

## EXECUTIVE SESSION

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

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

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

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, during the course of the debate on Miguel Estrada, there have been many serious misrepresentations of the record on Mr. Estrada. I want to address in some detail one of the more serious distortions which concerns the answers Mr. Estrada gave during his extensive hearing, one of the longest hearings for a circuit court of appeals nominee, to questions members of the Judiciary Committee asked him.

The charge being leveled against Mr. Estrada is that he did not answer questions put to him in general and did not answer questions about his judicial philosophy in particular. That charge is pure bunk.

It is important to remember the circumstances under which this hearing took place. The hearing was held on September 26, 2002. It was chaired by my Democratic friend, the senior Senator from New York, Mr. SCHUMER. It lasted all day, which was unusual in and of itself. Both Democratic and Republican Senators asked scores of questions which Mr. Estrada answered. If any Senator was dissatisfied with Mr. Estrada's answers, every member of the committee had the opportunity to ask Mr. Estrada followup questions, although only two of my Democratic colleagues did.

Now, a number of the questions Mr. Estrada was asked sought directly or indirectly to pry from him a commitment on how he would rule in a particular case. Previous judicial nominees confirmed by the Senate have rightly declined to answer questions on that basis, just as Mr. Estrada did. Virtually every Clinton nominee refused to answer questions about how they would decide cases or what they would do in certain circumstances. I will give some examples.

In 1967, during his confirmation hearing for the Supreme Court, Justice Thurgood Marshall responded to a question about the fifth amendment by stating:

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.

During Justice Sandra Day O'Connor's confirmation hearing, the Senator from Massachusetts, Mr. KENNEDY, the former chairman of the Judiciary Committee, defended her refusal to discuss her views on abortion. He said:

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 interest group.

Senator KENNEDY was concerned perhaps Justice O'Connor might possibly have difficulty with the conservative side or the pro-life side because she may have been pro-choice. The fact is nobody really knew, and there were some concerns about that, but Senator KENNEDY was right when he said:

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 a litmus test of any single-issue interest group.

He was right then. But why is there today a different standard for Miguel Estrada? Why the comments and remarks by some on the committee who are saying Mr. Estrada should have answered these types of questions?

Likewise, I will give another. Justice John Paul Stevens testified during his confirmation hearing for the Supreme Court:

I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say there have been many times in my experience in the last 5 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.

It was an excellent answer, but it was basically the same answer that Miguel Estrada gave to similar questions, and that almost every other nominee of Democrat and Republican administrations, since I have been on the committee, have given.

Why the double standard for Miguel Estrada? Why are we expecting him to answer questions that we did not expect leading Democrat judges, or other leading judges, to answer? Justice Ruth Bader Ginsburg, now sitting on the Supreme Court, also declined to answer certain questions, stating: 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 my 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 some questions, I would act injudiciously.

Like these previous nominees, all of whom the Senate confirmed, Mr. Estrada refused to violate the code of ethics for judicial nominees by declining to give answers that would appear to commit him on issues he will be called upon to decide as a judge. Again

and again, he provided answers in direct response to questions that make his judicial philosophy an open book. I will share some specific examples.

Responding to a question to identify the most important attribute of a judge, Mr. Estrada answered that it was to have an appropriate process for decision-making. That, he said, entails having an open mind, listening to the parties, reading their briefs, doing all of the legwork on the law and facts, engaging in deliberation with colleagues, and being committed to judging as a process that is intended to give the right answer.

Now, these are not extreme views. I do not think we could ask more from any nominee for a judgeship.

When asked about the appropriate temperament of a judge, he responded that a judge should be impartial, open minded, and unbiased, courteous yet firm, and one who will give ear to people who come into his courtroom.

These are the qualities of Miguel Estrada. He testified that he is and would continue to be that type of a person who listens with both ears and who is fair to all litigants.

Mr. Estrada was asked a number of questions about his views and philosophy on following legal precedent. Let me highlight a little of those exchanges.

Question:

Are you committed to following the precedents of higher courts faithfully and giving them full force and effect even if you disagree with such precedents?

Answer:

Absolutely, Senator.

Question:

What would you do if you believed the Supreme Court or the court of appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits or the best judgment of the merits?

Answer:

My duty as a judge and my inclination as a person and as a lawyer of integrity would be to follow the orders of the higher court.

Question:

And if there were no controlling precedent dispositively concluding an issue with which you were presented in your circuit, to what sources would you turn for persuasive authority?

Answer:

In such a circumstance, my cardinal rule would be to seize aid from anyplace where I could get it, related case law, legislative history, custom and practice and views of academics on analysis of law.

Pretty good answers. These are better answers than most of the judgeship nominees who have come before the committee over the last 27 years.

These exchanges illustrate clearly Miguel Estrada's respect for the law and his willingness and ability to faithfully follow the law. He further testifies in response to other questions: I will follow binding case law in every case, even in accordance with the case law that is not binding but seems instructive on the area, without any influence whatever from my personal

view I may have about the subject matter.

This is what we expect good judges to do. I can see no reason anyone would be opposed to a nominee who promised to follow the law.

When asked about the role of political ideology and the legal process, Mr. Estrada replied with a response that, in my view, was entirely appropriate and within the mainstream of what all Americans expect from their judiciary. He said: Although we all have views on a number of subjects from A to Z, the first duty of the judge is to self-consciously put that aside and look at each case with an open mind and listen to the parties, and to the best of his human capacity to give judgment based solely on the arguments on the law. I think my basic idea of judging is to do it on the basis of law and to put aside whatever view I might have on the subject, to the maximum extent possible.

Pretty good answer. Why isn't that answer good enough for my colleagues on the other side? It is better than most answers given by their nominees when their President controlled the White House and the nomination process.

Mr. Estrada was asked about his views on interpreting the Constitution. Mr. Estrada was forthright and complete in his responses. For example, in an exchange regarding the literal interpretation of the words of the Constitution, Mr. Estrada responded:

I recognize that the Supreme Court has said on numerous occasions, 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 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 14th amendment.

That is a pretty good answer, a lot better answer than many of the Clinton nominees made, although I am not meaning to criticize them. It is just that there is a different standard being applied here, a double standard. They were not expected to give these great answers he has given, that my colleagues on the other side have said he didn't give. Read the record. It is replete with decent, good, honorable, and intelligent answers to their questions.

Mr. Estrada was asked questions about the appropriate balance between Congress and the courts. His answers made clear his view that judges must review challenges to statutes with a strong presumption of the statute's constitutionality. For example, in responding to a question about environmental protection statutes he stated:

Congress has passed a number of statutes that try to safeguard the environment. I think all judges would have to read those statutes when they come to court with a strong presumption of constitutionality.

At the same time, he recognized that as a circuit court judge he would be

bound to follow the precedents established by Lopez and other Supreme Court cases. Now, some of my colleagues do not like Lopez and they wish he would be an activist judge and not follow it. But he said he would be bound by it, as he would the other Supreme Court pronouncements. That is all you can ask of a nominee.

Why the double standard? Why is it that Miguel Estrada is being held to a different standard than the Clinton judgeship nominees were?

Mr. President, it is clear from the record that Mr. Estrada did answer the questions put to him at his hearing. His judicial philosophy is an open book. But if my Democratic colleagues are still inclined to vote against him, as misguided as I believe that choice to be, they should do so in an up-or-down vote. Vote for him or vote against him or do whatever your conscience dictates. Just vote. And stop this unfair filibuster. It is unfair.

Let me make one more point. Even if my colleagues believed, despite the facts and precedent, that Mr. Estrada should answer more questions, well, they have had that chance. And in a February 27 letter, White House Counsel Al Gonzales made an offer. A copy of Mr. Gonzales' letter has already been printed in the RECORD.

I don't know what more the administration can do other than say we will make him available to you, you ask him whatever questions you want, and you can find out for yourself whether you want to support him or not.

To my knowledge, not one of our colleagues on the other side has taken advantage of this offer. Not one. How interested are they in getting the real story? Not one. Yet we had Senators on the floor yesterday saying all he has to do is answer our questions. Here is an offer: He will come right to your office and answer the questions for you. Not one has asked him to come to the office, which makes me question how serious they are about the merits of Mr. Estrada's nomination.

That brings me to another point. Mr. Estrada's hearing was held under Democratic control of the committee on September 26, 2002. If there was any question about the quality of Mr. Estrada's testimony, they could have held another hearing, they could have extended the hearing, and they could have held another hearing since they controlled the committee for another 3 months. Why didn't they hold another hearing? Why didn't they ask these questions that are so crucial? Because they thought they could kill the nomination by never bringing it up. Unfortunately for them and fortunately for the country, the election turned the other way and Mr. Estrada, of course, was nominated by the new President.

I think there is some hypocrisy, especially with regard to these responses that Mr. Estrada gave, because they are deemed sufficient for Clinton judges but they are not good enough now. Why this double standard for this

Hispanic man? Some Democrats have railed against Estrada for his responses to questions from the Judiciary Committee, as I have said. The fact is, however, the Democrats routinely voted in favor of Clinton nominees who gave similar responses, maybe not as good but similar responses. These were nominees who had never been judges and had few published writings. In their responses to questions they acknowledged the law, said they would follow it, and confirmed that they would not let their personal views get in the way—responses just like Miguel Estrada gave. Not one of these nominees, however, was denied a vote on the floor, not one.

Take, for example, Blane Michael, a Clinton nominee for the Fourth Circuit. He was asked what he would do if his personal beliefs and the law collided. He said he would uphold the Constitution and the law without question. As to whether he would follow Supreme Court precedents, he said: It is not my job to circumvent or shade what the Supreme Court has done.

Was he asked to expound on his favorite or least favorite Supreme Court cases? No. The record is less than four pages on his questioning.

Sid Thomas was another Clinton nominee not subjected to the same level of interrogation as Estrada. In fact, none of them were. Thomas, who had never been a judge or even a judicial clerk, was asked what he thought about the constitutionality of capital punishment.

He said:

I believe the Supreme Court has spoken . . . on the death penalty.

That was it. Thomas, who I should add had very few published writings, added:

I do not possess any personal convictions which would cause me to not apply the death penalty in an appropriate case.

The Thomas hearing takes up less than 2 pages in the RECORD.

Why were they treated differently by my colleagues on the other side than Miguel Estrada? Why is it? I don't see any reason, unless they are just not going to allow this President to nominate, as all Presidents in the past have done, the people he thinks are best for these jobs; or unless they just do not want to have a conservative Hispanic nominee appointed to this important court; or maybe they just do not want Miguel Estrada to get confirmed because they believe he is on the fast track to the Supreme Court and could be the first Hispanic nominated and confirmed to the Supreme Court; or maybe it is because he is Hispanic, but he is conservative; or maybe it is because he is Hispanic and he is Republican and he is conservative; or maybe it is because he is Hispanic, he is Republican, he is conservative, and they think he may be pro-life.

It is one of those. I personally do not believe there is racism involved, although there are those who do—but I am not one of them. I believe there is

a double standard being applied to this Hispanic nominee, the first Hispanic nominee to the Circuit Court of Appeals for the District of Columbia, and I think it is a crying shame.

Merrick Garland, a Clinton nominee to the Fourth Circuit, was asked if he personally favored the death penalty. I personally was very much in favor of Merrick Garland, but there were some on our side who were not very much enthused about him. He was a controversial nominee, as were these others. But he was a Clinton nominee to the Fourth Circuit. He was personally asked if he favored the death penalty. He responded by saying it is a matter of settled law. When asked about the independent counsel law, Garland said that, too, was settled and that he would follow that ruling.

These sound an awful lot like the responses of Miguel Estrada, the ones he gave, responses that Democrats say do not give them enough information. These Clinton nominees were all not only voted out of committee but were allowed an up-or-down vote on the floor, regardless of the fact that some of them were controversial—to borrow some of the language of my colleagues on the other side.

My colleague from New York has stated that according to an article that appeared in the *Legal Times* in April 2002, DC Circuit Judge Laurence Silberman has advised President Bush's judicial nominees to "keep their mouths shut." As the rest of the article explains, in fact, Judge Silberman simply explained that the rules of judicial ethics prohibit nominees from indicating how they would rule in a given case or on a given issue—or even appearing to indicate how they would rule.

As the same article reported, Judge Silberman stated:

It is unethical to answer such questions. It can't help but have some effect on your decisionmaking process once you become a judge.

A copy of this article has also been printed in the *RECORD*.

Yet I heard my colleagues on the other side yesterday blowing smoke over there, using a quote out of context to try to indicate that Judge Silberman was giving them radical advice. The fact is, he gave them advice that every Democrat President and every Democrat President's Justice Department has given to the Democrat nominees for these courts. It is proper advice.

This advice is consistent with Canon 5A(3)(d) of the ABA's Model Code of Judicial Conduct, which states that prospective judges:

[S]hall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office . . . [or] make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.

Justice Thurgood Marshall made the same point in 1967 when he refused, as I mentioned before, to answer ques-

tions about the fifth amendment during his confirmation hearing for the Supreme Court. I referenced that quote earlier.

Let me go to this letter from Seth Waxman, on behalf of Seth Waxman, Walter Dellinger, Drew S. Days, Kenneth W. Starr, Charles Fried, Robert Bork, and Archibald Cox. That is seven of the living former Solicitors General. Seth Waxman, Walter Dellinger, Drew Days, and Archibald Cox are Democrat former Solicitors General.

Here is what they said, and they said it in response to the Democrats, who have been saying we have to get these privileged materials because we do not know enough about Miguel Estrada, even though we have had a full day of hearings conducted where we could have asked any questions we wanted to, where we could have held additional hearings, we could have filed written questions—only two of them did—we could have asked additional questions, only two of them did. They even said the hearing was fair and fairly conducted. But this is a letter.

Let me just go back. They are hiding behind this red herring, demanding papers they know no self-respecting administration can give because it would interrupt, disturb the flow, and make it more difficult for the Solicitor General of the United States to do his or her job. I think this letter says it all. It was a letter written to the Honorable PATRICK J. LEAHY on June 24, 2002, better than 18 months ago:

DEAR CHAIRMAN LEAHY: We write to express our concern about your recent request that the Department of Justice turn over "appeal recommendations, certiorari recommendations, and amicus recommendations" that Miguel Estrada worked on while in the Office of the Solicitor General.

As former heads of the Office of Solicitor General—under Presidents of both parties—we can attest to the vital importance of candor and confidentiality in the Solicitor General's decisionmaking process. The Solicitor General is charged with the weighty responsibility of deciding whether to appeal adverse decisions in cases where the United States is a party, whether to seek Supreme Court review of adverse appellate decisions, and whether to participate as *amicus curiae* in other high-profile cases that implicate an important Federal interest. The Solicitor General has the responsibility of representing the interests not just of the Justice Department, nor just of the executive branch, but of the entire Federal Government, including Congress.

It goes without saying that, when we made these and other critical decisions, we relied on frank, honest and thorough advice from our staff attorneys like Mr. Estrada. Our decisionmaking process required the unbridled open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking requires candor, and candor in turn requires confidentiality.

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 U.S. 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.

Four of those former Solicitors General were Democrat Solicitors General. Mr. Estrada served three of those Democrat Solicitors General because he served, as I recall, 4 years in the Clinton administration in the Solicitor General's Office without any bad reaction. Then he served 1 year in the Bush administration.

Most people would say Archibald Cox is a person of the highest legal integrity and highest legal abilities. Knowing him personally, I have to say that is true. Most people would say Drew Days is one of the fine lawyers and law professors in this country. Most people would say—in fact, I think everybody would say with regard to these Democrat former Solicitors General who have said these records should be privileged, that Walter Dellinger was one of the great law professors at Duke, also a great public servant, and now one of the leading lawyers in one of the major law firms in the country, himself mentioned for the Supreme Court from time to time, a man I have to admit I have gained increasing respect for through the years.

It is pretty hard to find a better lawyer than Seth Waxman. He is a great lawyer. And he is somebody on whom I think the Democrats could rely. Have those colleagues on the other side asked those four people? The fact is those four people have basically said Miguel Estrada did a great job at the Solicitor General's Office. In fact, Seth Waxman, in particular, said he did a fine job there. The performance evaluations that described Mr. Estrada's work there are of the highest laudatory evaluation of staff. The only person who has raised any conflict is Professor Paul Bender, who gave those glowing performance evaluations at a time closest to the service of Miguel Estrada, but who is a very left-wing liberal Democrat law professor who has entered into this debate—and in an improper way, in my opinion—to try to smear Mr. Estrada, which he has done. He is the only one they can point to who has any real criticism of Miguel Estrada's work at the Solicitor General's Office.

I think those Democrat Senators on the other side of the floor would do very well to talk to Seth Waxman, Walter Dellinger, Drew S. Days, III, and Archibald Cox to say what is wrong with Mr. Estrada. I think they won't do it because they know these people will say Mr. Estrada is an exceptionally fine lawyer, which he, of course, is.

This is a man who has the highest rating from the American Bar Association—the gold standard of our friends, the Democrats—and, of course, he has

all the credentials in the world as one of the leading appellate lawyers in the country. Even though he suffers from a disability, a speech impediment, he has still risen to the top of the appellate court.

I know my colleague from Vermont is waiting. So I yield the floor at this time.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

THE PRICE OF WAR

Mr. JEFFORDS. Mr. President, for many months now, the administration has shown its determination to wage war against Saddam Hussein.

I am very concerned that the Bush administration's intense focus on Iraq has blinded it to the critical needs here at home.

While the administration prepares for a war with sky-rocketing cost estimates now in the range of \$100 billion or more, it pleads poverty when it comes to funding our domestic needs.

While the administration fixates on Iraq, the economy teeters, the stock market tumbles, the terrorist threat at home persists, and schools are threatened with premature closings for lack of money.

Last week, our Nation's governors met here in Washington and issued a troubling warning. They told us our States are hurting. They told us they do not have the money they need to do their jobs and serve the people of their States. They told us their situations would only worsen if the President were to enact his tax-cutting plans.

They told us they would need more than \$15 billion this year alone in emergency funds for schools and domestic security. And as the headline in the New York Times put it, "Governors Get Sympathy From Bush, But No More Money."

Sympathy will not pay our Nation's bills. We have the obligation to address the crisis in America's schools with the same urgency as the crises abroad. Our children deserve at least that much.

We have fallen woefully short in our commitment to our students, our teachers and our parents. We have failed to meet a promise that we made to our States nearly three decades ago to provide our fair share of special education funding.

And now, only 1 year after passage of the No Child Left Behind Act, we are hearing that States don't have the money they need to make that law work.

Yet the administration continues to devote extraordinary resources to its campaign against Iraq, and to its pursuit of allies for that campaign.

While critical education needs go unmet, the administration was able to cobble together the necessary funds to offer almost \$30 billion dollars to enlist Turkish support for the war.

I suspect untold billions are also being promised to other nations around the globe. The President apparently is confident that all of these expenses can be borne along with a significant tax cut. I sincerely question that logic.

There is no doubt that Saddam Hussein's rule in Iraq has been marked by brutality. He is an evil dictator with clearly evil intentions, and is a long-term threat to the United States and its allies in the Middle East.

Yet despite the well-documented atrocities associated with his rule and his clear flouting of U.N. resolutions, there still is no evidence of an imminent threat to the United States that justifies the administration's march to war.

Iraq is of obvious importance to the United States and the world because of its geographical location and its oil reserves. Much of the world depends upon fair access to Iraq's oil.

We went to war a decade ago to throw Iraq out of Kuwait and restore Kuwait's right to control its oil. Similarly, control of Iraq's oil must be put in the hands of the Iraqi people.

I praise the administration for abandoning its initial go-it-alone strategy toward Iraq. I congratulate the President for his willingness to work through the United Nations and for the results he and the U.N. have achieved since that decision.

An increasingly robust inspection process is under way, U2 planes are flying over Iraq under U.N. supervision, illegal missiles are being destroyed by Iraq, and additional measures are under consideration to more aggressively seek out illegal Iraqi weapons and programs.

The administration should continue to work with the U.N. to strengthen the inspection efforts and seek peaceful means for achieving the disarmament of Iraq. Instead, the administration appears bent on cutting this process short.

The administration has displayed a troubling lack of focus in articulating a rationale for military action in Iraq. Initial discussion of "regime change" shifted for some time to talk of disarmament.

However, recent comments from the White House now indicate that we are back to "regime change."

The administration's expectations for post-Saddam Iraq are equally troubling.

I am worried that the administration nurtures a naïve belief that there will be rapid transformation of the Middle East from an area in which autocratic governments and Islamist opposition forces vie for power to one in which democracy and Western ideals carry the day.

Talk of installing an American as temporary administrator of Iraq is also very troubling. We should be sending the message to the Iraqi people that we plan to put them in control of their country. The American people are not interested in becoming Iraq's overlord. We should be clear that we do not plan to rule Iraq as an American protectorate.

We need to be much more explicit in setting forth the goals and timetable for any post-war Western presence in Iraq.

Intelligence assessments make clear that the greatest threat today to the United States is the threat posed by terrorist attacks.

We know that the fight against terrorism and the fight against the proliferation of weapons of mass destruction can only be waged successfully with a robust set of international institutions and relationships.

The administration's push for war with Iraq undermines our relations with other countries and the strength of our international bodies at precisely the moment when they are most important to the United States.

We must ensure that any action against Iraq does not jeopardize our counterterrorism and counterproliferation fights.

President Bush has sought for many months to rally this Nation and the world community behind the notion that the threat from Iraq is imminent and that preemptive military action is required. He has not succeeded in making his case.

With no clear evidence of an imminent threat from Iraq, and with no credible plan for postwar Iraq, we should be supporting the U.N. in its work on the ground to bring about Iraqi compliance with U.N. resolutions.

Going to the U.N. must not be viewed merely as a cynical, tactical move designed to justify and aid preparations for war. Instead, the United States owes it to the world community, and to the institutions it worked so hard to establish in the period since World War II, to make a sincere effort to work with the U.N. to resolve the threat posed by Iraq in a peaceful fashion.

American Presidents have labored for many decades to construct relationships and international bodies capable of handling situations such as this.

They, the American people, and our allies deserve a patient, balanced, and considered approach to the current situation.

More importantly, the American people deserve an Administration that devotes the same degree of energy and concentration to the crises here at home.

I think, on more careful inspection, the President will realize that the domestic crises are truly imminent, and that they actually pose more of a threat to America's long-term security than the situation today in Iraq.

I urge the President to stop before he has irrevocably committed us to the destruction and rebuilding of Iraq, which will draw away the resources that are so badly needed here at home.

It will take courage and true leadership, but I implore him to act in this regard before it is too late.

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

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

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

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

Mr. JEFFORDS. Mr. President, I would like to direct my colleagues to a few of the more than 40 editorials or op-eds from around the Nation expressing concerns about Mr. Estrada's nomination to the D.C. Circuit.

Here are just a few of them. I ask unanimous consent that the following be printed in today's RECORD: the editorial of the Rutland Daily Herald of Vermont on February 24, 2003; the editorial of the Boston Globe on February 15, 2003; the recent editorial of the New York Times; and the op-ed in the Washington Post on February 14, 2003.

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

[From the Rutland Daily Herald, Feb. 24, 2003]

#### PARTISAN WARFARE

Senate Democrats are expected to continue their filibuster this week against the appointment of Miguel Estrada, a 41-year-old lawyer whom President Bush has named to the federal appeals court in Washington, D.C.

Sen. Patrick Leahy, ranking Democrat on the Judiciary Committee, is in the middle of the fight over the Estrada appointment. He and his fellow Democrats should hold firm against the Estrada nomination.

Much is at stake in the Estrada case, most importantly the question of whether the Democrats have the resolve to resist the efforts of the Bush administration to pack the judiciary with extreme conservative judges.

The problem with the Estrada nomination is that Estrada has no record as a judge, and senators on the Judiciary Committee do not believe he has been sufficiently forthcoming about his views. It is their duty to advise and consent on judicial nominees, and Estrada has given them no basis for deciding whether to consent.

President Bush has called the Democrats' opposition to Estrada disgraceful, and his fellow Republicans have made the ludicrous charge that, in opposing Estrada, the Democrats are anti-Hispanic. For a party on record against affirmative action, the Republicans are guilty of cynical racial politics for nominating Estrada in the first place. He has little to qualify him for the position except that he is Hispanic.

Unless the Democrats are willing to stand firm against Bush's most extreme nominations, Bush will have the opportunity to push the judiciary far to the right of the American people. Leahy, for one, has often urged Bush to send to the Senate moderate nominees around whom Democrats and Republicans could form a consensus. In a nation and a Congress that is evenly divided politically, moderation makes sense.

But Bush's Justice Department is driven by conservative ideologues who see no reason for compromise. That being the case, the Senate Democrats have no choice but to hold the line against the most extreme nominees.

Leahy has drawn much heat for opposing Bush's nominees. But he has opposed only three. In his tenure as chairman of the committee, he sped through to confirmation far more nominees than his Republican predecessor had done. But for the Senate merely to rubber stamp the nominees sent their way by the White House would be for the Senate to surrender its constitutional role as a check on the excesses of the executive.

The Republicans are accusing the Democrats of partisan politics. Of course, the Republicans are expert at the game, refusing

even to consider numerous nominees sent to the Senate by President Clinton.

The impasse over Estrada is partisan politics of an important kind. The Republicans must not be allowed to shame the Democrats into acquiescence. For the Democrats to give in would be for them to surrender to the fierce partisanship of the Republicans.

The wars over judicial nominees are likely to continue as long as Bush, with the help of Attorney General John Ashcroft, believes it is important to fill the judiciary with extreme right-wing judges.

The Democrats, of course, would like nothing better than to approve the nomination of a Hispanic judge. But unless the nominee is qualified, doing so would be a form of racial pandering. That is the game in which the Republicans are engaged, and the Democrats must not allow it to succeed.

[From the Boston Globe, Feb. 15, 2003]

#### RUSH TO JUDGES

The Senate Judiciary Committee ought to come with a warning sign: Watch out for fast-moving judicial nominees. Controlled by Republicans, the committee is approving President Bush's federal court nominees at speeds that defy common sense.

One example is Miguel Estrada, nominated to the US Court of Appeals for the District of Columbia. Nominated in May 2001, Estrada has been on a slow track, his conservative views attracting concern and criticism.

Some Republicans called Democrats anti-Hispanic for challenging Estrada. He came to the United States from Honduras at the age of 17, improved his English, earned a college degree from Columbia, a law degree from Harvard, and served as a Supreme Court clerk for Justice Anthony Kennedy.

What has raised red flags is Estrada's refusal to answer committee members' questions about his legal views or to provide documents showing his legal work. This prompted the Senate minority leader, Thomas Daschle, to conclude that Estrada either "knows nothing or he feels he needs to hide something."

Nonetheless, Estrada's nomination won partisan committee approval last month. All 10 Republicans voted for him; all nine Democrats voted against. On Tuesday Senate Democrats began to filibuster Estrada's nomination, a dramatic move to block a full Senate vote that could trigger waves of political vendettas.

It's crucial to evaluate candidates based on their merits and the needs of the country.

Given that the electorate was divided in 2000, it's clear that the country is a politically centrist place that should have mainstream judges, especially since many of these nominees could affect the next several decades of legal life in the United States.

Further, this is a nation that believes in protecting workers' rights, especially in the aftermath of Enron. It's an America that struggles with the moral arguments over abortion but largely accepts a woman's right to make a private choice. It's an America that believes in civil rights and its power to put a Colin Powell on the international stage.

Does Estrada meet these criteria? He isn't providing enough information to be sure. And the records of some other nominees fail to meet these standards.

Debating the merits of these nominees is also crucial because some, like Estrada, could become nominees for the Supreme Court.

The choir—Democrats, civil rights groups, labor groups, and women's groups—is already singing about how modern-day America should have modern-day judges. It's time for moderate Republicans and voters to join

in so that the president can't ignore democracy's 21st-century judicial needs.

[From the New York Times]

#### KEEP TALKING ABOUT MIGUEL ESTRADA

The Bush administration is missing the point in the Senate battle over Miguel Estrada, its controversial nominee to the powerful D.C. Circuit Court of Appeals. Democrats who have vowed to filibuster the nomination are not engaging in "shameful politics," as the president has put it, nor are they anti-Latino, as Republicans have cynically charged. They are insisting that the White House respect the Senate's role in confirming judicial nominees.

The Bush administration has shown no interest in working with Senate Democrats to select nominees who could be approved by consensus, and had dug in its heels on its most controversial choices. At their confirmation hearings, judicial nominees have refused to answer questions about their views on legal issues. And Senate Republicans have rushed through the procedures on controversial nominees.

Mr. Estrada embodies the White House's scorn for the Senate's role. Dubbed the "stealth candidate," he arrived with an extremely conservative reputation but almost no paper trail. He refused to answer questions, and although he had written many memorandums as a lawyer in the Justice Department, the White House refused to release them.

The Senate Democratic leader, Tom Daschle, insists that the Senate be given the information it needs to evaluate Mr. Estrada. He says there cannot be a vote until senators are given access to Mr. Estrada's memorandums and until they get answers to their questions. The White House can call this politics or obstruction. But in fact it is senators doing their jobs.

[From the Washington Post, Feb. 14, 2003]

#### ESTRADA'S OMERTA

(By Michael Kinsley)

Like gangsters taking the Fifth, nominees for federal judgeships have reduced their reason for not talking to a mantra. Repeat after me: "My view of the judicial function, Senator, does not allow me to answer that question." Miguel Estrada, President Bush's nominee for the U.S. Court of Appeals for the D.C. Circuit, used variations on that one many times in refusing to express any opinion on any important legal topic during Judiciary Committee hearings last fall. Democrats are now trying to block the Estrada nomination with a filibuster.

Estrada's "view of the judicial function" is shared by President Bush, congressional Republicans and conservative media voices hoarse with rage that Democratic senators want to know what someone thinks before making him or her a judge. The Estrada view is that judges should not prejudge the issues that will come before them. As Estrada amplified in this testimony, "I'm very firmly of the view that although we all have views on a number of subjects from A to Z, the job of a judge is to subconsciously put that aside and look at each case . . . with an open mind."

Obviously, Estrada's real reason for evasiveness is the fear that if some senators knew what his views are, they would vote against him. However, this kind of high-minded bluster is a powerful weapon in the ongoing judicial wars. Over the past couple of decades, talk like this has intimidated many a senator who aspires to a reputation for thoughtfulness. And it does sound swell. Until you think about it.

Potential judges should not reveal their views on legal issues because a judge should

have an open mind? Hiding your views doesn't make them go away. If the problem is judges having views on judicial topics, rather than judges expressing those views, then allowing people to become judges without revealing their views is a solution that doesn't address the problem. And if the problem is judges who fail to put their previous views aside, rather than judges having such views to begin with, then allowing judicial nominees to hide those views until it's too late is still a solution that is logically unrelated to the problem.

So Estrada's Rule of Silence does not solve the problem. And the supposed problem—of "prejudging"—makes no sense either. To see why, consider—or reconsider—Justice Clarence Thomas. In his 1991 confirmation hearings, Thomas testified that he had no "personal opinion" about *Roe v. Wade*, probably the most controversial Supreme Court decision of the 20th century. In 1992 Justice Thomas joined in a minority opinion calling for *Roe* to be overturned. By 2000 he was writing that the *Roe* decision was "grievously wrong" and "illegitimate" and part of "a particularly virulent strain on constitutional exegesis" and generally not something he cared for the least little bit.

This does not prove that Thomas was lying under oath in claiming that he hadn't prejudged *Roe* in 1991 (though no reasonable person could doubt that). It does prove that Thomas had prejudged *Roe* in 1992. But this is a point that Justice Thomas needn't bother to lie about, because no one objects. It's perfectly okay for a sitting judge to have and express views about an issue that comes before his or her court. That is his job.

In fact it's inevitable that anyone who has been an appellate judge for a while will have published opinions that touch on many of the issues he or she must decide in the future. There is not even an expectation of open-mindedness. Although a willingness to reconsider your own assumptions is regarded as admirable, no one is accused of prejudging a case just for ruling the same way this year as last year. Quite the opposite: Intellectual consistency is the hallmark of a fine legal mind. And following precedent is a sign of judicial professionalism.

Most legal rulings come from judges who have been on the bench for a while. If that is not a problem, why is it a problem if they have thought and reached conclusions on some important legal issues before they join the bench? The answer is that it is not a problem. It ought to be a problem if a potential judge has not thought about important legal issues and has no views on them. But instead, the problem is how to keep a judgeship candidate's opinions hidden until he or she is safely confirmed for a lifetime appointment, and the phony issue of "prejudging" is a strategy for doing that.

Judgeship nominations bring out the hypocrite in politicians of both parties, but the Republican hypocrisy here is especially impressive. When Bill Clinton was appointing judges, the senior Judiciary Committee Republican, Sen. Orrin Hatch, called for "more diligent and extensive . . . questioning of nominees' jurisprudential views." Now Hatch says democrats have no right to demand any such thing. President Bush fired the American Bar Association as official auditor of judicial nominations because the ABA gave some Republican nominees a lousy grade. Now Hatch cites the ABA's judgment as "the gold standard" because it unofficially gave Estrada a high grade.

The seat Republicans want to give Estrada is open only because Republicans successfully blocked a Clinton nominee. Two Clinton nominations to the D.C. Court were blocked because Republicans said the circuit had too many judges already. Now Bush has

sent nominations for both those seats. Hatch and others accuse Democrats of being anti-Hispanic for opposing Estrada. With 42 circuit court vacancies to fill, Estrada is the only Hispanic Bush has nominated. Clinton nominated 11, three of whom the Republicans blocked.

I could go on and on. Which is just what Senate Democrats are doing.

Mr. LEAHY. Mr. President, as I have previously mentioned before the Judiciary Committee and here before the Senate, I have significant concerns about Mr. Estrada's nomination. Significant concerns have been raised and not answered. Many of us would like to have sufficient confidence based on a record and a strong confidence about the type of judge he would be. Sadly that record is not there and the administration continues to deny us access to Government files that might be helpful to us.

While he has some experience arguing appeals in criminal cases, he appears to have little experience handling the types of civil cases that make up the majority of the docket of the D.C. Circuit, a court on which Republicans blocked appointments during the last 4-year term of the Clinton administration in order to shift the ideological balance of the court.

His confirmation has been opposed by many including people and groups who represent the Latino community. The opposition of so many Hispanic organizations and the Congressional Hispanic Caucus should be of concern.

Mr. Estrada's selection for this court has generated tremendous controversy across the country and within the Hispanic community. For more than 2 years I have been calling upon the President to be a uniter and not a divider. Here is another matter on which the White House has chosen divisive, partisanship and narrow ideology over what is best for the Senate, the D.C. Circuit, the Hispanic community and the American people. This has been yet another in a string of controversial nominations that has divided, not united, the American people and the Senate.

Senate Democrats demonstrated in the last Congress that we would bend over backwards to work with the Administration to fill judicial vacancies.

We proceeded with more than 100 nominations in 17 months, held hearings and confirmed nominees at a pace almost twice that of Republicans with a Democratic President. Unlike President Clinton, however, this President has continued to insist on doing things his way and only his way and simply refuses to work with us.

Last May, at the behest of a number of Senators seeking a solid basis on which to evaluate this nomination, I wrote to the nominee and to the Attorney General requesting access to his work while employed by the Government at the Department of Justice between 1992 and 1997. In that capacity he worked for the government of which Congress is a part. Similar papers have been provided to the Senate in connec-

tion with a number of previous nominations, including those of William Rehnquist, Robert H. Bork, William Bradford Reynolds, Benjamin Civiletti, and Stephen Trott. Despite this precedent, over 300 days have passed without cooperation from the administration.

The administration has unfortunately, chosen to treat the request for relevant information of a coequal branch like a litigation discovery request that it must resist at all costs. Their approach reminds me of how the tobacco companies treated requests for information about what they knew about the cancer causing properties of cigarettes for years and years. In connection with this nomination, the administration took three weeks to study the files then dismissed the request out of hand and called it without precedent.

The administration claimed that no administration had ever provided such materials in connection with a nomination. As we have now demonstrated over and over that precedent exists going back over the last 20 years.

When presented with irrefutable evidence that these types of materials had been provided, the administration shifted its defense to trying to distinguish those past nominations and even claimed that the documents previously produced by the Department of Justice to the Senate had, instead, been "leaked" to the Senate. They all but called Senator SCHUMER a liar in response to his January letter seeking to resolve the matter.

Then we provided documents from the Department of Justice that conclusively demonstrate that the materials had been furnished in response to Senate requests. This refutes the second round of misrepresentations by the Department of Justice. The proof is in a letter from Acting Assistant Attorney General Thomas Boyd to Chairman BIDEN in May 1988 which notes that:

[M]any of the documents provided to the Committee, 'reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

It is now beyond dispute that "the work product of attorneys in connection with government litigation or confidential legal advice" has provided to the Senate in connection with past nominations.

Rather than admit their errors and work with us to resolve this impasse, the administration simply shifts ground while remaining recalcitrant. The longstanding policy of the Justice Department, until now, has been a practice of accommodation with the Senate in providing access to materials requested in connection with nominations.

On February 11, the Democratic leader and I wrote the President urging cooperation. Instead, we received another

diatribe from the White House Counsel's office. It is as if this administration thinks it has a blank slate and a blank check notwithstanding tradition, history, precedent or the shared powers explicitly provided by our Nation's Constitution. There is certainly a nexus between our request and the powers committed to the legislative branch, yet the Department has failed to take any efforts to try to resolve this dispute. There is part of a pattern of hostility by this administration to requests for information by Congress acting pursuant to powers granted to it by the Constitution, regarding nominees and other important matters.

Despite the stonewalling by the administration, the Judiciary Committee proceeded with a hearing on the Estrada nomination toward the end of the last session. I had said in January that I intended to proceed with such a hearing. The administration took advantage of my good faith declaration and my willingness to proceed on some of their most controversial nominees, including Mr. Estrada. Of course, in addition to Mr. Estrada we also proceeded with hearing on Judge Dennis Shedd, Professor Michael McConnell, Judge Charles Pickering, Judge D. Brooks Smith, Justice Priscilla Owen and many others. In spite of all our good faith efforts to make progress, the administration continues its hostile and partisan ways.

Confirmation of 100 judicial nominations in record time, proceeding on nearly twice as many confirmations as Republicans had in the recent past, confirming new judges for the Fifth, Sixth and Tenth Circuits after years of Republican delays, counted for naught with this administration. Still, in spite of the administration's stonewalling, the committee fulfilled my commitment by proceeding with a hearing last September after waiting in vain for six months for the Administration to show some sign of accommodation to us.

Senator SCHUMER chaired that hearing for Mr. Estrada last September. I was hoping that the hearing might allay concerns that have been raised about this nomination, but I was left with more questions than answers after all of the steps Mr. Estrada took to avoid answering questions at that hearing. I was also left with little hope that he would ever answer any of the concerns raised about entrusting him for the rest of his life with the responsibility for deciding cases fairly and without favor toward any ideological agenda.

When President Clinton was nominating moderates to judicial vacancies, Republicans insisted on considering the judicial philosophy and ideology of the nominees. Many took a pledge not to vote for anyone that might turn out to be an activist. In those years any concern among Republicans could forestall a hearing or committee vote. Anonymous holds were the order of the day. The committee proceeded with few hearings on few nominees and voted on

even fewer. In the entire 1996 legislative session not a single circuit judge was approved by the Republican-led Senate all year not one.

Overall, during the 6½ years of prior Republican control, the Senate averaged only seven circuit court confirmations a year. During the recent 17 months in which Democrats led the Senate, by contrast we confirmed 17 circuit court nominees for a President of another party who nominated a string of highly controversial nominees. In fact, we held hearings on 20 circuit court nominees. Two of the most controversial, on whom we proceeded at the request of Republican Senators, were voted down before the committee last year. This year Mr. Estrada's nomination was reported even though all Democrats on the Committee voted against it.

Much like the administration's false claim that materials like those requested with regard to the Estrada nomination had no precedent when, in fact, there is ample precedent, the administration and Senate Republicans are now claiming that this Senate debate is without precedent. That, too, is false. In fact, a number of judicial nominations have been subjected to extensive debate over the years since Senator Thurmond filibustered the nomination of Justice Fortas to be Chief Justice in 1968. More than a dozen nominations have resulted in almost one and one-half dozen cloture votes on judicial nominations.

Among those nominations "filibustered" by Republicans were Stephen G. Breyer's nomination to the First Circuit; Rosemary Barkett's nomination to the Eleventh Circuit; H. Lee Sarokin's nomination to the Third Circuit; Marsha Berzon's nomination to the Ninth Circuit; and Richard Paez's nomination to the Ninth Circuit. In addition, the Democratic leadership of the Senate had to overcome Republican objection and obtain a cloture to proceed with three of President Bush's nominations in 2002, Richard Clifton to be a Ninth Circuit judge, Julia Smith Gibbons to be a Sixth Circuit judge, and Lavenski Smith to be a Eighth Circuit judge.

Of course, during the previous six and one-half years of Republican control of the Senate, Republicans often chose less public methods to end nominations. Almost 80 of President Clinton's judicial nominations were not confirmed by the Congress during which they were first nominated and more than 50 were never accorded a Senate vote. Most often Republicans would just refuse to proceed to a hearing or a committee vote on a nomination without explanation. Anonymous holds before the committee ended almost a dozen Clinton judicial nominations without anyone having to take a vote. Anonymous holds on the Senate floor delayed consideration of nominations for months and months without debate, explanation or accountability. Democratic opposition has not taken that

route. Instead, we ended the secrecy of the home State Senators' blue slips and did not allow anonymous holds to long delay Senate consideration of nominations.

The Republican spin machine is repeatedly asserting that cloture votes and the use of the filibuster are "unprecedented" with respect to judicial nominees. Such assertions are false and misleading. Cloture, the Senate's procedure to end a filibuster, was sought on more nominations during the 103rd Congress, from 1993 to 1994, when President Clinton was President and Republicans used the filibuster when they were in the Senate minority than at any other time in our history. In that Congress, cloture was sought on 12 nominations—judicial and executive. For the remainder of President Clinton's presidency, Republicans controlled the Senate and defeated scores of judicial nominations by deliberate inaction or anonymous holds in committee and on the floor. By using other extreme delaying tactics, they did not need to use filibusters, they defeated nominations without public explanation through other tactics available to them in the Senate majority.

Individuals from all parties have sought cloture and used the filibuster in response to judicial and other nominees. In fact, the use of the filibuster and cloture has increased in recent years. Congressional Research Service reports that the filibuster and cloture are used much more regularly today than at any time in the Senate's past. Approximately two-thirds of all identifiable Senate filibusters have occurred since 1970.

Cloture votes on judicial nominees are well-precedented in recent history. Both Democrats and Republicans have sought cloture in response to debate or objections to judicial nominees since the cloture rule was extended to nominations in 1949. I would note that cloture was not sought on any nomination until 1968, because, prior to then, concerns over nominees were resolved, or the nominee was defeated, behind closed doors. From 1968 to 2000, there were 13 cloture attempts on judicial nominees. For the record, I should also note that last Congress, cloture was sought on four of President Bush's circuit court nominees. I further note that it was the Democratic leadership of the Senate that sought to invoke cloture and proceed. The objection that was overcome last Congress was that of a Republican Senator who was concerned with the White House's refusals to act on certain executive nominations.

Cloture votes have occurred on judicial nominees submitted by Presidents of both parties and on nominees to the U.S. District Courts, the U.S. Courts of Appeal, and the U.S. Supreme Court. Of these 13 cloture attempts on judicial nominees, in six of them, the Democrats were in the majority and in seven the Republicans were in the majority. The opposition has been based on objections to the judicial philosophy of

the nominee, concerns about whether the nominee would treat all parties fairly and on procedural grounds.

I would like to take a moment to shed some light on filibusters and the practices used to block nominees when the Republicans were last in the majority. Some Republicans have been taking a quote of mine out of context from June 1998 about judicial nominations, replacing my actual words with an ellipse, then distributing it widely and misusing it. Here is what Republicans keep quoting: "I have stated over and over again . . . [ellipse] that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported." What the Republican talking points omit with their ellipse is the essential context of that quote. My actual comment was made during floor discussion about an anonymous Republican hold on yet another of President Clinton's nominees. Here was his actual comment:

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

The context of my comment—the subject of that very debate—and my reference even within the quote itself were about anonymous holds used by Republicans to defeat President Clinton's judicial nominations—anonymous filibusters, in essence. This was another instance in which sometimes only one or a handful of Republican Senators prevented Senate votes on President Clinton's judicial nominations.

The process of the anonymous holds with which Republicans prevented action on Clinton judicial nominees required not just a majority or a supermajority for the Senate to proceed to votes; Republicans were defeating President Clinton's nominees by requiring unanimity. And they were doing it anonymously, without accountability to the public. In the case of the Estrada nomination, Senate Democrats are seeking the information that the Judiciary Committee began requesting nearly a year ago, before proceeding to a vote.

It is clear from the language Republicans deliberately omit that what I was referring to the widespread Republican practice of blocking a nominee anonymously.

The debate from which my comment was taken was over the anonymous Republican hold on a Hispanic nominee, Judge Sonia Sotomayor, who was nominated by the first President Bush to a district court and who President Clinton nominated to the Second Circuit Court of Appeals.

Immediately after making this comment, I placed in the record a newspaper editorial criticizing these anonymous holds as "Partisan Nonsense." That editorial notes that, "In blunt terms, Leahy has criticized the Repub-

licans who, behind the scenes and not for attribution, are seeking to scuttle Sotomayor's nomination." That editorial goes on to note:

"Their reasons are stupid at best and cowardly at worst," Leahy told a New York Times reporter. "What they are saying is that they have a brilliant judge who happens to be a woman and Hispanic and they haven't the guts to stand up and argue publicly against her on the floor. They want to hide in their cloakrooms and do her in quiet."

This again makes clear that I was talking about—anonymous holds. Judge Sotomayor was reported out of the Judiciary Committee on March 5, 1998, but anonymous Republican holds had prevented her nomination from being scheduled for a vote.

On June 18, after her nomination had been pending on the floor for more than three months, I went to the floor to protest the anonymous hold against her. Republicans refused to bring her to a vote for four more months. That is, Judge Sotomayor's nomination was pending on the floor for seven months, seven times longer than Mr. Estrada's nomination, and no Republicans claimed that denying an immediate vote was somehow unconstitutional or amending the Constitution, as they have claimed in these recent days. Once Judge Sotomayor was finally allowed a vote, 23 Republicans voted against her, yet none put any statement in the record or made a statement accounting for their holds or votes.

The real double standard evident during the Estrada debate is that during the prior years of Republican control, Republicans in practice required unanimous consent to allow a vote on a judicial nominee—not a majority or even a super-majority. One or more Republicans could refuse to allow an up or down vote on a nominee, with no accountability to the public. Thus, even if as many as 80 or 90 or even 99 Senators did not object to a judicial nominee, the objection of any Republican was used to prevent an up or down vote. Republican complaints about Democratic objections and insistence on following Senate rules ring hollow in light of their own repeated practices with President Clinton nominees. They often required the consent of 100 Senators, and certainly all of the Republicans, to bring a judicial nominee to a vote.

To hold a nominee anonymously, without any accountability, is what I objected to in my full statement and full comment and in the full context of my statement during that debate. In contrast, the extended debate on the Estrada nomination is occurring in the light of day. Republicans and the White House can bring this matter to resolution by providing the documents requested and by providing responsive answers to Senators' questions. This is not a filibuster through anonymous holds. This is a public debate that Republicans can end through cooperation.

The nomination of Judge Richard Paez starkly displays this Republican

double standard. Judge Paez is a Mexican American who had served for years on the bench in Los Angeles before being appointed to the Federal district court by President Clinton in 1994. Judge Paez was nominated to the 9th Circuit in January 1996. He was one of only four circuit court nominees to get a hearing that year. His hearing was in July but he was not allowed to be reported to the floor that year. No circuit court nominees were given floor votes that year by the Republicans. Only 17 judges were confirmed that session, none of them circuit judges. This was the lowest number of confirmations during an election year in modern history. Judge Paez was then renominated in January 1997, after President Clinton's reelection.

Chairman HATCH required a second hearing on the Paez nomination in 1998, 25 months after his initial nomination. Judge Paez was reported to the floor again in March 1998, but Republicans did not schedule him for a vote in April, May, June, July, August, September, or October that year. So in contrast to the Estrada nomination, by the end of that year, Judge Paez's nomination had waited on the floor for more than 8 months. That is eight times longer than the Estrada nomination has been pending on the floor and Judge Paez still did not get a vote, due to anonymous, unaccountable Republican holds. His nomination was returned to the President without action at the end of that Congress. By then his nomination had been pending for almost three years.

Judge Paez was renominated again in January 1999. Chairman HATCH refused to place him on the committee's agenda for a vote until July 1999—another 6 months of delay, after his nomination had then been pending for more than 1000 days. Republicans continued anonymously to block a vote on the Paez nomination and refused to schedule him for a vote in July, August or September. By that time his nomination had been before the Senate for more than 1,300 days.

On September 21, 1999, Democratic Senators, having spent months and then years pleading for a vote on the Paez nomination, made a motion to proceed to his nomination. All Republicans voted against bringing his nomination up for a vote, including Chairman HATCH.

Finally, in March 2000, after his nomination had been pending for more than 1,500 days, Republicans failed in their effort to stop cloture from being invoked. The next day, Judge Paez was confirmed, and 39 Republicans voted for confirmation—two shy of the number necessary to prevent cloture or to filibuster the nomination. If they had two more votes, I wonder whether they would have ever allowed Judge Paez's nomination to come to a vote.

Mr. Estrada's nomination has been pending on the floor for less than one month. Judge Paez's nomination was pending on the floor for more than 20

months before Republicans allowed him a vote. The result was that Judge Paez's nomination waited on the floor for a vote for almost two years, and his nomination was before the Senate for more than four years, before he was given an up or down vote on confirmation. Mr. Estrada's nomination has been on the floor for less than one month—not 20 months—and Senate Democrats have raised serious and legitimate concerns about the Senate proceeding to a final vote, concerning the incompleteness of the record, the lack of responsive answers to basic questions and the refusal to turn over memos equivalent to those provided in other nominations.

It was no secret that the Republicans delayed the nominations of Judge Marsha Berzon and Judge Richard Paez to the U.S. Court of Appeals for the Ninth Circuit for years, culminating in filibusters in 2000, just three years ago. After the Republican-controlled Senate repeatedly delayed action on their nominations—over four years for Judge Paez and over two years for Judge Berzon—Republicans engaged in a filibuster and cited the filibusters of Justice Fortas, Justice Rehnquist and others as precedents. At that time, Republicans argued that they were not setting new precedent.

As Senator Robert Smith stated during the debate on these two nominees:

[I]t is no secret that I have been the person who has filibustered these two nominees, Judge Berzon and Judge Paez. The issue is, why are we here? What is the role of the Senate in judicial nominations? 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. . . .

I was criticized by some for filibustering, that 'we are on a dangerous precedent' of filibustering judges. . . .

Filibuster in the Senate has a purpose. It is not simply to delay for the sake of delay. It is to get information. It is to take the time to debate and to find out about what a judge's thoughts are and how he or she might act once they are placed on the court.

So, those who came before the Senate just prior to our recent recess and said that no Republican ever filibustered a Clinton judicial nominee were wrong, dead wrong. Senator SMITH was characteristically forthright about what he was doing.

Senator SMITH went on to explain:

As far as the issue of going down a dangerous path and a dangerous precedent, that we somehow have never gone before, as I pointed out yesterday and I reiterate this morning, since 1968, 13 judges have been filibustered by both political parties appointed by Presidents of both political parties, starting in 1968 with Abe Fortas and coming all the way forth to these two judges today.

It is not a new path to argue and to discuss information about these judges. In fact, Mr. President . . . [w]hen William Rehnquist was nominated to the Court, he was filibustered twice.

Then, after he was on the Court, he was filibustered again when asked to become the chief Justice. In that filibuster, it is inter-

esting to note, things that happened prior to him sitting on the Court were regurgitated and discussed. So I do not want to hear that I am going down some trail the Senate has gone down before by talking about these judges and delaying. It is simply not true.

This straight-forward Republican from New Hampshire proclaimed:

Don't pontificate on the floor and tell me that somehow I am violating the Constitution . . . by blocking a judge or filibustering a judge that I don't think deserves to be on the court. That is my responsibility. That is my advise-and-consent role, and I intend to exercise it.

Thus, the Republicans' claim that Democrats are taking "unprecedented" action, like the White House claim that our request for Mr. Estrada's work while paid by taxpayers was "unprecedented," is simply untrue. Republicans' desire to rewrite their own history is understandable but unavailing.

They cannot change the plain facts to fit their current argument and purposes. I note in passing how many Republicans now demanding a vote on Mr. Estrada, opposed cloture on Judge Berzon and Judge Paez. I have already noted how every Republican, many of whom are now insisting on a vote on the Estrada nomination, opposed even proceeding to consider the Paez nomination.

I also recall a motion that truly was unprecedented, the motion of Senator SESSIONS to recommit the Paez nomination to the Judiciary Committee after it had twice been voted out over a period of four years. In fact, Senator SESSIONS made a motion to indefinitely postpone the nomination of Judge Paez, and 31 Republicans voted in support of that motion, including most of the people on the other side of the aisle who have come to the floor to claim that the Constitution requires an immediate up or down vote on Mr. Estrada's nomination. After cloture was invoked, Senator SESSIONS made a motion to indefinitely postpone a vote on Judge Paez's nomination. The motion to indefinitely postpone failed by a vote of 31 to 67. After this motion failed on March 9, 2000 the day Paez was ultimately confirmed—Senator HATCH spoke about the unprecedented nature of that motion and admitted that there had been a filibuster on Paez's nomination. Here is what he said:

I have to say, I have served a number of years in the Senate, and I have never seen a "motion to postpone indefinitely" that was brought to delay the consideration of a judicial nomination post-cloture.

Indeed, I must confess to being somewhat baffled that, after a filibuster is cut off by cloture, the Senate could still delay a final vote on a nomination. A parliamentary ruling to this effect means that, after today, our cloture rule is further weakened.

While some Republicans would prefer to ignore that filibuster of this Ninth Circuit nominee in their quest to move as quickly as possible on the Estrada's nomination, but that would be to ignore the recent history of their conduct.

There were likewise two judicial nominees in 1994 whom the Republicans

filibustered. Judge H. Lee Sarokin, nominated by President Clinton to the Third Circuit, was a qualified nominee who served as a Federal district judge for 15 years. He was opposed by conservative Republicans who argued, among other things, that he was too liberal. Senator Thurmond led the filibuster against Judge Sarokin in calling him a "liberal judicial activist." That effort to defeat Judge Sarokin failed.

In 1994, the Republicans also used delay tactics to block the nomination of Judge Rosemary Barkett to the U.S. Court of Appeals for the Eleventh Circuit. Judge Barkett was criticized by those on the other side of the aisle as being a judicial activist. Senators Thurmond and SPECTER led the opposition to Barkett. After announcing the Republican intention to filibuster the nomination, Democratic Majority Leader George Mitchell stepped in and filed a cloture motion.

I could describe other filibusters in detail, such as the Republican filibuster of Justice Breyer to be on the U.S. Court of Appeals for the First Circuit in 1980. And I could quote those on the other side of the aisle, who have said time and time again how important it is to debate a nominee and to scrutinize a nominee's record and views. In 1997, Senator HATCH said that he had "no problem with those who want to review these nominees with great specificity" and, in fact, he supported such efforts while chairman of the Judiciary Committee and reviewing the nomination of a Democratic President.

So, when Republicans say that a filibuster or extended debate on judicial nominees is unprecedented, I would like to ask them about their filibusters and extended debates on Judge Berzon, Judge Paez, Judge Sarokin, Judge Barkett. And, I would like to ask them about all the other judicial nominees and executive nominees that they defeated through deliberate inaction, anonymous holds, or other extreme delaying tactics.

Of course, this debate on the Estrada nomination is not, given the definition used by Republicans, a "true filibuster." As the statements of the Democratic Leader and the exchange that I had with Senator BENNETT and Senator REID on February 12 made clear and as should be plain to all, we are seeking cooperation and information before proceeding to a vote. The current debate could have been shortened had the Administration at any time since last May shown any interest in working with us. It has not. Despite the efforts we have made, including the Democratic leader's letter on February 11 seeking accommodation and pointed the way out of this impasse, the Administration has steadfastly refused all of our efforts to work through these difficulties. The administration is intent on forcing this confrontation and division. That is too bad.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that editorials concerning the Estrada nomination from

the Portland Oregonian, the Omaha World, and the Los Angeles Times, and an article on the same topic by Chris Mooney that appeared in TomPaine.com, be printed in the RECORD.

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

[From the Los Angeles Times, Jan. 13, 2003]

BUSH'S FULL-COURT PRESS

There are at least two explanations—one even more cynical than the other—for President Bush's renomination last week of Judge Charles W. Pickering, a man the Senate rightly rejected last year for a seat on the federal appeals court.

Perhaps Bush really didn't mean it last month when he denounced as "offensive . . . and wrong" Mississippi Sen. Trent Lott's nostalgic musings about the segregated South. The Republican Party has long tried to have it both ways on race: ardently courting minority voters while winking at party stalwarts who consistently fight policies to establish fairness and opportunity for minorities. Even Bush has not always been above such doublespeak, encouraging African Americans to vote GOP and touting his Spanish-language facility on the campaign trail as a come-on to Latino voters even as he dropped in at Bob Jones University, which, until three years ago, barred interracial couples from sharing a pizza.

Bush's renomination of Pickering, a man whose law career is unremarkable but for his longtime friendship with Lott and his dogged defense of Mississippi's anti-miscegenation laws, throws another steak to the far right and sand in the eyes of most Americans.

There could be another explanation for Bush's decision, just weeks after denouncing Lott, to again shove Pickering on the American people. Perhaps the president doesn't really care whether Pickering, whom he's indignantly defended as "a fine jurist . . . a man of quality and integrity," is confirmed.

Maybe Bush calculates that Sens. Edward M. Kennedy (D-Mass.), Charles E. Schumer (D-N.Y.) and others, justly incensed that the judge is back before them, will embarrass a Republican or two into joining them and defeat his nomination a second time. The president may be figuring that if they can call in enough chits on Pickering, the Democrats won't have the votes to stop the many other men and women he hopes to place in these powerful, lifetime seats on the federal bench.

None of those nominees can be tarred with Pickering's in-your-face defense of segregation. But many, including Texas Supreme Court Justice Priscilla Owen, lawyers Miguel Estrada and Jay S. Bybee, North Carolina Judge Terrence Boyle and Los Angeles Superior Court Judge Carolyn B. Kuhl, share a disdain for workers' rights, civil liberties guarantees and abortion rights. Their confirmations would be no less a disservice to the American people than that of Pickering, who now has been nominated two times too many.

[From the Omaha World-Herald Feb. 13, 2003]

ANSWERS, PLEASE

NOMINEE ESTRADA REFUSES TO DISCLOSE JUDICIAL VIEWS, PHILOSOPHIES TO THE SENATE

A filibuster is a drastic tactic. In regard to federal judicial nominees, we would typically be against it. Now, Senate Democrats have promised to use it to stall a confirmation vote on judicial nominee Miguel Estrada. Yet given the current tight-lipped atmosphere, we understand what is pushing them in that direction.

Both sides agree that Estrada, nominated by President Bush to the District of Colum-

bia Court of Appeals, has exceptional legal credentials. However, he has refused to answer many basic yet important questions, giving senators scarcely any way to assess his judicial temperament. Democrats contend, rightly or wrongly, that Bush seeks to pack the federal courts with hard-right "stealth" activists, and Estrada personifies that goal.

Estrada would not tell senators which judges he might use as role models if he were appointed to the bench, for instance. That is a forthright question. The answer sheds light on a nominee's thinking and potential judicial approach. He also declined to say which Supreme Court opinions he disagreed with, another fundamental query.

Most judicial candidates won't, and shouldn't, give their personal views on a broad-brush basis—in effect judging hypothetical cases in advance. But Estrada, who has been mentioned as a potential Supreme Court justice, went beyond that—refusing to discuss well-known prior cases because, he said, he had no firsthand knowledge.

Judicial philosophy is important as senators considers an appointment to the court that has been called the second most important in the land after the Supreme Court. The D.C. appeals court considers, among other issues, many challenges to federal environmental regulations. And Estrada's views of, for instance, federalism vs. states' prerogatives would be crucial.

The president and Republican leaders have charged that Democrats don't want to approve a Hispanic conservative, an implicit accusation of racism. But Estrada isn't universally popular with Hispanic groups, either. One, the Puerto Rican Legal Defense and Education Fund, said he has "made strong statements that have been interpreted as hostile to criminal defendants' rights, affirmative action and women's rights."

In fairness, Democrats aren't above playing their own political games. They change that Estrada "lacks judicial experience," as if that were a disqualifying flaw. Before their appointments, most of the members of the D.C. appeals court "lacked judicial experience" much as Estrada does.

We agree with a statement made by one senator several years ago: "I believe the Senate can and should do what it can to ascertain the jurisprudential views a nominee will bring to the bench in order to prevent the confirmation of those who are likely to be judicial activists. . . . It will require the Senate to be more diligent and extensive in its questioning of nominees' jurisprudential views."

That was Republican Sen. Orrin Hatch, today an Estrada booster, in regard to former President Bill Clinton's nominees. The sentiment was valid then, and it's valid now.

[From TomPaine.com]

BENCHING CONGRESS—THE RISING POWER OF THE JUDICIARY

(By Chris Mooney)

When it comes to President Bush's judicial appointees, Sen. Joe Biden of Delaware has traditionally been one of the most deferential Democrats; he opposed only three out of 102 nominees during the 107th Congress. So Biden's recent speech at a hearing on the appointment of Jeffrey Sutton, a staunch states' rights defender named to the U.S. Court of Appeals for the Sixth Circuit, came as something of a surprise. "You seem to have an incredibly restrictive view of the Congress' prerogatives," Biden warned Sutton. Noting that the Supreme Court reviews only a tiny fraction of cases from courts like the Sixth Circuit, Biden announced he was

rethinking how the Senate should handle circuit court nominees. "[Appellate judges] have become the final arbiters in areas where I used to be able to say, 'I know the Court will review this,'" Biden said, adding that his staff was preparing a list of roughly 200 cases where courts of appeal have changed "basic law" without any review by the Supreme Court.

As the showdown begins over Bush's conservative judicial nominees—and Senate Democrats contemplate using their filibuster powers to block Miguel Estrada from a place on the U.S. Court of Appeals for the District of Columbia Circuit—it is important to remember this exchange. Sutton's history of states' rights advocacy, which included filing a brief on the winning side when the Supreme Court overturned part of the Violence Against Women Act (which Biden drafted), had clearly left Biden feeling leery about giving him a lifetime appointment to the bench. The senator got a taste of conservative judicial activism first hand, and he didn't like it one bit.

If more elected Democrats awaken to how their legislative powers are being snatched away by the federal judiciary the way Biden did, perhaps they too will resolve to fight harder against Bush's more radical conservative nominees. The key factor, after all, is the one Biden cited: The Supreme Court hears only about 80 cases a year, from all the circuit courts and state supreme courts combined. This compares with the tens of thousands of cases considered by Federal appellate courts. And because of the extreme rarity of Supreme Court review, "one could argue that the powerful actors in the United States who have the fewest real checks on what they do are federal appellate judges," as Georgetown law professor David Vladeck puts it. One existing check is the U.S. Senate's advice and consent role, yet from Michael McConnell to D. Brooks Smith, Senate Democrats thus far have allowed conservative after conservative to reach the federal bench.

Appellate judges interpret a huge chunk of the law that we live by. Even in simply applying Supreme Court precedent, they have immense sway, and they have it for life. The Supreme Court only "knocks out the broad contours" of the law, notes American University's Herman Schwartz; courts of appeal then fill in the blanks. For example, the conservative U.S. Court of Appeals for the Fourth Circuit recently ruled that the Clean Water Act allows mining companies to dump huge amounts of mountaintop rubble into rivers and streams, a process known as creating "valley fills." This "major victory for the mining industry," as The Washington Post put it, is precisely the sort of case that the Supreme Court never reviews. Due to the conservative tilt taken by the federal bench over the past two decades, environmental groups have become more or less resigned to these pro-business rulings. So have labor, civil-rights groups, and other liberal constituencies.

Appellate judges can't initiate legislation or make policy decisions, of course. But that's about the only sense in which they don't wield considerably more power than House members or even some senators. Whereas legislators have to sway a large group of colleagues in order to get a law passed, appellate judges need only one ally on a three-judge panel in order to rule the way they want. And most laws passed by legislators, at least controversial ones, inevitably end up being challenged in federal court and heard on appeal. Given all this, plus the fact that seven of the nine current Supreme Court justices were appellate judges first, it's something of a wonder how little attention has been paid to the ongoing

battle over the judiciary, especially compared with the extensive press coverage leading up to—and following—last year's elections. Instead all we get from the mainstream media are one-shot stories that have much more to do with how the nomination battles are waged than what's really at stake.

And appellate judges don't merely exert their power over Congress by overturning laws. They also police the federal regulatory state. Congress, after all, delegates a significant part of its lawmaking mandate to regulatory bodies like the Environmental Protection Agency. Indeed, Congress regularly sets up entire new agencies, like the Department of Homeland Security, to implement its wishes. But when these expert agencies try to carry out their mandates, they frequently find their actions challenged in federal court. Once again, appellate judges make the difference when it comes to whether a regulation will be allowed. They often second-guess laboriously prepared administrative rules, but rarely have their actions reviewed by the Supreme Court.

For precisely this reason, the appellate court most responsible for ruling on federal agency decisions, the U.S. Court of Appeals for the District of Columbia Circuit, is also considered the second most powerful court in the nation. Many Senate Democrats know this. That's why they're having such a tough time weighing the pluses and minuses of filibustering Estrada's nomination. The Wall Street Journal editorial page, which rallies the right's troops on judicial nominations, recently wrote that Democrats "have no reason to oppose Mr. Estrada other than the fact that he is a conservative who also happens to be Hispanic." Well, what about the fact that Estrada could be in a position to gut laws Democrats pass?

Take a closer look at the sort of cases Estrada will be deciding if he makes it to the D.C. Circuit. One well known D.C. Circuit environmental case was 1994's Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, a case over applications of the Endangered Species Act. In this case, a conservative-leaning panel of the D.C. Circuit overturned a Department of the Interior regulation protecting species habitat, ruling that the Department couldn't consider "significant habitat modification that leads to an injury to an endangered species" as "harm" under the act. The ruling stood for over a year before being overruled by the Supreme Court. But then, most D.C. Circuit rulings are never reviewed at all—Sweet Home v. Babbitt was exceptional in that respect. In other cases, the D.C. Circuit has rolled back regulations to protect wetlands, corporate average fuel economy (CAFE) standards, and much more. And that's just in the environmental arena.

The D.C. Circuit has recently regained a degree of ideological balance. But that won't last if Bush's nominees reach the court. And with a conservative D.C. Circuit prepared to upend regulatory actions as it sees fit, legislators would be foolhardy to assume that administrative agencies will actually be able to implement the laws they pass intact.

Of course, some will inevitably object to the power comparison between appellate judges and members of Congress, and perhaps even consider it demeaning to the judiciary. They will point out that appellate judges have a duty to apply Supreme Court precedent, and in many or most cases these judges probably do just that. But even the majority of judges, acting in good faith, have considerable wiggle room under the "broad contours" laid out by the Supreme Court. That's what Sen. Joe Biden seems to have figured out, anyway.

Moreover, it has become increasingly clear just how often appellate judges are com-

pletely on their own—and how willing they are to use their powers. In the past decade we have witnessed an unprecedented push among conservative judges to invalidate acts of Congress on the basis of a radical reinterpretation of the constitutional relationship between the states and the federal government, sometimes called the "New Federalism" (though it has its origins in the philosophy of the original opponents of the U.S. Constitution, the anti-Federalists). This push has had plenty of legal cover, of course, but in effect it has been a clear attempt to wrest power away from Congress. Why shouldn't Senators try to wrest some of that power back?

They can start with Miguel Estrada.

[From the Oregonian, Mar. 3, 2003]

#### JUDICIAL POWER TRIP

The partisan battle in the Senate over one of President Bush's nominees to a federal judgeship escalated last week with the addition of three more conservative nominees.

This is a high-stakes contest that encompasses more than a handful of judicial appointments; it represents a naked grab at power and an attempt to stack the federal courts in favor of an ultra-conservative ideology.

For nearly three weeks, Democrats have delayed a vote on Miguel Estrada, Bush's nominee to the U.S. Court of Appeals, District of Columbia Circuit. In Senate Judiciary Committee hearings, Estrada simply refused to answer many of Democrats' questions.

The battle has led to ugly name-calling, including the charge that Democrats are treating Estrada differently because he is Latino. That's simply preposterous. Eight of the 10 Latino appellate judges currently seated in the federal courts were appointed during the Clinton administration.

Republicans should be more careful using the ethnic card. They had no trouble holding up hearings on Latino candidates who were nominated by President Clinton. They used every tactic available to stall scads of Clinton nominees, including anonymous holds on Judge Sonia Sotomayor to the Second Circuit and a four-year delay on Judge Richard Paez to the Ninth Circuit.

Some critics have charged the Democrats are trying to extract payback. Of course, they may have overlooked that the Senate has confirmed 100 of Bush's judicial nominees.

Raising the stakes late last week, Senator Orrin Hatch, R-Utah, chairman of the Judiciary Committee forced committee approval of three more of Bush's controversial nominees. While the tactic seems designed to get some of the president's conservative nominees approved, this isn't a fight about one nominee or three or four.

The fight shows a majority trying to install one point of view and a president who has shown himself to be more doctrinaire than he gave any inkling of before his narrow success in the 2000 election.

In the case of Estrada, it is hard to know what he believes or how he would behave as a judge. He is a graduate of Harvard Law School and was a clerk for U.S. Supreme Court Justice Anthony Kennedy, but little is known about his views. He has an obligation to explain himself.

Ironically, Hatch was outspoken about the need for inquiry into nominees' view when Clinton was in office.

In the best of all possible worlds, it is better to have a judiciary of nonpartisan independent thinkers. But the process of nominating and confirming court appointments has always been far from ideal.

Democrats mustn't cave on this. The fairness and credibility of the nation's courts de-

pend on senators finding a reasonable compromise. Moderates within the president's party should also reconsider their lockstep loyalty.

The balance of power between the executive and the legislative branches is being tested. As Senator Ted Kennedy pointed out last week, the Founding Fathers "did not intend for the Senate to be a rubber stamp."

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

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Ms. MURKOWSKI). Without objection, it is so ordered.

#### MOSCOW TREATY

The PRESIDING OFFICER. Under the previous order, the hour of 12 noon having arrived, the Senate will now proceed to the consideration of Executive Calendar No. 1, which the clerk will report.

The senior assistant bill clerk read as follows:

Resolution of Ratification to Accompany Treaty Document 107-8, Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions.

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Madam President, the treaty we consider today, known officially as the treaty between the United States of America and the Russian Federation on strategic reductions, is truly remarkable in many respects.

The treaty is, of course, remarkable because it encompasses the most dramatic reductions in strategic nuclear weapons ever envisioned between two nuclear powers. It is also worth noting that not since 1954 have the two parties held such a low number of strategic nuclear weapons as that which will be enforced by the agreed numerical limits of this treaty.

Many have observed the extraordinary ease by which this treaty was negotiated and compare its three short pages—indeed, it is just three short pages—to the many thousands of pages of documents negotiated between the United States and the Soviet Union during the cold war.

This last point is, for me, the most significant of all, for as important as the substance of this treaty is, it is the form—the trust between the United States and Russia—that most shines through.

Perhaps this treaty should be known by the epitaph: "Cold War RIP," for it is not unreasonable to hope that this treaty represents and indeed reflects the close of a long era of hostility between these two nations.

In the past few weeks, I and many of my colleagues have had the opportunity to meet with a variety of Russian Government officials who have become regular and welcome visitors in