in a small group market, you can work for a small business and be part of a group of 4 or 5 people or 40 or 50 people, or you can work for a big business and be part of a group of 10,000 people, which would you choose?

I have asked that question in small business groups around the country. I have not had a single person say: If I were sick, I would rather be part of the small group. Of course you would rather be part of the bigger group.

This is a haven for small business people who want to help themselves and their employees, and particularly the ones who are sick and need the insurance, such as that lady in the optometrist shop in Farmington. It is a haven for them. And it will cut the cost of their health insurance, on average, 10 to 20 percent and make insurance available to millions of people who currently do not have it. It does not cost the taxpayers anything. It is just like a big co-op.

We have a lot of support in the Senate. I am very pleased about our progress. The chairman of the Small Business Committee, the senior Senator from Maine, Ms. SNOWE, is a strong supporter and is leading the fight. Senator BOND is supportive. The Senator who is presiding over the Senate today is supportive. Senator MCCAIN is supportive. I have been talking with a number of my friends and colleagues on the other side of the aisle. I am hoping to get support there.

In the House, it passed on a strong bipartisan basis. I believe we can do the same. It is just a question of the choices we want to make. We can choose these small businesspeople and their employees who have been telling us, year after year after year: We are working full time; We care about our jobs; We care about our fellow employees; Let us help ourselves, or we can choose the big insurance companies that have a monopoly on this market and are charging higher and higher prices and providing fewer and fewer policies of insurance for people who need it.

I think the choice is clear. I urge the Senate to look at this bill, the association health plans. We can get it passed. We can make a difference, and we can do it now.

I yield back the remainder of my time.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

EXECUTIVE SESSION

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

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

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

The PRESIDING OFFICER. The time until 12:30 p.m. shall be equally divided between the chairman and the ranking member of the Judiciary Committee or their designees.

Mr. REID. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time run equally between both sides.

The PRESIDING OFFICER. Without objection, the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEAHY. 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. LEAHY. Mr. President, what is the parliamentary situation?

The PRESIDING OFFICER. The Senate is on the Estrada nomination.

Mr. LEAHY. I thank the distinguished Presiding Officer.

SENATOR GRAHAM'S RETURN

I see the distinguished senior Senator from Florida in the Chamber. First, I will say on a personal basis, I am delighted to see him back. He is looking as healthy as he did before he left. I understand he is even more healthy now. For someone like myself who has probably a couple pounds more than I would like to be carrying, I noticed that he has found a way of losing a little weight. I suspect that what he has gone through is not something that is going to catch on with the various diet fads.

I had a chance to chat with the distinguished senior Senator last night, and he not only sounds even healthier than when he left, but he has the same sense of verve and sense of humor as he had before he left.

I yield to the distinguished Senator from Florida, if he would like to take the floor at this point, such time as he needs.

The PRESIDING OFFICER. The Senator from Florida.

Mr. GRAHAM of Florida. Mr. President, I extend to you and to my colleagues deep appreciation from me and my family for the many expressions of concern and best wishes which have flowed to us over the past 6 weeks. I report to the Senate that this is my second day back on the job since my operation. I feel increasingly strong and energetic, sufficiently so that I feel this is the time to come to the Senate floor and talk about the issue before us.

Before I do that, I especially extend my appreciation to the Republican leader and our colleague and friend, Senator BILL FRIST. As we know, before becoming a Senator, it was Dr. BILL FRIST. He happened to be a cardiac surgeon. When it was clear to me I was going to have to have cardiac surgery, and when that fact became known by a number of my friends, I had an almost mountain of suggestions as to what I should do, where I should go, who the surgeon should be.

Finally, my friend and former colleague, Connie Mack, called me and suggested I should talk to Senator FRIST, who actually knows something about this, which I did. He gave me excellent advice and a substantial amount of reassurance. Then after the operation, while I was still in the hospital, he came and visited. That was a touching moment for Adele and myself that he would make that effort.

I particularly thank Senator FRIST for his display of humanity during this period.

I am here to discuss my vote on the motion to invoke cloture on the nomination of Miguel Estrada to the District of Columbia Circuit Court of Appeals.

It will be my vote today to not invoke cloture. I want to explain the reasons for this. There are many issues raised by this nomination. I consider the most fundamental issue is the issue of the independence of the judiciary. That has been a matter of concern to thoughtful Americans from before our country was a country.

In the brilliant and Pulitzer Prize-winning book by David McCullough, ''John Adams,'' John Adams is quoted from a paper he wrote called ''Thoughts on Government.'' This was written before the War for Independence, anticipating that after a successful independence, there would be the need to establish a government. And these were some principles John Adams thought government should contain. Let me read one paragraph:

> ''Essential to the stability of government and to enable an impartial administration of justice,'' Adams stressed, ''with separation of judicial power for both legislative and the executive, there must be an independent judiciary, men of experience on the laws, of exemplary morals, invincible patience, unruffled calmness, indefatigable application, and should be subservient to none and appointed for life.''

Those were the characteristics John Adams laid out as crucial to the essential stability of government and to have an able and impartial administration of justice. Those words, written before the war, then became the guiding star for our Founding Fathers at the Constitutional Convention in 1787.

In order to preserve the political independence of judges, the Constitution provides they shall, as John Adams suggested they should, serve a lifetime appointment. In order to protect from economic intrusion into the

judiciary, this Congress is prohibited from reducing the salary of judges, so that they will be free of intimidation. But maybe the most difficult issue the Constitutional Convention faced—and it was one of the last matters to be resolved by that convention—was how should judges secure their place on the bench. Up until the very end of the Constitutional Convention, the idea was that this Senate would directly appoint Federal judges. However, late concern arose that this very principle of the independence of the judiciary might be at risk if one branch were solely responsible for the appointment of Federal judges. And so a compromise was struck. That compromise was that the President would nominate persons to be Federal judges, and that the role of the Senate would be to advise and then consent, through the confirmation process, to those nominations.

So the issue we are debating today—the relative role of the executive and legislative—is not a trivial issue. It goes to the heart, as John Adams said, of the stability of government, because it goes to the independence of the judiciary.

Having said that and having read some words from the 18th century, I would like to read you some words from the 21st century as printed in the New York Times Magazine of last Sunday. It is an article on one of our Federal intermediate appellate courts, a court of almost, but not quite, the same influence as the DC Circuit Court. One of its justices is J. Michael Luttig. It says this:

Luttig told me that he thinks the politics surrounding judicial appointments makes judges hyperconscious of their political sponsors. ''Judges are told, 'You're appointed by us to do these things.' So then judges start thinking, well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get?''

Judge Luttig continued:

I believe that there is a natural temptation to line up as political partisans that is reinforced by the political process. And it has to be resisted, by the judiciary and by the politicians.

Mr. President, I believe we are at a time when we are being called upon to resist an effort to inappropriately utilize the executive power to the exclusion of the legislative role in the appointment of Federal judges. I consider myself to be a pragmatist. I find very few things in life that are black and white. I do not think this issue is black and white.

I have been dealing with this issue in another dimension over the past weeks of recuperation. In my State of Florida, we have had for over 20 years a process of nominating Federal judges through a citizen-based judicial nominating commission. Persons who want to be a Federal judge in Florida submit their application to the judicial nominating commission, which reviews their submission and has personal interviews with those candidates that it believes are eligible for Federal judicial consideration. Then that commission used to recommend three people to the Senators. Senator Mack and myself worked for over 12 years in a very collaborative, nonpartisan manner to determine what recommendations should be made to the President. Under the system now, the number of persons to be recommended will be increased from three to six, and the role Senator NELSON and I will play—recognizing the fact that we are Democrats and the administration is Republican—is we will review those six nominations and make a judgment as to whether, in our opinion, any of those nominations would have difficulty being confirmed by the Senate. If that is not the case, then all six will go to the President for his consideration.

I highly commend to my colleagues the article I quoted from in The New York Times Magazine of March 9, 2003, written by Deborah Sontag.

I ask unanimous consent that some materials about this recent agreement that has been reached between the White House, the chairman of the Florida Judicial Commission, and Senator NELSON and myself, which I believe will well serve the Federal judiciary and the people of Florida, be printed in the RECORD.

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

[News From Bob Graham]

WHITE HOUSE COMMITS TO HONOR FLORIDA NOMINATING SYSTEM

GRAHAM SAYS JUDICIARY NEEDS TO MAINTAIN INDEPENDENCE

WASHINGTON (March 12, 2003).—Senator Bob Graham, D-Florida, announced today that the White House has committed to honor Florida's non-partisan process for selecting nominees for federal judgeships, federal prosecutors and U.S. marshals. The agreement culminates months of discussion about the importance of the role of the state's nominating commissions.

''This is an important assurance from Chief of Staff Andy Card that the White House will abide by the nominating process that has allowed the federal court system in Florida to retain public confidence and maintain its independence from political influence,'' Graham said. ''For nearly two decades, this merit-based process has produced judges and other officials of the highest caliber, while allowing our state to outpace the nation in filling vacancies. We need to ensure that this tradition continues.''

Graham released a letter from White House Chief of Staff Andrew H. Card Jr., that reads, in part: ''I want to reiterate that the President is committed to following the commission process in Florida and intends to abide by the rules of procedure of the Florida Federal Nominating Commission, consistent with 'the Constitutional and statutory powers, duties, or prerogatives of the President of the United States or the Senate in the filling of vacancies by nomination and confirmation' (Rule 30).''

Graham said it was agreed that the White House commitment to following the reformed rules of the nomination process will be prospective, meaning that persons already nominated or who are under consideration for a vacancy will not be subject to the new process.

Upon receiving Card's letter, Graham said he would encourage prompt consideration of and support before the Senate Judiciary Committee the pending nominee for a District Court judgeship in the Southern District of Florida, as well as the nominees for U.S. marshal in the three federal judicial districts in Florida.

If confirmed, judicial nominee Cecilia M. Altonaga would be the first Cuban-American woman to sit on the federal bench. The pending nominees for U.S. marshal are Dennis A. Williamson in the Northern District; Thomas Hurlburt Jr., in the Middle District; and Christina Pharo in the Southern District.

''My complaint has never been with the qualifications of these individual nominees, but with the fact that the White House deviated from the nominating process which has so well served Floridians,'' Graham said.

''I am hopeful that, with the White House commitment, we will to return to a selection process that gives assurances of merit-based and non-partisan selection of jurists, expedites non-partisan consideration of those jurists by the Senate and maintains the independence of the judiciary.''

THE WHITE HOUSE,
Washington, March 12, 2003.

DEAR SENATOR GRAHAM: Thank you for the numerous opportunities to discuss our mutual efforts to ensure that Florida's judicial vacancies are filled through an orderly process.

I know that you and Judge Gonzales have communicated previously about the important work and role of Florida's Federal Judicial Nominating Commission. I want to reiterate that the President is committed to following the commission process in Florida and intends to abide by the rules of procedure of the Florida Federal Judicial Nominating Commission, consistent with ''the Constitutional and statutory powers, duties, or prerogatives of the President of the United States or the Senate in the filling of vacancies by nomination and confirmation'' (Rule 30).

The Administration shares your desire to promptly fill the federal judicial and United States Marshals vacancies in Florida.

Sincerely,

ANDREW H. CARD, Jr.
Chief of Staff to the President.

COLSON HICKS EIDSON,
Coral Gables, Florida, March 12, 2003.

Hon. BOB GRAHAM,
U.S. Senate,
Washington, DC.

DEAR SENATOR GRAHAM: I want to thank you for your support of the nomination of Judge Cecilia Altonaga for United States District Court Judge for the Southern District of Florida.

Your substantial personal involvement and leadership in the nomination of Federal Judges, U.S. Attorneys and U.S. Marshals, throughout your years of service in the United States Senate, have been exemplary and have been responsible for the high qualifications of the men and women who serve in the three federal districts in the State of Florida. You have my admiration and respect.

With warm personal regards, I remain,

Sincerely,

ROBERTO MARTÍNEZ.

[From the Miami Herald, Jan. 16, 2003]

FLORIDA'S JUDICIAL-NOMINATION PROCESS UNDER THREAT

(By Bob Graham)

For more than a decade, through both Democratic and Republican presidencies, Florida had an outstanding record of filling federal judicial vacancies through a nonpartisan, merit-based process.

The process was driven by the judicial nominating commissions, which took applications, interviewed candidates and submitted three names for consideration for each judicial vacancy. These commissions, appointed by the two senators, were made up of volunteers who represented a cross-section of our state: lawyers and lay persons, Democrats and Republicans. Both Florida senators interviewed the three finalists and passed their recommendations onto the White House.

The process worked. Over 10 years, we filled 26 District Court vacancies without a single significant controversy. Because of the confidence that the Senate Judiciary Committee vested in the Florida judicial-nominating process, between the 101st and 106th Congress, those vacancies were filled in an average of 108 days. This compares to the average time for all U.S. District Court vacancies of 151 days.

The process attracted highly qualified candidates for federal judicial vacancies. This is sometimes difficult because the open process makes all the information submitted by the candidates publicly available. However, because decisions were made on merit, candidates of the highest quality from private practice as well as the state courts and federal magistrates were attracted to apply.

RAISING CONCERNS

After George W. Bush became president, the process changed. Now the governor, along with the most senior Republicans in our state's congressional delegation, are responsible for naming the nominating commission's members.

While Sen. Bill Nelson and I can interview the candidates, we cannot make recommendations to the White House anymore. We can only indicate whether any of the candidates might encounter difficulty in winning Senate confirmation.

Since this new system has taken effect, there have been two instances that raise concerns about the politicization of the judicial-nominating process, threatening to undermine the credibility of our judiciary.

A year ago, the nominating commission announced groups of three finalists to fill three U.S. marshals positions in Florida, including one in the Southern District of Florida. In March 2002, my office was informed that the three finalists for the position in the Southern District were being put aside in favor of a candidate who had not even applied. This candidate has been renominated in the 108th Congress and is now awaiting action by the Senate Judiciary Committee.

In February 2002, the Judicial Nominating Commission announced that it had selected three finalists for a Southern District court vacancy. The candidates included two state circuit-court judges and the sitting U.S. attorney for the Southern District, who were interviewed by the Judicial Nominating Commission and found to be qualified. Nelson and I informed the White House that, if nominated, any of the three would be expeditiously confirmed.

By April, however, the process took a mystifying turn. The nominating commission's chairman informed the fellow commissioners that the White House had requested three additional names, effectively disregarding the three initial candidates. A month later, at the direction of the governor and two U.S. House members, the commission met again and selected three new finalists. A nominee is expected from the White House any day now.

The qualifications of these three new candidates are not to be questioned. Rather, the concern is the deviation from a process that has been successful for more than a decade. The independence and integrity of our judicial system are at stake.

The legal counsel to the president, Alberto Gonzalez, said that the initial panel had been rejected because of inadequate diversity. I found this surprising because half of the federal court officers nominated in Florida by the Republican-appointed Judicial Nominating Commission and selected by the president were minorities.

With this record, if this recent set of recommendations by the Judicial Nominating Commission was found by the president to be insufficient, what recommendation would Gonzalez make to satisfy the diversity sought by the president?

PROUD TRADITION

We must live up to the words said by former Florida Bar President Herman J. Russamanno about our federal courts: ''Florida has been blessed with competent, experienced, compassionate and highly professional judges. These distinguished individuals bring to the court the highest standards and strong commitments to the administration of justice.''

I am committed to this proud tradition, which is why we must honor a system of nonpartisanship and cooperation in the selection of Florida's federal judges.

Mr. GRAHAM of Florida. Having said that, I believe the standard for the kind of information the Senate has a right and a need for in order to be able to carry out its advise and consent function is not an ideological or even a precedential standard but, rather, a pragmatic standard. If a person has been, for instance, an academic and has written, as they typically do, extensive articles or books, there is some means by which you can get below and beneath the resume and get some feel of the person who is being considered.

Similarly, if a person has been a judge at the State level, or at other levels within the Federal judiciary, it is likely that they have written opinions or other statements of their jurisprudential feelings which, again, would give you means by which to evaluate and cast an informed vote to consent to a Presidential nomination.

I have been away from the Senate most of the time this matter has been under consideration. I do not serve on the Judiciary Committee, but colleagues whose judgment I respect have indicated they do not feel that as of today we have the information to, in an informed manner, provide that consent.

I believe this is an issue upon which honorable men and women can reach agreement, just as after a series of negotiations, Senator NELSON and I have reached an agreement on the means by which the Florida judicial nominating process will be ordered and respected.

I urge those of my colleagues who have been particularly involved in this to not see today's vote as the last chapter but, rather, as a call to find an honorable way to provide us with the information, given the status of this nominee and the dearth of information which might otherwise be available.

Let me say, Mr. President, I find some irony in the issues with which this Senate is currently dealing. We may be at war as early as next week. This Senate has already voted to authorize that war. There have been a number of rationales submitted for the war.

One of the rationales that has been recently advanced with a great deal of intellectual fervor has been the concept that by taking down Saddam Hussein, we could create a new climate throughout the region of the Middle East and that in that new climate could sprout the seeds of democratic institutions which would, in turn, lead to democracy. That would be a very admirable consequence.

The irony is that at the same time we are hoping that our actions of war will lead to democracy in a region of the world thousands of miles away which has little history of democracy, we are today debating a process that, in my judgment, if not carefully balanced between the executive and legislative branches, has the prospect, as John Adams suggested, of destabilizing one of the key institutions of our more than two centuries of democracy.

I return to my hope that people of good will can find a way to provide to this institution the information that it legitimately requires, and which the Constitution imposes upon us, to make an informed consent to the President's nomination.

I offer as an example of that spirit of cooperation the good deeds that were extended to me by Senator FRIST. Maybe some people who observe this debate observe the Senate in other highly partisan conflicts, such as the one we voted on earlier today, to believe that we are warring armies. Yes, we are people who have strong views and opinions, and we will express those views and support them with our votes. But we also are people who have a respect for our colleagues and a humanity towards them. I think this is the time to draw upon that respect and appreciation for humanity, as well as our responsibilities under the Constitution, to see if we can find a means to close this impasse and move on to the other important business of the Senate.

Mr. President, I appreciate this opportunity. I again thank you and my colleagues for all the expressions of good will during my absence.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I thank my good friend from Florida for his statement. I again welcome him back. I heard in his absence statements from both Republicans and Democrats worried about him. I am glad to see him back. The Senator and his wife are dear and close friends of mine and my wife.

Sometimes people forget the Senate is a family. There are only 100 of us. We tend to know each other and spend time with each other. No matter what political positions we take, we worry about each other's health. We talk about each other's children and where they are going to school.

This is an example of those who were concerned about a very popular Senator. I am glad to see him looking in such great health. I welcome him back.

I thank him, of course, for his very thoughtful statement. I am glad to hear the quotes from a book that I probably enjoyed as much as any in the last 10 years, David McCullough's book on John Adams. I do not own the publishing company or anything else, but I recommend that book to anyone who wants to read it.

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

Mr. LEAHY. Of course.

Mr. REID. Mr. President, this is not a question, but I wish to say, Senator GRAHAM and I came to the Senate together. I have been so impressed with BOB GRAHAM his entire tenure in the Senate because he never does anything halfway; it is always all the way. Whenever he comes to the floor to speak, he is prepared and has thought about what he is going to talk about. Today is no different.

Of course, I am happy to see him back stronger than ever and certainly wish him well in his ambitions politically, even though he may have had a slight setback, but knowing how hard the Senator from Florida works, I am sure he will catch up with the pack.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, it was just 2 days ago we welcomed the Vice President to the Senate for debate scheduled by the majority. I said at that time that I am always glad to see the Vice President here, even though it is a rare appearance for a Vice President of either party.

I wish he had been here for debate about the impending war with Iraq. We are probably the only parliamentary body in the democratic world that has not had a major debate during the past few weeks on Iraq and the war. Or he might have been here for debate on terrorism or homeland defense or the need for action to stimulate the economy and improve the lives of the millions of Americans who have lost jobs over the last 2 years. Actually, there are more Americans losing jobs in a 2-year period than I think has occurred since I have been old enough to vote. Or the Senate might have been acting on a prescription drug benefit for seniors.

Apparently, we are not here to have that debate today nor did the majority schedule debate in the Senate on Tuesday on those important matters. Instead, we are here to hear again the arguments about Mr. Estrada. But not much has changed since last week or since this Tuesday. The administration's obstinacy continues to impede Senate consideration of this nomination.

The distinguished Democratic leader, Senator DASCHLE, pointed a way out of this impasse in a letter to the President on February 11. It is regrettable the President did not respond to that reasonable letter to resolve the issue. Instead, the letter sent this week to the distinguished majority leader, Senator FRIST, was not a response to Senator DASCHLE's realistic approach, but a further effort to minimize the Senate's role in this process by proposing radical changes in Senate rules.

I have great respect for the Office of the Presidency, for whoever holds it. One thing I have learned in 29 years is that Presidents come and Presidents go. The Office of the Presidency exists with its responsibilities, its duties, its rules, its traditions. Just as Senators come and go. No Senator holds a seat for life. No Senator owns a seat in the Senate. But the Senate stays, and the Senate has its rights, and it has its privileges, and it also has its obligations. It has its constitutional duties.

I have been in the Senate with six different Presidents. I have never been in the Senate with a White House that seems to have less understanding of the role of the Senate or more of a desire to overturn well over 200 years of practice and procedures in the Senate. I have never known a White House that thinks more just for the moment and not for the long term.

This may be why we are fast approaching the point where, as some suggest, the White House may get half of its goal of regime change, but they may get it in Great Britain. But I digress.

The real double standard in the matter of the Estrada nomination is that the President selected Mr. Estrada in large part based upon his 4½ years of work in the Solicitor General's Office, as well as for his ideological views. The administration undoubtedly knows what those views are and have seen those work papers. They know what he did. They picked him based on that, but they said even though we picked him based on that, we do not want the Senate to know what it was. We in the Senate cannot read his work, the work papers that would shed the most light on why this 41-year-old should have a lifetime seat on the Nation's second highest court.

We are to a point where the White House simply says, trust us, we know what he wrote and how he thinks and will make decisions, but we do not want you to know what he wrote, just rubberstamp him.

Actually, I would remind them of that made-up quote that President Reagan used to such effect—I happen to agree with President Reagan on it—trust but verify. We would like to verify. President Reagan said, ''Trust but verify.'' They say, trust us. We say, let us verify.

So actually this whole matter is in the hands of the White House. They could move forward with Mr. Estrada easily if they wanted to. Instead, the White House has taken on the attitude that they want to carry out the responsibilities of the Presidency, as awesome as they are, but they also want to carry out the responsibilities of the Senate.

I think they have their hands full carrying out the duties of the White House, with the impending war. We have millions of Americans out of work. We have a stock market that has tanked. We have runaway budget deficits. This is an administration that inherited the largest surpluses in history, and they are about to create the largest deficits in history; an administration that inherited a robust stock market, and we are about to see the stock market go to an all-time low. They have enough to worry about. Let us worry about carrying out the duties of the Senate.

If they would simply cooperate, we could go forward with Mr. Estrada. I mention this because I do not want anybody to make a mistake. The control and the scheduling of whether there will be a vote on Mr. Estrada is in the hands of the White House.

There seems to be a perversion to require the Senate to stumble in the dark about Mr. Estrada's views when he shared these views quite freely with others, and when the administration selected him for this high office based on these views.

Justice Scalia wrote just last year:

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

It was just a week ago that I thanked the Democratic leader and assistant leader and Democratic Senators for speaking and voting in favor of preserving the integrity of the confirmation process. We are acting to safeguard our Constitution and the special role of the Senate in ensuring that our Federal courts have judges who will fairly interpret the Constitution and the statutes we pass for the sake of all Americans.

The administration's obstinacy continues to impede progress to resolve this standoff. The administration remains intent on packing the Federal circuit courts and on insisting that the Senate rubber-stamp its nominees without fulfilling the Senate's constitutional advice and consent role in this most important process. The White House could have long ago helped solved the impasse on the Estrada nomination by honoring the Senate's role in the appointment process and providing the Senate with access to Mr. Estrada's legal work. Past administrations have provided such legal memoranda in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott and Ben Civiletti, and even this administration did so with a nominee to the EPA. Senator DURBIN noted this week that the administration is giving Mr. Estrada bad advice. Instead, the administration should instruct the nominee to answer questions about his views—consistent with last year's Supreme Court opinion by Justice Scalia—and to stop pretending that he has no views.

The White House is using ideology to select its judicial nominees but is trying to prevent the Senate from knowing the ideology of these nominees when it evaluates them. It was not so long ago when then-Senator Ashcroft was chairing a series of Judicial Committee hearings at which Edwin Meese III testified:

I think that very extensive investigations of each nominee—and I don't worry about the delay that this might cause because, remember, those judges are going to be on the bench for their professional lifetime, so they have got plenty of time ahead once they are confirmed, and there is very little opportunity to pull them out of those benches once they have been confirmed—I think a careful investigation of the background of each judge, including their writings, if they have previously been judges or in public positions, the actions that they have taken, the decisions that they have written, so that we can to the extent possible eliminate people eliminate persons who would turn out to be activist judges from being confirmed.

Timothy E. Flanigan, an official from the administration of the President's father, and who more recently served as Deputy White House Counsel, helping the current President select his judicial nominees, testified strongly in favor of ''the need for the Judiciary Committee and the full Senate to be extraordinarily diligent in examining the judicial philosophy of potential nominees.'' He continued:

In evaluating judicial nominees, the Senate has often been stymied by its inability to obtain evidence of a nominee's judicial philosophy. In the absence of such evidence, the Senate has often confirmed a nominee on the theory that it could find no fault with the nominee.

I would reverse the presumption and place the burden squarely on the shoulders of the judicial nominee to prove that he or she has a well-thought-out judicial philosophy, one that recognizes the limited role for Federal judges. Such a burden is appropriately borne by one seeking life tenure to wield the awesome judicial power of the United States.

Although the Senate Judiciary Committee has long recognized correctly, in my view, that positions taken as an advocate for a client do not necessarily reflect the nominee's own judicial philosophy, a long history of cases in which a nominee has repeatedly urged courts to engage in judicial activism may well be probative of a nominee's own philosophy.

Now that the President is not a popularly elected Democrat but a Republican, these principles seem no longer to have any support within the White House or the Senate Republican majority. Fortunately, our constitutional principles and our Senate traditions, practices and governing rules do not change with the political party that occupies the White House or with a shift in majority in the Senate.

Along with this current impasse, the administration has shown unprecedented disregard for the concerns of Senators in taking other unprecedented actions, including renominating both Judge Charles Pickering, despite his ethical lapses, and Judge Priscilla Owen, despite her record as a conservative ''activist'' judge. Both were rejected by the Senate Judiciary Committee after fair hearings and open debate last year. Sending these re-nominations to the Senate is unprecedented. No judicial nominee who has been voted down has ever been re-nominated to the same position by any President. This morning the Republican majority took another unprecedented step in holding a hearing on the re-nomination of Judge Owen, whose nomination had been rejected earlier by the committee. The White House, in conjunction with the new Republican majority in the Senate, is choosing these battles over nominations purposefully. Dividing rather than uniting has become their modus operandi.

Among the consequences of this partisan strategy is that for the last month, the Senate has been denied by the Republican leadership meaningful debate on the situation in Iraq. I commend Senator BYRD, Senator KENNEDY and the other Senators on both sides of the aisle who have nonetheless sought to make the Senate a forum for debate and careful consideration of our nation's foreign policy. The decision by the Republican Senate majority to focus on controversial nominations rather than the international situation or the economy says much about their mistaken priorities. The Republican majority sets the agenda and they schedule the debate, just as they have again here today.

One of the most disconcerting aspects of the manner in which the Senate is approaching these divisive judicial nominations is what appears to be the Republican majority's willingness to sacrifice the constitutional authority of the Senate as a check on the power of the President in the area of lifetime appointments to our Federal courts. It should concern all of us and the American people that the Republican majority's efforts to re-write Senate history in order to rubber-stamp this White House's Federal judicial nominees will cause long-term damage to this institution, to our courts, to our constitutional form of government, to the rights and protections of the American people and to generations to come. I have served in the Senate for 29 years, and until recently I have never seen such stridency on the part of an administration or such willingness on the part of a Senate majority to cast aside tradition and upset the balances embedded in our Constitution so as to expand Presidential power. What I find unprecedented are the excesses that the Republican majority and this White House are willing to indulge to override the constitutional division of power over appointments and long-standing Senate practices and history. It strikes me that some Republicans seem to think that they are writing on blank slate and that they have been given a blank check to pack the courts. They show a disturbing penchant for reading the Constitution to suit their purposes of the moment rather than as it has functioned for over 200 years to protect all American through checks and balances.

The Democratic Leader pointed the way out of this impasse again in his letter to the President on February 11. It is regrettable that the President did not respond to that reasonable effort to resolve this matter. Indeed, the letter he sent this week to Senator FRIST was not a response to Senator DASCHLE's reasonable and realistic approach, but a further effort to minimize the Senate's role in this process by proposing radical changes in Senate rules and practices to the great benefit of this administration. A distinguished senior Republican Senator saw the reasonableness of the suggestions that the Democratic leader and assistant leader have consistently made during this debate when he agreed on February 14 that they pointed the way out of the impasse. Sadly, his efforts and judgment were also rejected by the administration.

More recently, in its edition for next Monday, March 17, a writer in The Weekly Standard suggests that other Senate Republicans, ''several veteran GOP Senate staffers'' and ''a top GOP leadership aide'' asked the White House to shown some flexibility and to share the legal memoranda with the Senate to resolve this matter, but were rebuffed. I ask unanimous consent that a copy of the article from The Weekly Standard be printed in the RECORD.

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

[From the Weekly Standard, Mar. 17, 2003]

FILIBUSTER SI, ESTRADA NO!—THE GREAT REPUBLICAN DIVIDE OVER HOW TO FIGHT FOR BUSH'S JUDICIAL NOMINEE

(By Major Garrett)

It's not clear whether the constitutional definition of ''advice and consent'' will become a casualty of Miguel Estrada's fight for a seat on the D.C. Circuit Court of Appeals, but the possibility is serious and sobering. In a 55–44 vote, Democrats last week defeated a Republican attempt to break their unprecedented partisan filibuster of Estrada's nomination, opening the way for the simple-majority standard for Senate confirmation of judicial nominees to be replaced with a super-majority requirement. The Republic isn't there yet. But it's close.

''If we go very much further there will be obvious consequences,'' said Sen. Jon Kyl, an Arizona Republican. ''This standard will have to be applied to both parties and by both parties. This is very close to the point where you can't pull it back.''

The strain on the Constitution and Senate precedent is now obvious. Less obvious is the toll the Estrada fight has taken on the relationship between the new Senate GOP leadership team and the Bush White House. While GOP senators are loath to admit it, the Estrada debate has drifted on this long because the White House and the GOP leadership could not fashion a cohesive strategy.

Estrada is not the first fight new majority leader Bill Frist would have chosen—at least not under the restrictions imposed by the White House. Senate Republicans believe the White House has severely limited their room to negotiate.

Early on, several veteran GOP Senate staffers warned the White House and Justice Department to prepare for a brawl. They then gingerly asked two questions: Would Estrada answer more questions from Democrats? And was there any flexibility in the

White House's objection to releasing the working memos Estrada wrote while deputy solicitor general in the Clinton Justice Department?

Senior Senate GOP staff told White House and Justice Department officials that cutting a deal on limited Democratic access to Estrada's working papers could lead to his confirmation. The White House refused. There would be no access to Estrada's working papers. Period. This adamantine posture, in the eyes of some in the Senate GOP leadership circles, handcuffed Frist.

''There's some frustration,'' said a top GOP leadership aide. ''From the very beginning we told them that was the only way out and a face-saver for everyone. But it came down to the fact that no one on the White House or Justice team wanted to walk into the Oval Office and say to the president, 'You might have to give up these memos.' ''

The administration's position on the memos reflects its deeply held ethic of aggressively defending executive branch prerogatives. Though the White House has never characterized the Estrada matter as one of executive privilege (it is more akin to lawyer-client privilege), it falls into the broad category of executive branch muscularity. And while most Republicans generally support this posture, some Bush allies on and off Capitol Hill have come to question the administration's fastidiousness in the Estrada fight.

''I understand the principle, and I support it, but on this one it feels belligerent,'' said a longtime Republican lobbyist and ally of the Bush White House.

When a reporter last week asked Sen. Rick Santorum, the GOP conference chairman, if opposition to divulging Estrada's Justice Department memos was permanent, he snapped, ''Ask the White House.''

Conservatives like Sen. Kyl see the Estrada fight as purely ideological and strongly oppose cutting any deal on access to his working papers.

''It's a phony issue, a manufactured issue,'' said Kyl. ''We want to win this, but you don't win it by breaking a principle that has served this nation well for 200 years. And if we deal on the papers, it will be something else.''

But Sen. Harry Reid, the Senate's No. 2 Democrat, has said he will support Estrada if the papers are turned over and nothing objectionable emerges. Enough Democrats to break the filibuster would surely follow Reid, senior Democratic sources say.

''Their guy's not going to get confirmed without them,'' said a top Democratic lawyer who backs Estrada. ''This is not complicated. The White House is not going to confirm him without paying a price.''

If that price seems too high, the White House may want to reexamine the price of the alternative, an increasingly bitter filibuster fight. While protecting the privacy of internal memos at the Justice Department, the White House may be sacrificing the 50-vote majority as the historic benchmark of constitutional fitness for the federal bench. Some Senate Republicans believe a new 60-vote standard for judicial appointments could severely hamper this president and all future presidents. And some Senate Republicans wonder why it's more important to protect executive privilege than a president's power to have judicial nominees confirmed by simple majority vote.

The White House wants the fight to drag out and political pressure to build on centrist Democrats. The White House likes the Hispanic dimension of the Estrada fight and is counting on the weight of editorial and public opinion to turn the tide.

But numerous Republican senators say the Estrada fight, for all its constitutional implications, has yet to resonate with the public. Democratic senators report no political backlash at home and see it as their duty to defend Daschle.

''This is an ideological fight, and this is a fight for Daschle to be taken seriously,'' said a senior aide to a Democratic senator who has teamed up with the White House on economic policy. ''And my boss is with Daschle. He knows he's taken, and will take, enough flak on fiscal policy. This is a fight he's prepared to stick with.''

Absent a deal on the working memos, all Estrada can bank on is White House and Republican promises to fight until they prevail. But no one in the GOP Senate leadership or the Bush White House can explain how or when that will happen.

Mr. LEAHY. It is too bad that the White House will not listen to reason from Senate Democrats or Senate Republicans. If they had, there would be no need for this cloture vote. The White House is less interested in making progress on the Estrada nomination than in trying to make political points and to divide the Hispanic community.

The Supreme Court, in an opinion authored by none other than Justice Scalia, one of this President's judicial role models, instructs that judicial ethics do not prevent candidates for judicial office or judicial nominees from sharing their judicial philosophy and views.

With respect to ''precedent,'' Republicans not only joined in the filibuster of the of Abe Fortas to be Chief Justice of the United States Supreme Court, they joined in the filibuster Stephen Breyer to the 1st Circuit, Judge Rosemary Barkett to the 11th Circuit, Judge H. Lee Sarokin to the 3rd Circuit, and Judge Richard Paez and Judge Marsha Berzon to the 9th Circuit. The truth is that filibusters on nominations and legislative matters and extended debate on judicial nominations, including circuit court nominations, have become more and more common through Republicans' actions.

Of course, when they are in the majority Republicans have more successfully defeated nominees by refusing to proceed on them and have not publicly explained their actions, preferring to act in secret under the cloak of anonymity. From 1995 through 2001, when Republicans previously controlled the Senate majority, Republican efforts to defeat President Clinton's judicial nominees most often took place through inaction and anonymous holds for which no Republican Senator could be held accountable. Republicans held up almost 80 judicial nominees who were not acted upon during the Congress in which President Clinton first nominated them and eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and Committee votes.

Beyond judicial nominees, Republicans also filibustered the nomination of Executive Branch nominees. They successfully filibustered the nomination of Dr. Henry Foster to become Surgeon General of the United States in spite of two cloture votes in 1995. Dr. David Satcher's subsequent nomination to be Surgeon General also required cloture but he was successfully confirmed.

Other Executive Branch nominees who were filibustered by Republicans included Walter Dellinger's nomination to be Assistant Attorney General and two cloture petitions were required to be filed and both were rejected by Republicans. In this case we were able finally to obtain a confirmation vote after significant efforts and Mr. Dellinger was confirmed to that position with 34 votes against him. He was never confirmed to his position as Solicitor General because Republicans had made clear their opposition to him. In addition, in 1993, Republicans objected to a number of State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in cloture petitions. In 1994, Republicans successfully filibustered the nomination of Sam Brown to be an Ambassador. After three cloture petitions were filed, his nomination was returned to President Clinton without Senate action. Also in 1994, two cloture petitions were required to get a vote on the nomination of Derek Shearer to be an Ambassador. And it likewise took two cloture petitions to get a vote on the nomination of Ricki Tigert to chair the FDIC. So when Republican Senators now talk about the Senate Executive Calendar and presidential nominees, they must be reminded that they recently filibustered many, many qualified nominees.

Nonetheless, in spite of all the intransigence of the White House and all of the doublespeak by some of our colleagues on the other side of the aisle, I can report that I believe the Senate will by the end of this week have moved forward to confirm 111 of President Bush's judicial nominations since July 2001. That total would include 11 judges confirmed so far this year and of those, seven would be confirmed this week. With the time agreement on the controversial nomination of Jay S. Bybee to the United States Court of Appeals for the Ninth Circuit in place for later today, it also includes a circuit judge. Those observing these matters might contrast this progress with the start of the last Congress in which the Republican majority in the Senate was delaying consideration of President Clinton's judicial nominees. In 1999, the first hearing on a judicial nominee was not until mid-June. The Senate did not reach 11 confirmations until the end of July of that year. Accordingly, the facts show that Democratic Senators are being extraordinarily cooperative with a Senate majority and a White House that refuses to cooperate with us. We have made progress in spite of that lack of comity and cooperation.

Indeed, by close of business today, we will have reduced vacancies on the federal courts to under 55, which includes

the 20 judgeships the Democratic-led Senate authorized in the 21st Century Department of Justice Appropriations Authorization Act last year. That is an extremely low vacancy number based on recent history and well below the 67 vacancies that Senator HATCH termed ''full employment'' on the federal bench during the Clinton Administration.

Our D.C. Circuit has special jurisdiction over cases involving the rights of working Americans as well as the laws and regulations intended to protect our environment, safe work places and other important federal regulatory responsibilities. This is a court where privacy rights will either be retained or lost, and where thousands of individuals will have their final appeal in matters that affect their financial future, their health, their lives and their liberty, as well as the lives of their children and generations to come.

If a nominee's record or responses raise doubts or concerns, these are matters for thorough scrutiny by the Senate, which is entrusted to review all of the information and materials relevant to a nominee's fairness and experience. No one should be rewarded for stonewalling the Senate and the American people. Our freedoms are the fruit of too much sacrifice to fail to assure ourselves that the judges we confirm will be fair judges to all people and in all matters.

It is unfortunate that the White House and some Republicans have insisted on this confrontation rather than working with us to provide the needed information so that we could proceed to an up-or-down vote. Some on the Republican side seem to prefer political game playing, seeking to pack our courts with ideologues and leveling baseless charges of bigotry, rather than to work with us to resolve the impasse over this nomination by providing information and proceeding to a fair vote. I was disappointed that Senator BENNETT's straightforward colloquy with Senator REID and me on February 14, which pointed to a solution, was never allowed by hard-liners on the other side to yield results. I am disappointed that all my efforts and those of Senator DASCHLE and Senator REID have been rejected by the White House. The letter that Senator DASCHLE sent to the President on February 11 pointed the way to resolving this matter reasonably and fairly. Republicans would apparently rather engage in politics.

The Republican majority is wedded to partisan talking points that are light on facts but heavy on rhetoric. There has often been an absence of fair and substantive debate and a prevalence of name calling by the other side.

I urge the White House and Senate Republicans to end the political warfare and join with us in good faith to make sure the information that is needed to review this nomination is provided so that the Senate may conclude its consideration of this nomination. I urge the White House, as I have for more than two years, to work with us and, quoting from a recent column by Thomas Mann of The Brookings Institute, to submit ''a more balanced ticket of judicial nominees and engag[e] in genuine negotiations and compromise with both parties in Congress.''

The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation and, in this case, he has even managed to divide Hispanics across the country, unlike any of the prior nominees of both Democratic and Republican presidents. The nomination and confirmation process begins with the President, and I urge him to work with us to find a way forward to unite the nation on these issues, instead of to divide the Nation.

The presiding officer. The Senator from Utah.

Mr. HATCH. Mr. President, this is the fifth week of debate on Mr. Estrada's nomination. My Democratic colleagues have had unlimited opportunities to make their case. Some of them oppose him; others support him. But one thing has remained clear through this debate: There is no good reason to continue this route of obstruction by denying Mr. Estrada an up or down vote.

If my count is accurate, we have sought more than 17 times to come to an agreement with the Democratic leadership for a time to vote on Mr. Estrada's nomination. Each time, they rejected our efforts.

Yet, the Democratic leadership has complained that the Senate should move on to consider other important matters. All the while, they have continued to fight voting on Mr. Estrada's nomination—the very thing that would allow the Senate to focus its energies on other matters.

This filibuster of Mr. Estrada's nomination is just another step in a calculated effort to stall action on President Bush's judicial nominees. A few weeks ago, I spoke at length on the Senate floor about the Senate Democrats' weapons of mass obstruction. I mentioned that when the Democrats controlled the Senate, we saw them bottle up nominees in committee despite more than 100 vacancies in the federal judiciary. They have continued to try to inject ideology into the confirmation process by demanding that nominees like Miguel Estrada answer questions that other nominees rightly declined to answer, but were nevertheless confirmed. They have sought production of all unpublished opinions of nominees who are sitting Federal judges—a demand that has resulted in the production of hundreds of opinions and required the expenditure of a significant amount of resources, money, effort, the time. Most recently, they have demanded that a nominee, Mr. Estrada, produce confidential internal memoranda that are not within his control. Although this tactic made its debut with Mr. Estrada, I expect that we will see it repeated with other nominees.

Each of these weapons of obstruction were at their most potent when Democrats controlled the Judiciary Committee. Now things have changed, and Democrats can no longer keep nominees like Miguel Estrada bottled up in committee while they made demands for answers to questions that are unanswerable, and for confidential documents that are not subject to production. Democrats no longer control the committee, and as a result Miguel Estrada nomination has made it to the Senate floor. This means that the obstructionists among the Senate Democrats have turned to their ultimate weapon—the filibuster.

Filibusters of judicial nominees allow a vocal minority to prevent the majority of Senators from voting on the confirmation of a Federal judge—a prospective member of our third, coequal branch of Government. It is tyranny of the minority, and it is unfair to the nominee, to the judiciary, and to the majority of the Members of this body who stand prepared to fulfill their constitutional responsibility by voting on Mr. Estrada's nomination.

I have taken to the floor time and time again, for Democratic and Republican nominees alike, to urge my fellow Senators to end debate by voting to invoke cloture, which requires the vote of 60 Senators. Most, if not all, of these occasions did not represent true filibusters, but were situations in which nominees were nevertheless forced to overcome the procedural obstacle of a cloture vote. And no lower court nominee has ever been defeated through use of a filibuster—all previous lower court nominees who endured a cloture vote were ultimately confirmed.

I am not alone in my disdain for forcing judicial nominees through a cloture vote. I think that it is appropriate at this point to note that many of my Democratic colleagues argued strenuously on the floor of the Senate for an up-or-down vote for President Clinton's judicial nominees.

The distinguished minority leader himself once said:

> As Chief Justice Rehnquist has recognized: ''The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.'' An up or down vote, that is all we ask . . . .

The ranking member of the Judiciary Committee echoed these sentiments when he said:

> . . . I, too, do not want to see the Senate go down a path where a minority of the Senate is determining a judge's fate on votes of 41.

Another one of my Democratic colleagues, Senator KENNEDY, himself a former chairman of the Judiciary Committee, had this to say:

> Nominees deserve a vote. If our Republican colleagues do not like them, vote against them. But do not just sit on them—that is obstruction of justice.

The distinguished Senator from California, Mrs. FEINSTEIN, who also serves on the Judiciary Committee, likewise said in 1999:

A nominee is entitled to a vote. Vote them up; vote them down.

She continued:

It is our job to confirm these judges. If we do not like them, we can vote against them. That is the honest thing to do. If there are things in their background, in their abilities that do not pass muster, vote no.

My other colleague from California, Senator BOXER, said in 1997:

It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.

My colleague from Delaware, Senator BIDEN, also said in 1997:

I . . . respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor.

I could go on, but I think I have made my point. I had hoped that I could count on each of my Democratic colleagues who made statements supporting an up-or-down vote for President Clinton's judicial nominees to join me in voting for cloture on Miguel Estrada. I had hoped that their remarks in the past were not merely about partisanship, but about the fairness that should be extended to all judicial nominees, regardless of which President nominated them.

Last week, I was wrong. But today, there is a second chance—another chance to set aside partisanship for fairness.

For this cloture vote to succeed, a supermajority of 60 Senators must vote to end the filibuster of Mr. Estrada's nomination. I regret that it has come to this, because forcing a supermajority vote on any judicial nominee is a maneuver that needlessly injects even more politics into the already over-politicized confirmation process. I believe that there are certain areas that should be designated as off-limits from political activity. The Senate's role in confirming lifetime-appointed article III judges—and the underlying principle that the Senate perform that role through the majority vote of its members—are such issues. Nothing less depends on the recognition of these principles than the continued, untarnished respect in which we hold our third branch of Government—the one branch of Government intended to be above political influence.

So I now say once again to my Democratic friends: Vote for Miguel Estrada or vote against him. Do as their conscience dictates you must. But do not prolong the obstruction of the Senate by denying a vote on his nomination. Do not cast their vote against cloture today. Do not continue to treat the third branch of our Federal Government—the one branch intended to be insulated from political pressures—with such disregard that we filibuster its nominees. Do not perpetuate this campaign of unfairness. Vote for him or vote against him, but just vote.

This first filibuster in the history of the Senate on a substantive judgeship for a circuit court of appeals nominee is unprecedented, something that should never happen, that we prevented from happening when I was chairman of the committee during the Clinton administration. My friends on the other side are using a fiction that they know the administration cannot fulfill, and that is demanding a fishing expedition into all of the papers in the Solicitor General's Office pertaining to Mr. Estrada's recommendations on appeals, certiorari, and amicus curiae. They know the administration cannot do that. They knew that when they wrote the letter making that unreasonable demand. This is what we call fiction, a red herring, so they can justify the filibuster they are undergoing and act very pious, that they are really trying to learn more about this man, in spite of the fact that they conducted the hearings.

The hearings went all day. The transcript is almost 300 pages. They have all of his Supreme Court briefs. They have all of his Supreme Court arguments. They know more about Mr. Estrada than they know about any circuit court of appeals judgeship nominee we have had over the last 27 years that I have been in the Senate, as far as I know. There might be one or two they might know as much about as they do Mr. Estrada, but this is a fiction. It is a red herring. We have a letter from seven former Solicitors General, all living former Solicitors General, from Archibald Cox to Seth Waxman, four of the seven Democrat Solicitors General, three of who worked with Miguel Estrada in the Solicitor General's Office, because he worked, I might add, 4 years for the Clinton administration and 1 year for the Bush administration. Those former Solicitors General say these types of documents should never be given, because it would chill the ability of the Solicitor General to get honest and decent opinions on very important matters for the people's business, and the people's business does not make any delineation between Democrats and Republicans. The Solicitor General represents all of the people.

I will now say a few words about Priscilla Owen before I go back to the hearing.

I rise for the purpose of reading a Dear Colleague letter that I have written and distributed today concerning the nomination of Justice Priscilla Owen of Texas to be a judge on the US Court of Appeals for the Fifth Circuit. I have distributed this to every Senator in the Senate.

DEAR COLLEAGUE: On September 4 of last year I took the unusual step of writing to the entire Senate to express my outrage at the untruthful and misleading attacks made against Justice Priscilla Owen of Texas, who was nominated by President Bush to serve on the Fifth Circuit Court of Appeals. As you know, Justice Owen enjoyed the support of both of her home-state Senators last Congress, and again enjoys such support. I am writing today so that you have all information related to this important information.

In September, I expressed my concern that a continued pattern of misinformation about a nominee, like the one generated about Justice Owen, could undermine the integrity both of the judiciary and of the branch of government in which we are privileged to serve. A day later, the Judiciary Committee refused to allow Justice Owen a vote by the whole Senate on a party-line vote of 10 to 9.

Notably, one week later The Washington Post joined scores of other newspapers across the country in expressing support for Justice Owen and severely criticized the Committee's conduct. I have enclosed its editorial. The Post described the Committee's vote as ''a message to the public that the confirmation process is not a principled exercise but an expression of political power.'' The Post also noted that although they disagreed with some of her opinions, ''none seems beyond the range of reasonable argument.''

Despite the independent support of dozens of newspapers, prominent Democrats, and fourteen past Texas bar presidents, critics have portrayed Justice Owen as being ''far from the mainstream.'' Yet Texas voters have twice elected her overwhelmingly to statewide office. The American Bar Association has unanimously rated her well qualified, its highest rating. In fact, Justice Owen was the first judicial nominee with the ABA's highest rating to be voted down by the Judiciary Committee.

In my opinion, Justice Owen is perhaps the best sitting judge I have ever seen nominated. She is brilliant as well as compassionate. Justice Owen's record of applying the law as written is among the very best of any judicial nominee ever presented to the Senate. This is particularly true in her now famous decisions concerning the Texas law requiring parental notification when minor children obtain abortions. In these cases, no one's right to choose was implicated. The only right at stake was the right articulated by the Texas legislature of parents to have knowledge of, and an opportunity for involvement in, one of the most important decisions of their children's lives. In those cases, Justice Owen did exactly what any restrained judge should do: She applied Texas statutory law as directed by Supreme Court's precedent, including Roe v. Wade. Ironically, it is Justice Owen's opponents—the same ones who accuse her of being an ''activist''—who would have her ignore the legislature and the Supreme Court in order to reach a political result.

Justice Owen is also accused of deciding cases against consumers, workers, and the injured and sick. This charge is not only factually without basis, but also belies the accusation of ''activism.'' Only those obsessed with outcomes, rather than the law governing the facts of a particular case, would be compelled by a mere counting up of wins and losses among categories of parties before a judge.

Working as a judge is like being an umpire; Justice Owen cannot be characterized as pro-this or pro-that any more than an umpire can be analyzed as pro-strike or pro-ball. I hope you will agree that a judge's job is to apply the law to the case at hand, not to mechanistically ensure that court victories go 50/50 for plaintiffs and defendants, consumers and corporations.

Justice Owen was also notably assailed by her critics using incorrectly the words of one of her biggest supporters, Alberto Gonzales, President Bush's White House Counsel. Judge Gonzales served with Justice Owen on the Texas Supreme Court and has written publicly that she is ''extraordinarily well

qualified to serve as a judge on the federal appeals court.'' Rather than focus on his ringing endorsement, however, detractors instead sensationalized a disagreement that Judge Gonzales had not with Justice Owen, but with other dissenting judges in a case involving the Texas parental notification law.

Justice Owen is an excellent judge. Her opinions, whether majority, concurrences, or dissents, could be used as a law school text book illustrating exactly how an appellate judge should think, write, and do the people justice by effecting their will through the laws adopted by their elected legislatures. She clearly approaches these tasks with both scholarship and mainstream American common sense.

As a new Congress takes a fresh look at this nomination, I hope you will join me in informing the American people of the truth about Justice Owen and in warning them of the grave danger posed by an uninformed politicization of the federal judiciary. I hope you will urge our colleagues to do the right thing when Justice Owen is again voted on by the Committee and goes to the Senate floor for confirmation.—Signed, ORRIN G. HATCH.

We are holding a hearing today on Justice Owen's nomination. I invite all of my colleagues to attend. In fact, I encourage them to do so. I want everyone to get to know Justice Owen and have the opportunity to hear from her firsthand. This is a very unusual invitation, I know. But these are unusual times in the Senate for judicial nominations, and Justice Owen is a particularly important and impressive nominee. I urge my colleagues to come to the hearing taking place in Dirksen 106 and see for themselves what an extraordinary person and jurist she is.

We are having difficulty with the President's judicial nominees. Every one of these circuit nominees is being contested, some more than others, but all of them are quite rabidly being contested. Miguel Estrada is a perfect illustration of someone who is totally competent, totally equipped to do the job, honest, decent, has earned his stripes, has the highest rating from the American Bar Association, the gold standard, according to our colleagues on the other side. Yet he is being filibustered here now in the fifth or sixth week.

We have a cloture vote today. I hope my colleagues will consider this. I hope we can get some of the more clear thinking colleagues on the other side to start voting for Mr. Estrada, to start voting for cloture, so we can end this outrageous debate and put a qualified person on the court. Let's not hide behind a fishing expedition to get documents they know no self-respecting administration is going to give to them, and using that as a basic shield to say they are not doing something unjust to Miguel Estrada. They are being very unjust, very unfair. It is not right. We ought to stop it.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. LOTT. Let me take this opportunity, first, to express my appreciation and the appreciation of the Senate for the outstanding work that is being done by Senator HATCH as chairman of the Judiciary Committee. That is a tough job. It always has been. It seems to be getting tougher with every passing Congress. I know from personal experience during my tenure as the Republican Leader, both in the majority and the minority, of the diligent work and good work that has been done by Senator HATCH to move judicial nominations through the process.

Quite often, it was very difficult in the committee and on the floor. There have been accusations that, perhaps, he had unfairly delayed judges in the past. But I can tell you this: My knowledge was, and memory is, that he worked very hard to move a lot of judges, several of whom were highly controversial but were eventually confirmed anyway.

Yes, at the end of the last term some judicial nominees of the Clinton administration were not completed, but if you compare the number that were left over to similar situations in the past, it was a smaller number. When you look at the number of judges that have been confirmed under the stewardship and leadership of Senator HATCH, it has to be a record in terms of overall numbers compared with previous chairmen and previous administrations.

I will talk more about specifics, but while Senator HATCH is here I wanted to recognize the untiring and patient and effective efforts of the Senator from Utah on this very worthwhile effort.

Mr. HATCH. Will the Senator yield?

Mr. LOTT. I am happy to yield.

Mr. HATCH. I thank my dear colleague for those kind remarks. As he knows, there have been some on our side that did not want hardly any of the Clinton judges, especially the more liberal ones, some of whom have gone to circuit court of appeals.

Mr. LOTT. If the Senator will allow me to interject, I remember the Senator from Utah received some criticism from this side of the aisle, and so did I, as we tried to move some of these judges through the process. We may have voted against them, which I did in at least a couple of instances, but I thought they deserved a vote. And we made sure that those votes took place.

Mr. HATCH. We did that.

I thank my colleague because as the leader he helped me to do the job for the Clinton administration. The President deserved the best we could do. Do we get everything done? No one has ever gotten everything done at the end of anyone's administration.

He is right. Our record was much superior to when the Democrats controlled the committee.

I thank my colleague.

Mr. LOTT. I again thank Senator HATCH for the effort. I remember even last year at one point I think we had approximately 70 judges on the calendar, a large number, and there was disagreement about how to proceed. There was an indication we would have to have a recorded vote on every one of them, even though many of them could be moved on a voice vote with no problem. It looked like we were not going to be able to move them, but Senator DASCHLE and I kept talking about them and kept working on it, and we began to move them in blocks. We finished the process and we had moved, I think, almost all of them, if not all of them. That was an example of how there can be cooperation in this very important area of confirmation of judges.

Mr. HATCH. Will the Senator yield?

Mr. LOTT. I am happy to yield.

Mr. HATCH. I ask the Senator on our side, when he concludes, Senator KENNEDY has 2 minutes. We yielded our time.

Mr. LOTT. I will be happy to yield to the Senator from Massachusetts when I have finished my remarks.

Mr. LOTT. Let me talk briefly about the situation we find ourselves in, specifically, the nomination of Miguel Estrada to be a DC Circuit Court of Appeals Judge.

I made a brief speech about a month ago saying I thought this was a highly qualified candidate, one who had lived the American dream, having been born in Honduras, coming here when he was 17, and highlighting the phenomenal life he has lived. I thought it was a matter we would do pro forma. I assumed we would have some debate and some disagreement, but since he is a great nominee, I thought he would be confirmed a month ago or more. But here we are still.

I will not go back and recount all of his qualifications. All the Senators know, and most of America knows now, Miguel Estrada is certainly qualified to be a circuit court of appeals judge. He is qualified by education. He went to some of the best schools in America where he was Phi Beta Kappa, a Magna Cum Laude graduate, editor of the Harvard Law Review at that citadel of great conservative legal thinking. Now, he is accused of being conservative; a committed conservative, despite his broad background. He was editor of the Harvard Law Review, if you will. So by education he is qualified.

There are some points and comments from the Federalist Papers, a couple of considerations, that you should look into when you consider a judge. One is whether or not they are fit in the area of character. This is a man that has lived an exemplary life. There is no allegation of impropriety, no allegation of ethical misconduct. None whatsoever. So by education, by character, by ethics, and by experience he is an incredible nominee.

Some say he has not been a lower court judge. That is not always the criteria. We have a lot of people who have gone to the circuit court of appeals, even the Supreme Court, without having earlier been a judge in another court. But he has been involved by working with the Federal judiciary, and by serving as an Assistant to the Solicitor General. He has argued 15 cases before the Supreme Court. I have only been able to witness one case where I sat in the audience and listened to the snail darter case before

the Supreme Court. Listening to the arguments in that one case was enough for me. I left and never returned. But surely, clearly, everyone in this body knows this man is qualified to be a judge on the circuit court of appeals.

So what is the problem? What are they saying?

There is the suggestion that maybe he has a certain philosophy or a certain ideology, and that is a disqualification. If that were a disqualification, there are many judges I voted on during the Clinton years and at other points during my service in this chamber whom I would have voted against. I voted for Justice Ruth Bader Ginsburg even though I didn't agree with her philosophy and knew I probably wouldn't agree with a lot of her decisions, but she was qualified. She was the President's choice.

I think the burden is on the Senate to show why we should not confirm a nominee if they are qualified, have the proper experience, and don't have ethical problems. She met those criteria. I voted for her.

What is the problem here? Some Senators want more questions asked? Alright, that is a legitimate point. It is part of the advice and consent role of the Senate. Let's hear what the nominees have to say.

He had a long hearing before the Judiciary Committee. Every question in the world that could be thought of was asked of this nominee. He was asked hypothetical cases to which I personally would not respond. I thought that on a lot of things he was asked, he was very careful in how he responded. You don't want to prejudice your decision. You don't want to pass judgment on a Supreme Court decision on which your future decisions as a judge may be based. The number one factor for the Senate to keep in mind on this point, however, is that he has offered to meet with any Senator personally who wants to meet with him.

Secondly, Senators on both sides have been told if you want to ask more questions, then submit the questions, and he will answer the questions.

Finally, even a day or so ago, Senator FRIST—against some advice that perhaps this pattern should not be started—said Mr. Estrada would be willing to go back to the Judiciary Committee so that interested Senators could ask him some more questions, with an understanding he would get a vote. Unfortunately, that offer was turned down, too. They say they want to ask him more questions, but when they are given a chance to meet with the nominee or a chance to ask more questions, they don't ask them. When we say he is willing to go back for another hearing under these circumstances—no, they don't want that either. What do they say they want? They want internal memos from the time that he was working as an Assistant to the Solicitor General.

I believe that maybe something can be worked out on that. But you cannot set that precedent. Let me tell you why. If all these internal memos are made public in this instance, I guarantee future young attorneys in the Solicitor's Office, they will not be giving honest advice. No, no, they will pull their punches because they will know, anything I say in this written document may someday be used against me being confirmed as a Federal judge or in some other way. So this is not an insignificant request.

Should we try to find a way to work it out? I think so. But then I have been accused in the past of trying to get things done.

If everybody wants to make a statement around here to make their constituency happy, great. This is the way to do it. The People for the American Way and other liberal organizations—if Estrada is blocked—they will be happy. These political reasons are why many Senators on the other side of the aisle are opposing Mr. Estrada, but I want to point out that there are some notable exceptions, and I hope there will be more.

But on our side, we are able to say: This is an Hispanic nominee, and our core constituency groups are going to be happy. Republicans are happy, with us duking it out for this nominee to be on the Circuit Court of Appeals. Many will say that they are taking a stand, which is great.

How great is it when he is not confirmed? That is the goal here. I am not interested in blaming somebody or appeasing someone on our side. This man is qualified. We have vacancies on this court that should be filled. It is irresponsible for us not to find a way to work this out and get this nominee on the court.

So I say a pox on everybody's house if we are just trying to find a way to score political points with this man's life on hold while we do this thing that we are doing here. I really do think we are setting a dangerous precedent here, one we did not set in the past. We have not filibustered Federal judicial nominees. It is clearly not in the Constitution. I think advice and consent means 51 votes, not two-thirds; not 60—51.

You might say the Constitution doesn't make that clear. In the Constitution, article II, section 2, when the Framers of the Constitution were writing this out, when they intended supermajority votes, they said so. It clearly says in article II, section 2: To make treaties provided two-thirds of the Senators present concur. They specify two-thirds. When they said advice and consent, I believe they intended and expected, unless there were serious problems, that these nominees to the Federal judiciary would be confirmed with a vote, an up-or-down vote of 51.

I think what we are doing here is questionable constitutionally. We have never done this on a district or circuit court nominee before. Now we are about to do it.

Let me tell you what is scary. It may not be just about nominee Estrada. Next it is going to be Priscilla Owen. They are going to filibuster Priscilla Owen, a qualified woman who is a brilliant Supreme Court Justice in the State of Texas. I am sure they will extend it to other nominees, as well—maybe Sutton, maybe Cook, maybe Pickering. Is this a pattern?

Who in this room, and outside this room, believes that this tit-for-tat will not continue? Do they think that once we, Heaven forbid, ever have another Democrat President, that Republicans are not going to return the favor? We are going to filibuster them.

We have to stop this. I think we, the leaders, the Republicans, the Democrats, past and present, have to assume responsibility for how this has continued to escalate.

Did we do some things during the Clinton years with judges that we should not have done? Yes. But did we take up the cause and try to do the right thing on many occasions? Yes. That is why I am here today, because I do believe I have been a part of the solution and part of the problem in the past. I acknowledge it. But when I was the Majority Leader, I called up nominations that were controversial.

I remember on one occasion we did have a threatened filibuster and a cloture vote which was defeated. I made a speech standing right there saying: My colleagues, we don't want to do this. This was a judge nominated by President Clinton, but really it was a judge whom ORRIN HATCH recommended. His name was Brian Theodore Stewart. Unfortunately, though, cloture was defeated. So we started talking about that, and cooler heads prevailed. Shortly thereafter, we confirmed this judge. That was the only time we came close, during the past 7 years, to having a filibuster on a judge. We got right up to it, but we didn't do it, because we knew we couldn't do it and that it was wrong. So, fortunately we backed away from it.

In terms of what was done in the past, again, I resisted filibusters. I didn't want to have filibusters, even though I voted against Judges Paez and Berzon on their up-or-down confirmation votes. But Senator HATCH and I took a lot of grief. We said, no, they have come out of committee, they deserve an up-or-down vote. They got the vote, and they were confirmed. They each got an up-or-down vote, not a filibuster. Some people thought they should have been filibustered. I didn't think they should have been, and they weren't.

My colleagues, I ask us here today: Where do we go from here? What is next?

The argument can be made that you filibuster a lot of different ways. You don't let them out of committee; I know about that approach. The last Congress, I know two judges who were defeated on a straight party-line vote in the Judiciary Committee. They were not allowed to come to the floor to have a vote, and I believe the Constitution requires they should come here

and have a vote, not be killed by 11 Senators in the Judiciary Committee, or 10, or whatever the number may be.

So, I accept part of the blame. I acknowledge that Republicans have not always handled judges in the right way. But I ask the question again, what next? We are going to kill them in committee? We are going to kill them by filibuster? This is wrong, my colleagues. We should not do this.

We are starting down a trail that is unfair, and it is going to come back to haunt this institution, haunt both parties, and damage the lives of innocent men and women.

I urge my colleagues, find a way to move this judicial nominee, Miguel Estrada. He deserves better. He should be confirmed.

Some people say: Wait, if we don't stop him now, he may be on the Supreme Court. Well let's test him. Let's confirm him. Let's see how he does. We might be surprised. We might even be disappointed. I have been surprised at times. I voted for a couple of Supreme Court Justices and wished I could take the vote back because when they got there, they were not what I thought they were going to be. Men and women can do surprising things when they become Federal judges for life.

So I just felt a need to come down and recall some of the things that have happened, admit some of the mistakes, try to sober this institution up. This is a great institution that does pay attention to precedents. It does, sometimes, start in the wrong direction, but most of the time we pull ourselves back from the brink; we find a way to get it done. I hope and I certainly feel down deep we are going to find a way to not set this precedent and not defeat this qualified nominee with a filibuster.

I yield the floor.

Mr. KENNEDY. Mr. President, I want to make a brief response to the points made by our colleagues on the floor and in the press during the past week.

It is not true that majority rule is the only rule in our country. The purpose of the great checks and balances under the Constitution is to protect the country from the tyranny of the majority. As far as shutting off debate in the Senate is concerned, majority rule has not been the rule since 1806. Even in our presidential elections, majority rule is not the rule, or we would have a different President today.

There is nothing even arguably unconstitutional about the Senate Rule providing for unlimited debate unless and until 60 Senators vote to cut off debate. The same Constitution which gave the Senate the power of advice and consent gave the Senate the power to adopt its own rules for the exercise of all of its powers, including the rules for exercising our advice and consent power.

The Constitution does not say that judges shall be appointed by the President as he wishes. It says that they shall be appointed by the President with the advice and consent of the Senate. We are not potted plants decorating one end of Pennsylvania Avenue. We play a very special role under the Constitution. The Founders gave us numerous powers to balance and moderate the powers of the President. They gave us longer terms than the President, and staggered our terms, so we would be less subject to the passions of the time. Clearly, we have the power and the responsibility to oppose the President when he refuses to provide us with the only documentation that can tell us what kind of person he has nominated for a lifetime appointment on the Nation's second highest court.

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to the consideration of Executive Calendar No. 36, which the clerk will report.

NOMINATION OF JAY S. BYBEE, OF NEVADA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The assistant legislative clerk read the nomination of Jay S. Bybee, of Nevada, to be United States Circuit Judge for the Ninth Circuit.

The PRESIDING OFFICER. Under the previous order, there will now be 6 hours of debate equally divided in the usual form on the nomination.

The Senator from Nevada.

Mr. REID. Mr. President, Senator LEAHY, the manager of this side, requested that I speak now.

Mr. President, I am pleased that we will be moving forward on the nomination of Jay Bybee for U.S. Court of Appeals for the Ninth Circuit. This is an important job which Jay Bybee will have. It is the largest circuit as far as the number of judges that we have.

The chairman of the Judiciary Committee is here. I would be happy to yield to the chairman of the committee.

Mr. President, the Ninth Circuit is the largest circuit, with a full complement of 28 or 29 judges. It is a circuit that certainly is important to my State, the State of Nevada, and the entire western part of the United States. It is a controversial circuit. There have been efforts made in the past to change the makeup of the court and have States divided so we could create another circuit. No one can take away from the importance of this circuit. The State of California alone, with some 35 million people, is under the jurisdiction of the Ninth Circuit Court of Appeals.

The last time I had a conversation with a member of the Bybee family was on an airplane. Mrs. Bybee was on the plane. She is a lovely woman. Certainly Jay Bybee is a proud husband and father, as well he should be. I commented to Mrs. Bybee, Why does he have to write so much? He has written Law Review articles. He has written lots of articles on very controversial subjects. But the good thing about Jay Bybee is that he can explain why he wrote those articles. He is a person—while some may disagree with the conclusions that he reached in his large articles—who has the intellectual capacity to explain his reasoning. He has excellent legal qualifications, not only from an educational perspective but from an experience perspective.

He served as legal adviser during the first Bush administration. He has helped to teach a generation of new lawyers as a former professor at the University of Nevada, Las Vegas Boyd School of Law, and he has taught at other places. He is someone who will bring distinction to the Ninth Circuit.

He was favorably reported by the Senate Judiciary Committee on February 28. The swift pace of this nomination demonstrates how the process can work when both sides of the aisle work together, when the President works with Senators of the other party, and when the advise and consent clause of our Constitution is respected.

Senator JOHN ENSIGN and I work closely on all issues that affect Nevada, and on judges it is certainly no different. JOHN ENSIGN is a class act. The way he handles being in the majority is classic. We know the difference, both having served in the majority. It would be certainly easy for him just to submit a name and not run it past me. But, of course, he didn't. When he came up with the name Bybee, I said of course.

I have a lot of reasons for supporting people named Bybee. One reason is—I don't know the lineage—because there are a lot of Bybees in Utah and Nevada. But when I was in college I fought for a man by the name of ''Spike'' Bybee. He was a police officer in Cedar City, UT. But he devoted long hours of his time training fighters. ''Spike'' moved to Las Vegas where he became a respected probation officer. But my fondest memories of ''Spike'' Bybee were during the time he spent with me taking me in Arizona, Utah, and Nevada as my manager. Anyway, just for no other reason than I traveled around the country with someone who helped me through some difficult times—a fine man. He died at a young age from a very bad disease. I have the name Bybee in my mind from some of the times in my youth.

I indicated Senator ENSIGN and I consulted on Mr. Bybee's nomination when Senator LEAHY chaired the Judiciary Committee for a short time. Mr. Bybee was reported out of the Judiciary Committee in compliance with the committee's rules when Senator HATCH was chairman.

The consultation and respect for the rules is why we are here today, moving forward to fill the Ninth Circuit seat held by Proctor Hug, Jr. since 1977.

I must say a few things about Proctor Hug. He is a fine man and a great athlete. He went to Sparks High School. He was an all-star athlete in football, track, and basketball. He ran track in college, was State debate champion. He was student body president at Sparks High School. He met his