

to three or four thousand in four or five days. If this call is neglected, I am determined to sustain myself as long as possible and die like a soldier who never forgets what is due to his own honor and that of his country—Victory or Death.

WILLIAM BARRET TRAVIS,
Lt. Col., Commander.

This went out on February 24, 1836. Those 184 brave men held the Alamo, with no reinforcements, until March the 6th of 1836. They held all that time against exactly what William Barret Travis thought would happen. Thousands of Mexicans in the army were gathering steam to attack the Alamo. He never got reinforcements.

The Alamo fell on March 6. Just four days earlier, the men who were elected to the convention signed the Texas Declaration of Independence. My great-great-grandfather was one of those, elected from Nacogdoches County. He was alcalde of Nacogdoches County at the time. He went, along with Thomas Rusk, the first man to hold the seat that I now hold in the Senate, to Washington-on-the-Brazos, and they both signed the Texas Declaration of Independence.

It was during that time that women and children in the Nacogdoches area were being besieged by Indians, and they were concerned that the Mexican Army might also be coming there. So they fled in what is called the Runaway Scrape toward Louisiana. All four of my great-great-grandfather's children died in the Runaway Scrape. All four of his living children died. And yet those brave settlers went back to Nacogdoches and raised nine more children. So they were the kind of stock that settled our State and our country.

It was April 21 that Santa Anna finally was defeated at the battle of San Jacinto, led by Gen. Sam Houston, who was the commander there. So the time period between February and April 21 was key in the Texas independence and the beginning of the new republic. Texas was a republic, an independent nation, for 10 years before they joined the United States as a State in the United States.

So I always try to remember the brave people. Obviously, in my family we have a lot of stories and a lot of lore about that time because my mother grew up in Nacogdoches, and it is the oldest town in Texas, and it is one that is rich in our Texas history and is very much a part of my family and so many of the generations who came before us to settle our great State.

So I am going to continue the tradition as long as I am in the Senate because I think it is worthy of note that we had our own fight for independence and that we have such a unique character in our State.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I thank the distinguished Senator from Texas for her remarks. I think, indeed, they were very interesting. I had no idea about her family lineage and her

interest in the particular day. I salute her for her comments on the floor.

FRAUD AND MANIPULATION IN THE WESTERN
ENERGY MARKET

Mr. President, I want to take a few minutes, if I may, to make some informal comments on something that has happened today. Today was the deadline for California to submit to the Federal Energy Regulatory Commission the evidence of fraud and manipulation in the western energy market after a 100-day discovery period.

In fact, about 1,000 pages of evidence were submitted to the Commission. The problem is that evidence is not released to the public. This is a real problem.

I serve on the Energy Committee, and have served there since the crisis in 2000 and 2001 in California. The Energy Committee provides oversight to the Federal Energy Regulatory Commission. The Federal Power Act mandates that the FERC must ensure that rates for power are just and reasonable throughout the United States.

It is very difficult to know whether the Federal Energy Regulatory Commission is in fact ensuring that rates are just and reasonable if one can never view the evidence.

I happen to believe that the FERC has greatly improved. Patrick Wood, Bill Massey, Nora Brownell have been very strong in making change. That change is welcomed. It was on May 6 of last year that the major change began. It was then that the FERC ran on its Web site internal memos detailing some of the schemes Enron used in defrauding the marketplace. Get Shorty, Ricochet, Death Star, all became known to the general public directly following the posting of these memos. Since that time, several people have been indicted and pled guilty to fraud.

Additionally, more recently, one company, Reliant, was before the Commission. The Commission put on their Web site the transcript of tape recordings between Reliant managers. Those transcripts indicated instances where Reliant's plant manager and operations manager talked about holding power offline in California to drive prices up.

The operations manager—and this is not a direct quote, it is a paraphrase—said, in so many words: We are going to be manipulating the market tomorrow. So we are going to close down one plant at least for a day and perhaps more.

And the plant manager said: Oh, yes.

Well, that was sort of a dead bang admission of market manipulation. FERC, much to their credit, at the very least, fined Reliant \$13.8 million. But they could have sent a much stronger message to the entire energy sector by withdrawing Reliant's ability to sell power at market-based rates. That would have sent a clear and definitive message, yet instead FERC gave Reliant a slap on the wrist.

In California, we have a real problem. One year, the entire cost of energy for the entire State was \$7 billion. The

next year, it was \$28 billion; in other words, a 400-percent increase in 1 year's time of the cost of energy. The following year, it was \$27 billion.

I remember when John Bryson, the CEO of Southern California Edison, told me that when they were forced to divest themselves of their plants, the energy generator that came in and bought one of their plants, to which they were one day selling energy at \$30 a megawatt-hour, once it went to the other generator, the other generator charged \$300 a megawatt-hour. When I heard that, I knew it was a real danger signal that something had really gone wrong. Well, we are a long way down the pike since then.

I ask unanimous consent to print in the RECORD a letter I wrote this morning to the chairman of FERC, Pat Wood, in which I followed up on an earlier letter of February 6, to which I have not had a response, asking the FERC to lift the protective order that currently prevents the public from learning about evidence of fraud and manipulation in the western energy marketplace. I point out that now that the 100-day discovery period has ended, "I write to reiterate this request and ask the commission to make all evidence public."

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

U.S. SENATE,

Washington, DC, March 3, 2003.

Hon. PAT WOOD,

Chairman, Federal Energy Regulatory Commission, Washington, DC.

DEAR MR. CHAIRMAN: I am writing to follow up on my letter of February 6, 2003 to ask the Federal Energy Regulatory Commission (FERC) to immediately lift the "Protective Order" that currently prevents the public from learning about evidence of fraud and manipulation in the Western Energy Market. Now that this 100-day discovery period has ended, I am writing to reiterate my request and to ask the Commission to make all evidence public—even information FERC has obtained itself.

I would also appreciate the opportunity to review the filing submitted today by California parties detailing new evidence of fraud and manipulation in the Western Energy Market. As a member of the Senate Energy Committee and the senior Senator from California, I believe I have a duty and responsibility to have a full working knowledge of the evidence submitted to FERC.

I also believe that the evidence collected by FERC should not remain confidential. Since most of the information is over two years old, it no longer has any proprietary value. The widespread nature of abuse of the Western Energy Markets and its resulting economic damage on families and businesses require the Commission to allow the public to immediately review all evidence obtained by FERC.

As I stated in my letter last month, I also believe FERC must carefully review all the evidence presented by the California parties and hold hearings if necessary. How can the Commission attempt to remedy the harm done to families and businesses during the energy crisis if FERC cannot determine the extent of abuse in the Western market and its effect on energy prices and supplies?

Thank you for your consideration of this request and your continued attention to energy problems on the West Coast.

Sincerely yours,

DIANNE FEINSTEIN.

Mrs. FEINSTEIN. I also indicate that as the senior Senator from California and as a member of the Energy Committee, I have a specific obligation to render oversight to see that FERC is doing its job. How can anyone possibly render due diligence and oversight if they don't know what is being presented nor have access to what is being presented to the Commission on which they make their judgments?

I have spoken four times now about Miguel Estrada and the general state of the nominations process. I regret where these weeks have taken us, frankly. I hope we can come together to overcome what is increasingly separating the two sides of this great body, marring judgments and actions relating to the Judiciary Committee's hearing process and that process through which we advise and consent on nominees by the President to Federal judgeships.

In order to understand this filibuster over Miguel Estrada, we also have to understand what has led us to this point.

I would like to speak specifically to the nominations debate because this is a key area where the administration has, with few exceptions, acted in many ways as if the Senate simply doesn't matter. If this debate were only about whether or not we should vote on Miguel Estrada, that would be enough. Make no mistake about it.

There are serious questions about this nominee that we can't answer without more information, information that this nominee and the administration have essentially refused to provide.

My colleagues and I have outlined these concerns over and over again over the past few weeks. I have pointed out that the District of Columbia Circuit is a very critical circuit. Every Member of this body knows that and accepts it. It is a circuit that presides over many of the areas of appeal that are of extraordinary concern because they involve laws we have passed in areas such as worker rights, OSHA, Superfund, wetlands, all environmental concerns, and so on and so forth. It has assumed a particular role, if you will, because of the fact that two of President Clinton's nominees to this circuit never had a committee vote—one did not even have a hearing—this is a different kind of filibuster. So there are a number of vacancies on this circuit. And the circuit as it stands is equally divided, Republicans and Democrats equally divided. Therefore, who breaks this equal division is really important because it will swing the court one way or another.

Into this mix comes a very young man, 41 years old. When his nomination came over, it came over with substantial concerns. The Hispanic delega-

tion of the House had sat down and met with Mr. Estrada for an hour and a half. They sent out alerts that they did not believe this was a nominee who really represented the concerns of Hispanic citizens. That in itself is not dispositive. I am the first one to admit that.

This is a young man. He spent a lot of time on his education. It is not necessarily a requirement that someone serve on a number of civic groups. But it was a point.

Immediately, the Hispanic-American community indicated that there was a great and serious split over this nominee. That in itself is not, again, dispositive.

Then we note that he had never been a professor. He had never been a judge. He has no writings and no speeches. So when one turned to look for the due diligence, there was very little to see. We have none of his work product or other memos that would give us an idea of what kind of thinker he is or what kind of judge he would be. And he refused to answer in the public hearing a number of simple, basic questions that go to the heart of whether he could be a truly impartial judge and set aside his advocacy. I mentioned on the floor of the Senate that my office had spoken with Professor Paul Bender, who had been his direct supervisor in the Solicitor General's Office. Mr. Bender told my staff, "Well, I could not give him certain assignments because I could not be assured that he was impartial."

This, again, in itself is not dispositive, but it is a danger signal.

I talked to individuals who had been interviewed by him in a screening capacity when he was a clerk for Justice Kennedy, and each I talked to indicated that in fact there was a kind of litmus test and that they were told they were too liberal.

Again, that is not dispositive. But what all this points out is that we needed—some of us—to find out whether this was a man who could put aside his advocacy, his strong feelings about certain issues, and follow the law with impartial and wise judgments.

I came to the conclusion—and some have faulted me for it—after listening to Jeffrey Sutton, that here was a man who had strong views and beliefs, but who was willing to be very fulsome in his answers to the committee, very forthright in his views, and sent a very clear signal—at least to me—that he would, in fact, separate his personal views and the law that he would be charged and constitutionally pledged to uphold. So I voted for him.

There has been substantial dismay expressed by many of my constituents in California, and I heard them loud and clear when they picketed virtually every one of my offices. Nonetheless, I made that judgment after listening in a public hearing to questions and answers and, at least for myself, came to a conclusion. Only history will tell whether I am right or wrong.

Then, several weeks ago, in a markup in committee, I think another aspect of this situation that perhaps was caused by the strain and the raw nerve endings in the Senate came upon the scene.

The Judiciary Committee rules contain a clause providing "on the request of any member, a nomination or a bill on the agenda of a committee will be held over until the next meeting of the committee, or for one week, whichever occurs later." That appears in the rules of the committee.

I ask unanimous consent that those rules be printed in the RECORD, and I particularly call attention to the rule I have just quoted.

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

RULES OF THE COMMITTEE ON THE JUDICIARY

I. MEETINGS OF THE COMMITTEE

1. Meetings may be called by the Chairman as he may deem necessary on 3 days' notice or in the alternative with the consent of the Ranking Minority Member or pursuant to the provision of Sec. 133(a) of the Legislative Reorganization Act of 1946, as amended.

2. Each witness who is to appear before the Committee or any Subcommittee shall file with the Committee, at least 48 hours in advance of the hearing, a written statement of his testimony in as many copies as the Chairman of the Committee or Subcommittee prescribes.

3. On the request of any member, a nomination or bill on the agenda of the Committee will be held over until the next meeting of the Committee or for one week, whichever occurs later.

II. QUORUMS

1. Nine members shall constitute a quorum of the Committee when reporting a bill or nomination; provided that proxies shall not be counted in making a quorum.

2. For the purpose of taking sworn testimony, a quorum of the Committee and each Subcommittee thereof, now or hereafter appointed, shall consist of one Senator.

III. PROXIES

When a record vote is taken in the Committee or any bill, resolution, amendment, or any other question, a quorum being present, a member who is unable to attend the meeting may submit his vote by proxy, in writing or by telephone, or through personal instructions. A proxy must be specific with respect to the matters it addresses.

IV. BRINGING A MATTER TO A VOTE

The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a rollcall vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the Minority.

V. SUBCOMMITTEES

1. Any member of the Committee may sit with any Subcommittee during its hearings or any other meeting, but shall not have the authority to vote on any matter before the Subcommittee unless he is a member of such Subcommittee.

2. Subcommittees shall be considered *de novo* whenever there is a change in the Subcommittee chairmanship, and seniority on the particular Subcommittee shall not necessarily apply.

3. Except for matters retained at the full Committee, matters shall be referred to the

appropriate Subcommittee or Subcommittees by the Chairman, except as agreed by a majority vote of the Committee or by the agreement of the Chairman and the Ranking Minority Member.

Mrs. FEINSTEIN. Mr. President, this rule is designed to protect Members who need more time to examine an issue, to discuss it with their colleagues, or to prepare amendments. A very relevant factor.

My own office was alerted to the presence of Mr. Roberts and of Mrs. Cook on their hearing agenda the day before the actual hearing. In other words, we learned at 4:46 p.m., Tuesday, January 28, that the next day they would be up for hearing along with Mr. Sutton. I ask unanimous consent that that e-mail be printed in the RECORD.

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

TENTATIVE NOMINATIONS WITNESS LIST

TENTATIVE AGENDA—SENATE JUDICIARY COMMITTEE HEARING ON JUDICIAL NOMINATIONS, WEDNESDAY, JANUARY 29, 2003 AT 9:30 A.M., DIRKSEN 226

Panel I

The Honorable Dianne Feinstein, United States Senator (D-CA).

The Honorable Mike DeWine, United States Senator (R-OH).

The Honorable John Cornyn, United States Senator (R-TX).

The Honorable John Warner, United States Senator (R-VA).

The Honorable Kay Bailey Hutchison, United States Senator (R-TX).

The Honorable George Voinovich, United States Senator (R-OH).

Panel II

Deborah Cook to be U.S. Court of Appeals Judge for the Sixth Circuit.

John Roberts to be U.S. Court of Appeals Judge for the D.C. Circuit.

Jeffrey Sutton to be U.S. Court of Appeals Judge for the Sixth Circuit.

Panel III

John Adams to be U.S. District Court Judge for the Northern District of Ohio.

Robert Junell to be U.S. District Court Judge for the Western District of Texas.

S. James Otero to be U.S. District Court Judge for the Central District of California.

Mrs. FEINSTEIN. Now, for those of us on this side, that notice—or lack of it—presents a very real problem. Now we knew that Mr. Sutton, Mrs. Cook, and Mr. Roberts had been pending for some time. But the way things actually work is that the real due diligence is done in preparation for the hearing—it is done when the notice comes out. So we truly need time. And I believe the time to study and do our individual due diligence on each nominee would ease a lot of the raw nerve endings and scar tissue, which is now very evident on this committee.

Because it is the chairman who schedules matters for a vote, it is inevitably members of the minority party who most often need this extra time. As a result, this holdover rule is a rule that is viewed as a protection of minority rights in the Judiciary Committee.

After all, a chairman does not need to hold over a bill. If he doesn't want

the committee to consider an issue, he can simply refuse to add the issue to the agenda, or he can pull it off the agenda, if necessary. Many Clinton nominees suffered this fate, and Members have made that clear, I think, time after time in the past couple of weeks.

In any event, this rule has always been interpreted to mean that if a Senator asked for a matter to be held over, the earliest it would come up again was in 1 week. That week comprises 7 days from the meeting at which the rule is invoked.

Now, we have an exchange from 24 years ago between Senators Thurmond and KENNEDY about this rule. I want to read from the transcript of that Judiciary Committee meeting that occurred on January 24, 1979. Let me quote from Senator Thurmond:

There is one other matter. We have a custom, I guess since the committee was founded, that any Senator can carry over any matter for 1 week, any nomination for 1 week. I assume there is no objection to continuing that.

Chairman Kennedy: I think that is a reasonable request. I think that if it is on a Tuesday to a Tuesday—why don't we just have it on a Tuesday to a Tuesday, so it is 7 days?

Seven days, Mr. President. Now, in my 10 years on the Judiciary Committee, this rule has always been interpreted to mean 7 days. Any matter held over must be held over for 7 days, or until the next markup, whichever occurs later. Obviously, there have been many occasions where a chairman of a committee would have preferred to schedule another markup immediately to move a nominee or a bill forward. After all, a chairman does not schedule a matter for consideration unless he or she is ready to move forward. But regardless of the will of the chairman to move more quickly, there has always been a recognition that rules are rules, and this one has always been followed—until this year.

At the Judiciary Committee markup on Miguel Estrada several weeks ago, the chairman of the committee attempted to interpret the 1-week rule as allowing an issue to be held over for just 6 days rather than 7. Essentially, he decided to interpret 1 week as being 6 days.

Now, before I go into this further, let me say that Senator HATCH is one of my dearest friends in the Senate. He is a fair chairman. I have watched him for a long time. We have worked together on many important issues for the past 10 years. I hold him in the very highest regard. Even on the issue of judicial nominations, I know he did his very best in a very difficult position over the years, when President Clinton was President, to balance the strong will of many of his own caucus against his desire to be fair to President Clinton's judicial nominees, and I believe that very strongly.

If anything, this is an indication of how raw nerve endings really are. That is all at this point in time.

I certainly understand how any chairman might be frustrated by some of us and by perhaps all of us who might attempt to thwart his timetable. But this frustration, again, should not be allowed to manifest itself in circumvention of a clear, defined, and decades-old committee rule. If we allow 1 week to become 6 days, it becomes an hour tomorrow, maybe cloture only requires 20 rather than 60 votes or 40 percent constitute a majority. This is a bit of an exaggeration.

As a matter of fact, it is a major exaggeration, but the Senate and its committees have rules for a reason, and we really cannot function if we do not follow them.

When this 6-day week concept was verbalized, our ranking member, Senator LEAHY, made it clear that 6 days is not a week. The minority would allow the rule to be waived and a markup to occur in 6 days as a matter of cooperation. And so we waived the rule, partially to avoid a confrontation over this interpretation of the longstanding 7-day rule. But although we avoided a crisis that week, the 6-day concept was sort of a foreshadowing of what now seems to be increasingly a plan to ignore committee rules and move forward over the objections of the minority, and people feel very strongly about that.

Last week, we saw this plan come to fruition as two nominees were moved out of the Judiciary Committee over the strong objections of members who wished to continue debate, and despite the clear invocation of a decades-old rule, protecting the right of the minority to continue to debate until at least one of their own agrees it is time to vote.

Senator DASCHLE spoke on this issue last week, and I want to expand briefly on his comments. The judiciary rule in question contains the following language:

The chairman shall entertain a nondebatable motion to bring a matter before the committee to a vote. If there is objection to bringing the matter to a vote without further debate, a rollcall vote of the committee shall be taken and debate shall be terminated if the motion to bring the matter to a vote without further debate passes, with 10 votes in the affirmative, one of which must be cast by the minority.

What does this rule mean? Over the last few decades, it has clearly meant that unless at least one member of the minority agrees to cut off debate and move straight to a vote, no vote can occur. This is what happened and what came up last Thursday.

This is one of the only protections the minority has in our committee. Without it, there could conceivably never be a debate at all. A chairman could convene a markup, demand a vote, and the entire process would take 2 minutes. That is one of the reasons we feel so strongly about this particular rule. We believe this is not how the Judiciary Committee should function, and it is contrary to the rules of the committee.

As I understand it, this rule was first instituted in 1979, again, and it has been followed ever since by all of our chairmen.

I believe only two committees have something like it—Finance and Judiciary. The reason for it, as I understand it, goes back to Senator KENNEDY's days as chair, when it was determined they didn't want to be like other committees, where with Appropriations you will often have a committee in the majority just go off on its own, mark up something, and everybody is forced to accept it.

Let me give you an instance.

During the markup of Bill Lann Lee to be Assistant Attorney General for the Civil Rights Division, there was some fear on our side that Republicans who had the votes to defeat the nomination would move directly to a vote and prevent any debate on the issue at the markup. Democrats, on the other hand, wanted the chance to explain their position and maybe even change some minds on the other side.

During that markup, there was significant discussion about what rule IV, the rule about cutting off debate, really means. At one point, it is interesting to note, Chairman Hatch himself commented that:

At the appropriate time, I will move to proceed to a vote on the Lee nomination. I assume there will be no objection. It seems to me that he deserves a vote. People deserve to know where we stand on this issue. Then we will, pursuant to rule IV, vote on whether to bring the Lee nomination to a vote. In order to vote on the nomination, we need at least one Democrat to vote to do so.

This is precisely what we are discussing, Mr. President. In order to vote on the nomination, we need at least one Democrat to do so.

Last week, we did not have such a vote. No Democrat was prepared to cut off debate. I know this because it was discussed ahead of time. Even though Senator KENNEDY, who has substantial seniority and was chairman at the time the rule was put forward in 1979, objected and informed the chairman that no Democrat was ready to stop debating, the chairman moved ahead anyway.

I had an opportunity to speak to the chairman after this hearing, as a matter of fact, in the garage of the Hart Office Building. I think he has a very good understanding of the sensitivities and the nerve endings that are scratched raw right at this present time. It is my hope the chairman will take steps so we can restore to the committee the consideration that has always been extended.

Let me say something about Chairman HATCH. I understand how things can get to one in this committee, and I understand on both sides how—and the Chair is smiling—how we can be extraordinarily difficult to preside over. I would never make an adverse personal comment about this chairman because I respect him, I like him, he is a friend, we work together. I just want to see the two sides come together, and I

want to see this stop. I want to give the assurance, at least from this Senator, that what I want is ample time to do my due diligence on a given nominee.

Very often letters do not come in until almost the date of hearing. As the hearing date grows close, it seems people begin to know that something is happening. But if you get the official notice for a hearing the day before—and in this case at 4:46 p.m. the day before—for three appellate court nominees, it is extraordinarily difficult.

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

Mrs. FEINSTEIN. Yes, I will.

(Mr. SMITH assumed the chair.)

Mr. LEAHY. Mr. President, I have listened to the comments of the distinguished Senator from California. I strongly compliment her for what she has been saying. Is it not a fact, Mr. President, I ask my friend from California, that simply because a Senator wishes more time to debate a particular nominee that does not mean that Senator is going to vote against the nominee; is that not correct?

Mrs. FEINSTEIN. Well, the Senator is correct.

Mr. LEAHY. I mean, that might be.

Mrs. FEINSTEIN. That is correct.

Mr. LEAHY. If the Senator would yield further for another question, was it not made clear during the markup that she was speaking about, the executive meeting she was speaking about, that it was stated at that meeting there was very clearly an objection to going forward by at least a couple of Senators, and because of that objection rule IV would fall into place, which says debate shall be terminated if the motion to bring the matter to a vote without further debate passes with 10 votes in the affirmative, one of which must be cast by the minority? So rule IV would apply such an objection being made, unless there were 10 votes to cut off the debate, with one of those votes coming from the minority; is that not correct?

Mrs. FEINSTEIN. I say through the Chair to the distinguished ranking member, yes, that is correct. I have the rule before me, and that is what it says. The Senator is correct that someone objected, yes.

Mr. LEAHY. I ask my friend from California, and I say this because she has laid out this debate so well and the history of it so well, in this case was it not a fact there were not 10 votes, with one of those 10 votes being the minority, to cut off debate?

Mrs. FEINSTEIN. Through the Chair to the ranking member, yes, that is correct.

Mr. LEAHY. Mr. President, I ask again, through the Chair, to my friend from California, is it not a fact that the chairman then, notwithstanding the fact that there has not been a proper vote to cut off debate, went ahead and held the vote just the same?

Mrs. FEINSTEIN. Through the Chair to the ranking member, that is correct.

Mr. LEAHY. I thank the Chair.

Mrs. FEINSTEIN. I do not take any pleasure in this. When I became a Member of this body, I ran as an independent voice, and I want to be that way. I want to work with both sides, and I have tried to do that. I think we are at a point, though, where some action has to be taken to restore the consideration that has usually been offered to members of this committee, that when they have a problem, a little more time is provided.

I believe very strongly—I have never used my blue slip. I have said I would never use my blue slip prior to a hearing; that I believe everybody is entitled to a hearing, and then we should vote the individual up or down, and that is my view. I do not push my view on anybody else, but that is how I decided I was going to handle my spot on this committee. But if the minority gets rolled, we go into a defensive posture and everybody is compelled then to unify and hold together. I think my colleagues see a lot of this in this filibuster.

I am hopeful in the future there can be a precise time when an official notice is sent out prior to the hearing being scheduled, so that every member of this committee has an opportunity to do their due diligence.

It is interesting to note that the votes in the committee—and I have them. On Mrs. Cook, there were 12 yes, two nays and five present. The present, or pass, votes submitted by the ranking member, myself, Senators FEINGOLD, DURBIN and SCHUMER, were really, I think, on this point, that we did not have an ample opportunity to do our due diligence and to ask the questions we needed to ask.

On Mr. Roberts, there were 13 yes, two nays and two present, Senator LEAHY and Senator FEINGOLD, which probably came from the same venue. In other words, they did not feel they had sufficient information to vote.

So I am hopeful that in the future we would be able to settle some of these issues in the committee and just bend over backwards. I remember the day when if a Member had a problem with a judge who had been recommended to the President by a specific Senator, that Member picked up the phone and called that Senator and said: I just want you to know, I have these concerns, and there was this kind of convivial relationship. That is all but gone now.

So the process is extraordinarily formal now, and the formality is carried out, for the most part, in the public hearing. So having notice to that public hearing becomes really all important.

I have pretty much summed up my position and my hope on this. I see the distinguished Senator from Alabama on his feet so I yield the floor.

Mr. SESSIONS. Mr. President, I wanted the Senator to finish, so I thank the Chair. Graceful in her remarks, I think nerves are frayed, and

perhaps the senior Senator from California can play a role in bringing some things back.

The Senator talked about collegiality, and some of us were very disappointed that Strom Thurmond's chief judiciary counsel was virtually blocked last year. We finally got it through at the very last minute. So a lot of things have happened. There clearly was a change in the ground rules after Members on the other side asserted that Senator HATCH did not move nominees fast enough for President Clinton and that, of course, we should not filibuster and those sort of things. Then after the election, the ground rules changed and the obstruction of nominees President Bush has sent forward has reached a much higher level. I think no one can doubt that.

So we are frustrated also. I do believe we should have more collegiality in the committee, and I believe we can do better.

One thing I would ask the Senator, without yielding the floor, I would suggest that on the Cook and Roberts matters, the Senator did indicate they had been pending virtually 2 years, well over a year and a half. No hearings had been held on them, but there had been 2 weeks before this markup, or the hearing—2 weeks before they had been noticed, so we put it off another 2 weeks. Perhaps the exact time of the hearing or the exact nature of what the hearing was going to be may not have been given to the Senator, but I believe after the first request the Senator made for a delay, 2 weeks did transpire. I think that would have given people time to be prepared.

Mrs. FEINSTEIN. May I respond to that?

Mr. SESSIONS. I yield for a question or a comment.

Mrs. FEINSTEIN. Through the Chair, to answer the distinguished Senator from Alabama, I asked my counsels when did they first know, and they said, well, informally there was discussion, but the notice—and I said, well, get me a copy of the notice then. I want to see the notice. And it was 4:58 the day before.

That is the problem. I do not know exactly how all the counsels work, but I can tell the Senator that on our side time is important. Giving a little bit of time, I think, could go a very long way to solving the problem we are in, officially, so there are no excuses then. The official notice goes out. Who is on the calendar occurs a substantial period before the hearing so we have time to do what we need to do, particularly when I think there were seven judges on this particular calendar, three of them appellate judges, meaning it is a very big and heavy calendar on which to do your work.

Mr. SESSIONS. I appreciate the comments of the Senator from California. Hopefully, we can do something better.

This side does not intend to be victimized by a ratcheting up, substantially, of the process of confirmation

that did not occur when President Clinton was President. This is what has caused the problem.

I note these nominees. An absolutely superb nominee, Justice Cook, served on the Supreme Court of Ohio. As Senator HATCH has noted so often, Roberts is considered one of the top two appellate lawyers in America, an absolute superb candidate, with 39 arguments before the Supreme Court.

They were denied for over a year, almost 2 years, even a hearing when the Democrats controlled the committee. That is galling. Miguel Estrada was given a hearing a year and a half afterwards, the only one actually given a hearing. But he was not moved forward out of committee.

This is an odd thing to have a concern about frayed nerves when the ground rules were changed. After President Bush was elected, three professors went to the Democratic senatorial conference: Lawrence Tribe, Cas Sunstein, and Marsha Greenburger. They were quoted in the New York Times as saying: We want to change the ground rules. Obviously, one of them is that they did not conduct hearings. Some superb nominees never even had hearings.

Also not mentioned at the time because the Democrats had the majority, was the filibuster. This is the first time, insofar as I know, in the history of this country we have had a filibuster for a district judge or circuit judge. It is not as if Mr. Estrada had any serious problems. There is no ethical problem with this wonderful nominee. He was rated unanimously well qualified by the American Bar Association. He was at the top of his class.

Regarding his experience, he clerked for a Second Circuit judge. The position he would hold, if confirmed, is a sister circuit, the DC Circuit Court of Appeals. DC does handle some national issues and issues with which the Justice Department deals. He served in the Justice Department's Solicitor General's Office. In that position he prepared briefs and made arguments before the courts—often, I am sure, before the DC Circuit Court of Appeals. So he has an intimate connection with that.

Under Rudy Guiliani, he worked in the U.S. Attorney's Office of New York, considered one of the most prestigious offices—at least those in the Southern District of New York think it is the finest. It is competitive. He handled appellate work for them. To the extent to which this nominee has experience with appellate work, it is extraordinary.

I believe there is no justifiable basis for blocking his nomination. I know a Senator earlier expressed concern that we were somehow blocking an ability to take up other matters before the Senate. I would love to move forward. The way we move forward is to give Estrada a vote. We are not asking that people vote for him. We are just asking he be given a vote.

We have an unprecedented filibuster. Senator HATCH concluded that we were facing a filibuster in committee. Now we have a filibuster of Estrada on the floor. The ground rules have changed. We are going to put the burden of proof on the nominee. It was one of the views that Senator SCHUMER has put forward. We consider whatever the politics are, which was never done before, ratcheting up the pressure on the nominee and then we cannot get a vote in committee. Then we cannot get the vote because every Democrat has to sign off.

Senator HATCH examined the rules, met with the Parliamentarian. I have not studied the rules. He met with the Parliamentarian and he concluded he had the authority to make the ruling that he made. I don't think he wanted to do that. I think he would like to have proceeded as he had before with collegiality and allowing everyone to have their say as long as they wanted. But when you are faced with a systematic alteration of the ground rules, a systematic plan to obstruct a movement of nominees of extraordinary ability for years, who ought to be confirmed, and the courts need them, we are at a point where nerves are frayed.

If the rules are going to be used on one side, rules are going to be used on the other side. The President of the United States is not going to believe he can give up his right to nominate judges and expect them to have a confirmation. It was indicated President Bush maybe was not solicitous enough. But in California I have heard complaints because he has agreed to go along with a commission in California of some sort that gives unprecedented input from Senators from California and others on the nominees. I don't know how that works, but it is pretty unusual. He also reappointed two Democratic nominees, Barrington Parker and Gregory, who had been pending and were not confirmed.

I am not sure President Clinton ever nominated any Republican judges when he took over.

I believe we are in an unfortunate period, that there is a lot of frustration. It is pretty deep on our side. I don't think the Senator would doubt one moment that the tactics utilized by the Democratic minority are different than the tactics utilized when the Republicans were in that position.

Where do we go from here? I don't know. But it is a big deal.

The PRESIDING OFFICER. The Senator from California.

Mr. SESSIONS. I yield for a question. Mrs. FEINSTEIN. I wanted to make one point, so I will defer.

Mr. SESSIONS. Let me mention a couple of items.

It was suggested one of the Department of Justice members, Paul Bender, raised some question about Miguel Estrada's nomination, but Bender and the other supervisors in the Clinton Department of Justice—remember, he went into the Solicitor General's Office in 1992; surely within a year or so he

should have been under the supervision of the Democrats at that time. It probably takes some time to make the change over. Almost his entire career in the Justice Department was under the leadership of Janet Reno and a Democratic Solicitor General. The Democrats gave him the highest possible performance rating.

Mr. Bender, when he was evaluating him, gave him the highest evaluations. I think it odd now that he would come forward and suggest there was a problem. In fact, one of the evaluations given to him specifically noted his loyalty to the policies of the Department of Justice.

It was also said there was some deal about law clerks and screening law clerks for Supreme Court Justice Kennedy. Let me point out I think it is a great honor that Justice Kennedy was so impressed with Miguel Estrada that he asked him to do screening of possible law clerks for him. Justice Kennedy is considered a middle of the road swing Justice who votes with various sides, on various sides, and is not perceived as any kind of right-wing ideologue. He liked Estrada so much that he asked him to help him screen his law clerks. I think that is a matter that is a positive thing.

The PRESIDING OFFICER. There is a standing order for a vote on another nominee at 5:30.

NOMINATION OF MARIAN BLANK HORN, OF MARYLAND, TO BE A JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

The PRESIDING OFFICER. Under the previous order, the hour of 5:30 p.m. having arrived, the Senate will now proceed to the consideration of Executive Calendar No. 43, which the clerk will report.

The legislative clerk read the nomination of Marian Blank Horn, of Maryland, to be a Judge of the United States Court of Federal Claims.

Mr. HATCH. Mr. President, it is my pleasure today to speak in support of Marian Blank Horn, who has been nominated for a second term on the U.S. Federal Court of Claims. Judge Horn is a distinguished United States Court of Federal Claims Judge whose legal career has been nothing short of stellar.

Judge Horn graduated from Fordham University Law School in 1969, and began her career as an assistant district attorney in Bronx County, NY, before joining Arent, Fox, Kintner, Plotkin and Kahn, where she worked in the litigation division.

From 1973 to 1975, Judge Horn was a project manager for a Study of Alternatives to Conventional Criminal Adjudication which was financed by the U.S. Department of Justice's Law Assistance Enforcement Administration. She also served as an adjunct professor at American University's Washington College of Law, where she taught the Introductory Legal Methods course.

In 1975, Judge Horn joined the Office of General Counsel for the Department

of Energy/Federal Energy Administration. From 1979 to 1981, Judge Horn served as the deputy assistant general counsel for Financial Incentives, Office of General Counsel, where she supervised all legal work related to financial incentives at the United States Department of Energy. In addition, she served as legal advisor to the assistant secretaries for Fossil Energy and Resource Applications, as well as the Office of Energy Research.

From 1981 to 1986, she worked in the United States Department of Interior, where she assisted the Associate Solicitor and helped administer the Surface Mining Control and Reclamation Act of 1977. In 1985, Judge Horn was promoted to principal deputy solicitor, where she supervised all the Regional and Field Offices of the Solicitor's Office in the Department and acted as the chief lawyer to the Secretary and Under Secretary of Department of Interior. So you see that Judge Horn already had a very impressive resume in 1986, when she was first confirmed.

Since that time, she has built an excellent reputation as a judge, and I am confident that Judge Horn will continue being a fine member of the Federal Bench.

Mr. LEAHY. Mr. President, today we consider the nomination of Judge Marion Blank Horn to the U.S. Court of Federal Claims. Although this is not a so-called "Article III" court with lifetime appointments, it is an important court with 15-year terms for its members. Judge Horn has been serving on the court for almost 15 years and I do not oppose her re-appointment. What I do take issue with, however, is the Administration's unilateral actions, in spite of the bipartisan cooperation and appointments of other Presidents to this and other courts.

The process for nominating judges to the Court of Federal Claims has traditionally included accommodation and compromise. For more than 2 years Senate Republicans blocked President Clinton's appointment of Larry Baskir to the court until a compromise could be reached. They refused to give him a hearing and refused to allow any of the other vacancies to be filled unless the administration promised to keep conservative Judge Loren Smith as the Chief Judge. Republicans also insisted on the reappointment of another Republican appointee, Judge Christine Miller. Finally, Senator HATCH agreed to allow five Clinton nominees to have hearings and votes if the administration also named his staffer Edward Damich to the court and promised to retain Judge Smith as Chief until his retirement into lifetime senior status at the end of his term appointment. Upon Chief Judge Smith's "retirement," President Clinton named Judge Baskir the Chief Judge. Shortly after his inauguration, President George W. Bush summarily removed Judge Baskir as chief judge and installed Judge Damich as the Chief Judge.

Last fall when the Democrats were in the majority, we took the exceptional

action of quickly moving the nomination of Larry Block to the Court of Federal Claims at the request of the ranking Republican, Senator HATCH. At that time, I noted that we would expect fairness and consideration in return, including true bipartisan consultation with respect to Federal Court of Claims nominations. Despite our accommodation on Mr. Block's nomination, the White House refused to act on the nomination of Judge Sarah Wilson who, up until a few months ago, was already serving with distinction on the Court of Federal Claims. Judge Wilson is a well-respected and talented lawyer who graduated from Columbia Law School, clerked for a Federal judge, was a fellow with the Administrative Office of the Courts, and served in the Department of Justice and in a prior White House. Yet, the administration and the Senate Republicans refused to accommodate our request to consider her nomination for a continued position on the court.

It troubles me that despite a long history of compromise and accommodation regarding appointments to this court, there has been no consultation with the Democratic leadership regarding the remaining nominations to the Court of Federal Claims. Instead, the White House proceeded as it does with most things—unilaterally. The same is true with respect to the Parole Commission, the Federal Election Commission and many other bipartisan boards and commissions.

I can count on one hand the number of States that have any sort of bipartisan selection commission for their district court judges. The importance of such organizations is paramount. They ensure that nominees for judicial office are selected based upon professional merit and experience. The recommendations of such commissions have the support of members from their community on both sides of aisle. Accordingly, these bipartisan commissions preserve the independence and integrity of the judicial branch of government and ensure the fair and equal administration and enforcement of justice.

Unfortunately, this President has thwarted the development of bipartisan boards and commissions for judicial appointments. The White House Counsel has indicated publicly that he does not favor bipartisan committees because they "usurp the president's constitutional authority to choose judges." This unilateral and uncompromising view disregards the constitutional role of the Senate. It also fails to acknowledge that these commissions simply make recommendations to the President. They do not make nominations in lieu of the President. The administration's disdain for bipartisan commissions ignores past precedent and tradition.

It is one thing for a President to appoint members of his Cabinet to carry out his political agenda but it should be different with respect to judicial appointments. When a President makes