE ABORTION RIGHTS

(By Samara Kalk Der)

Women's rights leader Eleanor Smeal was in Milwaukee and Madison Wednesday urging grass-roots abortion rights supporters to send a message to U.S. Sens. Russ Feingold and Herb Kohl.

Smeal said she came to Wisconsin because it is the only state where both of its senators sit on the Judiciary Committee, which wields considerable power when it comes to the scrutiny and confirmation of Supreme Court justices.

While Democrats Feingold and Kohl both take positions supporting abortion rights, women in Wisconsin must not take for granted, Smeal told an overflow crowd of 250 that packed into the Marquee Room at the Madison Civic Center Wednesday night for ''Never Go Back,'' a national campaign aimed at putting a spotlight on the protection of abortion rights.'' I hope this campus organizes like it has never organized before,'' Smeal told the group, which was nearly all female and filled with many UW-Madison students.

The political landscape is making those who cherish the right to choose an abortion nervous, and Smeal and local activists who spoke.

''What Nov. 5 (the midterm election) has done is made it clear to everybody what we are up against,'' said Smeal, president of the Feminist Majority Foundation and three-time president of the National Organization for Women.

Smeal led the first national abortion rights march in 1986, which drew about 100,000 to rally in Washington, D.C. In 1989, more than twice as many marched, she said. And then, in 1992, the march turned out more than 700,000.

''I believe we are going to have to march again and again and again,'' she said.

Vacancies on the U.S. Supreme Court may appear as early as this summer, and it is expected that President George W. Bush will seek to appoint justices who oppose abortion.

Smeal is touting a plan to save abortion rights now that the country has a conservative president and U.S. Senate majority. The strategy focuses on the Senate because it has the power to confirm, reject or block nominees to he U.S. high court.

The tactic would call on senators to filibuster in order to block anti-abortion nominees. A filibuster is a parliamentary technique that allows a minority of senators to keep a vote from being taken. Defeating a nominee requires a majority vote in the Senate, but only 41 of the 100 senators are needed to sustain a filibuster.

''It's the safest tool we have to save the lives of the next generation of women,'' Smeal said.

If the Supreme Court overturns Roe v. Wade, the 30-year-old decision that struck down restrictive state abortion laws, abortion rights will again be determined state by state. That means rich women will be able to hop a plane to get an abortion, while poor women will be left to bring unwanted pregnancies to term or seek dangerous, ''back alley'' abortions, Smeal said.

''We'll lose centuries,'' she added.

Dr. Dennis Christensen, medical director of the Madison Abortion Clinic, also spoke. He said the huge turnout for the event was one of the few bright spots he's seen since last week's election. For the first time in 30 years he really feels the urgency of the abortion rights cause, he said.

''Where were the women in this election?'' he asked.

''Christensen said he is not a politician or a fund-raiser. He is a physician who is able to help women ''with this problem that they have.''

''I don't have to worry about it. I'm not going to get pregnant,'' he added.

If Roe v. Wade is overturned, abortion in Wisconsin will become illegal the next day, Christensen said. Wisconsin is one of just 14 states where abortion will be considered illegal should the federal law get struck down, he added.

''I don't think I'm ready to spend my retirement in jail,'' he quipped. ''I plan to spend it on the golf course.''

[From the New York Times, Nov. 10, 2002]

DEFENDING THE JUDICIARY

The biggest fallout from last week's Republican capture of the Senate may be that it will now be harder to block ideologically extreme nominees to the federal courts. But contrary to what some conservatives claim, nothing in the election returns suggests that Americans want the courts packed with such judges. Given the new political lineup, Democratic and moderate Republican senators must be more involved in the confirmation process to ensure that Justice Department ideologues do not have a free hand in shaping the federal judiciary for decades to come.

For all of the talk of Republican ascendancy, last week's election returns did not produce anything like a right-wing mandate. Republicans running in the hardest-fought elections hewed to the political center. The victory margins in the races that ended up shifting the Senate—Minnesota and Missouri—were less than three percentage points.

Despite President Bush's campaign promise to ''unite, not divide,'' many of his judicial nominees have done the reverse. They favor taking away the right to abortion, striking down reasonable environmental regulations and turning back the clock on race. (One pending nominee at one point criticized the Supreme Court's ruling that Bob Jones University should lose its tax-exempt status for discriminating against black students.) With the Senate in Republican control, the administration is likely to choose even more troubling nominees.

Senate Democrats must insist on two things going forward: consultation and consensus. Senator Patrick Leahy, who will be the ranking minority member of the Judiciary Committee, should ask to meet with the administration in advance to head off unacceptable candidates before they are nominated. Consultation of this kind occurred in the Clinton years, and it should be the norm for judicial selections, no matter which party holds the White House.

Senate Democrats should also make it clear that they will not accept extremist nominees. They must draw a line in the sand and say that those whose politics cross it will not be confirmed.

Democrats in the Senate no longer control the Judiciary Committee, which has until now been screening out the worst nominees, and cannot win party-line votes. But they should reach out to moderate Republican senators and build a mainstream coalition. And when a judicial nominee is unacceptable, they should not be afraid to mount a filibuster, which Republicans would need 60 votes to overcome.

Rumors have been swirling around Washington that there could be one or more Supreme Court vacancies in the next few months, making the stakes as high as can be. With the White House representing the far right in the nominating process, it remains up to the Senate—even in its new configuration—to represent the rest of the country.

Mr. HATCH. What these articles suggest is that the liberal interest groups are just as intent as ever on using every trick in the book to defeat President Bush's judicial nominees. From the start of their record, as they have tried to do with Miguel Estrada and others, by forcing a cloture vote, it appears the liberal interest groups will stop at nothing to further their agenda. What is more, it looks as if the defeat we are seeing on Miguel Estrada is

not so much about him as it is about seeing how well a filibuster works in case there is a Supreme Court nominee this summer.

It also may have a more sinister purpose: To desensitize the American people to filibustering judicial nominees so that the practice will become more acceptable and so that less outrage will be expressed over the filibustering of other circuit nominees and ultimately a Supreme Court nominee. This is all part of the strategy of changing the ground rules on judicial nominations that Senate Democrats discussed at their retreat back in April of 2001.

I am not the only one who recognized the dangerous precedent that some Democrats would set in filibustering qualified nominees. The Washington Post, hardly a bastion of conservatism, warned in a December 5, 2002, editorial that ''a world in which filibusters serve as an active instrument of nomination politics is not one either party should want.''

The Washington Post urged Democrats to ''stand down'' on any attempt to deny Miguel Estrada a vote because his nomination ''in no way deserves a filibuster.''

I couldn't agree more.

I hope I am wrong about the extent to which the liberal interests groups have had a role in orchestrating this lengthy debate on Miguel Estrada's nomination. I hope that this is not another example of an attempt by some of my Democratic colleagues to change the ground rules on judicial nominees. I hope that my Democratic colleagues will exercise the same independence that I did when I joined them to invoke cloture on the nominations of Clinton judicial nominees who were opposed by many of my Republican colleagues.

When I argued to invoke cloture on the nominations of Judge Berzon and Judge Paez, I noted several important reasons for avoiding a filibuster of judicial nominees. One is that the Senate's constitutional duty of advise and consent contemplates that a vote by a simple majority of the Senate determine the fate of a judicial nominee. There is nothing in the Constitution that gives that power to a minority of 41 Senators, just as that power should not be yielded by 10 Senators in a party-line vote in committee.

Another reason is that most of the fight over a nomination has occurred well before a nominee arrives at the Senate floor. The battles are largely fought between the White House and the Judiciary Committee, since it is our job to vet the nominees. By the time a judicial nominee reaches the Senate floor, he or she deserves a vote on the merits without having to clear the procedural hurdle of a cloture vote.

In the past, several of my Democratic colleagues have joined me in condemning the practice of forcing judicial nominees through a cloture vote. For example, during the debate on Clinton nominees, one of my Democratic friends spoke passionately about this tactic. He said:

I . . . 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.

He continued:

I . . . took the floor on occasion to oppose filibusters to hold . . . up [nominations] and believe that we should have a vote up or down.

On a different occasion, the same colleague said:

I have stated over and over again on this floor that . . . I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

And another Democratic colleague put it simply when she said:

A nominee is entitled to a vote. Vote them up or vote them down . . . If someone has an opposition to a judge, they should come to the floor and say that.

I agree wholeheartedly with these statements.

Miguel Estrada waited more than 16 months for his confirmation hearing. He waited another 4 months for a committee vote on his nomination. And now his nomination is being subjected to yet another hurdle: Extended floor debate on his nomination with no end in sight. If we're going to debate Mr. Estrada's nomination, then let's do it, vote on it, and get on with the other important matters that are the work of this body.

I hope my colleagues are not going to the unworthy ends of filibustering the President's nominees. It is unfair to the President. It is unfair to the process. It is unfair to Miguel Estrada who has earned the right to be here.

I think it is important to remind my Democratic colleagues of statements they have made over the years opposing filibusters of judicial nominees. Of course, there was a Democratic President in the White House at the time these statements were made. I guess that is the double standard for Mr. Estrada, in more ways than one.

I remember, on the nomination of Merrick Garland, here was a statement of Senator SARBANES, who came to the Senate the same time I did, and whom I respect, the Senator from Maryland. It was on the nomination of Merrick Garland, President Clinton's nominee to the very same court, the Circuit Court of Appeals for the District of Columbia, for which Miguel Estrada has been nominated. He said this:

It is worse than that. It is not whether you let the President have his nominees confirmed. You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today. In other words, the other side will not let the process work so these nominees can come before the Senate for judgment. Some may come before the Senate for judgment and be rejected by the Senate. That is OK. But at least let the process work so the nominees have an opportunity and the judiciary has an opportunity to have these vacant positions filled so the court system does not begin to break down because of the failure to confirm new judges. The Senator from Delaware, when he was chairman of the committee, always measured up to that responsibility, I think often taking a lot of political heat for doing it. But he was out to make sure the system could function. He had Republican Presidents nominating judges. He processed their nominations. He brought them to the floor of the Senate. He gave the Senate a chance to vote on them up or down for those people to get confirmed. that process is breaking down.

On another occasion Senator BIDEN said:

So any member who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life and they have not committed crimes of moral turpitude, and have not, in fact, acted in a way that would shed a negative light on the court. But I also respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor.

That was a statement of Senator JOSEPH BIDEN, CONGRESSIONAL RECORD, March 19, 1997 at S2540.

This is a statement of Senator BARBARA BOXER on the nomination of Margaret Morrow, to the Ninth Circuit Court of Appeals:

According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.

That statement of Senator BOXER was printed in the CONGRESSIONAL RECORD, May 14, 1997 at S4420.

On the nomination of Judge Richard Paez, to the Ninth Circuit, Senator LEAHY, the distinguished ranking member and Senator from Vermont, said:

I have heard rumors that some on the Republican side planned to filibuster this nomination. I cannot recall a judicial nomination being successfully filibustered. I do not recall earlier this year when the Republican Chairman of the Judiciary Committee and I noted how improper it would be to filibuster a judicial nomination. During this year's long-delayed debate on the confirmation of Margaret Morrow, Senator Hatch said: 'I think it is a travesty if we ever start getting into a game of filibustering judges.' Well, it appears that travesty was successfully threatened by some on the Republican side of the aisle and kept the Minority Leader from fulfilling his commitment to call up the nomination for a confirmation vote.

That is printed in the CONGRESSIONAL RECORD, October 14, 1997 at S12578.

He said:

If Senators are opposed to any judge, bring them up and vote against them. But don't do an anonymous hold, which diminishes the credibility and respect of the whole U.S. Senate. I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote. I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

That was printed in the CONGRESSIONAL RECORD, June 18, 1998 at S6523.

He said:

I hope we might reach a point where we as a Senate will accept our responsibility and vote people up or vote them down. Bring the names here. If we want to vote against them, vote against them.

That was printed in the CONGRESSIONAL RECORD, October 22, 1997 at S10925.

He also said:

I hope that when we return . . . there will be a realization by those in this body who have started down this destructive path of attacking the judiciary and stalling the confirmation of qualified nominees to the Federal bench that those efforts do not serve the national interest or the American people I hope that we can once again remove these important matters from partisan and ideological politics.

That is a statement of Senator PATRICK J. LEAHY printed in the CONGRESSIONAL RECORD of November 13, 1997 at S12569.

There are other statements by my colleagues, but I don't want to bore the Senate with any more. Let me just say, I hope we do not have a double standard, but it sure looks as if we do. If Miguel Estrada's nomination is truly filibustered—and I hope it is not, but we are getting to the point where we know it will be and we know that it is because the time is passing—then I think this body is going to be sorry because in the past we have been able to stop filibusters. Both sides have labored diligently to do so.

I have to tell you, if this is the way it is going to be in the future, nobody is going to be able to stop them. It just means that really highly qualified candidates who are controversial to one side are going to be filibustered. It is that simple. I don't want to see that day come.

I am disappointed and somewhat outraged with the recent letter that was sent to the President of the United States. This was sent by the distinguished minority leader and the distinguished Democrat leader on the Judiciary Committee. The fact of the matter is, Miguel Estrada's hearing was held in September of last year while the Senate was under Democratic control. The Democrats remained in control for the rest of the 107th Congress. If they weren't satisfied with Miguel Estrada's answers at the hearing, they could have held another hearing.

But this is what the letter said:

DEAR MR. PRESIDENT: We are writing in reference to your nomination of Miguel Estrada to the Estrada to the U.S. Court of Appeals for the District of Columbia Circuit. Pursuant to the Constitution, the Senate is to act as a co-equal participant in the confirmation of judges to the federal bench. Unlike nominations made by a President for Executive Branch appointments, judicial nominees are reviewed by the Senate for appointment to lifetime positions in the Judicial Branch.

The Senate has often requested and received supplemental documents when it is considering controversial nominations or when evaluating a candidate with a limited public record. The Chairman of the Senate Judiciary Committee wrote to your Administration on May 15, 2002 to request such supplemental documents to assist in Senate consideration of the Estrada nomination. In particular, the request was made for appeal recommendations, certiorari recommendations, and amicus recommendations that Mr. Estrada worked on while at the Department of Justice.

Prior Administrations have accommodated similar Senate requests for such documents. Such documents were provided during Senate consideration of the nominations of Robert H. Bork, William Bradford Reynolds, Benjamin Civiletti, Stephen Trott, and William H. Rehnquist.

Your Administration has refused to accommodate the Senate's request for documents in connection with the Estrada nomination. That refusal was a matter of inquiry at the confirmation hearing held on this nomination on September 26, 2002. Following the hearing, Senator Schumer wrote to the Attorney General on January 23, 2003, to follow up on the request.

I note parenthetically that was after President Bush won the election and the control of the Judiciary Committee was on its way to the Republicans in the Senate.

To continue with the letter:

In addition to requests for documents, Senators frequently question judicial nominees during their confirmation hearings to determine philosophy, views and temperament. For example, then-Senator John Ashcroft asked nominees: ''Which judge has served as a model for the way you would conduct yourself as a judge and why?'' Mr. Estrada refused to answer a similar question.

During consideration of President Clinton's judicial nominees, Republican Senators asked repeated questions regarding nominees' judicial philosophy, views on legal matters, and approaches to interpreting the Constitution. They insisted on and received answers. During his consideration before the Senate Judiciary Committee, Mr. Estrada failed to answer these kinds of questions. These questions have not only been routinely asked by the Senate, they have been routinely answered by other nominees—including other nominees from your Administration.

For the Senate to make an informed decision about Mr. Estrada's nomination, it is essential that we receive the information requested and answers to these basic legal questions. Specifically we ask:

1. That you instruct the Department of Justice to accommodate the requests for documents immediately so that the hearing process can be completed and the Senate can have a more complete record on which to consider this nomination; and

2. That Mr. Estrada answer the questions that he refused to answer during his Judiciary Committee hearing to allow for a credible review of his judicial philosophy and legal views.

We would appreciate your personal attention to this matter.

Sincerely,

TOM DASCHLE.
PATRICK LEAHY.

Madam President, as I said before, if they weren't satisfied with Miguel Estrada's answers at his hearing which they conducted and which they controlled, then they could have held another hearing. Nothing would have stopped them. They had the power to do so. They did not. They could have asked him followup questions in writing. Only two of the Democrats did. The fact of the matter is Estrada did answer the questions he was asked by the Democrats and Republicans back in September when he had his hearing. My Democratic colleagues are unhappy only because Mr. Estrada did not say anything they could use to oppose him. In other words, he didn't tell them what they really wanted to hear, which would have been mistakes, or some error, or some difference in opinion they could then use to oppose him. He answered the questions. He just didn't answer them the way they wanted him to answer.

That is why they are trying to engage in this fishing expedition and demanding unprecedented, unfettered access to the internal privileged memoranda Mr. Estrada offered at the Department of Justice. These memoranda are attorney work product done for our country when he worked for the Solicitor General. Any lawyer would object to having to hand them over. He didn't. He was proud of his work. He didn't care if the Government would give them over. But the Government has taken a principled position; that is, these internal documents should not be turned over to the Senate Judiciary Committee to be used to try to thwart the nomination of anybody, or to be used, since they were internal confidential documents. They were the work products of attorneys within the Solicitor General's Office. It is like asking a nominee to give up all of the confidential information his law firm had and that he worked on during the time at his law firm that is not in the public record. Any lawyer would object to turning that over.

What are we going to do when we disagree with somebody who worked for Senator HATCH? Are we going to ask for all of the internal documents the man or woman did while he worked for me that were given for my purview as their supervisor, and as their Senator, so I could take those documents and determine what to do in the future?

Let us make it even more clear.

Should Senator DASCHLE's staff be subject to this kind of thing?

Why would the Solicitor General's Office be subject to having to turn over confidential documents that were meant to help the Solicitor General make decisions on behalf of our country? Can you imagine how that would chill the work of the people in that office if attorneys there wanted to become judges someday? You don't think that would cause them to be putting their fingers up into the wind and asking, How will this be interpreted someday if I ever come up for a judicial nomination? Hopefully they wouldn't, but, of course, they would. Let us be honest about it.

But here, unlike Senator DASCHLE's representations—he certainly is a friend of mine. He signed this letter. It is the Department of Justice, not Mr. Estrada, that holds the memos. The Department has set forth the reasons why it is so inappropriate to release these memos. It is crystal clear to me—to all seven remaining former Solicitors General of the United States,

and to the Washington Post. It is clear to them, and to the Wall Street Journal. It is to just about everyone, it appears, except to my Democratic colleagues. Why would they want these memoranda? To see if they could find some reason to again attack Mr. Estrada? Is this Hispanic gentleman so unqualified they have to go on fishing expeditions to try to find things to give him a difficult time with?

The fact of the matter is he is as qualified as anybody we have had before the committee, and the American Bar Association said so. I know the Supreme Court Justices feel so. I know a lot of leading Democratic lawyers in this town are saying this is the man who deserves confirmation. Why is he being treated differently?

One of my colleagues the other day was complaining he thinks some of us over here are calling our Democratic colleagues racists because they are against Miguel Estrada. No. Nobody over here has made that comment. Nobody over here has even implied that. But what I have said is it isn't because he is Hispanic they are against him—it is because he is a Hispanic Republican who they think is conservative and who is going on a court they think is equally divided—where over 90 percent of the cases are unanimous decisions, anyway, in that court.

It is the worst excuse for voting against him I have ever heard. But it is because he is a Hispanic Republican conservative. That is the reason they are against him. They are so afraid he might not please them when he gets on the Circuit Court of Appeals for the District of Columbia.

I suggest to them he is a great lawyer. He understands precedent. He understands the rule of precedent. He understands the rule of what we call stare decisis in the law, and he more than told every one of them who questioned him over and over that he would apply the law as it is, regardless of his personal beliefs.

What more can anybody say? They are accusing him of not being responsive? I am accusing them of not being fair to a Hispanic conservative Republican. I do not know what his point of view is on Roe v. Wade. To this day, I don't know. I do know he at one time helped the National Organization for Women in a serious case, which I think if they were offering him as a nominee they would argue means he is all right. I do not know what his position is. But I will tell you this. He deserves to be confirmed as a jurist on the Circuit Court of Appeals for the District of Columbia.

Let me address in a little more detail why this letter Senator DASCHLE and Senator LEAHY sent to President Bush is so outrageous in its continuous demand for privileged documents.

At the outset, I must note the nature of this request for unfettered access to the universe of Mr. Estrada's work product is truly extraordinary. Contrary to what Senator DASCHLE and others would have us believe, and as I have mentioned before, during the last Congress the Senate confirmed Jonathan Adelstein, a former aide to Senator TOM DASCHLE to a position on the FCC. The Republicans did not demand all of Mr. Adelstein's memoranda to Senator DASCHLE on telecommunications issues before confirming him, despite the fact they would have been useful in determining how Mr. Adelstein would have approached his decisions as a commissioner. This is because of the obvious reason that to do so would have intruded into the deliberative relationship between Mr. Adelstein and Senator DASCHLE. Nobody here ever wanted to do that, even if we didn't like the appointment of Mr. Adelstein. And some on our side definitely did not like that appointment. I was not one of them, but there was a considerable number who did not agree with this appointment for the same reason, and for other equally sound reasons that I will detail.

No Member of this body should advocate holding Mr. Estrada's nomination hostage to demands for access to internal, confidential documents he authored at the Solicitor General's Office.

My Democratic colleagues have claimed that the Department of Justice has a history of disclosing previously confidential, internal documents in connection with confirmation proceedings. This is simply not accurate.

In a letter dated October 8, the Department of Justice points out that since the beginning of the Carter administration there have been 67 former Department of Justice employees confirmed as Federal circuit judges—38 of whom, like Mr. Estrada, had no prior judicial experience. Eight of these nominees, again like Mr. Estrada, had worked in the Solicitor General's Office.

The Department of Justice could find no record of having produced internal, deliberative materials created by the nominee while a DOJ lawyer in any of these cases.

Madam President, one of my Democratic colleagues listed six nominees in connection with which he claimed that the Department of Justice released confidential, internal documents. In its October 8 letter, the Department of Justice explained that of these nominees, the hearings of only one—only one; Judge Bork—involved documents from their service in the Solicitor General's Office.

I think there have been those misrepresentations made to Senators in their caucus, and they are absolutely false, because I chatted with some of my Democratic friends on my way over to the medical liability hearing I conducted this afternoon, and they were citing these same specious arguments that they had been told. Look, if we are going to tell our colleagues things, they ought to be accurate.

In that one case—Judge Bork's—the Department of Justice produced a limited number of documents related to specific topics of interest to the committee. The Department of Justice did not agree to the fishing expedition that was demanded, and they certainly did not agree to the type of fishing expedition that my Democratic colleagues now seek to impose upon Mr. Estrada in the Justice Department.

As the Department of Justice observed:

> The vast majority of memoranda authored or received by Judge Bork when he served as Solicitor General were neither sought nor produced. And the limited category of documents that were produced to the Committee did not reveal the internal deliberative recommendations or analysis of assistance to the Solicitor General regarding appeal, certiorari, or amicus recommendations in pending cases.

Exactly what they have been asking for here is something that has not been done. Yet I know it has been represented to some of my Democratic colleagues that the Department of Justice did give these kinds of documents. Well, they did not. And I hope my colleagues are watching this so they can get the truth.

This is hardly the unfettered, unprecedented access to privileged work product that my Democratic colleagues now seek. And why do they seek it for this fellow who has every qualification to be on the Circuit Court of Appeals for the District of Columbia, and more, who they have not laid a glove on, who they cannot name one thing that would refute his nomination other than these specious arguments that he has not answered the questions? Sure, he has answered the questions. They just don't like the answers.

My Democratic colleagues also claim that policy considerations weigh heavily on the side of disclosure. Curiously, however, they fail to mention the letter that the committee received from all seven living former Solicitors General of the United States, four of whom are leading Democrat lawyers, leading Democrat former Solicitors General.

I know some of my colleagues on the other side have not heard that yet because I asked some of them what is going to happen here and they indicated they are probably going to filibuster. And then one of them said: Why don't you give up those documents from the Justice Department? I said: Well, seven former Solicitors General, four of whom are Democrats, said that would be preposterous, that they should not do that. Those are confidential. That is the work product of attorneys in the Solicitor General's Office.

You should have seen the surprised look on some of my colleagues' faces? ''Really?'' It seems to me, if you are going to argue against a person, you ought to at least tell the truth and the facts on the other side.

Why is it they are picking on this young, terrific Hispanic candidate for this job, who has the highest rating from the American Bar Association, a unanimously well-qualified rating?

The letter, dated June 24, 2002, was signed by Democrat Seth Waxman—we

all respect Seth; he is a great lawyer—Walter Dellinger—one of the great teachers in this country; taught at Duke; a fine man; I have grown to think a great deal of him as I have listened to him on a variety of matters, where in the early days I was not sure I did—Drew Days, who is a wonderful African-American former Solicitor General, and a very adamant Democrat; all of them are—and Archibald Cox. You have to go pretty far to find somebody more prestigious than Archibald Cox. All Democrats: Waxman, Dellinger, Days, and Cox. And it was signed, as well, by Republicans Ken Starr, Charles Fried, and Robert Bork.

The letter notes that when each of the Solicitors General made important decisions regarding whether to seek Supreme Court review of adverse appellate decisions and whether to participate as amicus curiae in other high-profile cases, they ''relied on frank, honest and thorough advice from [their] staff attorneys like Mr. Estrada. . . .''

The letter explains that the open exchange of ideas, which must occur in such a context, ''simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure.''

The letter concludes that:

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

This is a bipartisan group of seven former Solicitors General—all the living ones.

The former Solicitors General are not the only ones who are disturbed by my Democratic colleagues' efforts to obtain privileged Justice Department memoranda. The editorial boards of two prominent newspapers have also criticized the attempt to obtain these records. I am sure there are others as well.

On May 28 of last year, the Washington Post—as I say, hardly a bastion of conservative thought—editorialized that the request ''for an attorney's work product would be unthinkable if the work had been done for a private client. The legal advice by a line attorney for the federal government is not fair game either.''

According to the Washington Post:

> Particularly in elite government offices such as that of the solicitor general, lawyers need to speak freely without worrying that the positions they are advocating today will be used against them if they ever get nominated to some other position.

Gee, that is a pretty good reason from the Washington Post. I have to tell you, that is a wise editorial, and it is true. And it goes along with the seven former Solicitors General, four of whom are Democrats.

The Wall Street Journal also criticized my Democratic colleagues' request in two editorials. In its second editorial, which appeared on June 11, they called the request ''outrageous'' and noted that the true goal was ''to delay, [to] try . . . to put off the day when Mr. Estrada takes a seat on the D.C. Circuit Court of Appeals, from which President Bush could promote him to become the first Hispanic-American on the U.S. Supreme Court.''

The Wall Street Journal got it pretty right. What is really behind all this is to damage this person as much as they can so this Hispanic gentleman, with all of these qualifications, can never receive a nomination to the U.S. Supreme Court, can never be considered.

Well, I am doing my best to make sure that does not happen, that he will have a chance, just as any other great lawyer in this country, to someday be nominated. And that is one reason why I have spent so much time on the floor.

Let me conclude. The bottom line is that my Democratic friends are seeking internal, confidential material that any reasonable person, thinking about it, would agree should not be delivered by the Justice Department to the Senate for partisan purposes—for any purposes.

Those seven former Solicitors General had no axes to grind. They understand how important those documents are, and how important they are to be held confidential. Yet my colleagues on the other side keep acting as if that is a right they should have no matter what.

Their attempts have been criticized by all seven living former Solicitors General and by at least two major newspapers of which I am aware. But more fundamental is the fact that Mr. Estrada does not object to turning over these memoranda. He has nothing to hide. It is the Department of Justice that has an institutional interest and a rightful institutional interest in refusing to comply with my Democratic colleagues' request. I, for one, understand and agree with the Department's position but the Department's recalcitrance in this dispute should neither be imputed to nor held against Mr. Estrada.

What bothers me is that we have had colleague after colleague from the other side come to the floor knowing that these seven Solicitors General have given this opinion—knowing it—and have not informed their colleagues, some of whom are very mixed up about this. Why? Why wouldn't they tell them the truth? I guess to embarrass Mr. Estrada.

This is a fishing expedition par excellence. It is wrong. They just don't want a conservative Hispanic Republican on this court at this time, especially one who has all the credentials that Miguel Estrada has because he would have to be on anybody's short list for the Supreme Court of the United States of America. The longer they can delay him from taking his seat, the more difficult it will be for him to have any chance of being on the Supreme Court and become the first Hispanic not only on the Circuit Court of Appeals for the District of Columbia but the first Hispanic to serve on the U.S. Supreme Court.

I am not saying the court is going to pick Miguel Estrada, but he would be on the short list; He is that good. How many Senators have argued 15 cases before the Supreme Court, winning 10 of them? How many Senators graduated magna cum laude from Columbia or from Harvard, which he did? How many Senators held the prestigious position of editor of the Harvard Law Review? I don't know of any.

All I can say is, how many Senators could have served not only a circuit court of appeals judge but also as a clerk to a Justice of the U.S. Supreme Court, Justice Anthony Kennedy? I don't think any of them. Maybe some, but I don't know of them.

We have reached the point where it is just terrible. We have waited long enough. We have been going on this debate now for a week. That is longer than most Supreme Court nominations. This man certainly deserves to have an up-or-down vote and not a vote on cloture.

I have been asked by the leader to make the following unanimous consent request: I ask unanimous consent that there be an additional 6 hours for debate on the Estrada nomination; provided further that the time be equally divided between the chairman and ranking member or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination with no intervening action or debate.

The PRESIDING OFFICER (Mr. ALEXANDER). Is there objection?

Mr. DODD. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. HATCH. I would modify my unanimous consent request to 8 additional hours in addition to the 6 I have asked for.

The PRESIDING OFFICER. Is there objection?

Mr. DODD. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. HATCH. Let me modify it to 10 additional hours.

The PRESIDING OFFICER. Is there objection?

Mr. DODD. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. HATCH. Let me go further, let me modify it to 20 additional hours, which would probably be close to 3 more days.

The PRESIDING OFFICER. Is there objection?

Mr. DODD. Madam President, reserving the right to object, the good Senator, my friend from Utah, can add as many hours as he would like, but the Senate wants to be heard on this matter. There will be objections noted on every request for additional time.

Mr. HATCH. Is the Senator telling me no matter what I offer that Senate Democrats are going to object?

Mr. DODD. To try to limit debate on this matter, I tell my good friend from Utah, that any effort to limit debate will be objected to.

Mr. HATCH. Even if I go up to 40 or 50 hours?

Mr. DODD. This is not about the amount of time. The Senate wishes to be heard on this matter. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. HATCH. I don't blame the distinguished Senator from Connecticut for having to make these objections.

Mr. DODD. I don't blame the good Senator from Utah for making the requests.

Mr. HATCH. I am going to keep making them because it is apparent now that we are in the middle of a filibuster. I just want to warn the Senate, that is not a good thing. It is not fair to the President. It is not fair to Miguel Estrada. It is not fair to the process. It is not fair to the judiciary. It is not fair to Senators who have been fair to Democrat nominees who were heavily contested where there were no cloture votes or no, should I say, real filibuster. It is just plain not fair.

What is so wrong with giving this Hispanic man, who may be conservative and who is Republican, an opportunity to serve, to break through that intellectual glass ceiling that suddenly seems to have been erected and give him an opportunity to serve since he has such great ability to be able to do so and has proven it?

I repeat again, he has the highest recommendations of the American Bar Association, the gold standard of my colleagues on the other side. They are the ones who said that the ABA recommendations are the gold standard, and he holds a unanimously well-qualified, highest rating of the American Bar Association. How can we stand here and filibuster somebody like that?

All I can say is that I hope everybody in America is watching us because it is just plain not fair nor is it right. If we are going to do this, it is a road I surely don't want to see the Senate go down. I am hoping that my good friend from Connecticut will talk to his friends on the other side and my friends on the other side and get some reason.

We are now at a new point in history for this body. In the confirmation of judicial nominees, this will be the first time in the history of this country and of this body that a filibuster will be conducted against a circuit court of appeals nominee, a true filibuster. I am going to keep the door open for my colleagues to see the error of their ways, and hopefully we can resolve this matter before the end of this week or in any reasonable time. I offered up to 50 hours that were objected to. I am surely hoping that my colleagues who think a little more clearly on the other side will influence all of our other colleagues who are seemingly so caught up in an ideological warfare and give this vote to Miguel Estrada who deserves it.

I notice my colleague has been patiently waiting for a long time. I apologize to him, but I had to make these comments.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Madam President, I am not a member of the Judiciary Committee. I was in the other body some years ago when I served there. But like many of my colleagues here who have served in this institution for some time and have been involved in any number of judicial nominations, going back now over the past two decades, this is a unique moment.

My friend and colleague from Utah has called this a moment of historic significance. I agree with him about that. This is an important moment historically. It is an important moment for this institution.

I enjoy carrying every day with me in my pocket a copy of the Declaration of Independence and the Constitution given to me some years ago by my seatmate, Senator ROBERT C. BYRD of West Virginia, a rather tattered looking copy now. I carry it with me and refer to it quite frequently as a reminder to myself of what a wonderful privilege it is to serve in this institution and the sacred obligation we bear, each and every one of us, when we are sworn in as Members of this body to uphold and defend this Constitution.

There are two important relevant points during the next few moments as I share my thoughts on the matter of this nomination. The first begins with article III of the Constitution written more than 200 years ago by our Founding Fathers. It says:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> The judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour . . . [in a sense for life].

It is a unique office in the judicial branch in this country. Unlike article II on the Presidency, in article III, judicial nominations serve, during good behavior, for the rest of their lives.

This nominee is in his early forties, I am told. God willing, Miguel Estrada may have as many as 40 or 50 years to serve on the judicial branch of this country, either at the circuit court level, or possibly the Supreme Court level, having listened to my friend from Utah about the possibility of being on a short list.

So in assessing this nomination and the process, it is critically important that my colleagues and others be mindful of this article III, section 1 provision, that judges are nominated by the President and serve, if confirmed, for life. These are unique positions in the entire constellation of offices that could be held in the Federal Government—for life, during good behavior.

The second provision that is important to take note of as you engage in this discussion is in article II, section 2. I will quote it. Article II, section 2, in part, reads, in the second paragraph:

> He [the President] shall have, Power by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the Supreme Court, and all other Officers of the United States. . . .

By and with the advice and consent of the United States Senate.

Those two provisions are critically important to keep in mind as you listen to this debate and discussion about this particular nomination. The debate and discussion, I suggest, goes far beyond the individual attributes, qualifications of Miguel Estrada.

For those reasons, I totally agree with my colleague from Utah that this is a historic moment in terms of how we consider this process, which has survived for more than 200 years. It has never been changed. Over the history of this institution, Senates have taken the role of advice and consent to varying degrees with more or less seriousness. There have been times when there was hardly any advice and consent, and matters went through here rather routinely. I think most historians look back on those periods and would define those moments as being less than stellar periods of this institution's history. When this institution, a coequal branch of Government with the article I and article III branches of government, has taken its advise and consent role seriously—particularly with lifetime appointments—then I think we have lived up to the Founding Fathers' ambitions for this body.

I have voted for almost every Presidential nominee to serve in a cabinet or ambassadorial post. I received significant criticism when I voted for John Tower more than a decade ago during the administration of the first President Bush. I voted for John Ashcroft to be Attorney General of the United States and received substantial criticism, and still do, to this day from people in my own party. I did so not because I agreed with John Ashcroft or with John Tower, but I happen to believe that, when it comes to cabinet officers or ambassadors for periods of limited duration, Presidents ought to be able to have their counsel and official team to advance the ideas and values they articulated during their campaigns and which the American public supported through the election process. That is not to say I would vote for every single nominee of whatever kind, because I take the advice and consent role seriously.

I have always felt when it comes to judicial nominations, because of that article III, section 1 language that gives them the right to serve for life, far beyond the tenure of the President who appoints them or the Congress that confirms them, far beyond any tenure of anyone who serves in any office in the Federal Government, there is a heightened degree of responsibility

to fulfill the article II, section 2 provisions of the Constitution to provide our advice and consent.

So it is with that background I come to this nomination, not because I want to necessarily become embroiled in the conditions or qualifications of Miguel Estrada, but because I am deeply concerned we are getting away from fulfilling the Senate's historic responsibilities of fulfilling its article II, section 2 functions and responsibilities.

So I rise to express my opposition to this confirmation and to vote, when the matter occurs, against this nomination, for one simple reason: The administration and Mr. Estrada have failed to provide this Member and this institution and its Members with sufficient evidence to demonstrate that Mr. Estrada would fairly and objectively decide cases that will come before the Court of Appeals for the DC Circuit.

I have no doubt in my mind, nor should anyone, that Mr. Estrada was not chosen in some sort of a blind lottery. His name wasn't just picked out of the blue because we thought we would like to have a Hispanic on the bench—he has a Hispanic heritage; therefore, we will take Mr. Estrada. I promise you there were people who questioned Mr. Estrada about his views before his nomination was made by the President of the United States. Let there be no doubts or illusions about that. The question remains, then, if the President is satisfied this nominee is qualified to sit on the District's Circuit Court of Appeals, why should those of us who have to vote on this nomination not also be entitled to the same opportunity to be full informed about his views? Not about particular cases that may or could come before the court. I have always felt we have no business inquiring of a judicial nominee what his or her views might be about a pending matter that might come before them. But on general questions about their judicial philosophy, their demeanor, how a nominee would conduct him or herself as a judge, those are entirely legitimate issues. In fact, we bear a responsibility to see that those questions are raised—certainly, just as the President or his appointees have questioned Mr. Estrada on those matters. Before they sent his name up here, I promise you they did that. Certainly those of us who have the responsibility under the Constitution to provide our advice and consent, and ultimately our votes, should be entitled to the same opportunity. We have been denied that opportunity. But whatever reasons and motivations there may be this is a process issue that should not be tolerated.

To suggest a nomination can be made by the President and sent to this body, and that this body should confirm such a nominee without having a meaningful opportunity to solicit information from the nominee is a precedent I don't think we ought to make. That is why I agree with my colleague from Utah that this is a historic moment. We should not walk away from our responsibility simply because Mr. Estrada is Hispanic and, apparently, of good background. I am not arguing about all of the good things I've heard about Mr. Estrada. What concerns me is the President and the nominees, or the appointees at the Justice Department, have had an opportunity to inquire of Mr. Estrada about his views, and that this body—a coequal branch—the Constitution requires we who exercise our advice and consent function are being denied that same opportunity. So no one that I know of—maybe there are some, but certainly not this Member—is questioning the accomplishments of Mr. Estrada. What many in the Chamber have questioned, however, is whether Mr. Estrada is likely to be a fair and unbiased appeals court judge for life.

This is an extremely important nomination for the reasons I have just tried to articulate. The Court of Appeals for the District of Columbia is an important court that has exclusive jurisdiction to review many Federal administrative law questions. In a sense, the Court of Appeals for the District of Columbia is the Nation's second highest court, because its decisions can profoundly impact how the Federal Government conducts the people's business. The decisions made by the court of appeals affect all of us across the country. This is not a debate, as I said a moment ago, about whether Mr. Estrada should be appointed to serve as a trial judge where he might gain some judicial experience, although were he to go through the process and refuse to respond to the questions, I would have the same concerns, even for a district court nominee. I think the precedent is dangerous. When the President nominates someone to serve as an appellate court judge and we allow the nonanswers to stand, the matter is even that much more serious because it is an appellate court.

Rather, this is a debate about whether Mr. Estrada, who has never served as a judge anywhere before, should be appointed as a judge who will judge judges and issue final decisions on a wide-ranging set of legal questions that will have national impact.

My colleague from New York, Senator SCHUMER, as well as others who are members of the Judiciary Committee, has pointed out Mr. Estrada is a young man, as I mentioned earlier. He is in his early forties. If confirmed, he may spend the next half century making decisions that will affect our children, our grandchildren, and generations to come. This is a lifetime appointment.

Again, I emphasize that point under article III, section 1. There is no going back if we find out Mr. Estrada is not a good judge. This vote is final, and if we confirm Mr. Estrada, we are all going to have to live with that decision the rest of our lives. We are being asked to confirm Mr. Estrada even though we have been provided with virtually no information about his judicial philosophy or judicial competency.

We have been offered some evidence that Mr. Estrada is a good lawyer, but good lawyers do not necessarily make good judges and, in my view, Mr. Estrada, like all judicial nominees, has an obligation to show the Senate he can be a good judge. He showed the President he can be a good judge, obviously. He showed the staff at the Justice Department he could be a good judge. But he has not shown the Members of this body, nor has the American public had the opportunity, through us, to draw that same conclusion.

We are not hiring a lawyer, we are confirming a judicial nomination. One of the fundamental differences between lawyers and judges is that lawyers are supposed to zealously represent the interests of their clients, but judges are supposed to be balanced, of even temperament, fair, impartial. We want lawyers to be passionate in advocating the causes of their clients, defending those who deserve to be defended and prosecuting those who deserve to be prosecuted. We have an entirely different expectation of judges in terms of demeanor and behavior.

Again, the fact that Mr. Estrada is a very good lawyer, a passionate advocate on behalf of his clients, is certainly a good recommendation, but not necessarily a recommendation that he bears the temperament to sit as a judge on the circuit court of appeals. That may be the case, but when we are denied the opportunity to inquire of him about his judicial temperament, about his philosophy, then, in my view, we really don't know. And if we confirm a nomination when we really don't know we are setting a precedent that I think is dangerous indeed.

Mr. Estrada, apparently on the advice of the administration, has chosen not to respond to the Senate's questions, refusing to answer questions on what he thinks about legal issues. He was asked by Senator SCHUMER, I am told, in the committee to name one Supreme Court decision over the last 40 or 50 years with which he disagreed. I do not know of a person in this Chamber who could not answer that question in about 2 minutes, particularly those who are members of the bar, attorneys by profession. Certainly, we all know of cases, maybe even cases we learned when we were in law school that we thought were wrong.

If Mr. Estrada, this terrific lawyer, a graduate of Harvard Law School, Phi Beta Kappa, cannot name one Supreme Court case with which he disagrees, then we are getting a message: I am not going to answer your questions about these matters, period. I think it is dangerous to allow nominees to refuse to respond.

My colleague from Utah, the chairman of the committee, Senator HATCH, once noted that when it comes to judicial nominations:

> The Senate has a duty not to be a rubberstamp.

I could not agree more with my friend and colleague from Utah on that point. This is not a trivial matter to be taken lightly. I believe it would be irresponsible to vote to confirm a judicial nominee without knowing something about his or her judicial temperament.

Not every judicial nominee comes to the Senate with years of experience on the bench, but when a nominee, such as Miguel Estrada, has no judicial experience, we bear a responsibility to look for other evidence of his demeanor and his ability to put aside rancor in favor of balanced judicial reasoning.

I would like to add that when nominees with similar backgrounds as Mr. Estrada have provided us with evidence, they have been confirmed by the Senate regardless of their ideologies. It was a few months ago the Senate Judiciary Committee and the full Senate voted unanimously to confirm Professor Michael McConnell as a judge on the Tenth Circuit Court of Appeals. Despite his impressive credentials as a lawyer and scholar, he had never been a judge before and, as we all know, a number of groups were concerned that his clearly conservative ideologies would influence his decisions on the bench.

However, after Professor McConnell openly and extensively discussed his opinions on issues, such as federalism and Roe v. Wade, in his hearing before the Judiciary Committee, then the full Senate, Democrats as well as Republicans, agreed that he would fulfill his duties as a judge impartially regardless of his personal views.

That is a recent example of a nominee unanimously confirmed by this body. But Professor McConnell had the courage of his convictions. He was not ashamed to stand up and say what he believed and why he believed it. As a result of that kind of forthrightness, this body unanimously confirmed him to be a circuit court judge. He had no judicial experience, but he was not ashamed of who he was or in what he believed.

I do not know Mr. Estrada, and I presume he is not ashamed of his views, but the reluctance to share those views with the membership of the Senate, with the members of the Judiciary Committee, is troubling, to put it mildly. When a nominee will not answer questions, when they cannot name a single Supreme Court case with which they disagree, then we begin to get concerned that this is a stonewalling operation.

During a hearing before the Senate Judiciary Committee, Mr. Estrada refused to answer a long list of questions about his positions on important legal matters. Mr. Estrada refused to explain whether he is inclined to support the interests of business, States rights, the rights of workers, consumers, or children. He refused to comment on whether he would approve the administration's environmental rollbacks. He even declined to give his opinion on a wide range of constitutional issues—the merits of Roe v. Wade, the constitutionality of affirmative action programs, the death penalty, employment discrimination against homosexuals, the balance between environmental protection and property rights, the public's right to know about health and safety standards versus a litigant's right to privacy in product liability cases.

Is there any doubt that the President or his appointees or staff at the Justice Department have a good idea of how Mr. Estrada feels about those questions? Does anyone believe for a second they would send his nomination to the Senate without having some idea of where he stood on these questions? And do not I as a Member of this body, in a coequal branch of Government, have a right, before I cast my vote, to at least have the opportunity to raise these questions and get some answers to them? I think I do.

If we set the precedent of saying you can be nominated by a President of any party, that your appointed staff at the Justice Department can ask these questions and know the answers, but Members of the Senate, Democrats or Republicans, have no right to solicit or find out this information, that is dangerous. That is precedent setting. That is troubling, indeed.

Regardless of who the nominee is, regardless of who the President is who sends a nominee to this Chamber, if we set the precedent that people can go through the confirmation process and not share with us their general views—not their views on how they would rule on individual pending cases; I would strenuously object to questions like that—but to get some sense of the nominee's demeanor, judicial philosophy and ideas. Much to the great credit of Professor McConnell, with whom I would disagree on many matters, I believe, I admire the fact he had the intestinal fortitude to stand up and say: This is what I believe.

As a result of that, the full support of the Senate. But I am deeply troubled with the idea that a person can stonewall, not answer these questions, and then be confirmed by this body. This issue goes far beyond Miguel Estrada. Our failure to understand that, I think, is dangerous.

When asked about each and every one of the issues I've discussed, Mr. Estrada refused to articulate an opinion to the members of the Judiciary Committee. It ought to be troubling to every one of us, regardless of our views, to set that precedent. It is troubling, to say the least, that a prospective appellate court judge and one who clearly, should a vacancy arise in the Supreme Court, according to my friend from Utah—and I believe he is correct—will be on the short list to be on the Supreme Court—that he would have no opinions on any of these matters.

If Mr. Estrada does indeed have opinions on these issues, it is even more troubling that he refuses to make those opinions known, not just to me or members of the committee but to the American public who have sent us to the Senate to represent them. They have a right to know how this individual would at least view some of these basic fundamental constitutional questions.

Instead of honestly and openly answering questions about his judicial philosophy, Mr. Estrada decided to keep quiet, to take his chances, and roll the dice on the floor of the Senate, hoping that the dice would be loaded in his favor and that there would be no way to stop this nomination from going forward.

Senator SCHUMER once again pointed out that if we confirm Miguel Estrada, we are ratifying a don't-ask-don't-tell policy for judicial nominees. Tragically, I think that characterization is correct.

Mr. Estrada sat before the Judiciary Committee and said nothing, believing if he did not say a word, the majority of the Senate would rubberstamp his nomination. And in turn, the administration has willingly participated in this conspiracy of silence to deny the Senate and the American people access to information by refusing to release copies of Mr. Estrada's legal memoranda from his time in the Solicitor General's Office.

I listened to my colleague from Utah go on at some length about this point. There is no legal requirement that memoranda from the Solicitor General's Office be withheld from the Senate. It is true that previous Solicitors General have said they would prefer that these documents not be forwarded to the Senate for the reason that this might make it difficult in future years to get the kind of candid assessments by Justice Department lawyers. I am somewhat sympathetic to that argument forwarded by my colleague from Utah, but in the absence of any other information it is more necessary to see documents. Certainly, if a person is forthcoming in sharing their views and thoughts, then the necessity to go and solicit documents from the Justice Department where a nominee may have worked before ought to be avoided, but the issue arises when a nominee refuses to answer any questions. Where there are no other papers, no documents, very few written materials that the nominee has produced, the value of these legal memoranda is heightened. So that in the absence of being forthcoming when the questions are asked, where does one go? What do I rely on? Do I say to my constituents back home that I am sorry he would not say anything and, by the way, there is no legal requirement but the Solicitor General's Office won't share information either?

Now, based on some research that has been done, there is precedent for the Solicitor General sharing information, that is really true, and I will leave it to my friend and former chairman of the

Judiciary Committee, the Senator from Vermont, Mr. LEAHY, to comment specifically on that.

Going back a number of years ago, the Judiciary Committee sought and received a number of documents, I believe during the Bork nomination and several others. I think Judge Trott was another case. There were two or three others who had worked in the Solicitor General's Office or other offices at the Department of Justice, and they shared with the Senate Judiciary Committee the work product of those employees. Those documents were used by the Judiciary Committee during the confirmation process.

I do not disagree with the Senator from Utah that there are some concerns about going that route for the reasons I have stated, but there is precedent where that information has been made available to the Senate Judiciary Committee when considering nominations for the Federal judiciary.

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

Mr. DODD. Let me finish my statement, and I will come back because I am going to put in the RECORD a large number of documents that make that case.

Mr. HATCH. I just ask the Senator to yield on that narrow point.

Mr. DODD. I would like to finish my statement rather than engage in a debate on this particular point.

Mr. HATCH. I do not want to debate. I just want to make one point.

Mr. DODD. I yield for one question.

Mr. HATCH. Is the Senator aware that I just went through that the Justice Department proved that these types of documents have never been given to anybody?

Mr. DODD. I was not going to dwell on the point.

Mr. HATCH. We go over and over it.

Mr. DODD. Then I will go over and over it. In the past documents were submitted to the Senate Judiciary Committee.

Mr. HATCH. No, they weren't.

Mr. DODD. There are four pages of list here that go on. They sent us a long list.

Mr. HATCH. Is the Senator aware of the list from the Justice Department?

Mr. DODD. In fact, I have a letter from the Justice Department dated May 10, 1988, signed by Thomas M. Boyd, Acting Assistant Attorney General, in which he says to Chairman Biden:

As assistant attorney general John Bolton noted in an August 24, 1987, letter to you, many of the documents provided to the committee reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. We provided these privileged documents to the committee in order to respond fully to the Committee's request and to expedite the confirmation process.

Would you send them back, in essence. These were documents in the committee that were provided by the Solicitor General's Office, and the assistant attorney general is asking for them back. What do you mean, they had not been sent up? They were.

I do not want to dwell on this point, but when we get no information from the nominee about where he stands on important matters—by the way, here is a list of the documentation in that particular case that goes on for four pages. I ask unanimous consent that these matters be printed in the RECORD.

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

U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
*Washington, DC, September 2, 1987.*

Hon. JOSEPH R. BIDEN, Jr.,
*Chairman, Senate Judiciary Committee,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork to the supreme court of the United States, and provided in response to requests made to date by Committee staff. These documents are being provided under the conditions stated in my August 24, 1987 letter to you.

Sincerely,

JOHN R. BOLTON,
*Assistant Attorney General.*

Attachments.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC, August 10, 1987.*

Hon. EDWIN MEESE III,
*Attorney General, Department of Justice,*
*Washington, DC.*

DEAR GENERAL MEESE: As part of its preparation for the hearings on the nomination of Judge Robert Bork to the Supreme Court, the Judiciary Committee needs to review certain material in the possession of the Justice Department and the Executive Office of the President.

Attached you will find a list of the documents that the Committee is requesting. Please provide the requested documents by August 24, 1987. If you have any questions about this request, please contact the Committee staff director, Diana Huffman, at 224–0747.

Thank you for your cooperation.

Sincerely,

JOSEPH R. BIDEN, Jr.,
*Chairman.*

REQUEST FOR DOCUMENTS REGARDING THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Please provide to the Committee in accordance with the attached guidelines the following documents in the possession, custody or control of the United States Department of Justice, the Executive Office of the President, or any agency, component or document depository of either (including but not limited to the Federal Bureau of Investigation):

1. All documents generated during the period from 1972 through 1974 and constituting, describing, referring or relating in whole or in part to Robert H. Bork and the so-called Watergate affair.

2. Without limiting the foregoing, all documents generated during the period from 1972 through 1974 and constituting, describing, referring or relating in whole or in part to any of the following:

a. Any communications between Robert H. Bork and any person or entity relating in whole or in part to the Office of Watergate Special Prosecution Force or its predecessors- or successors-in-interest;

b. The dismissal of Archibald Cox as Special Prosecutor;

c. The abolition of the Office of Watergate Special Prosecution Force on or about October 23, 1973;

d. Any efforts to define, narrow, limit or otherwise curtail the jurisdiction of the Office of Watergate Special Prosecution Force, or the investigative or prosecutorial activities thereof;

e. The decision to reestablish the Office of Watergate Special Prosecution Force in November 1973;

f. The designation of Mr. Leon Jaworski as Watergate Special Prosecutor;

g. The enforcement of the subpoena at issue in *Nixon* v. *Sirica*;

h. Any communications on October 20, 1973 between Robert H. Bork and then-President Nixon, Alexander Haig, Leonard Garment, Fred Buzhardt, Elliot Richardson, or William Ruckelshaus;

1. Any communications between Robert H. Bork and then-President Nixon, Alexander Haig and/or any other federal official or employee on the subject of Mr. Bork and a position or potential position as counsel to President Nixon with respect to the so-called Watergate matter;

m. Any action, involvement or participation by Robert H. Bork with respect to any issue in the case of *Nader* versus *Bork*, 366 F. Supp. 104 (D.D.C. 1975), or the appeal thereof;

n. Any communication between Robert H. Bork and then-President Nixon or any other federal official or employee, or between Mr. Bork and Professor Charles Black, concerning Executive Privilege, including but not limited to Professor Black's views on the President's ''right'' to confidentiality as expressed by Professor Black in a letter or article which appeared in the New York Times in 1973 (see Mr. Bork's testimony in the 1973 Senate Judiciary Committee hearings on the Special Prosecutor);

O. The stationing of FBI agents at the Office of Watergate, Special Prosecution Force on or about October 20, 1973, including but not limited to documents constituting, describing, referring or relating to any communication between Robert H. Bork, Alexander Haig, or any official or employee of the Office of the President or the Office of the Attorney General, on the one hand, and any official or employee of the FBI, on the other; and

p. The establishment of the Office of Watergate Special Prosecution Force, including but not limited to all documents constituting, describing, referring or relating in whole or in part to any assurances, representations, commitments or communications by any member of the Executive Branch or any agency thereof to any member of Congress regarding the independence or operation of the Office of Watergate Special Prosecution Force, or the circumstances under which the Special Prosecutor could be discharged.

3. The following documents together with any other documents referring or relating to them:

a. The memorandum to the Attorney General from then-Solicitor General Boark, dated August 21, 1973, and its attached ''redraft of the memorandum intended as a basis for discussion with Archie Cox'' concerning ''The Special Prosecutor's authority'' (typeset copies of which are printed at pages 287–288 of the Senate Judiciary Committee's 1973 ''Special Prosecutor'' hearings);

b. The letter addressed to Acting Attorney General Bork from then-President Nixon, dated October 20, 1973., directing him to discharge Archibald Cox;

c. The letter addressed to Archibald Cox from then-Acting Attorney General Bork,

dated October 20, 1973, discharging Mr. Cox for his position as Special Prosecutor;

d. Order No. 546–73, dated October 23, 1973, signed by then-Acting Attorney General Bork, entitled ''Abolishment of Office of Watergate Special Prosecutor Force'';

e. Order No. 547–73, dated October 23, 1973, signed by then-Acting Attorney General Bork, entitled ''Additional Assignments of Functions and Designation of Officials to Perform the Duties of Certain Offices in Case of Vacancy, or Absence therein or in Case of Inability or Disqualification to Act'';

f. Order No. 551–73, dated November 2, 1973, signed by then-Acting Attorney General Bork, entitled ''Establishing the Office of Watergate Special Prosecution Force'';

g. The Appendix to Item 2.f., entitle ''Duties and Responsibilities of Special Prosecutor'';

h. Order No. 552–73, dated November 5, 1973, signed by then-Acting Attorney General Bork, designating ''Special Prosecutor Leon Jaworski the Director of the Office of Watergate Special Prosecution Force'';

i. Order No. 554–73, dated November 19, 1973, signed by then-Acting Attorney General Bork, entitled ''Amending the Regulations Establishing the Office of Watergate Special Prosecution Force''; and

j. The letter to Leon Jaworski, Special Prosecutor, from then-Acting Attorney General Bork, dated November 21, 1973, concerning Item 2.i.

4. All documents constituting, describing, referring or relating in whole or in part to any meetings, discussions and telephone conversations between Robert H. Bork and then-President Nixon, Alexander Haig or any other federal official or employee on the subject of Mr. Bork's being considered or nominated for appointment to the Supreme Court.

5. All documents generated from 1973 through 1977 and constituting, describing, referring or relating in whole or in part to Robert H. Bork and the constitutionality, appropriateness or use by the President of the United States of the ''Pocket Veto'' power set forth in Art. I, section 7, paragraph 2 of the United States Constitution, including but not limited to all documents constituting, describing, referring or relating in whole or in part to any of the following:

a. The decision not to petition for certiorari from the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kennedy* v. *Sampson*, 511 F.2d 430 (1947);

b. The entry of the judgment in *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C. 1976); and

c. The policy regarding pocket vetoes publicly adopted by President Gerald R. Ford in April 1976.

6. All documents constituting, describing, referring or relating in whole or in part to Robert H. Bork and the incidents at issue in *United States* v. *Gray, Felt & Miller*, No. Cr. 78–00179 (D.D.C. 1978), including but not limited to all documents constituting, describing, referring or relating in whole or in part to any of the exhibits filed by counsel for Edward S. Miller in support of his contention that Mr. Bork was aware in 1973 of the incidents at issue.

7. All documents constituting, describing or referring to any speeches, talks, or informal or impromptu remarks given by Robert H. Bork on matters relating to constitutional law or public policy.

8. All documents constituting, describing, referring or relating in whole or in part either (i) to all criteria or standards used by President Reagan in selecting nominees to the Supreme Court, or (ii) to the application of those criteria to the nomination of Robert H. Bork to be Associate Justice of the Supreme Court.

9. All documents constituting, describing, referring or relating in whole or in part to Robert H. Bork and any study or consideration during the period 1969–1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities identified in the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component or document depository thereof.)

10. All documents constituting, describing, referring or relating in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States with respect to the following cases:

a. *Evans* v. *Wilmington School Board*, 423 U.S. 963 (1975), and 429 U.S. 973 (1976);

b. *McDonough* v. *Morgan*, 426 U.S. 935 (1976);

c. *Hills* v. *Gautreaux*, 425 U.S. 284 (1976);

d. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976);

e. *Roemer* v. *Maryland Board of Public Education*, 426 U.S. 736 (1976);

f. *Hill* v. *Stone*, 421 U.S. 289 (1975); and

g. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1975).

GUIDELINES

1. This request is continuing in character and if additional responsive documents come to your attention following the date of production, please provide such documents to the Committee promptly.

2. As used herein, ''document'' means the original (or an additional copy when an original is not available) and each distribution copy of writings or other graphic material, whether inscribed by hand or by mechanical, electronic, photographic or other means, including without limitation correspondence, memoranda, publications, articles, transcripts, diaries, telephone logs, message sheets, records, voice recordings, tapes, film, dictabelts and other data compilations from which information can be obtained. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

3. In the event that any requested document has been destroyed or discarded or otherwise disposed of, please identify the document as completely as possible, including without limitation the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.

4. If a claim is made that any requested document will not be produced by reason of a privilege of any kind, describe each such document by date, author(s), addressee(s), recipient(s), title, and subject matter, and set forth the nature of the claimed privilege with respect to each document.

Mr. DODD. I ask unanimous consent that the letter to Senator BIDEN from Thomas Boyd dated May 10, 1988, requesting these materials back from the Senate Judiciary Committee also be printed in the RECORD at this point.

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

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, May 10, 1988.*

Hon. JOSEPH R. BIDEN, JR.,
*Chairman, Senate Judiciary Committee,*
*U.S. Senate, Washington, DC.*

DEAR CHAIRMAN BIDEN: This letter requests that the Committee return to the Justice Department all copies of documents produced by the Department in response to Committee requests for records relating to the nomination of Robert Bork to the Supreme Court. As Assistant Attorney General John Bolton noted in an August 24, 1987, letter to you, many of the documents provided the Committee, ''reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.'' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

Although the Committee's need for these documents has ceased, their privileged nature remains. As we emphasized in our August 24, 1987, letter, production of these documents to the Committee did not constitute a general waiver of claims of privilege. We therefore request that the Committee return all copies of all documents provided by the Department to the Committee, except documents that are clearly a matter of public record (e.g., briefs and judicial opinions) or that were specifically made a part of the record of the hearings.

Please contact me if you have any questions. Thank you for your cooperation.

Sincerely,

THOMAS M. BOYD,
*Acting Assistant Attorney General.*

Mr. DODD. So there is precedent for this. I do not want to dwell on that point because we ought to avoid that at least when we get nominees who are more forthcoming when questions are asked.

I will wrap this up because I see my colleague from New Jersey is in the Chamber and wants to speak on this matter. The Senator from Vermont, who knows far more about this than this Senator does, is also present.

Since the matter was raised by my friend and colleague from Utah earlier in his remarks, I thought it was appropriate to address and respond to the issue of whether or not documents from the Solicitor General's Office had, in fact, been provided to the Judiciary Committee in the past. Of course, there is ample evidence that they have been.

I do not blame Mr. Estrada for this, by the way. These are not his documents. These documents are the documents of the Solicitor General's Office, and therefore the allegation that Mr. Estrada is unwilling to provide these documents is not fair. It is the Department of Justice that has made that decision. I am disappointed that Mr. Estrada has not been willing to respond to Senators' questions about judicial philosophy and temperament but, rather, refused to answer any questions. That is a separate matter, but I thought it was important for our colleagues to make the distinction.

It is unfortunate this has come to be seen as a partisan debate. This should not be the case. This ought to be a matter of concern to every single Member. If this is the way we conduct these judicial nominations in the future and this becomes the precedent, then I think this institution suffers terribly in terms of fulfilling its article II, section 2, requirements of the advice and

consent when the President submits nominations. Of course, for lifetime appointees, this matter becomes even that much more serious.

I will not take more of the Senate's time on my feelings on this. I do not speak on all of these matters. I pointed out earlier that this Member has, in the overwhelming majority of cases, voted to confirm nominees from all these administrations over the years where the nominations have been for a limited duration. I pointed out I voted for John Tower and John Ashcroft. I believe Presidents ought to have their teams. I recall very vividly, with great warmth, voting for the Presiding Officer when he was considered as a nominee before this body.

When someone gets elected President, they ought to have their team. The public ought to understand that when the President appoints someone to a high office, a Cabinet office or an ambassador, that certainly requires the advice and consent of the Senate. But for a lifetime appointee, particularly a young man of 40 years of age, who could be on that bench for 40 or 50 years, far beyond the tenure of this President's term of office, far beyond the tenure of probably every single Member who would vote on his nomination, that rises to a different level, with all due respect, to the other nominees who come before this institution.

The advice and consent function on a lifetime appointment requires a heightened degree of responsibility, in my view, and when nominees will not answer questions about judicial temperament and demeanor, it is deeply troubling to me. Conservatives and liberals ought to join together in saying: I am sorry, but, Mr. President, if you send us nominees and instruct them to do this, then all of us will join together against that. Regardless of whether it is a Democrat or Republican in the White House, as Senators, as Members of a coequal branch of Government, we cannot fulfill our constitutional responsibility if that is the way in which the President conducts his business.

This goes beyond Miguel Estrada. I regret he has been caught in this. He has, for whatever reason, decided to be used in this way. That is terribly unfortunate for him but far more unfortunate for this institution and the future of judicial nominations if, in fact, this becomes the platelet on how you get confirmed for a lifetime appointment: Don't answer any questions; don't respond to issues about constitutionality of various provisions.

I repeat: I have on numerous occasions voted for judicial nominees with whom I have disagreed. But because they have been forthcoming, they have been honest about their views, because they have convinced me they would be impartial and fair sitting on a bench, I have never used the litmus test whether I ideologically disagree with a judicial nominee. But when you do not answer my questions or the questions of my colleagues on whom I rely under our committee system, that troubles this Senator deeply. Whether this nominee was made by a Democratic President or a Republican President, I would stand here and make the same case, that this institution and its Members have an obligation in this historic hour to say to the President, this is not the way to do business around here. You cannot send up nominees in this manner and expect this body to rubber stamp a nomination and to send the nominee off for the many years he may serve, making decisions without any knowledge of whether or not he will conduct his affairs as a judge in a way that will bring credit to himself and to the federal courts, let alone the institution which is responsible for ultimately voting to confirm this nominee.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. I agree with my colleague that what he was saying is true, as I am sure he intended it to be. He is a dear colleague and close friend. I agree he has an open mind with regard to nominees and has exhibited that through the years. He has been totally misled on these matters.

That is something that is starting to bother me. I have run into a number of Democrat Senators who have spouted the same things that are just plain not right or factual—not everything he said.

But he is correct, I did make a speech at one time where I said we should not rubber stamp these people, and I still believe that. However, this is not rubber stamping.

First, it was 516 days before Miguel Estrada even got his hearing. For those who think he did not answer any questions, take a look at this hearing record. My gosh, I can hardly lift the doggone thing. He answered question after question after question. He just did not answer questions the way they wanted. I suspect, as is very evident here today, and evident throughout this matter, they do not have anything on him.

The distinguished Senator from Vermont wanted to speak and I am prepared to turn the time over to him when he returns. I ask unanimous consent that after my remarks the distinguished Senator from New Jersey—how much time does the Senator desire?

Mr. CORZINE. About 30 minutes.

Mr. ALLARD. I need about 15 minutes.

Mr. HATCH. I ask unanimous consent that the distinguished Senator from New Jersey immediately follow me for 30 minutes, the distinguished Senator from Colorado follow the distinguished Senator from New Jersey for 15 minutes, and that the distinguished Senator from Alabama be permitted then to speak.

Mr. REID. I have no objection, but just so we have some idea, and I really don't care how long the Senator from Alabama speaks, but do you how long you might speak tonight?

Mr. SESSIONS. Probably 15 minutes.

Senator DODD mentioned some documents. Have those been offered for the RECORD?

Mr. DODD. Yes.

Mr. SESSIONS. I would be pleased to take a look at those.

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

Mr. HATCH. Mr. President, I tell my dear colleague from Connecticut that I think he has been very badly misled by some of the people on his side. Mr. Estrada waited over 500 days for a hearing conducted by Democrats. Senator SCHUMER is no shrinking violet. We all know that. He is another friend of mine, and he is no shrinking violet.

They asked questions for a lengthy, extraordinary period of time compared to other nominees. This is the hearing transcript. My gosh. He answered question after question after question. But he just did not answer them the way he wanted them to answer. And he did not make any mistakes, apparently, and he did not give them anything to hang him with.

There is a double standard being played here. I remember the distinguished Senator from Connecticut saying he is sorry that Miguel Estrada has to be used in this way as a bad example. He is being used all right because they cannot pin anything on him that they do not like other than they claim he did not answer the questions.

Well, they had the committee. They could have asked all the questions they wanted to, and they did, and it went on for hours. I might add that he answered them. He just did not answer them the way they wanted him to answer. Talk about a double standard.

Why is this Hispanic person going through this? I will tell you why. Because he is a Hispanic conservative Republican who they are afraid will tip the balance of power on the Circuit Court of Appeals for the District of Columbia and might even be considered for the Supreme Court of the United States of America. They are going to do everything they can in their power to delay his nomination.

It is pathetic. It is shameful. I am sick and tired of it. I am tired of my colleagues being misled by their own colleagues. We go over and over the facts in this matter. The requests they were making of the Justice Department were for confidential documents.

I will take a few minutes, because it is important, after this last speech. I know my colleague would not have said some of the things he said if he had been given the true facts. I am not disagreeing with everything he said, but I certainly disagree with an awful lot of what he said.

Fact versus fiction—I will cite what has really gone on here. Their base is People for the American Way, a national abortion rights league, the Alliance for Justice—you can name 20 other far left organizations that just plain do not want any of President Bush's circuit court of appeals nominees being treated fairly. They do not

want them at all. They disagree with them because they are left wing and these nominees are moderate to conservative. At least, we hope they are. Certainly, the President hopes they are.

And I might add, the President does not tell them what to say up here, which was implied in the last remark. I know how they vote these judges. They do not ask them questions like that. We know darned well the minute they do our questionnaire would bring it up. We make it very clear in the questionnaire that is not supposed to happen, but, naturally, they help these people understand what is going on.

Let me use People for the American Way, just for one of these left-wing groups that is almost always wrong. Here is an argument against Miguel Estrada. This is in the Senate Democratic Policy Committee briefing book on the nomination of Miguel Estrada: Lack of judicial experience. Mr. Estrada has no judicial experience. He has had no publication since a banking law article he wrote in law school. He is not a distinguished legal scholar or professor and he has never taught a class. The bulk of his career has been spent in the Solicitor General's Office and in private practice.

Hey, that ain't bad right there, Solicitor General's Office and private practice. But the fact he has no judicial experience is a joke—as if that is an inhibiting factor.

This is what People for the American Way said in a letter from the president, Ralph Neas, to the Senate Judiciary Committee, dated January 29, 2003: Mr. Estrada has worked for the Justice Department for more than half of his career and has never served as a judge or a magistrate or law professor and, indeed, has not published any legal writings since law school. It is virtually the same thing in the Democratic policy books. But here are the facts. Only 3 of the 18 judges confirmed to the DC Circuit since President Carter's term began in 1977 previously had judicial experience—only 3 of them of the 18 judges.

Here is another fact. Democrat-appointed DC Circuit judges with no prior judicial experience include Harry Edwards—I think he is the current chief judge, isn't he, or he was—Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald. They are all Democrats, of course. All were appointed by either Carter or Clinton and had no prior judicial experience.

Why is it fair for them to be on this court with no prior judicial experience but it is not fair for Mr. Estrada? Why the double standard? My gosh, they are not treating this guy fairly at all.

Let me give another fact. Several other Clinton appointees to the courts of appeals received their appointments despite having no prior judicial experience. Ninth Circuit appointees Richard Tallman, Marsha Berzon, Ronald Gould, Raymond Fisher, William Fletcher, Margaret McKeown, Sidney Thomas, and Michael Hawkins all had no judicial experience prior to taking the bench. Seven of these eight—all but Fletcher, who was a law professor—were in private practice when they were nominated by President Clinton and confirmed by the Senate.

Several Supreme Court Justices had no prior judicial experience before their first appointment to the bench. Louis Brandeis spent his entire career in private practice before he was named to the Supreme Court in 1916. Byron White, a personal friend of mine, one of the great Justices, spent 14 years in private practice and 2 years in the Justice Department. He worked for the Justice Department. I guess that was an inhibiting factor before his appointment to the Court by President Kennedy in 1962. He had no prior judicial experience.

Thurgood Marshall had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall served in private practice and as special counsel and director of the NAACP prior to his appointment.

Why is Miguel Estrada, this Hispanic gentleman, being treated differently? Because he is a Hispanic conservative Republican, or at least they think he is conservative. I am not sure.

Let me go back to the Democratic Policy Committee.

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

Mr. HATCH. Sure.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. I know the Senator is so knowledgeable about these matters. This is an appellate bench, which handles appellate matters. But isn't it true that Mr. Estrada was a law clerk for a Second Circuit Federal judge and a U.S. Supreme Court Justice?

Mr. HATCH. He was a law clerk to Amalya Kearse on the Second Circuit Court of Appeals and law clerk to Justice Kennedy. He had lots of experience on the judiciary. I am glad the Senator pointed that out.

The Senate Democratic policy book on the nomination:

Mr. Estrada often refused to answer questions.

We are getting this bullcorn on the floor today, and we have gotten it every day we have been here. They don't seem to listen to the facts.

Mr. Estrada often refused to answer questions, or provided extremely evasive answers during his confirmation hearing.

You should have heard all of their nominees, whom we allowed to go through. OK. It goes on to say:

He declined to answer all questions about his judicial philosophy and his views on important Supreme Court cases. For example, when Senator Schumer asked Mr. Estrada to name a single case from the entire history of the Supreme Court law that he disagreed with, Mr. Estrada refused.

My goodness. The policy statement says:

Other judicial nominees of President Bush, including some with significant ''paper trails, have discussed their jurisprudential views extensively in hearings before the Senate Judiciary Committee. Just last year, Michael McConnell—

You heard Senator DODD bring this up—

confirmed to the 10th Circuit, thoroughly discussed his views on such subjects as Roe v. Wade and the Supreme Court's recent ''federalism'' decisions limiting the authority of Congress.

Here is what People for the American Way have to say:

Mr. Estrada refused to reveal his jurisprudential views . . . in response to questions by Senators. For example, despite repeated attempts by Senator Schumer, he refused to identify even a single Supreme Court decision over the past 40 years with which he disagrees.

At least they got that right—the 40 years part—because we have had Senator after Senator come here and say he refused to talk about any decisions with which he disagreed. Wouldn't he have disagreed with Dred Scott or Plessy v. Ferguson? Those were a long time before the 40 years that Senator SCHUMER asked about. But let's go a little further. People for the American Way says:

Estrada refused to answer key questions at his Senate Judiciary Committee hearing about his judicial philosophy, such as his views on important Supreme Court decisions. For example, he refused to name a single Supreme Court decision in the last 50 years that he thought was wrong.

Then they go on to say this. This is again a letter from Ralph Neas.

Other judicial nominees of President Bush, including some with significant ''paper trails have discussed their jurisprudential views extensively in hearings before the Senate Judiciary Committee. Just last year, Michael McConnell, who was recently confirmed to the Court of Appeals for the 10th circuit, thoroughly discussed his views on such subjects as Roe v. Wade and the Supreme Court's recent federalism or States rights decisions limiting the authority of Congress.

That was a letter dated January 24, 2002.

Let me give you the facts to show how wrong they are. That is what is killing me, that my colleagues would misrepresent like this on the floor of the Senate and misrepresent to their own colleagues. That is what is killing me. Here are the facts.

Cannon 5A(3)(d) of the American Bar Association's Model Code of Judicial Conduct states that prospective judges ''shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office . . . [or] make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

Justice Thurgood Marshall made the same point in 1967 when he refused to answer questions about the fifth amendment.

I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed and sit on the Court when a Fifth Amendment case comes up, I will have to disqualify myself.

Or Lloyd Cutler, who is one of the great lawyers in Washington, DC, and, frankly, in the country:

Lloyd Cutler, President Clinton's former White House Counsel, testified before the Senate Judiciary Committee last year that ''it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong, it is a matter of political science; and also serves to weaken public confidence in the courts.''

Think about it. Think about it. The reason Mike McConnell had to answer very carefully is that he had written so extensively that he pretty well had to acknowledge that that is what he wrote on Roe v. Wade. He was highly critical of Roe v. Wade. I respect my colleagues for accepting Professor McConnell. On the other hand, he had 305, many of whom were the most liberal law professors in the country, supporting him because he is so honest and decent and smart, rated as one of the two or three top constitutional experts in the country.

Just think about it. These kind of things bother me. Let me just talk about the SG memo, the Solicitor General memos we have heard so much about here. This is what the Democratic Policy Statement says:

Due to Mr. Estrada's almost nonexistent paper trail, the Judiciary Committee Democrats have tried to obtain legal memoranda he wrote while serve at DOJ. DOJ has refused to provide these documents which presumably would show Mr. Estrada's constitutional analysis of cases and statutes and give members a window into his judicial reasoning.

Here is what People for the American Way said in a letter from Ralph Neas dated January 29:

As several Senators have explained, Mr. Estrada has a limited paper trail, particularly because the Justice Department has refused to release the legal memoranda he wrote while serving in the Department.

Let's get the real facts. All seven living former Solicitors General of the United States—Seth Waxman, Drew Days III, Walter Dellinger, Kenneth Starr, Charles Fried, and Robert Bork—have written the Judiciary Committee defending the need to keep such documents confidential. Four of those are leading Democrats.

The letter noted that the SG, the Solicitors General:

relied on frank, honest and thorough advice from their staff attorneys like Mr. Estrada—

And that the open exchange of ideas which must occur in such a context—

simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure.

I have said that on the floor of the Senate so many times I am getting sick of saying it. Yet I have had Democrats tell me today: You mean seven Solicitors General said that, four of whom are Democrats?

They were amazed to hear that.

Why did the people for the American Way say that? Because they are partisans. They are left-wing partisans. I don't blame them. They believe in that left-wing philosophy of theirs, and I respect people who believe in their philosophies. The ones I don't respect are those who distort the record. That is unfortunate. That is what they have been doing.

On May 28, 2002, the Washington Post editorialized that the committee's request for attorney work product ''would be unthinkable if the work had been done for a private client. The legal advice by a line attorney for the federal government is not fair game either.''

According to the Post editorial:

Particularly in elite government offices such as that of the solicitor general, lawyers need to be able to speak freely without worrying that the positions they are advocating today will be used against them if they ever get nominated to some other position.

These people in the Solicitor's Office are generally the top lawyers around. Many of them are going to serve in other positions in the Government. A number of them are going to be judges. We just named eight of them. There are seven former Deputy Assistants for the Solicitor General now serving on Federal circuit courts of appeals. None had any prior judicial experience, and the committee did not ask the Justice Department to turn over any confidential internal memoranda those nominees prepared while serving in the Solicitor General's Office.

Why is Miguel Estrada being treated like this? Why is he being treated so unfairly and differently from anybody else? Why is he being treated differently than those seven others, many of whom are Democrats? Is there a double standard here? You doggone right there is. It is because he is a Hispanic conservative Republican. That is why—because they cannot pin anything on him. When you can't pin something on somebody, you do fishing expeditions to find any amount of dirt you can get. A fishing expedition into confidential memoranda in the Solicitor General's Office should not be allowed, and it has not been.

Let me go back to the Democrat policy statement:

LACK OF SUPPORT FROM HISPANIC AND OTHER ORGANIZATIONS

Mr. Estrada is opposed by, among others, the following organizations: Congressional Hispanic Caucus, Congressional Black Caucus, Mexican American Legal Defense and Education Fund, Puerto Rican Legal Defense and Education Fund, Leadership Conference on Civil Rights, AFL–CIO, Sierra Club, NOW, National Women's Law Center, NARAL and SEIU.

On January 30, People for the American Way again; this is a press release rather than a letter:

Neas noted that leading Hispanic organizations opposing Estrada's confirmation—including the Congressional Hispanic Caucus, Mexican American Legal Defense and Education Fund, Puerto Rican Legal Defense and Education Fund—have been joined in opposition by a diverse coalition of environmental protection, women's rights, and other public interest groups.

But they don't tell you that the following groups, among others, have announced their support for Estrada: League of United Latin American Citizens (LULAC) (nation's oldest and largest Hispanic civil rights organization); U.S. Hispanic Chamber of Commerce; Hispanic National Bar Association; Hispanic Business Roundtable; the Latino Coalition; National Association of Small Disadvantaged Businesses; Mexican American Grocers Association; and the Hispanic Contractors of America, Inc.

Of course, you can see many other things. There are so many groups that support him.

I attended a press conference today where the head of LULAC was so outraged at the double standard and the way Miguel Estrada is being treated—and, I might add, LULAC is not a conservative organization but it is a respected organization, and I have always respected them. Its leader ripped into what is going on over on the other side of the floor like you can't believe. He is one of the leading Hispanics in America, and rightfully so.

Let me tell you, I think the Hispanic people are starting to catch on—that it is outrageous the way this man is being treated. He is being treated with a double standard. He is being mistreated with a double standard.

I must say that I was a little surprised when I saw the similarities between the Democrats' handbook on Mr. Estrada and the propaganda being circulate by People for the American Way. I guess it's now clear where my Democratic colleagues' talking points are coming from. Maybe my Democratic colleague should examine a little more closely the euphemistically-named People for the American Way.

Over the past two years, I have watched the war of propaganda waged against President Bush's judicial nominees. I have seen the records of good men and women distorted and smeared simply because they are the nominees of a conservative President. And I have decried the pertpetrtors of these smear campaigns who have nothing to lose by their misrepresentations but everything to gain when it come to raising money to promote their left-wing agenda.

I am taking about the liberal Washington special interest groups that are the ones manufacturing the weapons of mass obstruction.

That is what they are—weapons of mass obstruction in this case, and others as well.

One of these groups, People for the American Way, claims that ''Americans could lose fundamental rights, freedoms, and protections that they have enjoyed for decades'' if the Senate confirms Miguel Estrada. How low can you get? When I learned this, I said to myself, with a name like People for the American Way, maybe I should rethink my position on the Estrada nomination. I began thinking, Who are these folks who call themselves People for

the American Way and who want me to oppose Miguel Estrada?

Obviously, I am not a member of their organization. But, given its name, I thought to myself, maybe I should look into joining it. After all, I am a person, and I am all for the American way—which, in my book, stands for truth, civility, fidelity, and justice. So I asked around my neighborhood and, well, it doesn't appear that any of my neighbors are members. My family and friends aren't members. Nor does it appear that any of my veteran friends are members.

So who are they, these People for the American Way? I went to their Web site to find out. It appears that they are a very busy bunch of people who raise money for left-wing causes. Indeed, their Web page on President Bush's judicial nominees contained four separate solicitations for donations, four on one page. Profiting at the expense of trashing other people's reputation may qualify for the National Enquirer way—but it is not the American way. Of course, this organization should be free to raise money and exercise its first amendment rights. But the Senate is not obligated to do its bidding or jump when it says so.

Unfortunately, you can see where a lot of the language is coming from—People for the American Way over and over. It is false.

So I became more curious. Maybe if I learned who its board members are I would be convinced that they truly are people who stand for the American Way.

I did a little more surfing on this Web site and found out that People for the American Way, board members, include a Hollywood actor.

Gee, I think that is great—to have a Hollywood actor acting in politics. We certainly have a few of them, don't we?

The board members include a record executive, a Democratic lobbyist, and a former Clinton White House staffer who was the center of the FALN terrorist clemency debacle. Are these mainstream Americans? Are these people to whom we defer on what qualifies as the American way? Maybe in Hollywood or on the Upper East Side of Manhattan. But not in my neighborhood nor, would I say, in most of America.

This is something that deeply troubles me. Too many of my colleagues on the other side of the aisle appear beholden to groups such as People for the American Way. But their brand of politics includes obstructing the confirmation of qualified men and women to the Federal judiciary using any available weapon. To them, this is war, and all is fair—even if it means smearing the reputation of good, solid nominees such as Miguel Estrada.

Not qualified? Give me a break. An ABA rating, unanimously well-qualified, the highest you can have; 15 U.S. Supreme Court arguments; Columbia, and Harvard Law magna cum laude; editor of the Harvard Law Review; law clerk for the U.S. Supreme Court for Justice Kennedy; and Assistant Solicitor General for both Presidents Bush and Clinton.

That sort of politics is not the American way at all.

I hope my colleagues on the other side of the aisle will stand up to the pressure tactics of the left and recognize that only in America can a teenage immigrant from Honduras apply his intellect and talent to rise to a Presidential appointment to our Nation's highest court. That is the American way.

Only in America can someone such as Miguel Estrada come here hardly speaking English, accomplish so much and rise to the point where the President of the United States has nominated him to one of the most important courts in the country. And only in America can his record be distorted like it is being distorted by the People for the American Way, and others. They have a right, I suppose, under the first amendment to do any kind of distortions they want, but it isn't right for them to do so.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from New Jersey is recognized.

Mr. CORZINE. Mr. President, I rise today to express my opposition to the nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia.

As many of my colleagues have expressed—and my remarks are not from the talking points of the People for the American Way—there are a few responsibilities of Senators that are more important than the review of judicial nominations. There are few things we will involve ourselves in on the floor of the Senate that actually will survive many of us in our careers in the Senate. The Constitution delegates us both the authority to advise the executive about possible nominations and the power to give or withhold consent. It is critical that we exercise these responsibilities seriously and with the utmost care. We need to be judicious.

After all, judicial nominations are fundamentally different than nominations for executive branch appointments. Unlike the nominations of Cabinet officers, judges, ambassadors, they do not serve the President. They function in an entirely independent branch of Government, a branch with significant power to shape the actions and policies of the other two. As a consequence, there is far less reason to be deferential to a President's judicial nominations than executive branch nominations. A President deserves to have his own team, but when we are talking about the judiciary, we are talking about an independent branch of Government.

Perhaps even more important, judges, unlike executive branch officials, have lifetime appointments. Once the Senate approves their nominations, there are few effective ways to hold them accountable for their decisions. Only in extraordinary circumstances—when a judge is guilty of high crimes and misdemeanors—can the legislative branch recall a judge who does a bad job. That is why it is especially important that Senators assure themselves about the quality of a nominee and their philosophy before he or she is sent to the bench. This power should not be just a review of their biographical information or their academic credentials, their resume. It ought to be complete with regard to understanding their judicial philosophy and how they may approach their demeanor on the bench.

Of course, while all judicial nominations deserve careful review, the particular nomination before us is unusually important. I think it is pretty clear that the Court of Appeals for the District of Columbia is widely acknowledged to be the most powerful appellate court in the Nation, below only the Supreme Court itself. Because it hears appeals for so many cases, involving Federal agencies, the work of Government, its decisions often have broad national impact. It regularly establishes rules with profound implications for workers' safety, consumer protection, civil rights, the environment, and on and on. And its decisions help determine the extent to which ordinary Americans are allowed to challenge the decisions of their Government or the judiciary.

Moreover, the person who is ultimately selected to fill the current vacancy is likely to be a swing vote on the court. The fact is, there currently are eight active judges in place, who are often divided on a 4–4 split. So this individual will almost certainly have an enormous impact on the lives of millions of Americans and vital concerns to them, for better or worse. That, no doubt, is largely why the President and the majority of the Senate have made it such a high priority. And it is a high priority. That is why all Senators need to think long and hard before approving this or any nomination.

Unfortunately, at this point, all of my colleagues face a serious problem in evaluating the nomination before us. We simply do not have enough information to do the job properly. At least that is my view. That is because this nominee has no record in public office, and basically has refused to provide us with information necessary to evaluate his judgment, fitness for appointment to the second highest court in the land. He has refused to answer many basic questions that were posed during the Senate Judiciary Committee review. And he has withheld examples of his work and thought in the past, things I think would be available to anyone who would be actually scrubbing down this nominee if he were in the executive branch.

As a result, it is extremely difficult—frankly, impossible—for any Senator to

evaluate his full set of views, his temperament, values, and method of analyzing legal issues, and his likely approach to the bench.

Fundamental questions on issues before the Nation are at stake very regularly in this court with respect to affirmative action, Roe v. Wade, how our labor laws are interpreted, interpretation of the commerce clause, basic fundamental directions I think Senators should understand and at least have a little bit of perspective about on how this nominee might feel about it.

Let me be clear, I recognize it is not appropriate to ask judicial nominees to say anything in the nomination process that would undermine their ability to judge particular cases in the future. They should not be asked to evaluate particular facts, nor to comment on specific legal issues likely to come before them, if confirmed. Nominees have a right and responsibility to exercise reasonable discretion throughout the nomination process. I respect that. I think my Senate colleagues do.

That said, we still need to have an understanding of how one might approach generally the philosophy of being a judge, how one might look at the Constitution, their judicial temperament. All those kinds of things seem to be fair questions people ought to have some understanding of before someone is approved.

While it is not appropriate to expect to comment on specific cases, it is entirely appropriate for nominees to answer general questions about their philosophy, their views and thoughts on broad types of legal issues. In fact, it is essential to do so. Otherwise, Senators, in my view, will be unable to exercise their own constitutional responsibilities to provide serious advice and consent in this process.

By the way, this is fundamental. It is clearly a bipartisan viewpoint. It certainly was as we looked at the judicial appointment process under the previous administration. People wanted to understand what a candidate's judicial philosophy was and how issues might be framed in a general context as they went forward and looked at nominees forthcoming from the previous administration.

Unfortunately, the nominee before us today—and I believe this is really the heart of the matter—has essentially refused to answer any of those relevant questions. He won't provide any information about his approach to the legal issues. He won't comment about any past cases. He won't give us even a clue about his judicial philosophy or his views on the way judges should handle their responsibilities. Instead, time after time, in his appearance before the Judiciary Committee, he simply refused to answer questions at all.

Now, that does not mean there wasn't any testimony or there were no questions answered. I saw a big book raised up that has a transcript of the hearing, but when it got to the basic questions of judicial philosophy, temperament, and how one would approach issues, there were no answers to the questions. Nor has the administration been willing to share any of Mr. Estrada's work product during his service in the Solicitor General's Office—a refusal that is apparently not consistent with precedent, at least in a number of cases in recent history, Justice Bork's nomination being one of those cases. But there are a number of others as well.

This is the kind of stonewalling, frankly, that I find unacceptable, and I think the American people would find unacceptable if they were focused on it. We, as Senators, must not tolerate it either. If this stealth and secretive approach to nominations is validated in this case, I am afraid all nominees in the future will adopt a similar ''secret strategy.'' It will not reveal anything, and so we will sort of play Russian roulette with how candidates will serve once they get to the bar.

Senators will be asked to exercise their constitutional duties with little or no information. Frankly, being blindfolded as a Senator when you are considering such an important issue is not acceptable.

Governing in the dark, governing in secret is most certainly contrary to the philosophy underlying our constitutional premises, and approving a nomination in such circumstances would represent a gross abdication of our responsibilities. In effect, we become nothing more than a rubberstamp. I hear there has been some argument about the rubberstamp concept. The distinguished Senator from Utah used that phrase when he was taking a different view about judicial philosophy for other candidates at another point in time and didn't appreciate it. I don't think we should at this point accept it and embrace it as our approach.

We need to be a part of this process and understand more about the nominee. Remember the stakes that could well be involved in the pending nomination. Is the Senate really willing to put the fate of worker safety in the hands of someone we know so little about? What about the myriad of consumer protections or civil rights, environmental protections, and so on?

Would any of my colleagues be willing to hire a legal counsel into their own staff, would any of us bring anybody into our own activities, as we represent the people from our States, without knowing at least something about their general approach to how they would deal with issues and how they approach their worklife? Who would do that? I don't know that anybody would do that in the private sector where I came from, and I doubt very seriously anybody would do that right here with their own staffs. That is true even though any of us can easily remove our own staffers if they fail to perform adequately.

In the case of a judicial nomination, by contrast, we are talking about a lifetime appointment over which we will have no control once confirmation is in place.

Let me ask my colleagues this: Do we really think the White House and the Justice Department nominated Mr. Estrada without knowing his views and approach to the law? Do we really think the same kinds of questions we would expect to ask ourselves, maybe of our own employees or someone who was giving us legal advice, don't we think that process was followed by the Justice Department and the White House? Once again, if that didn't happen, I would be disappointed. I would think the executive branch would not be following its responsibilities. I doubt anyone would take on someone with a lifetime appointment in a most serious position without understanding where they stood philosophically, temperament-wise, and with regard to how they view the law.

Beyond the constitutional issue, which by a wide margin is the most important, I would like to take a moment to respond to some claims that have been made by supporters of the nomination during the course of the debate. I am actually a little bit offended by it.

First, some of the supporters of Mr. Estrada have suggested those opposed to the nomination somehow are obstructing the process of filling vacancies on the Federal bench. This is a ridiculous statement on its face. During the last 17 months of the last Congress, under Democratic leadership, the Senate confirmed 100 of President Bush's judicial nominees. In fact, under Democratic leadership, the Senate worked at a rate almost twice the average during the preceding years when a Republican-led Senate repeatedly blocked the nominees of a Democratic President.

I can tell you in my own experience in New Jersey, we had four openings on the district court. We worked very carefully and thoughtfully and cooperatively with the administration to fill those vacancies with a diverse set of candidates, quite broad based. And we are now working very cooperatively to try to fill a circuit court judgeship in the same way that is now being debated with regard to the district court in Washington, DC. This is not something where cooperation is lacking. Over and over and over again people are prepared to reach out even when people have different judicial philosophies and work together.

I am not suggesting Democrats should block nominations in some sort of a tit for tat. In fact, we have not. I don't agree with that approach. I don't think it would be appropriate. But it is wrong and unfair for others to argue we are being obstructionist just because we refuse to serve as rubberstamps. I don't plan on being one. I was not elected to be a rubberstamp.

Let's remember, Senator SCHUMER has pointed out so eloquently that in the case of judicial nominations, the burden of proof does not lie with the Senate or those opposed to a nomination. The burden appropriately rests

with the nominee himself or herself and the President who made the nomination. It is their affirmative obligation to convince the Senate of a nominee's suitability.

It is clear in this case Mr. Estrada and the administration have not met this obligation. To the contrary, they have tried to say as little as possible about Mr. Estrada and his views. Again, we have a stealthy, secretive nomination process going on, and it is inconsistent with what our responsibilities are. It degrades the integrity of our role as Senators in the confirmation process.

Unfortunately, others in this body have also gone so far as to say that opposition to Mr. Estrada's nomination has been based on an ethnic background. I heard that just recently. It has even been suggested that opponents of the nomination are intent on keeping Hispanics off the court and opposition is disrespectful to our Hispanic citizens.

Let's get real. These kinds of attacks are outrageous, part of an attempt to intimidate those opposed to the Estrada nomination. Frankly, they just don't represent the kind of debate we should be having in the Senate, and they won't work. After all, most major national organizations that exist to represent the Hispanic community are actively opposing this nomination. I know this from actual dialog, not from some lobbying organization that represents a particular judicial philosophy. I hear it from the Congressional Hispanic Caucus, hardly an anti-Hispanic organization. I hear it from the National Association of Latino Elected and Appointed Officials; again, hardly an anti-Hispanic organization; Mexican American Legal Defense and Education Fund—I could go on and on—National Puerto Rican Coalition; Puerto Rican Legal Defense and Education Fund. None of these organizations are anti-Hispanic.

By the way, those of us on this side of the aisle who are trying to express a principle with regard to the Constitution are not, either. To have any kind of implication that we are is over the top. When virtually every credible Hispanic group opposes this nomination, it simply does not pass the laugh test to argue otherwise. The claim is ridiculous.

It is similarly preposterous to claim the Democratic Party is anti-Hispanic. Of the 10 Hispanic appellate judges currently seated in the Federal courts, eight were appointed by President Clinton. Three of President Clinton's first 14 judicial nominees were Hispanic, and he nominated more than 30 Hispanic men and women to Federal courts.

Let's contrast that record to that of our friends from the other side of the aisle. First, let's look at the Bush administration record. Of the 42 vacancies that existed in the 13 circuit courts of appeal during President Bush's tenure, the President has nominated only two Hispanics. That is 42 vacancies, two Hispanics.

Now let's look at the record of Republicans in the Congress. During President Clinton's tenure, 10 of the more than 30 Hispanic nominees were delayed or blocked from receiving hearings or votes, and many highly qualified Hispanic nominees were delayed for extended periods of time.

Take Richard Paez, for example. He was a highly qualified candidate, well respected in his profession, yet his confirmation was delayed for more than 1,500 days—1,500 days and we are complaining about 500 here. And 39 Republican Senators voted against him then.

In sum, the other party doesn't have a strong record when it comes to promoting this. I think it is hard to put it into a framework that somehow or another this campaign is anti-Hispanic.

Speaking for myself, I strongly believe in promoting diversity on the Federal bench. I was proud to join my colleagues who spoke about the efforts of working together with the White House and actively supporting the nomination of Jose Linares to the district court last year. Mr. Linares, a first-generation American born in Cuba, has been a leader in the Hispanic community in my State for many years, serving as president of the New Jersey Hispanic Bar Association and representing many clients of Hispanic origin while operating in private practice. Mr. Linares is just one example of my continued dedication, and I believe most of us in the Senate on both sides of the aisle, to promoting diversity on the Federal bench.

While I strongly believe in the value of promoting diversity and increased Hispanic representation in the judiciary, that doesn't mean the Senate should be rubberstamping any and every Hispanic nomination. In this case, we have a nominee who has consistently refused to answer any substantive questions regarding judicial philosophy, has no judicial experience, and is actively opposed by most of the mainstream organizations that represent the Hispanic community.

I hope my colleagues will remember what is at stake here. This is not just another vacancy on a single court. This debate, ultimately, is about our responsibilities as Senators. The question is whether we are going to become nothing more than that proverbial rubberstamp, abandoning our duty of advice and consent on judicial nominations. The question is whether we are going to start approving nominees about whose philosophies we know virtually nothing; whether we are going to vote like a gambler, blindly spinning a wheel of chance and hoping for the best.

I don't think the American people want that. I know the folks in New Jersey don't want that kind of attitude out of their Senator. I, for one, hope that the Senate will live up to our constitutional duties and that Senators will embrace the responsibilities entrusted to us by the people who elected us. That is why we are here: To ask those questions, to be diligent, thorough, and judicious, and to make sure we have an impartial judiciary after we go through the process.

I hope enough of my colleagues will have the strength to stand up to the demagogic attacks coming from many proponents and supporters of this nomination. I hope some of those on the other side will reconsider their approach.

Speaking for myself, this is one Senator who cannot and will not face down under these irresponsible attacks. This is one Senator who will not abandon his sense of responsibility to our Constitution. I simply cannot, in good conscience, support this nomination as it stands today without the information being provided that is necessary to understand the context of the nominee.

I would very much like to see a more diverse court, and I will work to make sure it happens. But I will not put my seal of approval on an individual who has basically challenged the nomination process in refusing to answer the kinds of questions that would allow me to have the assurance, when I speak to the people of New Jersey, that I understand how someone with a lifetime appointment might think about some of the most important issues that impact their lives in the days and years and decades ahead, particularly for a 43-year-old nominee. I do not intend to be a rubberstamp.

I thank the Chair.

The PRESIDING OFFICER (Mr. TALENT). Under the previous order, the Senator from Colorado is recognized for 15 minutes.

Mr. ALLARD. Mr. President, I rise to share an observation made by my colleague on this side of the aisle—the chairman of the Judiciary Committee, Senator HATCH from Utah—that, like him, I believe there is a double standard.

Last week, I came to the floor to urge my colleagues to support the confirmation of Miguel Estrada, President Bush's nominee to the DC Circuit Court. Last week, I had my statement focused on the late Byron White, Justice to the U.S. Supreme Court. During my comments, I pointed out that Justice White's judicial career began in a manner very similar to that of Miguel Estrada. Justice White was nominated by President John F. Kennedy when he was only 44 years old. He went on to serve his country for three decades, without having any judicial experience prior to joining the Supreme Court. And he did an exemplary job on the bench.

Yet opponents of Miguel Estrada have pointed to his lack of judicial experience as the ''poison pill'' to his nomination. This is an unacceptable double standard. This experience litmus test, as I call it, is nothing but an obstructionist argument that is intended to undermine the entire judicial nomination process. It is wreaking havoc with our constitutional duty to confirm the President's nominations.

To say that Mr. Estrada, one of the best appellate court lawyers in the country, should not be confirmed because he lacks prior judicial experience is simply ridiculous. Justice White, a great Coloradan, would never have been confirmed had he faced such a strenuous litmus test; nor would another great Coloradan, Carlos Lucero, have been confirmed had that test been applied to him.

Judge Lucero was nominated to the Tenth Circuit Court of Appeals by President Bill Clinton on March 23, 1995, and was confirmed by the Senate on June 30, 1995. Three months is all it took. Like Justice White and Miguel Estrada, Judge Carlos Lucero had never served as a judge prior to joining the court. Regardless of this fact, within 3 months of his nomination, the Judiciary Committee, then under the leadership of Chairman HATCH, held a confirmation hearing for Mr. Lucero. At no point during the confirmation hearing—not even once—did a member of the committee discuss his lack of judicial experience; nor did they consider it to be an impediment to his nomination. Instead, the Judiciary Committee moved forward with the nomination in a Republican-controlled Senate.

Judge Lucero had served as a staff assistant to a U.S. Senator. He had served on the staff of the Senate Judiciary Committee, clerked for Judge Doyle of the Colorado District of the U.S. District Court, and practiced law in the private sector prior to joining the Federal bench.

Let's look at Miguel Estrada. He was a graduate from Harvard Law School with high honors. We have a lot of his qualifications listed on the board behind me. He served as a law clerk to Supreme Court Justice Anthony Kennedy, and he worked as an Assistant Solicitor General of the United States in both the Bush and the Clinton administrations. Neither Carlos Lucero—now Judge Lucero—nor Miguel Estrada had judicial experience at the time of their nomination. They both had a breadth of legal experience that ensured success on the bench. Miguel Estrada's outstanding record of accomplishment and real-life experiences prove that he will be no different than Judge White or Judge Lucero and that he will perform his judicial duties with great conviction and enthusiasm.

Within 3 months, Mr. Lucero was nominated, confirmed, and seated on the bench of the Tenth Circuit, becoming that court's first Hispanic judge. Somehow, the fact that Mr. Lucero had no judicial experience did not stop a Clinton appointee from being confirmed, but that is not the only ironic argument.

The Lucero nomination points out a second double standard being put forward by his opponents that Miguel Estrada is too political. Carlos Lucero was a two-time candidate for the Senate and a member of one of President Carter's advisory committees. Yet he still was confirmed without a concern being voiced by a single Senator that he was involved in a Senate race which was hailed by local newspapers as a bitter interparty slugfest, and the opposition to Miguel Estrada wants to complain about politics.

Upon his confirmation, Judge Lucero correctly stated it was ''an unfortunate vestige of history'' that it had taken so long for the Tenth Circuit to seat a Hispanic judge. It certainly was not because of delays in a Republican Senate.

With the nomination of Miguel Estrada, the Senate has an opportunity to place the first Hispanic judge on the bench of the DC Circuit Court, a man who came to this country at age 17 as an immigrant from Honduras, and a man who is well equipped to serve as the Nation's second most important court, certainly a success story of America and one that I like to herald time and again.

When Judge Lucero was before the committee, he was not asked his position on one issue, and yet my colleagues just saw my colleague from Utah show the Members of this Senate three pages of facts and testimony that had been collected on Miguel Estrada.

There were a couple questions in committee. I have them right here. This is the committee record on Lucero. We saw the 3-inch committee record on Miguel Estrada. When Judge Lucero from Colorado was on the Tenth Circuit Court of Appeals, they asked him two questions: No. 1—it was an open-ended question—give this committee some idea why you think you qualify to serve on the Tenth Circuit Court of Appeals. It was an open-ended question, a softball. No. 2—it was intended to be somewhat humorous and bring some levity to the committee hearing—they simply kidded him with a question: Is it easier to become a Senator or is it easier to become a judge? That was the extent of the questions, other than a few introductory remarks that were made in committee on Carlos Lucero.

Yet we have information collected of an extremely qualified candidate, Miguel Estrada. I have to tell you, there is a double standard. Unlike Judge Lucero who was nominated by President Clinton, Miguel Estrada has been forced to put his life on hold while special interests play games with our system of justice, delaying his confirmation and perpetrating an unfortunate status quo.

Miguel Estrada's nomination has been pending since May 9, 2001. That is nearly 2 years, and this is simply ridiculous. Judge Lucero was nominated and confirmed in 3 months. Miguel Estrada has been waiting for 2 years. Judge Lucero ran for the Senate twice. Miguel Estrada is far less political than Judge Lucero.

Judge Lucero clerked for a U.S. district judge but had no judicial experience. Miguel Estrada served as a clerk to Justice Kennedy of the U.S. Supreme Court, Assistant to the Solicitor General, assistant U.S. attorney, and deputy chief of the appellate section, and law clerk to Judge Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit.

Judge Lucero practiced law in Colorado. Miguel Estrada practiced law in front of the U.S. Supreme Court where he argued 15 cases. Mr. Estrada's qualifications are clear and abundant. The obstructionist charade must stop.

Over the past 2 years, many of my colleagues have come to the floor to make statements regarding the sad pace of judicial nominations during the last Congress. They have made excellent points, but I believe the most telling statistic is simply that more appeals court nominees have had to wait over a year for a hearing in President Bush's Presidency than in the last 50 years combined.

Let me repeat that. The most telling statistic is simply that more appeals court nominees have had to wait over a year for a hearing in President Bush's Presidency than in the last 50 years combined.

The stalemate on the Bush nominees must end. In the wake of September 11, we now understand the somber reality that the most basic of our country's values and traditions are under attack. That is why it is so important that we move the nomination process forward and provide the judiciary branch of Government the tools that are necessary to carry out its constitutional duty. We cannot continue to allow partisan politics to interfere with principled jurisprudence that is intended to serve justice on those who have done us harm.

Justice cannot be delivered from an empty bench. Miguel Estrada's life story defines the very notion of our Republic. Like Judge Lucero and Justice White, he is an American success story, building his success by combining energy and opportunity with self-respect and integrity and values.

It is time for the confirmation process to move forward and for a vote on the floor of the Senate. At least we can have a vote on the floor of the Senate. And it is time to drop the double standard and to confirm this very highly qualified nominee. I thank the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I have been watching these proceedings on television in my office. I have heard some of the presentations that have been made. It seems that emotions are running high on this issue on both sides, and I can understand that, and maybe, given the stakes we are playing with, applaud the fact that people feel strongly enough to come to the floor and express themselves.

I wish to make a few comments simply in reaction to some of the statements I heard this afternoon, however. Perhaps no one will notice, but in my own mind I will have done something to set the record straight.

The Democratic leader talked at some length about Miguel Estrada's supervisor at the Department of Justice,

a supervisor who has now publicly stated that he does not think Mr. Estrada should be confirmed. That is obviously that supervisor's right, and it is something I think we should appropriately take into consideration.

That which I would point out, however, is that while Mr. Estrada was working there, that same supervisor gave him the highest possible ratings in his annual performance reviews. We are told there is no paper trail on Mr. Estrada, but there is a paper trail in terms of the written performance reviews of his activities while he was in the Department of Justice, and those reviews are unanimously and unchangingly glowing, giving us the indication, at least in the written opinion of his supervisors filed for the record in a situation where there was no political pressure one way or the other, that Mr. Estrada is certainly qualified in every way for the assignment he had at the Department of Justice and the implication, of course, is that he would be qualified for further assignments later in his career.

I should also like to point out that this was not the Ed Meese Justice Department, this was not the Richard Kleindienst Justice Department, those who have been attacked as being unduly partisan because of the nature of the particular Attorney General and his closeness to the President. This was the Janet Reno Justice Department, and Mr. Estrada was there not for a week or two in transition but he was there for a matter of years. If he is part of the vast right-wing conspiracy, as some have suggested, why did the people of the Reno Justice Department speak so highly of him and retain him for so long?

There can be only one logical answer. Either the people involved in the hiring of the Justice Department under Janet Reno were incredibly blind to Mr. Estrada's ideological bent or they saw in him a lawyer of incredible and significant ability and wanted his services and retained his services.

The Democratic leader made a great point out of the fact that none of Mr. Estrada's memos, while he was at the Justice Department, is being supplied to the committee for review. He did not tell us that Mr. Estrada's supervisor, the Solicitor General of the United States, appointed by President Clinton and serving under Attorney General Reno, says those memos should not be made public. The Solicitor General, not Mr. Estrada, was the client. The client who received the memos is the one saying the memos should not be made public, and yet the lawyer who prepared the memos, in confidentiality for his client, is being attacked for not violating his client's request.

I think it is fairly clear that the client is right in this case and that Mr. Estrada is acting in the highest levels of his profession to see to it that those memos are not made public. If they were made public, I do not think they would find anything in them that would expose Mr. Estrada as part of the vast right-wing conspiracy. I think they would find the excellent work of a superb lawyer so that it would probably help Mr. Estrada's case if those memos were brought forth in establishing his competence and his ability. But professional ethics say that a lawyer does not disclose that which he has prepared for a client, particularly in the case where the client says: Do not do it. Mr. Estrada has not done it and is being attacked now on the floor of the Senate for what, in my opinion, is his appropriate professional stance.

So we have the circumstance where a man who is responding to his professional requirements, a man whose career is fully open and clear for everyone to see, a man who has hidden nothing and has no holes at any point in his chronological resume, is being held up and being denied a vote on the floor of the Senate. As I have said before, we do not really know why. We do not know what particular test is being applied to this confirmation.

We know there are others whose rating by the American Bar Association is not as good as Mr. Estrada's who have gone through without any difficulty. We know there are those whose ''lack of judicial experience'' is exactly the same as Mr. Estrada's, others for whom the lack of judicial experience made no difference but which in his case suddenly is touted as making all the difference in the world.

We know these are straw arguments because we can find plenty of cases where others in exactly the same situation as Mr. Estrada did not have them raised against them.

So what we have is a situation where an additional test, unannounced and therefore unknown, is being applied in this case. I have tried to figure it out. I have asked Senator LEAHY to disclose what particular test he is applying in this situation. I have been unable to find a satisfactory answer. As I have said, perhaps facetiously but with some seriousness, I have come to the conclusion that the test that is being applied is passing muster with the editorial board of the New York Times. If the New York Times editorial board decides Mr. Estrada is not to be accepted, that means he must be turned down because the New York Times is the voice of what I call the responsible left in this country. We have the irresponsible left, but we have the responsible left.

There are those who claim the New York Times is completely middle of the road, the New York Times has no ideology. Those who are making that claim do not read the New York Times, or if they do, they do not understand it. It is the voice of the left in this country, the responsible left.

If its editorial board has decided that Miguel Estrada must not be confirmed, there are those who say we cannot cross the editorial board of the New York Times, we must follow their dictates, and therefore, without announcing it, we recognize that Estrada has failed that test and therefore must be opposed, and we will make up these other reasons to oppose him, even though we cannot apply these same reasons to other candidates for whom we have voted.

I hope I am wrong. Some will say: That is a facetious, almost capricious, statement on your part, Senator BENNETT. But I renew the request. I ask those who have determined in advance the test that Estrada must pass, and who have determined that he has failed to pass that test, to do us the courtesy of telling us what that test is, telling us in advance what hoop the nominees must pass through in order for them to allow the nominees a vote on the floor of the Senate. Until they tell us, this whole process we are going through will remain somewhat of a mystery.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, we are about to wrap up for this evening. I have been very disappointed with some of the debate today because it is apparent that some of our colleagues have not looked at the record, have not gotten the facts, that they are listening to People for the American Way and all the distortions that come from there. That is disturbing to me.

When I was chairman of this committee for 6 years during the Clinton administration, we put through 377 Federal judges. There were a number who gave great angst to people on my side because of the differences in philosophy, differences in judging, differences in approaches to judging, but we put them through. We did not mistreat people, at least as far as I can see, not like this.

It is important for people to realize what he has been through, because to hear this talk on the other side, one would think nobody ever even looked at this man; that they had not had a chance to question him; that he did not answer any questions.

This binder contains the hearing record. Most hearing records would be 10 pages. This is his hearing record. My gosh, the hearing was conducted by Democrats. They controlled the whole shebang. They asked every question they wanted to, and he answered them. I can see today he did not answer them the way they wanted him to, so that they could complain about him, but he did answer them. I think he answered them better than most of their judges whom I put through answered our questions.

Think about what he has been through. Before a person gets nominated, the White House does a thorough review. They do a thorough research on whether or not to nominate the person. They also interrogate the person as to whether there are any difficulties that person might have. Then if they decide they are ready to go forward, they are subject to an FBI report. They then send out the Federal Bureau of Investigation.

The Federal Bureau of Investigation does a terrific investigation. Generally on a judgeship like Estrada, it is a notebook at least this thick, where they interview the nominee's friends, neighbors, business associates, enemies, wackos, crazies. This is what you call a raw FBI report. Then assuming that goes well, the administration then makes a determination whether to submit the name. As they submit the name, they generally notify—sometimes even before they submit the name—the American Bar Association.

The American Bar Association then takes one of their examiners after all the FBI has done and their examiner generally is from the same area as the nominee. That examiner then goes and talks to the leading attorneys, the leading lawyers in the area—and others, if the person is so led—to determine ethical standards, legal ability, industriousness, health, strength, temperament, and so forth. All that is investigated by the ABA. Most nominees get a rating of ''qualified.'' That is a high rating. Anytime you can get the rating of ''qualified'' from the American Bar Association, you have done something pretty worthwhile. That means you have achieved in this life.

I used to be pretty upset at the American Bar Association when I saw partisan politics being played with the standing committee that investigated people. The perfect illustration was in the Bork case. Unanimously well qualified when he came up for the Circuit Court of Appeals for DC, the same court we are talking about here, and just a few years later, found to be ''well qualified'' by a majority of the standing committee, and ''not qualified''—one of the leading intellects in law in the history of this country? I happen to know one or two of the people on there who voted ''not qualified'' who were very partisan Democrats and did not want a conservative like Bob Bork on the court. They won in the end.

Since then we have had our problems with the ABA. When I became chairman, I took the ABA out of the process, and my argument was then, and it is still a good argument, why let one of the bar associations, even though it is the largest one, and not all the other ones, vote these people? If we let them all vote, we would never get through the process. In fact, it takes at least 2 months to 3 months for the ABA. They say they can do it in 30 days, but it is generally between 35 and 60 days to do their research. When the nominee comes up to the Judiciary Committee, all of that is submitted to the Senate Judiciary Committee.

Now, the chairman and the ranking member, in particular, have staff—skilled, honest, decent staff on both sides—who, along with the chairman and ranking member, go through all of those materials that the FBI especially has collected. Sometimes it is extremely voluminous. If we see, in going through the materials, that something has not been answered, or something has not been investigated, then we go to the FBI and say, You have to do further investigation. We want this done. And the FBI then does it, pursuant to our rules. It is, again, a very big, arduous, difficult process.

Then, as in the case of Estrada, the Democrats controlled the committee. They took a total of 516 days—16 months—before they even had a hearing. Now, generally these hearings go 2 or 3 hours at the most. Estrada's hearing was virtually all day. It was conducted by the Democrats. In fact, Senator SCHUMER chaired the hearing. Senator SCHUMER, as I have said before, is no shrinking violet. He is a tough guy. He is a very smart lawyer. I value our friendship because he is always straightforward. We have a decent, good, workable relationship. But he, along with other Democrats, then came in and asked questions of Miguel Estrada. They asked voluminous questions. That is what this hearing transcript is all about. You do not see many hearing transcripts that big. I have been here almost 30 years and I have seen very few that large until there is some real problem. But in all of this hearing, out of it came their comments that he really did not answer the questions. But he did answer the questions. Some of the questions he did not want to answer because they may have involved issues that could come before him as a judge. And he was not supposed to answer those questions. Lloyd Cutler, whom I quoted over the last week many times, says they should not answer questions that involve matters that might come before them.

The Circuit Court of Appeals for the District of Columbia has a tremendously broad jurisdiction. It is, like the people said, the second most important court in the country and in some ways the most important court because they have thousands of cases that the Supreme Court of the United States of America will never hear because they can only take 80 to 100 cases a year. So it is a very important court. It is a court of last resort to many. Because, as I said, those cases do not go to the Supreme Court.

Not only did they ask questions all day long and ask serious questions and he gave serious answers—and if you read the transcript, you will see that—they had every crack they wanted. If they did not have it, they could have called for another day of hearing. That would have been extremely unusual for a circuit court nominee, but they could have. They controlled the committee. There would have been absolutely nothing I as ranking member on that committee could have done other than complain. I probably would not have complained. But they did not do that. They did not ask anymore questions.

Now, after the full hearing and all of this time it took to do that, and all of the questions all of the Democrats asked at that time—which he answers; maybe, I admit, he did not answer the way they wanted him to, but that is not his obligation; he didn't make any mistake—he did not give them something to feed on to destroy him with.

There has not been a good argument against him made since we have started this debate other than ''he did not answer the questions.'' Well, some questions did not deserve being answered, but he answered a lot of questions.

Then, when the hearing is closed, they do a transcript. That is what this big document is, a transcript of that hearing. That is given to the Senators who want it. And most everyone does. Then the Senators pour over that transcript and if they see questions that were not answered in that transcript, then they have a right to write written questions. And the Senators who are really interested then write written questions for him to answer. Guess how many Democrats wrote written questions? Two. And he answered those written questions. He may not have answered them the way they wanted him to do so they could attack him and try to destroy his nomination, but he answered them. Where were all of the questions they are now raising when they had every opportunity to ask those questions?

By the way, that hearing was finished in September of last year. Ordinarily when you have a hearing—not always but ordinarily—the next Judiciary Committee markup, the persons put on that Judiciary Committee markup where you can raise anything you want to. Did they put him on a markup between September and January of this year? Not on your life. They did not give him a chance. He would not have made it. And the Republicans then won control of the Senate. He would not have had a chance. So they relied on being able to kill this nomination by never calling it up. Why would they want to kill a nomination of one of the brightest young Hispanic leaders in America who is totally qualified for the Circuit Court of Appeals for the District of Columbia? I'll tell you why. It is a very simple reason, to be honest with you. It is because he is a Hispanic Republican, appointed by a Republican President. They didn't like it. And they think he is conservative. I don't know whether he is or isn't. I presume he is. I guess they think he is on the fast track to the Supreme Court, and I suspect Miguel Estrada has a chance of becoming not only the first Hispanic nominee on the Circuit Court of Appeals for the District of Columbia, but the first Hispanic on the United States Supreme Court. And he is not the right kind of Hispanic.

I am the chairman of the Republican Senatorial Hispanic Task Force. That task force is made up of Democrats, Republicans, and Independents. We didn't worry about their political ideology. We worried about getting together with them and seeing what we

could do to help the Hispanic community. That has been an amazingly successful Hispanic task force.

I can tell you I fought very hard for Hispanics my whole Senate career, and for other people of color, other minorities as well. But the reason they don't like him is because he was appointed by a Republican; a Hispanic appointed by a Republican, who is conservative, they believe, and a Republican himself. That is enough to give him this kind of a rough time here on the floor of the Senate.

But even then, they had between September of last year and January of this year. As a matter of fact, they had between September of last year and February of this year to ask even further questions if they wanted to. It would have been very improper for them to do so because he had already been questioned. They controlled, certainly right up to January, the middle of January of this year. They could have asked any questions they wanted. They could have had another hearing if they wanted. It would have been highly extraordinary and highly unusual, but that is what they could have done.

It is partisanship. That is what is showing its ugly face here.

As chairman of the Hispanic Task Force in the Senate, I can tell you the Hispanic people in this country, the Latino people, have helped to make this country what it is. The Latino people are basically conservative. They believe in families. They believe in staying together in their marriages. They believe in educating their children. They believe in hard work. They have built the railroads. They have helped mine the mines. They have helped build our buildings.

Now we have young Hispanics such as Miguel who have gone on to professional schools and they are making a difference in this country that deserves commendation. Look what Miguel Estrada is going through for all of that, a fellow who is fulfilling the dream that America makes for us.

Miguel deserves better than what he is getting. Frankly, he is being treated very unfairly. I, for one, am really disturbed by it. To filibuster Miguel Estrada with the thin line of complaints they have is, I believe, going beyond the pale; to filibuster for the first time in a true filibuster the first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia because he is a Hispanic Republican who they think is conservative, appointed by a Republican President who they don't like. I am not saying all the Democrats don't like him, but the ones who are making these, I think, very unsubstantiated arguments, do not.

Time after time we have refuted their arguments in absolute terms and they come right back and keep spewing out the same stuff. The reason I went through People for the American Way is because all of that stuff has been coming from People for the American Way. That, as I have said earlier today, is not the American way, to treat a human being the way this man is being treated.

I warn my friends on the other side, if you are going to filibuster Miguel Estrada, then Katie bar the door because I know people on our side who are going to filibuster anybody they disagree with when the Democrats have the Presidency. That will be a sorry state of affairs.

As chairman of this committee, I worked very hard to make sure some of our firebrands did not get their way in wanting to filibuster Carter and Clinton judges. And I won. I was able to convince people it was not the thing to do.

I question, under the Constitution, whether you can do this. I really question it. I don't believe you can. I think it is outrageous to try. It is dangerous to try. And it is not fair to the first Hispanic nominated to the Circuit Court of Appeals for the District of Colombia, especially when they have had every chance and we are now in the 21st month for Mr. Estrada.

I guess we can learn to expect that because Mr. Roberts, who is on our markup on Thursday, who is considered one of the two greatest appellate lawyers in the country—Estrada is considered one of the top appellate lawyers, but Roberts is considered one of the two greatest in the country and that's from Supreme Court Justices themselves and many others—Roberts has been sitting here for 11 years, waiting for approval by the Senate; nominated three times by two different Presidents.

That is what we are going through. This is a big slowdown, trying to thwart the process because they don't like President Bush.

A lot of our people didn't care too much for President Clinton. I did, but a lot of the others didn't. But that didn't stop us from treating him fairly.

We have taken enough time.

Mr. REID. Has the Senator yielded the floor?

Mr. HATCH. I will be happy to yield the floor to my colleague.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, my father-in-law, may he rest in peace, was a chiropractor, but he knew a lot about people's illnesses and how people handled sickness. One thing he always said—he died as a young man—one thing he always said was, when somebody says they are sick, you believe they are sick. We have all said ''they are not really sick.'' When someone says they are sick, they are sick.

This debate here reminds me of my father-in-law's statement. My friend, no matter how many times the distinguished chairman of the committee says there is not a problem with Estrada, there is a problem with Estrada. You can say there is not. You can have pictures of him. You can do all kinds of things, say all kinds of things that there is not a problem. There is a problem. In this country, the Constitution of the United States, article II, section 2, says that we as a Senate have a right to advise and consent on nominations the President gives us for a wide variety of offices, not the least of which is the judiciary.

That is something that has been done in this country for a long time and it will continue a long time after the Estrada matter has ended. For my friend, who has served with such distinction as the chairman of the Judiciary Committee and ranking member for many years, to say he thinks it is unconstitutional to do what we are doing leaves me without any logic. I don't understand how he could say that.

I repeat, there is a problem with Estrada. You may not agree with what we believe is a serious problem, a flawed nominee, but we believe there is a problem. This isn't something we have jumped into in a matter of 10 minutes, 20 minutes, 10 hours. This has taken a matter of days, to take a look at this nominee and to make a decision about what we were going to do.

The majority has various things they can do at their disposal. We believe there are questions he did not answer. All nine members of the Judiciary Committee who are Democrats agree this man is not, for many different reasons, a person who should go on the District Court of Appeals.

We have heard it before, and I am reminded of my friend, Mo Udall, a longtime Member of Congress from Arizona, who said:

Everything has been said, but not everyone has said it.

That is what has happened here. We have talked for days and days, and we will tomorrow, and if someone can come up with something that hasn't been said by either side—I doubt it. They will continue to say what has been said in the last few days. We have opposition of the Congressional Hispanic Caucus. We believe, as has been done with a number of other people who have been sent to the Senate by Presidents, we are entitled to the memos he wrote when he was a member of the Solicitor's Office.

I recognize that some say that is not a good idea. It has been done in the past. If the majority believes this man is as good as they say he is, why don't they give us those memos? Are they afraid he said something there that may weigh against his being a judge? I do not know. But I think they protest too much.

There is a problem with this nomination. We don't need a numbers game here. But this is a filibuster. There are ways you can get rid of a filibuster: Take down the nomination, and vote to invoke cloture. That is about what you can do. Or you can do what has been suggested by the ranking member of the Judiciary Committee and the Democratic leader in a letter sent to the President, which basically says let

us have another hearing, let us ask some questions of this man, and have him submit those memos. It wouldn't take very long. I assume he didn't write too many memos, but we could tell. I am sure they could be reviewed in a day. I am sure the hearing could take place in a day.

To say that this opposition is because he is Hispanic and he is a conservative simply is not based on the facts.

But I accept what my friend from Utah has said. That is what he believes. I know he believes that. I submit that it is not right. He has a right to believe that. As I have said before, people have made statements over here about why they oppose Miguel Estrada. That doesn't mean that my friend from Utah has to agree. But that is how people over here feel.

We have a problem with this nomination. We are now in the throes of a filibuster. The majority leader has said he thinks the debate tomorrow should go for a long time. If that is what he wants, that is fine. I spend all of my legislative life here in the Chamber. I can spend a night or two here. It doesn't really matter that much. We have a lot to do. I know we have other things the leader wants to do. I know we have a very important appropriations bill that should be coming forward in the form of a conference report very soon. We have to do that.

The other reason we may be going through this process is that the leader doesn't want to bring any of that stuff forward. Maybe this is an excuse for doing nothing. But whatever the majority leader wants to do, I understand the procedures here in the Senate, and we are here because he determines what we do on this floor. But one of the things we have a right to do is take a look, because of the Constitution of the United States, at nominations that are given us. That is what we are doing.

As I started my brief little talk here tonight, you may not think there is a problem. But take the word of my father-in-law. May he rest in peace. There is a problem. I would suggest there are well over 40 Democrats who believe there is a problem. It seems to me that is the case; there is a problem.

There are only a few ways to deal with it. You can stay here and talk day after day after day and run TV ads, as they are doing right now, saying that we are anti-Hispanic. It is not going to change the belief of people over here that Miguel Estrada should answer questions and that he should provide his memos.

If they do not want to do that, they can continue running their ads and having to stay here late at night—stay here all night, and have us stay here during our vacation. When I say ''vacation,'' as everyone knows, they are not vacations; we go back to the States and work. But we are here. We have signed onto this. We as a matter of principle oppose this nomination. People may disagree with our principle. But that is in fact why we are here. We think there is a problem with this man being given this appointment. According to us, he has not answered questions, and he has not submitted his memos. And he is opposed by a lot of groups who should be supporting him and don't because they believe he is not a person who should go on the District Court of Appeals.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I appreciate my colleague. I agree with him; there is a problem here. I don't think there is any question about it. There is a problem of whether we are going to treat a person fairly. I appreciate my colleague in his own characteristic quiet and cautious and decent way. He has outlined what he feels.

Think about it. Where were the questions during the time they controlled the Senate right up through the middle of January? They didn't ask any further questions. Only two Senators gave written questions. They could have held an additional hearing. They did not do it. I guess they rolled the dice, figuring they were going to win anyway, and they would kill this nomination no matter what happened. The fact is they lost, and now the Republicans are in control of the Senate, and we want to see this man get fair treatment.

I admit there is a problem. But the Constitution doesn't say the Senate should advise and filibuster these nominations. It says the Senate should advise and consent to these nominations. That is a far cry from filibustering.

I question a filibuster in the case of judges in the third branch of Government. They are a coequal branch of Government.

With regard to the memos, Mr. Estrada said it is fine with him if they give up the memos. He doesn't have anything to hide. He is proud of his work. But the Justice Department, in its wisdom, says we don't give up these kinds of memos; it is a bad precedent, and we are not going to do it. So why blame Estrada for that? Why hide behind that when Estrada isn't the one causing the problem.

I happen to agree with the Justice Department. I don't think they should give up confidential memoranda that could chill the work that goes on in the Solicitor General's Office. I don't see how anybody with a straight face could make that argument as much as it has been made with straight faces today.

## LEGISLATIVE SESSION

Mr. HATCH. Mr. President, I ask unanimous consent that the Senate now return to legislative session.

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

## MORNING BUSINESS

Mr. HATCH. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business.

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

## AMERICA UNGUARDED

Mr. BYRD. Mr. President, as President Bush gears up for a possible war in Iraq, we have been treated to repeated announcements of troop deployments and callups of Reserve forces. A fourth aircraft carrier battle group centered around the USS *Theodore Roosevelt* is steaming toward the Persian Gulf, and the Navy is reportedly prepared to send up to three more carrier battle groups to the region. Two Marine amphibious groups of seven ships each are also already in the gulf. Military installations around the Nation are taking on an empty, shuttered feeling as unit after unit after unit packs up, says goodbye, wipes the tears away from their faces, from the faces of loved ones, and ships out. This is happening more and more and more all over this country.

National Guard and Reserve forces have been mobilized not only to go to the Persian Gulf but also to guard military installations around the United States. And more and more and more, one will look at dinner tables and at countless workplaces, and there they will see vacant chairs, vacant spots.

The 300th Chemical Company, headquartered in Morgantown, WV, was ordered, on January 3, 2003, to report to Fort Dix, NJ, in anticipation of deployment to some as yet undetermined final destination.

West Virginia: one State, the 35th State in the Union. Every Senator here can look at his or her own State and see what is happening, see the same thing happening as I am seeing in West Virginia. These troops may be gone for a year. They may be gone longer.

Other West Virginia Guard and Reserve units have already been called up, including members of the Bluefield-based 340th Military Police Company. That is on the southern border of West Virginia, on the border with the State of Virginia. And then there is the Romney-based 351st Ordnance Company. Romney is in the northeastern part of West Virginia, a community that changed hands 56 times in the Civil War.

There, too, we see vacant chairs at the dinner tables. We see the families, the spouses with the children, spouses who have remained behind. They and their children bow their heads at mealtime and say: ''God is great. God is good. And we thank Him for this food. By Thy goodness all are fed. Give us, Lord, our daily bread.''

And the same scene is repeated and repeated in Kansas, in Florida, in California, in Washington, in Oregon, in Virginia, in South Carolina, in North Carolina, Pennsylvania, New York, Massachusetts, and on and on and on. And pretty soon it adds up.

Then there is the Kenova-based 261st Ordnance Company and the Bridgeport-