Legal Defense Fund, the Puerto Rican Legal Defense Fund, the Congressional Hispanic Caucus, the Congressional Black Caucus, and many other organizations.

Earlier today we had meetings with the leaders of the Hispanic Caucus. They reviewed with us how they have interviewed various nominees over recent years, how they were able to get some kind of a sense, and the degree of support they had given to many other nominees who they had a particular interest in, who had a Hispanic background, and how they interviewed this nominee.

I will take some time tomorrow to review in some detail with the Senate their conclusions and their observations. They are the ones who speak for the Hispanic community. They are the ones who understand the hopes and dreams of so many of our Hispanic brothers and sisters. They are the ones who have, through life experience, a keen awareness and understanding about the importance of justice.

But some of the statements they made this afternoon, which I found so compelling, were the fact that when the dust settles on the Presidency, whether it is one party or the other, when the final action is taken in the appropriations and the legislative branch, the one place the Hispanics have historically been able to look to and have a sense of confidence has been the American judicial system. They consider it sacrosanct in terms of the types of challenges they are facing daily in our society. They challenge us to preserve that kind of equality.

They reviewed in careful detail, not just for us but for Americans, in the form of our meeting this afternoon with the press exactly why they are so strongly opposed to this nominee.

I stand with these groups and the millions of Americans they represent and urge the Senate to reject the nomination.

EDUCATION FUNDING

Mr. President, I see my friend and colleague from New Mexico. I would like to, if I may, proceed for about 3 or 4 more minutes on a different subject, but one I know he is very much interested in. I think it is important to bring to the attention of the Senate. That is the outcome of the omnibus 2003 budget in the area of education.

We are going to have the final budget conference report in the next several hours, but there are a number of parts of it that effectively have been closed. It is important, since it affects the families in this country who are concerned about education, that we take a moment to review the positive outcome that has taken place in the omnibus 2003 budget that marks a victory for parents and teachers and principals and schoolchildren across the Nation.

When the omnibus 2003 spending bill is reported out of conference later tonight, it will include an education budget increase that is eight times President Bush's request. For the second time in 4 weeks the Congress will reject President Bush's inadequate education budget and insist on increased resources to carry out school reform. And for the second time in 4 weeks, Republicans and Democrats in Congress will reject the administration's ongoing drive to divert scarce public school funding to private school vouchers.

I see the Senator from Maine who, with our friend and colleague from Connecticut, during the authorization spoke so eloquently about the importance of funding of title I. We made important progress in including approximately 500,000 more children who would be eligible for title I as the result of the omnibus bill.

The final year budget which effectively will provide resources that will be available to the school systems this spring will provide 3.2 billion in education over the previous year and 2.8 billion over President Bush's budget. Title I, the key school reform program, the No Child Left Behind, would be increased by $1.4 billion, helping half a million more needy children to be fully served. In my State of Massachusetts, 46,000 more children will be served. IDEA will increase by $1.4 billion, putting us a step closer toward fully funding the program as promised. My own State of Massachusetts will see a $32 million increase in special education funding.

Support for improved teaching quality and reducing class size will increase by $100 million—not nearly enough, but we are going in the right direction. We will improve the quality of 24,000 more teachers across the country. Programs that help English language learners master English will increase by $25 million and will help 37,000 more children learn English.

We have made strong steps toward meeting the promises of full funding outlined in No Child Left Behind and NIDA. But it is not enough. Teachers and students need more support. Teacher shortages are getting worse, class sizes are increasing, State deficits are skyrocketing. So we have a good deal of work to do. But as a result of the decisions that have been made recently in the Senate and in the conference report, there is some good news on the way.

I thank my friend and colleague from New Mexico for permitting me to finish.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Madam President, let me first thank my colleague from Massachusetts for his eloquent statement on the Estrada nomination and also his other statement about the level of funding for education contained in the omnibus appropriations bill. I know how hard he has worked on that issue for many years. I commend him for the progress that has been made, and I agree with him that much more progress needs to be made.

I want to say a few words about the Estrada nomination and also talk about another aspect of the President's proposed budget to us, with which I have found serious concern.

First, on the Estrada nomination for the DC Court of Appeals, Miguel Estrada has been nominated for that position, and, frankly, the concern I bring to this issue is that many of my good friends and people whom I respect in the House of Representatives, in the Hispanic Caucus, have indicated that they oppose his nomination. When I said many, I should have said all. They had quite a discussion and quite a period of investigation of this nomination, and they concluded unanimously that the Hispanic Caucus of the House of Representatives would oppose the nomination. I have been contacted by several members of that caucus and urged to resist the nomination in the Senate. As I say, I have not taken the time to look into it in detail myself, but I have great respect for these gentlemen and women who have worked hard on this issue, and their strong opposition is of concern to me.

I am also concerned that not a single Democratic member of the Senate Judiciary Committee determined to support the nominee after hearing the nominee's answers to questions before the committee. I share my colleagues' concerns as expressed by many of those members on the Judiciary Committee that we simply do not have enough information about this nominee at this time to cast an informed vote. During his confirmation hearing, he was not willing to answer many basic questions that were propounded to him. He was evasive when asked about his judicial philosophy. He refused to provide samples of his work from the time he served in the Solicitor General's Office. There have been requests for information made that, in my view, have been reasonable.

As I understand it, the chairman and ranking Democrat on the Judiciary Committee and Senator DASCHLE are continuing to request additional information before any vote is cast on that nomination.

Some have attempted to turn this debate into a debate about the nominee's ethnicity. I don't believe that is the issue. I have supported many Hispanic candidates. In my State, I had the great honor to recommend to President Clinton, our previous President, and he in fact appointed a Hispanic nominee to our Federal court in New Mexico. But that support was based on having a full record regarding the candidate's qualifications in each case. We do not have a full record as to this nominee at this point. I hope when we attain it, then we can move forward with the vote at sometime in the future.

THE PRESIDENT'S PENSION PROPOSAL

Madam President, I want to talk for a few minutes about a set of proposals the administration has made related to pension coverage that I think are of serious concern. You might say, where does that fit into the other major issues being discussed here? As I see it,

the President has presented his new budget to the Congress, and part of that budget involves reductions in revenue. Now, the portion of those reductions in revenue that has been focused on most is the stimulus package, the recommended elimination of the tax on dividends from stock, the recommendations to accelerate the anticipated changes in the income tax rates; all of that has been what people have focused on.

There are other parts of what the President has proposed to us which are also deeply troubling. I think it is time we begin to focus on those. The President has made some recommendations that I think carry with them some great danger.

Let me address the first chart called ''Passed and Proposed Tax Cuts.'' This chart makes the obvious point that, in 2001, Congress passed a major tax cut bill which, over a 10-year period, was estimated to reduce revenue to the Government by $1.35 trillion. That is a very large tax cut. At the time, there was great fanfare by those who supported it that this was the largest tax cut in our Nation's history. It reduced individual tax rates; it repealed, essentially, a temporary estate tax, increased contribution limits to retirement plans.

Two weeks ago, Congress received the President's proposed budget for this year. That budget says we should add to the $1.35 trillion and the 2002 stimulus bill a new tax cut, a new series of tax cuts that add up to $1.46 trillion. People say that is not the right figure. The figure discussed here is 670-some-odd billion dollars; that is what it is going to cost, not $1.46 trillion. But I refer you to the budget documents that were presented to the Congress. We had a hearing in the Finance Committee the other day with our new Secretary of the Treasury. I asked him about this. He said: I am not sure that is the right number. We read it back to him out of his own budget documents. That is the right number. It includes the stimulus package, but it also includes the CARE Act, MSA expansion and permanency, and the proposal related to pensions.

Let me talk about the pension-related provisions for a few minutes. In my view, these pension-related provisions that the President is now urging on the Congress could have a devastating effect on retirements and the ability of workers to save for their retirement. These proposals mark a dangerous and irresponsible shift away from existing policies that are intended to encourage retirement saving by all of our workers in employer-provided plans.

The proposal the President has made is to deemphasize employer-provided plans and essentially take away the incentives for continuation of those plans and, instead, shift to a system where everyone is left to fend for himself or herself. In my view, this would benefit only those in our society who need help the least. The President's proposal is based on the creation of two new super-IRAs: There is the RSA, Retirement Savings Account, and the LSA. Each of these would allow individuals to set aside $15,000 a year in the two together for favorable tax treatments. Those with additional resources would be able to set aside an additional $75,000 a year for other family members who could set up their own LSA; so if you had two or three children, or a spouse, you could certainly do it for them as well. While some would benefit from this type of arrangement, the vast majority of Americans would be unable to find the resources to save on their own.

The creation of these new accounts negates the tax advantages currently available only for employer-provided plans. The likely result is that without these current tax advantages, employers will simply stop offering their plans. It will no longer be economical, and it will no longer be the most efficient way to meet their own retirement needs.

About 80 years ago, Congress began to offer employers preferential tax treatment if they would help their employees to pay into pension plans. Then, as now, the Congress appreciated the need to get the employer involved in the employee's retirement savings. In doing so, we created a series of nondiscrimination rules to guarantee that employers provide benefits to all employees, not just those who are the top level employees.

We have seen many examples in recent months, beginning with the Enron scandal and then in the case of WorldCom, and many others, where top individuals in corporate structures have benefited extremely well, while the average worker has been left unassisted.

We have put in place in the tax law a requirement that there not be discrimination in pension coverage. We also created a series of tax incentives that encouraged employees to set aside their own funds in these same accounts. The combination of incentives for employers and incentives for employees have always been premised on the employer offering the employees a plan in which that employee could save.

Over the years, we have made significant changes and adaptations to the system. The primary goal has been to encourage employer-provided plans and to encourage employers to assist employees in this very important financial goal that employees need to have.

The President's current proposal, in my view, dramatically ends this policy, ends this effort to encourage employers to help employees save for their retirement. At a time when we are facing huge funding deficits in Social Security, it seems to me reckless to be considering removing the underpinnings and the stability of our current private retirement system.

Our current private retirement system has many defects, and I would be the first to point those out, and I have pointed them out many times. But to take away what we currently have in the way of a private retirement system and the incentives that underpin that system at this time I think would be very wrongheaded.

There is a rational basis for encouraging employer-provided plans. Let me show this chart which gives some statistics. This is a Department of Labor chart. It shows that for all workers for 1999, the coverage for all private sector workers was 44 percent. That is, 44 percent of private sector workers in the country had some kind of pension plan. In those firms where the employer sponsored a plan, it was substantially higher. It was 58 percent. The participation when the employer sponsored a plan was 75 percent for all workers.

The point of this is clearly that employee participation increases when employers are sponsoring a plan. We have the very same thing as Federal workers. The Federal Government says that if we wish to put away funds for retirement, the Federal Government, through the Thrift Savings Plan, will match the contribution that Federal workers make up to a certain percentage. I think it is 5 percent, in that range.

This is very similar to the kind of employee plan that many have—a matching plan. Some employers say they will match dollar for dollar; some say they will match 50 cents for each dollar the employee puts in. The main point is, workers will take advantage of employer retirement plans when those plans are offered.

This chart demonstrates one other point, and that is, when you get down to minority representation, the percentage of minority workers who are covered by pension plans is substantially less than the percentage in the population as a whole, and there is only 27 percent in the case of Hispanic workers, but it goes up dramatically where the employer is sponsoring the plan. It goes from 27 percent to 68 percent. So employer sponsoring of plans is a very substantial factor in causing people to save for their retirement.

The administration, in my view, should be focusing on ways to encourage more employers, particularly small businesses—in my State, most employers are small businesses—to offer their employees plans. We should not be giving employers reasons not to offer those plans or to discontinue plans they have historically offered.

Last year, Edward N. Wolf of the Economic Policy Institute presented a report entitled ''Retirement Insecurity: The Income Shortfalls Awaiting the Soon to Retire.'' That report demonstrated the shift away from defined benefit plans to defined contribution plans over the last 30 years, and we have seen that shift. It demonstrated that shift has not, in fact, improved our Nation's coverage rate, as it was advertised to do. Instead, it has reduced the overall retirement wealth for

the bulk of the workers in this country.

The primary reason the companies have shifted to these defined contribution plans—and defined contribution plan, of course, is nothing except a plan which specifies how much will be put in rather than specifying how much a benefit the retiree will finally receive as a result of a plan—but the primary reason companies shifted to these defined contribution plans is that under these plans, the employees make the majority of the contributions. The employee is the one who bears the risk about what happens to the funds invested in that plan. This reduces the employer's cost. It makes it far more attractive to the employer than a traditional pension plan.

The President's proposal takes it one step further, and it shifts us one step further away from employer participation in retirement savings. In many cases, the small business employer would be able to save more themselves with the new IRA, so they could put away $7,500, they could put away $7,500 for their wife, and they would be able to provide certain higher income employees with matches, for the employees' savings as well, without running afoul of any current discrimination rules.

Since IRAs are not covered by discrimination rules or by ERISA, the employer could pick and choose which employees they want to provide matches to; they could provide those matches in the form of bonuses, or whatever. That is not allowed under current rules and, in my view, should not be allowed. If an employer wanted, they could even contribute to family members, to shareholders, or to other nonworkers and avoid making contributions to the average worker working for that company.

I think, for good reason, Congress has always opposed the creation of this kind of mechanism which would open the possibility for discriminatory treatment among workers. The President's proposal, in my view, opens the floodgate to a whole range of new abuses of this kind.

At the same time, coverage rates have remained flat and as employers have shifted toward defined contribution plans, the retirement income of retirees, and those near retirement, have decreased as compared to their current incomes. This is not new information to a great many older Americans.

In 1989, roughly 30 percent of households were projected as living on less than half of their preretirement income. If we look a decade later, by 1998 this number had increased to 42 ½ percent. For African Americans and Hispanics, the numbers are significantly worse. In 1989, there was 43 ½ percent who lived on less than half of their preretirement income. By 1998, that had grown to over 50 percent—53 percent.

The Wolf report demonstrates that only those with retirement wealth in excess of a million dollars saw their retirement wealth increase in 1999. This chart shows every other class of retiree. It starts with those with incomes of less than $25,000; $25,000 to $50,000; $50,000 to $100,000; $100,000 to $250,000; $250,000 to $500,000; $500,000 to $999,999; and then over a million.

Between the period of 1983 and 1998, the changes in retirement wealth have been negative. There has been a reduction in retirement wealth for every single group in our society with the exception of those who earned over a million dollars a year. That is the unfortunate reality we face in this country.

The President's proposal would speed up this wealth gap immeasurably by forcing workers to solely fund their own retirement savings. For example, under the President's proposal, a wealthy executive would be able to save almost $50,000 a year with tax preferences for a family of four, and meanwhile workers living paycheck to paycheck would likely be unable to set aside any significant amount for retirement.

Clearly, what will be good for the top floor will not be good at the shop floor level. This is not the first time Congress has looked at IRAs. In 1986, as part of the major tax reform we did then, we created what we call the active participation rules that are still in place today. These rules limit those who can participate in an IRA based on income. The reasons for the rules are simple: Data clearly indicated the only people taking advantage of IRAs at that time were upper income people who also had employer-provided plans.

Congress realized then, as we still appreciate now, that IRAs are not utilized by lower income workers. The President is proposing to essentially replace the current retirement system with IRAs, and thereby ensuring lower paid workers are not saving for retirement.

According to the 1999 IRS statistics, that means less than 5 percent of income earners who made less than $50,000 a year were, in fact, putting funds into an IRA. That means 95 percent of those earning $50,000 or less did not put a single dollar into an IRA. The majority of working families clearly do not need or benefit from expanding IRAs as the President would have us do.

A shift toward this type of savings away from employer-provided plans will not help the majority of our workers.

This final chart indicates, using Department of Treasury data from 1999, it is clear we still have a great distance to go. Based on the data reflected on this chart, the lowest 40 percent of income earners receive roughly 2 percent of the tax benefits currently provided under our Tax Code.

That is the lowest 20 percent, and the second 20 percent, added together, get about 2 percent. The lowest 60 percent receive a little less than 12 percent of those benefits. At the same time, the top 10 percent receive 43 percent of the benefits and the top 1 percent get approximately 10 percent of those benefits.

The President's proposal, as I understand it, would significantly shift the Government-provided tax benefits to the upper income categories, as only those with disposable income would be able to participate. Unfortunately, this proposal we have been given makes it more cost effective and less administratively burdensome for employees to fund their own retirement outside of the qualified plan. So the result is most workers will find themselves without an employer-provided plan that provides salary deferrals and oftentimes significant employer contributions. Instead, most workers will have to put aside their own funds each paycheck, either without a tax benefit or the receipt of a tax benefit that does not come until the end of the tax year.

Sadly, for many American families, there are not enough resources available for them to pay all of their expenses and still do what the President has in mind.

I do not know what all of the motivations were behind this proposal. Before we move ahead, I very much hope we can look at it in great depth during hearings in the Finance Committee. As far as I can tell, it is designed to provide tax incentives for additional savings by those who need them the least, and it certainly would have the effect of undercutting the employer-sponsored retirement system we have long tried to strengthen.

As I indicated earlier, I am one of the first to admit the current employer-sponsored retirement system we have is not adequate and needs to be strengthened, but eliminating the private retirement system we have and undermining the incentives for employers to maintain that system is not the solution to the problem.

I yield the floor.

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

Mr. HATCH. Mr. President, it seems to me if the Democrats are going to filibuster, they ought to give some reasons for their filibuster. They have said they are going to filibuster, for the first time in the history of this country, a Federal circuit court nominee, and the first Hispanic nominated to the Circuit Court of Appeals for the District of Columbia.

Where are they? We have had all kinds of talks on foreign policy, on running down the President's financial plans, running down his foreign policy. I heard one Senator today talk about the real problem is North Korea. Of course, it is a real problem. So is Iraq. So is Osama bin Laden.

These are the people who watched me in the middle of the 1990s be the first one to tell President Clinton he better get on Osama bin Laden because he is going to kill Americans. I actually was the first to bring that forth.

I have been on the Senate Select Committee on Intelligence twice. They

did nothing, and now they are moaning and groaning because we have inherited a problem that has existed for a long time. Because nothing was done? Now they are saying, well, we should be concerned about North Korea. Yes, we should be. We should be concerned about everything.

It does not take many brains to realize a lot of the finances that come for the terrorist movement throughout the Middle East and throughout the world come from Iraq. They have supported virtually everybody. The Egyptian Islamic Jihad, that is where Al-Zawahri comes from. He is No. 2 to Osama bin Laden. That is where they have gotten a lot of their money. They support the Palestinian Islamic Jihad. They support virtually every Islamic terrorist group around. Now we are supposed to just stand back because some of the Democrats think we ought to concentrate our efforts on North Korea. Of course, we are concentrating our efforts there. The President is doing everything he should do. It is not quite the same. Those people are hemmed in by China, who they have to have just for food, and it is not in China's best interest to allow North Korea to have this kind of power and be able to irresponsibly use it. Nor is it in the interest of anybody in the Asian community, and it is certainly not in our interest. We have top people working on that and controlling it.

It is hard to control wild men, and we have to really look hard to find one worse than Saddam Hussein. Saddam Hussein has used weapons of mass destruction against his own people. Imagine what he would do to us if he could.

My colleagues on the other side know as much as I know about it, or at least they should, and that is before the first session of inspections, Saddam Hussein came that close to having a nuclear device. You think he is not trying to do that now, and in his country, the size of California, do you think it is hard for him to secrete his weapons of mass destruction? He can hide those in a million different ways. This is a joke.

We have to fight terrorism. We have to fight these types of people on all sides. And we are. This administration is doing everything it can, and it really needs to have a little less bellyaching and a little less criticism, a little less partisanship than what we are getting sometimes around here.

I heard other Senators get on this floor and say this court—to go back to Miguel Estrada—the first Hispanic nominated to the circuit court of appeals in this country who is being filibustered by people who, throughout the years, have said we would never filibuster when they had the Presidency, we would never use that type of a tactic. Here they are, using it. It is hypocritical. It is wrong. It is unfair. It is establishing a precedent that could hurt this country immeasurably. We could only have the least common denominator on the Federal courts if some on the other side got their way. To do it against the first Hispanic nominated to the Circuit Court of Appeals for the District of Columbia is particularly reprehensible, especially since he has every qualification a person needs to fulfill this responsibility.

The White House and the general counsel's office have been working overtime day and night to answer all the questions these people have asked over and over that are ridiculous in nature. They have made Miguel Estrada available for any Democrat who wants to talk to him. The Democrats conducted the hearing. It was all day, which is extraordinary in and of itself. They controlled every aspect of that hearing. They asked the questions that they wanted to ask. He did not answer some of them the way they would have preferred. Then they could have defeated him for sure. That is not his job to try to please the Democrats or me or anybody else. His job is to tell the truth, which is what he did. And he had an obligation to tell the truth without saying how he would vote on any given issue, or otherwise he would have to recuse himself after he gets on the bench and be less effective.

Some of the arguments we have had around here are ridiculous. The very people who are griping about getting these confidential privileged memoranda down at the Solicitor General's Office ignore the fact that of the seven former current living Solicitors General, four of them are Democrats in the Solicitor's Office. Three reviewed Miguel Estrada's memoranda.

How far do we go with these ridiculous arguments, these unfair arguments, these discriminatory and prejudicial arguments, against a person who has every qualification to be on this court? There is only one reason they are fighting like this. They think Republicans are going to back down. Or that the President will back down. He will not back down.

I don't think most Democrats feel the way some of the radicals over there do. There are some people with reasonable minds over there. I think most of them. I respect everyone on the other side, but I have to tell you, some of them are listening to the most radical people on their side in bringing this filibuster and going against one of the best nominees in history.

I have been on the Judiciary Committee almost 30 years, 27 years now. There are very few who you would rate at the level with Miguel Estrada. Every Hispanic in this country ought to be proud of it. I am calling on every Hispanic in the country, whether Democrat, Independent, Republican, whether you are liberal, moderate or conservative, you better start calling the Democrats and let them know this is not fair, this is not right. It is abysmal. Some would say abominable. I think I would be one of those.

I have seen some unfair things here from time to time, and this is a tough body, there is no question. Sometimes we do some dumb things, but I have never seen anything more unfair than what is happening here. With Senators hiding behind this, I think, phony request for documents they know they should not have a right to have and then try to represent on the floor that the few cases where somebody leaked documents to them, that were not recommendations for appeals, recommendations for amicus curiae briefs, recommendations for certiorari, none of them were, but some were leaked from the Solicitor General's Office by partisan Democrats and they have some of these.

They have not seen fit to let us have copies of them, other than what they are putting in the RECORD. We have asked for them, but they did not have time to give them to us. The one case they can show where the Department really did give some documentation was in the case of Robert Bork. The Department produced some documents concerning Bork's firing of Archibald Cox. It was a specialty situation. But they were not documents of recommendations of employees in the Solicitor General's Office concerning appeals, concerning certiorari appeals, and concerning amicus curiae briefs.

This is one of the phoniest excuses I have ever heard. Keep in mind, four of their former Solicitors General, Democrat Solicitors General, are on Miguel Estrada's side. And three of them reviewed every one of those documents. That is not good enough for them? They know the administration cannot give in to these requests because if they did, every time anybody is nominated from any part of the Justice Department they would have to get confidential memoranda.

The executive branch does have some rights. I know that some on the other side do not believe that, but they do. They have some rights to have their confidential documents remain confidential so they can get the best advice they possibly can to represent this country, as the executive branch should. This is one of the worst arguments I have ever heard on the floor of the Senate. And it is all done for political purposes because they believe that this Hispanic man, a Republican—which is very tough for them to take, who they believe to be conservative—he is certainly probably moderate to conservative—I just know he is qualified. Everything about him says he is qualified. All of his experience tells me he is qualified. The fact he led the class at Harvard Law School says he is qualified. The fact he was one of the leaders of the class at Columbia University says he is qualified. The fact that he served Amalya Kearse, a Carter appointee, and she praised him says he is qualified. The fact he served for a Justice of the U.S. Supreme Court, Anthony Kennedy, says he is qualified.

But now the administration, in response to these ridiculous claims and these ridiculous statements made on the floor of the Senate, has now sent a

15-page, single-spaced letter that basically covers every one of these stupid claims that have been raised.

I guess maybe I should not say that. Anyone can raise any claim, whether it is stupid or otherwise, on the floor, and every Senator can ask even the dumbest questions of nominees if they want. That does not mean nominees have to answer them. It does not mean they have to answer them the way they want to—the dumb questioners, that is. We have all done that from time to time, and we all fit into that category, maybe, from time to time, but not consistently.

There is nothing more than prejudice going on here; nothing more than unfairness going on here; nothing more than a double standard going on here; nothing more than trying to trip up the President of the United States and make his life even more miserable than it is every day with North Korea, with Iraq, with all the other problems we have in this world, including France, Germany, and Belgium, which are acting disgracefully and deserve the condemnation of the world for their continuous disgraceful disruptions of the unity of our NATO allies and for their refusal to back Turkey, our ally who has stood up when others have not stood up. We don't need them. We will back Turkey, and we should back Turkey.

What gets me is we are in the middle of a filibuster of a Federal judge, when the Constitution says we should give advice and consent, not advice and obstruction, not advice and a filibuster, not advice and unfairness.

I have to admit there were some on our side who treated President Clinton in a shabby fashion. Not very many, but there were a few. I remember as a young Senator I criticized President Carter pretty strongly one day. Later, I was on a 3-hour television show with him, sitting right beside him. We had plenty of time to discuss and talk, and I apologized. I said I really feel badly; I felt I didn't treat you fairly. He leaned over and smiled and said, ORRIN, I never knew you did it. He said, you were so fair in so many other ways, I didn't notice any unfairness. That is typical of what a fine, gracious man he is.

Bill Clinton has plenty of faults, we all know that, like all the rest of us. Maybe not like all the rest of us, but we all have faults, we will put it that way. And sometimes he wasn't treated as fairly as he should have been, but I sure tried to do so. I certainly did with regard to his judicial nominees. I will tell you one thing, we never, ever filibustered a Clinton nominee, not once. There were some cloture votes, but it wasn't part of a filibuster; it was more to move the Senate along. And nobody can claim anybody on our side actually filibustered a Federal judge, which is a disgraceful thing to do.

I have to say I care a great deal for all of my colleagues in this body. These are 100 of the greatest people on Earth. I care for my colleagues on the Democratic side. But where are they? Why aren't they telling us why? Why don't they give us a reason that is a good reason for being against Miguel Estrada, with all of the qualifications he has? Why couldn't they treat us the way they wanted us to treat their circuit court nominees, which I made sure we treated right. Why can't they be decent to this Hispanic nominee, the first ever nominated to the Circuit Court of Appeals for the District of Columbia, one of the most important courts? Why is it that Senators from the Democrat side get on the floor and act as if, because a person is conservative, that person is not going to do what is right under the law; that person is not going to make sure the law is fulfilled; that person is not going to make sure the principle of stare decisis or prior precedent is followed? Miguel Estrada says he will, and he's an honest man. He will.

Why is it they think only liberal ideas are any good? I kind of admire people who think only their point of view is correct and everybody else is wrong. But I have to tell you, some of the greatest judges in our country's history are conservatives. Some of the greatest judges are liberals. And some of the worst are liberals—and conservatives. Miguel Estrada would make one of the best, and he is the American dream personified. He would open the doors for many Hispanic people, not just in the Federal judiciary but in so many other ways throughout this society because he will set an example that will be exemplary for all of us to observe. He should have a chance to sit on this court and should not have to go through this type of unfair treatment.

No nominee to the Federal court should have to go through a filibuster. But, if the Democrats are going to filibuster, why don't they get over here and filibuster? Why don't they tell us the reasons why? If you look at their reasons, there is not a bit of substance to any of them.

I ask unanimous consent the most recent letter of the White House, this 15-page single-space typewritten letter I think answers every Democrat concern, be printed in the RECORD.

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

THE WHITE HOUSE,
Washington, February 12, 2003.

DEAR SENATOR DASCHLE AND SENATOR LEAHY: On behalf of President Bush, I write in response to your letter to the President dated February 11, 2003. In the letter, you renew your previous request for confidential Department of Justice memoranda in which Mr. Estrada provided appeal, certiorari, and amicus recommendations while he was a career attorney in the Office of Solicitor General for four years in the Clinton Administration and one year in the George H.W. Bush Administration. You also request that Mr. Estrada answer certain questions beyond the extensive questions that he already answered appropriately and forthrightly during his Committee hearing and in follow-up written responses.

We respect the Senate's constitutional role in the confirmation process, and we agree that the Senate must make an informed judgment consistent with its traditional role and practices. However, your requests have no persuasive support in the history and precedent of judicial appointments. Indeed, the relevant history and precedent convincingly demonstrate that a new and shifting standard is being applied to Miguel Estrada.

First, as the Department of Justice explained in its letters of June 5, 2002, October 8, 2002, and January 23, 2003, all living former Solicitors General (four Democrats and three Republicans) have strongly opposed your request for Solicitor General memoranda and stated that it would sacrifice and compromise the ability of the Justice Department to effectively represent the United States in court. Even more telling, we are informed that the Senate has not requested memos such as these for any of the 67 appeals court nominees since 1977 who had previously worked in the Justice Department (including the seven nominees who had previously worked in the Solicitor General's office). The few isolated examples you have cited—in which targeted requests for particular documents about specific issues were accommodated for nominees to positions other than the U.S. Courts of Appeals—similarly do not support your request here.

Second, as explained more fully below with respect to your request that Mr. Estrada answer additional questions, the only specific question identified in your letter refers to his judicial role models. You claim that Mr. Estrada refused to answer a question on this topic. In fact, in his written responses to Senator Durbin's question on this precise subject that Mr. Estrada submitted three months ago, he cited Justice Anthony Kennedy, Justice Lewis Powell, and Judge Amalya Kearse as judges he admires (he clerked for Justice Kennedy and Judge Kearse, and he further pointed out, of course, that he would seek to resolve cases as he analyzed them ''without any preconception about how some other judge might approach the question.'' Your letter to the President ignores Mr. Estrada's answer to this question. In any event, beyond this one query, your letter does not pose any additional questions to him. Additionally, neither of you has posed any written questions to Mr. Estrada in the more than three months since his all-day Committee hearing. Since the hearing, Mr. Estrada also has met (and continues to meet) with numerous Democrat Senators interested in learning more about his record. Finally, as I will explain below, Mr. Estrada forthrightly answered numerous questions about his judicial approach and views in a manner that matches or greatly exceeds answers demanded of previous appeals court nominees.

With respect, it appears that a double standard is being applied to Miguel Estrada. That is highly unfair inappropriate, particularly for this well-qualified and well-respected nominee.

I will turn now in more detail to the various issues raised by your letter. I will address them at some length given the importance of this issue and the nature of your requests.

I. MIGUEL ESTRADA'S QUALIFICATIONS AND BIPARTISAN SUPPORT

Miguel Estrada is an extraordinarily qualified judicial nominee. The American Bar Association, which Senators Leahy and Schumer have referred to as the ''gold standard,'' *unanimously* rated Estrada ''well qualified'' for the D.C. Circuit, the ABA's highest possible rating. The ABA rating was entirely appropriate in light of Mr. Estrada's superb record as Assistant to the Solicitor General

in the Clinton and George H.W. Bush Administrations, as a federal prosecutor in New York, as a law clerk to Justice Kennedy, and in performing significant *pro bono* work.

Some who are misinformed have seized on Mr. Estrada's lack of prior judicial experience, but five of the eight judges currently serving on the D.C. Circuit had no prior judicial experience, including two appointees of President Clinton and one appointee of President Carter. Miguel Estrada has tried numerous cases before federal juries, argued many cases in the federal appeals courts, and argued 15 cases before the Supreme Court of the United States. That is a record that few judicial nominees can match. And few lawyers, whatever their ideology or philosophy, have volunteered to represent a death row inmate pro bono before the Supreme Court as did Miguel Estrada.

Mr. Estrada's excellent legal qualifications are all the more extraordinary given his personal history. Simply put, Miguel Estrada is an American success story. He came to this country at age 17 from Honduras speaking little English. Through hard work and dedicated service to the United States, Miguel Estrada has risen to the very pinnacle of the legal profession. If confirmed, he would be the first Hispanic judge to sit on the U.S. Court of Appeals for the D.C. Circuit. Given his record, his background, and his integrity, it is no surprise that Miguel Estrada is strongly supported by the vast majority of national Hispanic organizations. The League of United Latin American Citizens (LULAC), for example, wrote to Senator Leahy to urge Mr. Estrada's confirmation and explain that he ''is truly one of the rising stars in the Hispanic community and a role model for our youth.'' A group of 19 Hispanic organizations, including LULAC and the Hispanic National Bar Association, recently wrote to the Senate urging ''on behalf of an overwhelming majority of Hispanics in this country'' that ''both parties in the U.S. Senate . . . put partisan politics aside so that Hispanics are no longer denied representation in one of the most prestigious courts in the land.''

The current effort to filibuster Mr. Estrada's nomination is particularly unjustified given that those who have worked with Miguel—including prominent Democrat lawyers whom you know well—strongly support his confirmation. For example, Ron Klain, who served as a high-ranking adviser to former Vice President Gore and former Chief Counsel to the Senate Judiciary Committee, wrote: ''Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. . . . [T]he challenges that he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need.''

President Clinton's Solicitor General, Seth 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 any consideration other than the long-term interests of the United States. I have great respect both for Mr. Estrada's intellect and for his integrity.

A bipartisan group of 14 former colleagues in the Office of the Solicitor General at the U.S. Department of Justice wrote: ''We hold varying ideological views and affiliations that range across the political spectrum, but we are unanimous in our conviction that Miguel would be a fair and honest judge who would decide cases in accordance with the applicable legal principles and precedents, not on the basis of personal preferences or political viewpoints.'' One former colleague, Richard Seamon, wrote that he is a pro-choice, lifelong Democrat with self-described ''liberal views on most issues'' who said he would ''consider it a disgrace'' if Mr. Estrada is not confirmed.

Similarly, Leonard Joy, head of the Federal Defender Division of the Legal Aid Society of New York, wrote that ''Miguel would make an excellent Circuit Court Judge. He is as fine a lawyer as I have met and, on top of all his intellectual abilities and judgment he would bring to bear, he would bring a desirable diversity to the Court. I heartily recommend him.''

Beyond the extensive personal testimony from those who worked side-by-side with him for many years, the performance reviews of Miguel for the years that he worked in the Office of Solicitor General gave him the highest possible rating of ''outstanding'' in every possible category. The reviews stated that Miguel:

''states the operative facts and applicable law completely and persuasively, with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity, and conciseness.''

''[i]s extremely knowledgeable of resource materials and uses them expertly; acting independently, goes directly to point of the matter and gives reliable, accurate, responsive information in communicating position to others.''

''[a]ll dealings, oral and written, with the courts, clients, and others are conducted in a diplomatic, cooperative, and candid manner.''

''[a]ll briefs, motions or memoranda reviewed consistently reflect no policies at variance with Departmental or Governmental policies, or fails to discuss and analyze relevant authorities.''

''[i]s constantly sought for advice and counsel. Inspires co-workers by example.''

In the two years that Miguel Estrada and Paul Bender worked together, Mr. Bender signed those reviews. These employment reviews thus call into serious question some press reports containing a negative comment from Mr. Bender about Mr. Estrada's temperament (which is the only negative comment made by anyone who actually knows Mr. Estrada). Just as important, President Clinton's Solicitor General Seth Waxman expressly refuted Mr. Bender's statement.

In sum, based on his experience, his intellect, his integrity, and his bipartisan support, Miguel Estrada should be confirmed promptly.

II. THE SENATE'S ROLE

President Bush nominated Miguel Estrada nearly two years ago on May 9, 2001. As explained above, he is well-qualified and well-respected. By any traditional measure that the Senate has used to evaluate appeals court nominees, Miguel Estrada should have been confirmed long ago. Your letter and public statements indicate, however, that you are applying both a new standard and new tactics to this particular nominee.

As to the standard, the Senate has a very important role in the process, but the Senate's traditional approach to appeals court nominees, and the approach envisioned by the Constitution's Framers, is far different from the standard that you now seek to apply. Senator Biden stated the traditional approach in 1997: ''Any person who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life, and they have not committed crimes of moral turpitude, and have not, in fact, acted in a way that would shed a negative light on the court.'' Congressional Record, March 19, 1997. Alexander Hamilton explained that the purpose of Senate confirmation is to prevent appointment of ''unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.'' Federalist No. 76. It was anticipated that the Senate's approval would not often be refused unless there were ''special and strong reasons for the refusal.'' No. 76.

As to tactics, you have indicated that some Senate Democrats intend to filibuster to prevent a vote on this nominee. As you know, there has never been a successful filibuster of a court of appeals nominee. Only a few years ago, Senator Leahy and other Democrat Senators expressly agreed with then-Governor Bush that every judicial nominee was entitled to an up-or-down floor vote within a reasonable time. On October 3, 2000, for example, Senator Leahy stated:

Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo. Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no—not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting 'maybe,' but we are doing a terrible disservice to the man or woman to whom we do this.

Senator Daschle similarly stated on October 5, 1999, that ''[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. An up or down vote, that is all we seek for Berzon and Paez. And after years of waiting, they deserve at least that much.''

In his East Room speech on October 30, 2002, President Bush reiterated that every judicial nominee deserves a timely up-or-down floor vote in the Senate, no matter who is President or which party controls the Senate. Contrary to President Bush's attempts at permanent reform to bring order to the process, your current effort to employ a filibuster and block an up-or-down vote on the Estrada nomination may significantly exacerbate the cycle of bitterness and recrimination that President Bush has sought to resolve on a bipartisan basis. We fear that the damage caused by a filibuster could take many years to undo. To continue on this path would also be, in Senator Leahy's words, ''a terrible disservice'' to Mr. Estrada. We urge you to reconsider this extraordinary action, to end the filibuster of Mr. Estrada's nomination, and to allow the full Senate to vote up or down.

III. REQUEST FOR CONFIDENTIAL SOLICITOR GENERAL MEMOS

You have suggested that Mr. Estrada's background, experience, and support are insufficient to assess his suitability for the D.C. Circuit. You have renewed your request for Solicitor General memos authored by Mr. Estrada. But every living former Solicitor General signed joint letter to the Senate opposing your request. The letter was signed by Democrats Archibald Cox, Walter Dellinger, Drew Days, and Seth Waxman. They stated: ''Any attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests—a cost that also

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

It bears mention that the interest asserted here is that of the United States, not the personal interest of Mr. Estrada. Indeed, Mr. Estrada himself testified that ''I have not opposed the release of those records. . . . I am exceptionally proud of every piece of legal work that I have done in my life. If it were up to me as a private citizen, I would be more than proud to have you look at everything that I have done for the government or for a private client.''

The history of Senate confirmations of nominees who had previously worked in the Department of Justice makes clear that an unfair double standard is being applied to Miguel Estrada's nomination. 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. Of those 67 nominees, 38 had no prior judicial experience, like Miguel Estrada. The Department of Justice's review of those nomination records disclosed that in none of those cases did the Department of Justice produce internal deliberative materials created by the Department. In fact, the Department's review disclosed that the Senate did not even request such materials for a single one of these 67 nominees.

Of this group of 67 nominees, seven were nominees who had worked as a Deputy Solicitor General or Assistant to the Solicitor General. These seven nominees, nominated by Presidents of each party and confirmed by Senates controlled by each party, included Samuel Alito, Danny Boggs, William Bryson, Frank Easterbrook, Daniel Friedman, Richard Posner, and Raymond Randolph.

The five isolated historical examples you have cited do not support your current request. In each of those five cases, the Committee made a targeted request for specific information primarily related to allegations of misconduct or malfeasance identified by the Committee. Even in those isolated cases, the vast majority of deliberative memoranda written by those nominees were neither requested nor produced. With respect to Judge Bork's nomination, for example, the Committee received access to certain particular memoranda (many related to Judge Bork's involvement in Watergate-related issues). The vast majority of memoranda authored by Judge Bork were never received. With respect to Judge Trott, the Committee requested documents unrelated to Judge Trott's service to the Department. So, too, in the three other examples you cite, the Committee requested specific documents primarily related to allegations of misconduct or malfeasance identified by the Committee. Of course, no such allegations have been made in the case of Mr. Estrada.

In sum, the examples you have cited only highlight the lack of precedent for the current request. As the Justice Department has explained to you previously, the existence of a few isolated examples where the Executive Branch on occasion accommodated a Committee's targeted requests for very specific information primarily related to allegations of misconduct does not in any way alter the fundamental and long-standing principle that memos from the Office of Solicitor General—and deliberative Department of Justice memoranda more broadly—must remain protected in the confirmation context so as to maintain the integrity of the Executive Branch's decisionmaking process. That is a fundamental principle that has been followed irrespective of the party that controls the White House and the Senate.

Your continued requests for these memoranda have provoked a foreseeable and inevitable conflict that, in turn, has been cited as a basis for obstructing a vote on Mr. Estrada's nomination. Respectfully, the conflict is unnecessary because your desire to assess the nominee can be readily accommodated in many ways other than intruding into and severely damaging the deliberative process of the Office of Solicitor General. For example, you can review Mr. Estrada's written briefs and oral arguments both as an attorney for the United Stats and in private practice. As you know, those documents are publicly available and easily accessible; that said, we would be pleased to facilitate your access to them. (Mr. Estrada's hearing transcript suggests that no Democrat Member of the Committee had read Mr. Estrada's many dozens of Solicitor General merits briefs, certiorari petitions, and opposition briefs or the transcripts of his 14 oral arguments when he represented the United States.) You also may consider the opinions of others who served in the Office at the same time (discussed above) and examine the nominee's written performance reviews (also discussed above). There is more than ample information for you to assess Mr. Estrada's qualifications and suitability for the DC Circuit based on the traditional standards the Senate has employed.

It also is important to recognize that political appointees of President Clinton have read virtually all of the memoranda in question—namely, the Democrat Solicitors General Drew Days, Walter Dellinger, and Seth Waxman. None of those three highly respected Democrat lawyers has expressed any concern whatever about Mr. Estrada's nomination. Indeed, Mr. Waxman wrote a letter of strong support, and Mr. Days made public statements in support of Mr. Estrada.

In sum, the historical record and past precedent convincingly demonstrate that this request creates and applies an unfair double standard to Miguel Estrada.

IV. REQUEST THAT MIGUEL ESTRADA ANSWER ADDITIONAL QUESTIONS

Your letter also suggests that Miguel Estrada should answer certain questions that he allegedly did not answer in his hearing. To begin with, we do not know what your specific questions are. In addition, this request frankly comes as a surprise given that (i) Senator Schumer chaired the hearing on Mr. Estrada, (ii) the hearing lasted an entire day, (iii) Senators at the all-day hearing asked numerous far-reaching questions that Mr. Estrada answered forthrightly and appropriately, and (iv) only two of the 10 Democrat Senators then on the Committee even submitted any follow-up written questions, and they submitted only a few questions (in marked contrast to other nominees who received voluminous follow-up questions).

It also bears mention that Mr. Estrada has personally met with a large number of Democrat Senators, including Senators Landrieu, Lincoln, Bill Nelson, Ben Nelson, Leahy, Feinstein, Kohl, and Breaux; is scheduled to meet with Senator Carper; and would be pleased to meet with additional Senators.

The only specific question your letter identifies refers to Mr. Estrada's judicial role models, and you claim that he refused to answer a question on this topic. In fact, in Mr. Estrada's written responses to senator Durbin's question on this precise subject, Mr. Estrada cited Justice Anthony Kennedy, Justice Lewis Powell, and Judge Amalya Kearse as judges he admires and he further pointed out, of course, that he would seek to resolve cases as he analyzed them ''without any preconception about how some other judge might approach the question.''

In our judgment, moreover, Mr. Estrada answered the Committee's questions in a manner that was both entirely appropriate and entirely consistent with the approach that judicial nominees of Presidents of both parties have taken for many years. Your suggestions to the contrary do not square with the hearing record or traditional practice.

A. JUDICIAL ETHICS AND TRADITIONAL PRACTICE

In assessing your request that Miguel Estrada did not answer appropriate questions, we begin with rules of judicial ethics that govern prospective nominees. Canon 5A(3)(d) provides that prospective judges ''shall not . . . 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'' (emphasis added). Justice Thurgood Marshall made the point well in 1967 when asked about the Fifth Amendment: ''I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed and sit on the Court, when a Fifth Amendment case comes up, I will have to disqualify myself.'' Lloyd Cutler, who served as Counsel to President Carter and President Clinton, has stated that ''candidates should decline to reply when efforts are made to find out how they would decide a particular case.''

In 1968, in the context of the Justice Abe Fortas' nomination to be Chief Justice, the Senate Judiciary Committee similarly stated: ''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 Justice 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.'' S. Exec. Rep. No. 8, 90th Cong. 2d Sess. 5 (1968).

Even in the context of a Supreme Court confirmation hearing, Senator Kennedy defended Sandra Day O'Connor's refusal to discuss her views on abortion: ''It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single-issue interest group.'' Nomination of Sandra O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomiantion of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, 97th Cong. 6 (1981) (statement of Sen. Kennedy).

Justice Ruth Bader Ginsburg likewise declined to answer certain questions: ''Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast mly vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.'' Similarly, Justice John Paul Stevens stated in his hearing: ''I really don't thinkk I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say that there have been many times in my experience in the last five years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions and I think that if I were to make comments that were not carefully

thought through they might be given significance that they really did not merit.''

Justice Ginsberg described the traditional practice in a case decided last year: ''In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be 'on interest' to the President and the Senate. . . . But in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well.'' *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2552 n.1 (2002) (Ginsburg, J., dissenting) (emphasis added). Justice Ginsburg added that this adherence to this ''longstanding norm'' was ''crucial to the health of the Federal Judiciary.'' Id. In his majority opinion, Justice Scalia did not take issue with that description and added: ''Nor do we assert that candidates for judicial office should be compelled to announce their views on disputed legal issues.'' Id. at 2539 n. 11 (emphasis in original).

In some recent hearings, including Mr. Estrada's, Senator Schumer has asked that nominees identify particular Supreme Court cases of the last few decades with which they disagree. But the problems with such a question and answer were well stated by Justice Stephen Breyer. As Justice Breyer put it, ''Until [an issue] comes up, I don't really think it through with the depth that it would require. . . . So often, when you decide a matter for real, in a court or elsewhere, it turns out to be very different after you've become informed and think it through for real than what you would have said at a cocktail party answering a question.'' 34 U.C. Davis L. Rev. 425, 462.

Senator Schumer also has asked nominees how they would have ruled in particular Supreme Court cases. Again, a double standard is being applied. The nominees of President Clinton did not answer such questions. For example, Richard Tallman, a nominee with no prior judicial service who would now serve on the Ninth Circuit, not only would not answer how he would have ruled as a judge in Roe v. Wade—but even how he would have ruled in Plessy v. Ferguson, the infamous case that upheld the discredited and shameful ''separate but equal'' doctrine. So, too, in the hearing on President Clinton's nomination of Judges Barry and Fisher, Senator Smith asked whether the nominees would have voted for a constitutional right to abortion before Roe v. Wade. Chairman Hatch interrupted Senator Smith to say ''that is not a fair question to these two nominees because regardless of what happened pre-1973, they have to abide by what has happened post-1973 and the current precedents that the Supreme Court has.''

B. ANSWERS BY MIGUEL ESTRADA

Miguel Estrada answered the Committee's questions forthrightly and appropriately. Indeed, Miguel Estrada was more expansive than many judicial nominees traditionally have been in Senate hearings, and he was asked a far broader range of questions than many previous appeals court nominees were asked. We will catalogue here a select sample of his answers.

Unenumerated rights, privacy, and abortion

When asked by Senator Edwards about the Constitution's protection for rights not enumerated in the Constitution, Mr. Estrada replied: ''I recognize that the Supreme Court has said [on] numerous occasion in the area of privacy and elsewhere that there are unenumerated rights in the Constitution, and I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the court. But I think the court has been quite clear that there are a number of unenumerated rights in the Constitution. In the main, the court has recognized them as being inherent in the right of substantive due process and the liberty clause of the Fourteenth Amendment.''

When asked by Senator Feinstein whether the Constitution encompasses a right to privacy and abortion, Mr. Estrada responded, ''The Supreme Court has so held, and I have not view of any nature whatsoever, whether it be legal, philosophical, moral, or any other type of view that would keep me from applying that case law faithfully.'' When asked whether Roe v. Wade was ''settled law,'' Mr. Estrada replied, ''I believe so.''

General Approach to Judging

When asked by Senator Edwards about judicial review, Mr. Estrada explained: ''Courts take the laws that have been passed by you and give you the benefit of understanding that you take the same oath that they do to uphold the Constitution, and therefore they take the laws with the presumption that they are constitutional. It is the affirmative burden of the plaintiff to show that you have gone beyond your oath. If they come into court, then it is appropriate for courts to undertake to listen to the legal arguments—why it is that the legislature went beyond [its] role as a legislat[ure] and invaded the Constitution.''

Mr. Estrada stated to Senator Edwards that there are 200 years of Supreme Court precedent and that it is not the case that ''the appropriate conduct for courts is to be guided solely by the bare text of the Constitution because that is not the legal system that we have.''

When asked by Senator Edwards whether he was a strict constructionist, Mr. Estrada replied that he was ''a fair constructionist''—meaning that ''I don't think that it should be the goal of courts to be strict or lax. The goal of courts is to get it right. . . . It is not necessarily the case in my mind that, for example, all parts of the Constitution are suitable for the same type of interpretative analysis. . . [T]he Constitution says, for example, that you must be 35 years old to be our chief executive. . . . There are areas of the Constitution that are more open-ended. And you adverted to one, like the substantive component of the due process clause, where there are other methods of interpretation that are not quite so obvious that the court has brought to bear to try to bring forth what the appropriate answer should be.''

When Senator Kohl asked him about environmental statutes, for example, Mr. Estrada explained that those statutes to court ''with a strong presumption of constitutionality.''

In response to Senator Leahy, Mr. Estrada described the most important attributes of a judge: ''The most important quality for a judge, in my view Senator Leahy, is to have an appropriate process for decisionmaking. That entails having on open mind. It entails listening to the parties, reading their briefs, going back beyond those briefs and doing all of the legwork needed to ascertain who is right in his or her claims as to what the law says and what the facts [are]. In a court of appeals court, where judges sit in panels of three, it is important to engage in deliberation and give ear to the view so colleagues who may have come to different conclusions. And in sum, to be committed to judging as a process that is intended to give us the right answer, not to a result. And I can give you my level best solemn assurance that I firmly think I do have those qualities or else I would not have accepted the nomination.''

In response to Senator Durbin, Miguel Estrada stated that ''the Constitution, like other legal texts, should be construed reasonably and fairly, to give effect to all that its text contains.''

Mr. Estrada indicated to Senator Durbin that he admired the judges for whom he clerked, Justice Kennedy and Judge Kearse, as well as Justice Lewis Powell.

Mr. Estrada stated to Senator Durbin that ''I can absolutely assure the Committee that I will follow binding Supreme Court precedent until and unless such precedent has been displaced by subsequent decisions of the Supreme Court itself.''

In response to Senator Grassley, Mr. Estrada stated: ''When facing a problem for which there is not a decisive precedent from a higher court, my cardinal rule would be to seize aid from anyplace where I could get it. Depending on the nature of the problem, that would include related case law in other areas that higher courts had dealt with that had had some insights to teach with respect to the problem at hand. I could include the history of the enactment, including in the case of a statute legislative history. It could include the custom and practice under any predecessor statute or document. It could include the views of academics to the extent that they purport to analyze what the law is instead of—instead of prescribing what it should be. And in sum, as Chief Justice Marshall once said, to attempt not to overlook anything from which aid might be derived.''

In response to Senator Sessions, Estrada stated: ''I am very firmly of the view that although we all have views on a number of subjects from A to Z, the first duty of a judge is to self-consciously put that aside and look at each case by starting withholding judgment with an open mind and listen to the parties. So I think that the job of a judge is to put all of that aside, and to the best of his human capacity to give a judgment based solely on the arguments and the law.''

In response to Senator Sessions, Mr. Estrada stated that ''I will follow binding case law in every case . . . I may have a personal, moral, philosophical view on the subject matter. But I undertake to you that I would put all that aside and decide cases in accordance with binding case law and even in accordance with the case law that is not binding but seems constructive on the area, without any influence whatsoever from any personal view I may have about the subject matter.''

Miranda/Stare Decisis

Mr. Estrada stated that United States v. Dickerson—a case raising the question whether Miranda should be overruled—reflected a ''reasonable application of the doctrine of stare decisis. In my view, it is rarely appropriate for the Supreme Court to overturn one of its own precedents.''

Affirmative Action

With respect to affirmative action, Mr. Estrada responded to Senator Kennedy that ''any policy views I might have as a private citizen on the subject of affirmative action would not enter into how I would approach any case that comes before me as a judge. Under controlling Supreme Court authority, particularly Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), if a government program creates a racial classification, it will be subject to strict scrutiny. Whether the program survives that sort of scrutiny will often involve a highly contextual and face-specific inquiry into the nature of the justifications asserted by the government and the fit between those justifications and the classification at issue. Adarand and similar cases provide the framework that I would be required to apply, and would apply, in considering these issues as a judge.''

Asked by Senator Leahy about the strict scrutiny test, Mr. Estrada replied, ''the Supreme Court in the Adarand case stated, as a general rule, that the consideration of race is subject to strict scrutiny. That means

that though it may be used in some cases, it has to be justified by a compelling state interest. And with respect to the particular context, there must be a fairly fact-bound individual assessment of the fit between the interest that is being asserted and the category being used. That is just another way of saying that it is a very fact-intensive analysis in the context of a specific program and in the context of the justifications that are being offered in support of the program.''

Congressional Authority

With respect to the outer limits of Congress' power to confer authority on other governmental bodies, Miguel responded to Senator Kennedy that the Supreme Court has said that ''particular factual context is significant in analyzing the appropriateness of a particular delegation. . . . Of course, the fact that the Supreme Court only rarely has struck down statutes on this ground suggests that the Court has been quite deferential to congressional judgments about the types of delegations that reasonably might be needed to carry on the business of government.''

When Senator Kohl asked Mr. Estrada about the 1995 Lopez case concerning the scope of Congress' power to regulate, Mr. Estrada pointed out that he had argued in a companion case ''for a very expansive view of the power to Congress to pass statutes under the Commerce Clause and have them be upheld by the court. . . . Lopez has given us guidance on when it is appropriate for the court to exercise the commerce power. It is binding law and I would follow it.''

Ethnicity

With respect to fact that the President had noted Miguel's ethnicity, Miguel responded to Senator Kennedy: ''The President is the leader of a large and diverse country, and it is accordingly appropriate for him, in exercising his constitutional nomination and appointment powers, to select qualified individuals who reflect the breadth and diversity of our Nation.''

With respect to the Democrat Congressional Hispanic Caucus's criticism of him, Miguel responded to Senator Kennedy that ''I strongly disagree, however, with the Congressional Hispanic Caucus' view that I lack an understanding of the role and importance of courts in protecting the legal rights of minorities, of the values and mores of Latino culture, or the significance of role models for minority communities.''

Racial Discrimination

With respect to race discrimination, Mr. Estrada stated in response to Senator Kennedy: ''I take a backseat to no one in my abhorrence of race discrimination in law enforcement or anything else.''

Senator Feingold asked Mr. Estrada whether he believed that racial profiling and racially motivated law enforcement misconduct are problems in this country today. Mr. Estrada replied, ''I am—I will once again emphasize I'm unalterably opposed to any sort of race discrimination in law enforcement, Senator, whether it's called racial profiling or anything else. . . . I know full well that we have real problems with discrimination in our day and age.''

Senator Leahy asked Mr. Estrada about whether statistical evidence of discriminatory impact is relevant in establishing discrimination. Mr. Estrada replied: ''I am not a specialist in this area of the law, Senator Leahy, but I am aware that there is a line of cases, beginning with the Supreme Court's decision in Griggs, that suggests that in appropriate cases that [such evidence] may be appropriate. . . . I do understand that there is a major area of law that deals with how you prove and try disparate-impact cases.''

Congressional Authority to Regulate Firearms

Senator Feinstein asked whether Congress may legislate in the area of dangerous firearms, and Mr. Estrada responded that the Supreme Court had ruled that ''if the government were to prove that the firearm had at any time in its lifetime been in interstate commerce even if that had nothing to do with the crime at issue, that that would be an adequate basis for the exercise of Congress' power.''

Right to Counsel

Senator Edwards asked about Gideon v. Wainwright, the Supreme Court case guaranteeing the right to counsel for poor defendants who could not afford counsel. Although Senator Edwards appeared to question the reasoning in that landmark case, Mr. Estrada responded that ''I frankly have always taken it as a given that that's—the ruling in the case.''

C. ANSWERS BY PRESIDENT CLINTON'S NOMINEES

Your criticism of Miguel Estrada's testimony creates a double standard. You did not require nominees of President Clinton to answer questions of this sort (keeping in mind that you have not identified what your additional questions to Mr. Estrada are). President Clinton's appeals court nominees routinely testified without discussing their views of specific issues or cases. A few select examples, including of several nominees who had no prior judicial experience, illustrate the point. (Please note that these are isolated examples; there are many more we can provide if necessary.)

Merrick Garland (no prior judicial experience). In the nomination of Merrick Garland to the DC Circuit, Senator Specter asked him: ''Do you favor, as a personal matter, capital punishment?'' Judge Garland replied only that he would follow Supreme Court precedent: ''This is really a matter of settled law now. The Court has held that capital punishment is constitutional and lower courts are to follow that rule.'' Senator Specter also asked him about his views of the independent counsel statute's constitutionality, and Judge Garland responded: ''Well, that, too, the Supreme Court in Morrison v. Olson upheld as constitutional, and, of course, I would follow that ruling.'' Judge Garland did not provide his personal view of either subject.

Judith Rogers. In the hearing on Judge Judith Rogers' nomination to the D.C. Circuit, Judge Rogers was asked by Senator Cohen about the debate over an evolving Constitution. Judge Rogers responded: ''My obligation as an appellate judge is to apply precedent. Some of the debates which I have heard and to which I think you may be alluding are interesting, but as an appellate judge, my obligation is to apply precedent. And so the interpretations of the Constitution by the U.S. Supreme Court would be binding on me.'' She then was asked how she would rule in the absence of precedent and responded: ''When I was taking my master's in judicial process at the University of Virginia Law School, one of the points emphasized was the growth of our common law system based on the English common law judge system. And my opinions, I think if you look at them, reflect that where I am presented with a question of first impression that I look to the language of whatever provision we are addressing, that I look to whatever debates are available, that I look to the interpretations by other Federal courts, that I look to the interpretations of other State courts, and it may be necessary, as well, to look at the interpretations suggested by commentators. And within that framework, which I consider to be a discipline, that I would reach a view in a case of first impression.'' Finally, Judge Rogers was asked her view of the three-strikes law and stated: ''As an appellate judge, my obligation is to enforce the laws that Congress passes, or, where I am now, that the District of Columbia Council passes.'' Judge Rogers did not provide her personal view of these subjects.

Marsha Berzon (no prior judicial experience). Senator Smith asked her views on Roe v. Wade and whether ''an unborn child is a human being.'' Judge Berzon stated: ''[M]y role as a judge is not to further anything that I personally believe or don't believe, and I think that is the strength of our system and the strength of our appellate system. The Supreme Court has been quite definitive quite recently about the applicable standard, and I absolutely pledge to you that I will follow that standard as it exists now, and if it is changed, I will follow that standard. And my personal views in this area, as in any other, will have absolutely no effect.'' When Senator Smith probed about their personal views on abortion and Roe v. Wade, Chairman Hatch interrupted: ''I don't know how they can say much more than that at this point in this meeting.''

Richard Tallman (no prior judicial experience). In response to written questions, Judge Tallman explained that ''[j]udicial nominees are limited by judicial ethical considerations from answering any question in a manner that would call for an 'advisory opinion' as the courts have defined it or that in effect ask a nominee to suggest how he or she would rule on an issue that could foreseeably require his or her attention in a future case or controversy after confirmation.'' He was asked how he would have ruled in Plessy v. Ferguson. He stated: ''It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and supporting legal authorities that were applicable at that time.'' He gave the same response when asked how he would have ruled on Roe v. Wade. When asked his personal view on abortion, he wrote: ''I hold no personal views that would prevent me from doing my judicial duty to follow the precedent set down by the Supreme Court.'' He gave the same answer about the death penalty.

Kim Wardlaw. In the hearing on Judge Kim Wardlaw's nomination to the Ninth Circuit, Judge Wardlaw was asked about the constitutionality of affirmative action. She stated (in an answer similar to Miguel Estrada's answer to the same question): ''The Supreme Court has held that racial classifications are unconstitutional unless they are narrowly tailored to meet a compelling governmental interest.''

Maryanne Trump Barry. In the hearing on Judge Maryanne Trump Barry's nomination too the Third Circuit, Senator Smith asked for her personal opinion on whether ''an unborn child at any stage of the pregnancy is a human being.'' Judge Barry responded: ''Casey is the law that I would look at. If I had a personal opinion—and I am not suggesting that I do—it is irrelevant because I must look to the law which binds me.''

Raymond Fisher. In the hearing on Judge Raymond Fisher's nomination to the Ninth Circuit, Senator Sessions asked Judge Fisher's own personal views on whether the death penalty was constitutional. Judge Fisher responded that ''My view, Senator, is that, as you indicated, the Supreme Court has ruled that the death penalty is constitutional. As a lower appellate court judge, that is the law that I am governed by. I don't want in my judicial career, should I be fortunate enough to have one, to inject my personal opinions into whether or not I follow the law. I believe that the precedent of the Supreme Court is binding and that is what my function is.''

V. CONCLUSION

Miguel Estrada is a well-qualified and well-respected judicial nominee who has very

strong bipartisan support. Based on our reading of history, we believe that you have ample information about this nominee and have had more than enough time to consider questions about his qualifications and suitability. We urge you to stop the unfair treatment, end the filibuster, allow an up-or-down vote, and vote to confirm Mr. Estrada.

Sincerely,

ALBERTO R. GONZALES
Counsel to the President.

Mr. HATCH. I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mrs. CLINTON. Mr. President, I listened with great interest to my friend and colleague from Utah. I have the highest respect for him. I must confess, in listening to him, though, it brought to mind that wonderful old saw about trial lawyers. You know: If the facts aren't on your side, argue the law. If the law isn't on your side, argue the facts. If neither the facts nor the law are on your side, pound the table and hope nobody notices. From my perspective, that is exactly what we have been hearing from our friends on the other side with respect to this very important matter that is not just about a nomination but about the role and responsibility of the Senate under our Constitution.

I rise today to expand on the points I made yesterday because, after further reflection and careful thought about this body's constitutional obligations to provide advice and consent on judicial nominations, I believe there are even greater reasons for us to focus during this time on that responsibility.

There has been, clearly, a debate going on about the role of the Senate in judicial nominations, and many of my friends on the other side have made the point that their view is the Senate defers to the executive when it comes to judicial nominees. That would certainly be a surprise to the 42nd President of the United States, that that is the position of my friends on the other side.

Furthermore, there are those who argue the Senate's role is to give advice and consent, but that does not encompass an inquiry into a nominee's judicial philosophy.

I, for one, believe on both of those grounds our colleagues are mistaken. I have done some further research and inquiry into what is it we mean when we open up our Constitution and we look at article II, section 2 and we see these words, ''advice and consent.'' Given the extraordinary brilliance and the economic use of words in the Constitution, I assume every word means something. Each word was battled over. Each word was poured over. A lot of effort went into coming up with those words that would help to guide our infant Nation. So I take advice and consent very seriously.

It is particularly important to recognize I am not alone in viewing this obligation with seriousness. From the very beginning of our country it has been a concern. It was one of those elements in the balance of power that was so carefully constructed among our three branches of Government. It is something I think we ignore at our peril.

What is it we are talking about? Again, I sometimes wonder what our friends and fellow countrymen who might be watching this debate, as they look for something perhaps more interesting or exciting on their televisions, stop and think if they see one of us talking about advice and consent, or talking about our Constitution. Article II, section 2 states that:

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

That is what the Constitution tells us. It is our obligation, as it has been ever since this body was formed, to determine what that means and how we apply it. The Framers of our Constitution did not envision the Senate's power of advice and consent to be a mere formality. In fact, at the Constitutional Convention of 1787, the power of judicial appointment was a subject of enthusiastic debate.

The first proposal that came from delegates to the Convention was that the choice of Federal judges should be left to the Senate alone—that it would be this body, acting on its own, that would appoint judges to the bench.

Then a competing proposal was put forth arguing that, no, the President should nominate and appoint judges and that the Senate should have only the power to reject or approve those candidates.

But what was it after the debate that our Founders decided was the American way? How did they conclude what was the proper balance between these competing positions? Clearly, the adopted language was a compromise. And, equally clearly, those who agreed to that compromise did not view our role—the Senate's role—as insignificant or deferential. In fact, Alexander Hamilton in Federalist No. 76 writes that the Senate's participation in the judicial nomination process was essential in order ''to promote a judicious choice of men''—of course, he would say men and women were he writing today—''for filling the offices of the Union.'' He further stated that the Senate's advise and consent role serves as ''a considerable and salutary restraint upon the conduct'' of the President.

There is plenty of evidence that exists which demonstrates what the Framers intended with respect to the advice and consent clause. This clause added formation and, in all of the decades since, contemplated a strong and decisive Senate role that would serve to advise and consent with respect to the President's nominees—or, to put it another way, would serve to balance the power of the President's nominating authority by Senate legislative power.

This strong role that the Constitution granted the Senate has only grown stronger in the years following the adoption of our Constitution. We know very well that members of both parties have historically expected judicial nominees to be fully candid and forthright with any information that Senators deem relevant. The Republicans are acting as though the questions we are asking and the opposition which we are presenting to the process that has been adopted and the responses—or, I should say nonresponses—of the nominee are unprecedented. But I have to just point to recent history. We don't have to go back to the Federalist Papers. We don't have to go back to the 19th century. We only have to go back a few years to find many instances in which my friends on the other side did not rest until they had satisfied themselves with the information provided by nominees sent up by a Democratic President.

A June 22, 1998, floor statement by Senator HATCH demonstrates that the advise and consent obligation is indeed a strong one. Here is what he said:

> While the debate about vacancy rates on our Federal courts is not unimportant, it remains more important that the Senate perform its advice and consent function thoroughly and responsibly. Federal judges serve for life and perform an important constitutional function without direct accountability to the people. Accordingly, the Senate should never move too quickly on nominations before it.

I couldn't agree more. I think Senator HATCH was right in 1998.

He also stated that he had ''no problem with those who want to review . . . nominees with great specificity.''

That is all we are asking for. But we can't review this nominee with great specificity because he has become kind of an emblem of nonspecificity with nonanswers and nonresponses.

It is really hard to imagine someone being considered for the important position that he would hold for life telling Senators who inquired that he really didn't have anything to say about any Supreme Court decision in the history of the Court.

Of course, my colleague from Mississippi, Senator LOTT, has also reminded us that:

> Yes, the President has a right to make nominations to the Federal bench of his choice. However, we—namely, the Senate—have a role in that process. We should, and we do, take it very seriously. We should not give a man or a woman life tenure if there is some problem with his or her background, whether academically or ethically, or if there is a problem with a series of decisions or positions they have taken.

Of course, we don't know whether there is any problem with respect to this nominee's decisions. He has never been a judge, and we have no idea what his positions are on anything.

It is hard to imagine that any Member of this body could, as some of my colleagues on the other side have been saying over the last days, say that we really do not have to worry too much

about this advice and consent clause because the Senate plays only a minor role in the nomination process. I would be more than happy to provide a list of citations and references so that any Senator who has been led to believe that would know it is not the case.

In fact, one of the very best descriptions of what advise and consent means in the Constitution that I have able to find comes from a very well respected former Republican Senator from Maryland, Mr. Charles McC. Mathias. In 1987, Senator Mathias submitted an essay that was published in the University of Chicago Law Review, a very prestigious publication. The essay is entitled ''Advice and Consent: The Role of the United States Senate in the Judicial Selection Process.'' This I would commend to all of my colleagues because the debate we are having today is not just about one nominee. And it is not just about one President or one political party. It is about how we fulfill our constitutional obligations. Senator Mathias has it just right.

Among the important points he makes are the following:

Among all the responsibilities of a United States Senator, none is more important than the duty to participate in the process of selecting judges and justices to serve on the Federal courts.

Senator Mathias goes on:

The Senate's duty in this sphere is extraordinary. Most other senatorial decisions are subject to revision, either by the Congress itself or by the executive branch. Statutes can be amended, budgets rewritten, appropriations deferred or rescinded, but a judicial nomination is different. When the Framers of the Constitution decided that Federal judges shall hold their offices during good behavior, and may be removed only by the rarely utilized process of impeachment, they guarantee respect for the principle of judicial independent.

Senator Mathias goes on to point out:

It will no longer provide—Their decision also meant, however, that the vote to confirm a judicial nominee must express the Senate's confidence in the nominee's ability to decide the burning legal controversy not only of the day but of future decades as well. The Constitution gives the Senate the consent power, not as a mechanical formality but as an integral part of the structure of government . . . If the Senate does not take its role seriously, it will lose its effectiveness as, in Hamilton's words—

''a considerable and salutary restraint upon the conduct'' of the President.

Senator Mathias points out what should be obvious to us all. A nominee should:

[E]merge from the nomination process knowing that the president and the Senate have confidence that he will preside with only one unalterable loyalty, to the Constitution, and with only purpose, to assure the individual standing before him a judgment based upon the law of the land.

Senator Mathias makes another very critical point in his University of Chicago Law Review article about the advice and consent clause. He says:

The Senate must be convinced that a nominee is impeccably competent. But competence alone is not sufficient. It is not enough that a nominee be skilled in legal argument and knowledgeable about legal doctrine, and that . . . he be able to write clearly and forcefully.

A candidate for the federal bench must, as Hamilton wrote in Federalist No. 78; ''unite the requisite integrity with the requisite knowledge.'' The nominee also must exhibit a strength of character and a range of vision that will help [him] look beyond the world that exists on the day on which [he] is nominated. . . .

[T]he full senate should have the opportunity to consider each nomination on a complete record. . . .[Senators] should have the opportunity to review the transcripts of hearings and to solicit other advice on the merits of the issue before voting.

The goal of these procedures is not to second-guess the judgment of the president in submitting the nomination to the Senate, but to ensure that the factors underlying that judgment are sufficiently disclosed to permit the Senate to make an informed and independent evaluation of the president's choice.

That is really the nub of what we are concerned about.

Listen to the words of a former Republican Senator who served with great distinction in this body:

The goal . . . is not to second-guess the judgment of the president . . . but to ensure that the factors underlying that judgment are sufficiently disclosed to permit the Senate to make an informed and independent evaluation of the president's choice.

Senator Mathias concludes:

For when the Senate carries out its function of advice and consent, its first loyalty must be not to the political parties, nor to the president, but to the people and the constitution they have established.

It is not only former Senators who have understood this and would be astonished at the amnesia that seems to have descended upon us about what the debate among the Framers was, about what the settled law and understanding of the Constitution was, about what distinguished Senators who served in this body always believed it to be. But this is the weight of all of the legal and academic analysis of the clause that has been done over so many years.

One of the most effective and thorough analyses of the advise and consent obligation is found in a joint statement by Philip Kurland from the University of Chicago and Laurence Tribe from Harvard, dated June 1, 1986, entitled: ''Joint Statement to the Senate Judiciary Committee on the Role of Advice and Consent in Judicial Nominations,'' submitted to the Judiciary Committee. 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:

June 1, 1986.

To the Senate Judiciary Committee:

The United States Senate has too often been confused and uncertain about its role in approving Federal judicial nominees. The Constitution entrusts the power to appoint the member of the third branch of the National Government not to the executive branch nor to the legislature, but to both political branches together: the President nominates, but the Senate must confirm. Providing ''advice and consent'' on judicial nominations, therefore, is no mere senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government.

Those who wrote the Constitution certainly did not envision the Senate's power of ''advice and consent'' to be a formality. The allocation of the appointment power was the subject of keen debate at the Constitutional Convention of 1787, which initially proposed a draft that left the choice of Federal judges to the Senate alone. The adopted language was a compromise, and it is clear that those who agreed to the compromise did not view the Senate's role as merely ceremonial or ritualistic.

The reasons that the Framers contemplated a strong Senate role in the process of judicial appointments are plain. It must be remembered that Federal judges are not, like the President's cabinet, to serve the will of the Chief Executive, but officers appointed for life to a separate and independent branch of government. If those appointed to these lifetime judicial posts should ultimately prove unequal to the task or unsuited to the role, they cannot be dismissed. Impeachment by the House and trial by the Senate is the only constitutionally authorized method of removing unfit judges, and the great difficulty of such a process makes it usable only in situations of outrageous misconduct. The only practical opportunity to consider the merits of a judicial candidate, therefore, is before that appointment is made. It thus becomes not only appropriate, but obligatory, that the Senate pass on judicial nominees with greater scrutiny than it reviews the President's choices for his own subordinates.

Whatever the philosophy of government or theory of law, the demands that the Nation makes on its Federal judges are indisputably great. The Federal courts play an increasingly critical part in American government. The men and women of the Federal bench must possess open minds that are capable of grasping sophisticated legal analysis, and that can grapple intelligently with fundamental constitutional issues. To Federal judges is given the task of policing the boundaries between State and Federal government, of giving principled articulation to the content of the basic human rights protected by the Constitution, of enforcing the myriad and complex Federal statutes and regulations, and of overseeing complicated commercial and criminal litigation. Senators therefore have a duty, both to the Constitution and to the Nation's citizens, businesses, and public and private institutions to ensure that the President's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions and, particularly in the case of appellate judges, to contribute lucidly to a body of legal precedents that can enlighten and guide trial courts, litigants, and those who must try to enlighten and guide trial courts, litigants, and those who must try to anticipate what courts will do.

Candidates for the Federal bench should meet a higher standard than that required for most government officers. A career marked by integrity, capacity, wisdom, and commitment is the minimal qualification. If it is not readily apparent that a candidate is truly distinguished, the burden should be on the President to demonstrate the merits of the nominee. A nominee's entire record—professional achievements, public service, academic credentials, appellate briefs or other legal writings, scholarly or other publications—should be reviewed carefully to screen out the merely competent, and certainly, the

simply mediocre. Respect for the institution of the Federal courts—and for the onerous responsibilities of the Federal bench—requires nothing less.

The responsibility of appointment to the independent judiciary was divided between the White House and the Senate in part to avoid burdening the Federal courts with candidates selected solely to satisfy criteria unrelated to judicial excellence. The President is certainly entitled to prefer loyal supporters and like-minded thinkers in choosing among the exceptionally qualified; but no President has a right to treat Federal judgeships as mere patronage appointments simply to reward friends or to assure a judiciary packed with ''true believers.'' And the Senate is surely not required to defer to the appointment of men and women whose most salient qualification is their location in a particular partisan line-up or their devotion to a particular cluster of political or philosophical views.

The Senate has the further obligation to assure itself that a nominee's substantive views of law are within the broad bounds of acceptability in American public life and not on its lunatic fringes—whether left or right. The Republic may demand—and its Senators ought therefore to ensure—that is life-tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

The absence of evidence of a nominee's lack of adherence to constitutional values should not be deemed a sufficient ground for confirmation. When dealing with a lifetime appointment to the Federal bench, rather than the trial of a criminal defendant, one's doubts as to a candidate's commitment to the Bill of Rights or to constitutionally commanded equality must be resolved in favor of the Constitution rather than the candidate.

None of this is to say that the Senate, any more than the President, is justified in using litmus tests that seek out a candidate's unswerving commitment to upholding or reversing a particular * * * dealing with * * * vised than the confirmation of ''single-issue'' nominees who appear to have been selected solely on the basis of their aversion to or endorsement of one particular line of legal doctrine.

Finally, the Senate must realize that, in the appointment process, the power of nomination belongs to the President alone. Senators are not entitled to a ''short list'' of their own. Therefore, it is not a sufficient objection to an otherwise legally distinguished and constitutionally acceptable nominee that a Senator would prefer someone from a different part of the legal profession or a different part of the country, or someone of a different race, gender, or ideology. But neither is a confirmation vote in order whenever the best that can be said of a nominee is that he has spent some time in law or public life and is untainted by any major scandal. Even at levels below that of the Supreme Court, where the need for exceptional distinction should be beyond debate, the Nation has a right to expect more than minimum qualifications and probable fitness from its Federal judges. And it has a right to insist that the Senate, whatever the practice of the past decade or two, recall the Framers' vision of its solemn duty to provide advice and consent, rather than perfunctory obeisance, to the will of the President.

PHILIP B. KURLAND.
WILLIAM R. KENAN,
Distinguished Service Professor, University of Chicago.
LAURENCE H. TRIBE.
RALPH S. TYLER, Jr.,
Professor of Constitutional Law, Harvard University.

Mrs. CLINTON. Professors Kurland and Tribe, joined by Professors William R. Kenan and Ralph S. Tyler, wrote that:

[P]roviding ''advice and consent'' on judicial nominations . . . is no mere senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government.

Now, that is a mouthful that really says a lot. This little clause—just three words—is so important to our tripartite; namely, our three branches—executive, legislative, and judicial—of Government. Well, it is. That is why we advocate it, not at our peril—we will come and go—but at the peril of undermining this extraordinary, brilliant construction of the United States, a tripartite form of Government, kept in equilibrium by a balance of power.

That is a heavy responsibility, to think of giving up advise and consent, giving up the Senate's constitutional duty because, as this statement goes on to say:

The reasons that the Framers contemplated a strong Senate role in the process of judicial appointments are plain. It must be remembered that Federal judges are not, like the president's cabinet, to serve the will of the Chief Executive, but officers appointed for life to a separate and independent branch of government.

If those appointed to these lifetime judicial posts should ultimately prove unequal to the task or unsuited to the role, they cannot be dismissed.

Impeachment by the House and trial by the Senate is the only constitutionally authorized method of removing unfit judges, and the great difficulty of such a process makes it usable only in situations of outrageous misconduct. The only practical opportunity to consider the merits of a judicial candidate, therefore, is before that appointment is made. It thus becomes not only appropriate, but obligatory, that the Senate pass on judicial nominees with greater scrutiny than it reviews the president's choices for his own subordinates.

Whatever the philosophy of government or theory of law, the demands that the Nation makes on its federal judges are indisputably great. The federal courts play an increasingly critical part in American government.

To federal judges is given the task of policing the boundaries between state and federal government, of giving principled articulation to the content of the basic human rights protected by the constitution, of enforcing the myriad and complex federal statutes and regulations, and of overseeing complicated commercial and criminal litigation.

Senators therefore have a duty, both to the constitution and to the Nation's citizens [who sent us here] to ensure that the president's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions, and, particularly in the case of appellate judges, to contribute lucidly to a body of legal precedents that guide [our] courts. . . .

The Senate has the further obligation to assure itself that a nominee's substantive views of law are within the broad bounds of acceptability in American public life and not on its lunatic fringes—whether left or right. The Republic may demand—and its Senators ought therefore to ensure—that its life-tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

Even in the absence of evidence of a nominee's lack of adherence to constitutional values, it is something that we have to take seriously. We have to be assured, we have to be reassured, that when we cast our votes, we are doing so in the best interests of our Constitution and our country.

It has been clear in the debate so far that the Constitution has become something of a political football. There are those who—when the shoe was on the other foot and the occupant of the White House was of another party—were certainly more than ready to ask any question and to raise any objection that they could possibly imagine.

I listened, with great interest, to my good friend from Utah say, with great conviction: We never, ever filibustered a judge.

That may be technically true, but the reason is because they wouldn't give nominees hearings. They wouldn't give nominees votes, and they would not bring them to the floor where they possibly could be filibustered. It is somewhat surprising to hear that argument being made with a straight face.

In the years between 1995 and 2000, the Judiciary Committee refused to hold hearings or to permit votes for more than 50 judicial nominees submitted by President Clinton. Some nominees waited years for a hearing. Some nominees waited years for a vote. One such nominee, a Hispanic judge, Judge Paez, waited more than 1,500 days. Others waited more than 1,500 days, never received the courtesy of a hearing, never received the courtesy of a vote.

So here we are, and we are being somehow taken to task because the other side never filibustered. But they controlled the committee. They didn't have to filibuster. They just let nominees languish, twist in the wind, and eventually disappear. I didn't approve of that. I thought that was unfair to a lot of very decent Americans of tremendous intellectual, academic, and legal experience and qualifications.

What we are doing now is trying to do the work of the Judiciary Committee. The Judiciary Committee would not stand for the prerogatives of this body and insist the nominee answer questions, provide information, require the administration to come forward forthrightly and give the documents and the other background material that was requested. The only way we can exercise our constitutional duty to advise and consent is to raise these issues here in the Chamber.

I want to put this into the context of why this would be important to anybody outside the Senate. Again, I imagine people trying to make sense of all of this, trying to figure out what it is all about. In fact, it is about the people themselves. Senators come and go. Presidents come and go. The Constitution, we hope, not only stays but prevails. The Constitution, which set up this genius form of government, unlike anything that any group of human

beings have ever devised for themselves, is our underpinning. It is our bedrock.

The interpretation of it can change from time to time. That is as it should be. That is part of the genius of our Constitution—that it was an organic, growing document to take into account a nation that started out primarily agrarian and now is in the midst of the information revolution. We couldn't even imagine thinking we had to live and work and govern ourselves in the same way as our predecessors did 200 plus years ago. But the values don't change. The balance of power that is fundamental to our tripartite system of government doesn't change. Human beings may fly through the air in airplanes rather than traverse from place to place on horseback, but fundamental human nature doesn't change.

The reason we have a balance of power is because the Framers were absolutely the best psychologists who ever came together in any place in the world. They knew, as they revolted against a king and a royal system, that they were setting up the potential for self-government. They recognized in order for self-government to work, you had to be realistic about human beings. You couldn't be too optimistic. You couldn't be too pessimistic. You had to get it just right, kind of like Goldie Locks. If you were too optimistic about human nature, you would certainly be disappointed. If you were too pessimistic about human nature, you wouldn't have enough hope to get up and move forward and try to solve problems.

So the Framers had to get it right. And did they ever get it right. They understood completely that we had to restrain ourselves, that we had to have systems that protect against runaway executive power, runaway legislative power, runaway judicial power. They had it absolutely right.

The advice and consent clause is part of how they got it right. I don't care if you are Republican or Democrat, if you served in the Senate in the 19th or 20th or 21st century, they got it right.

What we are saying is we don't want to second-guess the Framers. We don't want to substitute our judgment for theirs. We want to do what we are expected to do by the Constitution.

We wouldn't even be here having this debate if the constitutional responsibility had been fulfilled in the Judiciary Committee. I have listened to my colleagues talk about all of the paper that has been submitted and all of the time that has been taken to pass this nominee through the Judiciary Committee. But they know as well as we that many of the critical questions were never answered. Many of the essential documents that would give us insight into the attitudes and the beliefs and the philosophy of this nominee were never produced and that, in effect, we are asked to basically abdicate our advise and consent responsibility, to turn our back on the Constitution and to do what we are told to do.

That is not what the decision was when the debate took place among our Framers. If you look at the Federalist papers, if you look at all of the commentary in the many years since, this was a solemn duty that was given to the Senate.

When people say: Why are you debating this, I think there are a number of reasons. First, because it seems to those of us who are debating, it is our duty. It is our responsibility. We read the Constitution. We read what people said about it at the time it was written, what people have said about it recently. We read what our colleagues have said about it, when the shoe was on the other foot, and we have to conclude we are fulfilling our constitutional responsibility.

I went back and looked at the CONGRESSIONAL RECORD at some of the comments some of my friends on the other side have made in the past about what we should do when it comes to advising and consenting. I agree with what they said. When the shoe was on the other foot and it was a Democratic President sending judicial nominees, the same speeches were said on the other side of the floor, which strikes me as definitive, conclusive proof of what this is all about.

For example, Senator SMITH, March 9, 2000:

> The Constitution gave the Senate the advise and consent role. We are supposed to advise the President and consent, if we think the judge should be put on the court. We do not get very much opportunity to advise because the President just sends these nominations up here. He does not seek our advice. And then we are asked to consent. It seems as if the Senate should be a rubber stamp, that we should just approve every judge that comes down the line and not do anything about the advise and consent role.

I agree 100 percent with what Senator SMITH then said:

> That is not the way that I read the Constitution. I believe that is wrong. We have an obligation under the Constitution to review these judges very carefully.

In that same vein, Senator SMITH on another day, the same month, March 7, 2000, went on to explicate this important responsibility. I wish all of us would listen to it. I think this is exactly right. He said:

> I think the constitutional process is very clear, that the Senate has the right and the responsibility under the Constitution to advise and consent.
>
> That is exactly what I intend to do in my role as a Senator as it pertains to the two nominees before us. The issue, though, is whether it is OK to block judicial nominees. We have heard from a couple of my colleagues in the last few moments that it isn't OK to block judicial nominees, as if there was something unconstitutional about it. There is thinking by some that we should not start down this path of blocking a judicial nominee whom we do not think is a good nominee for the Court because it may come back to haunt us at some point when and if a Republican should be elected to the Presidency.

Senator SMITH goes on:

> Let me say, with all due respect to my colleagues, I am not starting down any new path. I am going to be very specific and prove exactly my point that we are not starting down a new path of blocking a judicial nominee. That path is well worn. We are following a path; we are not starting down any new path.

I could not say it better myself. In fact, I wish I had said it as well. But it is not only Senator SMITH, it is also Senator HATCH, on January 28, 1998:

> Conducting a fair confirmation process, however, does not mean granting the President carte blanche in filling the Federal judiciary. It means assuring that those who are confirmed will uphold the Constitution and abide by the rule of law.

Senator HATCH, October 3, 2000:

> The President has broad discretion, as we know, to nominate whomever he chooses for Federal judicial vacancies. The Senate, in its role, has a constitutional duty to offer its advice and consent on judicial nominations. Each Senator, of course, has his or her own criteria for offering this advice and this consent on lifetime appointments. The Judiciary Committee, though, is where many of the initial concerns about nominees are raised and arise. All of this information is, of course, available to every member of the Judiciary Committee and must be thoroughly reviewed before the nominee is granted a hearing by the committee. If questions about a nominee's background or qualifications arise, further inquiry may be necessary. Obviously, this is a long process, as it must be. After all, these are lifetime appointments.

Senator HATCH, May 23, 1997:

> The primary criteria in this process is not how many vacancies need to be filled, but whether President Clinton, or whoever the President is—whether their nominees are qualified to serve on the bench and will not, upon receiving their judicial commission, spend a lifetime, a career, rendering politically motivated activist decisions.

Then Senator HATCH goes on to say something else I agree with 100 percent:

> The Senate has an obligation to the American people to thoroughly review the records of all nominees it receives to ensure that they are capable and qualified to serve as Federal judges.

Listen to that specific point that Senator HATCH made back in 1997: There has to be a thorough inquiry and the Senate has to determine whether a nominee would, upon receiving their judicial commission, spend a lifetime, a career, rendering politically motivated, activist decisions. That is really the nub of what we are looking to determine.

There is more than sufficient concern that the nominee before us would do just that. And the reason why the administration will not, and maybe perchance cannot provide the information requested, is because to do so would make abundantly clear that this is a nominee on a mission, that this is a nominee who will do exactly what Senator HATCH warned about when the shoe was on the other foot; namely, render politically motivated, activist decisions.

Now, there may be some on the other side who believe they would agree with these politically motivated activist decisions, so bring it on. But I don't

think that is our responsibility. Our responsibility is to know ahead of time. The American people don't get to interview and vote on these nominees. If some nominee overturns, when he or she is on the bench, fundamental worker protections for people who work hard and play by the rules of what they are supposed to do at work, that affects the lives of millions of Americans. If someone decides they don't like the Violence Against Women Act, or they don't believe there is a right to privacy embedded in the Constitution, that affects millions of Americans.

So I think it is imperative that we listen to what our colleagues on the other side of the aisle said during the 1990s. All of this concern about advice and consent, all of this caution about rushing to judgment and voting—slow it down, do a thorough review, don't move too quickly. In fact, don't even give people hearings or a vote in committee. It is imperative that now we try to get back to that balance of power that the Constitution established.

Turning down nominations for a judgeship is something that goes back to the beginning of our Republic. It is not as though this is the first time we have ever had this debate. We have had many nominees rejected, starting with one of President Washington's nominees. John Rutledge was nominated in 1795 by President Washington. Why was he turned down? He was thought to be well qualified. He had quite an experience that could certainly be impressive when examined. He was a member of the Federalist Party, which should certainly ring a bell with my colleagues on the other side. But he was turned down because of his political views.

The idea that somehow the political views and positions of a nominee for a lifetime appointment are off limits to the Senate has no basis in fact, history, or law. The very first nominee in 1795 by probably the most popular President that we have ever had, because he was the first—and lucky for him he didn't have to be compared to other people and given all of the difficulties that our subsequent Presidents have faced—but President Washington's nominee was rejected because of the political positions he had taken.

Of course, that was not the only early nominee to be rejected. President Madison nominated Alexander Wolcott in 1811. He was rejected.

He was rejected. President Jackson nominated Roger Brook Taney in 1835. He was rejected the first time. He came back a year later and was accepted. There are many such situations.

It is revising history to claim that we cannot inquire into someone's opinions. If we are going to put someone on the bench who does not believe there is a right to privacy in the Constitution, which would perhaps lead to the overturning of many decisions that protect people's privacy in the sanctity of their home or with respect to their bodies, we should know that. That person might still be nominated and confirmed, but the American people have a right to know who these people are who are being nominated because they are going to be making decisions that affect the daily lives of Americans.

When you nominate a stealth candidate, when you send him up to the Judiciary Committee and tell him to dodge and duck and divert and do not answer a straight question with a straight answer, is it any wonder that people get a little suspicious and maybe say: Wait a minute; if this man will not even come and tell us what Supreme Court decision he agrees with, going back to Marbury v. Madison, and he says he cannot name one; How about one with which you disagree? Well, I can't name that either; that does not pass the smell test, I am sorry. That is a witness who has been well coached and told: Don't rock any boats, don't answer any questions, don't reveal your true opinions. Just try to get through the process.

That is why we need an advice and consent clause in the Constitution, and that is why the Framers put it there. It very well may be if he answered the questions forthrightly, if he said: My favorite Supreme Court decision is Marbury v. Madison, my least favorite is—pick one out of thousands—we would say: We do not agree with you, but OK. But he will not do that.

You have to ask yourself: Why won't he do that? Certainly given the kinds of questions that were asked of nominees during the 1990s that went into all kinds of areas—their associations, the meetings they attended, how they even voted—it is hard to understand why this nominee cannot be expected to answer pertinent questions about the law, about his opinions concerning Supreme Court decisions.

The fact he refuses to do so, or has been ordered not to do so, fundamentally defies the constitutional duty of this body to advise and consent.

I know there are those who have argued that there is already an adequate amount of information in the record that should be taken at face value. That is hard to do. That is hard to do because, in the absence of a willingness to answer pertinent, relevant questions, many of us do not believe the nominee has sufficiently subjected himself to the process that this body has established to permit Senators to make an informed decision.

If we go back and look at the reams of material that I reviewed to determine what was the basis for the advice and consent clause, I think that is obvious to us all it is there for a purpose. We ignore it at our peril. We have a duty to abide by it.

I again urge my friends and colleagues on the other side to read the extensive description of the advice and consent clause and the role of the Senate in the judicial selection process by former Republican Senator Charles McC. Mathias.

When my friends and colleagues raise the issue that somehow this is focused on a particular nominee, for whatever reason, I think that does a disservice to the seriousness of our concerns because it was this nominee who would not answer the questions. It was this nominee who did not provide the materials.

My very alert counsel has just reminded me that when Justice Taney was first rejected after being nominated by President Jackson in 1835 and then was renominated and confirmed in 1836, he went on to write one of the most discredited, racist, despicable opinions in the history of our court. Judge Taney was the author of the Dred Scott decision. Maybe the country would have been better off and saved a whole lot of misery if the Senate had delayed action and had never confirmed him when he was renominated. We just never know. We have to do the best we can given our own human limitations and idiosyncrasies based on the information available.

There are some, and I respect their opinion, on both sides of the aisle who say: If the President sends somebody up, I am voting for it, no questions asked. That is how I believe the Constitution is to be interpreted, as far as I am concerned.

With all due respect, I think that is an abdication of responsibility.

For most of us, we try to get behind the nomination. We try to understand, not just the academic or legal background which can be described by where you worked, who you worked for, what clients you had, what cases you tried or argued, but if that is all we did, we could put that into a computer. We would not need the Senate. We would computerize that decision. That is not what we are supposed to do. We are supposed to get behind the statistics, under the resume to satisfy ourselves that the person we give this lifetime job to is motivated by only one reason: to render justice to the best of his ability no matter who the parties are, no matter what the outcome of the matter may be, not to serve a political philosophy or ideology, not to serve a political party or even a President but to really do the hard work of justice.

It is a hard job, it is a really hard job and especially today. There are so many factors at work in our society, so many difficult decisions to be made about how we keep this wonderful, precious democracy of ours moving forward that judges have a very tough job. It is not for the casual or the indolent. It is for people who really care, will work hard, and will follow the law, the Constitution, and their conscience.

We are judging not just a legal resume. We are judging a potential judge. We are asking ourselves: Will everyone who appears before this court get the benefit of a fair rendering of justice?

Until we can satisfactorily answer that question about this nominee, we cannot move forward. We should not move forward. We should follow the words of our colleagues when the shoe was on the other foot and it was a

nominee from a Democratic President that caused questions and concerns on the other side.

I personally think that was overdone, and that many good, decent people who would have made fine judges were denied the right to go forward, but it was done in the name of the Constitution. It was done under the rubric of advise and consent.

It is a little hard to understand how my friends on the other side can, with straight faces, say that is not what it means at all. How dare we question this nominee. How can we ask for more information? Because that is what we think our duty is, just as at a previous time those on the other side thought it their duty.

It is difficult to explain how the Constitution's interpretation could flip so quickly. I do not think that is good for the Constitution. I do not think that is good for this body. I do not think it is good for the judiciary. Most of all, I do not think it is good for our country. I think no matter who is in the White House, no matter who is in the Senate, we ought to do our level best to fulfill the duties the Constitution places upon us. That is what I am attempting to do to the best of my ability. I know that is what all of my colleagues attempt to do.

When we face a moment such as this, which seems fraught with so much meaning not only with respect to a nominee and not only with respect to the judiciary but to that fundamental balance of power, we have to be careful. We will live with the precedents that are set.

Lord Acton had it right when he said, power corrupts and absolute power corrupts absolutely.

We must have those checks and balances. We must keep that fabulous, unbelievable genius of our Framers alive. I hope we can see some attention being paid to the legitimate questions and concerns that are being raised about this nominee and about this process and about the Constitution we revere and serve.

I yield the floor.

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

Mr. BURNS. Mr. President, I rise today and join my colleagues in supporting the confirmation of Miguel Estrada to the DC Circuit Court of Appeals. We have heard more information on this man than anyone I can remember in recent times. There is not much about this gentleman or this situation that has not been said thus far on the floor of the Senate.

The history of this man I can relate to. I kind of started out on my own about that age, but I will never attain the level of society and dedication he has. He did it the hard way, by his own bootstraps. He is a graduate of Harvard Law School, near the top of his class. We also know he is a very successful appellate lawyer who argued 15 cases before the United States Supreme Court. We know he has been rated well qualified by his own colleagues in the American Bar Association.

I find it interesting, as the case is trying to be made, that somebody is being denied their constitutional rights, the constitutional right of advice and consent. I tell the American people, no Senator is being denied access to this floor. No Senator is being denied the ability to come to this floor and make his or her case either in support or opposition to the confirmation of Miguel Estrada. Everyone is free to do so and is afforded the opportunity to discuss the merits of one side or the other. Nobody is being denied that. It is pretty simple, and I think the American people understand that. Come down and make your case. If you did not make it the first time, come back the second time, come back as many times as you like to respond.

No one has been denied anything dealing with the merits of this man Miguel Estrada. Come down and make your case. Then vote. It is very simple. There is nothing hard to understand about that.

If a good case is made, there may be 51 votes. Folks will vote for you and you have won, and we will say congratulations. Nobody is being denied that.

We see quite a lot of dust being kicked up to fuzz up and confuse the issue. The issue is Miguel Estrada. That is what it is about. He has been nominated to occupy a seat on the DC Court of Appeals.

I am not an attorney, never been hinged with that title, but I too get to vote. I too get to look at information, both positive and sometimes negative, about this man. He will be the first Hispanic to serve on the DC Court of Appeals, and I applaud President Bush for nominating a candidate of this quality and this integrity.

He is a living example of an American attaining what he terms as his American dream. Right now he is being denied a vote. That seems sort of strange to me. He deserves an up-or-down vote, and at the end of that we will count them up and we will move on.

Why should I, a Senator from Montana, be interested in a nominee to the DC Court of Appeals? Well, so many cases are argued before this court that have to do with the management of public lands and the management of our national parks. Because I am from a public lands State, it matters a great deal that the laws of the land are properly judged and adjudicated. Every piece of information that I have been able to read or listen to or watch tells me he understands one little word in the English language that is very important to each and every one of us. The word is ''fair,'' dedicated to the study of both sides of any issue and then relating that to the law or the Constitution of the United States and making judgments.

That is pretty simple. We make things a lot more difficult than they should be. I have seen the big thick book that the chairman of the Judiciary Committee had, all the questions he was asked, the responses. What else is there to know about this man that has not been revealed? Instead, we hear ''deny,'' when not one person in the United States as a Member has been denied access to this floor.

Cases that have to do with public lands have great ramifications for Montana. Therefore, not only will I think he will be fair, judicial, and constitutional, but I believe it is also important to fill this vacancy. Right now, we see declarations of emergencies in so many of our appellate courts that we are seeing justice delayed, justice denied.

So what do we see happening today? It is written in the Constitution about our rights not being denied, but we sure see a little bit of obstructing and delaying in the confirmation process. We will not even be denied a vote. Every Senator will come down and cast his vote.

He was rated the highest rating of the American Bar Association. Yet we have heard it argued that he does not have the right qualifications to serve the court and therefore make a decision that we are going to talk the nomination to death. The Senate is a better body than that. Being around politicians a lot, being talked to death happens to be the worst death in the world.

So, is he qualified? You bet he is. Does he meet the limits on some folks? Maybe not. Does he meet their litmus test, maybe a personal litmus test? Maybe not. But there were people who disagreed with us when we ran for office and no one was denied the vote. If we had to go through this process just to get elected to the Senate by our constituency, we might not ever get here; we would be talked to death at home.

We are not going to talk about his background. We are going to talk about this American. No, he did not start here, but this American has applied his talents and his intellect to become an appellate judge. I am proud of this man. Nowhere else do we see an example of who we are and why we are Americans.

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

Mr. BURNS. I am happy to yield.

Mr. SESSIONS. The Senator makes his point about having a right to a vote. The argument has been made previously that we need advice and consent, but we never vote. The Senator is aware that on a filibuster it takes 60 votes, and on an up-or-down vote it takes a majority, 51 votes; is that correct?

Mr. BURNS. That is the way I understand it.

Mr. SESSIONS. The Constitution is right on advice and consent, and we can debate forever about that, what that means. Basically, it means what any Senators believe it means; is that right? They can vote on any basis they want?

Mr. BURNS. That is my interpretation.

Mr. SESSIONS. The Constitution says: The President shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, with the advice and consent of the Senate, shall appoint ambassadors, judges, and other court officers.

It did not say what the vote was, so since the founding of our document, we managed that to be a majority. Where it needed a supermajority—more than 51 votes in this case—more than a simple majority, it set it out, two-thirds.

So wouldn't the Senator agree that a fair reading of the Constitution would indicate our Founders contemplated that the vote here would be a simple majority required for confirmation?

Mr. BURNS. You are asking a man who is not trained in the legal disciplines.

Mr. SESSIONS. But the Senator is most trained in common sense.

Mr. BURNS. I say that the majority, 50 plus 1, would be all it takes.

Mr. SESSIONS. And that is what we have done.

Is the Senator aware in his tenure in this Senate that we have ever had a filibuster maintained on a Federal judge?

Mr. BURNS. That is something else that sort of confused me the way you put your argument, but I am wondering why we are raising the bar for this nominee. Is that what we are doing here? Are we saying he has to stand a more difficult test than all others in the past or all others will be asked in the future?

I go back to that other old word, I say to my friend from Alabama: ''Fair.'' I guess that is all we ask, fairness. Everything I have read and everything I have heard tells me that this man is qualified to sit at any other man's fire. And I would tell you they don't come with a higher recommendation than that. But let's not ask this man to be subjected to a higher bar than has been asked of every other American—not this American.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. STABENOW. Mr. President, I rise this evening to discuss the nomination of Miguel Estrada to the DC Circuit Court of Appeals, and to express grave concerns that we are being asked to vote on a lifetime appointment with very little information on this nominee. There are many who have raised concerns about that very point. Let me share one letter that has been written, from the American Association of University Women.

We believe the information available regarding Mr. Estrada's record raises serious concerns about whether he should be given the enormous honor and responsibility of a lifetime appointment to this Nation's second most powerful Federal court. We strongly urge the members of the Judiciary Committee to conduct a thorough investigation of his record, including the areas of concern we have outlined, and to refrain from passing judgment on his nomination until that inquiry and the record is complete.

Let me begin by saying the DC Circuit Court of Appeals is, in fact, an extremely important court in our Nation. It is very important to the people I represent in Michigan and to the people that we all represent. It is, in fact, considered the Nation's second most important court, second only to the U.S. Supreme Court. This court has exclusive jurisdiction over a broad array of important Federal regulations that affect people in their lives every single day—environmental protection, our civil rights, human rights, consumer protections, workplace statutes—items that touch our lives. We have the right to know what someone's views are in general, and philosophy in general, as that person is being considered for this high court.

In addition, its judges are often nominated to serve on the U.S. Supreme Court, which is another reason why this is a particularly important nomination, and a particularly important decision for all of us in the Senate. Three of the current members of the Supreme Court, Justice Scalia, Justice Thomas, and Justice Ruth Bader Ginsburg, all previously served on the DC Circuit. So that is why this is particularly important and we should take the time necessary to make sure that the right decisions are made.

Despite the importance of the DC Circuit Court, the administration is trying very hard to prevent the Senate from making an informed decision—an informed decision on Mr. Estrada. Mr. Estrada has no judicial experience, nor is he a distinguished scholar or professor, which means he lacks any real public record. That is not disparaging in terms of a comment as to his intellect, but it is a question of public record which we can review as to his views and philosophies.

He has spent the bulk of his career in the Solicitor General's Office and in private practice. This makes it extraordinarily difficult for us to fairly evaluate him, and it makes his legal memos and other work product absolutely critical for this evaluation.

The Senate has a constitutional obligation to advise and consent on a Federal judicial nominee. This is a responsibility I take very seriously, as do my Senate colleagues, I know, from both sides of the aisle. I might just remind us that as we read in our U.S. history books, there was a major debate as to how to decide the nominees and the members who would sit on the U.S. Supreme Court. At one point, our Framers said the President should decide alone. At another point they said the Senate should be the one that has the absolute right to decide who should be on this all powerful, important court that affects our lives so much. In the end they compromised, as they did in much of the discussions and the final decisions as to the framing of our Government. They said we believe this is so important there needs to be a check and balance, so we need to have both the Senate and the President involved. The President will nominate but the Senate will have the responsibility of reviewing and consenting to the nomination. That is the process that we are involved in right now.

I might also say that we have confirmed over 100 judges since President Bush has come into his Presidency, and just on Monday night we had three votes. One was a Hispanic judge. We moved forward in this process. But when we find someone comes to the Judiciary Committee and when he is asked to provide copies of his memos and information, when he basically says no, or I'll just think about it, that makes it very difficult for an informed decision to be made.

Unlike other nominations that come before the Senate, such as ambassadorships or executive nominees, Federal judicial nominations, again, are lifetime appointments. I think it is so important to repeat that over and over again. I have, in fact, supported the confirmation of individuals, other nominees of the President for his Cabinet who certainly would not have been my personal first choice. But the President has the right to select his Cabinet—certainly within reason; has the right to select his Cabinet, the people who will work with him during the 4 years that he is in office.

That is not what this is about. This is about someone who will, in fact, make decisions that will affect us, not for 3 or 4 years, but for 30 or 40 years, through numerous Presidents, making it even more important that we are not a rubberstamp. The U.S. Senate has a very important role to play.

As a part of this important responsibility, my Democratic colleagues on the Judiciary Committee have tried to obtain information, legal memos Mr. Estrada wrote while serving in the Justice Department. The Justice Department has refused to provide these documents which presumably would show Mr. Estrada's constitutional analysis of cases. This is very important. The constitutional analysis of statutes—whatever his philosophies and beliefs—would give us insight into his judicial reasoning, not on a particular case but his reasoning. Unfortunately, as I indicated before, he has not been forthcoming to the committee. In fact, he has refused to answer the most basic questions before the committee.

During his nomination hearing, Mr. Estrada refused to answer questions regarding his judicial philosophy or his views on important Supreme Court cases, including Roe v. Wade. He even refused to name any Supreme Court case with which he disagreed. This refusal to provide necessary information is absolutely unprecedented. Past administrations and the current administration have disclosed legal memos and other information in connection with both judicial and executive nominees.

For example, in previous administrations the Senate has requested and the

Justice Department has provided similar memos, written by Justice Department attorneys, including the writings of Supreme Court Justice William Rehnquist, the Ninth Circuit Nominee Stephen Trott, Supreme Court nominee Robert Bork, Assistant Attorney General nominee William Bradford Reynolds, and Attorney General nominee Benjamin Civiletti, among others.

This breaks with a longstanding practice of cooperation between the Justice Department and the Senate in providing access to necessary materials for nominations.

The administration also has provided such memos for another nominee. The Bush administration has provided the Senate with legal memos written by Jeffrey Holmstead, an attorney with the White House Counsel's Office, during the consideration of his nomination as Assistant Administrator at the EPA. This was for a term appointment, in contrast to a lifetime appointment, which is certainly much more significant.

I am also concerned that my colleagues on the other side of the aisle are applying a different standard for nominees who are nominated by a Republican President than by a Democratic President. During the Clinton administration, and under Chairman HATCH, nominees were required to produce volumes of information. For example, Judge Richard Paez was asked to provide documentation of every instance during his tenure as a judge where he deviated downward from a sentencing guideline—every instance.

Marsha Berzon, a Tenth Circuit nominee, was required to provide the minutes from every California ACLU meeting that occurred while she was a member of that organization, regardless of whether she even attended the meeting.

Why was the bar placed so high for these Clinton nominees but there is such a hard push by my colleagues to confirm a nominee from whom we have no information? Why is there such a strong resistance by the administration to allow the Senate the opportunity to learn more about this nominee's writings and opinions? That is what this debate is all about.

I might just say that when I am asked what is the philosophy, what is the judicial reasoning of this particular nominee, I would have to say this—these are the answers to the questions that Miguel Estrada gave to the Judiciary Committee: An absolute blank slate. Not one answer to one question. How can that give us the opportunity to determine whether or not this is a nominee we wish to support?

Finally, I am extremely disappointed by how some of my colleagues across the aisle have tried to make this an issue of race. I believe racial diversity in our judicial system is extremely important. I wish my Republican colleagues had made the same impassioned speeches during the Clinton administration when 10 of more than 30 Hispanic nominees were delayed or blocked from receiving hearings or votes by members of their caucus. I wish my colleagues had been outraged when Ronnie White's nomination languished for 2½ years and then was rejected on the Senate floor on a party-line vote. I wish my colleagues had stood up for racial diversity when the President filed their brief opposing the University of Michigan's admissions policy to help create racial diversity in our law schools and our other colleges and schools at the university.

The Senate needs to apply the same level of scrutiny and the same standards regardless of a nominee's race or the politics of the administrations that nominated them.

Until we are given these memos that are a part of Mr. Estrada's record, we are not going to hold judicial nominees to the same standards and the same basic principles of fairness. It is time to do that—to give us a true opportunity.

I might also add that 100 percent of the Hispanic Caucus of the House of Representatives have joined with us asking that we oppose or withhold judgment—that we not proceed with this vote until we have the information. These are individuals who have expressed grave concerns. They do not support moving forward. One-hundred percent of the Hispanic Caucus of the House from all around the country joined with more than 30 different organizations expressing grave concern.

I think that says to us we need to take the time that is necessary and we need to receive information so that we can make an appropriate judgment.

I will take just a moment to change topics.

I ask while moving from one important topic to another to take just a moment to speak to a bill I have introduced today regarding the growing importation of waste problem.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I know the Senator would like to talk about another subject. But what is the pending business we are on now?

The PRESIDING OFFICER. The pending business is the Estrada nomination.

Mr. SESSIONS. I will, regretfully, have to object to proceeding to another subject. That is a subject we are here to talk about, and I have some remarks I want to make. So I would object.

Ms. STABENOW. Mr. President, I have been given the floor, as I understand it, for 30 minutes. And I appreciate the fact that we have a topic in front of us. At this point, it is my understanding that it is not the Senator's prerogative to object to my being on the floor and to be able to speak for a moment, along with this important topic, to a bill I introduced about waste coming into the United States and taking a moment to do that. It is my understanding that under the normal processes of the Senate, I would have the opportunity to take a moment to do that.

Mr. SESSIONS. If the Senator wouldn't take long, if she wants to ban importation of some of that Canadian lumber, I will join with her. I yield to the Senator, if she is not going to be too long then.

Ms. STABENOW. I thank the Senator.

The PRESIDING OFFICER. The Senator from Michigan has the floor.

Ms. STABENOW. I thank the Chair.

IMPORTATION OF CANADIAN WASTE

Mr. President, I wanted to have an opportunity this evening—realizing we have an important topic on the floor—to speak on the record about an important topic that affects many of our States, and Michigan is certainly one of them.

There is a growing problem of Canadian waste shipments to Michigan and other States. In 2001, Michigan imported almost 3.6 million tons of municipal solid waste—more than double the amount that was imported in 1999. This gives Michigan, unfortunately, the undue distinction of being the third largest dumping ground of waste in the United States.

My colleagues may be surprised to know that the biggest source of this waste is not another State but, in fact, Canada. And more than half the waste that was shipped to Michigan in 2001 was from Ontario, Canada, where these imports, unfortunately, are growing rapidly. In fact, on January 1, 2003, another Ontario landfill closed its doors, and the city of Toronto is shipping two-thirds to all of its trash—1.9 million tons—to a Michigan landfill. This deal could last up to 20 years. I think it is important for a statement to be made for the record as we move forward with this legislation that it is time to do something about it.

Not only does this waste dramatically decrease our own ability to have a landfill capacity, but it also has a negative effect on the environment and on public health. Frankly, right now, I am particularly concerned about the fact that this is a homeland security issue for us. We now have our citizens at high alert. We are telling them to prepare themselves with duct tape, with plastics, and with water for their homes. There is a high degree of concern about the possibility of a terrorist attack.

Yet on Monday, I was able to go to Port Huron, MI, and look at an international bridge where we have trucks coming over bumper to bumper—over 130 different semi-trailer trucks—from Ontario, Canada, to Michigan every day that have solid waste in them from Canada, waste that is not thoroughly inspected. I think this is a serious issue as it relates to homeland security. These trucks are going through the neighborhoods and on into Michigan. And the same is happening in a number of other States.

I have joined with colleagues—first with Senator LEVIN and Congressman