Chairman Greenspan's statements and other issues we think are just as important to talk about. But during these nominations, when there is extended debate, we are allowed to do that. Whatever the leader wants us to do, we are here. Whether it is tonight, tomorrow night, Friday, Saturday, whatever it is, we will be at your disposal.

Mr. FRIST. Mr. President, I appreciate the comments of the assistant Democratic leader. My objective is to fully address the nomination of this outstanding, well-qualified candidate. If we really get to the point where the other side of the aisle says there is nothing more to be said, I would simply ask that we do take this to a vote and give us in this body the opportunity to vote, yes, we are for the nomination or, no, we are against the nomination, if we really have had full debate, and from what I have just heard we are getting close to that point, and if everything has been said.

But the one thing I don't want to happen is for people to be critical: We didn't have enough time; we didn't have enough opportunity to debate.

Our willingness to at least present why we believe Miguel Estrada is extremely well qualified is close to being fulfilled. And if we get to the point where there is nothing more to say on the other side of the aisle, then we would expect, if that is the case, an up-or-down vote. I think that signal is being sent strongly through our colleagues and what has happened on the floor this week.

I think America is paying attention, recognizing that at this juncture, we believe Miguel Estrada is well qualified and that there is a critical, drastic shortage of Federal judges today. When you put those two together—that we feel strongly Miguel Estrada is a well-qualified judge and that there is a drastic shortage of judges and our responsibility to address that issue, which we are doing well on the floor now—we would expect that up-or-down vote in the next couple of days.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I compliment the leader. In the short time he has been leader, he has allowed full and adequate debate. He could have tried to stop debate on the omnibus bill, and the leader chose not to do that, and I think it worked to everyone's advantage. On this side of the aisle, we appreciate that very much.

I do say, though, speaking as one Senator, but having spent a little time on this floor, just about everything has been said about Miguel Estrada. There will be other people who wish to make statements. As I said, everything has been said but not everyone has said it. We will do everything we can to make sure everyone has said it. The majority leader is going to find there will be other issues spoken about here. We are not going to—there is no reason to mince around. We are not going to allow an up-or-down vote on Miguel Estrada. That is clear.

Our leader gave a speech yesterday to that effect. So the majority leader has to make a decision whether this nomination is going to be pulled, whether the memos will be supplied to us so we can review them, whether there is going to be more opportunity to ask questions, or whether there is going to be a vote on cloture. Those are the three choices the leader has.

Mr. FRIST. Mr. President, I agree, in essence, those are the three choices, and as majority leader, I consider what I feel is stalling on this nomination and not allowing an up-or-down vote of sufficient importance that we will continue to address it. There are many other important issues this Senate must address. If we could just agree on an up-or-down vote right now, which the distinguished assistant Democratic leader has said they are not going to do on the other side of the aisle, we could go on to address these other important issues.

I do want to make it clear, both to this body, to the House of Representatives, and to America, this side of the aisle is ready for an up-or-down vote since, as we just agreed, there has probably already been adequate debate put forward, and I think it is important for America to understand your side of the aisle—whether you use the word ''filibuster'' or not—is obstructing or stalling the process which is important to our judicial system and to our responsibilities, our constitutional responsibilities in this body.

RESERVATION OF LEADER TIME

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

EXECUTIVE SESSION

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

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

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

The PRESIDING OFFICER. Who seeks recognition?

The Senator from Vermont.

Mr. LEAHY. Mr. President, I will be very brief. I see the distinguished chairman of the committee on the floor. Under normal procedures, he would speak first. I appreciate his courtesy in withholding for a moment.

A lot has been said, and as the distinguished senior Senator from Nevada said, not all have said it. There is actually one person who, were he to speak, could speed this whole matter up very quickly. Miguel Estrada has written extensively on his views on very complex issues on law which would be of great interest to those who have to vote on somebody for a lifetime position in the courts. He has written extensively, but he has kept the writing secret.

We have ample precedent for similar writings that have been made available for everything from a nomination of a man who became Attorney General to a man who became the Chief Justice of the United States, William Rehnquist. The Democratic leader and I wrote to the President and asked once again: Release those secret writings.

Ironically, Mr. Estrada told us, when asked, he had no objection to those writings being released. He has no objection to them being released. It is only the White House has said: We will not release them. If they were released, I suspect we would then have a discussion of what is in those writings, and we would go to a vote up or down, win or lose.

At least we would know what we are voting on. We would not have a stealth candidate before the Senate. I think the White House ought to look at the fact Mr. Estrada has said he has no objection to his writings being made public. They ought to make them public, and then we can go ahead and complete action up or down on this nominee.

Again, I thank my good friend from Utah for his courtesy in letting me go forward. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, it is interesting that my colleague, who is my friend, says Miguel Estrada is holding this process up, and then at the end of his remarks says he has agreed, he has no objections to giving these documents, but they never emphasize the fact the Justice Department is highly justified, is absolutely right, and has the opinion of the seven former Solicitors General saying these types of confidential memoranda should not be given to the Judiciary Committee or to Congress. The reason for this is that these memoranda are utilized in deciding what the Solicitor General's Office should do with regard to various cases.

If these memoranda become readily available or available at all outside the Justice Department, this would chill the honest, forthright deliberations, suggestions, and recommendations by those who work in the Justice Department. I do not think it takes any brains to realize the Justice Department is totally right.

Miguel Estrada is being blamed because the Justice Department, in accordance with their seven former Solicitors General, refuses to give up these confidential memoranda, which are privileged, so the Democrats can go on a fishing expedition and see if they can find some matters in those memoranda with which they disagree. They can then say: We cannot confirm him because he wrote some memoranda with which we disagree.

That is what is behind this. This is not trying to be fair. This is not trying to understand what is good or bad about Mr. Estrada. It is a fishing expedition to try to get into privileged documents that should remain privileged, according to these seven former Solicitors General of the United States, four of whom are Democrats and partisan Democrats at that, although highly respected by me. And the other side seems to act like we should just brush those opinions aside, even though they are bipartisan opinions by people who have held this office. I do not think they can have it both ways. I do not think their arguments are worth a grain of salt.

In addition, I listened intently yesterday morning, when I could, to the comments by the junior Senator from New York who spoke about the role of the Senate in the constitutional advice and consent process. According to the Senator, Mr. Estrada's failure to answer questions about his personal views on legal issues, which she called ''basic information about where a nominee stands,'' amounts to an unconstitutional strategy to deny the Senate an opportunity to engage in its role to advise and consent on nominations.

While this is an interesting argument, it is wrong on the law. It is wrong on the law and wrong on the facts, too. Her argument ignores the basic underpinnings of the Senate's role in the advice and consent process. In fact, I submit that the other side's effort to demand Mr. Estrada's personal views on certain legal issues is itself an unconstitutional threat to the separation of powers inherent in our system of Government and to the Framers' desire to maintain an independent judiciary. I think that is a very persuasive argument on my behalf.

It has never been the case that the Senate is constitutionally entitled to an answer to any question it chooses to ask a nominee while exercising its advice and consent responsibility.

The reason for this is clear. The Framers sought to ensure the judicial branch would remain independent of the legislative branch. According to the Federalist Papers 78, judicial independence ''is an excellent barrier to the despotism of the prince'' and ''in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.''

For this reason, the Constitution prohibits Congress from reducing Federal judges' salaries, guarantees that judges will remain on the bench ''during good behaviour'' and allows Congress to remove them only by the process of impeachment. These protections were borne of the Framers' fear that like King George III, the Federal legislature would pressure judges into reaching outcomes of which it approved that otherwise were consistent with its interests.

The Framers' intent to insulate Federal judges from the political influence of the legislative branch also informed their decision to restrict the role of the Senate in the confirmation process. The Senate's limited function is apparent from the Constitution's very text. To state the obvious, the President holds the power to nominate candidates to the Federal bench while the Senate's role is restricted to providing ''advice and consent.''

Now, that does not mean advice and filibuster. It does not mean advice and obstruction. It does not mean advice and a demand that only the Senate's will can be followed. It does not mean advice and fishing expeditions, which is exactly what is going on.

I do not think my colleagues on the other side have a leg to stand on in these arguments they have been making. Even if they did, they had every opportunity to examine Mr. Estrada. This argument that he did not answer the questions is ridiculous. They had every opportunity to ask him every question they wanted to, and even stupid questions they could ask. Any member of the Judiciary Committee could ask anything they wanted to, and sometimes we have some of the dumbest questions anybody could possibly hear, but they have a right to ask these dumb questions. But the nominee has a right to say: I do not think I can answer that because that issue may come before me as a judge, and if it does, I do not want to have to recuse myself. Virtually everybody who has ever been nominated, who has been in any controversy, has said exactly that. Top authorities from both sides of the political spectrum agree they should not answer that, and the American Bar Association's ethical rule says they should not. Yet, Mr. Estrada is being crucified because he did not tell them everything they wanted to hear.

The real problem was, and I think is, that Mr. Estrada just did not say anything they could use against him. It is very disconcerting to my colleagues on the other side that they didn't find anything to use against Mr. Estrada. So they use ridiculous, idiotic arguments like he has no judicial experience. I saw the press release by Congressman Menendez who has led this terrible fight against Mr. Estrada, with his very partisan Democrat colleagues in the House, all of whom are rebutted by the Republican Hispanics in the House.

He basically said, well, he has no judicial experience. Well, that is not only ridiculous, it is idiotic. One of them made the case one does not have to have judicial experience to be a great judge, and that President Clinton nominated innumerable people to be judges, that we approved, who had no judicial experience. Some of the greatest judges in the history of this country did not have any judicial experience, and yet that argument is used.

It is a terrible argument. I think it is a prejudicial argument against Hispanics, because how many Hispanic judges are there in this country who might be put on the circuit court of appeals? Very few. That means all these great Hispanic lawyers who belong to the Hispanic Bar Association do not have a chance to be a judge under that reasoning because they have not sat as a judge anywhere before. Talk about discrimination. Talk about ridiculous arguments. Talk about prejudice.

It is a shame it comes from one of the Hispanic leaders in the House—Democrat Hispanic leaders, I might add. I cannot imagine anybody who really wants to see Hispanics progress and to become judges saying he has no judicial experience, therefore, he cannot be a judge. Give me a break.

Very few Hispanics have judicial experience, but there are a number of them who I hope President Bush and succeeding Presidents will give the opportunity of being a judge.

Now that just shows the lengths to which the other side has gone to basically scuttle this nomination, and this constitutional argument we had yesterday fits in that category. The Constitution assigns the Senate a limited role in the selection of judicial nominees. It simply allows the Senate to ratify the President's choices, or decline to do so. That is the Senate's power.

Put simply, the President selects, then the Senate reviews and reacts. As Alexander Hamilton explained in The Federalist No. 66:

> There will, of course, be no exertion of choice on the part of the senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice he may have made.

I think some of our colleagues on the other side want to choose these judges, and we are finding that continuously in their arguments, that the administration does not ''consult'' with them. If consultation means the administration has to take whatever judges the Democrats desire, then that is not consultation. Consultation is letting them know what is on the mind of the President, and the administration discussing it with them, seeing if they have any real objections to the choices of the President, asking them to weigh in and give the administration whatever information they can, and then making the choice and going from there. That is consultation.

The administration even goes further. The administration has had to put up with the blue slip system, which means local Senators have a lot of power in determining who are going to be the Federal district court judges. They do not have the same type of power in who should be Federal circuit court of appeals judges. That power has always been jealously guarded by whichever White House.

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

Mr. HATCH. Sure.

Mr. DURBIN. I want to make sure, the Senator is saying we are going to stay with the blue slip approach then for judges in the future?

Mr. HATCH. I doubt we are, because I have said I will follow the exact blue slip policy Senator KENNEDY, Senator BIDEN, and I followed. So all this bull in the press saying that I am going to change the blue slip laws, yes, I am changing it from what Senator LEAHY did, but I am going back to the process of KENNEDY, BIDEN, and HATCH.

Mr. DURBIN. So if the Senators from a State were——

Mr. HATCH. I have said it enough I would hope the Senator heard it.

Mr. DURBIN. To make sure it is clear for the record, if Senators from a State where a judge is being appointed do not approve of that judge, then you are not going to have a hearing; the Senator has to have two blue slips from two Senators from the State?

Mr. HATCH. That is absolutely false. Senator KENNEDY set the process to begin with. When he became chairman of the committee, he said negative blue slips shall be given great weight, but they are not dispositive.

If both Senators are against the nominee, that is given great weight by me. It was by Senator KENNEDY.

Mr. DURBIN. Senator LEAHY's approach of both Senators having a voice as to whether the nominee goes forward, the Senator is not going to abide by that blue slip process in the future?

Mr. HATCH. I have changed the Leahy approach because it was in contradiction to the Kennedy, Biden, and Hatch approach, who followed Kennedy and Biden and did it to the letter.

It is very difficult, when two Senators go against a nominee, for that nominee to make it, but it is, as Senator KENNEDY said, not dispositive. That has been the rule, as long as I can remember, until Senator LEAHY changed it. I think even Senator LEAHY basically acknowledged that rule.

Mr. DURBIN. I say to the Senator from Utah, the rule that has been followed since I have served in the committee under your leadership, as well as under Senator LEAHY, said both Senators would have a voice in the blue slip process.

Mr. HATCH. And both do.

Mr. DURBIN. The fact the Senator is changing it suggests to me, again, he is removing the power of the committee and of the Senate to look at judicial nominees.

Mr. HATCH. Not one bit.

Mr. DURBIN. That is what the debate is all about.

Mr. HATCH. Not one bit. In fact, I reiterate to my friend again, I did not set this policy. It was set by Senator KENNEDY. I remember when he set it way back then, there was a lot of people upset about it on our side, but it became the policy of the committee. Then when Senator BIDEN became chairman of the committee, he agreed with that policy. He adopted that policy. Then when I became chairman of the committee for the first time, I agreed with that policy and I followed that policy. All I am saying is I am going to follow the policy set by Democrats.

Mr. DURBIN. The Senator from Utah is rejecting Senator LEAHY's policy?

Mr. HATCH. I am not rejecting it. I am just saying we are going back to the original policy set by Senator KENNEDY, Senator BIDEN, and myself.

Mr. DURBIN. That is a very positive spin, but I think the answer is the Senator is rejecting Senator LEAHY's approach.

Mr. HATCH. We will not use the Leahy approach, that is true, because I think it is wrong. And I think Senator KENNEDY and Senator BIDEN thought it was wrong, as well, by their actions.

I find it a little strange that Democrats are criticizing a policy they themselves set and trying to say I have changed the policy when in fact it was set by Democrats—and leading Democrats at that.

The fact that Senator LEAHY changed it does not mean it was right for him to overrule Senators KENNEDY and BIDEN and myself. I believed he was wrong.

Mr. DURBIN. I ask the Senator one last question, does the Senator, as chairman——

Mr. HATCH. Let me ask this: Does the Senator have a question?

Mr. DURBIN. Yes. Did the Senator from Utah, as chairman of the committee, ever have a hearing for a nominee who did not receive both blue slips from Senators in the State?

Mr. HATCH. I don't recall.

Mr. DURBIN. I think the answer is no.

Mr. HATCH. As the general rule, it stopped the nominee—as a general rule, but it is not dispositive.

(Ms. MURKOWSKI assumed the chair.)

Mr. DURBIN. So we will change not only the Leahy approach but the Hatch approach?

Mr. HATCH. No, I still have the same approach. I gave great weight to the Senators, and I intend to in the future. But that does not mean that a legitimate nominee should not have his or her day in court.

Mr. DURBIN. One last question: Does the Senator, as chairman of the committee, now send out blue slips to Members so they can respond?

Mr. HATCH. We do. That is a policy of the Senate Judiciary Committee.

Mr. DURBIN. They have been sent out?

Mr. HATCH. As far as I know. If they have not, they should be. We know some have been returned and some have not been returned.

Mr. DURBIN. Thank you.

Mr. HATCH. Now, let me just say this. I was speaking a few minutes ago about the Federalist Papers and what they had to say.

As I said before, and has been repeatedly quoted, as though I said something I am not following to this day, I agree that the Senate should not be a rubberstamp to a President's choices for the judiciary. We do not have to be a rubberstamp.

We have an obligation to look at these people and to see what is wrong. Tell me what is wrong with Miguel Estrada. Tell me one glove they have laid upon him. Tell me one proof they have that he is not worthy of being on the Circuit Court of Appeals for the District of Columbia—other than the specious, spurious argument: Well, we do not know enough about him.

They conducted a hearing. They controlled the process. They asked questions. That hearing transcript is this thick. Normally the transcript is 10 pages. They controlled everything. They could have asked written questions. Only two of them did—two Democrats did. And he answered them.

Now they are coming in here crying over their failure to ask any further questions, saying: We must examine him more.

I am hearing that on every judge this President has nominated. We have 26 emergency situations in this country—in other words, 26 real problems in this country—and other vacancies that are also problems, and I am getting these spurious arguments.

We have a markup tomorrow. We have 3 circuit court nominees, and we had a hearing for 12 solid hours. I was willing to stay even longer. I would have stayed all night, if necessary, to get that hearing over with. It was the Democrats who decided it was over. They had every chance to ask questions. I am hearing they will filibuster these three nominees in the Judiciary Committee tomorrow.

When is it going to stop? When are they going to start doing what is right? Will this all be partisan just because they did not win the Presidency? Is President Bush going to be treated this way on every judgeship? They say these are controversial judges. I have not seen one circuit court of appeals nominee since I have been chairman of this committee who they do not think is controversial. Every one is controversial. The reason is they are circuit court of appeals nominees, and this President has nominated them, and they presume they must be Republicans and conservative. The only nominees about whom I did not hear any argument were the Democrats this President has nominated, holding out his hand to them, saying, let's work together. He has nominated Democrats we have been able to get through, and with my approval.

Now that we have some Republicans such as Miguel Estrada, who may be conservative, the President is not getting a fair shake. They are not even trying to give him a fair shake. I don't think my friends on the other side have to rubberstamp anybody, but they ought to be fair. They ought to be fair to this President. He is the President of the United States. He has a right to nominate these people. Unless they can show some legitimate reason for not confirming these people, then these people should be confirmed.

Where is the legitimate reason against Miguel Estrada? I don't see any. I have not heard one legitimate

reason the whole time we have debated this for the last week—not one, not one—other than we should be able to continue a fishing expedition long after they held a very extensive hearing on this person, long after they had the opportunity of sending him written interrogatories or questions. And only two of them did. Now they are in here crying as if they have been somehow mistreated in this process. They controlled the process.

As has been the case history, the Senate is entitled to detailed information about a nominee's background, career, and qualifications for the bench. Mr. Estrada has provided ample information to allow the Senate to determine his qualifications.

First, it bears repeating that the American Bar Association, their gold standard, when we were having problems whether the Bar Association was fairly examining judges—and there were some real questions on our side because of some ridiculous, I think, ratings they had given in the past—the Democrats said: We must have the ABA ratings. We will not allow candidates to go through, nominees to go through, without the ratings. It is our gold standard.

I think it bears repeating that the American Bar Association unanimously—the standing committee that really examines these judges and takes it seriously—unanimously rated Mr. Estrada well qualified for this position, the Democrats' ''gold standard.'' That is the highest rating the American Bar Association grants.

Let me say one other thing before I yield to my colleague. That is this: I have had real problems with the American Bar Association in the past. I was the one who said: We are not going to allow them to be part of the process. They can submit their recommendations. I will give them weight, and Senators can give whatever weight they want. But they will not be a vetting processor that can determine whether a person sits or not. The reason I did that was I believed they were not being fair.

In the intervening years, and currently, I believe the American Bar Association has straightened out its act, and I believe they are being fair, and I believe they are doing a good job. I want to be the first to correct the record as to why I am in agreement that we can pay very good attention. I don't think even the American Bar Association should stop someone from being a judge just because they disagree—and I can name two cases where I personally led the fight to have judges confirmed who were rated not qualified by the American Bar Association and the judges have turned out to be very good judges in the end.

I yield.

Mr. DURBIN. I think the Senator may have answered. I was going to ask, as chairman of the Senate Judiciary Committee, if the Senator believes we should approve Miguel Estrada because he was rated well qualified by the American Bar Association, has the Senator from Utah ever failed to approve a nominee from President Clinton who was well qualified by the American Bar Association? I think the Senator has answered that question that there were times when he rejected nominees, voted against nominees, refused to have hearings for nominees, delayed hearings on nominees who were rated well qualified by the American Bar Association.

Mr. HATCH. Not that I recall. I never allowed the American Bar Association to make the determination in my mind whether I was for or against someone. I have paid attention to what they do, even when I disagree with them. I always read what their recommendations were, and I always gave credibility where credibility should be given. I will continue to do that.

What I disagree with: I don't think the American Bar Association system should be a determining factor one way or the other whether a person is approved by a Judiciary Committee of the full Senate, whether a person is confirmed. I personally don't think anybody should take that attitude. Some did. But that should not be a rule of the Senate. We have that responsibility, not the ABA. I appreciate the Senator's excellent question.

Nor am I for Mr. Estrada because he happens to be unanimously well qualified. It is because he is the fulfillment of the American dream. Here is this young Hispanic man who came to America not speaking a lot of English, he learned English, and then he goes on and becomes a graduate of Columbia University, magna cum laude, and then he goes to Harvard and graduates magna cum laude there, where he was editor of the Harvard Law Review. Then he holds various positions, ranging from clerk on the Second Circuit Court of Appeals and clerk for Justice Anthony Kennedy, a moderate on the Supreme Court. And then he worked in the Solicitor General's Office in the first Bush administration and also for the Clinton administration. He has raving reviews of the kind of work he did there. Then he becomes a partner in one of the great law firms in this country, Gibson, Dunn & Crutcher, at a relatively young age. He has argued 15 cases before the U.S. Supreme Court, winning 10 of them.

Look, it doesn't take many brains to say this must be one heck of a guy, he must be one heck of a lawyer, and he must really be someone who can do the job on any bench in this country. To say he has no judicial experience when he clerked for two major Federal judges—one a circuit judge and the other a Supreme Court Justice—I think is pure bunk, and everybody knows it. That keeps coming up like it is a real argument. That is what they call arguments—that he wasn't a judge and, therefore, he should not have this privilege; that he hasn't answered questions just the way they want him to answer, even though the transcript is thick with extensive hearing questions and answers. He answered their interrogatories, written questions, but only two of them took the time to write them. I hope we don't send written questions to every one of these nominees, but if you have some questions, send them.

He said if the Justice Department wants to give up these memoranda, it is OK with me, I am proud of my work. But he fully understands why they don't want to simply turn them over. They are private, they are confidential, and they involve opinions that could undermine the work of the Solicitor General of the United States in arguing for our country. If they are disclosed and if other workers in the Solicitor General's Office believe their opinions are going to be disclosed to the public, guess how honest the future opinions are going to be, especially if somebody wants to go on to hold another position in the Justice Department or Government that is a confirmable position, or wants to become a district court, or circuit court, or Supreme Court judge.

Second, Mr. Estrada testified for a full day in the Senate Judiciary Committee on a range of subjects and then answered written follow-up questions from committee members. As I said, it should be mentioned that only two members of the committee decided to pose such questions.

Third, Mr. Estrada has received broad bipartisan support from lawyers who know him best, including former Clinton Solicitor General Seth Waxman and Vice President Gore's former chief of staff, Ron Klain—these are top Democrats who say this man deserves confirmation—former Clinton Justice Department officials Randolph Moss and Bob Litt—again, two top Democrats, many individuals in the Justice Department; and, in addition, 14 other colleagues of Miguel Estrada in the Solicitor General's Office have all written glowing recommendations of Mr. Estrada.

Fourth, the Senate is free to review the briefs and other publicly available written work Mr. Estrada performed on behalf of clients in the more than 15 Supreme Court cases he has handled during his career.

The record is voluminous. They are also able to get the oral arguments he made before the Court. Surely they can get, from all of that documentation, enough to understand what his judicial philosophy might be. Keep in mind, he was representing clients, so it would probably even be unfair for them to distort and utilize anything they disagreed with in all these documents because he represented clients and had to do the best he could for them. That doesn't mean those were necessarily his opinions, other than he did a job as an attorney must do on behalf of his clients. It's a ridiculous argument that we don't know enough about him because there is no doubt that the record is voluminous. They could go through

all of that. I don't believe they have gone through very much of it. Perhaps some of the staff.

This is just a phony bunch of excuses for giving this Hispanic American a rough time. They are against him because he is supported by a Republican President and he may be conservative. My goodness, he may even be against their hallmark decision of Roe v. Wade. Come on. These are foolish arguments.

All of this information is more than adequate. We have the Supreme Court cases, the briefs that were filed, and arguments that were made—all of that information is more than adequate to address Mr. Estrada's qualifications. We have approved thousands of judges who have never argued a case in the Supreme Court. He argued 15, winning 10 of them. This body must, in order to maintain the proper constitutional balance, refrain from seeking just this sort of information from Mr. Estrada. We should not have a right to this sort of information any more than we have a right to have them from their nominees to serve in our Federal courts.

Many distinguished Democrats have themselves noted that seeking personal views is highly inappropriate. Justice Thurgood Marshall made this point in 1967, when he refused to answer questions at his confirmation hearing about the fifth amendment. He said:

I do not think you want me to be in the 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.

Lloyd Cutler, one of the great lawyers in this town, a former Clinton White House counsel, and former Carter White House counsel, who also was at the other end of Pennsylvania Avenue at the same time as the Senator from New York, disagrees with efforts to discern a nominee's ideology during the confirmation process. According to Mr. Cutler:

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 as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging.

Former Senator Albert Gore, Sr., also believed that efforts to discern a nominee's personal views were inappropriate. Former Senator Gore noted the following in connection with the 1968 nomination of Abe Fortas to serve on the Supreme Court:

[A] judge is under the greatest and most compelling necessity to avoid construing or explaining opinions of the Court lest he may appear to be adding to or subtracting from what has been decided, or may perchance be prejudging future cases.

The Senate Judiciary Committee agreed with Senator Gore, noting the following in a committee report on the Fortas nomination that year:

Although recognizing the constitutional dilemma which appears to exist when the Senate is asked to advise and consent on a judicial nominee without examining him on legal questions, the committee is of the view that Justice Fortas wisely and correctly declined to answer questions in this area.

To require a judge to state his views on legal questions or to discuss his past decisions before the committee would threaten the independence of the judiciary and the integrity of the judicial system itself. It would also impinge on the constitutional doctrine of separation of powers among the three branches of government as required by the Constitution.

Democrats back then made it very clear, including Lloyd Cutler and countless others, that they should not be answering questions about how they might rule on given cases. Why this is suddenly not so clear to my colleagues on the other side is a mystery.

Finally, the ABA's Model Code of Judicial Conduct also prohibits a nominee from discussing his personal views. Canon 5A(3)(d) of the ABA'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.''

Mr. Estrada's opponents in essence are asking him to violate this ethical canon.

Mr. Estrada possesses an excellent record—one which merits confirmation. Efforts by the other side to deny him confirmation in the face of this excellent record are unfair and degrading to the confirmation process.

The arguments made by the other side are not constitutional, they are political. The other side knows that the Constitution prohibits this body from intruding on the independence of the judiciary, and from forcing candidates to provide us with their personal views on legal issues. I hope the Senate will reject these unconstitutional efforts and I surely hope that we will vote soon to confirm Miguel Estrada.

I have to ask, Where are the real arguments against Mr. Estrada? The fact they haven't been able to dig up any dirt on him is lamentable, I guess, to them. But, on the other hand, they haven't been able to. The fact is they do not have a good argument against Miguel Estrada, other than these specious arguments that they should be allowed to get into confidential, private, and privileged information at the Department of Justice in the Solicitor General's Office. They can't get those materials, but the fact of the matter is they shouldn't be able to do so. Not only do I say that, but seven former Solicitors General—four of them are top Democrats—even to this day take that position as well.

My gosh. The fact he wasn't a judge is irrelevant. If he is qualified, as he certainly is—and I don't think anybody can really argue he is not, with the reputation and the achievements he has had in his life—in all honesty, we should move to a vote. The fact he hasn't had judicial experience other than the years he spent as a judicial clerk in the Second Circuit Court of Appeals and with the Supreme Court of the United State of America—I mean, in all honesty, we have had fellow Hispanics say he is not Hispanic enough, and he hasn't done enough for the Hispanic community. Gee, I think everything he has done has been for the Hispanic community, and for everybody else as well. This is a man who really does.

Where does all of this come from? It comes from the 2001 retreat the Democrats held where they had some of the top liberal law professors come in and suggest to them how they have to fight on judges and how they have to be unfair. They came up with these ''weapons of mass obstruction'' because they do not want to have Bush judges confirmed.

No. 1, they suggested: ''Bottle up these nominees in committee.''

We are doing that every day. I have had a threat they will filibuster the nominees in our markup, which I do not recall ever happening in my almost 30 years in the Senate. But that is what I have been informed might happen. I hope they will reconsider that.

No. 2: ''Inject ideology in the confirmation procession.''

We see that regularly, where heretofore both sides have said ideology is not a part of this process. Yet, we have seen that in almost every circuit court of appeals nomination.

No. 3: ''Seek all unpublished opinions.''

That is why they are upset. Because he is not a judge, he has no published opinions. He has unpublished opinions. But unpublished opinions—judges do hundreds of those every year. Over a course of time, such as in the case of Dennis Shedd, he did thousands of them. Yet, they wanted his unpublished opinions because that would slow the process down even more. Regardless of how much it cost the taxpayers to go back through all of those archival records and dig up unpublished opinions, there were thousands from Dennis Shedd.

They don't have that in this case. They can't do that in the case of Miguel Estrada. What they seek is privileged in terms of memoranda. No nominee worth his salt is going to want his privileged internal memoranda made public to the Senate Judiciary Committee, or to anybody else, because that would chill the giving of fair, reasonable, and honest, and I might say, effective opinions of the Justice Department.

What they really then said—and this is the bottom line—if all those top three weapons don't work, and so far

they haven't worked in the Estrada nomination—then you do the last thing; that is, filibuster for the first time in the history of the United States against a circuit court of appeals nominee, or even a district court nominee.

I acknowledge we have had cloture votes in the past, but not because there was a true filibuster. But yesterday we were told by our colleagues on the other side they are going to filibuster. And we are, in effect, in the middle of a filibuster, as my good friend from Nevada mentioned this morning; that they are not going to allow a vote unless they can get these privileged internal memoranda, which is again part of this weapon of ''mass obstruction'' or these weapons of ''mass obstruction'' to totally shut down and delay fairness to President Bush's nomination. That is what it comes down to.

Let me tell you, it is the wrong thing to do, because it works both ways. Someday perhaps the Democrats may get the Presidency themselves and then find themselves in the same stupid position we find ourselves in where they cannot get honest treatment for their nominees because whenever there is a ''controversial'' nominee, there is going to be a filibuster. It is a dangerous road to go down. I want to recommend to my colleagues on the other side, don't go down that road anymore. The best thing you can do is to face the music and let the Senate vote. That is what the Senate should do in this matter. It should vote up or down.

It is believed by some on the other side that Miguel Estrada is a shoo-in because every Republican is going to vote for Miguel Estrada. We know there are a number of Democrats—I do not know how many, but there are a few for sure, and I believe others—who will vote for him as well, which means he will sit on the Circuit Court of Appeals for the District of Columbia. There are some on the other side who do not want him to sit on the bench under any circumstances because they think he might be a conservative judge who might disagree with them on some of their litmus test issues.

That is wrong. If we took that attitude, there would be very few judges sitting on the circuit courts of appeals.

I have worked my very best to make sure we never, ever had a filibuster started on my watch. We were successful. There were some who wanted to filibuster occasionally because they felt so deeply ideologically opposed to some of the Clinton nominees. There were some who felt deeply against some of the Carter nominees. But we stopped it. I believe my colleagues on the other side of the aisle ought to do the right thing to stop it here.

I yield the floor.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). The Democratic leader.

Mr. REID. Mr. President, I have sat here for the last couple of days trying to figure out a way to explain Miguel Estrada's refusal to answer questions. I think I have finally come to a conclusion of how to explain why he has not answered questions.

Travel with me 3,000 miles to Nevada. We have a home in a place called Searchlight, NV. It is a relatively new home. We built it a year ago last December. We have new furniture in it. I have a lot of grandchildren—12 and soon to be 13. One of my sons has three little boys. They are just very close together. My little grandson, Wyatt, just turned 3. It was obvious he had gone to one of our new couches and had written on it.

So his dad sees that, and he goes to him and he starts interrogating my 3-year-old grandson. He had just turned 3. He said: Did you do that? Wyatt said: No. He said: Well, who did it, then? He said: I don't remember his name.

That is how Miguel Estrada answers questions. He uses the ''Wyatt'' answering method. Sure, he fills up a book, but he does not say anything: ''Who did it?'' ''I don't remember his name.''

Mr. President, I cannot do it in a better way: ''Miguel Estrada's Answers to the Judiciary Committee's Questions.'' Here they are, on this chart, for everyone to see. That is it: ''Miguel Estrada's Answers to the Judiciary Committee's Questions.'' That is it. It is a blank page.

He can fill up a volume this deep with ''Wyatt'' answers. And the way he answers questions, here is what we know about his legal philosophy, as shown on this chart. That is it: ''Miguel Estrada's Legal Philosophy'' is summed up with those four words. There isn't any. We don't know.

And if we want to take a look at his memoranda, which is some evidence of what he said in his legal writings, this is what we have: ''Miguel Estrada's Legal Memoranda.'' That is it, another blank page.

I said, as politely as I could, to the distinguished majority leader, we have a problem here. Now, we may be wrong, Mr. President. We think we, on the basis of principle, are doing what the Constitution directs us to do. We believe, as a matter of principle, we are right. And history, I believe, will prove we are right.

Mr. HATCH. Will the Senator yield?

Mr. REID. I will, in just a second, to my dear friend.

Mr. President, people have a right to disagree with us, but we are united in saying we want from this man the ability to have him answer real questions and not give ''Wyatt'' answers.

We also believe, Mr. President, without any question, we have a right to his legal writings he performed while he was with the Solicitor General's Office. It has been done before.

Now, if this man is as good as they say he is, then that seems a very small duty. They can talk about how it is chilling, and all this kind of stuff, and that there have been people who say he should not do it. Of course, they say he should not do it. But that does not mean it cannot be done and has not been done in the past. Ask Chief Justice Rehnquist: Has it been done in the past? Of course, it has been done in the past. Ask others who have been here, Attorney General Civiletti, and others.

Of course, when there is a question that arises and you think somebody is really good, then you do what is necessary to get them confirmed. We are not asking that much: Answers to questions, real answers, not ''Wyatt'' answers. And let's see what you wrote.

Mr. HATCH. Will the Senator yield?

Mr. REID. I am happy to yield for a question without losing my right to the floor.

Mr. HATCH. Is the Senator familiar with this huge transcript of the hearing? I do not believe the Senator was there.

Mr. REID. I say to my friend——

Mr. HATCH. I think it is a little unfair to put up there that he doesn't answer any questions. This whole transcript is filled with answers. He may not have answered them all the way the Democrats wanted him to answer them.

Is the Senator also familiar with the fact he argued 15 cases before the Supreme Court, and that the Democrats have had access to all of those briefs, all of those arguments?

Mr. REID. As I told the majority leader——

Mr. HATCH. I think that is a little unfair to use that type of argument—look at it.

Mr. REID. As I told the majority leader this morning, everything has been said but not everybody has said it. What I am doing today is just saying it a different way. Everything has been said.

Mr. HATCH. Let's be fair about it.

Mr. REID. I would be happy to answer my friend. As I said—I am sure my friend was not listening—you could fill up a volume twice that big with ''Wyatt'' answers. That is what he has done. He has not answered questions. He has said words, but he has not answered questions.

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

Mr. REID. We have gone through his transcript. And, in fact, the distinguished Senator from California, DIANNE FEINSTEIN, is a person who is very fair, and on these nominations she bends over backwards to make sure the Republican President gets whoever he wants. But DIANNE FEINSTEIN was so concerned, she went back and reread everything, and she came to the conclusion he has said nothing. And that is what this is all about: He has said nothing.

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

Mr. REID. Yes, I will.

Mr. HATCH. Has the Senator read this transcript?

Mr. REID. I have gone through the transcript.

Mr. HATCH. You have read it, and you say he has not answered the questions?

Mr. REID. He has given ''Wyatt'' answers. He has answered questions, but he has not answered questions committee members felt he should have answered. I think he was evasive, terribly evasive, and I think this adequately describes his answers.

I want to say something else. It has been said—but let me say it again—he has been at the Supreme Court 15 times. Now, the distinguished Presiding Officer is a trial lawyer. I was very impressed, even though I disagreed basically with his presentation, right here, 4 years ago. But it was very clear, as I learned afterward, that the Presiding Officer was a fine trial lawyer. And I would like to think I have had some fairly good experience in a courtroom. I tried over 100 jury trials. But with all the jury trials I tried, you could go back and read every word I argued to a jury, every cross-examination I did, every direct examination I did, and you would not know how I stood on a single issue, because I was there representing people. I represented people who killed people. I represented people who robbed people with guns. I represented insurance companies. I represented people who had been injured. And I sued insurance companies. That does not have any bearing on how I feel about a particular principle, me personally.

You could have 5,000 cases at the Supreme Court and that does not determine how you stand. You write briefs. You are an advocate for a client. And Miguel Estrada argued cases before the Supreme Court when he worked for the Federal Government. He had a job to do, and he did a decent job. He won 75 percent of his cases, I understand.

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

Mr. REID. I will be happy to yield for a question.

Mr. DURBIN. The point has been made by the chairman of the Judiciary Committee, Senator HATCH of Utah, that because some Democrats do not agree with what is supposed to be Miguel Estrada's political philosophy, that is why he is running into some difficulty in the course of this debate.

I would like to ask the Senator from Nevada, is it not true we have approved over 100 nominees from the Bush White House, and 100 of those were under Senator LEAHY, the Democratic chairman of the Judiciary Committee? And is it not also true that among those nominees were people who were generally conservative in terms of their political beliefs, who have been approved by the Judiciary Committee, and by the Senate, because we understood where they particularly held their beliefs and went forward and gave them approval?

Mr. REID. Let me answer the question this way. A member of the Judiciary Committee, who has liberal credentials, came to me and said: You know, there's this man named McConnell—I think that was the name of the individual who came before the Judiciary Committee. The member of the Judiciary Committee disagreed with every answer he gave, but he knew what he was talking about, and he answered every question to the best of his ability. And that Senator voted for that person, even though that member of the Judiciary Committee told me he was not of that person's political philosophy. That is an example. Not only did we do 100, exactly 100 last year, the 18 months we were in control, but as I recall, Monday we voted on three judges. Not a single Democrat voted against any of those nominees.

I said last night, and I will tell my friend from Illinois—I will repeat just what I said. My father-in-law was a chiropractor, but even though he was not a trained medical doctor, he really understood people's feelings and their illnesses. He always used to tell my wife, and he told me, that if a person says they are sick, they are sick. We have had people second-guess: He's not really sick, he's faking it. He said if somebody says they are sick, they are sick.

What I have been telling everybody on the other side is Miguel Estrada has a problem. You may not agree it is a problem, but it is just like my father-in-law says: When somebody keeps telling me they have a problem, they have a problem. Miguel Estrada has a problem, and the only way they can have that problem resolved is supply his memos and, in addition to that, answer questions. If he doesn't do that, there are very few alternatives left.

One is to try to invoke cloture to stop this debate. No. 2 is pull the nomination. That decision has to be made by the Republican majority. We are not in the business of stopping judges. We, along with many groups in America today—not the least of which is the Congressional Hispanic Caucus, but we could go on and on with other groups—believe this man is a blank slate.

I want to say something to my friend from Illinois and everyone within the sound of my voice, including my dear friend from the neighboring State of Utah, somebody for whom I have great respect and admiration, ORRIN HATCH.

I don't know who came up with this ''weapons of mass destruction,'' but they should be ashamed of themselves. We have a situation where my family is out today trying to buy duct tape because they are afraid. They are afraid there is going to be a biological attack or a chemical attack, as we have been told by Secretary Ridge there might be.

Why? Because people are going to bring to our country weapons of mass destruction. A play on words today, thinking it is real cute—they are saying we are using ''weapons of mass obstruction.'' I think it is cheap, petty, wrong, and is below the dignity of this Senate.

I want anyone who thinks that is cute to get a better joke writer because it is not very funny.

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

Mr. HATCH. Matter of personal privilege.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. We did not use the term ''weapons of mass destruction.'' Matter of personal privilege.

Mr. REID. I have the floor. I have the floor.

The PRESIDING OFFICER. The Senator is correct.

Mr. REID. I am happy to yield to my friend from Illinois.

Mr. DURBIN. I want to say to my friend from Nevada——

Mr. HATCH. Parliamentary inquiry.

The PRESIDING OFFICER. Will the Senators yield for an inquiry?

Mr. REID. No.

Mr. DURBIN. I want to say to my colleague, the Senator from Nevada, many people here may characterize this debate over Miguel Estrada in a variety of ways, but many of us believe—I think the Senator from Nevada shares this belief—what is at issue here is a constitutional principle. It goes to the founding of our Republic. When the Founding Fathers decided that this body of 100 people would have the last word, to advise and consent on appointments to the Federal bench of judges who were seeking lifetime appointments, this is no trivial thing. It is not a personal thing when it comes to Miguel Estrada.

I think the point I tried to make to the Senator from Nevada: We have approved 103 nominees from the Bush White House without fail, each one of them conservative politically. I am sure I disagree with them on many issues, but so be it. That is the nature of the system.

I ask the Senator from Nevada, what is at stake in this debate, the reason it is taking so much time? Is it not a constitutional principle that goes beyond a cute political phrase as to whether or not this Senate is going to meet its constitutional responsibility to make sure that every nominee is honest and open and candid with the American people and the Senate so we do not end up with a secret judiciary, men and women who skate through by keeping their mouths shut?

I am sorry your grandson has become the object of this debate, but his answer to the question is a priceless one. When he was asked if he was guilty of mischief, he said: I don't remember the name of the person who was. That is the kind of evasive answer we have with Miguel Estrada. It goes way beyond a catchy political phrase. It goes way beyond political posturing.

I ask the Senator from Nevada, did we not sit here yesterday, both of us, going to the Constitution itself, to read again our constitutional responsibility when it comes to advice and consent on the judges nominated by any President?

Mr. REID. Article II, section 2.

I am happy to yield to my friend from Utah.

Mr. HATCH. I appreciate it. I knew he would. My friend is a very fair and

very decent man. Personally, I just want to correct the RECORD. We did not use the term ''weapons of mass destruction.'' We used the term ''weapons of mass obstruction.''

Mr. REID addressed to Chair.

Mr. HATCH. The Senator yielded to me. We have used what was used in the Senate retreat for the Democrats in 2001, exactly what these liberal law professors said Democrats should do to mess up the confirmation process and make it difficult for this President to be treated fairly. If these are not weapons of mass—obstruction—to make it clear, then I don't know what they are. But I would be ashamed to use all of those approaches. Above all, I would be ashamed to use a filibuster, the first time in history, to risk the whole judiciary because of partisan politics, and to do it against the first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia.

What is fair about that? What is right about that? I would be ashamed.

Mr. REID. I thought the Senator had a question for me.

Mr. HATCH. I thought I was yielded the floor.

Mr. REID. I technically yield the floor. I thought it was for a question. You have the floor.

Mr. HATCH. If not, I apologize.

The PRESIDING OFFICER. The Senator has the floor.

Mr. HATCH. And then bring up Moreno, as if there were a blue slip policy issue? It could have been. But the real issue was that the White House refused to consult with the two Senators of the State. I wrote a letter to Chuck Ruff and said: You need to consult with them. And they never did.

I have to say, in my chairmanship, if this administration doesn't consult with two Democrat Senators in the State, that nominee is not going to move. Now, I am not going to put up with a screwed-up definition of what consultation is. But they are going to have to consult. And they are consulting. That has been my direction to Judge Gonzales, to the Justice Department, to anybody: You need to consult with Democrats and Republicans up here. We do have some rights as Senators.

But let me tell you, I personally resent anybody trying to compare what we are doing here, quoting liberal law professors who ought to know better, by calling what they have suggested to the Democrats ''weapons of mass obstruction''—it is a far cry from ''weapons of destruction.''

This is true. There is not a word on there that is not true. You go down to the bottom line, which is, if you can't win on all these other procedural mechanisms that really are not valid, then you filibuster; for the first time in the history of circuit court nominees, we have a true filibuster. And to do it against the first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia I find particularly reprehensible. But it is not just that. It is not just that. The real reason they are doing this is that they are so afraid that this brilliant young Hispanic lawyer, with all of these credentials, may someday be tapped by the President for the U.S. Supreme Court. The very fact that he is considered for that shows the quality of the man.

But look at his record. Then, to try to imply that he did not answer questions, or even state that he didn't, with this kind of hearing record, when they controlled the whole process, I think is particularly wrong.

Look, I happen to respect my colleagues on the other side. I like them. I definitely have a great relationship with my friend from Nevada. We are close personal friends. This isn't the usual language around here. I am saying he is one of my close personal friends. I would do almost anything for him. I like the Senator from Illinois. He is one of the brightest, most articulate people in this body. He is a good lawyer.

But I tell you, I have never seen anything like this, not in my whole time in the Senate. I think it is wrong. I think it is wrong.

You know what is driving all these outside left-wing groups that are out there? It is their base, and they even say it, led by People for the American Way who are acting in a very un-American way: Distorting these people's records, bringing partisanship in, demanding litmus test votes, demanding a filibuster, which is exactly what the other side has done. They are hurting this process like you can't believe.

Are my colleagues on the other side listening to that stuff? We have had some on our side listen to it, but we have always stopped it. I am really concerned about it. I am concerned about this process. As important as Miguel Estrada is, this process is even more important. But I have to say, Miguel Estrada is a terrific nominee. They should have to come up with something valid or substantive, not just all of these philosophical objections that really have no merit to begin with.

Mr. REID. Will my colleague yield?

Mr. HATCH. I am happy to yield.

Mr. REID. The Senator raised a personal privilege.

Mr. HATCH. I withdrew that.

Mr. REID. And then I yielded the floor.

Mr. HATCH. You did.

Mr. REID. I didn't do it in the proper way. I had not finished my statement. I should have said, I yield the floor to my friend for a question. I didn't do that. I hope the Senator doesn't talk too much longer so I can get the floor back.

Mr. HATCH. Let me honor my colleague's request by just saying that I hope we can work fairly through this process. I know my friends on the other side don't like President Bush or don't agree with his philosophy, and they don't agree with his choices of judges. Several of them really feel that way, and they do it sincerely. I can understand that. But let's treat them fairly. Let's treat the President of the United States fairly. Some day the Democrats will have that position. I hope it is not in the near future. But they may have that position. And if I am here, I am going to treat them fairly, which I did for President Clinton. I think everybody around here knows it. I made every effort I could.

If my colleague asks for the floor back, I will be glad to give it back at this time.

The PRESIDING OFFICER. The Democratic whip.

Mr. REID. Mr. President, I want to complete my statement, and I will be very brief.

I think it is improper. I have attended every Democratic retreat that has been held in the last many years. I don't remember anyone ever saying that at a retreat that I attended. It is improper and not good to use it at a time when the President is talking about going to war, when we have a war going on with terrorists today.

Suffice it to say that Miguel Estrada's answers to Judiciary Committee questions are just like this, a blank slate. He has given answers, as my grandson answers questions: I don't remember his name.

We refuse to serve as a rubberstamp. We believe strongly that there is a way out of this, and that is by answering the questions that were asked in detail as have other nominees who have come before us. We also believe he should supply the memoranda that he wrote when he was in the Solicitor General's Office.

We believe this is our constitutional duty. And as I said before, everything has been said. We are going to figure out, however long the majority leader wants to talk, different ways to say it. But we are not going to back down from this. This is something we believe as a matter of principle. If we let this go through, somebody can come before the Judiciary Committee and, in effect, give them nothing and say, boy, I showed you guys. I think people need to be candid, forthright, and he has simply not done that. The record is very clear to that effect. I think using the term ''weapons of mass obstruction'' is wrong.

Mr. BENNETT. Will the Senator from Nevada yield for a question?

Mr. REID. I am happy to yield for a question.

Mr. BENNETT. The Senator from Nevada has said this morning that the

Democrats would not allow a vote on this nomination. He has also said they want to see the memoranda that were compiled by Miguel Estrada while he was working for the Clinton administration.

Mr. REID. And the Bush administration.

Mr. BENNETT. And the Bush administration. I would ask the Senator from Nevada if he knows of any Senator on his side who, upon seeing the memoranda, would change his vote and allow a vote, not change his vote and vote for Estrada but change his vote and allow a vote on Estrada upon seeing the memoranda?

Mr. REID. We would have to leave that to individual Senators. I am sure there could be some. It would be very helpful.

I am not a member of the committee, but we have a former chairman and ranking member here and one of the active members who has been on the floor a lot during this debate.

It could be very important in arriving at a decision about how you feel about this man if he did give his opinions. It helped with Rehnquist. It helped with Civiletti, Roberts, and a number of other people who came before various committees seeking their attention in the Senate.

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

Mr. REID. I am happy to yield without losing my right to the floor.

Mr. LEAHY. Mr. President, if the Senator from Nevada is aware of what the Senator from Vermont said, I realize the junior Senator from Utah was not in the Chamber at that time—the senior Senator from Utah was, as was the distinguished majority leader—it would be safe to say to the distinguished Senator from Utah that the Senator from Vermont stated this morning very clearly that I would be prepared to see this go to a vote once response would be made. And the Senator from Vermont noted that Mr. Estrada himself said he had no objection to having all this memoranda that we have sought made available but had been told by the administration that he would not be allowed to.

If the question is how various Senators would feel if the memoranda were made available and we were allowed to question Mr. Estrada, something he said personally that he would have no objection to, then as far as I am concerned I would be perfectly willing after that to have the matter go forward to a vote and have Senators vote up or down however they may feel.

Mr. REID. I would respond to my friend from Vermont, I would only add this: I think if the memoranda raise any questions, then certainly the members of the committee would be entitled to ask questions relating to those memoranda and get better answers—I should say, get answers, period—to the questions that were asked relating to those memoranda. That is fair; would the Senator agree?

Mr. LEAHY. I would agree. In fact, that is what I said again this morning. If we had the memoranda, something Mr. Estrada said he is perfectly willing to let us have but the administration wouldn't let him, but if we had the memoranda, if we were able to ask what he meant by this or that in the memoranda, once that was done, if he answered those questions, whether I agreed or disagreed with the answers to the questions, this Senator at least is perfectly willing to have it go forward on a vote, which is basically what we did with numerous other Democratic and Republican nominees in the past in similar circumstances. I don't want there to be any question about that.

This Senator is perfectly willing to have this matter come to a vote once Mr. Estrada did what he has said that he is perfectly willing to do—make available his memoranda and answer questions about them. So far only the administration has refused, and the distinguished Democratic leader and I wrote a letter to the President to that effect.

Mr. REID. That was yesterday.

Mr. LEAHY. That was yesterday.

Mr. REID. It is no secret that the ranking member, on behalf of the members of the committee, has for weeks and weeks sought this information.

Mr. LEAHY. Absolutely.

Mr. REID. Does the Senator from Utah have another question? I would be happy to yield without losing my right to the floor.

Mr. BENNETT. Mr. President, without the Senator from Nevada losing his right to the floor, I would like to continue a discussion at this point.

The PRESIDING OFFICER. Without objection.

Mr. BENNETT. Because I see perhaps the makings of a deal here, if indeed the senior Senator from Vermont is willing to allow this to go forward if the memoranda were made public and if indeed the nominee himself knows of nothing in the memoranda that would be objectionable, it comes down now, ultimately, to the decision of the client because this was an attorney serving a client, the decision of the client to allow this information to come forward.

Now, every living Solicitor General has said it would be a bad idea for this to come forward. The Washington Post has said it would be a bad idea for it to come forward. But if it could be worked out that on a one-time basis, not setting precedent, the opinions of the Solicitors General, both Republican and Democrat, could be set aside and these memoranda could be made available, do we have a commitment that, then, this could come to a vote? Because if that is the case, I, for one, would go to the administration and say let's allow it to come forward.

I recognize this is a precedent no one wants to set, but I think the precedent of establishing a filibuster is one nobody wants to set. I would be happy to join with the Senator from Vermont in asking the administration to consider these memoranda to be made public if, in fact, we can get a commitment that upon their being made public, we could get a vote.

Mr. REID. Mr. President, I say to my friend from Utah that even though he is not a lawyer, he certainly acts like one. I won't tell anybody in Utah that.

Mr. BENNETT. I am not sure that is a compliment.

Mr. REID. I indicated I would not tell anyone in Utah.

I want to respond to this question. The Democratic leader and the ranking member of the Judiciary Committee wrote a letter to the President of the United States yesterday and outlined exactly what we have talked about today. If, in fact, the memoranda were made public, were given to the Judiciary Committee—and it has happened other times in the past—and he would respond to questions, we would be happy to take another look at this man. That is what the letter said to the President of the United States. I said last night, and this morning, that there are a number of ways out of this: Pull the nomination, give us the information we want, the memoranda, and answers to these questions, or file cloture.

I yield to my friend from Illinois.

Mr. LEAHY. If I might, Mr. President, the suggestion has been made on the floor that this is a one-time precedent. It is not a fact that this is a one-time precedent. It happened in the nominations of Robert Bork, William Bradford Reynolds, Benjamin Civiletti, Stephen Trott, and William H. Rehnquist.

I yield to my friend from Illinois.

Mr. DURBIN. I say to my friend from Nevada, thank you for yielding. And I say to my colleague from Utah, Senator BENNETT, with whom I share some responsibility on the Appropriations subcommittee, and whom I have found to be an extremely fair person, I think perhaps he has come up with the solution to the gordian knot we face.

We are not against Miguel Estrada. Without information, we cannot make a judgment on Miguel Estrada. We believe it is our constitutional responsibility to ask of every judicial nominee, from both Democratic and Republican Presidents, obvious important questions. In the case of Mr. Estrada, since he never served as a judge, he has legal writings, legal memoranda, legal opinions. We are asking him to share those with us so we can have insight into who he is, what he believes, and what he will do with a lifetime appointment to one of the most important Federal benches in America.

That is what this is about. It is not about being Hispanic. If you look at the record on the Democratic side, President Clinton appointed far more Hispanics to the bench than any other President in history. We supported him, and we continue to support that. I believe this affirmative action by the

White House to bring Hispanics into the judiciary is a good thing for America. Our judiciary should reflect the diversity of the country. Whether they are Hispanic, Irish, or Lithuanian, we are going to ask the hard questions. Then the Senate will make a decision. The thing the Senator from Nevada has stated repeatedly is that what we are about today is a real quest for information, a search for information.

I hope the Senator from Utah will prevail not only on his leadership, but on the President, to follow the Bennett model here—full disclosure. Bring the legal memoranda and writings before us, let us ask the obvious questions that they will lead us to, and then let us consider up or down this nomination. That is an honest approach, and I think it would avoid what we have been through in the last couple weeks. Isn't this what the Senator from Nevada has been asking for and what the leadership has been asking for?

Mr. REID. I say to my friend from Illinois, I have said not once, not twice, I don't know how many times—over a dozen times—if this man is as good as they say he is, this seems to be such a small push, to have him answer questions and give us his legal memoranda. That is what we are asking, because as I had shown through my visual aid today, we have nothing from him. If he is as good as they say, I repeat, bring that forward. That would make us happy in so many different ways. It would show that we don't have to take these people given to us, just jammed through, having blank slates. We have the right to ask questions.

Secondly, it is important because I believe it sets a very dangerous precedent that Miguel Estrada, HARRY REID, DICK DURBIN, or anyone going through the process can go through without the Senate having the ability to learn who they are. We have that obligation. The Senator is absolutely right. We sat back there next to one another yesterday looking through the Constitution—we both had one—looking up article II, section 2, to make sure we felt good about what we were doing. I think it is very clear that our constitutional responsibilities not only allow us to do this but demand that we do it. We have an obligation to not only this Senate but future Senates, and not only the people of America today but future generations, that we are doing the right thing.

Mr. DURBIN. If the Senator will yield further for a question, I listened earlier when the Senator made his presentation about Miguel Estrada and what he said and did not say to the Senate Judiciary Committee and to the American people. He was challenged by Senator HATCH, who produced a binder and said: Have you read the words in here?

The Senator from Nevada said: You can evade answers and fill up pages and pages.

I would like to read, if the Senator will allow me, one exchange that I think gives light to why we are here today. This was between the Senator from New York, Mr. SCHUMER, and the nominee. Senator SCHUMER asked the following question:

> Other than the cases in which you were an advocate, please tell us three cases from the last 40 years of Supreme Court jurisprudence you are most critical of.

Mr. Estrada answered:

> I'm not even sure that I could think of three that I would be—that I would have a sort of adverse reaction to, if that's what you're getting at.

Senator SCHUMER asked:

> So with all of your legal background and immersion in the legal world, you can't think of three or even one single case that the Supreme Court has decided that you disagree with?

Answer:

> I don't know that I am in a position to say that I disagree with any case that the Supreme Court has ruled on or that I think that the Court got it right.

Senator SCHUMER:

> I'm not asking you how you approach cases. That is a legitimate question and some have asked it. I want to know how you feel about cases, and you have said more broadly than any other witness I have come across, you have given us virtually no opinion on anything because it might come up in the future.

Answer:

> But the problem is the same, Senator Schumer, because in taking case A and looking at whether the Court got it right or whether I think they got it right, I have only the benefit of the opinions. I haven't seen the litigants. I haven't—the case is ruled on, but I don't get to see what didn't make it into the opinion.

That is the end of that exchange.

I went to law school many years ago, as did the Senator from Nevada, but if they put you on the spot today and said can you think of one Supreme Court case with which you might disagree——

Mr. REID. I think maybe I would come up with Dred Scott.

Mr. DURBIN. A case that approved slavery in the United States is one with which we might disagree. Why would a man with his academic and legal background not have that spring to his mind? How about Plessy v. Ferguson, separate but equal?

Mr. REID. That was another dandy they did.

Mr. DURBIN. Those are two obvious ones. You don't have to go to law school to think about those. This is an example of the how he filled up a page, and what did he say? I guess he would say: If I didn't get a chance to meet Dred Scott, I will not comment on that case. I didn't know Mr. Plessy or Mr. Ferguson, for that matter, so I should not say what I think about that.

You wonder why the Democrats are coming to the floor and saying, for goodness' sake, this makes a mockery of the process. If a man wants a lifetime appointment to the second highest court in America, should he not be more honest, open, and candid? That is all we are asking today.

I ask the Senator from Nevada, does he believe, as Senator BENNETT is suggesting, that if there is full disclosure and openness that this will come to a vote? Miguel Estrada's legal memoranda will be presented, we will have a chance to ask questions, he will give us straight answers instead of these evasions, and then let the chips fall where they may; is that not what we are about?

Mr. REID. Yes, that is what we have been saying, and I told the majority leader this morning, this is no game we are playing; this is a filibuster. We have a right to do that. Why? Because we believe that what is being done is wrong.

I say to my friend from Illinois, we talk about article II, section 2, but the Constitution is a little document. It is so unique, and it does so much to protect people. The Constitution was not written to protect majorities. They can always protect themselves. It was written to protect minorities.

We know that the majority would vote 51 for this man today, and I think we have set a very bad tone for what we are doing in this country. What we have said is, there are a significant number of Democratic Senators—well over 40—who say this is not right. If we do this, why do you need the Senate? If you do this, why not just have, instead of President George, King George? He can just tell us what he wants done. It is not King George; it is President Bush. As a result of that, he has to go through this process, and if he wants this man, who they say they like so much, then let them come forward with the memoranda he wrote when he was in the Solicitor General's Office and let him answer some questions. It is as simple as that.

Mr. DURBIN. If the Senator will yield for a further question, I, of course, will give my friend and colleague from Utah the opportunity to respond.

Mr. REID. I yield to my friend for a question.

Mr. DURBIN. I wish to ask this question. I assume the Senator from Nevada, as a Senator from that great State, has had an opportunity to sit down with judicial nominees who were seeking district or circuit court appointments affecting Nevada and probably has nominated men and women for the Federal bench in Nevada. I do not know what his process has been. I have had that great honor in Illinois, and I try to get to know these people. I ask them questions to get an idea of what is going on in their minds.

It is not uncommon for me to ask the question we asked Miguel Estrada: Can you think of a Supreme Court case you think was particularly good or particularly bad and tell me why, as open-ended and as nonconfrontational as possible?

I say to the Senator from Nevada, this is a question I asked Miguel Estrada, and I ask the Senator from Nevada to think about it in the context

of interviewing nominees for the Federal bench in Nevada. A simple question and a simple answer. The question I asked was:

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

That is a pretty tame question: Tell me who you admire.

Answer—this is Miguel Estrada:

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

Forgive me, you cannot go through law school, you cannot be a clerk at the Supreme Court, you cannot argue before that Court 15 different times and not look at least at those nine Justices and think: I like that Justice's approach, or read the history of the Supreme Court and think: This judge added something to America; I would like to emulate this judge.

If you have no heroes, living or dead, among the Federal judiciary, the obvious question is, Have you been paying attention? Have you noticed that men and women have made a difference for America sitting on the Federal bench?

Here is this man being carefully groomed by the White House to move to the highest circuit court in our land, the DC Circuit, and perhaps to the Supreme Court—no one has denied that—and he cannot give us an answer to that question? It is the reason why we are here today.

I ask the Senator from Nevada, when he brings nominees before him for his State, what kind of questions does he ask them?

Mr. REID. Mr. President, I respond to my friend, I think he asked a trick question. I am being facetious, of course. I think that answer—that is why I sat here, and I have sat here for days now and the Senator has been in the Chamber—but I finally came upon it: I do not remember his name, just like my little grandson. That ended the conversation. He could not remember whether it was one of his brothers or his grandmother. So that ended that. That is what we have here.

We have a man who is evading answering a question. Obviously, he was pretty smart in doing that. He filled up a whole book saying: I am not going to answer. He filled up a book of nonanswers.

It is my understanding that the Senator from Utah wants to ask a question.

I allow the Senator from Utah to ask a question without losing my right to the floor.

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

Mr. BENNETT. Mr. President, I have now been given a copy of the letter signed by Senator DASCHLE and Senator LEAHY addressed to the President. As I have examined the letter, I do not find in it the commitment I have been seeking in our dialog here. So I renew that with the Senator from Nevada. The question is, Could we on this side of the aisle get a commitment that we could go to a vote if the memoranda were delivered? Senator DASCHLE and Senator LEAHY do not give that commitment in this letter. They simply say they want that information, they would appreciate the President's personal attention, and that they need the information in order to make an informed decision.

I think most of the Senators have already made their decision, be it informed or otherwise, and the issue that I am striving at is to try to get an up-or-down vote, an opportunity for them to express their decisions. So I am asking again——

Mr. REID. I respond to my friend, I think we have answered that very deliberately to the effect we feel that the memoranda are important, and we feel his answering questions regarding the memoranda and a couple of other issues are important.

This is my recommendation to the majority leader and to my friend from Utah who is, by the way, a deal maker, and there is nothing negative at all about that. Legislation is the art of compromise, and this is no different than any other issue.

If I were majority leader, I would simply ask the White House to supply this information, and that answer speaks for itself. I think if the information were forthcoming and the man, either in writing or otherwise, answers a few questions—I do not know what questions could come up by virtue of that information—but my answer speaks for itself. I think the majority leader should have that done. We should go on to other business in the Senate. There are other judicial nominations. There is other substantive legislative business on which we can work. I think when we come back from our break, this matter could be resolved very quickly.

I do say that unless this is done, this nomination is going nowhere. We have waited a long time to announce we were conducting a filibuster. We understand the seriousness of looking at judicial nominations in the manner we did. We understand. We understand the heartburn we are causing Senator HATCH. We know how he feels, that this is intemperate and wrong. We know, as we have explained in conversation between Senator DURBIN and me this morning, that it is extremely important we do this. We are locked in. We have talked to our Members over here. We are locked into this, but this does not mean if the information is forthcoming—and we will do what we think is appropriate. The margins in the Senate are very slim. You do not have to change a lot of votes to get what you want.

I suggest if you do what we want, things will work out probably for you. If you do not, nothing is going to happen.

Mr. BENNETT. Mr. President, if I may, I ask unanimous consent, without the Senator from Nevada losing the floor, to make a comment.

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

Mr. BENNETT. I think the Senator from Nevada and I could probably make a deal here, but we are both representing groups behind us. What I would search for would be a firm commitment that this can come to a vote, not a statement that, well, we will do the right thing; not a statement that we will review the answers; but a firm commitment that if the memoranda is produced and Mr. Estrada gives answers with respect to that memoranda, we can then have a firm vote.

The Senator from Illinois has given us an example of a question that was asked. He received an answer. He considers the answer totally inadequate and improper, but he received an answer. If we get into this conversation and say, all right, the memoranda will be produced, he will be questioned, and then you say, We do not like his answers, so we still will not give you a vote, that is not a blind alley into which I want to go.

Mr. REID. Mr. President, let me reply to my friend. Without that information, Miguel Estrada will never be a Federal judge. We have talked with our Members, and it does not matter if there is 1 cloture vote or 50 cloture votes, we will all be together on that—those who have agreed to hold up on this nomination.

I am speaking only for myself, but I think if he supplied that information, not evasive answers but tried to be fair in responding to any questions we had regarding those materials—and answers to some of these other questions people feel serious about—it would be resolved. I have no doubt that would be the case. So I think the Senator could spend his time with the significant influence he has—I know he is filling in for my counterpart who is ill temporarily, and that shows the respect people have for him on his side of the aisle—I am sure if the Senator from Utah went to work on that side, it would bear fruit. If it does not happen, nothing will happen other than acrimony, which is too bad because we are going to see this one through.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I thank the Chair. I thank Senator BENNETT for the contribution he has made. I hope he understands my position—I cannot speak for others—once this nominee has made full disclosure—his legal background, opinions, memoranda, his answer to questions—frankly, I would view him as other nominees. I may vote for him or against him. I think I voted against 6 out of 103 of President Bush's nominees. I have not made a pattern of this, but some disagree with this thought. I think that is where we are leading to. I hope that is where we are leading to.

More importantly, I hope the Senator from Utah understands why we are doing this. There is a belief among some that with the newfound majority on the Republican side since the last

election and with the control of Congress by the Republican Party and the White House, the process is going to be pushed aside and things are going to be moving quickly through without the kind of deliberation we have had in the past in the history of the Senate.

Some have suggested that on their way to the bar serving on the bench, people will be moving through the Senate Judiciary Committee like the receiving line at an Irish wedding, and I hope that does not happen. I think what we need to have is a deliberative process where Members have a chance to ask questions of every nominee, and then, satisfied or not satisfied, they come to a vote.

Make no mistake, Miguel Estrada is opposed by a variety of organizations which believe they know who he is and have seen enough evidence to raise questions in their mind. But I think for the sake of the Senate as an institution, whether Republican or Democrat, what we are asking is not unreasonable.

When one reads these answers from this nominee, they have to say to themselves, why is the Senate Judiciary Committee wasting its time? Because if someone can get by with that type of an answer where they cannot identify one single Supreme Court decision they disagree with, they cannot name a single Federal judge, living or dead, whom they admire—if they can get by with that, why are we here?

It reminds me of the Clarence Thomas nomination when he said before God and the world he never considered the issue of abortion in his life, had no opinion on it. A man who was a former Catholic seminarian at Conception Abbey in Missouri, a man who had been in law school when Roe v. Wade was decided, had no opinion on the issue of abortion? I guess that sort of thing was glossed over because of all the other hoopla and attention given to his nomination, but I thought to myself—and I was not in the Senate at the time—would the Senate Judiciary Committee let others get by with this where they do not even answer the question?

I can tell the Senator from Utah, and others who are following this matter, there have been nominees who have come before this Senate Judiciary Committee with whom I have disagreed vehemently on issue after issue. In fact, I have even successfully nominated judges to the bench in my State whom I disagreed with on basic issues. But I am not looking for a person who has the same political DNA that I am bringing to this job. I want a person who is moderate and reasonable, who shows that they are open minded and prepared to be a fair jurist.

How can one reach that conclusion about a person without asking some very basic questions to try to get into their mind a little bit as to what makes them tick and where their values might be?

Think about the election process for the Senate. Is that not what it is about? Don't the voters of this country basically want to know, whether it is ROBERT BENNETT or RICHARD DURBIN, who are you? What are your values? What are you likely to do?

We cannot predict what votes they are going to cast, but what have they done in the past or generally how do they feel about the principles and the constitutional values of this country? Those are some pretty basic questions. Why wouldn't we ask that of a person seeking a lifetime appointment to the Federal bench, a person who, with the stroke of a pen, could basically wipe out a law or say that a law is valid? That is an enormous delegation of power to the judiciary, particularly to this level of the judiciary.

What we are saying today when it comes to Miguel Estrada is we want to know some basic answers. We do not expect him to tell us his opinion of a case pending before the DC Court and how he is going to rule. Lloyd Cutler is right; we should never ask about a particular case. But to ask a judicial nominee their views on the issue of privacy, is that an important issue today?

Pick up this morning's paper. We are going through a debate now as to whether the Department of Defense can collect information about Americans across the board in the hope of finding those who might be threatening this country with terrorism, and Congress has basically said to the Department of Defense: Close that shop. We do not know if we want you mining these data banks across America at the expense of the privacy of individuals' rights and liberties.

This is an issue which is not going away. Since September 11, 2001, it has been front and center in the national debate and will continue to be.

So when one asks a judicial nominee, a person who is going to the second highest court in the land with a lifetime appointment, what is their view on the issue of privacy, is that an important question? It is not only important; it is timely; it is critical. And for nominees such as Miguel Estrada to basically say, I do not have an opinion, that tells me we have a problem.

We should be able to ask these nominees the most basic general questions relative to constitutional law and the rights and liberties of Americans, and we should not apologize for it.

I have told my colleagues in the Senate Democratic Caucus, I met Miguel Estrada. I sat down with him. I have read his background, his personal resume, his legal credentials. They are very impressive. This is a man who has come very far in his life against great odds, and I respect him so much for that. He is an immigrant to America.

I have a special affection for immigrants because my mother was an immigrant. I am proud to put her naturalization certificate in my office for everyone to see that I, as her son, would be standing today as a Senator from Illinois. Immigrants such as Miguel Estrada, my mother, and so many others bring so much to this country. So from a personal point of view, I admire this man very much. His legal credentials put me to shame. As a law student, I never got close to his level of achievement in law school, so I certainly admire that.

Having said all of that, accepting that he is a good person, accepting that he has a marvelous career as a lawyer and as a law clerk, I still need to ask some basic questions in terms of where he is going, given this position of responsibility. When the Democratic Caucus sat down, they decided this was an important issue to raise. Miguel Estrada was the case in point.

It is an important issue relative to the role of the Senate when it comes to President Bush's judicial nominees. If we cannot ask the questions, if we cannot ask questions that have been asked of nominees over and over again when Presidents of different political parties have been in power, then frankly we have given up more than our political right, we have squandered our constitutional responsibility.

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

Mr. DURBIN. I would be happy to yield for a question.

Mr. BENNETT. I want to pursue this with the Senator. If we can get Miguel Estrada to give the Senator the name of a Supreme Court Justice whom he appreciates, along with the memoranda, and answer questions on the memoranda, would the Senator—not speaking for his caucus, just for himself—agree to give us a vote?

Mr. DURBIN. I say to the Senator, obviously we do not know what the answers might be and what they might lead to, but what he suggests as a basic principle is one I stand behind. When nominees are open and honest with the Senate Judiciary Committee and the Senate, they are entitled to a vote.

Mr. BENNETT. I appreciate the comment of the Senator because we must understand, once again, we are not talking about the Senate rubberstamping something from King George. We are talking about the Senate entering a whole new era of saying a nominee must be approved by 60 votes—which is something we have not done before. I appreciate the Senator's understanding of how serious this is, that because Miguel Estrada gave answers that were not acceptable to some members of the Judiciary Committee, and because this memoranda has not been forthcoming—not at his request, but at his clients' request—we are now going to sail into a whole new sea. I hope everyone understands how significant that is, regardless of the qualifications of this man.

I will do what I can to get him to come up with a name for the Senator from Illinois. I do not know if I will be successful. If that is the whole thing stopping his confirmation, that he could not think of a Supreme Court Justice whom he admired under those circumstance and if, after reflection,

he now can come up with a name, we would like to see the Senator from Illinois allow this to come to a vote.

Mr. DURBIN. We gave two illustrations where we asked Miguel Estrada for a Supreme Court Justice, or a Federal judge, living or dead, he would emulate and admire; we also asked for a Supreme Court case he might disagree with. Senator SCHUMER asked the question. I say to the Senator from Utah, those are two very egregious illustrations of his evasion. There were others.

I cannot speak for my colleagues, but I will go back to the premise of my reply. I believe when a nominee is open and honest and cooperative, they are entitled to go through the process and have a vote. That is my personal view. I don't speak for any other Senator.

I have felt the same about issues on the floor of the Senate. My feeling is this: This is a deliberative body. We take our views on issues to the court of public opinion and to the 100 Senators gathered. We should be entitled to produce an amendment or a bill, debate it, and have an up-or-down vote. I think that is what the process should be all about. I have lost plenty in the Senate—the Senator of Utah can attest to that—I have won a few, but lost quite a few, too. I accept that consequence. That is why we serve.

The same is true with nominees. If they are open and cooperative, they are entitled to go through the process, whether nominated by a Democratic or Republican president.

When you take a look at the groups that oppose Miguel Estrada, many of them have seen in his background areas of great concern. Consider the groups that have opposed him: The Congressional Hispanic Caucus—all members of the Congressional Hispanic Caucus have opposed this Hispanic nominee; the Mexican American Legal Defense Fund, which is the premier civil rights organization for Mexican Americans and many Hispanics in the United States, opposes Miguel Estrada; the Puerto Rican Defense and Education Fund opposes Miguel Estrada. And then more generic groups: The Leadership Conference on Civil Rights, NARAL, Pro-Choice America, the Sierra Club, the National Women's Law Center, People for the American Way, and many others. I had printed in the RECORD yesterday the names of the organizations and I will not take up the pages of the RECORD again today with those illustrations.

The clear question before the Senate is why a man with such a compelling personal story and such great legal credentials has so many groups questioning whether he is the right person for a job. Some of it has to do with his evasion. Some has to do with the secrecy that has surrounded his nomination and the suggestion that this relatively young lawyer is on his way to the Supreme Court as early as next year.

Many believe when it comes to Supreme Court nominees, there are certainly higher standards that need to be met, but the DC Circuit Court is not far behind. As I said yesterday, the DC Circuit Court is the AAA for the major leagues on the Supreme Court. We have been told time and again by the ''great leakers'' at the White House, Miguel Estrada is on the fast track of the major leagues, the Supreme Court. We want to know his batting average and we want to know whether he can take an inside pitch. And he will not answer those questions. That really calls into question whether we are meeting our responsibility.

As I said yesterday, the choice is simple. It is a choice between the Constitution, article II, section 2, which says the Senate shall advise and consent to nominees. It gives us a role of responsibility to advise and consent. Or whether we will give up this Constitution for a rubberstamp and just say, as the President sends his nominees, thanks a lot, Mr. Bush, ''approved.'' I will not do that. I don't think I was selected for that purpose.

I think the Senator from Utah is understanding better what we are about. The fact Miguel Estrada has refused to disclose his writings is unprecedented. We have at least five illustrations, including Justice William Rehnquist, nominated as Chief Justice of the Supreme Court, who produced his writings so we could understand more about his thinking before he assumed the highest judicial post in America.

Antonin Scalia, who was called on to rule in a case involving the disclosure of legal views, Antonin Scalia, absolutely the hero of the rightwing in American politics and of our President, when he had to rule on a case as to whether or not nominees would disclose their opinions on legal issues, the case was the Republican Party of Minnesota v. White, Justice Antonin Scalia said:

> [E]ven if it were possible to select judges who do not have preconceived views on legal issues, it would hardly be desirable to do so. ''Proof that a Justice's mind at the time he joined the Court was complete tabula rasa [blank slate] in the area of constitutional adjudication, would be evidence of lack of qualification, not lack of bias.''

So, many of us, despite this impressive resume of Miguel Estrada, have fundamental questions. Is the man qualified for the job? By stepping back and saying, I am a blank slate, can't think of a Supreme Court case I disagree with in its history, can't think of a Supreme Court Justice or any Federal judge whom I admire, you wonder why we have questions about him? You wonder why this extraordinary debate is under way?

I see my colleague from New Jersey has come to the floor and I thank him for joining us this morning.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. CORZINE. Mr. President, to my colleague from Illinois, who is so eloquent on so many issues, his articulation, a reason why it is so important we challenge this nomination, if not the nominee, because of the process we have gone through, is just overwhelming. I think it is a basic sense of responsibility we should have as Senators. If we do not ask the questions on how one will respond in a jurisprudence context to not specific issues but general thought process before we hire someone to be an appellate court judge, I don't think we are fulfilling our constitutional responsibility of advise and consent.

Would the Senator hire someone if you had not been able to ask how they may think about some of the basic processes and logic they might bring to bear in giving you advice with regard to legal counsel in your office? It is incredible to me. No one with a blank slate would turn over such an important duty without doing a serious interview process to understand at least the thinking process of an individual.

Mr. DURBIN. Just to respond to my colleague from New Jersey, not only would I not hire them, I would be derelict in my responsibility in doing so. I think the Senator from New Jersey would agree, many times he has asked prospective staff people their opinions—and may even disagree with them. I, frankly, believe within my legislative staff there are people who think I am wrong on some issues. That is not only their right but their responsibility to give me that point of view. But at least going in, that is a pretty basic question.

If we can't ask Miguel Estrada, who is seeking a lifetime appointment to the second highest court in the land, what is in his mind in terms of his values and principles when it comes to constitutional law, then we have failed as Senators and we fail our constitutional responsibility.

Mr. CORZINE. Mr. President, I could not agree more with the Senator from Illinois. I have a responsibility to the people of New Jersey to make sure we ask serious questions with regard to how judges are selected. In my own process in reviewing district court judges and circuit court judges that we are asked to opine about by the White House, about how we would react, I have a bipartisan committee that does just exactly that. It sits literally for hours to make sure we have some sense of the approach future judges might take, how they think about issues, how they feel about constitutional principles. I think this is one of the most important debates we can have with regard to the responsibilities of being a Senator—making sure, when we determine the people who are actually going to sit on the court with lifetime appointments, that we do so with the full knowledge and understanding of where they are coming from.

By the way, that is not to say you are going to agree with everyone with regard to all aspects about how they might think about issues. But you

ought to at least understand what you are getting into. I certainly hope we will have the opportunity to review real information on this as we go forward.

THE BUSH BUDGET

Mr. CORZINE. Mr. President, I come to the floor to make a statement with respect to something I believe is vital that the American public get focused on. Last Monday President Bush proposed a budget to the American people that, if it were adopted, would basically dramatically change the landscape, reshape the future of our Nation in a lot of different ways. I would like to speak about that in the context of a few ideas today.

I hope I can come here every day, as long as is necessary, to make sure we raise up this, I think revolutionary document, radical document, with regard to what the shape of our economy and the shape of our participation of the Federal Government in our life in America is about.

Perhaps because of its release so soon after the tragic *Columbia* shuttle tragedy, the budget has not received the public attention it deserves. Frankly, we had unbelievably revealing testimony by the Chairman of the Federal Reserve yesterday with respect to how that budget fits into the overall concept of fiscal responsibility and fiscal prudence that is so important for Americans to understand. But even with that, even with such dramatic statements coming from the Chairman of the Federal Reserve, the budget has not received the public's attention. I think we need to raise up the debate that is embedded in many of the propositions that are made in the President's budget.

I do not think this is a run of the mill—these are the revenues, these are the expenses. By the way, we are going to have a $307 billion budget deficit, but that is not so important. This is a radical change from the direction that we in this country have been moving for a very long time. I don't think we are talking about it in those contexts, and I think the American people should understand the huge implications of its many far-reaching proposals.

There are so many significant elements in this budget that it is difficult for me to actually even know where to start. The big picture is clear. The Bush budget is fiscally reckless, in my view, and imprudent in the extreme in the macroeconomic context, and would substantially reduce the security of America's working families for decades to come. I will try to go through some of that.

But at the biggest level, when President Bush came to office we were projecting budget surpluses of $5.6 trillion over 10 years. We just preceded that with 3 years of budget surpluses. Since then that figure has declined by almost $8 trillion. We had projected $5.64 trillion in surpluses. Now in the same timeframe, until 2011, we are projecting $1 trillion-plus in deficits. Where I come from in the private sector, if you have an $8 trillion negative cashflow, somebody would ask some questions about what is driving it, what is making such an overwhelming difference in the context of our financial posture with respect to fiscal affairs in this country. That is extraordinary.

By the way, take that a step further. It was projected at the same time that we were going to pay down, for all practical purposes, the publicly held debt of the U.S. Government. That was in 2001, early 2001—going down to $36 billion.

Today, out to 2008, we are expecting a $5 trillion publicly held debt. That is extraordinary. That is an extraordinary amount of debt that will go on, not just to be financed by current generations of Americans. The view that we are not going to transfer to our kids and our grandkids future responsibilities to pay for what we are doing today, as we benefit from those expenditures—we are transferring it on. That is $5 trillion.

By the way, it is a heavy burden not only in the debt that the current generation is transferring to future generations, but it is also an extraordinary expense. We are going from a $622 billion cost of our debt under the projections that were established in 2001 to, get this, $2.3 trillion we are going to spend—$2.3 trillion we are going to spend just to finance that debt, that change in that $8 trillion that comes across. That is what it is going to cost us over 10 years to finance the bad fiscal policies we are taking on.

I don't know about most Americans, but I think they can figure out that we have lots of important things in this country that we could spend $2.3 trillion on, relative to this $622 billion, that we would have been able to spend if those changes had not occurred such as Leave No Child Behind, such as making sure our health care systems are properly funded, or that the Social Security trust fund is in place so Social Security can be in place. And maybe most importantly, we could protect Americans with something other than duct tape. We could actually put real protections in our ports, on our highways. We could make sure that the security surrounding our chemical plants across this country was in place. There are lots of things that this country could do if we had that $2.3 trillion that we are going to now give out in interest expense, many of those dollars going offshore, not even to Americans.

I think it is absolutely irresponsible that we are putting ourselves in a position that we are going to run the kinds of deficits we are talking about. In fact, I think that was the overwhelming weight of the conversation we had with the Chairman of the Federal Reserve Board yesterday. If we do not get our fiscal house in order, we are going to put ourselves into a position where the United States is going to have not just small deficits and not just $2.3 trillion worth of interest expense, but we are going to see that explode in the years well beyond the next decade because that is when the baby boomers retire. We will go from 40 million retired Americans to 75 million retired Americans on Medicare and Social Security and that will put unbelievable pressures on what we have as a nation in our fiscal responsibility.

So I find this a hard budget, at a macro level, for us to take on. I hope the American people can understand that we are burdening our children and our grandchildren as we go forward; that we really are putting at risk Medicare and Social Security as we understand it today as we go forward. Frankly, I think without a full discussion and without creating a full understanding in the minds of the American people, we are not doing our jobs. I think it is almost a question of ethics, about what our responsibility is to raise up this discussion so those choices are understood by the American people and not buried in some document of hundreds and hundreds of pages of numbers that really do not translate into the practical impact that the individuals need.

I go back to it again. It is basic economics.

We have had an $8 trillion swing in the cashflow of this government. There is no one I know who would think that is a positive way for us to approach the financial management of this country.

To carry on with slightly more detail, as economists would say, this budget calls for a dramatic reduction in national savings. When you are borrowing all this money, that money isn't going into the private sector. It isn't going into areas of productivity and growth in this country.

That is what we saw happen in the 1990s. We saw 22.5 million new jobs created, and we saw productivity rise from very low levels to the kind of high levels that are driving the successes of the economy in the late 1990s and continue to be the only really positive element we see in the economy today.

When you have that capital going off to the Federal Government, it means less capital to be available to invest in plant and equipment and less capital to implant new technologies and new inventions, and to do research and medical advances. The end result almost inevitably will be lower economic growth in the future, if you carry those kinds of debt burdens into the future. That is not a conclusion based on partisanship or ideology. It is economics 101. Less savings means less investment which means lower growth.

It is just that those are the truisms defined by the basic laws of economics. Less savings means less investment which means lower growth.

By the way, when you are borrowing money at the $8 trillion level at the Federal Government, you are having less savings.

That is just by definition. I guess that is why the 10 Nobel economists

yesterday put out the statement they thought we were on the wrong track with regard to our fiscal policy; that we were putting ourselves into a grave position with regard to our longrun fiscal structure. It is absolutely essential, in my view, that we stand back and get hold of the budget mess I think we are putting in place, if we go forward.

Unfortunately, many administration officials have lately been denying the laws of economics, as far as I can tell, dismissing the importance of fiscal discipline. As OMB Director Mitch Daniels put it, while we have returned to an era of deficits, ''We ought not hyperventilate about this issue.''

I guess we are just taking off the board all that discussion about balanced budget amendments, the No. 1 issue, and the Contract With America, all that discussion we had through the 1990s, all that discussion that the private sector has tried to impart to the public sector; that there really is competition for funds out in the marketplace; that deficits really do drive up long-term interest rates which, by the way, Chairman Greenspan once again reiterated very clearly and unequivocally yesterday; and that we hear consistent conversation about deficits do not matter to the investment function of the economy.

It is hard to believe we are so blind to the fundamentals of economics. Supply and demand do matter. When there is demand for the credit in the marketplace for the Federal Government, it does impact on the private sector and the savings function.

Comments like these—the one about hyperventilating about deficits—make it seem like we are living in a strange twilight zone, in my view.

As I said, we just came through a heavy period of discussion—actually before I got into political life—about amending the United States Constitution to establish a rigid Balanced Budget Act. I do not know where that discussion went. I guess we had a change of heart and a change of mind at some particular point. But it really is hard for me to understand. I almost find it humorous, although I don't, really.

We hear comments with regard to my Democratic colleagues that we are concerned about rising deficits. One of the leaders in the House dismissed the importance of fiscal discipline, arguing that ''The Soviet Union had a balanced budget.''

I am not exactly how sure that fits into the overall structure of our debate. But I think it demonstrates we are making so light of this $8 trillion—I repeat, $8 trillion—negative cashflow swing this government is now burdening our people with. It is serious.

I come from a part of the world where you can tolerate some negative income for a short period of team, but, after a while, you go bankrupt. It undermines the reality of your financial success. It will for our Government. It may not go bankrupt, but we will be living with higher interest rates than we need be, and we will be losing the ability to see our private sector invest appropriately and basic saving functions as defined by economics.

Think about it. Perhaps the most powerful Member of the other body, in effect, was comparing fiscal discipline to a failed regime on how operations work.

I am really troubled about how light we are making this issue of our fiscal responsibility.

Why are the administration and its supporters abandoning fiscal discipline? Quite simply because their overriding priority is to provide huge new tax breaks to those who are doing the best, I guess. There is no other basis of understanding. It looks to me like political policy as opposed to economic policy.

Let us look at these tax breaks. As many of my Democratic colleagues have pointed out, they would provide relatively few benefits to working Americans. But, more importantly, they would do virtually nothing to create jobs or stimulate our economy. In fact, the Bush plan could well cost jobs, and I believe very clearly it is bordering on antigrowth. That is true for at least four reasons I would like to expand on.

First, very simple, very little impact of that initiative the President has laid out—less than 5 percent of the growth package—would kick in right away in 2003, and very little of it in 2004. Most of its impact would be delayed into the future, undermining the long-term structure of our fiscal health, but doing little for the current package.

By the way, those 10 Nobel economists yesterday also talked about temporary, short-term stimulus was needed to create demand in our economy—create demand now so we can pump-prime the economy and help get it going. And then we will see the growth of revenues be the basis of how we reestablish the cashflow to the Federal Government.

By the way, we don't need to have all of these long-term cash cuts unless you are going to do it in a tax reform package. And, by the way, I totally agree with Chairman Greenspan. Double taxation on dividends is a bad idea. It ought to be done from a comprehensive, revenue-neutral position of tax reform. No one would argue there is very little in tax difference. But it ought to be done with a comprehensive set of tax reforms. The American people understand that. They understand companies are paying only about one half of what they report on their income statements to the public when they try to sell their stock as taxable income. They are doing all kinds of things—some legitimate, some not so legitimate—to try to shelter income.

We need to have a reform package that actually works—to raise revenues but also to make sure we don't have inhibition on American business in formation of capital such as taxes on dividends. But it ought to be on a comprehensive, revenue-neutral basis.

I think most people, when they are honest and step back, will see the logic of that. Certainly the American people do.

Second, the President's tax proposals provide, as I said, most of the benefit for those at the very highest incomes. These are the people least likely to spend a tax break. I think a better approach, as I have advocated with Senator LANDRIEU—and as Senator MCCAIN talked about a ''payroll tax holiday''—would target tax relief to middle-class working Americans who need help.

By the way, I happen to think this ''payroll tax holiday'' and what Senator LANDRIEU and I talked about is really fundamental to how we can stimulate the economy today. Three out of four Americans pay more in payroll taxes than they do in income taxes. It is also the people who are stretched the hardest in trying to keep their budget together at home. By the way, individuals have to balance their budgets. So it is not exactly like they can walk away from running their debts up. We can do that in the Federal Government, but you cannot do that at the individual level. Otherwise, your creditors will come and see you and say it is time for you to sell your house.

Third, the Bush plan to exempt most dividend income from taxation would have the effect of taking cash off the balance sheets of American corporations. That would mean less money to invest in plants and equipment and less money to hire new workers and retain old ones. In other words, it will depress the economy further as opposed to stimulating it.

If you want to deal with double taxation on dividends, you do it at the corporate level. It might not be as politically attractive, but it would certainly be more rational that you would treat dividends as the equivalent of interest, and it would allow for the basic judgment of corporations as to whether they wanted to invest, pay dividends, hire new workers, or do whatever the economic, advantageous element of managing their business is about. But if you take the cash off the balance sheet, and pay it out in dividends, because you have an incentive to do that, you end up with far less of an incentive to grow the economy. And, in fact, you may very well get an incentive to stifle growth in the economy. I think it is very dangerous.

Finally, whatever stimulative impact—and very few people think it is significant at all—the budget would have in the short-term, it is likely to be offset by those higher long-term rates, as projected future deficits shoot through the roof.

I know the administration likes to claim there is no connection between deficits and interest rates, as I suggested, but the economic evidence is overwhelming that expectations of future deficits—that is, more Government competition for a limited pool of

capital—almost inevitably leads to higher interest rates.

It was actually refreshing yesterday at the Senate Banking Committee to hear someone—who I do not necessarily always see eye to eye with, with respect to economic policy—make a clear and unequivocal statement that deficits do matter with respect to interest rates and the performance of the economy, and particularly with respect to the performance of the investment activities of this Nation. This is, again, simple supply and demand. If you have $8 trillion worth of deficits that you would not have had otherwise—or $5 trillion—it is going to compete with the private sector for capital. That, ultimately, is going to have something to do with the shape of our economy in the future, and it is absolutely the most important element of the savings function in the country.

So the administration's tax breaks, in my view, for all of those reasons, are antigrowth as much as they are anything else. Again, I reemphasize that I think it is a political proposal, not an economic one. They have the effect of starving the Government of resources needed to protect the security of working families, while we are basically rewarding those who I think are doing reasonably well.

The last I checked, in the 1990s, people did pretty well economically. There were more millionaires made in the 1990s, while we were creating 22.5 million jobs than I think we are doing so far in the new century. I wonder why it is that we think we need to have all these structural changes when, in fact, if we just get some demand going, taking up some of that overhang of excess production we have in our country, that we could get going.

There are, though, some issues in this budget that go beyond these macroeconomic issues. And they are really important. I do not want to make light of them in and of themselves.

I think budget deficits and whether you have a stimulus program or growth program are all fair questions, but are we going to continue as a nation to participate in helping protect the security of working families, protect the security of Americans everywhere?

I think what is really radical about this budget is that it is beginning the process to undermine whether we are really going to provide that kind of support. Because we have to make choices, we are going to have to make choices whether we are going to run those deficits, driven in at least a significant part by the kinds of tax cuts we have, or whether we are going to retain some of those resources to be able to invest in the security of working families.

I will take a few examples from the President's budget.

First, the budget fails to provide funds that are badly needed to protect our Nation against the threat of terrorism. This is maybe the most important domestic issue. While there is some funding for some homeland security programs, we have really turned our back on a lot of the critical priorities, such as port security and border patrols.

I heard today that actually we will have fewer people at border crossings, based on this budget, than we had prior to 9/11. I just visited the New York/New Jersey Port a weekend ago. The fact is, we are inspecting less than 2 percent—less than 2 percent—and that has not changed. We have been using that same number in debates on the floor of the Senate. It was not changed in our port at all.

The resources are not being made available to check containers, and we are doing nothing to improve the safety and security of the American people—certainly the people in New Jersey and New York—with regard to our ports. We are doing nothing with regard to improving the security surrounding our chemical production facilities in this country. And all this just keeps going on and on, without putting our money where our mouth is with regard to homeland security. We talk about it as our top priority, and we do not put the resources with it.

Time and time again, we have asked to try to increase the budget appropriations in this area and have not been able to do it. I think maybe it is the most important domestic issue. It is certainly on the minds of the people of New Jersey, and I suspect it is for most Americans.

Second, the budget reneges on the President's promise to provide a meaningful prescription drug benefit for our seniors. Instead, the administration, in effect, forces millions of seniors to drop their own doctor and move to a private sector approach in order to secure a prescription drug. It moves away from fee-for-service plans. This amounts to a backdoor attempt, in my view, to privatize Medicare.

We have not seen all the details, so it is a little hard to be as specific as I would like to be, but I have to tell you, if it is anything similar to the headlines we have heard in the State of the Union speech, there are a lot of us who are going to fight this tooth and nail. This is not the promise we have given to the individuals who have been paying payroll taxes for years and years with the expectation there will be a serious Medicare benefit at the end of the day. As you know, if anybody does any analysis, not only are the payroll taxes that go to Social Security being used to finance tax cuts for those who are already doing well, we are now using payroll taxes for Medicare to also do that. And we have gone through all those numbers. It is very hard to understand how we are putting this together.

Many of my constituents say: What is going on with those payroll taxes that we are paying every day? We go to work with the expectation that we are going to get Medicare benefits and Social Security benefits at the end of the day when we retire. It is really wrong, and I hope, as we discuss this budget, that becomes clear and more clear to the American public.

Third, the budget process proposes to gut health care coverage for the most disadvantaged Americans. Under the administration's plan, Governors, in effect, would be—I was going to say bribed—encouraged to leave the current Medicaid system and move to an alternative that probably would end up with poor and disabled Americans losing coverage.

I tell you, I know in New Jersey that we have to cut the number of people who are accessing this, particularly kids in the Children's Health Insurance Program, because we do not have the resources to be able to deal with bringing them into these programs which have long been something that has provided broader health care.

There is big, bipartisan support for a concept around here called Start Healthy, Stay Healthy, which is to bring prenatal care to a lot of our less economically enabled citizens. And it is through the Medicaid system and State programs. We are having to cut all of those kinds of programs because the resources are not available.

I have to ask—anyone has to ask—is that what the administration means by ''compassionate conservatism''?

I could go on and on with the misplaced priorities, from my point of view, of the administration's budget: Its underfunding or complete elimination of so many education programs, including afterschool care; its cuts in environmental protection—the riders included in the omnibus bill that is coming over which doesn't have to do with the 2004 budget, is a mind-boggling way to legislate environmental laws—its abandonment of a program to put police officers on the streets, the COPS program—there are law enforcement officials who are enraged about their ability to continue to protect the public; again, it sort of relates to homeland security—its cuts for children's health insurance; its abolition of the HOPE VI homeownership initiative, which is one of the great programmatic efforts to try to get people to buy into their communities, to be a part of the community, a whole host of other housing programs.

I could go on, and I probably will as the days go on, because these issues need to be identified in the mind of the American public. This is a budget that is changing the shape of what the role of the Federal Government is. Maybe that is what people want. Maybe they don't want afterschool programs for kids. Maybe they don't want the COPS programs. Maybe they don't want Leave No Child Behind underfunded. Maybe they do want it underfunded. Maybe they want no increase in affordable housing. Maybe they don't want them, but we ought to tell them what they are getting as opposed to piling it up into a whole host of numbers and covering it up with other things that

don't make it clear why we are doing what we are doing.

I also want to talk about the administration's proposal to fundamentally change the tax treatment of investment income, another area where—a little bit of my background—it strikes me as really debilitating to the longrun fiscal posture of this country. I know proposals to allow sheltering of investment income sound attractive to many. I used to promote a few of them myself. I think we all agree about the value of expanding opportunities for all Americans to save, to better prepare for retirement. But when you look at the administration's proposal, it has little to do with promoting retirement security for working families.

In fact, there are a whole series of these. For most Americans, these proposals are much more likely to undermine retirement security, and they will apply to a very narrow segment of American retirees or future retirees. Most Americans are not using all the tax-supported programs we have today. They are only using about 25 percent of them, if memory serves. And these programs will drain resources critical to the Federal budget to protect Social Security and Medicare in the future—again, as we go from 40 million retired seniors to 75 million. They represent a dramatic shift in the tax burden, a redistribution of wealth, to speak bluntly, to the benefit of those who have substantial investment income and to the detriment of people who depend on wages and support themselves and, by the way, pay payroll taxes.

Once again, those people who are paying payroll taxes are funding tax breaks in the income tax system—really hard to understand.

These new tax proposals are not merely radical in their redistribution of the tax burden, they are fiscally irresponsible and reckless in the context of our overall budget situation. There are a few elements of this program that need the light of day. They need the focus of the American people, whether it is homeland security, taking care of our kids' educational system, our health care, but probably most important, the longrun ability to fulfill the promise of Social Security and Medicare. That is what this debate is about. Are we really going to have the resources to do the kinds of things the American people have been promised?

It is not enough to say: We don't want to do this. We have promised the American people they will at the end of the day have their Social Security benefits, guaranteed benefits. We need to make sure we have the fiscal structure that is in place that allows that to happen.

This budget will not allow for that to take place. It needs lots of debate from the American people, lots of debate by the Senate, and a lot of debate in general until we get to a conclusion that is a long way from where we are starting.

There is too much at risk here, too many jobs in the first instance, too much in the longrun investment in our economy, to grow our productivity, too much investment to protect the American people with regard to homeland security and the war on terrorism, too much risk with regard to health care and disparities, the ability to provide a meaningful prescription drug benefit to seniors, too much at risk with regard to Social Security.

I hope we can truly flush out what the choices are being made through the context of this budget.

I appreciate the opportunity to speak. It will be one of many times I would like to come to the Chamber to make sure the American people understand we have a radical reshaping of America's priorities through this budget. Frankly, it is a political statement, not an economic program. Nothing less than the future of our country is at stake. We need a real and serious debate about it.

I yield the floor.

Mr. REID. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. HAGEL). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. REID. Mr. President, a number on the other side, in the majority, have lamented the fact that to get this man, Miguel Estrada, approved to be a circuit judge, it is going to take 60 votes. They ask, why can't we just have an up-or-down vote? Both Senators from Utah have talked about that today. Senator BENNETT indicated it would be a tremendous change if we required 60 votes for Mr. Estrada. There are cartoons around the country today in support of our position—cartoons that have indicated nominees are coming through here and no one is asking any questions that are answered, and that there should be some answers forthcoming. But the issue is that in fact Mr. Estrada hasn't answered many important questions. That is one of the big problems.

I found my colleagues' remarks very curious, lamenting the idea that it would take 60 votes to approve Mr. Estrada's nomination. They have lamented this, but I find this interesting because when President Clinton sat in the White House, his nominations were subject to anonymous holds by one or more Senators. Many were not provided hearings. Many were provided no votes. That is, rather than needing at least 41 votes to delay or block consideration of a nominee, Republicans allowed one Senator or a handful to block many of President Clinton's judicial nominees from getting hearings or votes.

Mr. President, I have a list of nominees, and I ask unanimous consent that it be printed in the RECORD.

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

CLINTON JUDICIAL NOMINEES NOT CONFIRMED IN CONGRESS FIRST NOMINATED

(31 CIRCUIT/48 DISTRICT—59 OF THESE NEVER ALLOWED VOTES BY REPUBLICAN-CONTROLLED SENATE)

31 CIRCUIT COURT NOMINEES (22 BLOCKED FROM GETTING VOTE OR BEING CONFIRMED)

Merrick Garland, D.C. Circuit. Allen Snyder, D.C. Circuit, never given a vote by Republicans/not confirmed. Elena Kagen, D.C. Circuit, never given a vote by Republicans/not confirmed.

Robert Cindrich, 3rd Circuit, never given a vote by Republicans/not confirmed. Stephen Orlofsky, 3rd Circuit, never given a vote by Republicans/not confirmed. Robert Raymar, 3rd Circuit, never given a vote by Republicans/not confirmed.

James Beatty, 4th Circuit, never given a vote by Republicans/not confirmed. Andre Davis, 4th Circuit, never given a vote by Republicans/not confirmed. Elizabeth Gibson, 4th Circuit, never given a vote by Republicans/not confirmed. Roger Gregory, 4th Circuit, never given a vote by Republicans/not confirmed. J. Rich Leonard, 4th Circuit, never given a vote by Republicans/not confirmed. James Wynn, 4th Circuit, never given a vote by Republicans/not confirmed.

H. Alston Johnson, 5th Circuit, never given a vote by Republicans/not confirmed. Enrique Moreno, 5th Circuit, never given a vote by Republicans/not confirmed. Jorge Rangel, 5th Circuit, never given a vote by Republicans/not confirmed.

Eric Clay, 6th Circuit. Kent Markus, 6th Circuit, never given a vote by Republicans/not confirmed. Kathleen McCree Lewis, 6th Circuit, never given a vote by Republicans/not confirmed. Helene White, 6th Circuit, never given a vote by Republicans/not confirmed.

Bonnie Campbell, 8th Circuit, never given a vote by Republicans/not confirmed.

Marsha Berzon, 9th Circuit. James Duffy, 9th Circuit, never given a vote by Republicans/not confirmed. William Fletcher, 9th Circuit. Barry Goode, 9th Circuit, never given a vote by Republicans/not confirmed. Ronald Gould, 9th Circuit. Margaret McKeown, 9th Circuit. Richard Paez, 9th Circuit.

Christine Arguello, 10th Circuit, never given a vote by Republicans/not confirmed. James Lyons, 10th Circuit, never given a vote by Republicans/not confirmed.

Timothy Dyk, Fed. Circuit. Arthur Gajarsa, Fed. Circuit.

(Helene White waited more than 1,500 days, never to be allowed a hearing or a vote.)

(Richard Paez waited more than 1,500 days to be confirmed.)

48 DISTRICT COURT NOMINEES (37 BLOCKED FROM GETTING VOTE OR BEING CONFIRMED)

Steven Achelpohl, District Court, never given a vote by Republicans/not confirmed. Ann Aiken, District Court. Richard Anderson, District Court, never given a vote by Republicans/not confirmed. Joseph Bataillion, District Court, never given a vote by Republicans/not confirmed. Steven Bell, District Court, never given a vote by Republicans/not confirmed. John Bingler, District Court, never given a vote by Republicans/not confirmed. David Cercone, District Court, never given a vote by Republicans/not confirmed '02. Patricia Coan, District Court, never given a vote by Republicans/not confirmed. Jeffrey Colman, District Court, never given a vote by Republicans/not confirmed. Valerie Couch, District Court, never given a vote by Republicans/not confirmed. Legrome Davis, District Court, never given a vote by Republicans/not confirmed '02.

Rhonda Fields, District Court, never given a vote by Republicans/not confirmed. S.

David Fineman, District Court, never given a vote by Republicans/not confirmed. Robert Freedberg, District Court, never given a vote by Republicans/not confirmed. Dolly Gee, District Court, never given a vote by Republicans/not confirmed. Melvin Hall, District Court, never given a vote by Republicans/not confirmed. William Hibbler, District Court. Faith Hochberg, District Court, never given a vote by Republicans/not confirmed. Marian Johnston, District Court, never given a vote by Republicans/not confirmed. Richard Lazzara, District Court, never given a vote by Republicans/not confirmed. J. Rich Leonard, District Court, never given a vote by Republicans/not confirmed. Stephen Lieberman, District Court, never given a vote by Republicans/not confirmed.

Matthew Kennelly, District Court. James Klein, District Court, never given a vote by Republicans/not confirmed. John Lim, District Court, never given a vote by Republicans/not confirmed. Harry Litman, District Court, never given a vote by Republicans/not confirmed. Frank McCarthy, District Court, never given a vote by Republicans/not confirmed. Donald Middlebooks, District Court. Jeffrey Miller, District Court. Margaret Morrow, District Court. Sue Myerscough, District Court, never given a vote by Republicans/not confirmed. Lynette Norton, District Court, never given a vote by Republicans/not confirmed.

Susan Oki Mollway, District Court. Virginia Phillips, District Court, never given a vote by Republicans/not confirmed. Robert Pratt, District Court. Linda Riegle, District Court, never given a vote by Republicans/not confirmed. Anabelle Rodriguez, District Court, never given a vote by Republicans/not confirmed. Michael Schattman, District Court, never given a vote by Republicans/not confirmed. Gary Sebelius, District Court, never given a vote by Republicans/not confirmed. Kenneth Simon, District Court, never given a vote by Republicans/not confirmed. Christina Snyder, District Court. Clarence Sundram, District Court, never given a vote by Republicans/not confirmed.

Hilda Tagle, District Court. Thomas Thrash, District Court. Cheryl Wattley, District Court, never given a vote by Republicans/not confirmed. Wenona Whitfield, District Court, never given a vote by Republicans/not confirmed. Ronnie White, District Court, never confirmed by floor vote. Frederic Woocher, District Court, never given a vote by Republicans/not confirmed.

Mr. REID. They had mysterious holds and were not provided with votes of any kind and were simply not allowed to have their matters brought before the Senate. We would have liked the opportunity to even see if we could have stopped a filibuster, if that was what they wanted, but they simply would not bring them forward.

I will name a few circuit court nominees. Out of 31 submitted who were not confirmed in the first Congress they were nominated, 22 were blocked by the Republicans from ever being confirmed. Allen Snyder, DC Circuit, never given a vote by Republicans, certainly not confirmed; Elena Kagen, DC Circuit, never given a vote by the Republicans; Robert Cindrich, Third Circuit, never given a vote; Steven Orlofsky, Third Circuit, never given a vote; Robert Raymar, Third Circuit, never given a vote; James Beatty, Fourth Circuit, never given a vote by the Republicans; Andre Davis, Fourth Circuit, never given a vote; Elizabeth Gibson, Fourth Circuit, never given a vote by the Republicans; Roger Gregory, Fourth Circuit, never given a vote by the Republicans, but finally, Mr. President, because President Clinton, in a recess appointment, appointed him, as a sitting judge, he was eventually confirmed; J. Richard Leonard, Fourth Circuit, never given a vote by the Republicans; James Wynn, Fourth Circuit, never given a vote by the Republicans; H. Alston Johnson, Fifth Circuit, never given a vote by the Republicans; Enrique Moreno—a Latino nominee—never given a vote by the Republicans; Jorge Rangel, Fifth Circuit, never given a vote—he is also Hispanic—Eric Clay, Sixth Circuit, and nothing happened with him; Kent Markus, Sixth Circuit, never given a vote by the Republicans; Kathleen McCree Lewis, Sixth Circuit never given a vote; Helene White, Sixth Circuit, never given a vote; Bonnie Campbell, Eighth Circuit, never given a vote; James Duffy, never given a vote; Barry Goode, Ninth Circuit, never given a vote; and Christine Arguello and James Lyons, Tenth Circuit, never given a vote.

I just note that Helene White waited more than 1,500 days, never to be allowed a hearing or a vote. Richard Paez waited more than 1,500 days, but there is good news there: He was finally confirmed. I spoke to that good man on a number of occasions during his time in ''legal limbo,'' or wherever he was, never being given a vote. But, finally, he had a hearing and he was confirmed after more than 1,500 days, more than 4 years.

Mr. President, we submitted 48 district court nominees who were blocked in the first Congress they were nominated, and 37 were blocked from ever getting a vote or being confirmed. So for my friends to lament the fact that we are in the light of day, where we have told everybody here we are not going to allow Miguel Estrada to be confirmed unless he submits to proper questioning—I should not say proper questioning, how about proper answers—and unless we are allowed to review the Solicitor's memoranda that have been given to us on other occasions and unless he is forthcoming in answers to questions.

These are not anonymous holds. We are telling the world that we will not allow Miguel Estrada to become a DC Circuit Court judge unless he does that. If he doesn't do that, the majority leader has three options: Pull the nomination, go forward to invoke cloture, or have this on the floor forever, which is something—boy, they are really giving it to us tonight. They are going to make us work late.

That is what the leader said. We are going to work late. I said everything has been said about Miguel Estrada, just not everyone has said it. So we are going to have other people come and say the same things that have been said by approximately 20 Senators, and they will try to say it a little differently, but everything has been said.

If the majority leader wants to take the time of the Senate and go forward on this nomination, not trying to invoke cloture, then that is his prerogative. He runs the floor. But there is other business we need to do. I know the omnibus bill should be here tomorrow. There are other judges we could approve perhaps. We approved three on Monday including Judge James Otero of California. So there is other business that could be done, but if he wants to have us stay late and keep talking about this person—we on this side believe there is a problem, and we feel it is our constitutional prerogative and duty to ask questions and have them answered.

When we have someone who has a track record like this, where there is not much in the way of legal information other than some cases he handled, we should be able to review his legal memoranda he wrote when he was a member of the Solicitor General's Office.

There were 48 district court nominees who did not get through the Senate in the Congress first nominated; 37 were blocked from getting a vote or being confirmed:

Steven Achelpohl, district court, never given a vote by Republicans; Joseph Bataillon, district court, never given a vote by Republicans; Steven Bell, district court, never given a vote by Republicans; John Bingler, district court, never given a vote by Republicans; David Cercone, district court—once in a while there is some good news. David was not given a vote but eventually was confirmed.

Patricia Coan, district court, never given a vote by Republicans; Jeffrey Colman, district court, never given a vote by Republicans; Valerie Couch, district court, never given a vote by Republicans; Legrome Davis, district court, never given a vote by Republicans finally allowed a vote once Democrats became the majority; Rhonda Fields, district court, never given a vote by Republicans; S. David Fineman, district court, never given a vote by Republicans; Robert Freedberg, district court, never given a vote by Republicans; Dolly Gee, district court, never given a vote by Republicans; Melvin Hall, district court, never given a vote by Republicans; Marian Johnston, district court, never given a vote by Republicans; Richard Lazzara, district court, never given a vote by Republicans; J. Rich Leonard, district court, never given a vote by Republicans; Stephen Lieberman, district court, never given a vote by Republicans; James Klein, district court, never given a vote by Republicans; John Lim, district court, never given a vote by Republicans; Harry Litman, district court, never given a vote by Republicans; Frank McCarthy, district court, never given a vote by Republicans; Sue Myerscough, district court, never given a vote by Republicans; Lynette Norton, district court, never given a vote by Republicans; Virginia

Phillips, district court, never given a vote by Republicans; Linda Riegle, district court, never given a vote by Republicans. This is very familiar to me because she is a bankruptcy judge from Nevada, still serving on the bankruptcy court. I nominated her. It simply did not move forward. I had a couple judges who did move forward and was very happy about that. Senator HATCH allowed me to move those nominations.

Anabelle Rodriguez, district court, never given a vote by Republicans; Michael Schattman, district court, never given a vote by Republicans; Gary Sebelius, district court, never given a vote by Republicans; Kenneth Simon, district court, never given a vote by Republicans; Clarence Sundram, district court, never given a vote by Republicans; Cheryl Wattley, district court, never given a vote by Republicans; Wenona Whitfield, district court, never given a vote by Republicans; Ronnie White, this is a fine man. He was defeated in a surprise strict party-line vote, but his nomination at least was done in the light of day, and I appreciate that. That is better than all these anonymous holds and nothing never happens.

Frederick Woocher, district court, never given a vote by Republicans.

My friend, and he is my friend, Senator BENNETT from Utah, a neighboring State—I have great admiration for him. He comes from a wonderful family. His father served in the Senate. He was very honorable. His wife is a friend. She is quite a musician. So I have only good thoughts about my friend, Senator BENNETT, but I do say to the distinguished Senator from Utah that he should not come here and talk about what a terrible thing it is for us to require that Mr. Estrada answer these questions and submit the memos. This is something we are doing openly. We are not trying to hide what is happening in any way.

I want to say one thing, I wanted to say it to him before he left the floor this morning, that I have been very honored to serve in the Senate. It is something I never dreamed could happen. I am every day aware of what an honor it is to serve in the Senate, and to serve with other Senators is an honor for me. This is unique.

The two Senators from Vermont are in the Chamber. One just walked in. The senior Senator from Vermont has been in the Senate approximately 30 years, and I have watched a magician—I say that in the most positive sense—perform his duties. I have the honor of serving with a senior member on the Appropriations Committee and the ranking member of the Judiciary Committee. I have so much admiration and respect for the work he does. He has been so fair. When people were saying, Don't do this, the senior Senator from Vermont stepped above the political fray and did what was right on many judges.

I have come to the Chamber many times telling the Senator what a good job he has done, but I have not done it recently. I want the Senator to know the people of Vermont are so well served by his public service. The Senator from Vermont could go anyplace in America and make a fortune, literally, because of his legal skills and his experience in the Senate, but he has taken the more difficult path, and that is serving the Senate because of his love of public service.

The people of Vermont are well served, but so are the people of Nevada. The people of Nevada benefit every day from the service of the Senator from Vermont.

I am very grateful he is here helping us—not helping us, this is his committee. He is leading us on this most important matter to bring about some direction and responsiveness to the process which we are now going forward with.

I see the other Senator from Vermont who is such a fine man. I want him to know how much I respect his service to the country, especially the work he does on the Environment and Public Works Committee. The environment is better because of the junior Senator from Vermont.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I want to thank my dear friend, the senior Senator from Nevada, for his comments. We have served together for a long time, as he said, on the Appropriations Committee. I have been in the Senate with several hundred Senators. I have been fortunate. Like the Senator from Nevada, I never knew I was going to be a Senator. I grew up in Montpelier, the State's capital. It had only 8,500 people. I lived almost diagonally across from the Statehouse.

I remember as a child, probably about 4 years old, riding my tricycle through the halls of the Statehouse delivering newspapers to the Governor, playing on the Statehouse lawn, sliding in the snow. Suddenly one day, at the age of 34, I was being sworn in as a Senator and I think what a thrill it was. I was the junior most member of the Senate, but then I realized the best part of it is the people you get to know and serve with.

Nobody has been more of a help, a mentor, a conscience for me, than the Senator from Nevada. Every morning when I come to work I look at the Capitol and I think this is a nation of 260 to 270 million Americans, so diverse, and there are only 100 of us who get a chance to serve at any given time. Only 100 Americans get a chance to serve and represent the whole country. Out of that 100, only 4 get to be the leaders of their party, the Republican leader and the deputy Republican leader, the Democratic leader, the deputy Democratic leader.

I have served with a number of them, but I would say the Senator from Nevada, Senator HARRY REID, is one of the most extraordinary leaders the Senate has ever had. He has kept the old-fashioned virtue that was drilled into me by the first leader I knew, Senator Mike Mansfield. Senator Mansfield said, whatever you do—and this is far more important than how you vote—always keep your word.

No Senator has a higher reputation for integrity and truth-telling than the Senator from Nevada, and that means a lot to me. I do appreciate the way he has watched the floor and brought dignity and respect to this debate. I admire him for it because, just as with the distinguished Presiding Officer, we all bring different experiences to the Senate. We all have different reasons for being here and we all have different life experiences.

The distinguished Presiding Officer was a war hero. After serving, he began a business. He gained great experience in that field in his home State of Nebraska, and then he came to the Senate.

The distinguished Senator from Nevada, of whom I was speaking, had varied experiences before coming to the Senate. He was a trial lawyer, a boxer, and a state official in Nevada. He even served as a Capitol police officer back in the days when many times they were chosen by the Senators of the congressional delegation from the particular State. All of these experiences of his he has brought to the Senate.

Many times I have asked the distinguished Presiding Officer questions on military matters, not having had the experience of serving in the military. Considering how close he came to ending his life in Vietnam, the country has benefited by the fact he was there. I know as a result of his life being spared, I had the opportunity to gain another close and dear friend in the Senate.

There are a few observations I would like to make before I go into the discussion I had earlier with both of the Senators from Utah about the administration's refusal to allow Senators to examine Mr. Estrada's writings—which, incidentally, is an unfortunate situation because Mr. Estrada told me and other members of the committee on both sides of the aisle he is perfectly willing to share and discuss his writings. He personally had no objection to his writings, his memos, his suggestions in the Department of Justice and elsewhere to be made public. He would have no objection to answering questions based upon what he wrote but, as he said, and he was very honest about this, the administration had told him he could not.

Mr. Estrada said the administration told him he could not, which in itself is too bad because when this matter has come up many times before in history in connection with nominations for lifetime appointments as well as for short-term appointments, past administrations, Democratic and Republican, have allowed memoranda by Department of Justice attorneys to be examined by the Senate Judiciary Committee.

I make this point speaking as one Senator, if Mr. Estrada were forthright and responsive to questions of Senators and if the administration sent these writings up and allowed Mr. Estrada to discuss them and answer questions about them—something Mr. Estrada himself has said he is perfectly willing to do—I may not like the candid and responsive answers, I may disagree with what is in the writings, but at that point I feel the questions have been answered, assuming he is forthcoming and we have the material, so then let us go ahead and vote for him or against him. But when my colleagues are going to vote for somebody on one of the most important courts in the country, at least we should do it knowing what is in the record and having meaningful, not evasive, answers to questions about his judicial philosophy, his views, and his feelings about legal decisions.

Republican Presidents and Democratic Presidents have faced this question before. President Reagan, President Carter, and other Presidents did, and the material was forthcoming and the Senate then went on to make a decision based on what they knew about the nominees. This is the best way to do it.

Before I discuss this precedent in more detail, I would like to note that this morning we had our third hearing in 2 weeks on the Judiciary Committee. This included the 16th nominee to receive a hearing, the fifth nominee to a circuit court in just two weeks. That is interesting because when a Democrat was President, the same Judiciary Committee chairman often took until the summer before having a hearing for these many nominees, especially this many circuit court nominees, many of whom have controversial or divisive records.

I see the distinguished senior Senator from Utah on the floor. When he was chairman under a Democratic President, when the Democrat was making the nominations to the courts, it often took until the summer to have hearings for this many nominees, especially circuit court nominees. We are talking about having hearings for five circuit court nominee hearings by early February.

In 1996, the Republican chairman did not hold hearings for five circuit court nominees all year. Of course, it was a Democrat President. Actually, no circuit court nominees were confirmed that year, and none of the four who were allowed a hearing were confirmed during that entire year.

In 1997, when President Clinton had been in office now on his fifth year, we did not reach this number if circuit court nominees getting a hearing until September. Now the Committee has done it in just 2 weeks. It is interesting because there have been questions of partisanship. Now the Senate Judiciary Committee does in 2 weeks with a Republican President, with the same chairman, what took 9 months—more than 35 weeks—to do with a Democratic President.

I think that sort of demonstrates what the partisanship is. In fact, there is a nomination hearing being held this morning for a seat that has been vacant since 1999. One part of me says good, it is about time we have had a hearing for that vacancy, but President Clinton nominated two people to that vacancy. This was to the Court of Appeals for the Tenth Circuit. One is the Honorable James Lyons who was blocked for partisan political reasons. There was an anonymous hold on the Republican side.

I mention this because also coincidentally we hear a lot about somebody getting the highest rating from the American Bar Association, actually from a screening committee which is now headed by a close friend and supporter of President Bush's. This nominee of President Clinton's had the highest rating possible. He could have easily been confirmed, but anonymous holds, not open holds but anonymous holds, on the Republican side stopped it. He was not even allowed a hearing or a vote in the committee. So the President nominated a second person, Christine Arguello, a Latina nominee. She had bipartisan support. She was supported by both her home State Senators. One would think she would get at least a hearing or a vote in the committee. No. A number of people were nominated after her and were given hearings and votes, but this Hispanic American woman was not. Under Republican control of the Senate, Professor Arguello was not even given a hearing, to say nothing about a vote.

Regarding the document request related to Mr. Estrada's nomination, he has told both Senator HATCH and myself, as well as several Members of the Senate, that he is perfectly willing to show us his writings and respond to them and answer questions about them, but he has been told by the administration that he cannot; the administration, however, would review those writings. They are the only ones who know whether this direct evidence of his views, the interpretation of law, is accurate or misleading—they are the only ones who have access to it and they say, basically: Trust us. In carrying out your constitutional duties of advise and consent: Trust us. Give someone a lifetime appointment of one of the most important posts in the country: Trust us.

Mr. HATCH. Will the Senator yield on that one point? I have some new information.

Mr. LEAHY. I will yield on the basis that I will be allowed to retain the floor, to which I know the Senator from Utah does not object, and I want to continue then. Because of my deep respect and quarter century of friendship with the distinguished Senator from Utah, I yield.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. And we do have mutual friendship.

I have done some checking on this, and I thought I would bring it do the attention of the Senator. They tell me at the White House that they have never, the Justice Department has never given out these materials requested by the Democrats—not in the Bork case, not in any other case.

Now, in the Bork case they did give materials that pertained to his dismissal of Archibald Cox during Watergate, specific materials, but not a widespread fishing expedition. And there is a reason they do not want to give these documents up—because they are privileged, they are a work product of the Solicitor General's Office, they are crucial to the Solicitor General's Office functioning well.

I bring that to my friend's attention because the arguments that have been brought up have been not persuasive, they are not accurate, and frankly in the other people beside Judge Bork, there is no record at all that the Justice Department ever gave those documents to those people. Somebody may have leaked them, but the Justice Department did not give them.

I thank the Senator. I just wanted to tell the Senator that I think this is a red herring.

Mr. LEAHY. Retaining my right to the floor, I ask the Senator from Utah to hear my speech because it may be that whoever he talked to at the White House may be new or may not be aware of this.

Here are some of the memos past White Houses have provided us. They are still in the files here. They are pretty extensive. Included in this large volume are some of the same memos written by attorneys to then-Solicitor General Bork, as well as memos related to the nominations of Justice William Rehnquist to be Chief Justice, of Bradford Reynolds, the Reagan Associate Attorney General for Civil Rights to be Associate Attorney General and other nominees to short-term or lifetime appointments.

I really do want to finish my speech, and I think that then the Senator from Utah will understand what is going on—with Mr. REYNOLDS, Mr. Benjamin Civiletti, in his nomination to become Attorney General, and other past nominees. I will not put them in the RECORD now, but if my friend from Utah will bear with me, he will see what happens on this, and I will lay out the case where this has been done over and over again in the past.

This is a case where the administration asks for the Senate to advise and consent to a lifetime appointment, something that will go on well after most of us have left the Senate, but the administration does not want to provide information and memoranda relevant to this nomination. The administration has done this in both judicial and executive nominations. Even this very administration has done so in another nomination for a short-term position, but it has refused to do so in the case of Mr. Estrada.

I wonder—and of course if the Senator wishes me to yield, I will—I wonder if he would give me the courtesy of hearing some of these points.

Mr. HATCH. If I could ask one question, and of course I will listen to the Senator.

It is my understanding that the Democrats have asked for memoranda of appeals, certiorari petitions, and amicus curiae. Does the Senator have any indication that any documents pertaining to recommendations of appeals, certiorari, or amicus curiae have ever been given by the Justice Department?

Mr. LEAHY. I do have evidence of exactly that. If the Senator would let me finish my speech, he would understand that.

The current White House has disclosed to the Senate legal memorandum writing by an attorney of President George H.W. Bush's White House Counsel's Office in connection with the nomination of Jeffrey Holmstead to be Assistant Administrator of the Environmental Protection Agency, and, interestingly enough, this was a position of far less duration and importance than a lifetime judicial appointment.

In Mr. Estrada's case, the White House will not provide any of the information sought. That bothers me. I wonder what is in there. They seem to be saying: We have looked at it; trust us, it is OK. Well, I remember the made-up Russian proverb that President Reagan speech writers came up with: Trust, but verify. Even though there was no such proverb, I thought it was a great saying, so I will use the same one.

The administration's claim that such a request is unprecedented, as the distinguished Senator from Utah suggested, is actually wrong within the administration's own knowledge, even their own history. It is also wrong with respect to prior administrations and the confirmation history of the Judiciary Committee.

What is happening is the White House seems willing to rewrite history for this case. I suspect if that is to be allowed, then the next difficult confirmation that comes up, the history will be rewritten again and the Senate will be stonewalled again.

The facts, I say to my friend from Utah, are these. The Senate has requested, and past Justice Departments have provided, similar memoranda such as memoranda related to appeals, certiorari petitions, and amicus curiae—the decision to join a case as a friend of the court—written by attorneys of the Department of Justice. They have done this in connection with the nominations of Robert Bork to become Associate Justice of the Supreme Court; William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division, to become Associate Attorney General; Benjamin Civiletti, nominated by President Carter to become Attorney General; Stephen Trott, nominated to become a judge in the Ninth Circuit; and then- Justice William Rehnquist, who was nominated by President Reagan to become Chief Justice—among others.

I did not get a chance to go to the gym this morning, but I guess I can almost get as much exercise in picking up and holding some examples of the memoranda that have been provided by both Republican and Democratic administrations in the past, the exact same type of memoranda to the Solicitor General, as well as other similar legal memoranda, that we now ask for on Mr. Estrada. So the real red herring is to assert that there is no precedent and to claim that no such documents have never been shared with the Senate Judiciary Committee in past nominations, and to say therefore that the Senate cannot examine such documents and that they will not accommodate the committee's request. Mr. Estrada has stated, and I admire his candor in doing this, that he is proud of his memoranda and has no personal objection to us seeing his memoranda and he has no objection to answering questions based on what he wrote. The administration, however, says: We object. That objection is based on a complete rewriting of the history of such requests and past cooperation and accommodation. They have refused to allow Mr. Estrada to answer many questions and they have refused to allow the Senate to look at his memoranda.

The Committee's request, however, is well within the practice of the Senate in prior administrations.

What does seem to be said by the administration is we cannot ask for this because we have not asked it in relation to every judicial nominee who has ever worked at the Department. Many who worked there and who were nominated did have lengthy careers or academic writings or had no controversy about being unable to set aside deeply held beliefs, unlike the stealth candidate before us. The administration also ignored the fact that when the Senate Judiciary Committee has requested memoranda written by nominees for term and lifetime appointments who worked at the Justice Department, past Justice Departments have accommodated past Congresses upon the request.

We get a lot of paperwork on nominees. Sometimes we ask for more and sometimes we ask for less, depending on the record before us. But when we have asked for it, everybody, except this administration, has allowed it and not stonewalled us. In fact, I have been here for 29 years and I do not know of a time when the Justice Department has taken such an uncooperative approach to a request for information relating to a nomination.

History shows the Senate does not always seek information it has the power to seek. We could ask for a whole lot of things that would be relevant to entrusting a person with a lifetime appointment as a judge. Often we do not ask. Sometimes there does not seem to be a need for it because there is enough other information on the record.

But when the requests have been made, they have been honored by prior administrations that have followed a policy of accommodation in response to a request from a co-equal branch of the Government for relevant information related to constitutional responsibilities, especially related to nominations.

This administration has not taken this position. Instead, they seem to be saying: We know what is there, just trust us. Rubberstamp what we send up to you. Don't ask any questions. Be quiet little boys and girls, just approve our lifetime judges and leave us alone.

The irony with all this is that they don't want to show us this material so we could make an objective analysis and not look to second hand evaluations, but they are perfectly willing to go to some of these files and take out selective pieces and give them to the supporters of the nominee and give them to the press or leak them to the press. They want to have it both ways. They are more than happy to use anything from a confidential Government file they think will help them, but they don't want to disclose the entire record because they don't want to have it in context because then the truth may hurt.

If this is how the administration and Department of Justice approach our shared constitutional responsibility for the appointment to high office, how are we to have confidence in them in their other representations about so many things critical to how our Government functions and how they exercise the enormous power entrusted to them as a function of the public office they occupy? How are we to accept it when they say, We don't want to talk about this but trust us? Yet when we ask questions about things we legitimately believe could be looked at—nothing classified, nothing confidential—they say they still don't want to show us that.

We talked about the performance evaluation. The administration and Republican supporters of Mr. Estrada have sought to exploit his performance evaluation.

Let's go to the whole story on that. They keep saying Professor Bender gave the highest evaluation to Mr. Estrada when he was at the Department of Justice. They claim that is all you need to know. They say we can't give you anything else in the file, but we will show you this one thing.

Well, this is not quite the whole story. There is a letter received from Professor Bender this week. It was sent to Senator HATCH and the members of the committee. I assumed, since Senator HATCH had been putting so much in the RECORD, he would probably put this in. He somehow didn't.

This is what Professor Bender's letter says in part. I would like to have the entire letter printed. He says:

It has come to my attention that, in responding to statements I made to the press several months ago regarding the Estrada nomination, you [Senator HATCH] have said, both to the Judiciary Committee and to the full Senate, (1) that I have since changed my opinion about the nomination, and (2) that performance evaluations of Mr. Estrada's work that I signed in 1995 and 1996, when I was Principal Deputy Solicitor General, are inconsistent with the views about the nomination that I gave to the press. I am writing this to correct those statements of yours.

No. 1. I have not changed my opinion of the nomination—

That is, the adverse opinion he had, in which he opposed the nomination of Mr. Estrada.

He said:

I have not changed my opinion of the nomination, nor have I ever said to anyone that I had changed my opinion. . . . I have not changed that opinion in any respect.

This is dated February 10, 2003. He can't be any more specific than that. He was opposed to his nomination before. He is opposed to his nomination since.

Then he says, speaking of the performance evaluations of Mr. Estrada, these:

. . . are not inconsistent with my published statements [of opposition to him.] To the best of my recollection, it was the policy of the Solicitor General's Office at the time to give every Assistant to the Solicitor General exactly the same performance evaluation.

These things could have been printed up a month before.

The language in the Performance Achievements portions of Mr. Estrada's evaluations was not written by me, nor did I fill out the Employee Appraisal Record form.

Then he goes on to say:

I believe that the Solicitor General's Office had the policy of giving each of the Assistants exactly the same Excellent rating each year.

And he stated why? Of course. It paid them the highest salaries permitted by the Government. Everybody they hired had those highest salaries. To keep the highest salaries, they had to have the excellent rating.

I ask unanimous consent to have the letter printed in the RECORD.

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

ARIZONA STATE UNIVERSITY,
Tempe, AZ, February 10, 2003.

Renomination of Miguel A. Estrada to the United States Court of Appeals for the District of Columbia Circuit.

Hon. ORRIN HATCH,
U.S. Senate,
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR HATCH: It has come to my attention that, in responding to statements I made to the press several months ago regarding the Estrada nomination, you have said, both to the Judiciary Committee and to the full Senate, (1) that I have since changed my opinion about the nomination, and (2) that performance evaluations of Mr. Estrada's work that I signed in 1995 and 1996, when I was Principal Deputy Solicitor General, are inconsistent with the views about the nomination that I gave to the press. I am writing this to correct those statements of yours.

1. I have not changed my opinion of the nomination, nor have I ever said to anyone that I had changed my opinion. Someone must have inadvertently given you incorrect information about this. When asked by reporters what I thought of the nomination when it was first made (I assume I was asked because I have been one of Mr. Estrada's supervisors in the Solicitor General's Office), I stated my honest opinion, to the best of my ability. I have not changed that opinion in any respect.

I have declined to keep stating the same views to the press, over and over again, because I am not engaged in, and do not wish to seem to be engaged in, any kind of campaign or crusade against Mr. Estrada. I did not volunteer my negative comments to anyone, either in the press, the government, or elsewhere. I was asked my opinion and I gave it. Having done so, I did not see any reason to keep repeating it to reporters who called. My opinion has not changed.

2. The ''Excellent'' performance evaluations of Mr. Estrada that I signed in 1995 and 1996 are not inconsistent with my published statements about the nomination. To the best of my recollection, it was the policy of the Solicitor General's Office at the time to give every Assistant to the Solicitor General exactly the same performance evaluation. The language in the Performance Achievements portions of Mr. Estrada's evaluations was not written by me, nor did I fill out the Employee Appraisal Record form. You will notice, in examining the Performance Appraisal Record form, that the language in the Performance Achievements portion was taken, word for word, from the printed Performance Standards that precede each part of the evaluation form. As far as I can remember, an administrator in the Solicitor General's Office prepared identical ''Excellent'' evaluations for each Assistant each year, taking the language directly from the printed performance standards. I do not think this practice is an unusual one in the government.

When these filled-out-forms came across my desk, I believe that I asked the Solicitor General what to do with them, and that he asked me to sign them, as written, as the Rating Official. I did as he requested. He then signed them as the Reviewing Official. No actual individual written evaluation was done by me—or, so far as I know, by anyone else—in connection with these evaluations for any Assistant to the Solicitor General. They were boilerplate.

I believe that the Solicitor General's Office had the policy of giving each of the Assistants exactly the same Excellent rating each year because it hired only the most highly qualified lawyers and it paid them the highest salaries permitted by the government. ''Excellent'' ratings were necessary to justify these salaries. I signed the already filled-out Performance Evaluation forms, as they were give to me, as part of that policy.

Since my views seem to be relevant to the Senate's consideration of the nomination, I would appreciate it if you would share this information with your colleagues who are considering the nomination. I thank you in advance for this consideration.

Sincerely,

PAUL BENDER,
Professor of Law.

Mr. LEAHY. Mr. President, I am doing that because Professor Bender asked that this be made known to the Senate, especially as he has been quoted as having changed his mind. He still opposes Mr. Estrada. I will quote him again. He says:

I have not changed my opinion of the nomination, nor have I ever said to anyone that I had changed my opinion.

He makes it very clear that he feels he has been misquoted on the Senate floor. He may feel it was done inadvertently. He said, ''Someone must have inadvertently given you incorrect information about this,'' making it very clear that he was misquoted.

I know what he means. It is easy to get misquoted around here. Earlier this week a Republican Senator misquoted me in the Senate Chamber. The Senator who purported to quote my words certainly could not have known that he was quoting me incorrectly. I can't believe—I would be shocked to think somebody would come here and quote me out of context or incorrectly to make a partisan point. I would be as shocked as Claude Raines was in ''Casablanca.''

So people understand, the statement I did make on June 18, 1998, was to protest the anonymous Republican hold in the consideration of the judicial nomination of Judge Sonia Sotomayor. The nomination of Judge Sonia Sotomayor was held up, as I have stated before, for months and months and months by anonymous holds. She had been nominated by President Clinton to the Second Circuit Court of Appeals. I believe she was the very first Hispanic woman to go to that court of appeals. Everybody assumed her to be a slam dunk. She had been originally appointed by President George H.W. Bush to the district court. But Republicans allowed anonymous holds and nobody on the Republican side would say who was holding her up, but they held her up.

I am saying I would never do this to a judge. What I said was I would refuse to put an anonymous hold on any judge. I never have put an anonymous hold on a judge. If I wanted to delay for whatever reason a nomination, I state it on the floor as I am doing now, in the light of day, not the cloak of secrecy.

The portion of my speech about anonymous holds—like some speeches I made in the years 1996, 1997, 1998, 1999, and 2000—were not heard on the other side of the aisle. That is probably why they now misquote it. I am sure it is an inadvertent misquote. I think it is because they didn't hear it. They certainly didn't hear it at the time because they continue to use the ''anonymous holds.'' It is a practice I put an end to when I was chairman of the Judiciary Committee. But when Republicans controlled the Senate in years past they held up scores of judicial nominees of President Clinton, and never allowed them to come to a vote by ''anonymous holds'' of a single Republican Senator or more than one.

I am not surprised that they misquote me on the floor, because they didn't hear my speech at that time. In this case, people should understand what was happening.

Judge Sonia Sotomayor's nomination was delayed by anonymous Republican holds and was on the Senate calendar for months and months. She was favorably reported by the Judiciary Committee in early March of 1998. But then

her nomination was stalled without explanation or accountability on the calendar without Senate action. Even after I made my speech criticizing anonymous holds and stating that I would never put on such an anonymous hold, her nomination continued to be delayed for several more months to the very end of the session of Congress. It was actually delayed, I think, for 7 months. When it finally came up, 29 Republican Senators voted against confirmation of Judge Sonia Sotomayor for the Second Circuit.

I went back and checked the CONGRESSIONAL RECORD. They are not required to, of course, but you would think after voting against a judge, or having anonymous holds on a judge for a long period, there would be at least one or two words in the CONGRESSIONAL RECORD explaining why this was done. They don't have any requirement to do that, but I think it would have been nice. If they carry out an anonymous hold like that for all of those months, you might say, Why?

I mention this because there seems to be a lot being overlooked. When that same Republican Senator quoted part of a colloquy between me and the then-majority leader, TRENT LOTT, I suspect that he did not really recall the discussion, or he would not have had it so wrong here on the floor.

I will read again what Senator LOTT, the Republican leader, said at that time:

> [T]here are not a lot of people saying: Give us more Federal judges. They just are not. For us to be pontificating about this and gnashing, how unfair, this appointment of more Federal judges, It is just not there. . . . Some people might argue that we have plenty of Federal judges to do the job. I hope they will do that. I am saying to you, I am trying . . . but getting more Federal judges is not what I came here to do.

The distinguished Presiding Officer was not in the Senate at that time. But he may recall Justice Ronnie White came from his State.

The nomination of Ted Stewart to the District Court in Utah was also very controversial. A lot of the so-called ''liberal groups'' the distinguished chairman is fond of excoriating around here opposed Mr. Stewart. A lot of the same groups the distinguished senior Senator from Utah implies control things around here opposed Mr. Stewart.

I voted for Mr. Stewart. I was one of those Democrats who should not be lumped together. In fact, a whole lot of Democratic Senators voted for Mr. Stewart, even though he was strongly opposed by groups that are normally aligned with Democratic interests, especially those who support a clean environment in this country.

Then there was, of course, the nomination of Justice Ronnie White. He also was supported by every Democratic Senator. And every single Republican, including those who had voted for Ronnie White in committee, came down on the floor and voted against him.

I do not recall anything like that ever happening on the Senate floor.

His nomination was rejected by a party-line vote of Republics—it was quite unusual to vote down a district court nominee, especially one who had been voted out by the Judiciary Committee. Some of the same Republicans who voted for him before the committee voted against him on this floor. This superb African American jurist was humiliated and defeated.

It took several more months of hard work to obtain votes on the nomination of Judge Paez and Marsha Berzon.

Again, these anonymous Republican holds held them up until March of the following year 2000.

Again, as I said, I will always oppose such anonymous holds.

Even then, after obtaining a vote of Judge Paez's nomination to the circuit court involving overcoming several procedural hurdles and several votes before we were finally able, after more than 4 years of trying—4 years it sat here—this distinguished Hispanic jurist finally got a vote. Then 39 Republicans voted against the nomination, including a number of Republican Senators who were involved in yesterday's debate saying it would be a terrible and unique precedent if we don't immediately vote for a Hispanic who is nominated to the court of appeals, in this case, Mr. Estrada.

They were perfectly willing to block floor votes for years before. I am not sure what the difference is. They both have supporters.

I do recall the difference now. One was appointed by a Democratic President and one by a Republican President. Like I said, that seems to be all the difference in the world.

In the debate, my Republican colleagues speak of the weight of the letter from the former Solicitors General and Acting Solicitor General. They say this is definitive and assert that the Senate has no right to ask these questions.

Immediately, the independent 100 Members of the Senate say, My gosh. These guys who held these important staff positions at the Department of Justice are telling us we can't ask questions; that we should immediately run for cover, and say, of course, we will not ask questions.

I don't quite read the Constitution that way.

In fact, I frankly didn't get elected to the Senate and take my oath of office and decide at that point I will vote or take actions based upon what somebody who worked for the Attorney General tells me to do or not do as a Senator. I don't care which attorney general it might have been, Republican or Democrat. It is not in the cards.

But I was concerned. I know of these former Solicitors General from both Republican and Democratic administrations. For many of them, I was impressed with their legal abilities. So I am struck with their letter's ignorance of the precedents. I do not know who wrote the letter, but one of the people who signed it was Robert Bork. But I doubt he wrote it because his own nomination provides some of the strongest precedent for the requests we are making.

I do not fault them for seeking to maximize the secrecy of executive branch memoranda and deliberations, although I am surprised they are willing to do that at a time when we have the most secretive administration I have ever known out of the six administrations—I came here right after the Nixon administration, so I cannot speak for the Nixon administration. But this administration is certainly far more secretive than the other ones I have served with before: the Ford, the Carter, the Reagan, the first Bush, and the Clinton administrations.

This letter states a policy preference and has been misinterpreted by some as a statement of law, or privileged, which it is not. I want to emphasize that. They state what they think the policy should be. They do not state what the law should be. Therein lies an enormous difference. They are not writing this based on their legal knowledge, saying this is the law. They are saying: This is what we think the policy should be.

Well, I have always felt, on these kinds of issues, Senators should make that policy. Especially we should make the policy of what we are going to ask for in confirmation hearings. That was done at the time of our nation's first leader, President George Washington in cooperation with the Senate. I would note that in 1795, four years after the Constitution was adopted, the Senate defeated one of the judicial nominations of President Washington, that of John Rutledge and that vote was based on differences between many of the Senators and Justice Rutledge regarding ideas and policies. The Senate's consideration of judicial nominees and their views and approach to the law has been done by every Senate since.

It is especially difficult to understand, hearing the sudden urge on the other side of the aisle that: Oh, my gosh, we have to keep everything in the executive branch confidential. Well, Congress passed the Presidential Records Act to require the opposite, that memoranda and writings of advisors to the President be made public.

Additionally, I would not that some of the same Senators made demand after demand for internal documents of the Clinton administration over the last several years. They were asking for things that had never been asked for before, such as information related to on-going investigations. In fact, I think the Republican-led Senate spent tens of millions of dollars—tens of millions of dollars—of the taxpayers' money asking for document after document, many of which were probably were never read. I would be willing to bet some are still sitting in the envelopes they were transmitted in. And it was done almost every day: Let's think

of something else to ask for. And it was sent. And the taxpayers were paying for it.

Now, if you have something that is relevant to the core functions of the Senate, especially the confirmation function, then it is appropriate to ask for it. This is especially so for the only positions in our whole system of government that are for life—these judgeships are lifetime appointments. The Senate cannot amend these decisions, like a law, if we make a mistake.

The administration's assertion that the documents produced to the committee during the Bork nomination did not reveal internal deliberations is way off the mark—way off the mark. When they say this did not reveal internal deliberations, that is way off the mark. It is quite clear the Department provided the Senate with memoranda written to Mr. Bork by lower level attorneys, those who were in the exact same capacity as Mr. Estrada, making recommendations about appeals in a variety of cases.

For example, the Justice Department provided the Senate Judiciary Committee with memoranda related to the Justice Department's legal analysis of school integration cases, such as memoranda from Frank Easterbrook when he was an Assistant Solicitor General and Bork was Solicitor General. The Easterbrook legal memo and similar memos were shown as examples at Mr. Estrada's recent hearing as part of the large volume of legal memoranda provided by the Reagan Justice Department and examined by Senators and key staff.

Senator DODD, in an excellent speech, referred to some of these materials last night in debate. Not all of the information disclosed was previously placed in the Estrada hearing record, so I ask unanimous consent, Mr. President, to have printed in the RECORD a sample of the correspondence between Senator BIDEN, who was the then-chairman of the Judiciary Committee, and the Justice Department, which demonstrates the substantial cooperation and the types of disclosures the Justice Department made to accommodate the Senate in past administrations.

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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS
Washington, DC, May 10, 1998.

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.

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;

l. 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* v. *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 from 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. TALENT assumed the Chair.)

Mr. LEAHY. I put that material in the RECORD because it stands in stark contrast to the total lack of cooperation by the current occupants of the Justice Department.

The administration, quite inappropriately, I believe, refuses the request of a coequal branch of Government. To quote a friend of mine, one who went to the same law school I did, at about the same time: We are not potted plants up here. The Senate has demonstrated its role in the confirmation of judges from the beginning of this country's history. After all, the Senate rejected some of President George Washington's and President Madison's judicial nominees. But let's go ahead with what has happened here. It makes me wonder if there is some kind of huge disconnect at the administration, or whether they are getting all their information based on some of the things that were wrongly stated on the Senate floor.

What happened first is, the administration claimed: We cannot send up this material, these memos of Mr. Estrada because we never provided internal legal memos in the past. Then, of course, we gave them evidence: Well, yes, previous administrations had. Then the administration says: Whoops, well, those were different. They are distinguishable. So then we show them evidence: No, it is exactly the same kind of memoranda. And they say: Prove that you received memos that contained confidential information written by attorneys. And they say, we are still not going to accommodate you. We are still not going to come forth. They, in essence, are saying we are still going to stonewall you and we will continue to deny that any precedent exists.

I am reminded of the famous story of President Lincoln's cross-examination in a case when he was a young lawyer. As the story goes, Lincoln was cross-examining a witness about how a man, who was far away from the scene of a fight, could have seen what happened. And it went something like this.

Lincoln said: Isn't it true that you were across the road from where the incident took place?

The answer was: Yes.

Then Lincoln said: Isn't it true that you are near-sighted?

The witness answered: Yes.

And then Lincoln said: Isn't it true that your view of the fight was blocked by trees?

The witness said: Yes.

So Lincoln said: Then, how can you sit there and testify under oath that the defendant bit Mr. Smith?

The witness answered: Because I saw the defendant spit Mr. Smith's ear out of his mouth.

In our case, subsequent to Mr. Estrada's hearing, we learned that most of the Bork appeal memos disclosed to the Senate were returned to the Department the year after the nomination. The proof is in a letter from Acting Assistant Attorney General Thomas Boyd to Chairman BIDEN in May 1988, which notes that:

[M]any 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.''

Sound familiar? Well, the requests should be familiar. It is exactly what we requested last year. The difference is, during President Reagan's administration, they responded. During this administration, they say: There is no precedent for it.

So, frankly, this is the ''ear being spit out.'' The fact is, this letter ''spits out'' that the overly partisan current occupants of the Justice Department have sought to deny the Justice Department previously provided such documents. Mr. President, those denials are false.

Surely, a copy of this letter is also in the Justice Department's files. If we had been able to get this letter earlier, even by the time of Mr. Estrada's hearing, we would have put it in the RECORD. It is obvious why the Justice Department probably did not want us to have it. Because it conclusively demonstrates the precedent that documents like the ones written by Mr. Estrada were provided to the Senate Judiciary Committee in the past.

The Boyd letter conclusively demonstrates the precedent that documents like the ones written by Mr. Estrada were provided to the Senate Judiciary Committee in the past. It must now be admitted beyond dispute that, as the Justice Department acknowledged back then, ''the work product of attorneys in connection with government litigation or confidential legal advice'' was provided to the Senate in connection with past nominations.

I hope that the administration and its Republican supporters will finally quit denying the precedent for the request and provide us with Mr. Estrada's memoranda. Letters from the Justice Department itself finally conclusively establish the precedent for our request.

The longstanding policy of the Justice Department, until now, and the policy of prior administrations, including the Reagan and first Bush administrations, has been a practice of accommodation with the Senate in providing access to materials requested in connection with nominations. This administration would rather deny the truth and long-standing practices. At times it is as if this administration thinks it has a blank slate and a blank check notwithstanding tradition, history, precedent or the shared powers explicitly provided by our nation's Constitution.

There is part of a pattern of hostility by this administration to requests for information by Congress acting pursuant to powers granted to it by the Constitution, regarding nominees and other important oversight matters.

Yesterday, I joined with the distinguished Democratic Leader in a letter to the President setting forth background on the stonewalling of his administration that has occurred with respect to this nomination and urging him to take action to help resolve the impasse. I thank the Democratic Leader for taking this action and seeking accommodation between the two branches of our government. I have been seeking such accommodation for the last two years with respect to judicial nominations. I hope that we can now be more successful.

I would also note that the few court cases cited by the administration about the general desirability of confidentiality for government documents are dicta and not precedential or binding on the Senate.

One of the cases relied on by the administration is United States v. Nixon, 418 U.S. 683 (1974), in which the Supreme Court ordered President Nixon to disclose his Watergate-related tape recordings of Oval Office conversations with his closest personal and legal advisors. The Supreme Court also noted in the Nixon case that it is quite unlikely ''that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure.'' 418 U.S. at 712.

Just as the Supreme Court observed in the Nixon case, it seems unlikely that Mr. Estrada was chilled from expressing his views in his memos following the disclosure of memos written by attorneys at the Department in the decade prior to his service there in connection with the Trott, Bork, Rehnquist, and Reynolds nominations. Ironically, memoranda by Mr. Bork assessing President Nixon's authority to refuse to disclose information was one of documents provided to the Senate in connection with the Bork nomination.

Other cases cited by the Justice Department in its second letter are inapplicable to the Senate or pre-date the Nixon decision. For example, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975), is a case brought under the Freedom of Information Act (FOIA) involving a statutory-based claim of deliberative process privilege under FOIA, not a request from the Congress. I wish this administration were more forthcoming in connection with FOIA requests, but this is not a FOIA request, nor does FOIA limit Congress' authority to seek information from the Executive Branch or its agencies. Indeed, 5 U.S.C. 552(d) expressly provides that FOIA ''is not authority to withhold information from Congress.''

During the course of this debate Republican Senators have also spoken as if these materials are somehow protected by an attorney-client privilege. First, I note that even the administration has not made that claim. The administration's refusal to cooperation is not based on any claim of a legal privilege, just recalcitrance. I believe I explained at Mr. Estrada's hearing some of the reasons a claim of attorney-client privilege would be misplaced. Until this week, only the Washington Post had gotten it wrong in asserting that privilege applies.

Unfortunately, Republican Senators are now taking up that chant. It is heartwarming to hear Republicans' devotion to concepts like the attorney-client privilege but it is that concept is inapplicable to the request for Mr. Estrada's writings.

As a legal matter, the Seventh, Eighth, and District of Columbia Circuits have ruled that government lawyers are not entitled to claim the attorney-client privilege.

Moreover, in this setting the ''client'' is the government of which the Congress is certainly a part.

This administration's own Assistant Attorney General for Legal Policy Viet Dinh flatly rejected the notion of such a privilege five years ago when he told Legal Times that a government lawyer's ''employer is not a single person but the United States of America.'' He said both the ''United States of America'' and the ''government'' obviously include the United States Senate, especially when it is fulfilling constitutional responsibilities. As conservative law professor Ronald Rotunda has noted, ''government lawyers work for the government, and not the particular individual whose offices happen to be down the hall.'' He added that ''the government cannot plead attorney-client privilege against itself.'' This is from the Legal Times of August 3, 1998.

The attorney-client privilege is designed to encourage candor by the client, not the attorney. For those who are not attorneys, I note that the attorney-client privilege is designed for litigation in courts between private parties. It is a judge-made doctrine based on policy considerations to foster an effective adversary legal system. I am a strong believer in our adversarial legal system and a strong supporter of the attorney-client privilege. It does not apply in these circumstances.

Finally, there is ample precedent that the attorney-client privilege does not apply to requests by Congress. As Senator Fred Thompson, who chaired one of the many Republican investigations into the Clinton Administration, noted: ''In case after case, the courts have concluded that allowing it [the attorney-client privilege] to be used against Congress would be an impediment to Congress' obligation and duty to get to the truth and carry out its investigative and oversight responsibilities.''

My good friend from Utah, Senator HATCH, has echoed that analysis. A few years ago, he observed: ''The attorney-client privilege exists as only a narrow exception to broad rules of disclosure. And the privilege exists only as a statutory creation, or by operation of State common law. No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules.''

The Congressional Research Service has found that ''No court has ever questioned the assertion of that prerogative'' and noted that the privilege ''is not of constitutional dimensions, [and] is certainly not binding on the Congress of the United States.''

I regret that so many of our Republican colleagues have chosen to seek

comfort and concealment in a legal principle that has no application to this matter. I think that the confusion started with a Washington Post editorial that got this matter all wrong and reflects a lack of familiarity with the history of nominations and the Senate's long-standing view of the privilege. The Washington Post's editorials on these matters has been prone to err in a number of ways and they remain free to do so, but I am sorry so many were led astray on this and other matters.

This Administration's policy argument for absolute secrecy of these memoranda is undermined by other long-standing practices related to nominees. The Senate routinely receives confidential information about lifetime and term-appointed nominees by way of the FBI's background investigation of a nominee, which details their adult lives and many private matters. Thus, the Senate is not required to show a particularized need for such private information which has long been germane to a nominee's fitness for judicial office.

Moreover, the memos at issue do not involve national security. There are no state secrets in the documents Mr. Estrada has written requiring that they be sealed from congressional view forever. The memos do not relate to any on-going criminal investigation or to any matters that have not likely already been disposed of by the courts long ago. His writings are relevant to how he thinks, analyzes legal issues and makes judgement and, therefore, relevant to whether or not he should be confirmed to the second highest court in the country. Moreover, as Senator SCHUMER noted in his letter, anytime one of these memos is written, the writer must assume, and even hope, that his or her views will become the Department's official position. Thus, it is hard to believe the risk of disclosure on the remote chance that one might someday be selected for a judgeship would be chilling.

Further, as noted long ago by the Supreme Court in McGrain v. Daugherty, 273 U.S. 135 (1927), Congress has the power to inquire into the administration of the Department of Justice—whether its functions are being properly discharged or neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties. Even Montesquieu, the architect of separation of powers, stated that ''The legislature should have the means of examining in what manner its laws have been executed by public officials.'' In this case, whether Mr. Estrada was using his position as an Assistant Solicitor General to advance his personal political opinions or to defend faithfully the laws passed by Congress has been called into question.

In sum, there is ample historical precedent for the request made by the Senate Judiciary Committee. This Administration's refusal to cooperate obstructs Senators from fulfilling their role of giving meaningful advice regarding lifetime appointments and to give or withhold consent. The advice and consent responsibility that the Constitution entrusts to the Senate is demeaned if the Administration refuses to disclose information reasonably related to a nominee's fitness or integrity.

Public confidence in the fairness of the judiciary is eroded when the Administration hides pertinent information about a nominee sought by the Senate Judiciary Committee in seeking to fulfill its role related to the appointment power that the Constitution confers jointly on the Senate and the President. The advice and consent clause of the Constitution is part of the Constitution's checks and balances in the lifetime appointment of individuals to a co-equal third branch of the federal government, unaccountable to the normal democratic process. The public's representatives in the Senate should have an opportunity to examine the writings of Mr. Estrada in advance of entrusting him with a judicial role for life.

The influence of the courts over the lives of Americans demands that the Senate exercise its checking responsibility carefully and only after reviewing all relevant information.

I think it has to be admitted beyond dispute that, as the Justice Department acknowledged back then, ''the work product of attorneys in connection with government litigation or confidential legal advice'' was provided to the Senate in connection with past nominations. I hope the administration and their supporters here in the Senate will finally quit denying the precedent for the request and provide us with Mr. Estrada's memoranda. Letters from the Justice Department itself finally and conclusively establish the precedent for our request.

I ask unanimous consent that the letter, dated May 10, 1988, from Acting Assistant Attorney General Thomas Boyd be printed in the RECORD.

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

U.S. 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. LEAHY. It is interesting to note that after I wrote the Attorney General and Mr. Estrada in May 2002, when I requested Mr. Estrada's writings, the administration didn't respond immediately. If they really believed in their own precedent, they would have come back and said: Look, we have a precedent against it. I think they realized there really was no such precedent, and they were going to try to make one up. They took weeks to respond. They could have responded in a day because the precedent was so clear. Or if they simply wanted to say, well, maybe all other Presidents did it that way, we are not going to do it that way, they could have done that in just a matter of days. But instead, it makes you wonder, did they go back and read those memoranda and say: Whoops, we don't want these to go before the Senate, they are too revealing?

Whatever it is, Mr. Estrada himself says: As far as I am concerned, you can see them, and you can ask me questions about them.

The irony is, in all likelihood we would not be here today, having this long debate on the Estrada nomination, if he had simply done that. If the administration simply said: Look, Miguel Estrada is willing to have his memoranda before the Senate Judiciary Committee and then to answer questions about what he meant, we would not be here; we would not be in the circumstance where he is asked, over the last 40 or 50 years: Is there anything that you disagreed with that the Supreme Court said? During that time, the Supreme Court has overruled itself. No, nothing.

So we really have no idea what he thinks. They simply said: Look, we nominated somebody. We were not willing to allow the nominations to go forward when President Clinton nominated people here. We blocked them for year after year after year, but take ours on faith.

Again, to the folks who made up a slogan I kind of liked, ''Trust, but verify,'' we will trust but verify. As I said, we would not even be here today, we would not be having this debate today, if this had been done.

The longstanding policy of the Justice Department until now, the policy of prior administrations, including

Reagan and the first Bush administration, has been a practice of accommodation with the Senate in providing access to materials requested in connection with nominations. But this administration wants to deny the truth and longstanding practices. You would think they believe they have a blank slate and a blank check notwithstanding tradition, history, and precedent or the shared powers explicitly provided by our Nation's Constitution.

This goes beyond hubris. This goes to a sense of entitlement. It is a ''l'etat, c'est moi'' attitude on the part of the administration. It is saying: If we say it, it happens. If we want it, it is OK. It is almost like the little kid on the playground who says: I want this one, I want this one, I want this one, and I don't care what the playground rules are.

Well, this is a lot more than a playground. This is the U.S. Senate, a place I love and revere and a place steeped in constitutional history, steeped in constitutional prerogatives; but even more so, one where we are called upon day after day to protect the Constitution of the United States. I see a pattern of hostility by this administration to requests for information by Congress, even though Congress is actively pursuing the powers granted to it by the Constitution, regarding not only nominees but important oversight matters.

Yesterday, I joined with the distinguished Democratic leader in a letter to the President. We set forth the background of the stonewalling of this administration that has occurred with respect to this nomination. We urged them to take action to help resolve the impasse. I thank the Democratic leader for taking this action seeking accommodation between the two branches of our Government. I have been seeking such accommodation for the last 2 years with respect to judicial nominations. I hope we can be more successful.

I hope that now people will step back and say: Look, let's put this on a more even keel. Let's have real hearings, not assembly line type hearings. Let's carry out our constitutional responsibilities. Let's go forward. That is the way I thought it should be when I came to the Senate 29 years ago. That is the way I think it should be now. I think that is the way it could be. It is the way it was with both Republican and Democratic administrations.

I was not here at the time of the Nixon administration. I came shortly thereafter. I don't know if this kind of stonewalling is precedent or not. In my experience, I would not know that. But I know it was not during the administrations of President Ford, President Carter, President Reagan, the first President Bush, or President Clinton.

I ask unanimous consent that a copy of the letter Senator DASCHLE and I sent to the President on this matter, pointing out that the precedent for what we have asked for was shown in the nominations of Robert Bork, William Bradford Reynolds, Benjamin Civiletti, Stephen Trott, and William Rehnquist, be printed in the RECORD.

There being no objection, the letter 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 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.

Mr. LEAHY. Mr. President, I yield the floor.

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

Mr. HATCH. Mr. President, I have been listening to this day after day after day. It is clear this is a game. It is a bad game. If they don't like the answers Mr. Estrada has given, vote against him. That is the remedy here. Don't filibuster. Don't explode this body into always having filibusters on any judge who may be controversial on one side or the other. Vote against him. Talk against him, like we have had plenty of. Then you have an absolute right to vote against him if you want to.

Now, let me go back through some of the things we were talking about. On May 15, 2002, Senator LEAHY sent the following letter to Attorney General Ashcroft:

In connection with the nomination of Miguel Estrada to the United States Court of Appeals for the D.C. Circuit, I write to request that the Department of Justice send to the Judiciary Committee appeal recommendations, certiorari recommendations, and amicus recommendations Mr. Estrada worked on while at the Department of Justice. This should assist the Committee in considering this nomination.

On June 5, in a letter from the Department of Justice, they answered the then-Chairman LEAHY'S letter:

Dear Mr. Chairman:

This is in response to your letter dated May 15, 2002, requesting appeal recommendations, certiorari recommendations, and amicus recommendations that Miguel Estrada worked on when he was employed at the Department of Justice.

The categories of documents you have requested are among the most highly privileged and deliberative documents generated within the Department of Justice. The Solicitor General must have the benefit of candid and confidential advice in order to discharge his critical responsibility of deciding what appeals the Government will take and what positions the Government will adopt in pending litigation. Attorneys like Mr. Estrada who serve as Assistants to the Solicitor General are asked to render candid, unbiased, and professional advice about the merits of potential appeals.

They do so by preparing exactly the kinds of recommendation memoranda you have requested. These documents review the substantive legal issues in a case, the broader jurisprudential implications of the case, policy considerations, the strength of the factual record, and the overall likelihood of success on appeal.

If highly privileged and deliberative documents of this kind are not shielded from disclosure, the Department will face the grave danger that Assistants to the Solicitor General, and others in comparable positions, will be chilled in the future from providing the candid and independent analysis that is essential to high-level decisionmaking. As the unanimous Supreme Court recognized: ''Human experience teaches that those who

expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'' United States v. Nixon, 418 U.S. 683, 705 (1974). The Court observed that ''the importance of this confidentiality is too plain to require further discussion.'' Simply put, the Department cannot function properly if our attorneys write these kinds of documents with one eye focused on the effect that their words, if made public, might have on their qualification for future office.

For these reasons, the Department has a longstanding policy—which has endured across administrations of both parties—of declining to release publicly or make available to Congress the kinds of documents you have requested.

We trust that you will appreciate the important institutional interests that lead us to decline your request. In our judgment, the Committee has had ample time and alternative means for obtaining assessments of how Mr. Estrada's performance as an Assistant to the Solicitor General bears on the merits of his nomination. In particular, you have been free to inquire of the Solicitors General under whom Mr. Estrada served their views as to his qualifications for the position to which he has been nominated.

On January 25, 2002, you promised a Committee hearing for Mr. Estrada this year. So that the Committee can meet our commitment, we would request that you contact me or Judge Gonzales as soon as possible to discuss this matter if you have any questions or concerns.

That is the letter from the Justice Department in response to the letter Senator LEAHY sent on May 15. Apparently, at the hearing this issue was raised again, and the Department of Justice responded to Chairman LEAHY again on October 8, 2002:

Dear Mr. Chairman:

During the hearing on September 26, 2002, on the nomination of Miguel A. Estrada to the U.S. Court of Appeals for the District of Columbia Circuit, you and Senator Schumer restated your request that the Department of Justice disclose certain confidential and privileged appeal, certiorari, and amicus memoranda that Mr. Estrada authored when he was a career lawyer in the Office of the Solicitor General.

As we indicated in our letter of June 5, 2002, we must respectfully decline your request. The relevant historical, policy, and legal considerations implicated by your request demonstrate that disclosure of these memoranda from the Office of the Solicitor General would undermine the integrity of the decisionmaking process in that Office.

The Committee's request threatens the proper functioning of the Office of the Solicitor General. Indeed, all seven living former Solicitors General—from Archibald Cox to Seth P. Waxman—have written to the Committee and explained that the Committee's broad and unprecedented request would have a debilitating effect on the ability of the United States to represent itself in litigation. Their letter explained that, as Solicitors General, their ''decisionmaking process required the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure.''

That letter is quite detailed, Mr. President. It goes on to make this case as persuasively as it can, and it gives a number of charts that make the case as well, all to no avail, apparently, because our colleagues think this is a good issue to stop and stymie this Hispanic nominee.

Now, that was October 8. Not until after we noticed the markup for Mr. Estrada on January 23, 2003, did Senator SCHUMER write to the Honorable John Ashcroft at the Attorney General's Office, again requesting these matters. And then the Department of Justice responded immediately. We received it on January 23. Jamie E. Brown, Acting Assistant Attorney General, explained that they cannot do this. I have been informed that never have they given up appeal recommendations, amicus recommendations, and certiorari recommendations.

I ask unanimous consent that these letters be printed in the RECORD in that order.

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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, June 5, 2002.

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

DEAR MR. CHAIRMAN: This responds to your letter dated May 15, 2002, requesting appeal recommendations, certiorari recommendations, and amicus recommendations that Miguel Estrada worked on when he was employed at the Department of Justice.

The categories of documents that you have requested are among the most highly privileged and deliberative documents generated within the Department of Justice. The Solicitor General must have the benefit of candid and confidential advice in order to discharge his critical responsibility of deciding what appeals the Government will take and what positions the Government will adopt in pending litigation. Attorneys like Mr. Estrada who serve as Assistants to the Solicitor General are asked to render candid, unbiased, and professional advice about the merits of potential appeals. They do so by preparing exactly the kinds of recommendation memoranda that you have requested. These documents review the substantive legal issues in a case, the broader jurisprudential implications of the case, policy considerations, the strength of the factual record, and the overall likelihood of success of appeal.

If highly privileged and deliberative documents of this kind are not shielded from disclosure, the Department will face the grave danger that Assistants to the Solicitor General, and others in comparable positions, will be chilled in the future from providing the candid and independent analysis that is essential to high-level decisionmaking. As the unanimous Supreme Court recognized: ''Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'' *United States* v. *Nixon,* 418 U.S. 683, 705 (1974). The Court observed that ''the importance of this confidentiality is too plain to require further discussion.'' *Id.* Simply put, the Department cannot function properly if our attorneys write these kinds of documents with one eye focused on the effect that their words, if made public, might have on their qualification for future office.

For these reasons, the Department has a longstanding policy—which has endured across Administrations of both parties—of declining to release publicly or make available to Congress the kinds of documents you have requested.

We trust that you will appreciate the important institutional interests that lead us to decline your request. In our judgment, the Committee has had ample time and alternative means for obtaining assessments of how Mr. Estrada's performance as an Assistant to the Solicitor General bears on the merits of his nomination. In particular, you have been free to inquire the Solicitors General under whom Mr. Estrada served their views as to his qualifications for the position to which he has been nominated.

On January 25, 2002, you promised a Committee hearing for Mr. Estrada this year. So that the Committee can meet your commitment, we would request that you contact me or Judge Gonzales, as soon as possible to discuss this matter if you have any questions or concerns.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, October 8, 2002.

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

DEAR MR. CHAIRMAN: During the hearing on September 26, 2002, on the nomination of Miguel A. Estrada to the United States Court of Appeals for the District of Columbia Circuit, you and Senator Schumer restated your request that the Department of Justice disclose certain confidential and privileged appeal, certiorari, and amicus memoranda that Mr. Estrada authored when he was a career lawyer in the Office of the Solicitor General.

As we indicated in our letter of June 5, 2002, we must respectfully decline your request. The relevant historical, policy, and legal considerations implicated by your request demonstrate that disclosure of these memoranda from the Office of the Solicitor General would undermine the integrity of the decisionmaking process in that Office.

The Committee's request threatens the proper functioning of the Office of the Solicitor General. Indeed, all seven living former Solicitors General—from Archibald Cox to Seth P. Waxman—have written to the Committee and explained that the Committee's broad and unprecedented request would have a debilitating effect on the ability of the United States to represent itself in litigation. Their letter explained that, as Solicitors General, their ''decisionmaking process required the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure.'' Thus, ''[a]ny attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests—a cost that also would be borne by Congress itself.''

Longstanding historical Senate practice reinforces the position of the former Solicitors General that confidential, deliberative documents from the Office of Solicitor General have been, and should remain, confidential during confirmation hearings. As the attached charts demonstrate, since the beginning of the Carter Administration in 1977, the Senate has approved 67 United States Court of Appeals nominees who previously had worked in the Department of Justice. Those 67 nominees—of whom 38 had no prior judicial experience—include eight former lawyers with the Office of the Solicitor General. Our review of each of these 67 nominees' hearing records establishes that in none of

these cases did the Department of Justice produce internal deliberative materials created by the nominee while a Department lawyer. In fact, we could find no nominee for whom the Senate Judiciary Committee even requested that the Department produce such materials. The Committee's request with respect to Mr. Estrada therefore is unprecedented.

Of particular relevance are the appellate-court nominees who previously had been Assistants to the Solicitor General or Deputy Solicitors General, and had not served as judges as the time of their nomination—the same position Mr. Estrada occupies now. The nominees, nominated by Presidents of both political parties and confirmed by Senates controlled by both political parties, are:

Samuel A. Alito Jr. (Assistant to the Solicitor General, 1981–85; confirmed to the Third Circuit, 1990);

Danny J. Boggs (Assistant to the Solicitor General, 1973–75; confirmed to the Sixth Circuit, 1986);

William C. Bryson (Assistant to the Solicitor General, 1978–79; Deputy Solicitor General, 1986–94; confirmed to the Federal Circuit, 1994);

Frank H. Easterbrook (Assistant to the Solicitor General, 1974–77; Deputy Solicitor General, 1978–79; confirmed to the Seventh Circuit, 1985);

Daniel M. Friedman (Assistant to the Solicitor General, 1959–68; Deputy Solicitor General, 1968–78; confirmed to the appellate division of the Court of Claims (later the Federal Circuit), 1982);

Richard A. Posner (Assistant to the Solicitor General, 1965–67; confirmed to the Seventh Circuit, 1981); and

A. Raymond Randolph (Deputy Solicitor General, 1975–77; confirmed to the D.C. Circuit, 1990).

In none of these cases did the Department of Justice provide to the Committee the nominees' appeal, certiorari, or amicus recommendations. And in none of these cases did the Committee request that the Department do so.

The policy considerations implicated by the Committee's request underscore the strength of the Department's position and demonstrate that previous Senate Judiciary Committees have recognized the essential, long-term interest of the United States in protecting the integrity of such memoranda. The need to ensure the integrity of the process by which the Solicitor General makes litigation decisions for the United States is extraordinarily important. As the former Solicitors General explained, the interest in receiving honest, candid assessments of possible litigation positions, agency interests, and Supreme Court opinions would be severely compromised by disclosure in this context. It is important to add, furthermore, that memoranda written by Assistants to the Solicitor General present legal arguments supporting the litigation position of the United States, not their personal views. These memoranda seek to determine the legal arguments that are appropriate in government briefs, not the legal or policy preferences of their author.

Furthermore, the committee's need to assess a nominee's performance, intellect, and integrity can be accommodated in ways other than introducing into the deliberative process of the Office of the Solicitor General. For example, the Committee can review the nominee's written briefs and oral arguments, consider the opinions of others who served in the Office at the same time, and examine the nominee's written performance reviews. In Mr. Estrada's case, for example, there is a substantial body of information about his tenure in the Office of the solicitor General. Former Solicitor General Seth Waxman, who supervised Mr. Estrada, has written to the Committee in support of his nomination. Mr. Waxman wrote: ''During the time Mr. Estrada and I worked together, he was a model of professionalism and competence. In no way did I ever discern that the recommendations Mr. Estrada made or the analyses he propounded were colored in any way by his personal views—or indeed that they reflected anything other than the long-term interests of the United States.''

Moreover, 14 of Mr. Estrada's former colleagues in the Office of the Solicitor General have written the Committee to emphasize his ability, collegiality, and integrity: ''We also know Miguel to be a delightful and charming colleague, someone who can engage in open, honest, and respectful discussion of legal issues with others, regardless of their ideological perspectives. Based on our experience as his colleagues in the Solicitor General's office, we are confident that he possesses the temperament, character, and qualities of fairness and respect necessary to be an exemplary judge. In combination, Miguel's exceptional legal ability and talent, his character and integrity, and his deep and varied experience as a public servant and in private practice make him an excellent candidate for service on the federal bench.''

Finally, Mr. Estrada has sent the Judiciary Committee copies of his performance evaluations from his tenure in the Office. These documents indicate that Mr. Estrada's supervisors gave him ratings of ''outstanding''—the highest possible score—in every category for every evaluation period.

It bears emphasis that the long-standing historical practice, policy considerations and views of the former Solicitors General are fully supported by applicable legal principles. At the outset, it is important to note that the memoranda sought by the Committee are indisputably within the scope of the deliberative process, attorney-client, and attorney working-product privileges. The Supreme Court has recognized ''the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.'' *Houchins* v. *KQED*, 438 U.S. 1, 35 n.27 (1978). Indeed, the Court has explained that ''the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'' Id. (internal quotation omitted). The deliberative process privileges's ultimate purpose is to prevent injury to the quality of agency decisions by allowing government officials freedom to debate alternative approaches in private. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Based on these principles, courts have long recognized the Executive Branch's authority to protect the integrity of documents and other materials which would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

As a matter of law and tradition, these privileges can be overcome only when Congress establishes a ''demonstrably critical'' need for the requested information. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). It is insufficient for the requested material merely to ''have some arguable relevance'' to appropriate Congressional function. Id. at 733. In assessing whether Congress' possesses a ''demonstrably critical'' need for the material in question, one crucial consideration is whether Congress can obtain reasonably equivalent information from alternative sources that would satisfy its legitimate needs. In this instance, we again note that the Committee has full access to Mr. Estrada's briefs and oral arguments, to the information provided by Mr. Waxman, to the letter from former colleagues in the Solicitor General's office, and to his performance reviews. The Committee also is free to contact any of Mr. Estrada's former supervisors and colleagues in the Office of the Solicitor General to seek further information about Mr. Estrada's temperament, fairness, analytical skills and abilities or any other matters the Committee appropriately deems relevant to its inquiry. Because the Committee has adequate sources of information about Mr. Estrada, among other reasons, it cannot establish the ''demonstrably critical'' need for the deliberative materials in question.

None of the seven examples cited during Mr. Estrada's hearing as precedent for the Committee's request—the nominations of Judge Frank Easterbrook to the Seventh Circuit, Judge Robert Bork and Chief Justice William Rehnquist to the Supreme Court, Benjamin Civiletti to be Attorney General and Deputy Attorney General, William Bradford Reynolds to be Associate Attorney General, Judge Stephen Trott to the Ninth Circuit, and Jeffrey Holmstead to be Assistant Administrator at the Environmental Protection Agency—supports the Committee's request in this matter.

Of the seven cited nominees, the hearings of only two—Judge Bork and Judge Easterbrook—involved documents from their service in the Office of Solicitor General. Senator Schumer placed into Mr. Estrada's hearing record a single, two-page amicus recommendation memorandum that Judge Easterbrook authored as an Assistant to the Solicitor General. The official record of Judge Easterbrook's confirmation hearing contains no references to this document, and based on a comprehensive review of the Department's files, we do not believe that the Department authorized its release in connection with Judge Easterbrook's nomination. Senator Schumer's possession of this memorandum does not suggest that the Department waived applicable privileges and authorized its disclosure in connection with Judge Easterbrook's or any other nomination.

The hearing record of Judge Bork's nomination to the Supreme Court demonstrates that the Committee received access to a limited number of documents related to three specific subjects of heightened interest to the Committee, two of which were related to Judge Bork's involvement in Watergate-related issues and triggered specific concerns by the Committee. 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 Assistants to the Solicitor General regarding appeal, certiorari, or amicus recommendations in pending cases.

The remaining five nominations cited at the hearing similarly do not justify the disclosure of deliberative material authored by Mr. Estrada. None of the limited documents disclosed in the hearings for those five nominations involved deliberative memoranda from the Office of the Solicitor General. The Committee with respect to those five nominations requested specific documents primarily related to allegations of misconduct or malfeasance identified by the Committee. Moreover, as noted above, with respect to

the nomination of Judge Trott, the Committee requested documents wholly unrelated to Judge Trott's service with the Department. Again, the vast majority of deliberative memoranda authored or received by these nominees where never sought or received by the Committee. In sum, the existence of a few isolated examples where the Executive Branch on occasion accommodated a Committee's targeted requests for very specific information does not in any way alter the fundamental and long-standing principle that memoranda from Office of Solicitor General—and deliberative Department of Justice materials more broadly—must remain protected in the confirmation context so as to maintain the integrity of the Executive Branch's decisionmaking process.

In conclusion, we emphasize that the Department of Justice appreciates and profoundly respects the Judiciary Committee's legitimate need to evaluate Mr. Estrada's qualifications for the federal bench. We again suggest, however, that the information currently available is more than adequate to allow the Committee to determine whether Mr. Estrada is qualified to be a federal judge.

Thank you for considering the Department's views on this matter. Mr. Estrada's nomination for a position on an important federal court of appeals has now been pending for 518 days. There is no disagreement about the fact that he is a talented, experienced and exceptionally well-qualified nominee with strong and widespread bipartisan support. In fact, after an intensive investigation, the American Bar Association found Mr. Estrada to be unanimously well-qualified for a judgeship on the District of Columbia Circuit. We sincerely hope that the Committee and the Senate will approve Mr. Estrada's nomination before the close of the 107th Congress.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, Jan. 23, 2003.

Hon. CHARLES E. SCHUMER,
U.S. Senate,
Washington, DC.

DEAR SENATOR SCHUMER: I am responding to your letter dated January 23, 2003, in which you once again requested that the Department disclose the confidential and privileged appeal, certiorari and amicus memoranda that Miguel Estrada authored when he was a career lawyer in the Office of the Solicitor General. You continue to insist that disclosure of this sensitive material is necessary to allow you adequately to address Mr. Estrada's nomination to the United States Court of Appeals for the District of Columbia Circuit—a nomination that has been pending for some 624 days. As you know, Mr. Estrada has received a unanimous ''well qualified'' rating from the American Bar Association, the ABA's highest rating.

We addressed fully the assertions made in your most recent correspondence in our previous letters to you dated June 5, 2002, and October 8, 2002 (attached herewith). Our previous explanations remain equally applicable today, and we therefore must again respectfully decline your request. As we have explained, the relevant historical, policy and legal considerations implicated by your request establish that disclosure of these memoranda from the Office of Solicitor General would undermine the integrity of the decision making process in that Office. Notwithstanding our previous letters, several specific items in your letter merit discussion.

At Mr. Estrada's hearing, you asserted that the Department disclosed memoranda written by Judge Easterbrook in connection with his confirmation hearing. In response to that claim, as we noted in our letter of October 8, 2002, we comprehensively reviewed the Department's files and the public record of Judge Easterbrook's confirmation hearing and we found absolutely no evidence that the Department authorized the release of these memoranda in connection with Judge Easterbrook's nomination. Your most recent letter now asserts that the Easterbrook documents ''apparently'' were provided to the Committee in connection with Judge Bork's nomination. However, the public record of Judge Bork's confirmation hearings contains no mention of the Easterbrook memoranda you reference. As we explained previously, your mere possession of these documents does not suggest that the Department waived applicable privileges nor authorized their disclosure in connection with either nomination.

You also suggest in your letter that the Administration's decision to disclose legal memoranda from the White House Counsel's Office in connection with the nomination of Jeffrey Holmstead to serve as Assistant Administrator of the Environmental Protection Agency serves as precedent for disclosing Mr. Estrada's highly privileged work product. As you may be aware, the White House initially declined to provide all of Mr. Holmstead's files as requested by the Senate Environment and Public Works Committee, on the basis of the deliberative process, attorney-client and work product privileges. In response, the Environment Committee, based on its particularized concerns and allegation of misconduct regarding one specific subject, requested a small subset of documents related only to that matter. Because of the specificity of the Environment Committee's concerns, the White House permitted the Committee to review that limited subset of materials, which answered the allegation in question. This example, if anything, further demonstrates the overbreadth and impropriety of the current request—a request that some have characterized as a fishing expedition requesting all documents authored by Mr. Estrada about all subjects during his entire tenure in the Office.

Finally, we respectfully submit that, despite your view to the contrary, your request threatens the proper functioning of the Office of the Solicitor General. All seven living former Solicitors General, including Archibald Cox, Drew Days, Walter Dellinger and Seth Waxman, have written to the Senate Judiciary Committee and explained the debilitating impact your request would have on the ability of the Office to represent the United States in litigation. The letter—authored by distinguished lawyers of both parties—noted that their ''decisionmaking process required the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure.'' While we respect your right to disagree with these seven former Solicitors General, we must defer to their considered judgments about the impact of disclosure based on their collective experience of decades heading the Office. Thus, we respectfully adhere to our previous decision to protect these highly privileged documents from disclosure.

Thank you for considering the Department's views on this matter. As we have noted previously, the public record is more than adequate for the Committee to evaluate Mr. Estrada's qualifications to be a Circuit Judge on the D.C. Circuit. We look forward to Mr. Estrada's prompt consideration by the Committee and confirmation by the full Senate.

Sincerely,

JAMIE E. BROWN,
Acting Assistant Attorney General.

Mr. HATCH. Mr. President, I want to make one or two other points, and then I understand Senator KYL is here and I hope he can be heard. I ask unanimous consent that he be recognized after me.

Mr. REID. Objection.

The PRESIDING OFFICER. Objection is heard.

Mr. HATCH. All right. Here we are in the middle of an unprecedented filibuster. We have heard a lot of arguments and many repeated arguments. We have heard Mr. Estrada ''has not answered the Senators' questions.'' Well, he has. They asked question after question at the hearing—one that they conducted and they controlled. Any Senator who was not satisfied, and had additional questions, had the opportunity to send additional questions. Well, they did. Two Senators—only two of them—sent Mr. Estrada followup questions. Senators DURBIN and KENNEDY asked multiple questions. Mr. Estrada answered these, and answered them fully.

Here is what is unfair. If they don't like the answers, as I have said, my Democratic colleagues have a remedy; they can vote against him. That is their right. If that is what they want to do, that is the proper exercise of their constitutional duty. But to simply deny the Senate a vote is unfair to the nominee, unfair to this body, unfair to the President, and unfair to a majority of Senators who want to vote for this man and exercise their constitutional duty under article II, section 2. This is an abuse of the debate privileges of this body. This is simply an abuse by the minority. It is nothing more than what some would call the tyranny of the minority. It is the first time in the history of this country that an appeals court nominee has been filibustered. It is a doggone shame the first Hispanic ever nominated to the Circuit Court of Appeals of the District of Columbia happens to be the nominee here. This is against our constitutional duty and against the spirit of what we are elected to do. We are supposed to advise and consent. Consent means Senators can vote against or they can vote for. It doesn't mean advise and filibuster. It doesn't mean advise and obstruct.

I will say it again. The Democrats have asked their questions and they have gotten their answers. If they don't like the answers, they can vote against the nominee. But don't continue to obstruct. It is simply not fair.

Mr. President, I think any fair observer who looks at the transcript of this hearing, and looks at those questions and answers, will have to admit he answered their questions. Admittedly, I suspect he did not answer them the way they wanted him to. That is, they could not dig up any dirt on him. So what are they doing now? Trying to

see if, through a fishing expedition, they can find some documents where they can. That is offensive. To ask for confidential, privileged documents from the Solicitor General's Office in spite of the warning of seven former Solicitors General, four of whom are leading Democrat attorneys who vociferously say you should not do that, that would be very harmful and detrimental to the process. They have ignored those recommendations.

Any fair observer who looks at these questions and answers will have to say he answered their questions, maybe not the way they wanted him to, but he answered them as a deliberative person would, and as most other nominees have answered the same type of questions. He answered them in a very intelligent, worthwhile fashion.

I yield the floor.

The PRESIDING OFFICER (Mrs. DOLE). The Senator from Arizona.

Mr. KYL. I thank the Chair.

Madam President, I wish to expand on what the Senator from Utah was just talking about. To put this in context, I remind my colleagues we are talking about the nomination of a very distinguished lawyer, Miguel Estrada, by President Bush to serve on the DC Circuit Court of Appeals.

There have been two primary objections recently raised by Members of the other side of the aisle to this nomination. The first includes a recitation of a long list of nominees of previous Presidents—I presume primarily President Clinton—who allegedly were not considered by the Republicans. I do not have the information. It has not been given to me, so I cannot vouch for its authenticity. But if that is the basis for denying a vote to Mr. Estrada, then it is nothing more than retribution or spite.

I cannot believe that is the motivation of any of my colleagues on the other side. I refuse to believe that. So of what relevance is it that in previous Congresses some other President's nominee was or was not given a vote? What is the relevance to this individual, Miguel Estrada, who, by everyone's admission, is an extraordinarily well qualified lawyer? It has no relevance at all.

The other line of thought is that he has not answered questions, and that is what Senator HATCH was just talking about. He answered every question that was asked of him. He was in a hearing from 10:06 a.m. until 5:25 p.m. There were other candidates on the panel with him, but hardly any questions were asked of them. Almost all of the questions were asked of Miguel Estrada. He answered them all, until there were not any more to be asked.

Then there was the questionnaire. Senator HATCH noted the questions that have been asked by Senators in writing, in addition to the others. There was the questionnaire from the Judiciary Committee with 25 pages of answers. They are all right here. I will not suggest they be printed in the RECORD because I presume they already have. Every question was answered fully and satisfactorily, as far as I am concerned.

I think one of them is especially interesting. It used to be there was not a litmus test for judges. When President Reagan was nominating judges, some people on the other side thought President Reagan was asking these nominees their opinions on how they might rule on a case. They said that was a litmus test and that would be wrong. They were wrong. He never had such a litmus test. But the committee has had a question in its file ever since—and I think even before then—that has been asked of every single nominee, and this is one of the questions to which Miguel Estrada responded.

Let me read the question and his answer. The question is: Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as asking you how you would rule on such case, issue, or question? If so, please explain fully.

Answer: No.

Mr. President, that is just about all he got in the hearing by the members of the other side of the aisle in the Judiciary Committee on how he would rule and what he felt about certain specific cases, legal issues, or questions. Specific cases were mentioned by name. Specific hypothetical questions were asked of him. Apparently, it is not OK for the President to find out how a candidate might feel about an issue, but Senators, by golly, we have the right and, in fact, it is so important to us, or to some of the body, that we are going to deny a nominee a vote even; we are going to deny the other Senators to have the opportunity to vote yes or no if we did not like the way he answered one of those questions.

Senator HATCH is right; it is not that he did not answer the questions. It is that some people did not like his answers to the questions. If so, vote no, but do not deny everyone else the opportunity to vote, and that is what is going on here. It is called a filibuster.

Our friends on the Democratic side have acknowledged that is exactly what they are engaged in: a filibuster of a judge. That is fundamentally wrong. It destroys the comity between the three branches of Government. It seeks to modify the majority vote confirmation process to an extra-majority requirement. It is going to poison the consideration of nominees of every President from here on, Democrat or Republican. This is one of those issues which, when once let out, you can never bring back; the horse will have been out of the barn.

Never in the history of the Senate has a partisan filibuster succeeded in preventing the confirmation of a judge. That is what is at stake here. Of course, also at stake is the confirmation of a very decent, very fine, very forthright, and highly qualified candidate for judge.

There was one other criticism I noticed early on, but I have not heard it recently, and that is he had no prior judicial experience. Senator HATCH pointed out the literally scores of Federal judges who became a judge when they were a lawyer. Not everybody can be born a judge, you see. First, you have to be a lawyer, and then somebody has to appoint you judge. So not everybody has experience as a judge when they are asked to be a judge.

Current members of the U.S. Supreme Court, in fact, five out of the nine members of the DC Circuit Court of Appeals, the court to which Mr. Estrada is being nominated, were not judges before they were nominated.

Mr. Estrada is a Hispanic lawyer. Are we going to create a new bar for minority lawyers? You have to be a judge before you can be elevated to the next level of the court? Not very many minority lawyers have been appointed or nominated as judges. President Bush is nominating a lot of them, that is true, but they are not judges now; they are lawyers. Are we going to create a bar that says if you are not already a judge, you cannot become a judge in the next level of the court?

I do not want to see us setting a glass ceiling for minorities just because not as many of them have gotten to be judges. I think that is a very pernicious argument made with respect to Miguel Estrada. Five of the nine members of the court were not judges before they were nominated to serve. Why does it matter with respect to Miguel Estrada? I did not hear arguments made from the other side with respect to those nominees, so why with regard to Miguel Estrada? It is not right.

I quoted yesterday, when the Senator from Vermont was on the floor, his own words, so I feel it appropriate to mention them again. He himself, the former chairman, now ranking member, of the Judiciary Committee said what many of the other leaders on the other side of the aisle have said: That filibustering a judge is wrong. And the Senator from Vermont said he would oppose—strongly oppose, I believe were his words—any filibuster of a judge regardless of whether he supported the nominee. You can always vote yes or no, but you should at least vote to invoke cloture.

Madam President, I will give you an example. Twice I voted to invoke cloture so we could come to a vote on two of President Clinton's nominees. I supported one; I opposed the other. That is our right. I have good reasons for opposing the judge I opposed, but I believed my colleagues needed or had the right to vote on both of the candidates, and so I voted for cloture in both cases. That is the same point the Senator from Vermont made earlier: That we should vote for cloture and have an up-or-down vote.

I will later bring to the floor the literally scores of statements by my colleagues on the other side of the aisle

over the years who have made the point over and over that filibustering a judge is wrong, that they would oppose it regardless of how they felt about the nominee, and that they would vote to invoke cloture.

What has changed with Miguel Estrada? Why is he different? Why all of a sudden has their strongly held opinion, which was expressed before, changed? It is not that my colleagues are not consistent. Obviously, they want to be consistent. So it must be something else. It must be that in this nominee they see something very bad. They must see a reason why we should not even be allowed to vote on the nominee. It is so bad with Miguel Estrada that they are not willing to put it to a vote. They have to prevent the vote from occurring.

What is it about Miguel Estrada that is so dangerous or so bad? If my colleagues say it is not about Miguel Estrada, it is the process, he would not answer the questions, Senator HATCH and I have already responded to that. He answered every question he was asked. Any more questions?

As Senator HATCH said, the problem is they do not necessarily like all the answers. That is their right. We do not all agree with each other. That is why we have votes and the majority wins.

I get back to the question, Why is it different with Miguel Estrada? There were 30 questions asked in the hearing that was held, and he answered them all. Maybe they did not like the answers. So vote no. But why would the other side deny the right of the Senators to cast a vote on the nominee?

At the end of the day, the American people are going to look at this and wonder what is going on, what is this all about. Why will a minority of the Senate not agree to let the others vote? Is it because the candidate is not well qualified? No. This candidate had the highest rating that the American Bar Association can give a candidate.

Is it that he does not have any experience? No. He is one of the most experienced lawyers in the country. In fact, he has argued at least 15 cases to the U.S. Supreme Court. I practiced law for 20 years and only went to the Supreme Court three times, which is pretty good. Most lawyers never get there. Fifteen times he has argued cases.

He answered every question that was asked of him. He has been strongly recommended by members of the bench and bar all over the country, Democrats and Republicans, including members of the former Democratic administration.

There has been a question raised about when he was an Assistant Solicitor General and was providing advice to his seniors, should his confidential memos be released to the public? For the first time, our colleagues on the other side say, oh, yes, we want to see all of that.

Now, I would kind of like to see the staff memos going to the Senators on the other side. Would that be fair? Would that be right? No, it really would not. Much as I would like to see what kind of advice they are getting, that would not be right.

What about someday when very highly qualified staff of some of our colleagues on the other side of the aisle are going to be nominated for the court? That happens actually fairly frequently. Staff of the Judiciary Committee have been nominated to various courts. In fact, one of them serves no less than on the U.S. Supreme Court. How about asking for the memos that he sent to his boss advising his boss on various issues prior to his confirmation? What would we get there? I think we would get pushed back by Members saying, wait a minute, I was asking for his personal advice. I was asking for his judgment. I was not asking him for what he necessarily believed personally, and what he told me cannot be taken as something he personally believed but rather what he thought was the best advice for me on this particular issue. That is why our employees are protected from having to disclose all of the information they give us as their best judgment on different issues, because we are not asking them necessarily what they believe in their head or their heart. We are asking them for what the law is on this, what their recommendation is as to what I should do on this, knowing my views, not theirs.

So to ask a young lawyer in the Solicitor General's Office to disclose all of the advice that he gave his bosses is nothing more than an unprecedented fishing expedition.

I ask my colleagues on the other side of the aisle, is this the precedent that they want to create? When they seek to have one of their staff members nominated to a high court, do they expect to see a request for all of the memos that this staff person gave to them because they just might be useful in opposing the nomination? Maybe he said something that we could pick apart somehow or another.

That is what is going on, and that is why four Democratic Solicitors General and three Republican Solicitors General, those who are living today, all wrote a letter unanimously saying this should not be done and all of them would have recommended against it.

I happened to work for one of the Solicitors General who is no longer alive. One of the things he told me over and over again was that this is an office considered by some to be the tenth Justice on the Court. The Solicitor General is literally almost a member of the Court in a sense because of the objectivity and forthrightness with which he or she represents the views of the Government before the Court.

The Court often solicits a brief from the Solicitor General saying, we have heard from both sides in this case but we would like to hear from the lawyer for the Government, the Solicitor General, who is supposed to be a very honest, forthright, and objective person. That is the office in which Miguel Estrada was working.

If we ever get to the point where the decisions made by the Solicitor General, based upon the advice from the lawyers that work for him, do not represent the best objective advice, do not represent the best truth and the proper reading of the law as they can bring forth but, rather, now must take into consideration political considerations that arise from the fact that these memos and this advice would be disclosed publicly, the Solicitor General is no longer going to be deemed the ''tenth Justice.''

The Government is no longer going to be solicited for its advice to the Court on these important matters because the consideration would be, well, what did they have to consider politically since the whole world is going to read these memos and is going to know what the advice was that was given. It does not work that way. It cannot. That is why it would be wrong.

Many of my colleagues on the other side know that it would be wrong. They know they are never going to get the memos. They know they should not get the memoranda. But because they can ask for it knowing that it is not going to come, they have an excuse to be able to say, gee, we do not have all the information we need.

I do not think that is the motivation of any of my colleagues on the other side of the aisle because I think they realize this is not something that historically has been requested and should be requested.

So when you parse out all of the different objections to Miguel Estrada, it all boils down to abstract process and, from some of the outside groups anyway, retribution. It has nothing to do with his qualifications. It seems to me that common decency and fairness would cause each one of the 100 of us to look deep within ourselves and say maybe we vote yes, maybe we vote no on his nomination, but we should not deny him a vote. That is partisanship and negativity and obstructionism that is not worthy of the Senate. So we should not do that.

We should agree to let this nominee be voted on, cast the vote we believe is appropriate, and then move on with the Nation's business. At a time when we may well be on the brink of engaging in military conflict, and the President has a great many issues on his agenda to deal with in that regard, I think it is unseemly for the Senate to be holding up, filibustering, one of his highly qualified nominees to the DC Circuit Court of Appeals.

As the Senator from Nevada said earlier today, everything has been said, it is just that everybody has not said it. Fine. Come on down and say it so we can get on with the vote, confirm Judge Miguel Estrada, and move on with the Nation's business.

The PRESIDING OFFICER. The Democratic whip.

Mr. REID. Madam President, if this were a matter of retribution, it would have started a long time ago.

Senator DASCHLE came to the floor after we took the majority in the Senate and said that as it related to judicial nominations this was not payback time; we were not going to treat the then-minority, the Republicans, as we were treated when we were in the minority. To show that we were true to our word, we approved 100 nominees during the short time we had the majority of the Senate.

I read into the RECORD earlier today the scores of judicial nominees who did not receive hearings, who waited and never got a vote on their nominations. They are out practicing law someplace. This is not retribution.

Madam President, once in a while I try to come up with something that has not been said on the Senate floor during the last several days. My friend from Arizona said: Everything has been said, but not everyone has said it. I have come up with something that has not been said, in response to what my friend from Utah and others have said about this ABA rating that Estrada has. The Republicans thought so much of the ABA rating that when they had the majority, they decided to do away with it. But now they have decided it is a good thing.

It is true, Estrada received a well-qualified rating from the American Bar Association. I think everyone acknowledges that the ABA should not completely supplant the Senate's role. Those on the other side have indicated the ABA rating of Mr. Estrada should be afforded great weight. I think it should be afforded some weight. Some have implied it should take the ABA's word for it when it comes to Estrada and simply limit our role in reviewing his record because he got a well-qualified rating from the ABA.

The American Bar Association rating is a useful tool for the Senate. But that is all it is, a tool. It is not a replacement for the Senate exercising its own independent judgment regarding a nominee's suitability for the second highest court in the land. There are good reasons for that. The best reason is the Constitution, Mr. President.

I am sorry, I referred to the Presiding Officer as a ''Mister.'' I have the greatest respect for the Senator from North Carolina, having one of the most distinguished records of any Senator who has come to the Senate, having served in so many different Cabinet positions that they are difficult to name; and, in addition, the highly visible role the Senator from North Carolina has held in different administrations. She has been head of one of the greatest organizations in the history of the world, the American Red Cross. I know who is presiding, and I was just reading from my notes and apologize for referring to the Senator as ''Mr. President.''

The best reason we do not agree with the majority is the Constitution. The Constitution assigns the role of evaluating a nominee to the Senate—not to the American Bar Association. In addition, if you look at the ABA process, it is far from perfect. The ABA delegates the review of potential nominees to one individual member of the ABA committee for each circuit. In effect, these nominations that the President gives us, no matter what party, go to one lawyer in the ABA, and that lawyer makes a recommendation. The ABA delegates that review to one individual who nominates each nominee and appoints to the ABA a recommended rating of that nominee's qualifications.

In this instance, a man by the name of Fred Fielding was in charge of evaluating potential nominees for the DC Circuit at the time Miguel Estrada was under consideration by the White House. In this role, Mr. Fielding was in charge of evaluating Mr. Estrada's qualification and was in charge of recommending a rating to the ABA. He recommended well-qualified. The ABA places heavy reliance upon the recommendation of people such as Mr. Fielding and approved Fielding's recommendation unanimously.

There have been some concerns about how this ABA process works and how it will work in this case. In this case, Mr. Fielding, at the same time he was evaluating DC Circuit Court nominees such as Miguel Estrada, continued to be heavily involved in partisan politics. He was counsel to the Republican National Committee for the Republican National Convention of 2000 and served on the Bush-Cheney transition team in 2000. At the same time he was serving on the ABA committee that evaluated DC nominees, Mr. Fielding cofounded, with C. Boyden Gray, something called the Committee for Justice.

We all know C. Boyden Gray has been a long-time, very partisan Republican. There is nothing wrong with that. But that is a fact of life. This organization was founded to help the White House with the public relations effort to pack the Federal bench with extreme judges. They also founded it to run ads to intimidate Democrats from exercising their constitutional duty to scrutinize the President's judicial nominees. Ads are now run to that effect, saying Senate Democrats are really bad. The ads are paid for by the Committee for Justice, which is this front that has been established by Fred Fielding and Boyden Gray. Their ads label Members of this Chamber as ''liberal extremists'' and ''anti-Hispanic'' even though the Hispanic Caucus has said Miguel Estrada should not be placed in the DC Circuit.

These ads run by this organization that is led by Fielding and Gray are unfortunate. It is a right that Fielding and Gray have to engage in these activities to mislead the American people. They have that right. But it does call into question whether someone so heavily steeped in partisan activities can objectively and impartially evaluate nominees' qualifications to the second highest court in the land.

This man, Fred Fielding, was the person who gave Estrada the recommendation while he was doing this. He was forming a committee he calls Committee for Justice, with Boyden Gray, another partisan Republican, and the purpose was to pack the bench with right-wing conservative judges. They also raised money so that if someone disagreed with them, they would run ads and intimidate them into agreeing with them. It does call into question whether someone so heavily steeped in partisan activities can objectively and impartially evaluate the qualifications of the nominees of the second highest court in the land.

The Senate is not privy to Mr. Estrada's ABA report, and we have no way to evaluate how Mr. Fielding arrived at his recommendation, but I think at the very least his partisan activities at the time he was charged with independently evaluating Mr. Estrada create the appearance of a conflict of interest and should embarrass the American Bar Association.

People expect the ABA reviews to be conducted by independent, nonpartisan individuals, not by partisans who are the President's foot soldiers in the effort to pack the Federal courts. The circumstances of Estrada's ABA evaluation are very serious—very serious. These circumstances underscore the need for the Senate to independently evaluate Mr. Estrada's record.

It would be somewhat shallow for people to say that this man, Fielding, who evaluated this judge to be, was fair and independent. I said the ABA should be embarrassed. What we are talking about here is Estrada. This has made an independent review impossible. I am not willing to delegate my constitutional duty to Mr. Fielding, the cofounder of a group designed to attack Members of this body who do not agree with him.

Earlier today, I had a chart here that outlined Mr. Estrada's assistance to this body so we could come up with answers to Judiciary Committee questions. Some people called in and said the chart was small and they could not read it. I want to make sure they can read this chart. It is titled ''Miguel Estrada's answers to the Judiciary Committee's questions.'' Here are his answers.

There weren't any. Those from the other side can come here and talk and show us visual aids about all the answers given to this committee that fill volumes when, in fact, as Senator DURBIN so well described, his answers were evasive.

Mr. Estrada, give us the name of a Supreme Court Justice that you would like to be.

I don't have an opinion.

Give us a case you disagree with.

I don't have an opinion.

These were his answers to the Judiciary Committee's questions.

I had some other charts here, and they said the writing was too small.

Here is one about Miguel Estrada's legal memoranda. Here is the information we have regarding Miguel Estrada's legal memoranda. The writing this morning was too small. But here is what it says:

Miguel Estrada's legal memoranda.

Here is what we have: Nothing.

My friend from Arizona said this would be chilling; why would we want to set a precedent like this?

It has been set in the past. We have had Chief Justice Rehnquist, for beginners. When he came before this body and we wanted to look at a memo, we got it. I don't have all the names here, but we know Civiletti and Roberts and others—it has happened on other occasions. This is no dangerous, misleading, scary precedent.

We have, by virtue of the Constitution of the United States, an obligation to make sure that we advise and consent to the nomination of the President. Article II, section 2, says that is our obligation, and that is what we are doing. We have an obligation that is in the depths of the Constitution to do just that.

If they, the majority, believe this man is as good as they say he is, let us share in the information, let us look at his legal memoranda, and let us also have him answer questions.

You would think we would want to know, as part of our constitutional duties, what a person's legal philosophy is. As the Senator from Illinois, Mr. DURBIN, and I this morning indicated in an exchange, Mr. DURBIN, the distinguished Senator from Illinois, the senior Senator from Illinois, he said to Miguel Estrada: Give us the name of a case in the Supreme Court that you disagreed with.

As Senator DURBIN and I said: You know, we have been to law school. I will bet it is not too hard of a press to come up with a case about which you think the U.S. Supreme Court was wrong. How about Dred Scott? Maybe Dred Scott was wrong.

Not him. He wouldn't tell us. No.

I have no opinion on that.

Miguel Estrada's legal philosophy—that is it. And because that is it, this blank, we are going to make a decision? No.

The majority leader is the one here who has to make a decision. He can go on like we are today, tonight, tomorrow. In fact, I read in a publication here that one of the Republican leaders says:

If [Democrats] want to stay through the weekend, we'll stay through the weekend.

Boy, is that a threat that just chills me. We may have to work here over the weekend? That would be terrible. Is that supposed to take away our constitutional duties, because they are going to make us work? I work whether I work here or go home.

The leader has to make a choice: Are they going to pull this nomination or do they think enough of this man to give us his legal memoranda and have him answer questions? Or he could do something that is done a lot around here: File cloture. See if he can stop the debate.

As I have said before, we are in harmony over here. We believe what we are doing is principled and right. No matter how many times the other side says there is no problem, all they have to do is see what is going on here. There is a problem. If they want to resolve that problem, all the cards are in their hands and they can decide how they want to handle it. Otherwise, if they want us to stay here, we will stay in quorum calls or we will talk.

I have suggested to some of the Senators here if we get past the morning hour when we have to be fairly germane to what is being talked about, I think it would be an excellent time, as the Senator from West Virginia did yesterday, I think we should have a little discussion about what is going on in the world. We are very close to going to war. That is what I am told. I think it would be very important to the people of Nevada to have a discussion about that. I think we are going to win the war, but are we going to win the peace in Iraq? That should be a subject. If they want to keep us here all weekend, we could talk about that at some length.

Mr. BYRD. Madam President, will the Senator yield?

Mr. REID. I am happy to yield for a question without losing the floor.

Mr. BYRD. Are we likely to be in session this weekend?

Mr. REID. That is a decision they have to make. I am just reading from one of the publications. One of the Republican leaders said they are really going to get us on this. They are not filing cloture, but what they are going to do is talk all night tonight and all night tomorrow night, to get a vote on the Estrada nomination by the weekend.

Let me just say to everyone within the sound of my voice, that will not get them a vote on Estrada. We have told them what we believe is appropriate.

People may disagree with us. This is the Senate. We have certain rules. We are not dealing from under the deck. We are not holding any cards up our sleeves. We have said openly what we are doing. We are not going to allow a vote on this until we get the information we want. So it is up to them. If they want to threaten us, we could also—we could talk about the war, as the distinguished Senator from West Virginia did yesterday.

I think it is also important to think about this economic plan that has been suggested, the one the President has put forward that the Chairman of the Federal Reserve says is not a good plan. The chairman of the Ways and Means Committee in the House says it is not a good plan. We could talk and elaborate on how some of the Republicans feel about their own plan. That would take a little bit of time.

We could talk about the President's Medicare fix, which the Speaker of the House of Representatives said is a really bad idea.

We can talk about a lot of things. This is the Senate rules. We do not have to talk about Miguel Estrada. I said to everyone yesterday and I have said it today, everything has been said about Miguel Estrada, for and against him. But not everyone has said it. So we can be here, we can continue rehashing Miguel Estrada.

But the President said—I think I am quoting almost verbatim when he was told there is a filibuster—the game is over.

I don't know what that means. That is a term he used a lot. He said the game is over in Iraq. The game is over on Estrada. This is not a game; this is something we are doing based upon principle.

I think, for the good of the country, unless they are going to give us the information we want, this nomination should be pulled. Then we can get on to other things that I think are very pressing that we should get on to.

I want to make sure I was right. I want to make sure I said this right.

Senate Judiciary Committee Chairman Orrin Hatch . . . scoffed the Democrats' demand for more information about Estrada.

I said the President said: The game is over.

Senator HATCH said that. He is quoting what the President said on other things.

That game is over.

The game is over—this is not a game. This is not something that was arrived at in a short period of time. In fact, the Democratic leader waited a number of days before the decision was made, after he conferred literally with every Democratic Senator about how he felt about this. This is not an arbitrary decision made by the Democratic leader. This is a decision made by Senator DASCHLE after having conferred with every Democratic Senator, on more than one occasion in most instances. That is what the body over here desired to do, and that is what we are doing. We hope everyone understands this is not a game. We are very serious about what we are doing. We believe what we are doing is principled.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

TRIBUTE TO JOE MEADOWS

Mr. BYRD. Madam President, this past Saturday my longtime, good friend, and former staff member, Joe Meadows, passed away.

Joe Meadows was a dedicated, hard-working, conscientious, sincere, and loyal individual. As the mail clerk in my office in the Hart Building, he managed the mailroom for me. He did his