United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 108th CONGRESS, FIRST SESSION

Vol. 149 WASHINGTON, WEDNESDAY, FEBRUARY 12, 2003 No. 26

Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

The PRESIDENT pro tempore. The Senate will be led in prayer today by our guest Chaplain, Dr. John Tolson, First Presbyterian Church, Orlando, FL.

PRAYER

The guest Chaplain offered the following prayer:

Our Gracious Heavenly Father, we thank You for the gift of this day, for Your incredible love for us and for the privilege and opportunity of and the freedom in which we live. May our lives reflect our gratitude for all these things by living according to Your purpose.

Father, we realize that our children, to a large extent, will become like us as parents. In the same way the shaping of our Nation will be molded by its leaders. May we be willing to ask if we, as leaders, are like what You want our Nation to become.

Your word says, ''Blessed are the poor in spirit.'' In our great and rich Nation, too many find themselves spiritually poor. Father, help them to open their eyes to Your love. Please help all of us to understand that no woman or man can open his or her heart without humility and willingness to accept their dependence on You.

On this day when we honor President Lincoln and all he did to unite our Republic, we recall how he never lost sight of Your hand of grace and guidance.

Father, help and encourage the Members of this great body to aspire to excellence as Senators, as leaders, and as Americans. Build Your character into their lives so that their conduct will be a reflection of You.

And now, may the living Lord be with you this day; may He go above you to watch over you, behind you to encourage you, beside you to befriend you, and within you to give you peace and before you to show you His way. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDING OFFICER (Mr. BROWNBACK). The majority leader is recognized.

SCHEDULE

Mr. FRIST. The Senate will resume consideration of the nomination of Miguel Estrada to be a circuit judge for the DC Circuit. We have spent 4 days and over 20 hours debating this eminently qualified nominee. Yesterday 14 Senators participated in the debate. To afford Senators ample time to fulfill their constitutional advise and consent responsibilities and to facilitate unfettered consideration of this nomination, I expect tonight to be a very late night. Senators are encouraged to come to the floor over the course of today to engage in this debate.

The Democratic leader and I have discussed options to conclude the Senate's constitutional responsibilities as they pertain to this nominee. My colleagues on the other side of the aisle continue to object to any time agreement and refuse to set a time for a dispositive vote. My objective is to provide all Senators with sufficient opportunity to debate the merits of this nominee and then to move this nomination to a final vote.

Therefore, once again, I encourage Senators to come to the floor today and this evening and, if necessary, tomorrow and tomorrow evening, to express their views so a final vote can be scheduled. I do hope the Democratic leader will assist me in achieving this goal.

In addition, the Senate continues to wait for the completion of the very important conference report on the omnibus appropriations bill. Those discussions have gone on over the course of the last several days, well into last night and over the course of this morning. This omnibus appropriations bill—I believe I speak for both sides of the aisle—is a must-pass item to be addressed and ultimately passed prior to any recess.

Mr. REID. While the majority leader is on the floor, Mr. President, we on this side are prepared to stay as long, of course, as the leader asks us to do so. But because we will have to have people here to make sure there are people on the floor to discuss whatever they feel they want to discuss during this nomination process, do you have an idea how late you might want us to stay tonight?

Mr. FRIST. Mr. President, I want to provide ample opportunity. We have been on this nomination since last Wednesday. I would expect we will be here very late into the evening; I don't know what time. But if we are to achieve having a recess at all, I do want to be able to fully address the issue of the omnibus appropriations and the Estrada nomination. I would think it is going to be very late tonight, but I can't give an exact time.

Mr. REID. As I said last night, as Senator HATCH and I were closing the Senate, everything has been said, but not quite everyone has said it, on the nomination of Miguel Estrada. Both sides have talked about what they like and dislike about this nomination. Yesterday, of course, there were a lot of repetitive statements.

We will be here. I think it is quite clear that we won't be speaking much about Miguel Estrada as the day proceeds. We will want to talk about

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Printed on recycled paper.

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Nevada.

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

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

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

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

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

RESERVATION OF LEADER TIME

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

EXECUTIVE SESSION

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

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

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

The PRESIDING OFFICER. Who seeks recognition?

The Senator from Vermont.

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Utah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. HATCH. Sure.

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

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

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

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

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

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

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

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

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

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

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

Mr. HATCH. And both do.

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

Mr. HATCH. Not one bit.

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

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

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

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

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

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

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

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

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

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

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

Mr. HATCH. I don't recall.

Mr. DURBIN. I think the answer is no.

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

(Ms. MURKOWSKI assumed the chair.)

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

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

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

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

Mr. DURBIN. They have been sent out?

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

Mr. DURBIN. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> I do not think you want me to be in the position of giving you a statement on the fifth amendment, and then, if I am confirmed and sit on the Court, when a fifth amendment case comes up, I will have to disqualify myself.

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

> It would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging.

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

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

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

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

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

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

Finally, the ABA's Model Code of Judicial Conduct also prohibits a nominee from discussing his personal views.

Canon 5A(3)(d) of the ABA's Model Code of Judicial Conduct states that prospective judges ''shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office . . . [or] make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.''

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

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

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

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

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

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

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

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

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

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

Mr. HATCH. Will the Senator yield?

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

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

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

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

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

Mr. HATCH. Will the Senator yield?

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

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

Mr. REID. I say to my friend——

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

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

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

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

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

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

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

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

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

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

Mr. REID. Yes, I will.

Mr. HATCH. Has the Senator read this transcript?

Mr. REID. I have gone through the transcript.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. HATCH. Matter of personal privilege.

The PRESIDING OFFICER. The Senator from Utah.

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

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

The PRESIDING OFFICER. The Senator is correct.

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

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

Mr. HATCH. Parliamentary inquiry.

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

Mr. REID. No.

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

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

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

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

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

Mr. REID. Article II, section 2.

I am happy to yield to my friend from Utah.

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

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

Mr. REID addressed to Chair.

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

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

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

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

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

Mr. HATCH. If not, I apologize.

The PRESIDING OFFICER. The Senator has the floor.

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

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

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

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

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

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

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

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

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

Mr. REID. Will my colleague yield?

Mr. HATCH. I am happy to yield.

Mr. REID. The Senator raised a personal privilege.

Mr. HATCH. I withdrew that.

Mr. REID. And then I yielded the floor.

Mr. HATCH. You did.

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

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

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

The PRESIDING OFFICER. The Democratic whip.

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

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

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

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

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

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

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

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

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

Mr. REID. And the Bush administration.

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

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

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

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

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

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

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

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

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

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

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

Mr. REID. That was yesterday.

Mr. LEAHY. That was yesterday.

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

Mr. LEAHY. Absolutely.

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

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

The PRESIDING OFFICER. Without objection.

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

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

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

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

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

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

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

I yield to my friend from Illinois.

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

I yield to my friend from Illinois.

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

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

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

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

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

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

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

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

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

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

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

Mr. Estrada answered:

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

Senator SCHUMER asked:

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

Answer:

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

Senator SCHUMER:

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

Answer:

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

That is the end of that exchange.

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

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

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

Mr. REID. That was another dandy they did.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer—this is Miguel Estrada:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Illinois.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from New Jersey.

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

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

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

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

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

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

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

THE BUSH BUDGET

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

capital—almost inevitably leads to higher interest rates.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I yield the floor.

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

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

The assistant legislative clerk proceeded to call the roll.

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

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

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

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

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

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

CLINTON JUDICIAL NOMINEES NOT CONFIRMED IN CONGRESS FIRST NOMINATED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Vermont.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. And we do have mutual friendship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He said:

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

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

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

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

These things could have been printed up a month before.

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

Then he goes on to say:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

PAUL BENDER,
Professor of Law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I don't quite read the Constitution that way.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Judiciary Committee, U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: This letter requests that the Committee return to the Justice Department all copies of documents produced by the Department in response to Committee requests for records relating to the nomination of Robert Bork to the Supreme Court. As Assistant Attorney General John Bolton noted in an August 24, 1987, letter to you, many of the documents provided the Committee, ''reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.'' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

Although the Committee's need for these documents has ceased, their privileged nature remains. As we emphasized in our August 24, 1987, letter, production of these documents to the Committee did not constitute a general waiver of claims of privilege. We therefore request that the Committee return all copies of all documents provided by the Department to the Committee, except documents that are clearly a matter of public record (e.g., briefs and judicial opinions) or that were specifically made a part of the record of the hearings.

Please contact me if you have any questions. Thank you for your cooperation.

Sincerely,

THOMAS M. BOYD,
Acting Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, September 2, 1987.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Judiciary Committee, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork to the Supreme Court of the United States, and provided in response to requests made to date by Committee staff. These documents are being provided under the conditions stated in my August 24, 1987 letter to you.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

Attachments.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, August 10, 1987.

Hon. EDWIN MEESE III,
Attorney General, Department of Justice, Washington, DC.

DEAR GENERAL MEESE: As part of its preparation for the hearings on the nomination of Judge Robert Bork to the Supreme Court, the Judiciary Committee needs to review certain material in the possession of the Justice Department and the Executive Office of the President.

Attached you will find a list of the documents that the Committee is requesting. Please provide the requested documents by August 24, 1987. If you have any questions about this request, please contact the Committee staff director, Diana Huffman, at 224–0747.

Thank you for your cooperation.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Chairman.

REQUEST FOR DOCUMENTS REGARDING THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Please provide to the Committee in accordance with the attached guidelines the following documents in the possession, custody or control of the United States Department of Justice, the Executive Office of the President, or any agency, component or document depository of either (including but not limited to the Federal Bureau of Investigation):

1. All documents generated during the period from 1972 through 1974 and constituting, describing, referring or relating in whole or in part to Robert H. Bork and the so-called Watergate affair.

2. Without limiting the foregoing, all documents generated during the period from 1972 through 1974 and constituting, describing, referring or relating in whole or in part to any of the following:

a. any communications between Robert H. Bork and any person or entity relating in whole or in part to the Office of Watergate Special Prosecution Force or its predecessors- or successors-in-interest;

b. the dismissal of Archibald Cox as Special Prosecutor;

c. the abolition of the Office of Watergate Special Prosecution Force on or about October 23, 1973;

d. any efforts to define, narrow, limit or otherwise curtail the jurisdiction of the Office of Watergate Special Prosecution Force, or the investigative or prosecutorial activities thereof;

e. the decision to reestablish the Office of Watergate Special Prosecution Force in November 1973;

f. the designation of Mr. Leon Jaworski as Watergate Special Prosecutor;

g. the enforcement of the subpoena at issue in *Nixon* v. *Sirica*;

h. any communications on October 20, 1973 between Robert H. Bork and then-President Nixon, Alexander Haig, Leonard Garment, Fred Buzhardt, Elliot Richardson, or William Ruckelshaus;

l. any communications between Robert H. Bork and then-President Nixon, Alexander Haig and/or any other federal official or employee on the subject of Mr. Bork and a position or potential position as counsel to President Nixon with respect to the so-called Watergate matter;

m. any action, involvement or participation by Robert H. Bork with respect to any issue in the case of *Nader* v. *Bork*, 366 F. Supp. 104 (D.D.C. 1975), or the appeal thereof;

n. any communication between Robert H. Bork and then-President Nixon or any other federal official or employee, or between Mr. Bork and Professor Charles Black, concerning Executive Privilege, including but not limited to Professor Black's views on the President's ''right'' to confidentiality as expressed by Professor Black in a letter or article which appeared in the *New York Times* in 1973 (see Mr. Bork's testimony in the 1973 Senate Judiciary Committee hearings on the Special Prosecutor);

o. the stationing of FBI agents at the Office of Watergate, Special Prosecution Force on or about October 20, 1973, including but not limited to documents constituting, describing, referring or relating to any communication between Robert H. Bork, Alexander Haig, or any official or employee of the Office of the President or the Office of the Attorney General, on the one hand, and any official or employee of the FBI, on the other; and

p. the establishment of the Office of Watergate Special Prosecution Force, including but not limited to all documents constituting, describing, referring or relating in whole or in part to any assurances, representations, commitments or communications by any member of the Executive Branch or any agency thereof to any member of Congress regarding the independence or operation of the Office of Watergate Special Prosecution Force, or the circumstances under which the Special Prosecutor could be discharged.

3. The following documents together with any other documents referring or relating to them:

a. the memorandum to the Attorney General from then-Solicitor General Boark, dated August 21, 1973, and its attached ''redraft of the memorandum intended as a basis for discussion with Archie Cox'' concerning ''The Special Prosecutor's authority'' (typeset copies of which are printed at pages 287–288 of the Senate Judiciary Committee's 1973 ''Special Prosecutor'' hearings);

b. the letter addressed to Acting Attorney General Bork from then-President Nixon, dated October 20, 1973., directing him to discharge Archibald Cox;

c. the letter addressed to Archibald Cox from then-Acting Attorney General Bork, dated October 20, 1973, discharging Mr. Cox from his position as Special Prosecutor;

d. Order No. 546–73, dated October 23, 1973, signed by then-Acting Attorney General Bork, entitled ''Abolishment of Office of Watergate Special Prosecutor Force'';

e. Order No. 547–73, dated October 23, 1973, signed by then-Acting Attorney General Bork, entitled ''Additional Assignments of Functions and Designation of Officials to Perform the Duties of Certain Offices in Case of Vacancy, or Absence therein or in Case of Inability or Disqualification to Act'';

f. Order No. 551–73, dated November 2, 1973, signed by then-Acting Attorney General Bork, entitled ''Establishing the Office of Watergate Special Prosecution Force'';

g. the Appendix to Item 2.f., entitle ''Duties and Responsibilities of Special Prosecutor'';

h. Order No. 552–73, dated November 5, 1973, signed by then-Acting Attorney General Bork, designating ''Special Prosecutor Leon Jaworski the Director of the Office of Watergate Special Prosecution Force'';

i. Order No. 554–73, dated November 19, 1973, signed by then-Acting Attorney General Bork, entitled ''Amending the Regulations Establishing the Office of Watergate Special Prosecution Force''; and

j. the letter to Leon Jaworski, Special Prosecutor, from then-Acting Attorney General Bork, dated November 21, 1973, concerning Item 2.i.

4. All documents constituting, describing, referring or relating in whole or in part to any meetings, discussions and telephone conversations between Robert H. Bork and then-President Nixon, Alexander Haig or any other federal official or employee on the subject of Mr. Bork's being considered or nominated for appointment to the Supreme Court.

5. All documents generated from 1973 through 1977 and constituting, describing, referring or relating in whole or in part to Robert H. Bork and the constitutionality, appropriateness or use by the President of the United States of the ''Pocket Veto'' power set forth in Art. I, section 7, paragraph 2 of the United States Constitution, including but not limited to all documents constituting, describing, referring or relating in whole or in part to any of the following:

a. The decision not to petition for certiorari from the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kennedy* v. *Sampson*, 511 F.2d 430 (1947);

b. the entry of the judgment in *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C. 1976); and

c. the policy regarding pocket vetoes publicly adopted by President Gerald R. Ford in April 1976.

6. All documents constituting, describing, referring or relating in whole or in part to Robert H. Bork and the incidents at issue in *United States* v. *Gray, Felt & Miller*, No. Cr. 78–00179 (D.D.C. 1978), including but not limited to all documents constituting, describing, referring or relating in whole or in part to any of the exhibits filed by counsel for Edward S. Miller in support of his contention that Mr. Bork was aware in 1973 of the incidents at issue.

7. All documents constituting, describing or referring to any speeches, talks, or informal or impromptu remarks given by Robert H. Bork on matters relating to constitutional law or public policy.

8. All documents constituting, describing, referring or relating in whole or in part either (i) to all criteria or standards used by President Reagan in selecting nominees to the Supreme Court, or (ii) to the application of those criteria to the nomination of Robert H. Bork to be Associate Justice of the Supreme Court.

9. All documents constituting, describing, referring or relating in whole or in part to Robert H. Bork and any study or consideration during the period 1969–1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities identified in the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component or document depository thereof.)

10. All documents constituting, describing, referring or relating in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States with respect to the following cases:

a. *Evans* v. *Wilmington School Board*, 423 U.S. 963 (1975), and 429 U.S. 973 (1976);

b. *McDonough* v. *Morgan*, 426 U.S. 935 (1976);

c. *Hills* v. *Gautreaux*, 425 U.S. 284 (1976);

d. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976);

e. *Roemer* v. *Maryland Board of Public Education*, 426 U.S. 736 (1976);

f. *Hill* v. *Stone*, 421 U.S. 289 (1975); and

g. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1975).

GUIDELINES

1. This request is continuing in character and if additional responsive documents come to your attention following the date of production, please provide such documents to the Committee promptly.

2. As used herein, ''document'' means the original (or an additional copy when an original is not available) and each distribution copy of writings or other graphic material, whether inscribed by hand or by mechanical, electronic, photographic or other means, including without limitation correspondence, memoranda, publications, articles, transcripts, diaries, telephone logs, message sheets, records, voice recordings, tapes, film, dictabelts and other data compilations from which information can be obtained. This request seeks production of all documents described, including all drafts and distribution copies, and contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

3. In the event that any requested document has been destroyed or discarded or otherwise disposed of, please identify the document as completely as possible, including without limitation the date, author(s), addressee(s), recipient(s), title, and subject matter, and the reason for disposal of the document and the identity of all persons who authorized disposal of the document.

4. If a claim is made that any requested document will not be produced by reason of a privilege of any kind, describe each such document by date, author(s), addressee(s), recipient(s), title, and subject matter, and set forth the nature of the claimed privilege with respect to each document.

(Mr. TALENT assumed the Chair.)

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

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

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

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

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

The answer was: Yes.

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

The witness answered: Yes.

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

The witness said: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 10, 1988.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: This letter requests that the Committee return to the Justice Department all copies of documents produced by the Department in response to Committee requests for records relating to the nomination of Robert Bork to the Supreme Court. As Assistant Attorney General John Bolton noted in an August 24, 1987, letter to you, many of the documents provided the Committee, ''reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.'' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

Although the Committee's need for these documents has ceased, their privileged nature remains. As we emphasized in our August 24, 1987, letter, production of these documents to the Committee did not constitute a general waiver of claims of privilege. We therefore request that the Committee return all copies of all documents provided by the Department to the Committee, except documents that are clearly a matter of public record (e.g., briefs and judicial opinions) or that were specifically made a part of the record of the hearings.

Please contact me if you have any questions. Thank you for your cooperation.

Sincerely,

THOMAS M. BOYD,
Acting Assistant Attorney General.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U.S. SENATE,
Washington, DC, February 11, 2003.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: We are writing in reference to your nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia Circuit. Pursuant to the Constitution, the Senate is to act as a co-equal participant in the confirmation of judges to the Federal bench. Unlike nominations made by a President for Executive Branch appointments, judicial nominees are reviewed by the Senate for appointment to lifetime positions in the Judicial Branch.

The Senate has often requested and received supplemental documents when it is considering controversial nominations or when evaluating a candidate with a limited public record. The Chairman of the Senate Judiciary Committee wrote to your Administration on May 15, 2002 to request such supplemental documents to assist in Senate consideration of the Estrada nomination. In particular, the request was made for appeal recommendations, certiorari recommendations, and amicus recommendations that Mr. Estrada worked on while at the Department of Justice.

Prior Administrations have accommodated similar Senate requests for such documents. Such documents were provided during Senate consideration of the nominations of Robert H. Bork, William Bradford Reynolds, Benjamin Civiletti, Stephen Trott, and William H. Rehnquist.

Your Administration has refused to accommodate the Senate's request for documents in connection with the Estrada nomination. That refusal was a matter of inquiry at the confirmation hearing held on this nomination on September 26, 2002. Following the hearing, Senator Schumer wrote to the Attorney General on January 23, 2003, to follow up on the request.

In addition to requests for documents, Senators frequently question judicial nominees during their confirmation hearings to determine their judicial philosophy, views and temperament. For example, then-Senator John Ashcroft asked nominees: ''Which judge has served as a model for the way you would conduct yourself as a judge and why?'' Mr. Estrada refused to answer a similar question.

During consideration of President Clinton's judicial nominees, Republican Senators asked repeated questions regarding nominees' judicial philosophy, views on legal matters, and approaches to interpreting the Constitution. They insisted on and received answers. During his consideration before the Senate Judiciary Committee, Mr. Estrada failed to answer these kinds of questions. These questions have not only been routinely asked by the Senate, they have been routinely answered by other nominees—including other nominees from your Administration.

For the Senate to make an informed decision about Mr. Estrada's nomination, it is essential that we receive the information requested and answers to these basic legal questions. Specifically we ask:

1. that you instruct the Department of Justice to accommodate the requests for documents immediately so that the hearing process can be completed and the Senate can have a more complete record on which to consider this nomination; and

2. that Mr. Estrada answer the questions that he refused to answer during his Judiciary Committee hearing to allow for a credible review of his judicial philosophy and legal views.

We would appreciate your personal attention to this matter.

Sincerely,

TOM DASCHLE.
PATRICK LEAHY.

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

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

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

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

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

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

Dear Mr. Chairman:

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

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

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

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

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

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

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

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

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

Dear Mr. Chairman:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The hearing record of Judge Bork's nomination to the Supreme Court demonstrates that the Committee received access to a limited number of documents related to three specific subjects of heightened interest to the Committee, two of which were related to Judge Bork's involvement in Watergate-related issues and triggered specific concerns by the Committee. The vast majority of memoranda authored or received by Judge Bork when he served as Solicitor General were neither sought nor produced. And the limited category of documents that were produced to the Committee did not reveal the internal deliberative recommendations or analysis of Assistants to the Solicitor General regarding appeal, certiorari, or amicus recommendations in pending cases.

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

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

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

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

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

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

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

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

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

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

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

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

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

Sincerely,

JAMIE E. BROWN,
Acting Assistant Attorney General.

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

Mr. REID. Objection.

The PRESIDING OFFICER. Objection is heard.

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

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

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

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

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

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

I yield the floor.

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

Mr. KYL. I thank the Chair.

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

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

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

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

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

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

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

Answer: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Democratic whip.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I don't have an opinion.

Give us a case you disagree with.

I don't have an opinion.

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

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

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

Miguel Estrada's legal memoranda.

Here is what we have: Nothing.

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

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

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

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

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

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

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

I have no opinion on that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I said the President said: The game is over.

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

That game is over.

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

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

TRIBUTE TO JOE MEADOWS

Mr. BYRD. Madam President, this past Saturday my longtime, good friend, and former staff member, Joe Meadows, passed away.

Joe Meadows was a dedicated, hardworking, conscientious, sincere, and loyal individual. As the mail clerk in my office in the Hart Building, he managed the mailroom for me. He did his

job effectively and efficiently. And everyone else on the staff liked him.

One couldn't help but like Joe Meadows. From time to time, when I went into his section of the office, I would find Joe Meadows with a handful of papers, letters, correspondence, and files in one hand. And with his glasses down over his nose, he would look up over his glasses.

He was a wonderful man. He rarely talked about it, this quiet, soft-spoken, hard-working, unassuming man. He was also one of the best country fiddle players in the United States. He was a bluegrass musician, born in a small coal town in southern West Virginia, on the last day of 1934.

Joe never learned to read a note of music.

Does the distinguished Senator from New York have memories concerning the year 1934?

Mr. SCHUMER. Madam President, I appreciate the Senator yielding. I say to the Senator, my memories are those my parents told me.

Mr. BYRD. Well, the Senator, I take it, was not around in 1934?

Mr. SCHUMER. I was not.

Mr. BYRD. OK. Well, I was a high school senior in 1934. I graduated that year. And we were hearing talk, in those days, about a gadget that would allow one to see a person as that person spoke or would allow one to see a person who played the violin as the violin was being played. That was a few years right after the invention of the television. Television was invented in 1926. And so I am talking about 1934, just 8 years after television was invented. Eight years after television was invented, 1934.

Oh, we heard about this gadget, as I say. It was coming and would be on the market in a few years. My, what a change that made. 1934; well, the last day of 1934, Joe Meadows was born. He never learned to read a sheet of music, but he could really play it. He could make that fiddle cry. He could make it scream. He did have neighbors and a father who played the fiddle.

He had an extraordinary gift for music: Joe Meadows from the hills of southern West Virginia. He is one of the finest bluegrass musicians I ever heard. Like many lads in southern West Virginia, including myself, Joe Meadows grew up listening to the Grand Ole Opry on the radio. The Grand Ole Opry, I can remember the times when that was all we had to listen to on Saturday night—the Grand Ole Opry.

Yes, I can remember the Solemn Old Judge and Deford Bailey. Deford Bailey played that harmonica. Oh, he could make that harmonica scream. He could make that harmonica play ''Freight Train Blues,'' Deford Bailey. And there was Sam and Kirk McGee. There was Arthur Smith and His Dixieliners: ''Going on down that Dixie line, walking in my sleep''—Arthur Smith and His Dixieliners. He played ''The Mockingbird.'' He could make that mockingbird sing on that violin.

But Joe Meadows could do anything that Arthur Smith could do, and better.

The Grand Ole Opry, that is all we had in those days. On Saturday nights we would square dance and listen to the Grand Ole Opry. There was the Fruit Jar Drinkers. That was kind of a lousy band. I probably shouldn't say that. But I did not think as much of the Fruit Jar Drinkers as I did the Dixieliners, by any means. And Roy Acuff used to sing ''That Great Speckled Bird'' Saturday nights. Saturday nights, 1934.

I graduated from high school in 1934. I liked a pretty, pretty girl, too. She was not in my class. She was in the next class behind me, and she was the daughter of a coal miner. And that coal miner played a fiddle. His name was Fred James.

I took a liking to that daughter of the coal miner. And I tell you, you young ladies, and young men as well, who are pages here, I tell you how I courted my girl, my sweetheart, how I won her hand in marriage.

There was another boy in my class at Mark Twain High School in 1934. His name was Julius Takach. His father had a grocery store at Ury, what we called Cooktown, about 3 miles south of Stotesbury where I lived. And Julius Takach would, every morning, come to school with his pockets filled with that candy and chewing gum, bubble gum, and so on, from his father's store.

Now, I tell you, I made it my business to be the first to greet Julius at the schoolhouse door upon his arrival every day because he would give me some of that candy and chewing gum.

I tell you, it was something to be able to present your girl, your sweetheart, a piece of bubble gum. And I never let her know that I did not buy that, I did not purchase that gum or candy. I did not let her know it was given to me, but it was given to me by Julius Takach.

I would meet her when the classes changed, and I would give her that candy and chewing gum. Boy, what a hit I thought I was, giving that pretty girl that candy and chewing gum.

Well, now, 65 years and almost 9 months after I married that pretty girl, I am here to tell these young men who are pages, that is the way you court your girl, with another boy's bubble gum.

Mr. SCHUMER. Will my friend and leader from West Virginia yield?

Mr. BYRD. Yes.

Will the CONGRESSIONAL RECORD please note that there was laughter.

The PRESIDING OFFICER. The Senator from New York.

Mr. BYRD. Would the reporter kindly note there was laughter again in the CONGRESSIONAL RECORD. We have to make that CONGRESSIONAL RECORD come alive.

Mr. SCHUMER. My colleague from West Virginia, if he might yield——

Mr. BYRD. Yes.

Mr. SCHUMER. Is making everything come alive in this Chamber. We have not had a happier moment in a long time. And I very much appreciate the stories he is telling. I was going to say, I guess we all ought to take this up, because 65 years of marriage to Erma—and we all hope and pray she is in good health again; and I hope she is—is something we should all pay very good attention to.

Now, I don't know, these days, if the young ladies will just accept bubble gum. You might have to do a little more than that, maybe a whole basket of candy or something. But it is good for us to know.

I did not want to interrupt my colleague. I just, in terms of the scheduling, ask if it might be all right to ask unanimous consent that after the Senator from West Virginia is finished I be recognized for the time that I might need.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SCHUMER. Madam President, if I may continue, I try to remember great speeches. One of the best speeches I ever heard was made by our colleague from West Virginia when he came to the floor, it must have been about a year and a half ago, and talked, with as much love as he has for his employee who has passed and almost as much love as for his wife, about the beauties of coming to West Virginia on a vacation. It was one of the finest, nicest speeches I ever heard. I will never forget it, and I think this one is going to be just as memorable. I look forward to hearing my friend continue. I thank him for his courtesy.

Mr. BYRD. Madam President, I thank the distinguished senior Senator from New York for his observations. I am very grateful to him.

Like many lads in southern West Virginia, including myself, Joe Meadows grew up listening to the Grand Ole Opry on radio—that was back in the days of the Great Depression—as well as ''Farm and Fun Time'' and other radio programs that featured country and bluegrass music. And Joe Meadows absorbed it all. His ear was fixed on and naturally attuned to the fiddle playing. Joe listened. Joe learned. And later, Joe performed what he had heard. At the age of 16, Joe Meadows began performing with Melvin and Ray, the Goins Brothers, and from there he went on to tour with and recorded with the greatest names in country and bluegrass music including Jim and Jesse, the Stanley Brothers, and the legendary Bill Monroe and his Blue Grass Boys.

Joe Meadows' musical career included 25 years on the road as a professional fiddle player and a 7-year run at the Grand Ole Opry. He had toured Europe four times and Japan once where he was incredibly well received. Before I stopped playing the fiddle, Joe Meadows and I would sometimes sit down on weekends and play our fiddles together. We usually taped our sessions, and then we listened to our recordings together to see how we could improve our

playing. Well, he couldn't improve his playing much, but I had plenty of room to improve my own. I always hoped to be as smooth in handling that bow, that fiddle bow as Joe was. He had complete control of that fiddle bow. I don't think I ever got there, but he never stopped trying to help me.

Joe Meadows was not only naturally endowed with a strong and supple bow arm, the good Lord blessed him with a great pair of fiddler hands.

I never have had the pleasure to observe anyone whom I liked to listen to better than I liked Joe Meadows. He had nimble, quick fingers, and he used them beautifully.

The bluegrass and mountain music and old-time fiddling world has lost a great musician. I have lost a good friend. West Virginia has lost a good and gracious son.

My wife Erma and I extend our deepest condolences to Joe Meadows' family and to his many friends.

Let fate do her worst.
There are relics of joy,
Bright dreams of the past
That she cannot destroy.

They come in the nighttime
Of sorrow and care,
And bring back the features
That joy used to wear.

Long, long be my heart
With such memories filled,
Like the vase in which roses
Have once been distilled.

You may break, you may shatter
The vase, if you will,
But the scent of the roses
Will hang, 'round it still.

ON THE BRINK OF WAR

Mr. BYRD. Madam President, to contemplate war is to think about the most horrible of human experience. On this February day, as this Nation stands at the brink of battle, every American on some level must be contemplating the horrors of war.

My wife says to me at night: Do you think we ought to get some of those large bottles, the large jugs, and fill them with water? She says: Go up to the attic and see if we don't have two or three there. I believe we have two or three there.

And so I went up to the attic last evening and came back to report to her that, no, we didn't have any large jugs of water, but we had some small ones, perhaps some gallon jugs filled with water. And she talked about buying up a few things, groceries and canned goods to put away.

I would suspect that kind of conversation is going on in many towns across this great, broad land of ours. And yet this Chamber is for the most part ominously, dreadfully silent. You can hear a pin drop. Listen. You can hear a pin drop. There is no debate. There is no discussion. There is no attempt to lay out for the Nation the pros and cons of this particular war. There is nothing.

What would Gunning Bedford of Delaware think about it? What would John Dickinson of Delaware think about it? What would George Read think about it? What would they say?

We stand passively mute in the Senate today, paralyzed by our own uncertainty, seemingly stunned by the sheer turmoil of events. Only on the editorial pages of some of our newspapers is there much substantive discussion concerning the prudence or the imprudence of engaging in this particular war. I can imagine hearing the walls of this Chamber ring just before the great war between the States, a war that tore this Nation asunder and out of which the great State of West Virginia was born.

But today we hear nothing, almost nothing, by way of debate. This is no small conflagration that we contemplate. It is not going to be a video game. It may last a day or 6 days. God created Earth, and man, the stars, the planets, and the Moon in 6 days. This war may last 6 days. It may last 6 weeks. It could last longer. This is no small conflagration that we contemplate. This is no simple attempt to defang a villain. No, this coming battle, if it materializes, represents a turning point in U.S. foreign policy and possibly a turning point in the recent history of the world.

This Nation is about to embark upon the first test of a revolutionary doctrine applied in an extraordinary way, at an unfortunate time—the doctrine of preemption, no small matter—the idea that the United States or any other nation can legitimately attack a nation that is not imminently threatening but which may be threatening in the future.

The idea that the United States may attack a sovereign government because of a dislike for a particular regime is a radical, new twist on the traditional idea of self-defense. It appears to be in contravention of international law and the U.N. Charter. And it is being tested at a time of worldwide terrorism, making many countries around the globe wonder if they will soon be on our hit list, or some other nation's hit list.

High-level administration figures recently refused to take nuclear weapons off the table when discussing a possible attack on Iraq. What could be more destabilizing? What could be more world shattering? What could be more future shattering? What could be more unwise than this kind of uncertainty, particularly in a world where globalism has tied the vital economic and security interests of so many nations so closely together?

There are huge cracks emerging in our time-honored alliances. One wonders what is going to happen, and about what is happening to the United Nations. One should pause to reflect on what is happening there at the United Nations, formed 54 years ago. And we say: If you are not with us, you are against us. That is a pretty hard rule to lay down to the United Nations. If you are not with us, you are against us. If you don't see it our way, take the highway. We say to Germany and we say to France—both of whom have been around longer than we—if you don't see it our way, we will just brush you to the side.

Do we fail to think about a possible moment down the road, a bit further on, when we may wish to have Germany and France working with us and thinking with us, standing with us, because there is a larger specter, at least in my mind, looming behind the specter of Saddam Hussein and Iraq. There looms a larger specter, that of North Korea, which has one or two nuclear weapons now, and others within reach within a few weeks. So there are huge cracks, I say, emerging in our time-honored alliances, and U.S. intentions are suddenly subject to damaging worldwide speculation.

Anti-Americanism based on mistrust, misinformation, suspicion, and alarming rhetoric from U.S. leaders is fracturing the once solid alliance against global terrorism which existed after September 11, 2001.

Here at home, people are warned of imminent terrorist attacks, with little guidance as to when or where such attacks might occur. Family members are being called to active duty, with no idea of the duration of their stay away from their hearthside, away from their homes, away from their loved ones, with no idea of the duration of their stay or what horrors they may have to face, perhaps in the near future. Communities are being left with less than adequate police and fire protection, while we are being told that a terrorist attack may be imminent. What about those communities like little Sophia, WV?

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

Mr. BYRD. Yes, I am happy to yield.

Mr. DURBIN. I am happy the Senator has taken the floor today. We have spent most of our time discussing other matters. But this is a critically important matter in West Virginia and Illinois.

I ask the Senator, as a matter of record, if he would kindly recount, since September 11, the efforts he has personally made, as well as speaking on behalf of this side of the aisle in the caucus, to try to bring together the necessary resources and funds so that we can be prepared to deal with acts of terrorism against the United States. We were just alerted this weekend that we were on something called the orange alert. The Senator noted that his wife asked what does this mean in terms of water and protecting our families and our houses.

Would the Senator be kind enough to tell us for the record, as we reflect on whether we are prepared to deal with terrorism, what we have tried to do—unsuccessfully—since September 11 to respond to this challenge?

Mr. BYRD. Madam President, I thank the very able and distinguished Senator from Illinois who is a graduate of the other body where I believe he served on the Appropriations Committee.

He serves on the Senate Appropriations Committee. I need only respond

in a brief way at this point to the incisive question which the distinguished Senator has asked. I refer him to the CONGRESSIONAL RECORD upon several occasions last year when I said to the Senate that I was bringing to the floor, or said to the Appropriations Committee, that I was bringing an amendment up dealing with homeland security, and I shall do that again, hopefully before this week is over.

Let me say briefly in response to the able Senator, time and time again the Senator has worked with me and with every other Senator on the Senate Appropriations Committee, Republicans and Democrats alike, to report measures from the Senate Appropriations Committee unanimously that provided moneys for homeland security.

I remember our providing $2.5 billion—$2.5 billion—for homeland security. We designated it in the committee as an emergency item, and all that remained to be done—all that remained to be done—in order to have that $2.5 billion immediately flow to the policemen, the law enforcement officers, the firefighters, the health emergency personnel all over this country, all that needed to be done was for the President of the United States to attach his signature and likewise designate that $2.5 billion as an emergency.

How little to ask. But how much it would have meant to the first responders in the many towns and cities and rural communities in Illinois, in North Carolina, in West Virginia, and cities and hamlets all over this country if the President had but condescended in that moment to sign his name on that item, making it an emergency item.

The law requires that for an item to be declared an emergency item, both the Congress and the President have to designate the item as an emergency. Congress did its part, and, in that case, that involved $2.5 billion. The President literally gave the back of his hand to that effort on the part of the elected representatives of the American people in this Chamber and on that committee. He gave the back of his hand to that effort on the part of Congress to provide $2.5 billion for the local responders and people in the health laboratories all over this country, for border security, airport security, port security, and all of the many facets that are involved in homeland security. He turned his back on that effort.

Then last year, I believe in November of this past year when we had the omnibus appropriations bill before the Senate, I offered an amendment, a $5 billion amendment, an amendment making $5 billion available for homeland security. Did the administration support that amendment? No, the administration fought it, and the amendment went down in flames, as it were, on the floor of the Senate on virtually a party-line vote.

That $5 billion would have gone a long way, would have been out there today when we have this orange alert scaring the American people—I am not saying it is not appropriate to have an orange alert, but we have seen alert after alert after alert, and in spite of the alerts that have been so often set forth in this country by the administration's own people, the administration, the President, have turned their backs on these efforts of the Senate Appropriations Committee by unanimous votes, including the Republicans on the committee, to provide ample moneys for homeland defense.

Again, having lost the $5 billion, I came back with an amendment providing for $3 billion. We slimmed down—you can go to the store and get the Slim Fast at the Giant. I go to the store and do the shopping for my wife. She does not need Slim Fast, but I sometimes get Slim Fast. Well, we slimmed fast that $5 billion and brought it down to $3 billion, thinking we would pick up some votes with the administration's support.

Did we get any more votes? No, the administration was against the $3 billion, and today they are telling us all, we better be on watch day and night.

Mr. DURBIN. Will the Senator yield for another question?

Mr. BYRD. Yes.

Mr. DURBIN. Madam President, the Senator is probably preeminent in this Chamber in his knowledge of history, and he certainly knows the history leading up to World War II when a Member of the House of Commons by the name of Winston Churchill took to the floor week after week, month after month, year after year, warning the people of England that the looming crisis, the rise of Nazism and fascism and their failure to prepare. William Manchester's famous biography of that period of Winston Churchill's life is entitled ''Alone'' because he stood alone warning the people of England of the crisis that was to come.

I say to my colleague from the State of West Virginia, his role in this crisis facing America has been Churchillian in that he has taken the leadership in the Senate time and again to warn us of a looming crisis. I ask him if he agrees with most people that to have an orange alert and to tell mothers and fathers across America to put aside some bottles of water, buy some duct tape and plastic sheeting, and prepare for the crisis of terrorism is not enough; that we as a nation should have taken this looming crisis seriously long ago?

I believe I know the answer to this question, but, Madam President, I thank my colleague from West Virginia for his leadership. I thank him for standing on this floor and reminding us that there is still an unfulfilled agenda, and that if we face terrorism, we have to be honest with the American people. We have tried in the Senate, but we have failed. We are not as prepared as we should be to face this threat.

I ask the Senator from West Virginia—I am not going to take any more time from his great comments—if he would comment on the Churchill analogy.

Mr. BYRD. The Senator is preeminently correct. His mention of William Manchester reminds me of that great book, ''The Glory and the Dream'' by William Manchester who wrote about the Great Depression. In fact, Herbert Hoover was the first President to have a telephone on his desk in the White House. ''The Glory and the Dream.''

Yes, we have had time to prepare. In many respects, we have failed. Our committee on which the distinguished Senator from Illinois sits conducted hearings and requested that the Homeland Security Director, former Gov. Tom Ridge, appear before the Appropriations Committee to testify concerning the needs of homeland security in this country. Did he come? He probably would have come but his boss, the President, said, no, he shall not come. So we conducted 5 days of hearings on homeland security in those early months of 2002. As a result, we brought to the floor legislation based on the testimony that had been adduced from witnesses from all over this country—mayors, Governors, and first responders.

This legislation, to a large extent, was pretty much sneered at—it is hard to respond in any other way—by the administration. Based on the testimony of those witnesses, we tried time and again to bring to the Senate and pass legislation that would provide for the needs of those local responders, the people at the local level, in the effort to prevent terrorist attacks and in the effort to deal with terrorist attacks once they occurred. We got no help from this administration.

Did the people out there know it? Some of us attempted to tell the American people about these efforts, but the press has not picked up on it very well. Communities are being left with less than adequate police and fire protection. Other essential services are also shortstaffed. The mood of the Nation is grim, is the only way I know how to put it. The economy is stumbling. Economic growth is worse than it has been in 50 years. Fuel prices are rising and may soon spike higher.

This administration, now in power for a little over 2 years, must be judged on its record. I believe that record is dismal. In that scant 2 years, this administration has squandered a large projected surplus of some $5.6 trillion. How much is that? That is $5,600 for every minute since Jesus Christ was born.

Let me say that again. In that scant 2 years—I am talking about the last 2 years—of this administration's record, this administration has squandered a large projected surplus of some $5.6 trillion over the next decade and taken us to projected deficits as far as the human eye can see. This administration's domestic policy has put many of our States, including my own, in a dire

financial condition, underfunding scores of essential programs for the people, the people out there who are watching through those electronic lenses.

This administration has fostered policies that have slowed economic growth. This administration has ignored urgent matters such as the crisis in health care for our elderly. This administration has been slow to provide adequate funding for homeland security. The distinguished Senator from Illinois, Mr. DURBIN, and I have been talking about that.

This administration has been reluctant to better protect our long and porous borders to the north and to the south, and to the east and to the west, where the great oceans form the borders.

In foreign policy, this administration has failed to find Osama bin Laden. In fact, yesterday we heard from him again marshaling his forces and urging them to kill, kill, kill.

This administration has split traditional alliances, possibly crippling for all time international order, crippling entities such as the United Nations and NATO. This administration has called into question the traditional worldwide perception of the United States as being a well-intentioned peacemaking, peace loving, peacekeeping nation.

This administration has turned the patient art of diplomacy on its head. It has turned the patient art of diplomacy into threats, labeling, and name calling of the sort that reflects quite poorly on the intelligence and sensitivity of our leaders and which will have consequences for years to come, calling heads of state pygmies, labeling whole countries as evil—as though we are not evil, as though there is no country that is not evil—denigrating powerful European allies as irrelevant. These types of crude insensitivities can do our great Nation no good.

We may have massive military might, and we have, but remember we have had massive military might before. How many millions of men marched to the drums of war only 60 years ago? Thirteen million American men under arms, was it? Millions.

While we may have massive military might today, we cannot fight a global war on terrorism alone. We need the cooperation and the friendship of our time-honored allies, as well as the newer found friends whom we can attract with our wealth. Our awesome military machine will do us little good if we suffer another devastating attack on our homeland which severely damages this economy.

Our military manpower is already stretched thin, and they are taking them from our States every day. Yesterday, I talked to the Senate about the vacancies, about the empty seats at the dinner tables in the homes of many West Virginians, because of the National Guard and Reserve departures every day from the State of West Virginia. Yes, there they come. They are law enforcement officers. They are State troopers. They are road builders. They are doctors. They are teachers. They are Sunday school teachers. These are the men and women who keep the lights burning when the snows fall and darkness comes. But on whom will we depend when these men and women are gone to foreign lands to fight a war if a war faces us here at home, a different kind of war.

Our awesome military machine will do us little good if we suffer another devastating attack on our homeland which severely damages our economy.

As I say, our military forces are already being stretched thin and we will need the augmenting support of those nations that can supply troop strength, not just sign letters cheering us on.

The war in Afghanistan has cost us $37 billion so far. Yes, we bombed those caves. We ran them into the holes, but they could not hide. We ran them out of the holes, and we ran behind them to get them. But there is evidence that terrorism may already be starting to regain its hold in that region. We have not found Bin Laden, and unless we secure the peace in Afghanistan, the dark dens of terrorism may yet again flourish in that remote and devastated land.

Pakistan, as well, is at risk of destabilizing forces. This administration has not finished the first war against terrorism, and yet it is eager to embark on another conflict with perils much greater than those in Afghanistan. Is our attention span that short? Have we not learned that after winning the war, one must also secure the peace?

Yet we hear little, precious little, about the aftermath of war in Iraq. In the absence of plans, speculation abroad is rife. Will we seize Iraq's oil fields, becoming an occupying power which controls the price and supply of that nation's oil for the foreseeable future? There are some who think so.

To whom do we propose to hand the reins of power in Iraq after Saddam Hussein? Will our war inflame the Muslim world, resulting in devastating attacks on Israel? Will Israel retaliate with its own very potent nuclear arsenal? What are we about to unleash here? The genie is getting out of the bottle. Can it ever be put back? Will the Jordanian and Saudi Arabian Governments be toppled by radicals, bolstered by Iran, which has much closer ties to terrorism than Iraq? Could a disruption of the world's oil supply lead to a worldwide recession? Has our senselessly bellicose language and our callous disregard for the interests and opinions of other nations increased the global race to join the nuclear club and make proliferation an even more lucrative practice for nations which need the income?

In only the space of 2 short years, this reckless and arrogant administration has initiated policies which may reap disastrous consequences for years.

We have heard it asked, Are you better off today than you were 4 years ago? The question can be shortened: Are we better off than we were 2 years ago?

One can understand the anger and the shock of any President after the savage attacks of September 11. One can appreciate the frustration of having only a shadow to chase and an amorphous, fleeting enemy on which it is nearly impossible to exact retribution. But to turn one's frustration and anger into the kind of extremely destabilizing and dangerous foreign policy debacle that the world is currently witnessing is inexcusable from any administration charged with the awesome power and responsibility of guiding the destiny of the greatest superpower on the planet.

Frankly, many of the pronouncements made by this administration are outrageous. There is no other word. Yet this Chamber is hauntingly silent—silent. What would John Langdon of New Hampshire say about that? What would Nicholas Gilman of New Hampshire say about that? What would Rufus King and Nathaniel Gorham of Massachusetts say? What would Alexander Hamilton, who signed the Constitution, from the State of New York, say about the silence in this Chamber? What would Dr. Samuel Johnson of Connecticut say about the silence in this Chamber? What would William Paterson or William Livingston or David Brearley or Jonathan Dayton of New Jersey, the signers of the Constitution, have to say about the silence in this Senate which they created? What would Benjamin Franklin, Thomas Mifflin, James Wilson, Robert Morris, of Pennsylvania, have to say? What would Thomas FitzSimons or Gouverneur Morris, who signed the Constitution on behalf of the State of Pennsylvania, have to say about the silence that rings and reverberates from these walls today, the silence with respect to the war on which we are about to enter? What would they have to say? What would their comments be? Gunning Bedford, George Read of Delaware, Daniel Carroll, Dan of St. Thomas Jenifer of Maryland. These and more.

What would these signers of the Constitution have to say about this Senate which they created when they note the silence, that is deafening, that emanates from that Chamber on the great subject, the great issue of war and peace? Nothing. Nothing is being said except by a few souls. Yet this Chamber is hauntingly silent—hauntingly silent on what is possibly the eve of horrific infliction of death and destruction on the population of the nation of Iraq. Think about that.

Oh, I know Saddam Hussein is the person who is primarily responsible. But how about us? How about ourselves?

Yes, there are going to be old men dying. There will be women dying. There will be children, little boys and girls dying if this war goes forward in Iraq. And American men and women will die, too.

Iraq has a population, I might add, of which over 50 percent is under age 15.

Over 50 percent of the population in Iraq is under age 15. What is said about that? This Chamber is silent—silent. When it is possibly only days before we send thousands of our own citizens to face unimagined horrors of chemical and biological warfare, this Chamber is silent. The rafters should ring. The press galleries should be filled. Senators should be at their seats listening to questions being asked about this war, questions to which the American people out there have a right to expect answers. The American people are longing for information and they are not getting it. This Chamber is silent. On the eve of what could possibly be a vicious terrorist attack in retaliation for our attack on Iraq, it is business as usual here in the Senate, and business as usual means it is pretty quiet. There is not much going on in the Senate. Business as usual.

Oh, I know it may be scare talk to talk about what may happen in the event of a terrorist attack. But when the Twin Towers fell, it wasn't scare talk. When hundreds of local firefighters and police officers, law enforcement officers died as the walls of the Twin Towers came tumbling down, it wasn't scare talk. It wasn't scare talk.

We are truly sleepwalking through history. In my heart of hearts I pray that this great Nation and its good and trusting citizens are not in for a rudest of awakenings. To engage in war is always to pick a wild card. And war must always be a last resort, not a first choice.

But I truly must question the judgment of any President who can say that a massive unprovoked military attack on a nation which is over 50 percent children is in the highest moral traditions of our country. This war is not necessary at this time. Pressure appears to be having a good result in Iraq. Our mistake was to put ourselves in a corner so quickly. Our challenge is now to find a graceful way out of a box of our own making. Perhaps—just perhaps—there is still a way, if we allow more time.

Madam President, I yield the floor. I suggest the absence of a quorum—I withdraw that suggestion.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. SMITH. Madam President, I believe Senator SCHUMER is scheduled to speak. I understand he is not now going to claim his time. If I may, I would like to speak about Miguel Estrada. I appreciate the Senator from West Virginia and his effort to present his perspective. I find myself wanting not to be silent, though, in response. He has a perspective that is not one I share with respect to President Bush and the job he is doing as our Commander in Chief and as the leader of the free world. So before I speak about Miguel Estrada, I would like to remain not silent.

When I was elected to this body in 1996 I was given membership on the Senate Budget Committee. Being given membership on that committee, I remember President Clinton presented his first budget. We were coming through a period of great deficits and President Clinton projected deficits for as far as the eye could see. But something happened to our economy, something entirely unrelated to Government, something entirely unrelated to the Clinton administration. We saw what has happened periodically in the great civilizations, and that is a speculative bubble, irrational exuberance, and we saw the stock market surge with stock values wholly unrelated to their book values.

We began to witness a great bubble. That is when Alan Greenspan and others said there is irrational exuberance. We have a problem. They began pulling back on the money supply, and by the time George W. Bush took his oath of office, this country was in a full blown recession. He inherited this. For a colleague to suggest that this President has run this economy into the ground is belied by the facts and it is belied by the common sense of the American people who do not blame this President for the condition of this economy that he inherited and they, in fact, appreciate the fact that he is doing something about it and trying to do what the Federal Government can, with the levers available to it, to help put people back to work, to grow the economy, to say to the country, to say to the Congress: You know, the economy is tough. When the economy is tough, families have to tighten their belts, and Congress should do the same with the Government budget so we can leave more money at home so people can spend it to pursue their dreams, to balance their economies because when they do that, we are more likely to see employers reemploying people.

I must tell you, like my friend from Wisconsin, before I came to this body I was in the business of meeting a payroll. It was always a source of frustration to me to hear politicians from mighty places say that they were responsible for creating jobs, that they were somehow responsible for the condition of the private sector economy. We are citizens of a nation that has a free market economy, not centrally planned. I have always been upset, whether from Republican or Democratic politicians, when there is the claim that somehow we in the public sector create jobs.

It is false. It is a lie. So when I hear speeches saying that President Clinton is to blame for it, or President Bush is to blame for it, I say baloney because, as long as I have been in public life, I have seen us do various things with the levers available to us to try to help the economy, to take credit for it. But you know what. We can't. And may we never be able to because if we do, we will have adopted the ways of western socialist societies, of Western Europe, and these are failing models. These are not models designed to reemploy people and to give them opportunity and hope.

I sit on this side of the aisle for, frankly, one major reason. I believe in free enterprise. I do not believe in creeping socialism. I believe if you are interested in social justice you will pursue those policies that leave more money at home and give people a chance to reemploy folks and to produce products, to provide services that other people want to buy.

So when I hear a statement like I have just heard, with all due respect to a great man in this Chamber, I think it simply disregards the nature of the economic system we are in. I say that as a businessman before I was a Senator. So I thank President Clinton for doing the best job he could. I thank President Bush for doing the best job he could. But in the middle of the administration there was a stock market bubble that neither of them created for which we are now trying to deal with the consequences of the bursting of that bubble.

IRAQ

Madam President, on the issue of Iraq, I think every American feels disquiet about the fact that we are actually contemplating going on the offense because we are trying to provide for the defense of the American people.

I don't think President Bush relishes going to war. But I will tell you that I am glad he does not check our national security with the French or the Chinese or some international body which is, at the core, anti-American and anti-Semitic. I am grateful we have a President who goes to such bodies and makes America's case and stays engaged but never loses sight of the fact that America's interests are best determined by Americans.

I have never believed there was a sharp line of coordination between all the Islamic terrorist groups and Islamic states. But I am not so naive to believe that this is not a loose confederation of terrorism—a loose confederacy that has as its purpose the murder of Jews and Americans and other minorities who do not share their religious faith.

It takes foolish people to look at all the money moving around and all of the ammunition being bought and all of the murder being committed to say we just have to wait for them to hit us again.

I thank God for a President who is willing to say: I am going to protect the American people, and I am going to go where the facts lead us. And even if it says we have to play defense by going on offense we are going to do that.

I don't believe we are going to Iraq out of reasons of oil. I believe we are going there for the security of the American people. Who can like the situation in the Middle East now? Perhaps there is a prospect of a better future. Perhaps there is a prospect of democracy that takes root in the middle of Arabia on the border of Persia that may ultimately figure out how to find

peace with their Jewish neighbors. We have no prospect of that in the current arrangement.

When I hear motives described of this President that his response to 9/11 is somehow failed, I think maybe they are going to different briefings than I am. Maybe they are seeing different facts than I see. I don't understand the charges that were just made here. The charge was made that we are being silenced. I diverted from my Miguel Estrada speech because, frankly, I don't want to be silent if that is what people actually believe here because it is wrong. I want to make clear my opposition to it.

Madam President, when I came to this body, I promised the people of Oregon that while I have values I refuse to check at the door, I would not have a single-issue litmus test when it came to judicial nominees.

I remember very vividly our phones ringing off the hook with calls from conservative people in my State who were very upset at all the Clinton nominees for whom I voted. But I wanted to keep my word that I would not have a single-issue litmus test. I was going to focus on whether President Clinton's nominees were qualified and for some reason not disqualified by personal conduct or ethics.

So with that, I can think of only one exception when a nomination was defeated on the floor of this body at the request of the two Senators of that State.

I voted time and time again for President Clinton's nominees who probably in most cases had different views than I did. I remember specifically the nomination of Richard Paez of California which the Republicans held up for some time. But some of us pushed on this side to get him confirmed.

I remember the nomination of Marsha Berzon, another Ninth Circuit nominee. The conservatives couldn't stand her. Some of us pushed through and got her confirmed and voted for her because we didn't want to happen in this place what is happening now in the case of Miguel Estrada.

I was trained in the law. As a lawyer, I have to tell you that I am envious of the credentials of Miguel Estrada. I will bet in all the time I serve here, few nominees will come to this place who are better prepared and better credentialed than Miguel Estrada. Yet it has come to this? A filibuster? Not for the Supreme Court but for an appeals court—an important one for sure but not even the highest court. We are in the midst of a filibuster.

But consider what an Horatio Alger story is Miguel Estrada when it comes to American law. This man came to this country, from Honduras, at the age of 17, speaking little English. He went to Columbia University. He graduated there magna cum laude. Then he went to Harvard Law School and he graduated there as the editor in chief of the Harvard Law Review, Order of the Coif. Then he went on to clerkship for United States Supreme Court Justice Anthony Kennedy.

You cannot get better credentials than this.

He then served as Assistant Solicitor General of the United States under both the Bush and Clinton administrations, earning high praise from colleagues, including President Clinton's Solicitor General, Seth Waxman, under whom he served.

By the way, I also note that he argued the Government's case against the abortion clinic demonstrators. He upheld the law.

He has the unanimous high rating by the American Bar Association as ''very well-qualified''—its highest rating. That used to be the gold standard for the Democratic conference for people coming through the Judiciary Committee to this floor.

He enjoys broad support from Hispanic communities, including the U.S. Hispanic Chamber of Commerce, the Hispanic National Bar Association, and the Washington Post, of all papers, which editorialized that this confirmation should be an ''easy call''. But it is not. It is all bollixed up. Charges have been raised against Miguel Estrada that he is way out of the mainstream. When you ask for evidence of that, I find none forthcoming. They say he has no judicial experience. Well, I have told you what his legal training is, as well as his legal practice at Gibson, Dunn & Crutcher, a great law firm in California.

I would note that five of the eight current judges on the District of Columbia Circuit had no prior judicial experience before they served on it. But, clearly, that doesn't cut it.

I noted before that he has the highest rating of the American Bar Association. Some have said: Well, but he defended antigang laws. These are known as antiloitering laws. But I would point out that he did that when he was hired by Chicago's Solicitor, at the request of Democratic Mayor Richard Daley, to defend their constitutionality. There is no partisan conspiracy in this. They wanted a good lawyer to defend it. This is a man who has argued 15 cases before the U.S. Supreme Court. No judicial experience? That doesn't hold up.

Some have said he didn't answer all the questions.

I can tell you I fear that what we are doing in this Chamber by the process that began with Robert Bork is setting a standard that if you provide the opposition with your views and your records, you give them ammunition to shoot you—at least politically speaking—in this place.

I come back to my belief that what this really is is the victory of single-issue politics. I regret that.

My friend from Nevada holds the same view I do on single issue. He is evidence that his party has had a big enough part to include people who may—I emphasize ''may''—have a view as to the sanctity of life that is out of the mainstream, if you will.

You see, Miguel Estrada has never told us what his views are. Maybe that is what is wrong here. Maybe if he would come and pledge allegiance to Roe v. Wade all this opposition would go away. But I want to lament that our process has come down to single issue litmus tests. I do not think it should.

See, Miguel Estrada has said what should be said in the case of abortion, issues coming before appellate courts. He has said: I will follow the law. I understand stare decisis. And I am not going to be out there trying to make new law. That is what he should say.

What he has not said I think is feared on that side; and that is, coming from a Latin American part of our hemisphere, that he has a Catholic background, that he has a heritage, a tradition that sanctifies human life. And they are worried about that.

Yet I have to say I think a lot of the American people worry about that. I, for one, who describes myself as pro-life, understand completely that it is unlikely in our lifetime that early rights to choose will ever be abridged by this place or by the Court. But I think Americans generally are increasingly discomforted by late-term abortions.

You have but to see the General Electric advertisement about seeing this couple looking at their unborn child in utero and the inexpressible joy they feel at the anticipation of the child's birth. And to think: Well, this unborn child is of no consequence—it is of enormous consequence.

I think there is a fear there that Miguel Estrada may have some of those beliefs. We do not know that. And, frankly, I think he has said what is right and that is: I will enforce the law.

Madam President, I, for one, say, without reservation, Miguel Estrada has my vote. And I think for the good of our institutions, some of our colleagues on the other side ought to remember that some of us pushed through a lot of President Clinton's nominees with whom we had differences because we were fearful of going down the road of single issue litmus tests for judicial nominees, because if we go there, we are ratcheting up to a different level, and it will be to the lament of this country and its judicial processes because we will leave too many places and seats vacant on the bench, and that will mean justice delayed. And justice delayed means justice denied. I urge his confirmation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. DORGAN. Will the Senator from Wisconsin yield for a unanimous consent request?

Mr. KOHL. I will.

Mr. DORGAN. I ask unanimous consent that I be recognized following the presentation by the Senator from Wisconsin.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. KOHL. Madam President, I rise today to express my concerns about the nomination of Miguel Estrada. Once a nominee is confirmed by the Senate, these men and women serve lifetime appointments, unanswerable to Congress, the President, or the people. They become the guardians of our liberties, of our Constitution, and of our civil rights. Our duty to advise and consent is the only check we will ever have on the qualifications and fitness of those chosen to serve as Federal judges.

In considering judicial nominees, we can review their credentials, their professional record, their writings, and the recommendations of their colleagues. But to truly evaluate a nominee's fitness, especially one with no judicial record, we are dependent on the nominee to candidly share with us their opinions, their judicial philosophy, and their approach to interpreting the Constitution during the give and take of a confirmation hearing.

The need for forthright testimony is especially crucial in the case of Mr. Estrada, given the minimal public record we have to evaluate him. He has never served as a judge and, therefore, unlike many appellate court nominees, has no judicial opinions to review. He has virtually no professional writings for us to read. And although he has argued before the Supreme Court, he has rebutted any attempt we made to attach his personal views to the positions he advocated in those cases. Therefore, we were dependent on his testimony from his confirmation hearing. But this testimony gave us precious little on which to evaluate him.

Instead, we have been told that Mr. Estrada is bright, capable, and qualified. His proponents say ''trust us, he will make a good judge.'' Trust is not enough; trust leaves too much to doubt. When considering a nominee, we do not owe the benefit of the doubt to the nominee but, rather, to the courts, the Constitution, and to our civil liberties.

A judicial confirmation hearing is not an intrusive exercise. We do not ask nominees to comment on pending cases or to speculate on unlikely facts. Rather, we only ask them to help us reach a level of comfort with them as potential judges. Without candid and honest testimony by the nominee our advice and consent process is meaningless.

Unfortunately, at his confirmation hearing, Miguel Estrada refused to answer question after question regarding his views and judicial philosophy. Mr. Estrada even went so far as to refuse, when asked by Senator SCHUMER, to name a single Supreme Court decision of which he was critical in the last 40 years. I myself have asked that very same question of many nominees, and every one had an answer—until now. This is not an isolated example. Senator FEINSTEIN asked him to state whether he believed Roe v. Wade was correctly decided, and Mr. Estrada refused to do so.

He refused to provide responsive information to my own questions on a variety of topics, ranging from his views on two recent Federal court opinions striking down the Federal death penalty, to the Government's role in protecting the environment, and to the use of ''protective orders'' mandating court secrecy in products liability cases. This pattern of evasiveness and avoidance falls far short of what we need to evaluate a candidate's fitness to serve a lifetime appointment on the DC Circuit Court of Appeals.

The importance of the court to which Mr. Estrada has been nominated makes his efforts to hide his views from us all the more serious. The DC Circuit, a court second in importance only to the Supreme Court, is unique among the Federal courts of appeals as the court that reviews decisions of the executive branch and the independent agencies. The rules and regulations reviewed by this court are felt by all Americans every single day. If you work, your safety is protected by rules issued by the Occupational Safety and Health Administration. When we drink water and breathe the air, we are protected by rules issued by the Environmental Protection Agency. When we shop and watch advertisements, we are protected from fraud and deceit by the Federal Trade Commission. And when we see our cable, phone, and internet bills, we can be sure that the Federal Commerce Commission played an important role. The decisions of the D.C. Circuit on these and many other subjects have a real and immediate impact on the lives of all Americans.

My decision to oppose this nomination in the Judiciary Committee was not taken lightly. I have done so only six times in my more than 14 years of service in the Senate, and I do so reluctantly in the case of Mr. Estrada. We recognize that Mr. Estrada is a talented attorney who has compiled an impressive record of achievement, and that he is to be commended for devoting a substantial portion of his professional career to public service.

My decision to support the need for a filibuster on this nomination is also not taken lightly. We take this step reluctantly, and with the full understanding that we are left with no other choice. Our constitutional responsibility to advise and consent has been compromised by a process that has provided us with no opportunity to learn anything about this nominee. If we permit Mr. Estrada's nomination to proceed, we have provided future nominees a roadmap to evade questions and hide who they are. This would be a disservice to the people we were elected to represent.

We cannot support Mr. Estrada's nomination to the DC Circuit in the face of his unwillingness to candidly share his views, his approach and his judicial philosophy. If no further information is provided about Mr. Estrada, then I will be forced to oppose his nomination.

I thank the Chair.

The PRESIDING OFFICER (Mr. Smith). The Senator from North Dakota.

Mr. DORGAN. Mr. President, I listened to my colleague from Wisconsin, who serves on the Judiciary Committee, on the nomination of Mr. Estrada to the DC Circuit Court. I also listened to my colleague from Oregon and others who have spoken today.

Mr. Estrada has had his name submitted to the Senate by the President, acting under article II of the Constitution. And the President has the right to send nominations for lifetime appointments to the judiciary to the Senate for advice and consent. It is the Senate's responsibility to evaluate the President's nominees and determine whether to vote to confirm those nominees and provide someone a lifetime tenure on one of the Federal courts.

That advice and consent is not in any way subordinate to the President's right of sending a nomination. We both have constitutional obligations. One is for the President to select and send nominations to the Senate. The other is for the Senate to evaluate and provide its advice and consent.

The DC Circuit Court is the second highest court in the land. It is very important that for a lifetime appointment, we decide carefully whether we want to confirm a nominee sent to us by the President. Most of us would not know the nominees personally. That is certainly the case in this circumstance. I don't know Mr. Estrada personally.

I have been to one hearing where he appeared. I was there for only a brief period because a candidate for a Federal judgeship in North Dakota was being heard at that time. This was a nomination of President Bush's. I was pleased to be there to support President Bush's nomination and to support the candidate whose name had been sent to us. I went down to the hearing and supported Mr. Hovland's candidacy. I am proud to say he is now a Federal judge in the West District of North Dakota. He is going to be a credit to the bench. He will be a wonderful Federal judge. I was very pleased to support President Bush in sending this nomination to the Senate.

On that day when he was also testifying, Mr. Estrada was there. That is the only time I have seen him. I was there for only a couple questions, and I don't know a great deal about him but have read a lot about him since.

It is the case with respect to Mr. Estrada's appearance before the committee and also the interviews and discussions prior to his appearance before the Judiciary Committee, that Mr. Estrada decided he would not answer some basic questions put to him by Members of the Senate. Members of the committee were asking some pretty basic questions. Tell us a bit about your judicial philosophy, because you

don't have experience as a judge and you have not served as a judge at any level in the judiciary system. Tell us about how you see this job. Evaluate for us some of the decisions that have been made over time by the Supreme Court, and so on. Mr. Estrada essentially said, I don't care to do that.

Contrast that for a moment, for example, with Dan Hovland who is now a Federal judge in the West District of North Dakota. He was asked: What three U.S. Supreme Court cases can you identify that you disagree with? This is Mr. Hovland. He said: Well, Behrens v. Peltier, 1996; a 2002 case, Thompson v. Western States Medical Center; and then, of course, the case I suspect most would cite, Korematsu v. the United States. That is, of course, the case in which the Supreme Court affirmed the conviction of a person of Japanese ancestry for a violation of a curfew order solely because of the individual's ancestry.

I think now most would view that Supreme Court decision as a profound mistake. Mr. Hovland did. He was asked a simple question. He gave a straightforward answer. He said: Here is my notion of three Supreme Court decisions with which I would disagree. It gave Members a bit of an insight into who Mr. Hovland was, what he thinks. That was helpful.

The same question was asked, for example, of Freda Wolfson: What three U.S. Supreme Court cases can you identify that you disagree with. Plessey v. Ferguson, that would come to mind almost immediately for everyone. They held that the State statute requiring passenger railroads to provide separate but equal accommodations for African Americans and Caucasians did not violate the 13th or 14th amendments. It seems to me that is probably an obvious case one would disagree with.

Yet questions of that type were asked repeatedly of Mr. Estrada, and he said he just wouldn't offer an opinion, wouldn't answer the questions. So then the members of the committee said: Well, you served in the Solicitor's Office at the Justice Department. Could we be provided with the memoranda written there, the advice you were offering, to get some insight into how you feel about these issues, how you reason, how you think?

He said, no, those are confidential. Those should not be released.

Well, they have been released in the past. On other occasions candidates have indicated they wanted those papers released. They were released. It gave the committee, when making a lifetime appointment, some better judgment about how this person thinks, how this person reasons, what approach this person takes to dealing with some of these questions. Mr. Estrada said, no, he couldn't do that.

What has happened with this nomination, a circuit court nomination is that, both the President's administration and the candidate himself, Mr. Estrada, have said: I don't intend to answer questions, and I don't intend to make the information available with respect to what I was doing as assistant in the Solicitor's Office.

If that is the case, Mr. Estrada is then a blank sheet. What are we to make of Mr. Estrada? Who is he? How does he think? How does he reason? Would he be a good judge? This is, after all, a lifetime appointment. This isn't an appointment for 5 years, 10 years, or 20 years. We are being asked by the President to take Mr. Estrada's nomination and say, yes, we will put him on this Circuit court forever, for his entire life, and we have no right to get answers to basic questions, to understand a bit about the philosophy of Mr. Estrada, a bit about his approach, his thinking. We have no right to that?

I have been astounded to hear some colleagues on the floor say: You have a responsibility to approve this nomination. No, we have a responsibility under the Constitution to advise and consent. The President has a responsibility to send us a nomination. We have a responsibility to evaluate it and make a decision. Is this someone who should be given a lifetime appointment or not? That is our judgment. That judgment doesn't rest with others. It rests with us.

I would like very much for Mr. Estrada to give us the information requested. My colleagues on the Judiciary Committee have repeatedly requested this information. I would like very much to see the information. It is entirely possible I would see all of this information, understand a bit more about Mr. Estrada, and decide to support his nomination. I don't know. I would like to see the information and make a judgment.

I believe I have voted for virtually all the nominations the President has sent to Congress with respect to judgeships. I would hope to be able to support this and others as well. But I don't intend to decide that we should force the Senate to vote for a lifetime appointment for a candidate on the DC Circuit Court who tells us nothing about himself.

He seems to suggest, I am here for a job interview, but I will not tell you anything about me. That would be a job interview that would last a very short time. It ought to last a very short time here. When Mr. Estrada and the administration provide the information that is requested, then, in my judgment, this Congress has a responsibility to consider it, and consider it with great seriousness because this is, after all, a Federal judgeship, not just a district judgeship, but a circuit court judgeship of DC, which is the second highest court in the land.

Judge Scalia once said—and I am not prone to quoting him often:

> Indeed, even if it were possible to select judges who didn't have preconceived views on legal issues, it would hardly be desirable to do so.

What are the preconceived views on legal issues of Mr. Estrada? Does anyone know? Does anyone who has spoken in support of this nomination know? Can you answer that question? The answer is no one in this Chamber knows; no one in the Chamber can answer the question because Mr. Estrada and the administration say you are not entitled to know.

They are wrong. The Constitution requires us to know. It says we are entitled to know. I don't believe we ought to vote on this nomination until we have received the information requested. When we do, I think we should vote on this nomination. But until then, in my judgment, this is not a problem of our making, this is not something someone from the other side should shoehorn over here. This is a problem the administration and Mr. Estrada created by deciding on a strategy that, if we allow to continue, would essentially say to the Senate, you consider us for lifetime appointments and we won't give you any information about ourselves as we ask for that consideration.

There are reciprocal obligations here—ours, the President's, and the nominee's. We will and should meet ours as soon as others have met theirs. The first test of that is to send the names of qualified people to the Senate for judgeships. Mr. Estrada may well be very well qualified. The ABA says he is well qualified. The second obligation on the part of those who send his nomination to us is for the candidate himself, or herself, to make themselves available to the Senate, answer questions, and allow us to evaluate whether this is the kind of person we want to provide a lifetime appointment to on the Federal bench. That hasn't been the case at this point.

With respect to this nominee, we are waiting; but we should not vote, and no one in this Chamber ought to pressure others to vote until we have the basic information we have requested. What is so secret about all of this? What is there we should not know? Is there anyone qualified to serve on the second highest court of the land who doesn't have some basic views on past Supreme Court decisions—especially some of the controversial ones—they might explore with us in order to give us some evaluation of how they think and reason, what kind of capability they have to sit on the bench? If such a nominee is sent to the Senate, that nominee ought not ever be confirmed.

I don't believe that is the case with Mr. Estrada. I think he has views on all of these issues. He certainly could tell us his views about Supreme Court decisions with which he would disagree and why, so we could develop some notion of his reasoning. He just refuses to do that. I don't know why. I assume if this is the case with this candidate and the Senate says that is fine, we will see future nominees refuse to answer anything; our advice and consent will become a rubberstamp; and we will not ask people to give us basic information. Then the next candidate will do

exactly the same thing and we won't have a constitutional responsibility at all here in the Senate. We will say, all right, whatever it is you decide to give us, we will take, or whatever you decide to withhold, we will accept.

I am not willing to do that. Why not the materials from the Solicitor's Office? It has been done in other nominations. Why not now? Why won't the candidate answer basic questions? Again, I come here not as a member of the committee and as someone who has a preconceived notion that Mr. Estrada would not do a good job. I don't know. And no one else in the Senate knows. There is nobody in the Senate who can stand up and say Mr. Estrada has answered these questions for us, because he has refused to answer the questions for all Senators. Some in the Senate might be perfectly comfortable deciding the constitutional role granted us in this process of lifetime appointments on the judiciary is not very important. But I am not among them.

THE STATE OF FOREIGN AND DOMESTIC POLICY

Mr. President, let me speak for a moment, while I have the floor, about a couple of other issues that are happening that I think are very important. I know others want to come and speak about the nomination. I want to talk for a moment about what has been happening in our country with respect to foreign policy and domestic policy.

In recent days, we have had the following occur: We wake up in the morning and turn on the television programs. The lead story is, as it has always been in recent weeks, days, and months, the war with Iraq. When is it going to happen? How is it going to happen? When is it going to start? Who is going to support it? Who is going to be involved? Every week, day, and month.

As a result, this economy of ours, which desperately needs certainty, predictability about the future—and this economy, in my judgment, is in a stall, serious trouble—is not going to come out of its problems unless we stop every day the lead news story being about war. I am not suggesting Iraq is not a problem; it is. Saddam Hussein is a bad guy. North Korea is a problem—a bigger problem than Iraq, I might say. Terrorism is a bigger problem than both of them. We have a situation in which we have to deal with all three. I understand that. But the other day we get an orange alert in the country, the second highest alert for terrorist activity in our country, the terrorist threat. Today, I understand we have hardware stores that are out of duct tape. Why? Because yesterday they said we are on orange alert, under the threat of terrorist attack, and we need people to go out and buy gas masks and plastic sheeting and duct tape. So the hardware stores in our country are being cleared out of duct tape. Why? People are concerned about the potential of a terrorist attack in our country.

North Korea. Apparently, we read in the news—I have not heard it in classified briefings because we have not had any—that trucks are leaving a facility in North Korea, potentially with spent fuel rods, which will, in the not-too-distant future, be turned into weapons-grade plutonium, probably sold to a terrorist; and it is not out of the question that 18 or 24 months from now a terrorist will have a nuclear weapon with which to hold hostage an American city.

Is that a frightening thought? You bet your life it is. So what consumes our attention today? Iraq. Saddam Hussein. Oh, but today is a bit different in that Osama bin Laden also shows up. He is out there. The other day Osama ''been forgotten'' is what I called him, because you don't hear about him anymore from the administration. They cannot find him, don't know where he is. I have flown over those mountains; it was about a year ago. You can look down and see where the caves are, where Osama bin Laden and his band of murderers plotted the murder of innocent Americans, thousands of them. And so men and women wearing America's uniform went into Afghanistan, kicked the Taliban out, ran the al-Qaida up into the hills. But Osama bin Laden was not found. Al-Qaida still lives. The head of the CIA said a couple of months ago that the terrorist threat against this country is as serious now as it has ever been since September 11. What of terrorism? What do we make of North Korea? What about Bin Laden? And, yes, what about Iraq?

We have had a single track playing now for month after month about the country of Iraq. I want to see regime change in Iraq. I want to see Saddam Hussein displaced. My preference, by far, is that the free world in unison says to this man: You leave, you disarm, or you are going to be disarmed, and you are going to be replaced. I would hope very much the entire free world says that to Mr. Saddam Hussein, but I also hope that we understand in this country—the President and, yes, his key advisers understand—that there are more threats and, in my judgment, at this moment, more serious threats with respect to North Korea and the development of additional nuclear weapons that could possibly go into the hands of terrorists very quickly; more serious threats with respect to al-Qaida which still lives, and Osama bin Laden, who is still broadcasting to those who follow him, which is also a very serious threat to this country and to the free world.

We need to understand that we face very serious problems, and it is not just Iraq. Inattention to some parts of our foreign policy, in my judgment, have contributed to this. I understand North Korea has lied to us. I understand that. But deciding not to talk to them? It is not an option.

There are only two options dealing with a problem that serious. One is military. We are not going to do that. The second is diplomacy, and that means we talk. We talk and we talk and we talk, and we try to work through these issues.

With respect to al-Qaida and terrorism, the fact we do not mention it, the fact no one will talk about it, the fact it is not something the Defense Department, the State Department, or others want to talk much about does not mean it has gone away. It is as serious today, perhaps more so, than ever, and we have a responsibility to deal with it. I worry a great deal about these terrorist issues and the terrorist threat against our country.

My point is not to say somehow the attention to Iraq is misplaced. It is to say that the sole attention to Iraq at the expense of, in my judgment, a more serious threat from North Korea, the sole attention to Iraq at the expense of attention to al-Qaida and the growth and the continuation of a very serious threat of terrorist attacks is unwise, in my judgment. It makes no sense.

We have a responsibility to protect the national interests of this country, and I will and always have supported our President as we proceed to do that, but I think it is important with respect to not only advice and consent on judgeships, but providing advice on issues as we perceive threats to this country, it is important for some of us to speak up to say: Mr. President, you are right, Saddam Hussein is a bad guy, but you are wrong to not pay attention to North Korea and the war on terrorism with equal vigor and equal strength.

Frankly, no one can take a look at what has happened in the last 6, 8, 10 months and judge there has been that kind of balance. My hope is that in the coming days we will see greater balance dealing with this terrorist threat and also the threat of North Korea producing more nuclear weapons and potentially moving those nuclear weapons into the hands of terrorists who the next time they threaten us will do so with a nuclear weapon.

God forbid we will face a world in which a nuclear weapon is used as an act of terrorism, not killing 3,000 people but 300,000 people or 1 million people.

If ever we wonder about these issues, we have a world in which there is somewhere, we think, around 30,000 nuclear weapons. We do not know exactly. With theater weapons, strategic weapons, somewhere around 25,000 to 30,000 nuclear weapons, one of which, just one, missing or in the hands of terrorists will cause chaos. The explosion of one will be devastating, and the genie will be out of the bottle.

Pakistan and India have nuclear weapons, and the other day they were shooting at each other over Kashmir. Dangerous? You bet your life that is dangerous.

We have a responsibility, especially in the shadow of the terrorist threat against this country, in the shadow of what is now happening in North Korea and the potential of the spread of nuclear weapons, we have a responsibility

to decide that job No. 1 is protecting ourselves against the terrorist threat and then trying to find ways to reduce the number of nuclear weapons in this world.

I have kept in my desk for some long while a couple of items I have always used to remind us of what this job is about.

This little piece of metal, if I may show by consent, Mr. President, this little piece of metal is from a backfire bomber. This bomber was a Soviet bomber. It used to be flown by Soviet aircrews hauling bombs that presumably would threaten the United States of America. It was at a Soviet airbase in Ukraine when it was destroyed.

How was this bomber destroyed? Did we shoot it down? No, this bomber was destroyed with a saw, a large circular metal saw. We sawed the wings off a Soviet bomber, and we paid for it under Senate appropriations.

We destroyed a bomber, not through hostile action but under what is called threat reduction. We destroyed missiles. We took off the nuclear warheads. In the Ukraine, where there was once a missile with a nuclear warhead aimed at the United States of America, there is now no missile, no nuclear warhead, and sunflowers are now planted on that ground. Is that progress? Boy, I think so.

This is ground up copper from a Russian submarine that I assume at one point or another was lingering off the east coast of the United States with missiles in its tubes armed with nuclear warheads. But we did not sink that submarine. This is copper wire ground up from a submarine that was taken apart under the Threat Reduction Program.

Senator LUGAR, who is a real champion of this issue, and former Senator Nunn were the first to start the funding by which we actually paid to destroy weapons of our adversaries with whom we had agreements on nuclear weapons reductions and the reduction of delivery systems.

We sawed the wings off a bomber; a submarine, we simply took it apart and ground up the copper wire. Is that progress? I think it is. If we do not in this country assume world leadership in stopping the spread of nuclear weapons and reducing the stockpiles of nuclear weapons, our children and grandchildren will almost certainly see a future in which nuclear weapons are used.

It is our job, our responsibility to be a world leader in this area. There are some who seem not to understand or care about that responsibility. We have some right now in this town talking about designing new nuclear weapons. Let's design a nuclear weapon, a designer nuclear weapon, that will be a cave buster. Hard to get into caves? Let's design a little new nuclear weapon to drop on a cave someplace.

Apparently, after the al-Qaida situation in which they hold up in caves, we have some people thinking they can create designer nuclear weapons. Once that thinking starts, the thinking that you can use nuclear weapons in circumstances such as that, others will say: We can use nuclear weapons. Once the thinking starts that you can use preemptive strikes against countries because you are worried what they might do later, other countries will say: We can do preemptive strikes.

I worry a lot about where we are headed with the multiple policies with respect to weapons programs. I think we ought to be strong. I have supported many weapons programs, but I also believe, with respect to nuclear weapons, we must lead the world. We must stop the spread of nuclear weapons. We must reduce the stockpile of nuclear weapons all around the world. It is our job. It is our responsibility. We are the world leader. We are the ones.

ECONOMIC POLICIES

These are challenging, difficult, tricky times. Every one of us in this Chamber wants this President to succeed. We want our country to succeed. I do not want us to have foreign policy failures. I do not want us to have an economy that is in trouble. I want this President to succeed. I am a Democrat. He is a Republican. It is in my interest and our country's interest for him to do well. It is also in our interest, where we have differences of opinion, differences on policies, for us to bring out those differences and debate them aggressively.

There is an old saying that when everyone in the room is thinking the same thing, no one is thinking very much. I know some do not like that. There are some who think if questions are raised these days, shame on you. But with the challenges we have in both domestic and foreign policy, we ought to have questions flying from every direction in every corner and every philosophy of this Chamber and then pick the best of those ideas and suggestions.

There is a tendency for each side to want the other to lose these days, and so instead of getting the best of each, we get the worst of both, and that does not serve the interests of this country, whether it is foreign policy challenges, which I just discussed, or the challenges in economic policy which I am going to talk about for a moment. We really need to understand that there is not only one way to address these. On some occasions, there are wrongheaded ideas, things that will make things worse with the economy or with foreign policy. There are some good ideas, some brilliant ideas, some in the middle. Our job is to select from the range of alternatives and to work with this President.

I will talk for a moment about the challenge with respect to the economy. I know there are others who want to speak. I started by talking about the Estrada nomination, but I do want to take a moment to talk about the foreign policy and the economic policies that I think are significant challenges as well.

Yesterday, Mr. Greenspan came to the Congress and I think he poured a 5-gallon pail of cold water on President Bush's fiscal policy proposals. I am thankful for that because the President is proposing, in the face of the largest budget deficits in history by far, more tax cuts, the bulk of which will help upper income taxpayers. I do not think that is what we need to do for the economy.

As I said earlier, this economy is not going to grow if every day, in every way, the lead story is about war, as it has been every day and every week and every month for some long while. This economy does not grow when that happens. The price of oil increases. People are uncertain about the future, and they manifest that uncertainty by what they do. So we need to get through this.

When we get through it, the question is: How is a jump start provided to this ship of state of ours? How is this economy provided a boost? The President says what we need to do is more tax cuts. He said what we ought to do is exempt dividends from taxation.

That is interesting. Certainly, if one were discussing tax reform, if that were the subject, they would have that as part of their discussions, no question about that. Of course, that is not the subject at the moment. The subject at the moment is, should we do an economic stimulus package? So the President takes the opportunity to say let's exempt dividends.

I am wondering why exempting taxation from dividend checks has a priority over exempting taxation from work, such as paychecks. Dividend checks should be exempt; paychecks should be taxable? Is that a value system that says let's tax work and exempt investment? If so, does that make sense? I do not know. I do not know how one chooses that approach.

I will talk now about where we are and how we have gotten to this point. Mitch Daniels, who runs the fiscal policy program at the White House—he is at the Office of Management and Budget—has been the prognosticator of where we have been and what we have been doing.

On March 2, 2001, which is not quite 2 years ago, he said:

> It has become clear that this new era of large surpluses is more dangerous to the taxpayer than the preceding era of large deficits.

So Mr. Daniels was gnawing at his fingernails worried about these large surpluses: Woe are we; the surpluses are going to kill us. He said these big surpluses are a big problem. That was about 2 years ago.

Then about a year and a half ago, he said:

> We're going to have an enormous surplus, $160 billion or more.

So he must have gotten his crystal ball at a Dollar Store, I guess, because in November—that is, about 15 months ago—he said:

> It is, regrettably, my conclusion that we are unlikely to return to balance in Federal accounts before, possibly, fiscal year 2005.

What happened in that short period of time? Well, we ran into a recession. I stood at this desk when they were proposing their $1.7 trillion tax cut and said: How can you be so certain? Maybe we will not have surpluses. Maybe we will run into some problems. Guess what we ran smack into. A recession, a September 11 terrorist attack, a war against terrorists, the largest corporate scandals in the history of this country, the tech bubble burst, the stock market pancake, and all of those surpluses that Mr. Daniels was worried about turned to big deficits.

Did that change Mr. Daniels' mind about what we ought to do with the economy? Oh, no. He has only one speed in his transmission. In January—just a year ago—he said:

> We project effective balance in 2004.

So he is still using that same crystal ball. A month later he says:

> Despite everything, the outlook is promising for balance in the year after next and for a return to large surpluses thereafter.

That was 1 year ago. Still predicting, Mr. Daniels says:

> Despite simultaneous war, recession and emergency, we are in a position to fund the requirements of victory, plus a stimulus package, and still be near balance.

That was 1 year ago.

March 27—11 months ago: The U.S. budget is in an extremely good position, Daniels said, adding that:

> OMB expected the fiscal year 2002 budget deficit to be about $50 billion.

This is a guy who was excessively worried about having surpluses that were too large. I assume he was not sleeping; he was worried about large surpluses. A year later, he is saying it is only going to be a $50 billion deficit. That will be the smallest recession deficit in modern times.

But then we come to February 2003, the same man, same crystal ball apparently, same prognosticator:

> Our projections, which incorporate extraordinarily conservative revenue estimates, see deficits peaking this year, heading back thereafter.

Now let me show the chart of Mr. Daniels. In 2002, he predicted our surplus would be $283 billion. We did not have a surplus. We had a deficit of $159 billion. In 2003, he predicted we would have a surplus of $334 billion. We did not have a surplus. We had a deficit of $304 billion. In 2004, he predicts a $387 billion surplus. He missed it by well over half a trillion dollars.

I do not know what to make of this. This is the guy who is driving the stage, with apparently 8 or 10 runaway horses, and does not have the foggiest idea what is happening in this economy. He says we are going to have big surpluses—that is his biggest fear—turns them into the largest deficits in this country's history and says: Oh, by the way, I can solve that. Let's do more tax cuts, the bulk of which will go to upper income people, and let's decide to keep taxing work but we will start exempting investment—a value system that is curious to me. Why would work be taxed and investment be exempted? Is work less worthy than investment?

Yesterday, we had 10 Nobel laureates in the field of economics, along with 400 economists, who put an ad in the New York Times, I believe it was—it could have been the Washington Post—saying that this proposed fiscal policy is going to lead to bigger deficits and bigger problems; it is going to saddle our children and their children with the burdens that we create, and it makes no sense at all. It certainly will not stimulate or jump start this economy.

This country is a strong, resilient country. It will overcome bad policies from Democrats and Republicans, and it has had plenty in two centuries. It has also been benefited by good policies, by visionaries who had the strength and the endurance to stick to those good policies that they knew would allow this country to grow, that they knew would invest in working families, they knew would give investors and entrepreneurs an opportunity. This country is a great place, but it faces very serious challenges at the moment. Those challenges will not be resolved—domestic and foreign policy—by having our heads in the sand. Al-Qaida and terrorism is a very serious abiding threat in this country right now.

The fact is, homeland security is not adequately funded and everybody knows it. But no one will admit it. North Korea is a bigger problem than Iraq and everyone understands and no one will admit it. Yes, Iraq is a problem, but it is not the only problem. It does not even lead the list with respect to North Korea and the issue of terrorism.

Having said all that, against that backdrop of foreign policy challenges as aggressive and difficult as we have seen in some long time in this country, we have an economy that is sputtering and has lost strength. It will not gain strength by deciding to borrow more money and add to the Federal budget deficit and do it for the purpose of reducing the tax burden of those at the upper income levels.

Upper income people are wonderful people who do a lot for this country. But should a proposal, when we are up to our neck in Federal debt—should a proposal that gives an $80,000 average tax cut to the American who earns $1 million a year be a priority in this country?

Yesterday, I was at a hearing and I was told by the Secretary of the Interior: By the way, we will close, we will zero fund a school called the United Tribes Technical College. It is a wonderful school, 32 years in existence. Native Americans from across the country, some 40 States, go to school there. It gives them a chance in life. These schools are very important. Why are we going to defund it? Why doesn't the administration want to fund it? It is a matter of choices. I asked, What choices? Exempting dividends? Or funding an Indian school that does wonderful things for people who want to advance their education?

These are the choices. Yet there are too many wrong choices being made.

My hope is as we confront these economic challenges and foreign policy challenges, this country will succeed. We have survived a lot. This country has been through a lot. We have survived a Great Depression. We beat back the oppressive forces of fascism and Hitler. This country has achieved what no other country in the world has achieved. But it is not because it has made bad choices, it is because it made good choices.

The question is, What are those good choices? They do not come from one location. They come from all corners of this Chamber, all corners of this country. They come from, yes, the executive branch, but they come from the legislative branch, as well. It does no service to our country to not have an aggressive, vigorous debate about these issues.

Let me finish where I started. I don't particularly enjoy coming to the floor of the Senate saying we ought not vote at this point on Mr. Estrada. That is of Mr. Estrada's doing, not ours. That is of the White House's doing, not ours. When they ask us to give someone a lifetime appointment to the Federal bench, and then say to us we have no right to receive answers to basic questions asked—questions asked and answered by other candidates—we have no right to those answers, then we have a responsibility to say, well, advise and consent does not mean that we rubberstamp anything sent down to the Congress. It means it is an obligation of ours to evaluate. Is this person worthy of being on the Federal bench? How do they reason? How do they think? How do they approach this job?

I mentioned when we asked questions, or my colleagues on the Judiciary Committee asked questions of Mr. Estrada, he said he would not answer them. Those same questions were asked of Mr. Hovland. He is now a district judge. He answered. Questions were asked of Freda Wolfson. She answered the questions. Ed Kinkeade answered the questions. Linda Rae Reade answered the questions. All are Federal judges now because they came to the Congress, not expecting and demanding to be approved, just presenting themselves as the President has done through nomination, to say, here I am; now, Members of the Senate, your job is to give advice and consent and to vote on this nomination. I am willing to answer questions. Here I am. Here is who I am. Ask me questions. I will answer them.

Mr. Estrada's approach was different. He said: Here I am. But I will only tell you my name and you get a chance to look at me, but I will not answer your questions. We cannot allow that to

happen. If it happens on this nomination, it will happen on the next nomination.

What we have said to Mr. Estrada is, answer the questions. We have submitted a list of things he refused to answer that others have routinely answered. We said: Release the information from your term working in the Solicitor's office. Others have done that. Mr. Estrada is not a judge so we do not have much of a record to go on regarding how he thinks and how he approaches his responsibilities.

He should, and I hope he will, decide to meet the basic requirements of providing information to the Senate. When he does that, in my judgment, I think we ought to proceed. Until he does, in my judgment, we ought not proceed under any circumstance.

Our job is to give advice and consent on a lifetime appointment. Anyone who treats that lightly does not understand the responsibility under article II of the Constitution.

Let me finish by saying I take no pleasure in saying that Mr. Estrada has additional requirements in front of him. But it is he himself who has visited that upon this Senate. Had he answered the questions and provided the information, we would not be in this situation. But we are in this situation of requiring this nominee, before he is voted upon, to provide the basic information that we have requested in consideration of whether he ought to receive a lifetime appointment on the second highest court in this country. If and when he provides that information, I will be happy to vote and make a judgment on Miguel Estrada.

I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. TALENT. Mr. President, I rise first of all in support of the Estrada nomination and to say a word or two about it. Mr. Estrada's qualifications are excellent. I reviewed them the other day and it struck me that the man is so smart it is almost scary: Harvard Law School, Phi Beta Kappa graduate, clerk of the court of appeals, clerked on the Supreme Court, argued numerous cases before the Supreme Court.

I clerked on a court of appeals, and I mean no disrespect to the members of the Federal judiciary when I say I wish every Judge had Mr. Estrada's qualifications when he or she went on the bench. Mr. Estrada is competent, qualified, honest, and he deserves to be on the court of appeals.

I regret the filibuster that is currently underway to prevent his confirmation. It is unfair to him. It is bad for the country. Worst of all, it introduces a note of discord into the Senate that makes me discouraged about our ability to do the other things we need to do for this country—to pull together behind a prescription drug plan, behind a jobs bill, behind a strong defense that will protect our men and women in uniform, protect our country, create jobs in Missouri and around the country. It will also inhibit our ability to accomplish what we need to do in health care for small business.

HEATH CARE INSURANCE

I will take a few minutes and talk now about what could be the most significant measure that we could pass to expand the cause of access to health insurance for people who work for small businesses in this country.

I chaired the Small Business Committee in the House for two terms, and from the time I did that, I made it my point to interact with small business people around the country and especially around Missouri. They have a number of problems they are confronting: Taxes are too high; in many cases they face regulations that do not make any sense, that inhibit them and hurt them and burden them and accomplish nothing in terms of environmental quality or worker safety or any of the social goals we want to achieve. Many small businesses have difficulty getting access to the capital they need to grow, to expand, to create jobs.

Those are all problems. We need to work on all those problems. But the No. 1 problem facing small business in this country today is the rising cost of health insurance premiums. I have seen it all over the State of Missouri. I have been in places in Cape Girardeau, in Columbia, in Joplin, where small business owners report to me premium increases of 25 percent in 1 year or premiums doubling over 3 years. The effects of this are incalculable. Small business people cannot compete effectively for employees. They have to buy poor quality health insurance, and in some cases have to drop their health insurance altogether, or else the high premiums suck up money they want to put in wage increases or to expand the business. The high premiums are tremendously unfair to them, very bad for the country and, most importantly, very bad for the people who work for small businesses. Of the 41 million people in the United States who are uninsured today, almost two-thirds of them own a small business or work for a small business or are dependents of somebody who owns a small business. The impact on them is enormous.

And think of the impact on the rest of the health care system. Just because these folks are uninsured doesn't mean they don't get sick. At a certain point, when they get sick enough they go to the emergency room or they go to the hospital. Since, those costs are currently unsponsored, they have to be shifted to the rest of the population or hospitals have to eat those costs. What a difference it would make to the people of this country and the small business sector and to the economy if we could introduce and pass a measure that would help cover folks who currently are uninsured. We can do that.

I have talked about the bad news. The good news is that we have an idea that can fix this problem very substantially. It is an idea that passed in the House of Representatives two terms in a row. It is time tested. It is supported on a bipartisan basis in the House. It has the broad support of the small business community. It would not cost the taxpayers of this country a dime. I am talking about association health plans.

Let me explain what association health plans are. The best way to think of them is that they would simply empower small businesspeople of whatever kind to get health insurance on the same terms that big companies already can. AHPs would reduce the cost of health insurance to small businesses by 10 percent to 20 percent. This is how they would work. We need to pass a law empowering or enabling the major trade associations, the Farm Bureau, the Chamber of Commerce, the NFIB, the medical associations, to sponsor ERISA health care plans, including self insured plans, the same way big companies can.

Then, if you joined the trade association, the association would have to offer you coverage under the plans. They would have to offer it to you. They would have to carry you. So if you were a small business you could join the trade association and it would be as if you were becoming a little division of a big company. It would be as if your small business had been bought by a bigger company and all of a sudden you were part of a large national pool of people without having to pay the marketing costs or the profit margins of big insurance companies, and with much reduced administrative costs. One of the big reasons small businesses have to pay more for health insurance is that the administrative cost for small businesses is so much greater.

As I said, this would not cost the taxpayers a dime. It is not a Government program. It just allows small businesses to pool together to help themselves and their employees. It is not a revolutionary change, but the impact would be revolutionary on people who work for small business who would have access to health insurance. The number of uninsured would be reduced by millions of people.

We have gone years without really good news in the health care sector, and association health plans have the potential to be that good news. As I said, the bill has a history already, at least in the House. It was introduced first in the 104th Congress 6 or 7 years ago by my good friend, then-Congressman Harris Fawell. We passed it twice 2 years running in the House. It had strong bipartisan support. I think the bill when we introduced it originally in the House had 85 Republicans and 25 Democrats, including the ranking member of the Small Business Committee in the House. It has very strong support already in this body. I am pleased to say the chair of the Small Business Committee, Ms. SNOWE, is a strong supporter. Senator BOND is a strong supporter.

There is simply no reason why we cannot pass this bill. There is nothing in this bill that implicates any of the great philosophical divisions that separate the two parties on other kinds of issues. The bill is in the mainstream of both political parties. It would make a huge difference for America, for small business, and for the people who are uninsured, and we simply ought to get it done.

That is the kind of thing I am looking forward to working on in the Senate. Let us have an up or down vote on the Estrada nomination and then move forward together.

We have to be able to create jobs. We have to do something about the health care situation in this country. We have to attend to the national defense. We should confirm the President's qualified nominees such as Mr. Estrada and then move on and pass this necessary measure for small business and for the people of the country.

I yield the floor.

The PRESIDING OFFICER (Ms. COLLINS). The senior Senator from Missouri.

Mr. BOND. Madam President, it is a great pleasure today to be able to welcome my new colleague from Missouri to this body. I think he will find, since we are not limited to 1 minute on this side of the Capitol, that remarks are not nearly as concise as they would be in the other body. But certainly his experience there will be of great value.

I have been proud and pleased to know JIM TALENT and his wonderful family for many years in the State of Missouri. I knew him when he served as the Republican leader in the legislature. I worked with him closely when he was the chairman of the Small Business Committee in the House. There was a time when the State of Missouri had double duty in small business and it was a pleasure to work with him then.

I also know his children and his wonderful wife, Brenda. They are a great family. They make a great team. This fall I got to see a lot of them. They give him the courage and the support he needs to do an excellent job.

We also were very saddened that his father, who meant so much to him, did not live to see him achieve this victory in the end of the campaign. He lost his father and, while it was quite a blow to him, he persevered. It was a mark of the man that he came through these very difficult times.

I know this body will benefit from JIM TALENT's contributions. He has been a champion for association health plans, which I think are essential for enabling small businesses to participate in the competitive marketplace, to secure health insurance for employees and their families. JIM has championed this idea on the House side. I know it is a top priority of the President and the Secretary of Labor, and it is good to have him leading this charge in the Senate now, along with Chairman SNOWE and the other members of the Small Business Committee and people who are supportive of small business in the Senate.

Obviously, as has been said, the benefit of an AHP, or association health plan, is by allowing small businesses with similar interests across State lines, across the country, to come together in one pool; they can gain the efficiencies of purchasing in volume; They can gain the advantages of administering overhead, which can be spread across many businesses. For the same reason that you pay less for soda in cans if you buy it by the case, or multiple cases, than if you buy it one at a time, buying health care is much the same. No. 1, you get efficiencies of scale. You also have an opportunity to spread the risks. Those who have taken time to study health care know that the broader the pool, the broader the actuarial component is, the more reasonable the limits will be.

I see my colleague from Massachusetts is ready to take the floor.

Mr. TALENT. Will the Senator yield for just a moment? I certainly will not delay the Senator from Massachusetts. He has been very kind in allowing me to speak, but I wanted to thank the Senator for his kind remarks about me and many kindnesses to me, and especially coming out on the floor. I also want to say, because I see the senior Senator from Massachusetts and the Senator from Nevada and the Senator from Utah, how impressed I have been and how much I feel welcomed by the many senior Members of this body who took a moment to come over on their own and say hello to me. I am just grateful for that. It is a real mark of the congeniality of the Senate. I appreciate it.

I thank my friend and colleague from Missouri for yielding.

Mr. BOND. I thank my colleague. I appreciate the indulgence of the Members on the floor.

I yield the floor.

Mr. HATCH. Madam President, if I may ask my colleague from Massachusetts for a moment of privilege, I want to personally praise my colleague from Missouri for his maiden speech today and for the excellent job he has been doing ever since he began here. I just wish we had him on the Judiciary Committee as well because we know the great lawyer he is, and we also know about the terrific experiences he has had over in the House and also in private practice.

I just want him to know how much we appreciate having him in the Senate and how proud I am of him every day.

I thank my colleague from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Madam President, I join with my colleagues in drawing attention to the remarks of our new colleague from Missouri speaking on the issue of health insurance, the uninsured and the challenges which are out there for the small business community. This is, as he has very well stated, an extraordinary problem for the reasons he has outlined.

It is amazing to me that the small businesses in this country continue to try to provide coverage. As we know, in his State as well as mine, they are all paying about 30 percent more in terms of the premiums than larger companies, and in many instances they have a rapid turnover in terms of the companies that are available to them.

This really is an extremely significant part of the whole crisis in terms of the uninsured. There are a number of different proposals to which we will have a chance to give focus. But I certainly welcome the fact that he selected as his maiden speech the whole issue and question about the uninsured and the challenges that businesses, and small businesses, face. We may have some difference in just how to deal with the issue, but I certainly look forward to working with him and others to see how we can make progress.

I thank him for his statement and for the fact that he is focusing on an issue that is of such importance to our fellow citizens; that is, the question of the uninsured and how we are going to continue to provide insurance for small businesses.

Madam President, one of our most important responsibilities as Senators is the confirmation of federal judges. These are lifetime appointments. Long after we have served our Senate terms, the judges nominated by the President will continue to interpret the Constitution and federal laws. A President's nominees are an enduring legacy that will affect the life of our country and the lives of our constituents for many years to come.

The important work we do in Congress to improve health care, reform public schools, protect workers rights, and ensure enforcement of civil rights means less if we fail to fulfill our responsibility to provide the best possible advice and consent on judicial nominations. Tough environmental laws mean little to a community that can't enforce them in our federal courts. Civil rights laws are undercut if there are no remedies for disabled men and women. Fair labor laws are only words on paper if we confirm judges who ignore them.

For all of these reasons, we must carefully review the qualifications of federal judges, particularly nominees to the DC Circuit. Because the supreme Court hears relatively few cases, the appellate courts are frequently the courts of last resort for millions of Americans. And, of those appellate courts, the DC Circuit is one of the most important. It has a unique and prominent role among the Federal courts, especially in interpreting administrative law, and it has exclusive jurisdiction over many laws affecting the workplace, the environment, civil rights, and consumer protection. For the most vulnerable among us, the DC circuit is often the final stop on the road to justice.

Given its location and jurisdiction, the D.C. Circuit has often decided important cases involving separation of powers, the role of the federal government, the responsibilities of Federal officials, and the authority of Federal agencies. In the 1960s and 1970s, the DC Circuit had a significant role in broadening public access to agency and judicial proceedings, expanding civil rights guarantees, overseeing administrative agencies, protecting the public interest in communications regulation, and strengthening environmental protections.

In the 1980s, however, the DC Circuit changed dramatically because of the appointment of conservative judges. As its composition changed, it became a move conservative and activist court—striking down civil rights and constitutional protections, encouraging deregulation, closing the doors of the courts to many citizens, favoring employers over workers, and undermining federal protection of the environment.

In the 1960s and 1970s, the DC Circuit expanded public access to administrative proceedings and protected the interests of the public against big business. For example, the court enabled more plaintiffs to challenge agency decisions. It held that a religious group—as members of the listening public—could oppose the license renewal of a televisionstation accused of racial and religious discrimination. It held that an organization of welfare recipients was entitled to intervene in proceedings before a Federal agency. No longer would these agencies be able to ignore the interests of those they were supposed to protect.

But in the 1980s, with the ascent of conservative appointees, the DC Circuit began denying access to the courts. It held that a labor union could not challenge the denial of benefits to its members—a decision later overturned by the Supreme Court. It held that environmental groups are not qualified to seek review of EPA Standards under the Clean Air Act. These decisions are characteristic of the DC Circuit's flip-flop in the 1980s. After decades of landmark decisions allowing effective implementation of important laws and principles, the DC Circuit is now creating precedents on labor rights, civil rights, and the environment that will set back these basic principles for years to come.

In the 1970s and early 1980s, the DC Circuit advanced the cause of environmental protection. In this period, the court interpreted the Clean Air Act in ways consistent with Congress' intent. In Lead Industries Associations v. EPA, the court held that the EPA cannot consider economic costs to industry in setting air quality standards, because Congress had made health the paramount concern in setting these standards.

Decisions in leaded gasoline cases also significantly advanced the effort to reduce air pollution and protect people—particularly children in cities, from the harmful effects of automobile exhaust. In addition, the court took strict action when it upheld the ban on the manufacturer and sale of the pesticides DDT, heptachlor and chlordane.

But in the mid-1980s, conservative judges on the DC Circuit began cutting off access to the courts for environmentalists and injected an anti-environmental point of view into decision after decision, regardless of even Supreme Court precedents. In American Trucking Associations v. EPA in 1999, the DC Circuit issued a harsh decision denying the EPA the authority to establish health standards for smog and soot. That decision was unanimously reversed by the Supreme Court. In another notorious decision, Sweet Home Chapter of Communities for a great Oregon v. Babbitt, it struck down habitat protections for endangered species. This decision also was reversed by the Supreme Court.

When Congress passed the National Labor Relations Act, it guaranteed workers the rights to join a union without discrimination or reprisal by employers, and to bargain with employers over the terms and conditions of employment. The National Labor Relations Board interprets and enforces the act and reviews appeals of decisions by administrative law judges. NLRB decisions are appealable to the circuit court, where the unfair labor practice is alleged to have occurred, or here the employer resides or transacts business, or in the DC Circuit. As a result, the DC Circuit is always available as a forum to challenge decisions of the board.

In 1980, the DC Circuit fully enforced the board's decision 83 percent of the time, and at least partly enforced the board's decision in all the other cases. By the year 2000, when the court had a 5-to-4 Republican majority, including a solid majority of Reagan/Bush appointees, the DC Circuit enforced in full only 57 percent of NLRB cases and enforced at least part of the board's decisions just 70 percent of the time. These enforcement statistics put the DC Circuit significantly below the national average of an 83.4 percent enforcement rate for the board in all the courts of appeals.

Given these statistics, it is not surprising that the DC Circuit has become the circuit of choice for employers trying to overturn NLRB decisions. In 1980, the DC Circuit heard only 3 percent of the NLRB appeals heard by the circuit courts. The DC Circuit ranked next to last of all the circuits. Only the Tenth Circuit heard fewer cases.

As the Reagan/Bush effect on the DC Circuit took hold, the court became increasingly attractive to industries, and the court;'s share of NLRB cases steadily rose. By the year 2000, the DC Circuit ranked first among all circuit courts in the percentage of NLRB cases herd by those courts. Almost one in five cases—18 percent—were filed in the DC Circuit, and employers brought by far the largest number of these cases.

The DC Circuit's willingness to overturn National Labor Relations Board decision is deeply troubling because of the precedents being established. In Freund Baking Co. v. NLRB, it reversed the NLRB and set aside a union election because the court felt that a wage and hour lawsuit brought on behalf of several workers shortly before the election interfered with a fair election.

In Macmillan Publishing. Co. v. NLRB, the board had overturned a union representation election, finding that a company prevented a fair election by distributing a leaflet telling employees to vote against the union or risk losing a previously announced wage increase. The DC Circuit reversed the board's action.

The DC Circuit's hostility to the NLRB, to the detriment of workers and their unions, is also illustrated in other cases dominated by Reagan Bush appointees. In International Paper Co. v. NLRB, the court overturned the board's decision and held that the company's permanent subcontracting of employees' job during a lockout was an unfair labor practice. In Detroit Typographical Union v. NLRB, the court overturned the NLRB's determination that Detroit News and Free Press had committed an unfair labor practice when it unilaterally implemented a merit pay proposal immediately prior to the beginning of a 19-month strike by newspaper employees. In Pall Corp. v. NLRB, the court overturned the board's determination that it was an unfair labor practice for an employer to unilaterally revoke a contract provision on ways for the union to obtain recognition at other facilities.

The DC Circuit also vacated a decision by the board to include handicapped workers at a Goodwill production facility in the same bargaining unit as other employees. The court held that the handicapped workers were not employees. And in C.C. Eastern v. NLRB and North American Van Lines v. NLRB, the court overturned the board's ruling that truck drivers are employees. Instead, the court held that the drivers are independent contractors unprotected by the National Labor Relations Act.

Immediately after Congress passed the Occupational Safety and Health Act of 1970, the DC Circuit issued major decisions that protected workers from job-related hazards. The DC Circuit issued a landmark ruling in United Steelworkers of America v. Marshall, which upheld OSHA's standard on lead in the workplace. This case continues to be important, because it upheld basic principles and protections that the agency went on to use in many other workplace safety standards.

The DC Circuit also held the OSHA Administrator to a high standard in implementing the law. In 1983, the court ordered OSHA to expedite rulemaking on ethylene oxide, a highly toxic substance used to sterilize medical equipment. In a subsequent case,

the court sent an ethylene oxide standard back to OSHA for failure to adopt a short-term exposure limit that would have made the standard more protective.

In 1987, after unacceptable delay by OSHA, the court ordered the agency to issue a field sanitation standard requiring toilets and drinking water for farmworkers, to protect them from disease.

Today however, employees no longer see the DC Circuit as a court in which to bring worker safety and health actions. Despite the court's earlier willingness to hold OSHA to its statutory mandate to protect workers, workers are turning elsewhere for relief, and big business is counting on the DC Circuit for assistance. It is no accident that the National Association of Manufacturers and other trade associations who filed a lawsuit to overturn OSHA's ergonomics standard chose the DC Circuit to bring their petitions for review.

In decades past, the DC Circuit was in the forefront of upholding Federal protections for minorities and women. One of the most notable cases on racial discrimination was a 1969 decision upholding measures to end the overcrowding and segregation of schools in the District of Columbia. In another important decision, the court held that a written examination had a disparate impact on African Americans applying for positions in the police department. The court held that unless the test had sufficient relationship to job performance, it violated the Constitution.

The DC Circuit also contributed important precedents for women seeking justice and equality. In Laffey v. Northwest Airlines, female flight attendants were assigned to the all-female ''stewardess'' classification, while men who performed essentially the same job were paid more and called ''pursers.'' The female flight attendants sued Northwest Airlines for sex discrimination. The district court held that Northeast Airlines had violated Federal law, and the DC Circuit upheld the argument that the Equal Pay Act extended to identical jobs, and held that it required equal pay for ''substantially equal'' jobs.

This principle was emphasized in Thompson v. Sawyer, involving a claim of sex discrimination by employees of the Government Printing Office. The court held that jobs may be ''substantially equal,'' even it they involve work on different machines or equipment, as long as the skills, effort, responsibility and working conditions are the same.

All of these decisions are advancing the cause of equal pay for women in the workplace, enormously important decisions. Because of these decisions, we see further compliance by other companies, knowing that this is the law and it has to be respected.

In the late 1970s and mid 1980s, in the area of sexual harassment, the court held in a series of cases that sexual harassment in the workplace violates title VII even when there has been no loss of tangible job benefits. The court also held an employer can be held liable for sexual harassment by a supervisor, even if the employee is unaware of the supervisor's actions.

These cases were all important steps on civil rights, enormously important to the kinds of conditions in the workplace, particularly for women on equal pay and also in terms of the issues on sexual harassment. This was major progress in decisions made by the DC Circuit.

People say: Why are we so concerned about this particular nominee? I have been trying to review for the Senate, this afternoon, these various areas. Whether we are talking about the environment, whether we are talking about worker safety, whether we are talking about issues on women's rights—equal pay, freedom from harassment—all of these judgments and decisions that have been made by the DC Circuit have advanced the cause of greater protection and greater equality for the citizens in the workplace.

These cases were all important steps on civil rights. But when more conservative judges were appointed, the tide began to change. In 1973, the DC Circuit had required the Federal Government to take steps to end segregation in educational institutions receiving Federal funds. But a decade later, by a 6-to-4 vote, the DC Circuit held in Adams v. Richardson that the plaintiffs could not obtain judicial review of the Federal Government's settlement with higher education institutions, despite the Government's abandonment of its own desegregation criteria.

The workers and the firms affected by such decisions are well aware that the DC Court of Appeals is a powerful court. This fact is not lost on the current administration. For over two decades, Republican administrations have worked diligently to reshape this court and other courts. Current judicial nominees are clearly being chosen for their ideological beliefs.

None of us should have any doubt that the Bush administration is intensely pursing this goal today.

The President's nominees to the circuit courts are among the most conservative lawyers and judges in the country. This administration is doing all it can to reshape the Federal judiciary for a generation or more to come in its own conservative image. In doing so, the administration is undermining the enforcement of important environmental, labor, worker safety, immigration, and civil rights laws while advancing harsh new policies.

If this administration has its way, we will soon be drilling in the Arctic National Wildlife Refuge, developing and exploiting wetlands and waterways protected by the Clean Water Act, and undermining policies that protect our environment.

If this administration has its way, employees will have fewer labor and workplace protections. If this administration has its way, we will see the continued erosion of civil rights laws.

It is obvious that Mr. Estrada has been nominated to a court that is overturning important precedents and moving farther and farther to the right—a court that disregards congressional intent and the letter and spirit of the law it has a duty to respect—courts like the current administration, more interested in serving big business than in serving justice.

As I reviewed just briefly why this nominee is so important, we get asked why is this particular nominee so important? As I mentioned, it is the DC Circuit. It is making and has made these judgments time and time again in protecting individuals and the environment and protecting workers. We have seen a significant shift in recent times. What we are trying to find out is what the nominee's views are in the general areas I have mentioned in which this court has such important jurisdiction.

We could get no answers on the issue of workers rights, no answers on the issue of civil rights, no answers on the issue of the environment, no answers on the issue of the broad sweep of different questions that come in terms of administrative agencies and the importance, what kind of precedence, what kind of latitude they give to administrative agencies. No, we are not entitled to those answers at all. Absolutely none. We just are denied any kind of opportunity to hear any response as to a court of this importance. We are entitled to hear the nominee, not for his specific outcomes of a particular case but to show an understanding and a grasp and an awareness of the importance of the laws and a sense of the type of commitment he has in terms of fundamental constitutional protections.

I urge my colleagues to heed the warnings of the many Latino organizations and leaders who have raised concerns about Mr. Estrada's nomination. As 52 Latino labor leaders have written:

> America's working families look to the federal courts to protect our rights at work, to stop unfair labor practices by employers, and to ensure that employers respect laws regarding fair pay and equal treatment on the job.
>
> Of all the federal courts, none—other than the U.S. Supreme Court—is more important to working people than the U.S. Court of Appeals for the District of Columbia Circuit. It is in this court that the legal rights of working people are won and lost. After a careful review of Mr. Estrada's record, on behalf of the working families of America, we have decided to oppose the nomination of Miguel Estrada.

These concerns are shared by the United Steelworkers of America, the UAW, Community Rights Counsel, Defenders of Wildlife, Earth Justice, the Endangered Species Coalition, the Environmental Defense Fund, the Environmental Working Group, Friends of the Earth, the Sierra Club, the Wilderness Society, the Mexican American

Legal Defense Fund, the Puerto Rican Legal Defense Fund, the Congressional Hispanic Caucus, the Congressional Black Caucus, and many other organizations.

Earlier today we had meetings with the leaders of the Hispanic Caucus. They reviewed with us how they have interviewed various nominees over recent years, how they were able to get some kind of a sense, and the degree of support they had given to many other nominees who they had a particular interest in, who had a Hispanic background, and how they interviewed this nominee.

I will take some time tomorrow to review in some detail with the Senate their conclusions and their observations. They are the ones who speak for the Hispanic community. They are the ones who understand the hopes and dreams of so many of our Hispanic brothers and sisters. They are the ones who have, through life experience, a keen awareness and understanding about the importance of justice.

But some of the statements they made this afternoon, which I found so compelling, were the fact that when the dust settles on the Presidency, whether it is one party or the other, when the final action is taken in the appropriations and the legislative branch, the one place the Hispanics have historically been able to look to and have a sense of confidence has been the American judicial system. They consider it sacrosanct in terms of the types of challenges they are facing daily in our society. They challenge us to preserve that kind of equality.

They reviewed in careful detail, not just for us but for Americans, in the form of our meeting this afternoon with the press exactly why they are so strongly opposed to this nominee.

I stand with these groups and the millions of Americans they represent and urge the Senate to reject the nomination.

EDUCATION FUNDING

Mr. President, I see my friend and colleague from New Mexico. I would like to, if I may, proceed for about 3 or 4 more minutes on a different subject, but one I know he is very much interested in. I think it is important to bring to the attention of the Senate. That is the outcome of the omnibus 2003 budget in the area of education.

We are going to have the final budget conference report in the next several hours, but there are a number of parts of it that effectively have been closed. It is important, since it affects the families in this country who are concerned about education, that we take a moment to review the positive outcome that has taken place in the omnibus 2003 budget that marks a victory for parents and teachers and principals and schoolchildren across the Nation.

When the omnibus 2003 spending bill is reported out of conference later tonight, it will include an education budget increase that is eight times President Bush's request. For the second time in 4 weeks the Congress will reject President Bush's inadequate education budget and insist on increased resources to carry out school reform. And for the second time in 4 weeks, Republicans and Democrats in Congress will reject the administration's ongoing drive to divert scarce public school funding to private school vouchers.

I see the Senator from Maine who, with our friend and colleague from Connecticut, during the authorization spoke so eloquently about the importance of funding of title I. We made important progress in including approximately 500,000 more children who would be eligible for title I as the result of the omnibus bill.

The final year budget which effectively will provide resources that will be available to the school systems this spring will provide 3.2 billion in education over the previous year and 2.8 billion over President Bush's budget. Title I, the key school reform program, the No Child Left Behind, would be increased by $1.4 billion, helping half a million more needy children to be fully served. In my State of Massachusetts, 46,000 more children will be served. IDEA will increase by $1.4 billion, putting us a step closer toward fully funding the program as promised. My own State of Massachusetts will see a $32 million increase in special education funding.

Support for improved teaching quality and reducing class size will increase by $100 million—not nearly enough, but we are going in the right direction. We will improve the quality of 24,000 more teachers across the country. Programs that help English language learners master English will increase by $25 million and will help 37,000 more children learn English.

We have made strong steps toward meeting the promises of full funding outlined in No Child Left Behind and NIDA. But it is not enough. Teachers and students need more support. Teacher shortages are getting worse, class sizes are increasing, State deficits are skyrocketing. So we have a good deal of work to do. But as a result of the decisions that have been made recently in the Senate and in the conference report, there is some good news on the way.

I thank my friend and colleague from New Mexico for permitting me to finish.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Madam President, let me first thank my colleague from Massachusetts for his eloquent statement on the Estrada nomination and also his other statement about the level of funding for education contained in the omnibus appropriations bill. I know how hard he has worked on that issue for many years. I commend him for the progress that has been made, and I agree with him that much more progress needs to be made.

I want to say a few words about the Estrada nomination and also talk about another aspect of the President's proposed budget to us, with which I have found serious concern.

First, on the Estrada nomination for the DC Court of Appeals, Miguel Estrada has been nominated for that position, and, frankly, the concern I bring to this issue is that many of my good friends and people whom I respect in the House of Representatives, in the Hispanic Caucus, have indicated that they oppose his nomination. When I said many, I should have said all. They had quite a discussion and quite a period of investigation of this nomination, and they concluded unanimously that the Hispanic Caucus of the House of Representatives would oppose the nomination. I have been contacted by several members of that caucus and urged to resist the nomination in the Senate. As I say, I have not taken the time to look into it in detail myself, but I have great respect for these gentlemen and women who have worked hard on this issue, and their strong opposition is of concern to me.

I am also concerned that not a single Democratic member of the Senate Judiciary Committee determined to support the nominee after hearing the nominee's answers to questions before the committee. I share my colleagues' concerns as expressed by many of those members on the Judiciary Committee that we simply do not have enough information about this nominee at this time to cast an informed vote. During his confirmation hearing, he was not willing to answer many basic questions that were propounded to him. He was evasive when asked about his judicial philosophy. He refused to provide samples of his work from the time he served in the Solicitor General's Office. There have been requests for information made that, in my view, have been reasonable.

As I understand it, the chairman and ranking Democrat on the Judiciary Committee and Senator DASCHLE are continuing to request additional information before any vote is cast on that nomination.

Some have attempted to turn this debate into a debate about the nominee's ethnicity. I don't believe that is the issue. I have supported many Hispanic candidates. In my State, I had the great honor to recommend to President Clinton, our previous President, and he in fact appointed a Hispanic nominee to our Federal court in New Mexico. But that support was based on having a full record regarding the candidate's qualifications in each case. We do not have a full record as to this nominee at this point. I hope when we attain it, then we can move forward with the vote at sometime in the future.

THE PRESIDENT'S PENSION PROPOSAL

Madam President, I want to talk for a few minutes about a set of proposals the administration has made related to pension coverage that I think are of serious concern. You might say, where does that fit into the other major issues being discussed here? As I see it,

the President has presented his new budget to the Congress, and part of that budget involves reductions in revenue. Now, the portion of those reductions in revenue that has been focused on most is the stimulus package, the recommended elimination of the tax on dividends from stock, the recommendations to accelerate the anticipated changes in the income tax rates; all of that has been what people have focused on.

There are other parts of what the President has proposed to us which are also deeply troubling. I think it is time we begin to focus on those. The President has made some recommendations that I think carry with them some great danger.

Let me address the first chart called ''Passed and Proposed Tax Cuts.'' This chart makes the obvious point that, in 2001, Congress passed a major tax cut bill which, over a 10-year period, was estimated to reduce revenue to the Government by $1.35 trillion. That is a very large tax cut. At the time, there was great fanfare by those who supported it that this was the largest tax cut in our Nation's history. It reduced individual tax rates; it repealed, essentially, a temporary estate tax, increased contribution limits to retirement plans.

Two weeks ago, Congress received the President's proposed budget for this year. That budget says we should add to the $1.35 trillion and the 2002 stimulus bill a new tax cut, a new series of tax cuts that add up to $1.46 trillion. People say that is not the right figure. The figure discussed here is 670-some-odd billion dollars; that is what it is going to cost, not $1.46 trillion. But I refer you to the budget documents that were presented to the Congress. We had a hearing in the Finance Committee the other day with our new Secretary of the Treasury. I asked him about this. He said: I am not sure that is the right number. We read it back to him out of his own budget documents. That is the right number. It includes the stimulus package, but it also includes the CARE Act, MSA expansion and permanency, and the proposal related to pensions.

Let me talk about the pension-related provisions for a few minutes. In my view, these pension-related provisions that the President is now urging on the Congress could have a devastating effect on retirements and the ability of workers to save for their retirement. These proposals mark a dangerous and irresponsible shift away from existing policies that are intended to encourage retirement saving by all of our workers in employer-provided plans.

The proposal the President has made is to deemphasize employer-provided plans and essentially take away the incentives for continuation of those plans and, instead, shift to a system where everyone is left to fend for himself or herself. In my view, this would benefit only those in our society who need help the least. The President's proposal is based on the creation of two new super-IRAs: There is the RSA, Retirement Savings Account, and the LSA. Each of these would allow individuals to set aside $15,000 a year in the two together for favorable tax treatments. Those with additional resources would be able to set aside an additional $75,000 a year for other family members who could set up their own LSA; so if you had two or three children, or a spouse, you could certainly do it for them as well. While some would benefit from this type of arrangement, the vast majority of Americans would be unable to find the resources to save on their own.

The creation of these new accounts negates the tax advantages currently available only for employer-provided plans. The likely result is that without these current tax advantages, employers will simply stop offering their plans. It will no longer be economical, and it will no longer be the most efficient way to meet their own retirement needs.

About 80 years ago, Congress began to offer employers preferential tax treatment if they would help their employees to pay into pension plans. Then, as now, the Congress appreciated the need to get the employer involved in the employee's retirement savings. In doing so, we created a series of nondiscrimination rules to guarantee that employers provide benefits to all employees, not just those who are the top level employees.

We have seen many examples in recent months, beginning with the Enron scandal and then in the case of WorldCom, and many others, where top individuals in corporate structures have benefited extremely well, while the average worker has been left unassisted.

We have put in place in the tax law a requirement that there not be discrimination in pension coverage. We also created a series of tax incentives that encouraged employees to set aside their own funds in these same accounts. The combination of incentives for employers and incentives for employees have always been premised on the employer offering the employees a plan in which that employee could save.

Over the years, we have made significant changes and adaptations to the system. The primary goal has been to encourage employer-provided plans and to encourage employers to assist employees in this very important financial goal that employees need to have.

The President's current proposal, in my view, dramatically ends this policy, ends this effort to encourage employers to help employees save for their retirement. At a time when we are facing huge funding deficits in Social Security, it seems to me reckless to be considering removing the underpinnings and the stability of our current private retirement system.

Our current private retirement system has many defects, and I would be the first to point those out, and I have pointed them out many times. But to take away what we currently have in the way of a private retirement system and the incentives that underpin that system at this time I think would be very wrongheaded.

There is a rational basis for encouraging employer-provided plans. Let me show this chart which gives some statistics. This is a Department of Labor chart. It shows that for all workers for 1999, the coverage for all private sector workers was 44 percent. That is, 44 percent of private sector workers in the country had some kind of pension plan. In those firms where the employer sponsored a plan, it was substantially higher. It was 58 percent. The participation when the employer sponsored a plan was 75 percent for all workers.

The point of this is clearly that employee participation increases when employers are sponsoring a plan. We have the very same thing as Federal workers. The Federal Government says that if we wish to put away funds for retirement, the Federal Government, through the Thrift Savings Plan, will match the contribution that Federal workers make up to a certain percentage. I think it is 5 percent, in that range.

This is very similar to the kind of employee plan that many have—a matching plan. Some employers say they will match dollar for dollar; some say they will match 50 cents for each dollar the employee puts in. The main point is, workers will take advantage of employer retirement plans when those plans are offered.

This chart demonstrates one other point, and that is, when you get down to minority representation, the percentage of minority workers who are covered by pension plans is substantially less than the percentage in the population as a whole, and there is only 27 percent in the case of Hispanic workers, but it goes up dramatically where the employer is sponsoring the plan. It goes from 27 percent to 68 percent. So employer sponsoring of plans is a very substantial factor in causing people to save for their retirement.

The administration, in my view, should be focusing on ways to encourage more employers, particularly small businesses—in my State, most employers are small businesses—to offer their employees plans. We should not be giving employers reasons not to offer those plans or to discontinue plans they have historically offered.

Last year, Edward N. Wolf of the Economic Policy Institute presented a report entitled ''Retirement Insecurity: The Income Shortfalls Awaiting the Soon to Retire.'' That report demonstrated the shift away from defined benefit plans to defined contribution plans over the last 30 years, and we have seen that shift. It demonstrated that shift has not, in fact, improved our Nation's coverage rate, as it was advertised to do. Instead, it has reduced the overall retirement wealth for

the bulk of the workers in this country.

The primary reason the companies have shifted to these defined contribution plans—and defined contribution plan, of course, is nothing except a plan which specifies how much will be put in rather than specifying how much a benefit the retiree will finally receive as a result of a plan—but the primary reason companies shifted to these defined contribution plans is that under these plans, the employees make the majority of the contributions. The employee is the one who bears the risk about what happens to the funds invested in that plan. This reduces the employer's cost. It makes it far more attractive to the employer than a traditional pension plan.

The President's proposal takes it one step further, and it shifts us one step further away from employer participation in retirement savings. In many cases, the small business employer would be able to save more themselves with the new IRA, so they could put away $7,500, they could put away $7,500 for their wife, and they would be able to provide certain higher income employees with matches, for the employees' savings as well, without running afoul of any current discrimination rules.

Since IRAs are not covered by discrimination rules or by ERISA, the employer could pick and choose which employees they want to provide matches to; they could provide those matches in the form of bonuses, or whatever. That is not allowed under current rules and, in my view, should not be allowed. If an employer wanted, they could even contribute to family members, to shareholders, or to other nonworkers and avoid making contributions to the average worker working for that company.

I think, for good reason, Congress has always opposed the creation of this kind of mechanism which would open the possibility for discriminatory treatment among workers. The President's proposal, in my view, opens the floodgate to a whole range of new abuses of this kind.

At the same time, coverage rates have remained flat and as employers have shifted toward defined contribution plans, the retirement income of retirees, and those near retirement, have decreased as compared to their current incomes. This is not new information to a great many older Americans.

In 1989, roughly 30 percent of households were projected as living on less than half of their preretirement income. If we look a decade later, by 1998 this number had increased to 42 ½ percent. For African Americans and Hispanics, the numbers are significantly worse. In 1989, there was 43 ½ percent who lived on less than half of their preretirement income. By 1998, that had grown to over 50 percent—53 percent.

The Wolf report demonstrates that only those with retirement wealth in excess of a million dollars saw their retirement wealth increase in 1999. This chart shows every other class of retiree. It starts with those with incomes of less than $25,000; $25,000 to $50,000; $50,000 to $100,000; $100,000 to $250,000; $250,000 to $500,000; $500,000 to $999,999; and then over a million.

Between the period of 1983 and 1998, the changes in retirement wealth have been negative. There has been a reduction in retirement wealth for every single group in our society with the exception of those who earned over a million dollars a year. That is the unfortunate reality we face in this country.

The President's proposal would speed up this wealth gap immeasurably by forcing workers to solely fund their own retirement savings. For example, under the President's proposal, a wealthy executive would be able to save almost $50,000 a year with tax preferences for a family of four, and meanwhile workers living paycheck to paycheck would likely be unable to set aside any significant amount for retirement.

Clearly, what will be good for the top floor will not be good at the shop floor level. This is not the first time Congress has looked at IRAs. In 1986, as part of the major tax reform we did then, we created what we call the active participation rules that are still in place today. These rules limit those who can participate in an IRA based on income. The reasons for the rules are simple: Data clearly indicated the only people taking advantage of IRAs at that time were upper income people who also had employer-provided plans.

Congress realized then, as we still appreciate now, that IRAs are not utilized by lower income workers. The President is proposing to essentially replace the current retirement system with IRAs, and thereby ensuring lower paid workers are not saving for retirement.

According to the 1999 IRS statistics, that means less than 5 percent of income earners who made less than $50,000 a year were, in fact, putting funds into an IRA. That means 95 percent of those earning $50,000 or less did not put a single dollar into an IRA. The majority of working families clearly do not need or benefit from expanding IRAs as the President would have us do.

A shift toward this type of savings away from employer-provided plans will not help the majority of our workers.

This final chart indicates, using Department of Treasury data from 1999, it is clear we still have a great distance to go. Based on the data reflected on this chart, the lowest 40 percent of income earners receive roughly 2 percent of the tax benefits currently provided under our Tax Code.

That is the lowest 20 percent, and the second 20 percent, added together, get about 2 percent. The lowest 60 percent receive a little less than 12 percent of those benefits. At the same time, the top 10 percent receive 43 percent of the benefits and the top 1 percent get approximately 10 percent of those benefits.

The President's proposal, as I understand it, would significantly shift the Government-provided tax benefits to the upper income categories, as only those with disposable income would be able to participate. Unfortunately, this proposal we have been given makes it more cost effective and less administratively burdensome for employees to fund their own retirement outside of the qualified plan. So the result is most workers will find themselves without an employer-provided plan that provides salary deferrals and oftentimes significant employer contributions. Instead, most workers will have to put aside their own funds each paycheck, either without a tax benefit or the receipt of a tax benefit that does not come until the end of the tax year.

Sadly, for many American families, there are not enough resources available for them to pay all of their expenses and still do what the President has in mind.

I do not know what all of the motivations were behind this proposal. Before we move ahead, I very much hope we can look at it in great depth during hearings in the Finance Committee. As far as I can tell, it is designed to provide tax incentives for additional savings by those who need them the least, and it certainly would have the effect of undercutting the employer-sponsored retirement system we have long tried to strengthen.

As I indicated earlier, I am one of the first to admit the current employer-sponsored retirement system we have is not adequate and needs to be strengthened, but eliminating the private retirement system we have and undermining the incentives for employers to maintain that system is not the solution to the problem.

I yield the floor.

The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Utah.

Mr. HATCH. Mr. President, it seems to me if the Democrats are going to filibuster, they ought to give some reasons for their filibuster. They have said they are going to filibuster, for the first time in the history of this country, a Federal circuit court nominee, and the first Hispanic nominated to the Circuit Court of Appeals for the District of Columbia.

Where are they? We have had all kinds of talks on foreign policy, on running down the President's financial plans, running down his foreign policy. I heard one Senator today talk about the real problem is North Korea. Of course, it is a real problem. So is Iraq. So is Osama bin Laden.

These are the people who watched me in the middle of the 1990s be the first one to tell President Clinton he better get on Osama bin Laden because he is going to kill Americans. I actually was the first to bring that forth.

I have been on the Senate Select Committee on Intelligence twice. They

did nothing, and now they are moaning and groaning because we have inherited a problem that has existed for a long time. Because nothing was done? Now they are saying, well, we should be concerned about North Korea. Yes, we should be. We should be concerned about everything.

It does not take many brains to realize a lot of the finances that come for the terrorist movement throughout the Middle East and throughout the world come from Iraq. They have supported virtually everybody. The Egyptian Islamic Jihad, that is where Al-Zawahri comes from. He is No. 2 to Osama bin Laden. That is where they have gotten a lot of their money. They support the Palestinian Islamic Jihad. They support virtually every Islamic terrorist group around. Now we are supposed to just stand back because some of the Democrats think we ought to concentrate our efforts on North Korea. Of course, we are concentrating our efforts there. The President is doing everything he should do. It is not quite the same. Those people are hemmed in by China, who they have to have just for food, and it is not in China's best interest to allow North Korea to have this kind of power and be able to irresponsibly use it. Nor is it in the interest of anybody in the Asian community, and it is certainly not in our interest. We have top people working on that and controlling it.

It is hard to control wild men, and we have to really look hard to find one worse than Saddam Hussein. Saddam Hussein has used weapons of mass destruction against his own people. Imagine what he would do to us if he could.

My colleagues on the other side know as much as I know about it, or at least they should, and that is before the first session of inspections, Saddam Hussein came that close to having a nuclear device. You think he is not trying to do that now, and in his country, the size of California, do you think it is hard for him to secrete his weapons of mass destruction? He can hide those in a million different ways. This is a joke.

We have to fight terrorism. We have to fight these types of people on all sides. And we are. This administration is doing everything it can, and it really needs to have a little less bellyaching and a little less criticism, a little less partisanship than what we are getting sometimes around here.

I heard other Senators get on this floor and say this court—to go back to Miguel Estrada—the first Hispanic nominated to the circuit court of appeals in this country who is being filibustered by people who, throughout the years, have said we would never filibuster when they had the Presidency, we would never use that type of a tactic. Here they are, using it. It is hypocritical. It is wrong. It is unfair. It is establishing a precedent that could hurt this country immeasurably. We could only have the least common denominator on the Federal courts if some on the other side got their way. To do it against the first Hispanic nominated to the Circuit Court of Appeals for the District of Columbia is particularly reprehensible, especially since he has every qualification a person needs to fulfill this responsibility.

The White House and the general counsel's office have been working overtime day and night to answer all the questions these people have asked over and over that are ridiculous in nature. They have made Miguel Estrada available for any Democrat who wants to talk to him. The Democrats conducted the hearing. It was all day, which is extraordinary in and of itself. They controlled every aspect of that hearing. They asked the questions that they wanted to ask. He did not answer some of them the way they would have preferred. Then they could have defeated him for sure. That is not his job to try to please the Democrats or me or anybody else. His job is to tell the truth, which is what he did. And he had an obligation to tell the truth without saying how he would vote on any given issue, or otherwise he would have to recuse himself after he gets on the bench and be less effective.

Some of the arguments we have had around here are ridiculous. The very people who are griping about getting these confidential privileged memoranda down at the Solicitor General's Office ignore the fact that of the seven former current living Solicitors General, four of them are Democrats in the Solicitor's Office. Three reviewed Miguel Estrada's memoranda.

How far do we go with these ridiculous arguments, these unfair arguments, these discriminatory and prejudicial arguments, against a person who has every qualification to be on this court? There is only one reason they are fighting like this. They think Republicans are going to back down. Or that the President will back down. He will not back down.

I don't think most Democrats feel the way some of the radicals over there do. There are some people with reasonable minds over there. I think most of them. I respect everyone on the other side, but I have to tell you, some of them are listening to the most radical people on their side in bringing this filibuster and going against one of the best nominees in history.

I have been on the Judiciary Committee almost 30 years, 27 years now. There are very few who you would rate at the level with Miguel Estrada. Every Hispanic in this country ought to be proud of it. I am calling on every Hispanic in the country, whether Democrat, Independent, Republican, whether you are liberal, moderate or conservative, you better start calling the Democrats and let them know this is not fair, this is not right. It is abysmal. Some would say abominable. I think I would be one of those.

I have seen some unfair things here from time to time, and this is a tough body, there is no question. Sometimes we do some dumb things, but I have never seen anything more unfair than what is happening here. With Senators hiding behind this, I think, phony request for documents they know they should not have a right to have and then try to represent on the floor that the few cases where somebody leaked documents to them, that were not recommendations for appeals, recommendations for amicus curiae briefs, recommendations for certiorari, none of them were, but some were leaked from the Solicitor General's Office by partisan Democrats and they have some of these.

They have not seen fit to let us have copies of them, other than what they are putting in the RECORD. We have asked for them, but they did not have time to give them to us. The one case they can show where the Department really did give some documentation was in the case of Robert Bork. The Department produced some documents concerning Bork's firing of Archibald Cox. It was a specialty situation. But they were not documents of recommendations of employees in the Solicitor General's Office concerning appeals, concerning certiorari appeals, and concerning amicus curiae briefs.

This is one of the phoniest excuses I have ever heard. Keep in mind, four of their former Solicitors General, Democrat Solicitors General, are on Miguel Estrada's side. And three of them reviewed every one of those documents. That is not good enough for them? They know the administration cannot give in to these requests because if they did, every time anybody is nominated from any part of the Justice Department they would have to get confidential memoranda.

The executive branch does have some rights. I know that some on the other side do not believe that, but they do. They have some rights to have their confidential documents remain confidential so they can get the best advice they possibly can to represent this country, as the executive branch should. This is one of the worst arguments I have ever heard on the floor of the Senate. And it is all done for political purposes because they believe that this Hispanic man, a Republican—which is very tough for them to take, who they believe to be conservative—he is certainly probably moderate to conservative—I just know he is qualified. Everything about him says he is qualified. All of his experience tells me he is qualified. The fact he led the class at Harvard Law School says he is qualified. The fact he was one of the leaders of the class at Columbia University says he is qualified. The fact that he served Amalya Kearse, a Carter appointee, and she praised him says he is qualified. The fact he served for a Justice of the U.S. Supreme Court, Anthony Kennedy, says he is qualified.

But now the administration, in response to these ridiculous claims and these ridiculous statements made on the floor of the Senate, has now sent a

15-page, single-spaced letter that basically covers every one of these stupid claims that have been raised.

I guess maybe I should not say that. Anyone can raise any claim, whether it is stupid or otherwise, on the floor, and every Senator can ask even the dumbest questions of nominees if they want. That does not mean nominees have to answer them. It does not mean they have to answer them the way they want to—the dumb questioners, that is. We have all done that from time to time, and we all fit into that category, maybe, from time to time, but not consistently.

There is nothing more than prejudice going on here; nothing more than unfairness going on here; nothing more than a double standard going on here; nothing more than trying to trip up the President of the United States and make his life even more miserable than it is every day with North Korea, with Iraq, with all the other problems we have in this world, including France, Germany, and Belgium, which are acting disgracefully and deserve the condemnation of the world for their continuous disgraceful disruptions of the unity of our NATO allies and for their refusal to back Turkey, our ally who has stood up when others have not stood up. We don't need them. We will back Turkey, and we should back Turkey.

What gets me is we are in the middle of a filibuster of a Federal judge, when the Constitution says we should give advice and consent, not advice and obstruction, not advice and a filibuster, not advice and unfairness.

I have to admit there were some on our side who treated President Clinton in a shabby fashion. Not very many, but there were a few. I remember as a young Senator I criticized President Carter pretty strongly one day. Later, I was on a 3-hour television show with him, sitting right beside him. We had plenty of time to discuss and talk, and I apologized. I said I really feel badly; I felt I didn't treat you fairly. He leaned over and smiled and said, ORRIN, I never knew you did it. He said, you were so fair in so many other ways, I didn't notice any unfairness. That is typical of what a fine, gracious man he is.

Bill Clinton has plenty of faults, we all know that, like all the rest of us. Maybe not like all the rest of us, but we all have faults, we will put it that way. And sometimes he wasn't treated as fairly as he should have been, but I sure tried to do so. I certainly did with regard to his judicial nominees. I will tell you one thing, we never, ever filibustered a Clinton nominee, not once. There were some cloture votes, but it wasn't part of a filibuster; it was more to move the Senate along. And nobody can claim anybody on our side actually filibustered a Federal judge, which is a disgraceful thing to do.

I have to say I care a great deal for all of my colleagues in this body. These are 100 of the greatest people on Earth. I care for my colleagues on the Democratic side. But where are they? Why aren't they telling us why? Why don't they give us a reason that is a good reason for being against Miguel Estrada, with all of the qualifications he has? Why couldn't they treat us the way they wanted us to treat their circuit court nominees, which I made sure we treated right. Why can't they be decent to this Hispanic nominee, the first ever nominated to the Circuit Court of Appeals for the District of Columbia, one of the most important courts? Why is it that Senators from the Democrat side get on the floor and act as if, because a person is conservative, that person is not going to do what is right under the law; that person is not going to make sure the law is fulfilled; that person is not going to make sure the principle of stare decisis or prior precedent is followed? Miguel Estrada says he will, and he's an honest man. He will.

Why is it they think only liberal ideas are any good? I kind of admire people who think only their point of view is correct and everybody else is wrong. But I have to tell you, some of the greatest judges in our country's history are conservatives. Some of the greatest judges are liberals. And some of the worst are liberals—and conservatives. Miguel Estrada would make one of the best, and he is the American dream personified. He would open the doors for many Hispanic people, not just in the Federal judiciary but in so many other ways throughout this society because he will set an example that will be exemplary for all of us to observe. He should have a chance to sit on this court and should not have to go through this type of unfair treatment.

No nominee to the Federal court should have to go through a filibuster. But, if the Democrats are going to filibuster, why don't they get over here and filibuster? Why don't they tell us the reasons why? If you look at their reasons, there is not a bit of substance to any of them.

I ask unanimous consent the most recent letter of the White House, this 15-page single-space typewritten letter I think answers every Democrat concern, be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

THE WHITE HOUSE,
Washington, February 12, 2003.

DEAR SENATOR DASCHLE AND SENATOR LEAHY: On behalf of President Bush, I write in response to your letter to the President dated February 11, 2003. In the letter, you renew your previous request for confidential Department of Justice memoranda in which Mr. Estrada provided appeal, certiorari, and amicus recommendations while he was a career attorney in the Office of Solicitor General for four years in the Clinton Administration and one year in the George H.W. Bush Administration. You also request that Mr. Estrada answer certain questions beyond the extensive questions that he already answered appropriately and forthrightly during his Committee hearing and in follow-up written responses.

We respect the Senate's constitutional role in the confirmation process, and we agree that the Senate must make an informed judgment consistent with its traditional role and practices. However, your requests have no persuasive support in the history and precedent of judicial appointments. Indeed, the relevant history and precedent convincingly demonstrate that a new and shifting standard is being applied to Miguel Estrada.

First, as the Department of Justice explained in its letters of June 5, 2002, October 8, 2002, and January 23, 2003, all living former Solicitors General (four Democrats and three Republicans) have strongly opposed your request for Solicitor General memoranda and stated that it would sacrifice and compromise the ability of the Justice Department to effectively represent the United States in court. Even more telling, we are informed that the Senate has not requested memos such as these for any of the 67 appeals court nominees since 1977 who had previously worked in the Justice Department (including the seven nominees who had previously worked in the Solicitor General's office). The few isolated examples you have cited—in which targeted requests for particular documents about specific issues were accommodated for nominees to positions other than the U.S. Courts of Appeals—similarly do not support your request here.

Second, as explained more fully below with respect to your request that Mr. Estrada answer additional questions, the only specific question identified in your letter refers to his judicial role models. You claim that Mr. Estrada refused to answer a question on this topic. In fact, in his written responses to Senator Durbin's question on this precise subject that Mr. Estrada submitted three months ago, he cited Justice Anthony Kennedy, Justice Lewis Powell, and Judge Amalya Kearse as judges he admires (he clerked for Justice Kennedy and Judge Kearse, and he further pointed out, of course, that he would seek to resolve cases as he analyzed them "without any preconception about how some other judge might approach the question." Your letter to the President ignores Mr. Estrada's answer to this question. In any event, beyond this one query, your letter does not pose any additional questions to him. Additionally, neither of you has posed any written questions to Mr. Estrada in the more than three months since his all-day Committee hearing. Since the hearing, Mr. Estrada also has met (and continues to meet) with numerous Democrat Senators interested in learning more about his record. Finally, as I will explain below, Mr. Estrada forthrightly answered numerous questions about his judicial approach and views in a manner that matches or greatly exceeds answers demanded of previous appeals court nominees.

With respect, it appears that a double standard is being applied to Miguel Estrada. That is highly unfair inappropriate, particularly for this well-qualified and well-respected nominee.

I will turn now in more detail to the various issues raised by your letter. I will address them at some length given the importance of this issue and the nature of your requests.

I. MIGUEL ESTRADA'S QUALIFICATIONS AND BIPARTISAN SUPPORT

Miguel Estrada is an extraordinarily qualified judicial nominee. The American Bar Association, which Senators Leahy and Schumer have referred to as the "gold standard," *unanimously* rated Estrada "well qualified" for the D.C. Circuit, the ABA's highest possible rating. The ABA rating was entirely appropriate in light of Mr. Estrada's superb record as Assistant to the Solicitor General

in the Clinton and George H.W. Bush Administrations, as a federal prosecutor in New York, as a law clerk to Justice Kennedy, and in performing significant *pro bono* work.

Some who are misinformed have seized on Mr. Estrada's lack of prior judicial experience, but five of the eight judges currently serving on the D.C. Circuit had no prior judicial experience, including two appointees of President Clinton and one appointee of President Carter. Miguel Estrada has tried numerous cases before federal juries, argued many cases in the federal appeals courts, and argued 15 cases before the Supreme Court of the United States. That is a record that few judicial nominees can match. And few lawyers, whatever their ideology or philosophy, have volunteered to represent a death row inmate pro bono before the Supreme Court as did Miguel Estrada.

Mr. Estrada's excellent legal qualifications are all the more extraordinary given his personal history. Simply put, Miguel Estrada is an American success story. He came to this country at age 17 from Honduras speaking little English. Through hard work and dedicated service to the United States, Miguel Estrada has risen to the very pinnacle of the legal profession. If confirmed, he would be the first Hispanic judge to sit on the U.S. Court of Appeals for the D.C. Circuit. Given his record, his background, and his integrity, it is no surprise that Miguel Estrada is strongly supported by the vast majority of national Hispanic organizations. The League of United Latin American Citizens (LULAC), for example, wrote to Senator Leahy to urge Mr. Estrada's confirmation and explain that he ''is truly one of the rising stars in the Hispanic community and a role model for our youth.'' A group of 19 Hispanic organizations, including LULAC and the Hispanic National Bar Association, recently wrote to the Senate urging ''on behalf of an overwhelming majority of Hispanics in this country'' that ''both parties in the U.S. Senate . . . put partisan politics aside so that Hispanics are no longer denied representation in one of the most prestigious courts in the land.''

The current effort to filibuster Mr. Estrada's nomination is particularly unjustified given that those who have worked with Miguel—including prominent Democrat lawyers whom you know well—strongly support his confirmation. For example, Ron Klain, who served as a high-ranking adviser to former Vice President Gore and former Chief Counsel to the Senate Judiciary Committee, wrote: ''Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. . . . [T]he challenges that he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need.''

President Clinton's Solicitor General, Seth Waxman, wrote: ''During the time Mr. Estrada and I worked together, he was a model of professionalism and competence. . . . In no way did I ever discern that the recommendations Mr. Estrada made or the analyses he propounded were colored in any way by his personal views—or indeed that they reflected any consideration other than the long-term interests of the United States. I have great respect both for Mr. Estrada's intellect and for his integrity.

A bipartisan group of 14 former colleagues in the Office of the Solicitor General at the U.S. Department of Justice wrote: ''We hold varying ideological views and affiliations that range across the political spectrum, but we are unanimous in our conviction that Miguel would be a fair and honest judge who would decide cases in accordance with the applicable legal principles and precedents, not on the basis of personal preferences or political viewpoints.'' One former colleague, Richard Seamon, wrote that he is a pro-choice, lifelong Democrat with self-described ''liberal views on most issues'' who said he would ''consider it a disgrace'' if Mr. Estrada is not confirmed.

Similarly, Leonard Joy, head of the Federal Defender Division of the Legal Aid Society of New York, wrote that ''Miguel would make an excellent Circuit Court Judge. He is as fine a lawyer as I have met and, on top of all his intellectual abilities and judgment he would bring to bear, he would bring a desirable diversity to the Court. I heartily recommend him.''

Beyond the extensive personal testimony from those who worked side-by-side with him for many years, the performance reviews of Miguel for the years that he worked in the Office of Solicitor General gave him the highest possible rating of ''outstanding'' in every possible category. The reviews stated that Miguel:

''states the operative facts and applicable law completely and persuasively, with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity, and conciseness.''

''[i]s extremely knowledgeable of resource materials and uses them expertly; acting independently, goes directly to point of the matter and gives reliable, accurate, responsive information in communicating position to others.''

''[a]ll dealings, oral and written, with the courts, clients, and others are conducted in a diplomatic, cooperative, and candid manner.''

''[a]ll briefs, motions or memoranda reviewed consistently reflect no policies at variance with Departmental or Governmental policies, or fails to discuss and analyze relevant authorities.''

''[i]s constantly sought for advice and counsel. Inspires co-workers by example.''

In the two years that Miguel Estrada and Paul Bender worked together, Mr. Bender signed those reviews. These employment reviews thus call into serious question some press reports containing a negative comment from Mr. Bender about Mr. Estrada's temperament (which is the only negative comment made by anyone who actually knows Mr. Estrada). Just as important, President Clinton's Solicitor General Seth Waxman expressly refuted Mr. Bender's statement.

In sum, based on his experience, his intellect, his integrity, and his bipartisan support, Miguel Estrada should be confirmed promptly.

II. THE SENATE'S ROLE

President Bush nominated Miguel Estrada nearly two years ago on May 9, 2001. As explained above, he is well-qualified and well-respected. By any traditional measure that the Senate has used to evaluate appeals court nominees, Miguel Estrada should have been confirmed long ago. Your letter and public statements indicate, however, that you are applying both a new standard and new tactics to this particular nominee.

As to the standard, the Senate has a very important role in the process, but the Senate's traditional approach to appeals court nominees, and the approach envisioned by the Constitution's Framers, is far different from the standard that you now seek to apply. Senator Biden stated the traditional approach in 1997: ''Any person who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life, and they have not committed crimes of moral turpitude, and have not, in fact, acted in a way that would shed a negative light on the court.'' Congressional Record, March 19, 1997. Alexander Hamilton explained that the purpose of Senate confirmation is to prevent appointment of ''unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.'' Federalist No. 76. It was anticipated that the Senate's approval would not often be refused unless there were ''special and strong reasons for the refusal.'' No. 76.

As to tactics, you have indicated that some Senate Democrats intend to filibuster to prevent a vote on this nominee. As you know, there has never been a successful filibuster of a court of appeals nominee. Only a few years ago, Senator Leahy and other Democrat Senators expressly agreed with then-Governor Bush that every judicial nominee was entitled to an up-or-down floor vote within a reasonable time. On October 3, 2000, for example, Senator Leahy stated:

Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo. Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no—not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting 'maybe,' but we are doing a terrible disservice to the man or woman to whom we do this.

Senator Daschle similarly stated on October 5, 1999, that ''[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. An up or down vote, that is all we seek for Berzon and Paez. And after years of waiting, they deserve at least that much.''

In his East Room speech on October 30, 2002, President Bush reiterated that every judicial nominee deserves a timely up-or-down floor vote in the Senate, no matter who is President or which party controls the Senate. Contrary to President Bush's attempts at permanent reform to bring order to the process, your current effort to employ a filibuster and block an up-or-down vote on the Estrada nomination may significantly exacerbate the cycle of bitterness and recrimination that President Bush has sought to resolve on a bipartisan basis. We fear that the damage caused by a filibuster could take many years to undo. To continue on this path would also be, in Senator Leahy's words, ''a terrible disservice'' to Mr. Estrada. We urge you to reconsider this extraordinary action, to end the filibuster of Mr. Estrada's nomination, and to allow the full Senate to vote up or down.

III. REQUEST FOR CONFIDENTIAL SOLICITOR GENERAL MEMOS

You have suggested that Mr. Estrada's background, experience, and support are insufficient to assess his suitability for the D.C. Circuit. You have renewed your request for Solicitor General memos authored by Mr. Estrada. But every living former Solicitor General signed joint letter to the Senate opposing your request. The letter was signed by Democrats Archibald Cox, Walter Dellinger, Drew Days, and Seth Waxman. They stated: ''Any attempt to intrude into the Office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the United States' litigation interests—a cost that also

would be borne by Congress itself. . . . Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process.''

It bears mention that the interest asserted here is that of the United States, not the personal interest of Mr. Estrada. Indeed, Mr. Estrada himself testified that ''I have not opposed the release of those records. . . . I am exceptionally proud of every piece of legal work that I have done in my life. If it were up to me as a private citizen, I would be more than proud to have you look at everything that I have done for the government or for a private client.''

The history of Senate confirmations of nominees who had previously worked in the Department of Justice makes clear that an unfair double standard is being applied to Miguel Estrada's nomination. Since the beginning of the Carter Administration in 1977, the Senate has approved 67 United States Court of Appeals nominees who previously had worked in the Department of Justice. Of those 67 nominees, 38 had no prior judicial experience, like Miguel Estrada. The Department of Justice's review of those nomination records disclosed that in none of those cases did the Department of Justice produce internal deliberative materials created by the Department. In fact, the Department's review disclosed that the Senate did not even request such materials for a single one of these 67 nominees.

Of this group of 67 nominees, seven were nominees who had worked as a Deputy Solicitor General or Assistant to the Solicitor General. These seven nominees, nominated by Presidents of each party and confirmed by Senates controlled by each party, included Samuel Alito, Danny Boggs, William Bryson, Frank Easterbrook, Daniel Friedman, Richard Posner, and Raymond Randolph.

The five isolated historical examples you have cited do not support your current request. In each of those five cases, the Committee made a targeted request for specific information primarily related to allegations of misconduct or malfeasance identified by the Committee. Even in those isolated cases, the vast majority of deliberative memoranda written by those nominees were neither requested nor produced. With respect to Judge Bork's nomination, for example, the Committee received access to certain particular memoranda (many related to Judge Bork's involvement in Watergate-related issues). The vast majority of memoranda authored by Judge Bork were never received. With respect to Judge Trott, the Committee requested documents unrelated to Judge Trott's service to the Department. So, too, in the three other examples you cite, the Committee requested specific documents primarily related to allegations of misconduct or malfeasance identified by the Committee. Of course, no such allegations have been made in the case of Mr. Estrada.

In sum, the examples you have cited only highlight the lack of precedent for the current request. As the Justice Department has explained to you previously, the existence of a few isolated examples where the Executive Branch on occasion accommodated a Committee's targeted requests for very specific information primarily related to allegations of misconduct does not in any way alter the fundamental and long-standing principle that memos from the Office of Solicitor General—and deliberative Department of Justice memoranda more broadly—must remain protected in the confirmation context so as to maintain the integrity of the Executive Branch's decisionmaking process. That is a fundamental principle that has been followed irrespective of the party that controls the White House and the Senate.

Your continued requests for these memoranda have provoked a foreseeable and inevitable conflict that, in turn, has been cited as a basis for obstructing a vote on Mr. Estrada's nomination. Respectfully, the conflict is unnecessary because your desire to assess the nominee can be readily accommodated in many ways other than intruding into and severely damaging the deliberative process of the Office of Solicitor General. For example, you can review Mr. Estrada's written briefs and oral arguments both as an attorney for the United Stats and in private practice. As you know, those documents are publicly available and easily accessible; that said, we would be pleased to facilitate your access to them. (Mr. Estrada's hearing transcript suggests that no Democrat Member of the Committee had read Mr. Estrada's many dozens of Solicitor General merits briefs, certiorari petitions, and opposition briefs or the transcripts of his 14 oral arguments when he represented the United States.) You also may consider the opinions of others who served in the Office at the same time (discussed above) and examine the nominee's written performance reviews (also discussed above). There is more than ample information for you to assess Mr. Estrada's qualifications and suitability for the DC Circuit based on the traditional standards the Senate has employed.

It also is important to recognize that political appointees of President Clinton have read virtually all of the memoranda in question—namely, the Democrat Solicitors General Drew Days, Walter Dellinger, and Seth Waxman. None of those three highly respected Democrat lawyers has expressed any concern whatever about Mr. Estrada's nomination. Indeed, Mr. Waxman wrote a letter of strong support, and Mr. Days made public statements in support of Mr. Estrada.

In sum, the historical record and past precedent convincingly demonstrate that this request creates and applies an unfair double standard to Miguel Estrada.

IV. REQUEST THAT MIGUEL ESTRADA ANSWER ADDITIONAL QUESTIONS

Your letter also suggests that Miguel Estrada should answer certain questions that he allegedly did not answer in his hearing. To begin with, we do not know what your specific questions are. In addition, this request frankly comes as a surprise given that (i) Senator Schumer chaired the hearing on Mr. Estrada, (ii) the hearing lasted an entire day, (iii) Senators at the all-day hearing asked numerous far-reaching questions that Mr. Estrada answered forthrightly and appropriately, and (iv) only two of the 10 Democrat Senators then on the Committee even submitted any follow-up written questions, and they submitted only a few questions (in marked contrast to other nominees who received voluminous follow-up questions).

It also bears mention that Mr. Estrada has personally met with a large number of Democrat Senators, including Senators Landrieu, Lincoln, Bill Nelson, Ben Nelson, Leahy, Feinstein, Kohl, and Breaux; is scheduled to meet with Senator Carper; and would be pleased to meet with additional Senators.

The only specific question your letter identifies refers to Mr. Estrada's judicial role models, and you claim that he refused to answer a question on this topic. In fact, in Mr. Estrada's written responses to senator Durbin's question on this precise subject, Mr. Estrada cited Justice Anthony Kennedy, Justice Lewis Powell, and Judge Amalya Kearse as judges he admires and he further pointed out, of course, that he would seek to resolve cases as he analyzed them ''without any preconception about how some other judge might approach the question.''

In our judgment, moreover, Mr. Estrada answered the Committee's questions in a manner that was both entirely appropriate and entirely consistent with the approach that judicial nominees of Presidents of both parties have taken for many years. Your suggestions to the contrary do not square with the hearing record or traditional practice.

A. JUDICIAL ETHICS AND TRADITIONAL PRACTICE

In assessing your request that Miguel Estrada did not answer appropriate questions, we begin with rules of judicial ethics that govern prospective nominees. Canon 5A(3)(d) provides that prospective judges ''shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court'' (emphasis added). Justice Thurgood Marshall made the point well in 1967 when asked about the Fifth Amendment: ''I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed and sit on the Court, when a Fifth Amendment case comes up, I will have to disqualify myself.'' Lloyd Cutler, who served as Counsel to President Carter and President Clinton, has stated that ''candidates should decline to reply when efforts are made to find out how they would decide a particular case.''

In 1968, in the context of the Justice Abe Fortas' nomination to be Chief Justice, the Senate Judiciary Committee similarly stated: ''Although recognizing the constitutional dilemma which appears to exist when the Senate is asked to advise and consent on a judicial nominee without examining him on legal questions, the Committee is of the view that Justice Fortas wisely and correctly declined to answer questions in this area. To require a Justice to state his views on legal questions or to discuss his past decisions before the Committee would threaten the independence of the judiciary and the integrity of the judicial system itself. It would also impinge on the constitutional doctrine of separation of powers among the three branches of Government as required by the Constitution.'' S. Exec. Rep. No. 8, 90th Cong. 2d Sess. 5 (1968).

Even in the context of a Supreme Court confirmation hearing, Senator Kennedy defended Sandra Day O'Connor's refusal to discuss her views on abortion: ''It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single-issue interest group.'' Nomination of Sandra O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomiantion of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, 97th Cong. 6 (1981) (statement of Sen. Kennedy).

Justice Ruth Bader Ginsburg likewise declined to answer certain questions: ''Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast mly vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.'' Similarly, Justice John Paul Stevens stated in his hearing: ''I really don't thinkk I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say that there have been many times in my experience in the last five years where I found that my first reaction to a problem was not the same as the reaction I had when I had the responsibility of decisions and I think that if I were to make comments that were not carefully

thought through they might be given significance that they really did not merit.''

Justice Ginsberg described the traditional practice in a case decided last year: ''In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be 'on interest' to the President and the Senate. . . . But in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well.'' *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2552 n.1 (2002) (Ginsburg, J., dissenting) (emphasis added). Justice Ginsburg added that this adherence to this ''longstanding norm'' was ''crucial to the health of the Federal Judiciary.'' Id. In his majority opinion, Justice Scalia did not take issue with that description and added: ''Nor do we assert that candidates for judicial office should be compelled to announce their views on disputed legal issues.'' Id. at 2539 n. 11 (emphasis in original).

In some recent hearings, including Mr. Estrada's, Senator Schumer has asked that nominees identify particular Supreme Court cases of the last few decades with which they disagree. But the problems with such a question and answer were well stated by Justice Stephen Breyer. As Justice Breyer put it, ''Until [an issue] comes up, I don't really think it through with the depth that it would require. . . . So often, when you decide a matter for real, in a court or elsewhere, it turns out to be very different after you've become informed and think it through for real than what you would have said at a cocktail party answering a question.'' 34 U.C. Davis L. Rev. 425, 462.

Senator Schumer also has asked nominees how they would have ruled in particular Supreme Court cases. Again, a double standard is being applied. The nominees of President Clinton did not answer such questions. For example, Richard Tallman, a nominee with no prior judicial service who would now serve on the Ninth Circuit, not only would not answer how he would have ruled as a judge in Roe v. Wade—but even how he would have ruled in Plessy v. Ferguson, the infamous case that upheld the discredited and shameful ''separate but equal'' doctrine. So, too, in the hearing on President Clinton's nomination of Judges Barry and Fisher, Senator Smith asked whether the nominees would have voted for a constitutional right to abortion before Roe v. Wade. Chairman Hatch interrupted Senator Smith to say ''that is not a fair question to these two nominees because regardless of what happened pre-1973, they have to abide by what has happened post-1973 and the current precedents that the Supreme Court has.''

B. ANSWERS BY MIGUEL ESTRADA

Miguel Estrada answered the Committee's questions forthrightly and appropriately. Indeed, Miguel Estrada was more expansive than many judicial nominees traditionally have been in Senate hearings, and he was asked a far broader range of questions than many previous appeals court nominees were asked. We will catalogue here a select sample of his answers.

Unenumerated rights, privacy, and abortion

When asked by Senator Edwards about the Constitution's protection for rights not enumerated in the Constitution, Mr. Estrada replied: ''I recognize that the Supreme Court has said [on] numerous occasion in the area of privacy and elsewhere that there are unenumerated rights in the Constitution, and I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the court. But I think the court has been quite clear that there are a number of unenumerated rights in the Constitution. In the main, the court has recognized them as being inherent in the right of substantive due process and the liberty clause of the Fourteenth Amendment.''

When asked by Senator Feinstein whether the Constitution encompasses a right to privacy and abortion, Mr. Estrada responded, ''The Supreme Court has so held, and I have not view of any nature whatsoever, whether it be legal, philosophical, moral, or any other type of view that would keep me from applying that case law faithfully.'' When asked whether Roe v. Wade was ''settled law,'' Mr. Estrada replied, ''I believe so.''

General Approach to Judging

When asked by Senator Edwards about judicial review, Mr. Estrada explained: ''Courts take the laws that have been passed by you and give you the benefit of understanding that you take the same oath that they do to uphold the Constitution, and therefore they take the laws with the presumption that they are constitutional. It is the affirmative burden of the plaintiff to show that you have gone beyond your oath. If they come into court, then it is appropriate for courts to undertake to listen to the legal arguments—why it is that the legislature went beyond [its] role as a legislat[ure] and invaded the Constitution.''

Mr. Estrada stated to Senator Edwards that there are 200 years of Supreme Court precedent and that it is not the case that ''the appropriate conduct for courts is to be guided solely by the bare text of the Constitution because that is not the legal system that we have.''

When asked by Senator Edwards whether he was a strict constructionist, Mr. Estrada replied that he was ''a fair constructionist''—meaning that ''I don't think that it should be the goal of courts to be strict or lax. The goal of courts is to get it right. . . . It is not necessarily the case in my mind that, for example, all parts of the Constitution are suitable for the same type of interpretative analysis. . . [T]he Constitution says, for example, that you must be 35 years old to be our chief executive. . . . There are areas of the Constitution that are more open-ended. And you adverted to one, like the substantive component of the due process clause, where there are other methods of interpretation that are not quite so obvious that the court has brought to bear to try to bring forth what the appropriate answer should be.''

When Senator Kohl asked him about environmental statutes, for example, Mr. Estrada explained that those statutes to court ''with a strong presumption of constitutionality.''

In response to Senator Leahy, Mr. Estrada described the most important attributes of a judge: ''The most important quality for a judge, in my view Senator Leahy, is to have an appropriate process for decisionmaking. That entails having on open mind. It entails listening to the parties, reading their briefs, going back beyond those briefs and doing all of the legwork needed to ascertain who is right in his or her claims as to what the law says and what the facts [are]. In a court of appeals court, where judges sit in panels of three, it is important to engage in deliberation and give ear to the view so colleagues who may have come to different conclusions. And in sum, to be committed to judging as a process that is intended to give us the right answer, not to a result. And I can give you my level best solemn assurance that I firmly think I do have those qualities or else I would not have accepted the nomination.''

In response to Senator Durbin, Miguel Estrada stated that ''the Constitution, like other legal texts, should be construed reasonably and fairly, to give effect to all that its text contains.''

Mr. Estrada indicated to Senator Durbin that he admired the judges for whom he clerked, Justice Kennedy and Judge Kearse, as well as Justice Lewis Powell.

Mr. Estrada stated to Senator Durbin that ''I can absolutely assure the Committee that I will follow binding Supreme Court precedent until and unless such precedent has been displaced by subsequent decisions of the Supreme Court itself.''

In response to Senator Grassley, Mr. Estrada stated: ''When facing a problem for which there is not a decisive precedent from a higher court, my cardinal rule would be to seize aid from anyplace where I could get it. Depending on the nature of the problem, that would include related case law in other areas that higher courts had dealt with that had had some insights to teach with respect to the problem at hand. I could include the history of the enactment, including in the case of a statute legislative history. It could include the custom and practice under any predecessor statute or document. It could include the views of academics to the extent that they purport to analyze what the law is instead of—instead of prescribing what it should be. And in sum, as Chief Justice Marshall once said, to attempt not to overlook anything from which aid might be derived.''

In response to Senator Sessions, Estrada stated: ''I am very firmly of the view that although we all have views on a number of subjects from A to Z, the first duty of a judge is to self-consciously put that aside and look at each case by starting withholding judgment with an open mind and listen to the parties. So I think that the job of a judge is to put all of that aside, and to the best of his human capacity to give a judgment based solely on the arguments and the law.''

In response to Senator Sessions, Mr. Estrada stated that ''I will follow binding case law in every case . . . I may have a personal, moral, philosophical view on the subject matter. But I undertake to you that I would put all that aside and decide cases in accordance with binding case law and even in accordance with the case law that is not binding but seems constructive on the area, without any influence whatsoever from any personal view I may have about the subject matter.''

Miranda/Stare Decisis

Mr. Estrada stated that United States v. Dickerson—a case raising the question whether Miranda should be overruled—reflected a ''reasonable application of the doctrine of stare decisis. In my view, it is rarely appropriate for the Supreme Court to overturn one of its own precedents.''

Affirmative Action

With respect to affirmative action, Mr. Estrada responded to Senator Kennedy that ''any policy views I might have as a private citizen on the subject of affirmative action would not enter into how I would approach any case that comes before me as a judge. Under controlling Supreme Court authority, particularly Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), if a government program creates a racial classification, it will be subject to strict scrutiny. Whether the program survives that sort of scrutiny will often involve a highly contextual and face-specific inquiry into the nature of the justifications asserted by the government and the fit between those justifications and the classification at issue. Adarand and similar cases provide the framework that I would be required to apply, and would apply, in considering these issues as a judge.''

Asked by Senator Leahy about the strict scrutiny test, Mr. Estrada replied, ''the Supreme Court in the Adarand case stated, as a general rule, that the consideration of race is subject to strict scrutiny. That means

that though it may be used in some cases, it has to be justified by a compelling state interest. And with respect to the particular context, there must be a fairly fact-bound individual assessment of the fit between the interest that is being asserted and the category being used. That is just another way of saying that it is a very fact-intensive analysis in the context of a specific program and in the context of the justifications that are being offered in support of the program.''

Congressional Authority

With respect to the outer limits of Congress' power to confer authority on other governmental bodies, Miguel responded to Senator Kennedy that the Supreme Court has said that ''particular factual context is significant in analyzing the appropriateness of a particular delegation. . . . Of course, the fact that the Supreme Court only rarely has struck down statutes on this ground suggests that the Court has been quite deferential to congressional judgments about the types of delegations that reasonably might be needed to carry on the business of government.''

When Senator Kohl asked Mr. Estrada about the 1995 Lopez case concerning the scope of Congress' power to regulate, Mr. Estrada pointed out that he had argued in a companion case ''for a very expansive view of the power to Congress to pass statutes under the Commerce Clause and have them be upheld by the court. . . . Lopez has given us guidance on when it is appropriate for the court to exercise the commerce power. It is binding law and I would follow it.''

Ethnicity

With respect to fact that the President had noted Miguel's ethnicity, Miguel responded to Senator Kennedy: ''The President is the leader of a large and diverse country, and it is accordingly appropriate for him, in exercising his constitutional nomination and appointment powers, to select qualified individuals who reflect the breadth and diversity of our Nation.''

With respect to the Democrat Congressional Hispanic Caucus's criticism of him, Miguel responded to Senator Kennedy that ''I strongly disagree, however, with the Congressional Hispanic Caucus' view that I lack an understanding of the role and importance of courts in protecting the legal rights of minorities, of the values and mores of Latino culture, or the significance of role models for minority communities.''

Racial Discrimination

With respect to race discrimination, Mr. Estrada stated in response to Senator Kennedy: ''I take a backseat to no one in my abhorrence of race discrimination in law enforcement or anything else.''

Senator Feingold asked Mr. Estrada whether he believed that racial profiling and racially motivated law enforcement misconduct are problems in this country today. Mr. Estrada replied, ''I am—I will once again emphasize I'm unalterably opposed to any sort of race discrimination in law enforcement, Senator, whether it's called racial profiling or anything else. . . . I know full well that we have real problems with discrimination in our day and age.''

Senator Leahy asked Mr. Estrada about whether statistical evidence of discriminatory impact is relevant in establishing discrimination. Mr. Estrada replied: ''I am not a specialist in this area of the law, Senator Leahy, but I am aware that there is a line of cases, beginning with the Supreme Court's decision in Griggs, that suggests that in appropriate cases that [such evidence] may be appropriate. . . . I do understand that there is a major area of law that deals with how you prove and try disparate-impact cases.''

Congressional Authority to Regulate Firearms

Senator Feinstein asked whether Congress may legislate in the area of dangerous firearms, and Mr. Estrada responded that the Supreme Court had ruled that ''if the government were to prove that the firearm had at any time in its lifetime been in interstate commerce even if that had nothing to do with the crime at issue, that that would be an adequate basis for the exercise of Congress' power.''

Right to Counsel

Senator Edwards asked about Gideon v. Wainwright, the Supreme Court case guaranteeing the right to counsel for poor defendants who could not afford counsel. Although Senator Edwards appeared to question the reasoning in that landmark case, Mr. Estrada responded that ''I frankly have always taken it as a given that that's—the ruling in the case.''

C. ANSWERS BY PRESIDENT CLINTON'S NOMINEES

Your criticism of Miguel Estrada's testimony creates a double standard. You did not require nominees of President Clinton to answer questions of this sort (keeping in mind that you have not identified what your additional questions to Mr. Estrada are). President Clinton's appeals court nominees routinely testified without discussing their views of specific issues or cases. A few select examples, including of several nominees who had no prior judicial experience, illustrate the point. (Please note that these are isolated examples; there are many more we can provide if necessary.)

Merrick Garland (no prior judicial experience). In the nomination of Merrick Garland to the DC Circuit, Senator Specter asked him: ''Do you favor, as a personal matter, capital punishment?'' Judge Garland replied only that he would follow Supreme Court precedent: ''This is really a matter of settled law now. The Court has held that capital punishment is constitutional and lower courts are to follow that rule.'' Senator Specter also asked him about his views of the independent counsel statute's constitutionality, and Judge Garland responded: ''Well, that, too, the Supreme Court in Morrison v. Olson upheld as constitutional, and, of course, I would follow that ruling.'' Judge Garland did not provide his personal view of either subject.

Judith Rogers. In the hearing on Judge Judith Rogers' nomination to the D.C. Circuit, Judge Rogers was asked by Senator Cohen about the debate over an evolving Constitution. Judge Rogers responded: ''My obligation as an appellate judge is to apply precedent. Some of the debates which I have heard and to which I think you may be alluding are interesting, but as an appellate judge, my obligation is to apply precedent. And so the interpretations of the Constitution by the U.S. Supreme Court would be binding on me.'' She then was asked how she would rule in the absence of precedent and responded: ''When I was taking my master's in judicial process at the University of Virginia Law School, one of the points emphasized was the growth of our common law system based on the English common law judge system. And my opinions, I think if you look at them, reflect that where I am presented with a question of first impression that I look to the language of whatever provision we are addressing, that I look to whatever debates are available, that I look to the interpretations by other Federal courts, that I look to the interpretations of other State courts, and it may be necessary, as well, to look at the interpretations suggested by commentators. And within that framework, which I consider to be a discipline, that I would reach a view in a case of first impression.'' Finally, Judge Rogers was asked her view of the three-strikes law and stated: ''As an appellate judge, my obligation is to enforce the laws that Congress passes, or, where I am now, that the District of Columbia Council passes.'' Judge Rogers did not provide her personal view of these subjects.

Marsha Berzon (no prior judicial experience). Senator Smith asked her views on Roe v. Wade and whether ''an unborn child is a human being.'' Judge Berzon stated: ''[M]y role as a judge is not to further anything that I personally believe or don't believe, and I think that is the strength of our system and the strength of our appellate system. The Supreme Court has been quite definitive quite recently about the applicable standard, and I absolutely pledge to you that I will follow that standard as it exists now, and if it is changed, I will follow that standard. And my personal views in this area, as in any other, will have absolutely no effect.'' When Senator Smith probed about their personal views on abortion and Roe v. Wade, Chairman Hatch interrupted: ''I don't know how they can say much more than that at this point in this meeting.''

Richard Tallman (no prior judicial experience). In response to written questions, Judge Tallman explained that ''[j]udicial nominees are limited by judicial ethical considerations from answering any question in a manner that would call for an 'advisory opinion' as the courts have defined it or that in effect ask a nominee to suggest how he or she would rule on an issue that could foreseeably require his or her attention in a future case or controversy after confirmation.'' He was asked how he would have ruled in Plessy v. Ferguson. He stated: ''It is entirely conjectural as to what I would have done without having the opportunity to thoroughly review the record presented on appeal, the briefs and arguments of counsel, and supporting legal authorities that were applicable at that time.'' He gave the same response when asked how he would have ruled on Roe v. Wade. When asked his personal view on abortion, he wrote: ''I hold no personal views that would prevent me from doing my judicial duty to follow the precedent set down by the Supreme Court.'' He gave the same answer about the death penalty.

Kim Wardlaw. In the hearing on Judge Kim Wardlaw's nomination to the Ninth Circuit, Judge Wardlaw was asked about the constitutionality of affirmative action. She stated (in an answer similar to Miguel Estrada's answer to the same question): ''The Supreme Court has held that racial classifications are unconstitutional unless they are narrowly tailored to meet a compelling governmental interest.''

Maryanne Trump Barry. In the hearing on Judge Maryanne Trump Barry's nomination too the Third Circuit, Senator Smith asked for her personal opinion on whether ''an unborn child at any stage of the pregnancy is a human being.'' Judge Barry responded: ''Casey is the law that I would look at. If I had a personal opinion—and I am not suggesting that I do—it is irrelevant because I must look to the law which binds me.''

Raymond Fisher. In the hearing on Judge Raymond Fisher's nomination to the Ninth Circuit, Senator Sessions asked Judge Fisher's own personal views on whether the death penalty was constitutional. Judge Fisher responded that ''My view, Senator, is that, as you indicated, the Supreme Court has ruled that the death penalty is constitutional. As a lower appellate court judge, that is the law that I am governed by. I don't want in my judicial career, should I be fortunate enough to have one, to inject my personal opinions into whether or not I follow the law. I believe that the precedent of the Supreme Court is binding and that is what my function is.''

V. CONCLUSION

Miguel Estrada is a well-qualified and well-respected judicial nominee who has very

strong bipartisan support. Based on our reading of history, we believe that you have ample information about this nominee and have had more than enough time to consider questions about his qualifications and suitability. We urge you to stop the unfair treatment, end the filibuster, allow an up-or-down vote, and vote to confirm Mr. Estrada.

Sincerely,

ALBERTO R. GONZALES
Counsel to the President.

Mr. HATCH. I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mrs. CLINTON. Mr. President, I listened with great interest to my friend and colleague from Utah. I have the highest respect for him. I must confess, in listening to him, though, it brought to mind that wonderful old saw about trial lawyers. You know: If the facts aren't on your side, argue the law. If the law isn't on your side, argue the facts. If neither the facts nor the law are on your side, pound the table and hope nobody notices. From my perspective, that is exactly what we have been hearing from our friends on the other side with respect to this very important matter that is not just about a nomination but about the role and responsibility of the Senate under our Constitution.

I rise today to expand on the points I made yesterday because, after further reflection and careful thought about this body's constitutional obligations to provide advice and consent on judicial nominations, I believe there are even greater reasons for us to focus during this time on that responsibility.

There has been, clearly, a debate going on about the role of the Senate in judicial nominations, and many of my friends on the other side have made the point that their view is the Senate defers to the executive when it comes to judicial nominees. That would certainly be a surprise to the 42nd President of the United States, that that is the position of my friends on the other side.

Furthermore, there are those who argue the Senate's role is to give advice and consent, but that does not encompass an inquiry into a nominee's judicial philosophy.

I, for one, believe on both of those grounds our colleagues are mistaken. I have done some further research and inquiry into what is it we mean when we open up our Constitution and we look at article II, section 2 and we see these words, ''advice and consent.'' Given the extraordinary brilliance and the economic use of words in the Constitution, I assume every word means something. Each word was battled over. Each word was poured over. A lot of effort went into coming up with those words that would help to guide our infant Nation. So I take advice and consent very seriously.

It is particularly important to recognize I am not alone in viewing this obligation with seriousness. From the very beginning of our country it has been a concern. It was one of those elements in the balance of power that was so carefully constructed among our three branches of Government. It is something I think we ignore at our peril.

What is it we are talking about? Again, I sometimes wonder what our friends and fellow countrymen who might be watching this debate, as they look for something perhaps more interesting or exciting on their televisions, stop and think if they see one of us talking about advice and consent, or talking about our Constitution. Article II, section 2 states that:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by law. . . .

That is what the Constitution tells us. It is our obligation, as it has been ever since this body was formed, to determine what that means and how we apply it. The Framers of our Constitution did not envision the Senate's power of advice and consent to be a mere formality. In fact, at the Constitutional Convention of 1787, the power of judicial appointment was a subject of enthusiastic debate.

The first proposal that came from delegates to the Convention was that the choice of Federal judges should be left to the Senate alone—that it would be this body, acting on its own, that would appoint judges to the bench.

Then a competing proposal was put forth arguing that, no, the President should nominate and appoint judges and that the Senate should have only the power to reject or approve those candidates.

But what was it after the debate that our Founders decided was the American way? How did they conclude what was the proper balance between these competing positions? Clearly, the adopted language was a compromise. And, equally clearly, those who agreed to that compromise did not view our role—the Senate's role—as insignificant or deferential. In fact, Alexander Hamilton in Federalist No. 76 writes that the Senate's participation in the judicial nomination process was essential in order ''to promote a judicious choice of men''—of course, he would say men and women were he writing today—''for filling the offices of the Union.'' He further stated that the Senate's advise and consent role serves as ''a considerable and salutary restraint upon the conduct'' of the President.

There is plenty of evidence that exists which demonstrates what the Framers intended with respect to the advice and consent clause. This clause added formation and, in all of the decades since, contemplated a strong and decisive Senate role that would serve to advise and consent with respect to the President's nominees—or, to put it another way, would serve to balance the power of the President's nominating authority by Senate legislative power.

This strong role that the Constitution granted the Senate has only grown stronger in the years following the adoption of our Constitution. We know very well that members of both parties have historically expected judicial nominees to be fully candid and forthright with any information that Senators deem relevant. The Republicans are acting as though the questions we are asking and the opposition which we are presenting to the process that has been adopted and the responses—or, I should say nonresponses—of the nominee are unprecedented. But I have to just point to recent history. We don't have to go back to the Federalist Papers. We don't have to go back to the 19th century. We only have to go back a few years to find many instances in which my friends on the other side did not rest until they had satisfied themselves with the information provided by nominees sent up by a Democratic President.

A June 22, 1998, floor statement by Senator HATCH demonstrates that the advise and consent obligation is indeed a strong one. Here is what he said:

> While the debate about vacancy rates on our Federal courts is not unimportant, it remains more important that the Senate perform its advice and consent function thoroughly and responsibly. Federal judges serve for life and perform an important constitutional function without direct accountability to the people. Accordingly, the Senate should never move too quickly on nominations before it.

I couldn't agree more. I think Senator HATCH was right in 1998.

He also stated that he had ''no problem with those who want to review . . . nominees with great specificity.''

That is all we are asking for. But we can't review this nominee with great specificity because he has become kind of an emblem of nonspecificity with nonanswers and nonresponses.

It is really hard to imagine someone being considered for the important position that he would hold for life telling Senators who inquired that he really didn't have anything to say about any Supreme Court decision in the history of the Court.

Of course, my colleague from Mississippi, Senator LOTT, has also reminded us that:

> Yes, the President has a right to make nominations to the Federal bench of his choice. However, we—namely, the Senate—have a role in that process. We should, and we do, take it very seriously. We should not give a man or a woman life tenure if there is some problem with his or her background, whether academically or ethically, or if there is a problem with a series of decisions or positions they have taken.

Of course, we don't know whether there is any problem with respect to this nominee's decisions. He has never been a judge, and we have no idea what his positions are on anything.

It is hard to imagine that any Member of this body could, as some of my colleagues on the other side have been saying over the last days, say that we really do not have to worry too much

about this advice and consent clause because the Senate plays only a minor role in the nomination process. I would be more than happy to provide a list of citations and references so that any Senator who has been led to believe that would know it is not the case.

In fact, one of the very best descriptions of what advise and consent means in the Constitution that I have able to find comes from a very well respected former Republican Senator from Maryland, Mr. Charles McC. Mathias. In 1987, Senator Mathias submitted an essay that was published in the University of Chicago Law Review, a very prestigious publication. The essay is entitled ''Advice and Consent: The Role of the United States Senate in the Judicial Selection Process.'' This I would commend to all of my colleagues because the debate we are having today is not just about one nominee. And it is not just about one President or one political party. It is about how we fulfill our constitutional obligations. Senator Mathias has it just right.

Among the important points he makes are the following:

Among all the responsibilities of a United States Senator, none is more important than the duty to participate in the process of selecting judges and justices to serve on the Federal courts.

Senator Mathias goes on:

The Senate's duty in this sphere is extraordinary. Most other senatorial decisions are subject to revision, either by the Congress itself or by the executive branch. Statutes can be amended, budgets rewritten, appropriations deferred or rescinded, but a judicial nomination is different. When the Framers of the Constitution decided that Federal judges shall hold their offices during good behavior, and may be removed only by the rarely utilized process of impeachment, they guarantee respect for the principle of judicial independent.

Senator Mathias goes on to point out:

It will no longer provide—Their decision also meant, however, that the vote to confirm a judicial nominee must express the Senate's confidence in the nominee's ability to decide the burning legal controversy not only of the day but of future decades as well. The Constitution gives the Senate the consent power, not as a mechanical formality but as an integral part of the structure of government . . . If the Senate does not take its role seriously, it will lose its effectiveness as, in Hamilton's words—

''a considerable and salutary restraint upon the conduct'' of the President.

Senator Mathias points out what should be obvious to us all. A nominee should:

[E]merge from the nomination process knowing that the president and the Senate have confidence that he will preside with only one unalterable loyalty, to the Constitution, and with only purpose, to assure the individual standing before him a judgment based upon the law of the land.

Senator Mathias makes another very critical point in his University of Chicago Law Review article about the advice and consent clause. He says:

The Senate must be convinced that a nominee is impeccably competent. But competence alone is not sufficient. It is not enough that a nominee be skilled in legal argument and knowledgeable about legal doctrine, and that . . . he be able to write clearly and forcefully.

A candidate for the federal bench must, as Hamilton wrote in Federalist No. 78; ''unite the requisite integrity with the requisite knowledge.'' The nominee also must exhibit a strength of character and a range of vision that will help [him] look beyond the world that exists on the day on which [he] is nominated. . . .

[T]he full senate should have the opportunity to consider each nomination on a complete record. . . .[Senators] should have the opportunity to review the transcripts of hearings and to solicit other advice on the merits of the issue before voting.

The goal of these procedures is not to second-guess the judgment of the president in submitting the nomination to the Senate, but to ensure that the factors underlying that judgment are sufficiently disclosed to permit the Senate to make an informed and independent evaluation of the president's choice.

That is really the nub of what we are concerned about.

Listen to the words of a former Republican Senator who served with great distinction in this body:

The goal . . . is not to second-guess the judgment of the president . . . but to ensure that the factors underlying that judgment are sufficiently disclosed to permit the Senate to make an informed and independent evaluation of the president's choice.

Senator Mathias concludes:

For when the Senate carries out its function of advice and consent, its first loyalty must be not to the political parties, nor to the president, but to the people and the constitution they have established.

It is not only former Senators who have understood this and would be astonished at the amnesia that seems to have descended upon us about what the debate among the Framers was, about what the settled law and understanding of the Constitution was, about what distinguished Senators who served in this body always believed it to be. But this is the weight of all of the legal and academic analysis of the clause that has been done over so many years.

One of the most effective and thorough analyses of the advise and consent obligation is found in a joint statement by Philip Kurland from the University of Chicago and Laurence Tribe from Harvard, dated June 1, 1986, entitled: ''Joint Statement to the Senate Judiciary Committee on the Role of Advice and Consent in Judicial Nominations,'' submitted to the Judiciary Committee. I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

June 1, 1986.

To the Senate Judiciary Committee:

The United States Senate has too often been confused and uncertain about its role in approving Federal judicial nominees. The Constitution entrusts the power to appoint the member of the third branch of the National Government not to the executive branch nor to the legislature, but to both political branches together: the President nominates, but the Senate must confirm. Providing ''advice and consent'' on judicial nominations, therefore, is no mere senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government.

Those who wrote the Constitution certainly did not envision the Senate's power of ''advice and consent'' to be a formality. The allocation of the appointment power was the subject of keen debate at the Constitutional Convention of 1787, which initially proposed a draft that left the choice of Federal judges to the Senate alone. The adopted language was a compromise, and it is clear that those who agreed to the compromise did not view the Senate's role as merely ceremonial or ritualistic.

The reasons that the Framers contemplated a strong Senate role in the process of judicial appointments are plain. It must be remembered that Federal judges are not, like the President's cabinet, to serve the will of the Chief Executive, but officers appointed for life to a separate and independent branch of government. If those appointed to these lifetime judicial posts should ultimately prove unequal to the task or unsuited to the role, they cannot be dismissed. Impeachment by the House and trial by the Senate is the only constitutionally authorized method of removing unfit judges, and the great difficulty of such a process makes it usable only in situations of outrageous misconduct. The only practical opportunity to consider the merits of a judicial candidate, therefore, is before that appointment is made. It thus becomes not only appropriate, but obligatory, that the Senate pass on judicial nominees with greater scrutiny than it reviews the President's choices for his own subordinates.

Whatever the philosophy of government or theory of law, the demands that the Nation makes on its Federal judges are indisputably great. The Federal courts play an increasingly critical part in American government. The men and women of the Federal bench must possess open minds that are capable of grasping sophisticated legal analysis, and that can grapple intelligently with fundamental constitutional issues. To Federal judges is given the task of policing the boundaries between State and Federal government, of giving principled articulation to the content of the basic human rights protected by the Constitution, of enforcing the myriad and complex Federal statutes and regulations, and of overseeing complicated commercial and criminal litigation. Senators therefore have a duty, both to the Constitution and to the Nation's citizens, businesses, and public and private institutions to ensure that the President's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions and, particularly in the case of appellate judges, to contribute lucidly to a body of legal precedents that can enlighten and guide trial courts, litigants, and those who must try to enlighten and guide trial courts, litigants, and those who must try to anticipate what courts will do.

Candidates for the Federal bench should meet a higher standard than that required for most government officers. A career marked by integrity, capacity, wisdom, and commitment is the minimal qualification. If it is not readily apparent that a candidate is truly distinguished, the burden should be on the President to demonstrate the merits of the nominee. A nominee's entire record—professional achievements, public service, academic credentials, appellate briefs or other legal writings, scholarly or other publications—should be reviewed carefully to screen out the merely competent, and certainly, the

simply mediocre. Respect for the institution of the Federal courts—and for the onerous responsibilities of the Federal bench—requires nothing less.

The responsibility of appointment to the independent judiciary was divided between the White House and the Senate in part to avoid burdening the Federal courts with candidates selected solely to satisfy criteria unrelated to judicial excellence. The President is certainly entitled to prefer loyal supporters and like-minded thinkers in choosing among the exceptionally qualified; but no President has a right to treat Federal judgeships as mere patronage appointments simply to reward friends or to assure a judiciary packed with ''true believers.'' And the Senate is surely not required to defer to the appointment of men and women whose most salient qualification is their location in a particular partisan line-up or their devotion to a particular cluster of political or philosophical views.

The Senate has the further obligation to assure itself that a nominee's substantive views of law are within the broad bounds of acceptability in American public life and not on its lunatic fringes—whether left or right. The Republic may demand—and its Senators ought therefore to ensure—that is lifetenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

The absence of evidence of a nominee's lack of adherence to constitutional values should not be deemed a sufficient ground for confirmation. When dealing with a lifetime appointment to the Federal bench, rather than the trial of a criminal defendant, one's doubts as to a candidate's commitment to the Bill of Rights or to constitutionally commanded equality must be resolved in favor of the Constitution rather than the candidate.

None of this is to say that the Senate, any more than the President, is justified in using litmus tests that seek out a candidate's unswerving commitment to upholding or reversing a particular * * * dealing with * * * vised than the confirmation of ''single-issue'' nominees who appear to have been selected solely on the basis of their aversion to or endorsement of one particular line of legal doctrine.

Finally, the Senate must realize that, in the appointment process, the power of nomination belongs to the President alone. Senators are not entitled to a ''short list'' of their own. Therefore, it is not a sufficient objection to an otherwise legally distinguished and constitutionally acceptable nominee that a Senator would prefer someone from a different part of the legal profession or a different part of the country, or someone of a different race, gender, or ideology. But neither is a confirmation vote in order whenever the best that can be said of a nominee is that he has spent some time in law or public life and is untainted by any major scandal. Even at levels below that of the Supreme Court, where the need for exceptional distinction should be beyond debate, the Nation has a right to expect more than minimum qualifications and probable fitness from its Federal judges. And it has a right to insist that the Senate, whatever the practice of the past decade or two, recall the Framers' vision of its solemn duty to provide advice and consent, rather than perfunctory obeisance, to the will of the President.

PHILIP B. KURLAND.
WILLIAM R. KENAN,
Distinguished Service Professor, University of Chicago.
LAURENCE H. TRIBE.
RALPH S. TYLER, Jr.,
Professor of Constitutional Law, Harvard University.

Mrs. CLINTON. Professors Kurland and Tribe, joined by Professors William R. Kenan and Ralph S. Tyler, wrote that:

[P]roviding ''advice and consent'' on judicial nominations . . . is no mere senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government.

Now, that is a mouthful that really says a lot. This little clause—just three words—is so important to our tripartite; namely, our three branches—executive, legislative, and judicial—of Government. Well, it is. That is why we advocate it, not at our peril—we will come and go—but at the peril of undermining this extraordinary, brilliant construction of the United States, a tripartite form of Government, kept in equilibrium by a balance of power.

That is a heavy responsibility, to think of giving up advise and consent, giving up the Senate's constitutional duty because, as this statement goes on to say:

The reasons that the Framers contemplated a strong Senate role in the process of judicial appointments are plain. It must be remembered that Federal judges are not, like the president's cabinet, to serve the will of the Chief Executive, but officers appointed for life to a separate and independent branch of government.

If those appointed to these lifetime judicial posts should ultimately prove unequal to the task or unsuited to the role, they cannot be dismissed.

Impeachment by the House and trial by the Senate is the only constitutionally authorized method of removing unfit judges, and the great difficulty of such a process makes it usable only in situations of outrageous misconduct. The only practical opportunity to consider the merits of a judicial candidate, therefore, is before that appointment is made. It thus becomes not only appropriate, but obligatory, that the Senate pass on judicial nominees with greater scrutiny than it reviews the president's choices for his own subordinates.

Whatever the philosophy of government or theory of law, the demands that the Nation makes on its federal judges are indisputably great. The federal courts play an increasingly critical part in American government.

To federal judges is given the task of policing the boundaries between state and federal government, of giving principled articulation to the content of the basic human rights protected by the constitution, of enforcing the myriad and complex federal statutes and regulations, and of overseeing complicated commercial and criminal litigation.

Senators therefore have a duty, both to the constitution and to the Nation's citizens [who sent us here] to ensure that the president's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions, and, particularly in the case of appellate judges, to contribute lucidly to a body of legal precedents that guide [our] courts. . . .

The Senate has the further obligation to assure itself that a nominee's substantive views of law are within the broad bounds of acceptability in American public life and not on its lunatic fringes—whether left or right. The Republic may demand—and its Senators ought therefore to ensure—that its lifetenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

Even in the absence of evidence of a nominee's lack of adherence to constitutional values, it is something that we have to take seriously. We have to be assured, we have to be reassured, that when we cast our votes, we are doing so in the best interests of our Constitution and our country.

It has been clear in the debate so far that the Constitution has become something of a political football. There are those who—when the shoe was on the other foot and the occupant of the White House was of another party—were certainly more than ready to ask any question and to raise any objection that they could possibly imagine.

I listened, with great interest, to my good friend from Utah say, with great conviction: We never, ever filibustered a judge.

That may be technically true, but the reason is because they wouldn't give nominees hearings. They wouldn't give nominees votes, and they would not bring them to the floor where they possibly could be filibustered. It is somewhat surprising to hear that argument being made with a straight face.

In the years between 1995 and 2000, the Judiciary Committee refused to hold hearings or to permit votes for more than 50 judicial nominees submitted by President Clinton. Some nominees waited years for a hearing. Some nominees waited years for a vote. One such nominee, a Hispanic judge, Judge Paez, waited more than 1,500 days. Others waited more than 1,500 days, never received the courtesy of a hearing, never received the courtesy of a vote.

So here we are, and we are being somehow taken to task because the other side never filibustered. But they controlled the committee. They didn't have to filibuster. They just let nominees languish, twist in the wind, and eventually disappear. I didn't approve of that. I thought that was unfair to a lot of very decent Americans of tremendous intellectual, academic, and legal experience and qualifications.

What we are doing now is trying to do the work of the Judiciary Committee. The Judiciary Committee would not stand for the prerogatives of this body and insist the nominee answer questions, provide information, require the administration to come forward forthrightly and give the documents and the other background material that was requested. The only way we can exercise our constitutional duty to advise and consent is to raise these issues here in the Chamber.

I want to put this into the context of why this would be important to anybody outside the Senate. Again, I imagine people trying to make sense of all of this, trying to figure out what it is all about. In fact, it is about the people themselves. Senators come and go. Presidents come and go. The Constitution, we hope, not only stays but prevails. The Constitution, which set up this genius form of government, unlike anything that any group of human

beings have ever devised for themselves, is our underpinning. It is our bedrock.

The interpretation of it can change from time to time. That is as it should be. That is part of the genius of our Constitution—that it was an organic, growing document to take into account a nation that started out primarily agrarian and now is in the midst of the information revolution. We couldn't even imagine thinking we had to live and work and govern ourselves in the same way as our predecessors did 200 plus years ago. But the values don't change. The balance of power that is fundamental to our tripartite system of government doesn't change. Human beings may fly through the air in airplanes rather than traverse from place to place on horseback, but fundamental human nature doesn't change.

The reason we have a balance of power is because the Framers were absolutely the best psychologists who ever came together in any place in the world. They knew, as they revolted against a king and a royal system, that they were setting up the potential for self-government. They recognized in order for self-government to work, you had to be realistic about human beings. You couldn't be too optimistic. You couldn't be too pessimistic. You had to get it just right, kind of like Goldie Locks. If you were too optimistic about human nature, you would certainly be disappointed. If you were too pessimistic about human nature, you wouldn't have enough hope to get up and move forward and try to solve problems.

So the Framers had to get it right. And did they ever get it right. They understood completely that we had to restrain ourselves, that we had to have systems that protect against runaway executive power, runaway legislative power, runaway judicial power. They had it absolutely right.

The advice and consent clause is part of how they got it right. I don't care if you are Republican or Democrat, if you served in the Senate in the 19th or 20th or 21st century, they got it right.

What we are saying is we don't want to second-guess the Framers. We don't want to substitute our judgment for theirs. We want to do what we are expected to do by the Constitution.

We wouldn't even be here having this debate if the constitutional responsibility had been fulfilled in the Judiciary Committee. I have listened to my colleagues talk about all of the paper that has been submitted and all of the time that has been taken to pass this nominee through the Judiciary Committee. But they know as well as we that many of the critical questions were never answered. Many of the essential documents that would give us insight into the attitudes and the beliefs and the philosophy of this nominee were never produced and that, in effect, we are asked to basically abdicate our advise and consent responsibility, to turn our back on the Constitution and to do what we are told to do.

That is not what the decision was when the debate took place among our Framers. If you look at the Federalist papers, if you look at all of the commentary in the many years since, this was a solemn duty that was given to the Senate.

When people say: Why are you debating this, I think there are a number of reasons. First, because it seems to those of us who are debating, it is our duty. It is our responsibility. We read the Constitution. We read what people said about it at the time it was written, what people have said about it recently. We read what our colleagues have said about it, when the shoe was on the other foot, and we have to conclude we are fulfilling our constitutional responsibility.

I went back and looked at the CONGRESSIONAL RECORD at some of the comments some of my friends on the other side have made in the past about what we should do when it comes to advising and consenting. I agree with what they said. When the shoe was on the other foot and it was a Democratic President sending judicial nominees, the same speeches were said on the other side of the floor, which strikes me as definitive, conclusive proof of what this is all about.

For example, Senator SMITH, March 9, 2000:

> The Constitution gave the Senate the advise and consent role. We are supposed to advise the President and consent, if we think the judge should be put on the court. We do not get very much opportunity to advise because the President just sends these nominations up here. He does not seek our advice. And then we are asked to consent. It seems as if the Senate should be a rubber stamp, that we should just approve every judge that comes down the line and not do anything about the advise and consent role.

I agree 100 percent with what Senator SMITH then said:

> That is not the way that I read the Constitution. I believe that is wrong. We have an obligation under the Constitution to review these judges very carefully.

In that same vein, Senator SMITH on another day, the same month, March 7, 2000, went on to explicate this important responsibility. I wish all of us would listen to it. I think this is exactly right. He said:

> I think the constitutional process is very clear, that the Senate has the right and the responsibility under the Constitution to advise and consent.
>
> That is exactly what I intend to do in my role as a Senator as it pertains to the two nominees before us. The issue, though, is whether it is OK to block judicial nominees. We have heard from a couple of my colleagues in the last few moments that it isn't OK to block judicial nominees, as if there was something unconstitutional about it. There is thinking by some that we should not start down this path of blocking a judicial nominee whom we do not think is a good nominee for the Court because it may come back to haunt us at some point when and if a Republican should be elected to the Presidency.

Senator SMITH goes on:

> Let me say, with all due respect to my colleagues, I am not starting down any new path. I am going to be very specific and prove exactly my point that we are not starting down a new path of blocking a judicial nominee. That path is well worn. We are following a path; we are not starting down any new path.

I could not say it better myself. In fact, I wish I had said it as well. But it is not only Senator SMITH, it is also Senator HATCH, on January 28, 1998:

> Conducting a fair confirmation process, however, does not mean granting the President carte blanche in filling the Federal judiciary. It means assuring that those who are confirmed will uphold the Constitution and abide by the rule of law.

Senator HATCH, October 3, 2000:

> The President has broad discretion, as we know, to nominate whomever he chooses for Federal judicial vacancies. The Senate, in its role, has a constitutional duty to offer its advice and consent on judicial nominations. Each Senator, of course, has his or her own criteria for offering this advice and this consent on lifetime appointments. The Judiciary Committee, though, is where many of the initial concerns about nominees are raised and arise. All of this information is, of course, available to every member of the Judiciary Committee and must be thoroughly reviewed before the nominee is granted a hearing by the committee. If questions about a nominee's background or qualifications arise, further inquiry may be necessary. Obviously, this is a long process, as it must be. After all, these are lifetime appointments.

Senator HATCH, May 23, 1997:

> The primary criteria in this process is not how many vacancies need to be filled, but whether President Clinton, or whoever the President is—whether their nominees are qualified to serve on the bench and will not, upon receiving their judicial commission, spend a lifetime, a career, rendering politically motivated activist decisions.

Then Senator HATCH goes on to say something else I agree with 100 percent:

> The Senate has an obligation to the American people to thoroughly review the records of all nominees it receives to ensure that they are capable and qualified to serve as Federal judges.

Listen to that specific point that Senator HATCH made back in 1997: There has to be a thorough inquiry and the Senate has to determine whether a nominee would, upon receiving their judicial commission, spend a lifetime, a career, rendering politically motivated, activist decisions. That is really the nub of what we are looking to determine.

There is more than sufficient concern that the nominee before us would do just that. And the reason why the administration will not, and maybe perchance cannot provide the information requested, is because to do so would make abundantly clear that this is a nominee on a mission, that this is a nominee who will do exactly what Senator HATCH warned about when the shoe was on the other foot; namely, render politically motivated, activist decisions.

Now, there may be some on the other side who believe they would agree with these politically motivated activist decisions, so bring it on. But I don't

think that is our responsibility. Our responsibility is to know ahead of time. The American people don't get to interview and vote on these nominees. If some nominee overturns, when he or she is on the bench, fundamental worker protections for people who work hard and play by the rules of what they are supposed to do at work, that affects the lives of millions of Americans. If someone decides they don't like the Violence Against Women Act, or they don't believe there is a right to privacy embedded in the Constitution, that affects millions of Americans.

So I think it is imperative that we listen to what our colleagues on the other side of the aisle said during the 1990s. All of this concern about advice and consent, all of this caution about rushing to judgment and voting—slow it down, do a thorough review, don't move too quickly. In fact, don't even give people hearings or a vote in committee. It is imperative that now we try to get back to that balance of power that the Constitution established.

Turning down nominations for a judgeship is something that goes back to the beginning of our Republic. It is not as though this is the first time we have ever had this debate. We have had many nominees rejected, starting with one of President Washington's nominees. John Rutledge was nominated in 1795 by President Washington. Why was he turned down? He was thought to be well qualified. He had quite an experience that could certainly be impressive when examined. He was a member of the Federalist Party, which should certainly ring a bell with my colleagues on the other side. But he was turned down because of his political views.

The idea that somehow the political views and positions of a nominee for a lifetime appointment are off limits to the Senate has no basis in fact, history, or law. The very first nominee in 1795 by probably the most popular President that we have ever had, because he was the first—and lucky for him he didn't have to be compared to other people and given all of the difficulties that our subsequent Presidents have faced—but President Washington's nominee was rejected because of the political positions he had taken.

Of course, that was not the only early nominee to be rejected. President Madison nominated Alexander Wolcott in 1811. He was rejected.

He was rejected. President Jackson nominated Roger Brook Taney in 1835. He was rejected the first time. He came back a year later and was accepted. There are many such situations.

It is revising history to claim that we cannot inquire into someone's opinions. If we are going to put someone on the bench who does not believe there is a right to privacy in the Constitution, which would perhaps lead to the overturning of many decisions that protect people's privacy in the sanctity of their home or with respect to their bodies, we should know that. That person might still be nominated and confirmed, but the American people have a right to know who these people are who are being nominated because they are going to be making decisions that affect the daily lives of Americans.

When you nominate a stealth candidate, when you send him up to the Judiciary Committee and tell him to dodge and duck and divert and do not answer a straight question with a straight answer, is it any wonder that people get a little suspicious and maybe say: Wait a minute; if this man will not even come and tell us what Supreme Court decision he agrees with, going back to Marbury v. Madison, and he says he cannot name one; How about one with which you disagree? Well, I can't name that either; that does not pass the smell test, I am sorry. That is a witness who has been well coached and told: Don't rock any boats, don't answer any questions, don't reveal your true opinions. Just try to get through the process.

That is why we need an advice and consent clause in the Constitution, and that is why the Framers put it there. It very well may be if he answered the questions forthrightly, if he said: My favorite Supreme Court decision is Marbury v. Madison, my least favorite is—pick one out of thousands—we would say: We do not agree with you, but OK. But he will not do that.

You have to ask yourself: Why won't he do that? Certainly given the kinds of questions that were asked of nominees during the 1990s that went into all kinds of areas—their associations, the meetings they attended, how they even voted—it is hard to understand why this nominee cannot be expected to answer pertinent questions about the law, about his opinions concerning Supreme Court decisions.

The fact he refuses to do so, or has been ordered not to do so, fundamentally defies the constitutional duty of this body to advise and consent.

I know there are those who have argued that there is already an adequate amount of information in the record that should be taken at face value. That is hard to do. That is hard to do because, in the absence of a willingness to answer pertinent, relevant questions, many of us do not believe the nominee has sufficiently subjected himself to the process that this body has established to permit Senators to make an informed decision.

If we go back and look at the reams of material that I reviewed to determine what was the basis for the advice and consent clause, I think that is obvious to us all it is there for a purpose. We ignore it at our peril. We have a duty to abide by it.

I again urge my friends and colleagues on the other side to read the extensive description of the advice and consent clause and the role of the Senate in the judicial selection process by former Republican Senator Charles McC. Mathias.

When my friends and colleagues raise the issue that somehow this is focused on a particular nominee, for whatever reason, I think that does a disservice to the seriousness of our concerns because it was this nominee who would not answer the questions. It was this nominee who did not provide the materials.

My very alert counsel has just reminded me that when Justice Taney was first rejected after being nominated by President Jackson in 1835 and then was renominated and confirmed in 1836, he went on to write one of the most discredited, racist, despicable opinions in the history of our court. Judge Taney was the author of the Dred Scott decision. Maybe the country would have been better off and saved a whole lot of misery if the Senate had delayed action and had never confirmed him when he was renominated. We just never know. We have to do the best we can given our own human limitations and idiosyncrasies based on the information available.

There are some, and I respect their opinion, on both sides of the aisle who say: If the President sends somebody up, I am voting for it, no questions asked. That is how I believe the Constitution is to be interpreted, as far as I am concerned.

With all due respect, I think that is an abdication of responsibility.

For most of us, we try to get behind the nomination. We try to understand, not just the academic or legal background which can be described by where you worked, who you worked for, what clients you had, what cases you tried or argued, but if that is all we did, we could put that into a computer. We would not need the Senate. We would computerize that decision. That is not what we are supposed to do. We are supposed to get behind the statistics, under the resume to satisfy ourselves that the person we give this lifetime job to is motivated by only one reason: to render justice to the best of his ability no matter who the parties are, no matter what the outcome of the matter may be, not to serve a political philosophy or ideology, not to serve a political party or even a President but to really do the hard work of justice.

It is a hard job, it is a really hard job and especially today. There are so many factors at work in our society, so many difficult decisions to be made about how we keep this wonderful, precious democracy of ours moving forward that judges have a very tough job. It is not for the casual or the indolent. It is for people who really care, will work hard, and will follow the law, the Constitution, and their conscience.

We are judging not just a legal resume. We are judging a potential judge. We are asking ourselves: Will everyone who appears before this court get the benefit of a fair rendering of justice?

Until we can satisfactorily answer that question about this nominee, we cannot move forward. We should not move forward. We should follow the words of our colleagues when the shoe was on the other foot and it was a

nominee from a Democratic President that caused questions and concerns on the other side.

I personally think that was overdone, and that many good, decent people who would have made fine judges were denied the right to go forward, but it was done in the name of the Constitution. It was done under the rubric of advise and consent.

It is a little hard to understand how my friends on the other side can, with straight faces, say that is not what it means at all. How dare we question this nominee. How can we ask for more information? Because that is what we think our duty is, just as at a previous time those on the other side thought it their duty.

It is difficult to explain how the Constitution's interpretation could flip so quickly. I do not think that is good for the Constitution. I do not think that is good for this body. I do not think it is good for the judiciary. Most of all, I do not think it is good for our country. I think no matter who is in the White House, no matter who is in the Senate, we ought to do our level best to fulfill the duties the Constitution places upon us. That is what I am attempting to do to the best of my ability. I know that is what all of my colleagues attempt to do.

When we face a moment such as this, which seems fraught with so much meaning not only with respect to a nominee and not only with respect to the judiciary but to that fundamental balance of power, we have to be careful. We will live with the precedents that are set.

Lord Acton had it right when he said, power corrupts and absolute power corrupts absolutely.

We must have those checks and balances. We must keep that fabulous, unbelievable genius of our Framers alive. I hope we can see some attention being paid to the legitimate questions and concerns that are being raised about this nominee and about this process and about the Constitution we revere and serve.

I yield the floor.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator from Montana.

Mr. BURNS. Mr. President, I rise today and join my colleagues in supporting the confirmation of Miguel Estrada to the DC Circuit Court of Appeals. We have heard more information on this man than anyone I can remember in recent times. There is not much about this gentleman or this situation that has not been said thus far on the floor of the Senate.

The history of this man I can relate to. I kind of started out on my own about that age, but I will never attain the level of society and dedication he has. He did it the hard way, by his own bootstraps. He is a graduate of Harvard Law School, near the top of his class. We also know he is a very successful appellate lawyer who argued 15 cases before the United States Supreme Court. We know he has been rated well qualified by his own colleagues in the American Bar Association.

I find it interesting, as the case is trying to be made, that somebody is being denied their constitutional rights, the constitutional right of advice and consent. I tell the American people, no Senator is being denied access to this floor. No Senator is being denied the ability to come to this floor and make his or her case either in support or opposition to the confirmation of Miguel Estrada. Everyone is free to do so and is afforded the opportunity to discuss the merits of one side or the other. Nobody is being denied that. It is pretty simple, and I think the American people understand that. Come down and make your case. If you did not make it the first time, come back the second time, come back as many times as you like to respond.

No one has been denied anything dealing with the merits of this man Miguel Estrada. Come down and make your case. Then vote. It is very simple. There is nothing hard to understand about that.

If a good case is made, there may be 51 votes. Folks will vote for you and you have won, and we will say congratulations. Nobody is being denied that.

We see quite a lot of dust being kicked up to fuzz up and confuse the issue. The issue is Miguel Estrada. That is what it is about. He has been nominated to occupy a seat on the DC Court of Appeals.

I am not an attorney, never been hinged with that title, but I too get to vote. I too get to look at information, both positive and sometimes negative, about this man. He will be the first Hispanic to serve on the DC Court of Appeals, and I applaud President Bush for nominating a candidate of this quality and this integrity.

He is a living example of an American attaining what he terms as his American dream. Right now he is being denied a vote. That seems sort of strange to me. He deserves an up-or-down vote, and at the end of that we will count them up and we will move on.

Why should I, a Senator from Montana, be interested in a nominee to the DC Court of Appeals? Well, so many cases are argued before this court that have to do with the management of public lands and the management of our national parks. Because I am from a public lands State, it matters a great deal that the laws of the land are properly judged and adjudicated. Every piece of information that I have been able to read or listen to or watch tells me he understands one little word in the English language that is very important to each and every one of us. The word is ''fair,'' dedicated to the study of both sides of any issue and then relating that to the law or the Constitution of the United States and making judgments.

That is pretty simple. We make things a lot more difficult than they should be. I have seen the big thick book that the chairman of the Judiciary Committee had, all the questions he was asked, the responses. What else is there to know about this man that has not been revealed? Instead, we hear ''deny,'' when not one person in the United States as a Member has been denied access to this floor.

Cases that have to do with public lands have great ramifications for Montana. Therefore, not only will I think he will be fair, judicial, and constitutional, but I believe it is also important to fill this vacancy. Right now, we see declarations of emergencies in so many of our appellate courts that we are seeing justice delayed, justice denied.

So what do we see happening today? It is written in the Constitution about our rights not being denied, but we sure see a little bit of obstructing and delaying in the confirmation process. We will not even be denied a vote. Every Senator will come down and cast his vote.

He was rated the highest rating of the American Bar Association. Yet we have heard it argued that he does not have the right qualifications to serve the court and therefore make a decision that we are going to talk the nomination to death. The Senate is a better body than that. Being around politicians a lot, being talked to death happens to be the worst death in the world.

So, is he qualified? You bet he is. Does he meet the limits on some folks? Maybe not. Does he meet their litmus test, maybe a personal litmus test? Maybe not. But there were people who disagreed with us when we ran for office and no one was denied the vote. If we had to go through this process just to get elected to the Senate by our constituency, we might not ever get here; we would be talked to death at home.

We are not going to talk about his background. We are going to talk about this American. No, he did not start here, but this American has applied his talents and his intellect to become an appellate judge. I am proud of this man. Nowhere else do we see an example of who we are and why we are Americans.

Mr. SESSIONS. Will the Senator yield for a question?

Mr. BURNS. I am happy to yield.

Mr. SESSIONS. The Senator makes his point about having a right to a vote. The argument has been made previously that we need advice and consent, but we never vote. The Senator is aware that on a filibuster it takes 60 votes, and on an up-or-down vote it takes a majority, 51 votes; is that correct?

Mr. BURNS. That is the way I understand it.

Mr. SESSIONS. The Constitution is right on advice and consent, and we can debate forever about that, what that means. Basically, it means what any Senators believe it means; is that right? They can vote on any basis they want?

Mr. BURNS. That is my interpretation.

Mr. SESSIONS. The Constitution says: The President shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, with the advice and consent of the Senate, shall appoint ambassadors, judges, and other court officers.

It did not say what the vote was, so since the founding of our document, we managed that to be a majority. Where it needed a supermajority—more than 51 votes in this case—more than a simple majority, it set it out, two-thirds.

So wouldn't the Senator agree that a fair reading of the Constitution would indicate our Founders contemplated that the vote here would be a simple majority required for confirmation?

Mr. BURNS. You are asking a man who is not trained in the legal disciplines.

Mr. SESSIONS. But the Senator is most trained in common sense.

Mr. BURNS. I say that the majority, 50 plus 1, would be all it takes.

Mr. SESSIONS. And that is what we have done.

Is the Senator aware in his tenure in this Senate that we have ever had a filibuster maintained on a Federal judge?

Mr. BURNS. That is something else that sort of confused me the way you put your argument, but I am wondering why we are raising the bar for this nominee. Is that what we are doing here? Are we saying he has to stand a more difficult test than all others in the past or all others will be asked in the future?

I go back to that other old word, I say to my friend from Alabama: ''Fair.'' I guess that is all we ask, fairness. Everything I have read and everything I have heard tells me that this man is qualified to sit at any other man's fire. And I would tell you they don't come with a higher recommendation than that. But let's not ask this man to be subjected to a higher bar than has been asked of every other American—not this American.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Ms. STABENOW. Mr. President, I rise this evening to discuss the nomination of Miguel Estrada to the DC Circuit Court of Appeals, and to express grave concerns that we are being asked to vote on a lifetime appointment with very little information on this nominee. There are many who have raised concerns about that very point. Let me share one letter that has been written, from the American Association of University Women.

We believe the information available regarding Mr. Estrada's record raises serious concerns about whether he should be given the enormous honor and responsibility of a lifetime appointment to this Nation's second most powerful Federal court. We strongly urge the members of the Judiciary Committee to conduct a thorough investigation of his record, including the areas of concern we have outlined, and to refrain from passing judgment on his nomination until that inquiry and the record is complete.

Let me begin by saying the DC Circuit Court of Appeals is, in fact, an extremely important court in our Nation. It is very important to the people I represent in Michigan and to the people that we all represent. It is, in fact, considered the Nation's second most important court, second only to the U.S. Supreme Court. This court has exclusive jurisdiction over a broad array of important Federal regulations that affect people in their lives every single day—environmental protection, our civil rights, human rights, consumer protections, workplace statutes—items that touch our lives. We have the right to know what someone's views are in general, and philosophy in general, as that person is being considered for this high court.

In addition, its judges are often nominated to serve on the U.S. Supreme Court, which is another reason why this is a particularly important nomination, and a particularly important decision for all of us in the Senate. Three of the current members of the Supreme Court, Justice Scalia, Justice Thomas, and Justice Ruth Bader Ginsburg, all previously served on the DC Circuit. So that is why this is particularly important and we should take the time necessary to make sure that the right decisions are made.

Despite the importance of the DC Circuit Court, the administration is trying very hard to prevent the Senate from making an informed decision—an informed decision on Mr. Estrada. Mr. Estrada has no judicial experience, nor is he a distinguished scholar or professor, which means he lacks any real public record. That is not disparaging in terms of a comment as to his intellect, but it is a question of public record which we can review as to his views and philosophies.

He has spent the bulk of his career in the Solicitor General's Office and in private practice. This makes it extraordinarily difficult for us to fairly evaluate him, and it makes his legal memos and other work product absolutely critical for this evaluation.

The Senate has a constitutional obligation to advise and consent on a Federal judicial nominee. This is a responsibility I take very seriously, as do my Senate colleagues, I know, from both sides of the aisle. I might just remind us that as we read in our U.S. history books, there was a major debate as to how to decide the nominees and the members who would sit on the U.S. Supreme Court. At one point, our Framers said the President should decide alone. At another point they said the Senate should be the one that has the absolute right to decide who should be on this all powerful, important court that affects our lives so much. In the end they compromised, as they did in much of the discussions and the final decisions as to the framing of our Government. They said we believe this is so important there needs to be a check and balance, so we need to have both the Senate and the President involved. The President will nominate but the Senate will have the responsibility of reviewing and consenting to the nomination. That is the process that we are involved in right now.

I might also say that we have confirmed over 100 judges since President Bush has come into his Presidency, and just on Monday night we had three votes. One was a Hispanic judge. We moved forward in this process. But when we find someone comes to the Judiciary Committee and when he is asked to provide copies of his memos and information, when he basically says no, or I'll just think about it, that makes it very difficult for an informed decision to be made.

Unlike other nominations that come before the Senate, such as ambassadorships or executive nominees, Federal judicial nominations, again, are lifetime appointments. I think it is so important to repeat that over and over again. I have, in fact, supported the confirmation of individuals, other nominees of the President for his Cabinet who certainly would not have been my personal first choice. But the President has the right to select his Cabinet—certainly within reason; has the right to select his Cabinet, the people who will work with him during the 4 years that he is in office.

That is not what this is about. This is about someone who will, in fact, make decisions that will affect us, not for 3 or 4 years, but for 30 or 40 years, through numerous Presidents, making it even more important that we are not a rubberstamp. The U.S. Senate has a very important role to play.

As a part of this important responsibility, my Democratic colleagues on the Judiciary Committee have tried to obtain information, legal memos Mr. Estrada wrote while serving in the Justice Department. The Justice Department has refused to provide these documents which presumably would show Mr. Estrada's constitutional analysis of cases. This is very important. The constitutional analysis of statutes—whatever his philosophies and beliefs—would give us insight into his judicial reasoning, not on a particular case but his reasoning. Unfortunately, as I indicated before, he has not been forthcoming to the committee. In fact, he has refused to answer the most basic questions before the committee.

During his nomination hearing, Mr. Estrada refused to answer questions regarding his judicial philosophy or his views on important Supreme Court cases, including Roe v. Wade. He even refused to name any Supreme Court case with which he disagreed. This refusal to provide necessary information is absolutely unprecedented. Past administrations and the current administration have disclosed legal memos and other information in connection with both judicial and executive nominees.

For example, in previous administrations the Senate has requested and the

Justice Department has provided similar memos, written by Justice Department attorneys, including the writings of Supreme Court Justice William Rehnquist, the Ninth Circuit Nominee Stephen Trott, Supreme Court nominee Robert Bork, Assistant Attorney General nominee William Bradford Reynolds, and Attorney General nominee Benjamin Civiletti, among others.

This breaks with a longstanding practice of cooperation between the Justice Department and the Senate in providing access to necessary materials for nominations.

The administration also has provided such memos for another nominee. The Bush administration has provided the Senate with legal memos written by Jeffrey Holmstead, an attorney with the White House Counsel's Office, during the consideration of his nomination as Assistant Administrator at the EPA. This was for a term appointment, in contrast to a lifetime appointment, which is certainly much more significant.

I am also concerned that my colleagues on the other side of the aisle are applying a different standard for nominees who are nominated by a Republican President than by a Democratic President. During the Clinton administration, and under Chairman HATCH, nominees were required to produce volumes of information. For example, Judge Richard Paez was asked to provide documentation of every instance during his tenure as a judge where he deviated downward from a sentencing guideline—every instance.

Marsha Berzon, a Tenth Circuit nominee, was required to provide the minutes from every California ACLU meeting that occurred while she was a member of that organization, regardless of whether she even attended the meeting.

Why was the bar placed so high for these Clinton nominees but there is such a hard push by my colleagues to confirm a nominee from whom we have no information? Why is there such a strong resistance by the administration to allow the Senate the opportunity to learn more about this nominee's writings and opinions? That is what this debate is all about.

I might just say that when I am asked what is the philosophy, what is the judicial reasoning of this particular nominee, I would have to say this—these are the answers to the questions that Miguel Estrada gave to the Judiciary Committee: An absolute blank slate. Not one answer to one question. How can that give us the opportunity to determine whether or not this is a nominee we wish to support?

Finally, I am extremely disappointed by how some of my colleagues across the aisle have tried to make this an issue of race. I believe racial diversity in our judicial system is extremely important. I wish my Republican colleagues had made the same impassioned speeches during the Clinton administration when 10 of more than 30 Hispanic nominees were delayed or blocked from receiving hearings or votes by members of their caucus. I wish my colleagues had been outraged when Ronnie White's nomination languished for 2½ years and then was rejected on the Senate floor on a party-line vote. I wish my colleagues had stood up for racial diversity when the President filed their brief opposing the University of Michigan's admissions policy to help create racial diversity in our law schools and our other colleges and schools at the university.

The Senate needs to apply the same level of scrutiny and the same standards regardless of a nominee's race or the politics of the administrations that nominated them.

Until we are given these memos that are a part of Mr. Estrada's record, we are not going to hold judicial nominees to the same standards and the same basic principles of fairness. It is time to do that—to give us a true opportunity.

I might also add that 100 percent of the Hispanic Caucus of the House of Representatives have joined with us asking that we oppose or withhold judgment—that we not proceed with this vote until we have the information. These are individuals who have expressed grave concerns. They do not support moving forward. One-hundred percent of the Hispanic Caucus of the House from all around the country joined with more than 30 different organizations expressing grave concern.

I think that says to us we need to take the time that is necessary and we need to receive information so that we can make an appropriate judgment.

I will take just a moment to change topics.

I ask while moving from one important topic to another to take just a moment to speak to a bill I have introduced today regarding the growing importation of waste problem.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I know the Senator would like to talk about another subject. But what is the pending business we are on now?

The PRESIDING OFFICER. The pending business is the Estrada nomination.

Mr. SESSIONS. I will, regretfully, have to object to proceeding to another subject. That is a subject we are here to talk about, and I have some remarks I want to make. So I would object.

Ms. STABENOW. Mr. President, I have been given the floor, as I understand it, for 30 minutes. And I appreciate the fact that we have a topic in front of us. At this point, it is my understanding that it is not the Senator's prerogative to object to my being on the floor and to be able to speak for a moment, along with this important topic, to a bill I introduced about waste coming into the United States and taking a moment to do that. It is my understanding that under the normal processes of the Senate, I would have the opportunity to take a moment to do that.

Mr. SESSIONS. If the Senator wouldn't take long, if she wants to ban importation of some of that Canadian lumber, I will join with her. I yield to the Senator, if she is not going to be too long then.

Ms. STABENOW. I thank the Senator.

The PRESIDING OFFICER. The Senator from Michigan has the floor.

Ms. STABENOW. I thank the Chair.

IMPORTATION OF CANADIAN WASTE

Mr. President, I wanted to have an opportunity this evening—realizing we have an important topic on the floor—to speak on the record about an important topic that affects many of our States, and Michigan is certainly one of them.

There is a growing problem of Canadian waste shipments to Michigan and other States. In 2001, Michigan imported almost 3.6 million tons of municipal solid waste—more than double the amount that was imported in 1999. This gives Michigan, unfortunately, the undue distinction of being the third largest dumping ground of waste in the United States.

My colleagues may be surprised to know that the biggest source of this waste is not another State but, in fact, Canada. And more than half the waste that was shipped to Michigan in 2001 was from Ontario, Canada, where these imports, unfortunately, are growing rapidly. In fact, on January 1, 2003, another Ontario landfill closed its doors, and the city of Toronto is shipping two-thirds to all of its trash—1.9 million tons—to a Michigan landfill. This deal could last up to 20 years. I think it is important for a statement to be made for the record as we move forward with this legislation that it is time to do something about it.

Not only does this waste dramatically decrease our own ability to have a landfill capacity, but it also has a negative effect on the environment and on public health. Frankly, right now, I am particularly concerned about the fact that this is a homeland security issue for us. We now have our citizens at high alert. We are telling them to prepare themselves with duct tape, with plastics, and with water for their homes. There is a high degree of concern about the possibility of a terrorist attack.

Yet on Monday, I was able to go to Port Huron, MI, and look at an international bridge where we have trucks coming over bumper to bumper—over 130 different semi-trailer trucks—from Ontario, Canada, to Michigan every day that have solid waste in them from Canada, waste that is not thoroughly inspected. I think this is a serious issue as it relates to homeland security. These trucks are going through the neighborhoods and on into Michigan. And the same is happening in a number of other States.

I have joined with colleagues—first with Senator LEVIN and Congressman

DINGELL—to introduce legislation to enforce an agreement that was made between Canada and the United States back in 1986 that would give notice to the EPA—30-day notice—and the ability to reject waste coming into this country. That is not being enforced now. I support their efforts to enforce this provision with the EPA. But I think we have to go a step further now and stop these shipments until we can get the agreement enforced and have the EPA step up and receive notice on these shipments coming into the States.

I believe the State of Michigan should be able to tell the EPA that they don't want this trash in Michigan and that the EPA should honor that and be able to reject those shipments coming in from Canada. We need to act now. This is a serious environmental issue and a public health and homeland security issue.

I urge my colleagues and invite my colleagues to join me in legislation that will stop the shipments and give us the opportunity to enforce this agreement that has been on the books long term so that we can send a very strong message that we are not interested in Canadian trash coming into Michigan or any other State that does not wish to have it.

I thank the Chair. I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, it is really frustrating. I know Senator HATCH last night expressed his frustration about arguments that are made that are just not factual.

I know the Senator, as she finished her remarks eloquently, as she does, was not at the Judiciary Committee hearing which I attended on Miguel Estrada. The hearings started at 9 in the morning and went until 5 in the afternoon. There are hundreds of pages of transcript of that testimony that he gave answering every question I think with the proper nuance each and every time on question after question after question.

Remember, the questions they were asking were during the time the Democrats controlled the majority in the Senate and Senator LEAHY was the chairman. He could have kept them there as long as he wanted. There is no record that indicates Miguel Estrada said: Stop the hearing; I don't want to answer any more questions. He was never asked to come back to answer any more questions. The record was kept open, and Senators were allowed to submit written questions in addition. Two Senators did that—Senator SCHUMER and Senator KENNEDY. Those were answered by Mr. Estrada.

He has answered question after question after question. It is not true that he did not answer one question. He answered hundreds of questions. He answered them accurately and with skill and with good judgment.

It was said earlier in the debate that he would not answer the question of whether or not he was a strict constructionist. I thought that was interesting. Somebody said that was an example of a question he would not answer.

I remember the answer that he gave because I thought it was special, really indicative of his brilliance and insight into the law.

Senator EDWARDS. Are you a strict constructionist?

Mr. ESTRADA. I am a fair constructionist, I think.

Senator EDWARDS. Do you consider yourself a strict constructionist?

Mr. ESTRADA. I consider myself a fair constructionist. I mean, that is to say, I don't think that it should be the goal of courts to be strict or lax. The goal of courts is to get it right. And that may be in some cases to interpret the text as it is written because other consideration of every element of help that there is to give the text meaning tells us that that is what the lawmaker intended. But it may be inappropriate to give it a more general construction. I think we can have laws and constitutional text of both types. It is not necessarily the case in my mind that, for example, all parts of the Constitution are suitable for the same type of interpretive analysis.

A very insightful, thoughtful answer.

Senator EDWARDS. Excuse me. I am sorry. I didn't mean to interrupt you.

Mr. ESTRADA. No, no.

Senator EDWARDS. Were you finished?

Mr. ESTRADA. The example I was going to give is, you know, the Constitution says, for example, that you must be 35 years old in order to be our Chief Executive. There is not a lot of hard study that has to go into figuring out whether somebody is in compliance with the 35-year-old requirement. You can read it and say I am 40 and I can run.

There are areas of the Constitution that are more open-ended, and you averted to one, like the substantive component of the due process clauses, where there are other methods of interpretation that are not quite so obvious that the Court has brought to bear to try to bring forth what the appropriate answer should be.

I thought that was a very rich, very mature answer to that question and was a good example of the way he answered the questions.

He was asked about his position on Roe v. Wade. He made it absolutely clear that he considered it the law of the land and he would follow that law. And he cited Casey as being further explication of Roe v. Wade, and he would follow that. So I think that is important for us to think about.

People say he refused to allow himself to be questioned about a judicial philosophy. I do not understand it that way at all. He refused to allow himself to be pressured into considering questions that he might have to deal with on the bench or questions he had not fully researched. And that is what he should do.

If you are before a Senate committee, and you are asked what your opinion is on the right of privacy or some due process clause, and you express that, and then you get on the bench, are you obligated, since you were under oath when you were at that committee, to follow it? What if, once you get on the bench, and you receive highly sophisticated and high-quality legal briefs that convince you you were wrong, what does the judge do then? Judges should not opine on matters that are going to come before them in the future. So he answered the questions consistently, and over and over and over again.

They say: ''We have a right to advise and consent. The constitution allows that.'' And it does say that. This Senate—and every Senator—can vote for or against a nominee on any basis they choose—a proper or improper basis. It is their right. Nobody can control me on how I vote on this floor.

But what ought we do? How ought we handle matters of confirmation?

Let's be truthful. The reality is that, in the past, there has been a preference given, a presumption given to the President's nominees. They were able to come before the Senate or submit documents or just have their names submitted, and generally they have been confirmed. It is part of the cooperation, unwritten courtesies, collegiality and tradition of the Senate, that the President's nominees would be confirmed, where possible. And if there is a serious objection, that should be raised.

My concern in the matter of Miguel Estrada is, for the first time—maybe this century maybe ever—a court of appeals nominee is facing a confirmation process that would require not a majority of votes in the Senate but a supermajority—60 votes—to be confirmed. That is something we have not done before. It is not something we should proceed with.

The Constitution, in article II, section 2, says:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . Judges of the supreme Court, and all other Officers. . . .

The Constitution does not say what the vote should be, but it has been fully understood it meant a majority because when a supermajority of two-thirds was required, the Constitution spelled it out explicitly.

So the reason many of us on this side, who have been involved and have studied the confirmation process, are deeply concerned by what is happening here is because we are changing the ground rules in an extraordinary way. We are saying now—without any real basis, without any statement of wrongdoing by this nominee, any proof whatsoever that he is extreme or will not follow the law—they are now asserting this young Hispanic, outstanding lawyer has to have 60 votes to be confirmed, not 51. That is not right. I urge the Members of this body, I plead with the Members of this body: Do not do this. This knife cuts both ways.

Are we setting a precedent we are going to follow as long as this Senate exists? If you do not like a nominee, and 40 people get together, they can block that nominee? That was not done

when President Clinton was President. There was not a filibuster of a President Clinton nominee. There was not a blocking of any of the nominees in committee.

Last year, when the Democrats had the majority in the Judiciary Committee, they blocked two nominees in committee on a straight party-line vote, both of whom would have been confirmed, it was clear, from news reports, had they reached the floor. They killed them in committee. I thought they had, but that may not be the case today. That was a rachetting up of the process. They said: Well, you held up President Clinton's nominees.

Let me tell you what the facts are there. In the 8 years that President Clinton was President, he had confirmed 377 Federal judges. One of his nominees was voted down. That nominee was opposed by the National Sheriffs Association, law enforcement groups, and both Home State Senators. It is the only one that was voted down. Not one was killed in committee on a party-line vote. Not one was filibustered.

So I just say, that it is not true that President Clinton's nominees received unfair scrutiny. Yes, they were asked questions, but they were asked responsible questions. And they were consistently confirmed in large numbers.

They said: Well, some of them did not get through. The fact is, when President Clinton left office, he had nominated 41 judges who had not been cleared. He confirmed 377, but 41 had not cleared.

When former President Bush left office in 1992, there were 54 judges which the Democratic majority Senate had not confirmed.

So it is a total falsehood to suggest the Clinton nominees were mistreated when they came through here. They got a higher percentage of them confirmed than did former President Bush's nominees. They were not filibustered, and they were not blocked in committee. I feel very strongly about that.

It has been said that you Republicans said advise and consent is not a rubberstamp and you had a right to raise questions and vote against nominees.

I agree with that. We all have that right. We can vote against them. We have a right to debate them. We have a right to ask questions. If we are not satisfied with those answers, we have an obligation to vote no. We should vote no. But wait a minute. What if we don't allow them to have a vote? Is that what we are saying? We are going to vote to not allow a vote? I am not at all pleased with that.

One person suggested we are dealing with judges from the lunatic fringes. That was a quote made earlier. This nominee cannot possibly be considered a lunatic fringe nominee. This nominee unanimously was rated well qualified by the American Bar Association. The ABA goes out and investigates these nominees. They ask what cases they have handled. They then make a list of the lawyers on the other side of the cases, and they go out and interview the lawyers. They interview the judges who tried the cases. They don't give out well-qualified ratings that often. It is rare to get a unanimously well-qualified rating.

How can we say Miguel Estrada is somehow out of the mainstream or a lunatic fringe nominee when the gold standard, as one of my Democratic colleagues said, the ABA, rated him well qualified with their highest possible rating? It can't be done.

He went to Harvard. He was editor of the Law Review and spent 5 years in the Department of Justice Office of Solicitor General under the Clinton administration. Under the Clinton administration he was evaluated repeatedly by his supervisors, and he was given the highest possible evaluation you could give an attorney in the Department of Justice every year, the top rating.

Is this some sort of incapable stealth candidate we don't know anything about? No, sir. Not so.

One of our Senators talked about the Constitution as a changing document and that from time to time we just change it. I think that is dangerous. Our liberties are bound up in that document. If we say we have a right to change its meaning from time to time, according to the length of the chancellor's foot, according to how a judge may feel on a given day, our liberties have been eroded.

I remember Professor Van Alstyne at Duke, a constitutional scholar, said: If you love this Constitution and you really respect the Constitution, you will interpret it as it is written. You don't interpret it as you wish it were. If you do that, you don't respect the document. You undermine the document and the power that it has had for generation after generation to protect our liberties and order.

They say: You are just pounding on the table over there, Republicans. You have no argument whatsoever.

That is not true. Mr. Estrada has one of the highest recommendations, with one of the greatest backgrounds of any nominee I have ever seen come before this Senate. I was in the committee and I heard his testimony. It was absolutely superb, one of the finest testimonies I have seen. He was responsive, intelligent, quiet, thoughtful, courteous to the questioners, at times when he should not have been. I was very impressed with him.

Some think maybe the opposition to this young conservative Hispanic is because, who knows, President Bush might want to put him on the Supreme Court. I will just say this: I saw him testify. I read his record and background. He would make an outstanding Supreme Court Justice, a great Supreme Court Justice. He has integrity and legal thought processes that are superb. I am very pleased with him.

They throw out these charges. I just happen to know some of them because I have been involved in the hearings. They said one judge was asked to give all his downward departures in criminal cases. What a judge sentences in a criminal case is a public document. It is part of the public record. A downward departure means the judge has violated the sentencing guidelines. But when he does that, he has to write a special opinion to justify why he downward-departed and gave the criminal defendant less than the statutory minimum and sentencing guidelines would require him to get as a sentence. I don't think that was an extreme thing to ask.

What they are asking this nominee to do is reveal internal memoranda he wrote while he was a member of the Clinton administration to his fellow colleagues as they discussed how to handle complex legal matters. Every single living Solicitor General has said that this should not be done. There are seven of those, and four of them are Democrats. They have said: No, we do not want our attorneys' work product, our internal memoranda popped up every time somebody wants to do it. If members of our staff think they can't express an honest opinion in my law office as Solicitor General, then they are being chilled, if they are going to bring it out some day and say, you can't be a Federal judge because as a young lawyer you wrote a memorandum that didn't make sense.

Also they want the free and open discussion they get from the members of their staff. That would be reduced if these memoranda should be put forward.

I ask my colleagues: Should those documents be produced? Is that something we have to do here? Is that a good policy for America to say that from henceforth, now and forever, every member of the Department of Justice, every member of a law firm who wrote internal memoranda, they have to produce all of those before they can be confirmed? That is a dangerous precedent we ought not to follow.

They say: Well, there are some examples in which that happened. The Senator from Connecticut had some documents and had a letter from the Department of Justice asking for them back. He said: That proves they had to exist because they asked for them back.

I asked him about it. He introduced them into evidence. I read them. Well, it was the Bork confirmation. There were allegations about Watergate and those kind of things, and they were asking questions before they wanted to put him on the court about specific concerns that Bork may have acted improperly in a series of positions and events. So they asked for those documents, and at some point they turned them over.

That is not the routine thing. There has not been a single suggestion Miguel Estrada has done anything to implicate

himself in a Watergate type matter. He was a lower echelon attorney in the Solicitor General's office of President Bill Clinton. They have not suggested he would do anything corrupt. They have not suggested any particular issue he took some extreme view on that somehow we have to have this document.

They want a fishing expedition. Not so. We ought not do that. I urge my colleagues, I plead with my colleagues, do not do this. We ought not to do it. It is not right we would do that.

Well, the junior Senator from New York said that power corrupts, and somehow that moving this nominee, who almost sat here for 2 years—moving forward and having a hearing and all, is somehow corrupt or some sort of corrupt thing—to ask for a vote and insist we have a vote, that is corrupt.

Well, I say this: All of us have responsibilities to use our power responsibly. We ought not abuse that power. Abuse of power is a form of corruption. But, may not the minority be corrupt if they use the rules and procedures of this Senate to work a transformation of the traditions of this Senate, to block a nominee by requiring that they now have to have 60 votes instead of a majority? Could that be a form of corruption? I suggest it may be. Why? Because hard left attack groups insist and jerk their chain and demand that they vote no, so they just fall in line with that kind of thinking. I am not happy with that.

I don't believe this nominee deserves this kind of delay. I believe he deserves a vote. I believe there is not one bit of evidence that has come into this record that indicates he has any failings that would disqualify him from the federal judiciary. I think we ought to give him a vote. They asked a nominee how he voted on some issue. I remember that. Somebody asked that question. The nominee didn't answer it, and I think it was said that he should not answer it. He never answered it, and he was confirmed. They are saying if you don't produce confidential, internal Department of Justice memoranda, we are not going to confirm you.

Well, what is this all about? I remember quite a number of years ago, there was a ''Meet the Press'' program and Hodding Carter, who used to be assistant to President Carter, was asked about judges and nominations when President Reagan was in office. He made this comment. He said: The truth is, we liberals have been asking the Federal courts to do for us that which we can no longer win at the ballot box.

If you cannot win the issue at the ballot box and you can get an activist judge on the bench, maybe you can just file a lawsuit and they will rule your way. Maybe they will just reinterpret the meaning of the Constitution or statute and give it some new meaning and just use the law to effect a political agenda.

That is not right. When judges are given lifetime appointments, you need judges who are faithful to the Constitution and the statutes. That is what Miguel Estrada's judicial philosophy is. That is what it is. It is a hostility to use the law for other matters. He believes in giving the law a fair construction, as he said to Senator EDWARDS. He asked a little bit about it, and Senator EDWARDS pursued the matter a little later. He said: Well, President Bush said that he believes in strict construction. You say you believe in fair construction, and Mr. Estrada replied that he had not talked to President Bush about it. He said: You asked me my opinion. My opinion is fair construction. Mr. President, that is an independent and wise answer.

So we have seen courts do things that are really bizarre in America today. We have seen the courts be utilized as a tool to further agendas. Many decisions that we have seen rendered fly in the face of logic. We had judges on the Ninth Circuit Court of Appeals rule that ''under God'' should be taken out of the Pledge of Allegiance. We have had one judge in Vermont—he had a good name, Sessions—whom we confirmed. He is Senator LEAHY's friend and was his campaign manager. It wasn't long after Judge Sessions got on the bench that he declared the Federal death penalty unconstitutional. We have heard Senators talk about Berzon and Paez having some difficulties. But I would say that perhaps they should have had some difficulties. Since they have been affirmed just a few years ago, after taking their positions on the Federal bench in California, they both have participated in separate opinions declaring the California ''three strikes and you are out'' law unconstitutional. This law has been the basis of tens of thousands of convictions of defendants and has helped drive the crime rate down. Yet they said they thought it was cruel and unusual punishment to have a mandatory penalty—really an odd and extreme view.

I felt very strongly that both of those nominees were going to be activist judges, were not going to be bound by the law, and I voted against them; but they both were confirmed. We didn't filibuster them. They got their up-or-down vote, and they were confirmed with a majority of the vote in this Senate. So I just make that point.

As one of our witnesses said in committee, all in all, a judge who believes in strict construction of the law, or a fair construction of the law, and who is not an activist poses less threat to our liberties than one who is an activist judge. That is what Miguel Estrada believes in. That is what President Bush believes in. He wants to bring some sanity back to our legal system. He wants judges who have the classical view of the law. He wants judges who do not feel it is incumbent upon them to tell a city they cannot have Christmas decorations. He does not believe they should be striking down the Pledge of Allegiance, or striking down the Federal death penalty, or striking down the California ''three strikes and you are out'' law. Those are activist decisions and they threaten our judicial process and deny the people the right to control their destiny.

Federal judges, being lifetime appointed, are not subject to control by the democratic process. So when they are given the power to carry on political agendas, then they are acting in an antidemocratic way. It is an anti-, undemocratic act when a lifetime appointed judge, with no accountability to the public, starts issuing opinions that affect public policy.

Well, I will just say that it wasn't long ago when the leadership on the other side, without any hesitation, opposed the filibustering of Federal judges. Senator LEAHY, past chairman of the Judiciary Committee, and currently the ranking Democrat on the committee, said this:

> If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported, that I felt the Senate should do its duty.

That is a clear and unequivocal statement in opposition to a filibuster. He said that in 1998.

In 2000, Senator LEAHY said:

> I have said on the floor, although we are different parties, I have agreed with Governor George Bush, who has said that in the Senate a nominee ought to get a [floor] vote, up or down, within 60 days.

Senator BIDEN, the past Judiciary chairman:

> But I also respectfully suggest that everyone who is nominated ought 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. . . . It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor, and not to allow them to have a vote. . . .

Senator FEINSTEIN:

> A nominee is entitled to a vote. Vote them up; vote them down.

On and on that is mentioned. That has been our policy. Sure, some nominees have been held, but they usually have been forced up for votes, and they have gotten their vote.

When President Clinton left office, there were only 41 judges who did not get a vote. Only 41. There were 54 when President Bush left office, and it has been historic in this body at the end of a session when nominees come in and people are thinking there might be a new President, the process slows down. That has happened for good or ill probably for the last century. That is within the realm of responsibility. To openly filibuster a qualified nominee (early in a term) is contrary to the traditions of this body and would set a precedent that would be quite dangerous.

Once again, I urge my colleagues not to go down this road. I urge my colleagues to think seriously before they

consider a routine filibuster. Maybe if this nominee had ethical problems or serious personal problems, that would justify a filibuster, but not a nominee who is rated well-qualified by the bar, who has the support of virtually everyone with whom he has worked, who demonstrated by his testimony extraordinary skill and intelligence. I respect him. I believe he should be given a vote. I hope and believe that somehow we will avoid this and we will get an up-or-down vote on him.

That is my request to my friends across the aisle, and it would be a mistake if that does not occur.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

UNIVERSITY OF MICHIGAN

Mr. LEVIN. Mr. President, George Washington was nearing the end of his Presidency. He dreamed of a national university for the United States to be located in Washington. This university was going to bring together all the different people of this great country into one educational setting to learn together, to learn from each other, to get to know each other, to overcome prejudices and intolerance.

President Washington actually planned to include his vision of such a university in his now famous and historic Farewell Address. It was not included in that Farewell Address. Apparently, one of the people who was working with him on that Farewell Address was Alexander Hamilton who urged, as he was writing the address, drafting it:

> The idea of the university is one of those which I think will be most properly reserved for your speech at the opening of the session. A general suggestion respecting education will very fitly come into the address.

In other words, what Hamilton was saying is this vision of yours, Mr. President, about a national university, where people can come to shed their prejudices from various parts of the country, to live and work with each other should be saved for a different address. Leave it out of the Farewell Address.

In fact, President Washington ended up leaving it out of his Farewell Address, but he included it in a letter. It is a letter which has come down through the generations, and that vision of a national university was outwardly reflected in this letter.

He stated his belief that this country would be stronger if the children from different parts of the country could come together in an educational setting to learn from each other and about each other.

I want to read a few parts of this letter of George Washington because I think it has an application to the University of Michigan case which is currently pending in the Supreme Court.

I come from the State of Michigan. I am proud of it, and I am proud of our university and its effort to promote diversity, and not just racial diversity, but geographic diversity, economic diversity, gender diversity—diversity in general which has been promoted by not just the University of Michigan but by most universities in this country, and it seems to me is to be encouraged.

What George Washington sensed 205 years ago was that a university had a special ability to bring together different people to help them learn about each other, drop their fears of each other and make us one Nation.

This is what he wrote:

> I have regretted that another subject (which in my estimation is of interesting concern to the well-being of this country) was not touched upon also: I mean Education generally as one of the surest means of enlightening and givg. just ways of thinkg to our Citizens, but particularly the establishment of a University; where the Youth from all parts of the United States might receive the polish of Erudition in the Arts, Sciences and Belle Letters; and where those who were disposed to run a political course, might not only be instructed in the theory and the principles, but (this Seminary—

Referring to the university—

> being at the Seat of the General Government) where the Legislature wd. be in Session half the year, and the Interests and politics of the Nation of course would be discussed, they would lay the surest foundation for the practical part also.
>
> But that which would render it of the highest importance, in my opinion, is, that the Juvenal period of life, when friendships are formed, and habits established that will stick by one; the youth . . . from different parts of the United States would be assembled together, and would by degrees discover there was not that cause for those jealousies and prejudices which one part of the Union had imbibed against another part; of course, sentiments of more liberality in the general policy of the Country would result from it. What, but the mixing of people from different parts of the United States during the War rubbed off these impressions? A century in the ordinary discourse, would not have accomplished what the Seven years association in Arms did; but that ceasing, prejudices are beginning to revive again, and never will be eradicated so effectually by any other means as the intimate intercourse of characters in early life, who, in all probability, will be at the head of the councils of this country in a more advanced stage of it.

He went on:

> To shew that this is no new idea of mine, I may appeal to my early communications to Congress; and to prove how seriously I have reflected on it since, and how well disposed I have been, and still am, to contribute my aid towards carrying the measure into effect, I enclose you the extract of a letter from me to the Governor of Virginia on this Subject, and a copy of the resolves of the Legislature of that State in consequence thereof.
>
> I have not the smallest doubt that this donation (when the Navigation is in complete operation, which it certainly will be in less than two years), will amount to twelve or 1500 pounds Sterlg a year, and become a rapidly increasing fund. The Proprietors of the Federal City have talked of doing something handsome towards it likewise; and if Congress would appropriate some of the Western lands to the same uses, funds sufficient, and of the most permanent and increasing sort might be so established as to envite the ablest Professors . . . to conduct. . . .

President Washington saw that the two strongest ways to unite a country are when people go to war together against the common enemy and when they go to school together with a common goal, to learn. While we would all like to avoid the need to fight together, we all know we can strengthen our ties to democracy and to our country when we learn together about the world and each other.

Learning together allows us to strip away the prejudices that would otherwise keep us apart. The hope of George Washington was later joined by the dream of Martin Luther King and by the promise and the potential of Brown v. Board of Education a half century ago, and they are now hanging in the balance because of the issues that are raised in the University of Michigan affirmative action cases before the Supreme Court.

In April, the U.S. Supreme Court is going to hear two oral arguments in two separate lawsuits challenging the University of Michigan's diversity admissions policy. The Court's decision in these cases will result in the most far-reaching affirmative action ruling since the Bakke decision in 1978. The Court will decide the critical issue of whether Bakke still remains the law of the land and whether racial or ethnic diversity has a value at a university which can be considered in admissions of higher education.

In the Bakke decision, the Court ruled against rigid quotas or set-asides based on race but found that higher education could consider race or ethnicity as a factor in a properly considered competitive admissions process to achieve the educational benefits of diversity.

If the Court overturns Bakke, it could outlaw any consideration of race or ethnicity in admissions to colleges and universities.

There is a national security factor to this issue as well. There are going to be a number of military officers and people connected with national security and defense who will be filing an amicus brief in support of the University of Michigan because universities run ROTC programs. Those programs, where there is diversity at the universities that have them, produce officers for the military, who in turn are diverse and reflect our population. The failure to have officers who reflect our population in terms of race and ethnicity and gender, the failure to have diversity in our officer corps, led to huge problems of morale in the military for decades, until just about 20 years ago when we reached out and made great efforts to have diversity in our officer corps. That is going to be a part of the issue in an amicus brief filed in the University of Michigan case.

I am not going to spend a lot of time on that aspect, but I do want to at least comment on the fact that a significant number of very significant military officers, retired officers, who have been connected at the highest levels with our Nation's military and its schools, are going to be filing a brief

with the Supreme Court relative to this issue.

I want to comment on the more fundamental issue, which is the value of diversity in a university and whether it is conceivable in this country that we will say to universities that they can give additional points for geography, which many universities do, including the University of Michigan. In other words, they can reach out to students in different parts of their State who have been underrepresented and try to get better representation from those underrepresented parts. They can give additional points for that. They can give additional points for gender. If the law school has not had women students, they can give additional points for that in order to overcome the problems which were created when women were discriminated against. They can have an affirmative action program for that. They can give additional points to alumni, kids—and they all do—and athletes—and they all do—and the children of public officials—and many of them do.

Geography alone, which George Washington talked about—I went to a college out east which I know for a fact reached out geographically in this country to try to have good representation from various parts of the country. I come from the Midwest. My SAT scores were not as high as some of the kids' in the East, but the college I went to decided it was important to those kids from the East that they have kids from the Midwest, kids from the Far West, kids from the South, kids from the Southwest, kids from Alaska, kids from Hawaii, kids from Africa—it is important to the education of our students that they go to school with a diverse group of students. So they gave out geographic points. I got points. I do not think I would have gotten into my college, my beloved college, Swarthmore, but for the fact that I came from the Midwest and I was given some additional points. I do not know for sure, but that is my belief, and that is the likelihood, I have no doubt. I know they have geographical affirmative action. Is it conceivable that points can be given for everything but race to achieve diversity, that race is singled out as the one area where we cannot reach out to achieve diversity in our universities? Is it possible that is what we are going to come to in this country, that the equal protection clause will be turned right on its head? The 14th amendment, which was designed, at least in significant measure, to end the scourge of the remnants of slavery, is going to be used to prevent diversity from being achieved in one area where it is most important that we have a diverse university, and that is the area of race. It is the one area where we have had the most difficulty in overcoming the kind of prejudices and obstacles President Washington talked about and for which he said a university was the most suited, other than going to war together.

Our military has done a spectacular job in terms of diversity. It has been a huge factor in the promotion of democracy in this country. Hopefully, we do not have to go to war to promote coming together and learning to overcome prejudices and differences. Hopefully, our universities can be allowed to reach out, as they are with geography, to overcome the fact that some parts of our States are totally underrepresented in our educational institutions, to say, yes, we are going to reach out to that part of the State and we are going to try to get more students from there; they may not have done quite as well on their SATs, because of various historic factors or whatever, but they are highly qualified students, so we are going to give some additional points to those students. But not race? Race would be singled out for not being permitted to be given additional consideration to achieve diversity which is so valuable in education? That would be an unthinkable, unconscionable result, and a distortion of the very purpose of the equal protection clause.

Of all the areas where we have the most hurdles to overcome, most barriers to overcome, more attitudes to overcome, more prejudices to overcome, with all the progress we have made—and we have made a lot—we have a long way to go in the area of race. The idea that somehow or another all that other diversity, all those other additional points can be given—alumni kids, you can get 10 points; athletes, you can be given 20 points; gender, you can be given points; economic, you can be given points—but not race, that would be, it seems to me, singling out race for discriminatory treatment when it comes to promoting diversity at a university.

The law school's current policies have been upheld by the Sixth Circuit as being consistent with Bakke. The Sixth Circuit has explicitly rejected the plaintiff's contention that the system used by the University of Michigan was the functional equivalent of a quota. The Sixth Circuit found that the law school's admissions program is ''virtually indistinguishable'' from the Harvard man, which Justice Powell held out in the Bakke decision as the appropriate model.

In the University of Michigan's undergraduate admissions program, 110 points out of 150 are given for academic factors, including grades, test scores, and curriculum. The greatest weight, up to 80 points, goes to high school grade point average. Applicants can earn up to 12 points for SAT or ACT scores, up to 10 points for attending a competitive high school, 8 points for taking the most challenging curriculum, and 3 points for SAT quality. Other factors can be considered, including geography, athletics, relationship to alumnus, economic disadvantage. Points can be added for students from various parts of the State which have been underrepresented at the university. Students who have athletic scholarships get additional points, children of alumni get additional points, students from economically disadvantaged backgrounds get additional points. And at the University of Michigan, students from an underrepresented racial or ethnic minority or attending a high school serving a predominantly minority population can receive additional points. And the provost can award additional points to applicants at his or her discretion.

The idea it is all right for colleges and universities to give special consideration to all the other groups—children of alumni, large donors' children—how is that one? It is OK to give special consideration to the children of large donors for whatever university purpose that serves—but it is not OK to give additional points to underrepresented minorities for the obvious university purpose that serves, which is a diverse student population, which our first President, the Father of our Country, pointed out in this letter is absolutely essential if this country is going to be one, if this country is going to be unified.

Indeed, he saw that 200-plus years ago. I hope the Supreme Court will have the wisdom of reading that letter and seeing how important it is that President Washington's dream to bring people from different parts of the country, that people of different backgrounds, which is the University of Michigan program, can, in fact, be realized. That is what some of the stakes are in the University of Michigan case.

Since we are talking judicial matters this evening, I wanted to raise that issue, as well.

Mr. SESSIONS. Is the Senator going to another subject for long?

Mr. LEVIN. It will be lengthy.

Mr. SESSIONS. I would like to speak on the Estrada nomination.

Mr. LEVIN. You can talk for quite some time on that. You have talked longer, I believe, than I have on this evening.

Mr. SESSIONS. Not as long as some of the other Members over there.

Mr. LEVIN. Let me try to limit this to about 10 minutes.

The PRESIDING OFFICER. The Senator from Michigan has the floor.

NATIONAL SECURITY

Mr. LEVIN. I will keep the floor and try to keep this down to 10 minutes.

Earlier today we had a hearing in the Armed Services Committee where we received testimony from the intelligence community on worldwide threats to our national security. I gave an opening statement at that hearing, parts of which I want to share with the Senate tonight because of the importance of the subject of Iraq. We have a lot of work ahead of us. We have threats of all kinds, threats which are more immediate, more personal, more imminent, than Iraq, particularly the al-Qaida terrorist network, even though that network has been weakened, it has been deprived of its safe haven in Afghanistan.

It has, just over the last few months, attacked innocent civilians in Bali and Tunisia and has attacked United States service members and civilians in Kuwait and Jordan.

Last month, the United States and coalition forces fought the biggest battle in Afghanistan since Operation Anaconda last spring. Even though our intelligence and our law enforcement agencies are working with allied countries to thwart further attacks in the United States and abroad, the fact is we remain highly vulnerable to al-Qaida, to other terrorist groups. As a matter of fact, the United States is at alert orange now—that is the second highest level of alert in our military forces—and also at heightened force protection levels worldwide. We remain vulnerable. We remain vulnerable not just to conventional explosives but now, we believe, more and more vulnerable to weapons of mass destruction.

Earlier this week, Federal officials even suggested the public should make preparations for a terrorist attack involving chemical, biological, or radiological weapons. While we are placing such a huge focus on Iraq, North Korea, a country that possesses weapons of mass destruction and has ejected the international nuclear inspectors, has declared it is resuming operation of its plutonium-related nuclear facility.

North Korea is not just a country which proclaims it is engaged in a nuclear program as it now has with the enriched uranium program. North Korea is probably the world's worst proliferator of ballistic missile and missile technology. It is on the brink of becoming an undisputed nuclear power. The administration has refused to open a direct dialog with North Korea. That has serious ramifications. Our ally which lives next to North Korea, which surely has got at least as much at stake as we do in the whole matter—and, I think, obviously a lot more since they are the ones nearest the threat—our ally, South Korea, wants us to open a direct dialog with North Korea. They have openly expressed the wish that this country have a direct dialog of the highest levels with North Korea.

The administration has decided not to do that, and all of a sudden, what is obviously a crisis to most of us and most of the world, is not even described as a crisis by the administration. Even though the failure to have contact, the linking it to the axis of evil and the announcement we will have a preemptive policy using military force, could lead to additional provocative and irreversible action on their part because it is stoking the paranoia which exists in North Korea.

On top of that, Iran has admitted now it is mining uranium. That surely must underscore our concern that its nuclear energy program is intended for nuclear weapons, not just for the promotion of nuclear energy. Iraq is the focus and Iraq continues to flout the international community. It is not assisting U.S. weapons inspectors to find or account for chemical or biological weapons programs. Disagreement on how to address the Iraqi threat has divided the U.N. Security Council.

Surely there can be little doubt Osama bin Laden would like to see the United States and Britain attack Iraq without the authority of the world community acting through the United Nations. Keeping the world community together through the U.N. Security Council is exactly what Osama bin Laden does not want to see. He does not want to see a United Nations. He wants to be able to say it is the United States, it is Britain, and it is a few of their personal, close allies. It is not the world that is going after Iraq, it is the United States and Britain that are doing it. He does not want, it is obvious, the world community to be united against the Iraqi threat. He wants to be able, as does Iraq, to characterize the effort as an American/British-led unilateral, not having U.N. authority type of effort.

All of us want Saddam Hussein to be disarmed. The best way to accomplish the goal of disarming Saddam Hussein without war is if the United Nations speaks with one voice relative to Iraq. I want to repeat that, as I think there is so much concern about the possibility of war with Iraq that that particular point is frequently lost.

The best way to accomplish the goal of disarming Saddam Hussein without war is if the United Nations speaks with one voice relative to Iraq.

But if military force is going to be used, the best way of reducing the short-term risks, including risks to the U.S. coalition forces, and the long-term risks, including the risk of terrorist attacks on our interests throughout the world, is if the United Nations specifically authorizes the use of military force. That is the bottom line. The best way of increasing any chance for disarming Hussein without war, and of minimizing casualties in future attacks on the United States if war does ensue is if the United Nations acts relative to Iraq.

The next point, though, is essential as well. Supporting U.N. inspections is an absolutely essential step if we are going to keep the Security Council together. We are not going to have a chance of keeping the United Nations Security Council speaking with one voice unless we support United Nations inspections, which are and have been such an important part of the Security Council's position.

How do we support those U.N. inspections? First, by sharing the balance of the information that we have about suspect sites; No. 2, by quickly getting U–2 aircraft in the air over Iraq, with or without Saddam Hussein's approval, and by giving the inspectors the time they need to do their work as long as the inspections are unimpeded.

I disagree with those, including high officials in our government, who say that U.N. inspections are useless. We heard before the inspections began from the highest level of this government that inspections were useless. We heard it from Dr. Rice at the White House last week. She said specifically that inspections are doomed to failure.

I am also astounded that some of our highest officials have gone so far as to refer in a derogatory way to the ''so-called'' U.N. inspectors. If these inspectors and inspections are useless without Iraqi assistance in pointing out where they have hidden or destroyed weapons of mass destruction, why are we sharing any intelligence at all with the inspectors; and why are we apparently finally implementing U–2 flights to support the inspectors?

It is one thing to be realistic about the limitations of the U.N. inspections and not have too high hopes about what they can produce. It is another thing to denigrate their value or prejudge their value or to be dismissive and disdainful about the beliefs of others on the U.N. Security Council about their value, or to be cavalier about the facts relative to those inspections.

Referring to being cavalier about facts brings me to another point which has to do with the sharing of intelligence information in our possession with the U.N. inspectors. I have followed this issue very closely. I have asked the CIA for months to give us the precise information as to how many suspect sites there are, how many of those suspect sites are of great significance, for how many of the significant sites have we shared information that we have with the United Nations inspectors. They have given me the information in writing but, as it turns out, it is erroneous.

We just began sharing specific information in early January, according to Secretary Powell, who is quoted in the Washington Post on January 9. I can't go into those classified details in the open. I can't give the precise numbers, how many suspect sites we have information on, how many of those suspect sites that we have information on are of significance, and how many of those have we shared with the United Nations. The numbers themselves are classified.

I can say in an unclassified setting, in public, that as of a couple of weeks ago we had shared information on only a small percentage, a fraction of the suspect sites in Iraq, and we had not shared information on the majority of the suspect sites. That was confirmed by CIA staff.

Yet when I asked the Director of the CIA yesterday about this subject, he told us that we have now shared with the U.N. inspectors information about every site where we have credible evidence—all of a sudden, going from a fraction of the sites to we have now shared all the sites.

Then last night, in Director Tenet's presence and in the presence of Senator WARNER, his staff acknowledged that as a matter of fact we still have useful information that we have not shared

with the inspectors—which is the opposite of what Director Tenet told the Intelligence Committee yesterday in open session. If we have not yet shared all the useful information that we have with the U.N. inspectors, that would run counter to the administration's position that the time for inspections is over.

The same type of issue exists relative to the U–2s. The inspectors have asked for U–2 surveillance planes. These are planes which have a capability of tracking those suspicious vehicles on the ground that have been referred to by Secretary Powell in his speech, tracking the vehicles that are at a suspicious site and going to another site. They have the advantage of being able to loiter. Unlike a satellite, a U–2 can loiter and actually keep track of a vehicle as it moves from one suspicious place to another and can connect that information to inspectors in real time. They are intensely valuable to the inspectors. They have asked over and over again for the U–2 flights. Why haven't they been provided to the inspectors?

Well, because Saddam Hussein says he can't guarantee the safety of the pilots. So instead of going to the U.N. and saying: Resolution whatever the number is, the United Nations authorizes these U–2 flights and if Saddam Hussein interferes with these flights that will be considered an act of war against the United Nations—instead of doing that, to give the inspectors this additional capability, at least until yesterday or perhaps today, Saddam Hussein has been given a veto by the U.N.—including us; we are part of the U.N.—over the use of surveillance planes, which would contribute to the likelihood that inspectors would catch him with the goods.

I hope that is over now. I don't know for sure that it is. I hope now there is an arrangement made to use the U–2 flights. But if we believe it is important, short term and long term, to both avoiding war, and if war comes, to reducing its risks, that we have a United Nations that is united, speaking with one voice against Iraq, we then must deal with the United Nations' key request that we have an inspection process which is complete and robust. And we must lead at the United Nations to help make it robust. And that includes the use of the U–2 planes.

We have made the suggestion, Senator CLINTON and myself, in a letter which we sent to Secretary Powell, that that kind of resolution be introduced at the United Nations which would provide that the U–2 planes be authorized by the United Nations, have the United Nations flag, and, if interfered with by Saddam Hussein, that would be considered an act of war against the United Nations and every member would then be authorized to use military force in response.

When President Bush addressed the United Nations General Assembly on September 12 of last year, he said that:

> We want the United Nations to be effective, and respectful, and successful.

We have some responsibility to help the United Nations achieve that. Saying to other countries, including allies, that if you don't see it our way you must have some ulterior motive, doesn't help us in leading the United Nations to a united front against Saddam Hussein. While a number of heads of State and Governments have called for the United Nations Security Council to take appropriate action, necessary action in response to the threat, and others have pledged to contribute military forces to that effect, others believe we should give strengthened inspections the time that they need to finish their job. But all of the groups agree on the necessity of disarming Iraq.

Rather than following a course that divides the United Nations and separates us from some of our closest allies, we should fairly consider courses of action that unite the world community against Iraq.

I yield the floor.

The PRESIDENT pro tempore. The Senator from Utah.

Mr. HATCH. Mr. President, I ask unanimous consent that the distinguished Senator from Pennsylvania be allowed 6 minutes without my losing the right to the floor and that I immediately be recognized thereafter.

The PRESIDENT pro tempore. Is there objection?

Without objection, it is so ordered.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I have sought recognition to comment about the current procedures with respect to the selection of judges, and what is happening in the Senate today is a constitutional revolution.

The Constitution provides that the Senate will give advice and consent to the President. And the tradition of this country for 215 years has been that the President makes selections as he chooses, and advice can come from the Senate. Consent has been given without challenging the President to a partnership arrangement where the Senate has to consent to the nominee before the President can submit the nominee to the Senate with any chance for confirmation.

What the Democrats are doing here today is really seeking a constitutional revolution. What they want as the minority party in the Senate is a full partnership with the President on selecting Federal judges.

What we are doing with Miguel Estrada, and other nominees who are coming up for an executive session tomorrow, is really a prelude to the nomination of the next Justice for the Supreme Court. The effort is being made by the Democrats to have their acceptable ideology without the traditional deference which has been paid to the President.

The Senate has been maneuvered into a position here, an institution with lines being drawn in the sand, and Republicans on one side and Democrats on the other being backed into a corner—sort of a macho-macho game where no one wants to play the chicken game. What we are really seeing is gridlocking this institution on a permanent basis, if no one yields.

The Judiciary Committee has three nominees on the Executive Calendar tomorrow, and the Democrats have served notice that they are going filibuster. If at least one Democrat does not vote to end the filibuster, nothing will happen there.

So we have a long litany of judges—some of whom have been held up for 2 years—and nothing is going to happen.

What we may be seeing here is the foundation laid for a grand political argument in the Presidential election of 2004. We are laying it right on the line. If the American people want judges confirmed, there are going to have to be 60 votes in the President's party.

Both sides have been at fault in the past, in my opinion. When President Clinton was in the White House and the Republicans controlled the Senate, we wouldn't confirm people. There were some breakthroughs but relatively few. When President Bush submitted nominees for 2 years, or a year and 7 months, the Democrats stopped the nomination process.

It is high time we had a protocol which both sides respected wherein so many days after a nomination, there is a hearing, so many days later, a vote in committee, and so many days later, a vote on the full floor.

But we are really heading for extraordinary deadly deadlock in this body. I think we ought to recognize it for what it is. There is a constitutional revolution underway here to change the fundamental way judges are selected.

If the Democrats insist on a full partnership with the President, if any party insists on a full partnership with the President of the opposite party, then it is going to take 60 votes. And we may be setting the stage for 60 votes in the 2004 election.

But it is my hope that cooler heads can prevail and we can sit down and work this out so that when the shoe is on the other foot, we don't have this kind of gridlock and this effort to really upset longstanding constitutional principles.

I thank the Chair. I yield the floor.

NOTICE

Incomplete record of Senate proceedings. Except for concluding business which follows, today's Senate proceedings will be continued in the next issue of the Record.

ORDERS FOR THURSDAY, FEBRUARY 13, 2003

Mr. TALENT. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 11 a.m., Thursday, February 13. I further ask unanimous consent that on Thursday, following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day, and the Senate then return to executive session to resume the consideration of the nomination of Miguel Estrada to be a circuit judge for the DC Circuit.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. TALENT. Mr. President, on behalf of the majority leader, and for the information of Senators, tomorrow the Senate will once again resume debate on the nomination of Miguel Estrada. We have now spent 5 days, over 35 hours, debating this well-qualified and capable nominee. During this debate, every Senator should have had the opportunity to speak on the nomination of Miguel Estrada if they desired. We will continue consideration of this qualified nomination tomorrow morning.

In addition, the omnibus conference report will be filed in the House tonight. The House is expected to act on that conference report tomorrow. Therefore, it is the leader's hope that the Senate will be able to complete action on that measure on Thursday or Friday. Rollcall votes are therefore possible during Thursday's session.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. When this was prepared, it wasn't morning. I think the report is going to be filed in the next hour or two.

Mr. TALENT. That is correct. It would be in the morning.

ADJOURNMENT UNTIL 11 A.M. TOMORROW

Mr. TALENT. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the previous order.

There being no objection, the Senate, at 12:45 a.m., adjourned until Thursday, February 13, 2003, at 11 a.m.

NOMINATIONS

Executive nominations received by the Senate February 12, 2003:

THE JUDICIARY

CONSUELO MARIA CALLAHAN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT, VICE FERDINAND F. FERNANDEZ, RETIRED.

STEVEN M. COLLOTON, OF IOWA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, VICE DAVID R. HANSEN, RETIRED.

HARRY A. HAINES, OF MONTANA, TO BE A JUDGE OF THE UNITED STATES TAX COURT FOR A TERM OF FIFTEEN YEARS, VICE RENATO BEGHE, RETIRING.