commercial policy should hold an equal and impartial hand: neither seeking nor granting exclusive favors or preferences; consulting the natural course of things; diffusing and diversifying by gentle means the streams of commerce but forcing nothing; establishing with powers so disposed, in order to give trade a stable course—in order to give to trade a stable course, to define the rights of our merchants, and to enable the government to support them, conventional rules of intercourse, the best that present circumstances and mutual opinion will permit, but temporary, and liable to be from time to time abandoned or varied as experience and circumstances shall dictate; constantly keeping in view, that it is folly in one nation to look for disinterested favors from another—that is must pay with a portion of its independence for whatever it may accept under that character—that by such acceptance, it may place itself in the condition of having given equivalents for nominal favors and yet of being reproached with ingratitude for not giving more. There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion which experience must cure, which a just pride ought to discard.

In offering to you, my countrymen, these counsels of an old and affectionate friend, I dare not hope they will make the strong and lasting impression I could wish—that they will control the usual current of the passions or prevent our nation from running the course which has hitherto marked the destiny of nations. But if I may even flatter myself that they may be productive of some partial benefit, some occasional good, that they may now and then recur to moderate the fury of party spirit, to warn against the mischiefs of foreign intrigue, to guard against the impostures of pretended patriotism—this hope will be a full recompense for the solicitude for your welfare by which they have been dictated.

How far in the discharge of my official duties, I have been guided by the principles which have been delineated, the public records and other evidences of my conduct must witness to you and to the world. To myself, the assurance of my own conscience is, that I have, at least, believed myself to be guided by them.

In relation to the still subsisting war in Europe, my proclamation of the 22d of April 1793 is the index to my plan. Sanctioned by your approving voice and by that of your representatives in both houses of Congress, the spirit of that measure has continually governed me, uninfuenced by any attempts to deter or divert me from it.

After deliberate examination with the aid of the best lights I could obtain, I was well satisfied that our country, under all the circumstances of the case, had a right to take, and was bound in duty and interest to take—a neutral position. Having taken it, I determined, as far as should depend upon me, to maintain it with moderation, perseverance and firmness.

The considerations which respect the right to hold this conduct it is not necessary on this occasion to detail. I will only observe that, according to my understanding of the matter, that right, so far from being denied by any of the belligerent powers, has been virtually admitted by all.

The duty of holding a neutral conduct may be inferred, without anything more, from the obligation which justice and humanity impose on every nation, in cases in which it is free to act, to maintain inviolate the relations of peace and amity towards other nations.

The inducements of interest for observing that conduct will best be referred to your own reflections and experience. With me, a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions and to progress, without interruption to that degree of strength and consistency which is necessary to give it, humanly speaking, the command of its own fortunes.

Though in reviewing the incidents of my administration I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have committed many errors. Whatever they may be, I fervently beseech the Almighty to avert or mitigate the evils to which they may tend. I shall also carry with me the hope that my country will never cease to view them with indulgence and that, after forty-five years of my life dedicated to its service with an upright zeal, the faults of incompetent abilities will be consigned to oblivion, as myself must soon be to the mansions of rest.

Relying on its kindness in this as in other things, and actuated by that fervent love towards it which is so natural to a man who views in it the native soil of himself and his progenitors for several generations, I anticipate with pleasing expectation that retreat, in which I promise myself to realize without alloy the sweet enjoyment of partaking in the midst of my fellow citizens the benign influence of good laws under a free government—the ever favorite object of my heart, and the happy reward, as I trust, of our mutual cares, labors and dangers.

GEO. WASHINGTON.

The PRESIDING OFFICER. The Chair wishes to thank the Senator from Georgia for his outstanding elocution in delivering George Washington's Farewell Address. It was an outstanding presentation.

Mr. CHAMBLISS. I thank the Presiding Officer.

## EXECUTIVE SESSION

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

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

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

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, as I listened to the distinguished Senator from Georgia recite the Farewell Address of George Washington dating back to 1796, I could not help but think how the Founding Fathers must regard the debate on the confirmation of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit that we have been having for 3 weeks. I rise this afternoon, at the beginning of that third week of Senate debate, with grave concerns about the judicial confirmation process and about how that process is being applied in this particular case.

I am saddened to say I believe the process has degenerated into one where double standards are being applied, and games of payback that are really beneath the dignity of this institution. I have actually heard with my own ears, as the junior Senator from New York has said, that Democrat obstructionism in this instance is justified by the manner in which confirmation proceedings have occurred in the past, using a phrase like ''what is good for the goose is good for the gander.''

That kind of language, that kind of attitude, that kind of conduct in this Chamber is deeply disconcerting to me, and I suspect to all the American people. As I have had the opportunity to say previously, many of us, myself included, were not in the Senate when these perceived slights took place in the past, but I believe what we need is a fresh start with regard to judicial nominations and the judicial confirmation process, one where Presidential nominees can be given a timely hearing and then voted up or down without unnecessary delay and gamesmanship. Only then can we discharge our responsibility and get on with the business the American people have sent us to do, putting the public interests and not special interests first.

In this instance, I am not just concerned about the unfair delays—in fact, Mr. Estrada was nominated by the President on May 9, 2001—I am also concerned about unfair standards, double standards. Those who oppose Mr. Estrada's confirmation will apparently stop at nothing to obstruct it. It must be a terrible dilemma indeed for those

who oppose this nomination because for them to win, the American dream must lose.

Of course, the time to vote has come and gone. Yet we have only delay and obstruction. It does not affect only this one nomination. On every day the Senate has been in session since February 5, Members of this body have extensively and exhaustively debated this nomination. Precious Senate time, energy, and attention that could have been devoted to getting the Nation's business done has simply been delayed: Things such as getting the economy moving again, strengthening our national security, protecting our homeland, modernizing and strengthening Medicare.

This time has been squandered by endlessly debating an obviously and extremely qualified nominee. So many other challenges needing this body's attention have been hijacked by this delay and by those who will not even allow a vote on Mr. Estrada's nomination, a truly selfish and unprecedented act.

The debates on this issue have run into the late hours of the day and even into the wee hours of the night. It is time, indeed it is long past time, to bring this debate to a close.

We have returned after the President's Day recess, and I hope others will join with me as I join President Bush in calling for a vote on Mr. Estrada's nomination today.

Unfortunately, the Democratic leadership strategy is clear: Delay the nomination indefinitely in the belief that Mr. Estrada's countless supporters across this Nation and across the political spectrum will eventually grow tired and give up hope. These same leaders seek to defeat Mr. Estrada, even though he commands the support of a bipartisan majority of the Senate, and they want to deny the President his plan to place Mr. Estrada, a role model for countless immigrants and an inspiration to all Americans, on to one of the most prestigious Federal courts in all the land.

It is worth recounting who is Miguel Estrada. He is an individual of extraordinarily high academic achievement, having graduated magna cum laude from both Columbia and Harvard Law School, and having been an editor on the Harvard Law Review. He is an individual who has already served the public with great distinction, as a law clerk to one of President Jimmy Carter's most respected appointees on the Federal courts of appeals, as a law clerk to U.S. Supreme Court Justice Anthony Kennedy, as an Assistant U.S. Attorney, and as an Assistant to the Solicitor General during the first Bush and Clinton administrations. This is an individual who has argued 15 appeals to the U.S. Supreme Court, the legal equivalent of the Super Bowl, reserved for only the Nation's very top lawyers.

This is an individual who has been endorsed by numerous top Clinton administration lawyers and officials, including Vice President Gore's former chief of staff and a former chief counsel to the Senate Judiciary Committee, Ron Klain, the Clinton Justice Department Solicitor General, Seth Waxman, and several other high-ranking Clinton Administration officials. This is an individual who has been supported by numerous Hispanic organizations, including the League of United Latin American Citizens, the National Hispanic Bar Association, the U.S. Hispanic Chamber of Commerce, and the Latino Coalition, to name but a few.

Miguel Estrada is an individual who was not born in this country but who came here at age 17 from his native Honduras barely speaking English. This is an individual described by the oldest and largest Hispanic organization in the United States as ''truly one of the rising stars in the Hispanic community and a role model for our youth.'' This is an individual who has been rated unanimously well qualified by the American Bar Association, which some of my Democratic colleagues have referred to as the ''gold standard'' in judicial confirmation proceedings. And yes, this is an individual who embodies the realization of the American dream for immigrants throughout our land. It is no wonder that today, the beginning of the third week of debate on this exceptional individual's nomination to the Federal bench, that a bipartisan majority of the Senate stand ready to confirm him right now without any further debate or discussion.

We need to do what the American people have sent us here to do. We need to vote. The Democratic leadership has tried to convince Members of this body to vote against confirmation. But because those leaders have failed to make the case for voting this nominee down, they are now left with one alternative, and that is obstructing any vote on this nominee.

There is simply no reasonable case for refusing confirmation of this individual to the U.S. Court of Appeals for the D.C. Circuit. Yet it seems that the Democratic leadership is obsessed with obstruction. Before the November election in 2002, they obstructed President Bush's proposal to create a Department of Homeland Security to better ensure the protection of the United States and the American people in the event of further terrorist attacks. They have obstructed President Bush's proposal to stimulate the economy by making the 2001 tax cuts permanent, leaving the economy flat and too many Americans out of work. They also failed to pass a budget for the Federal Government last year.

Because of their obstruction, much of our time since January 7, 2003, when this Congress convened, has simply been devoted to cleaning up the mess left by the failure to get the job done last year under their leadership. And today they are obstructing a vote on President Bush's appointment of one of the most talented lawyers in our Nation to the Federal bench.

The Democratic leadership seems particularly obsessed and preoccupied with obstructing Mr. Estrada's confirmation. I have wondered why that is. As I have already explained, he is an exceptionally qualified attorney and has an inspiring personal story. The Democratic leadership does not rebut any of that record, and they cannot point to any evidence that Mr. Estrada will not be a fair and just member of the Federal bench who will interpret the law as written, without injecting his personal agenda or political views. Nor can they rebut his stellar record of government service as a law clerk on the U.S. Supreme Court and as a career Justice Department attorney, working under Democrats and Republicans alike. Nor can they rebut the fact that the American Bar Association has unanimously given him the highest possible rating of well qualified.

So you might ask, why are they picking on Mr. Estrada? When I was back home in Texas last week during the Presidents Day recess, I read an editorial from the Dallas Morning News that perhaps gives us some clue as to why the Democratic leadership is so obsessed with obstructing Mr. Estrada's confirmation. They said: ''There is a time for talking and a time for voting. The time has passed for the U.S. Senate to talk about Mr. Estrada's nomination. It is time to vote. . . . But . . . Democrats don't relish giving President Bush one more thing to brag about when he goes into Hispanic neighborhoods during his reelection campaign next year.''

I could not put it any better myself. The Democratic leadership wants to deny President Bush the opportunity to make history by placing an American success story, an exceptionally talented attorney, and the pride of the Hispanic community on one of the most prestigious courts in this country. Why? I am sorry to say, the answer is for petty partisan purposes. The Democratic leadership is frantic to stop Mr. Estrada, even though a bipartisan majority of the Senate stands ready to confirm him.

But how do you do that? How do you convince a majority of Senators to vote against such an exceptional individual? When you have such an obviously qualified person in Mr. Estrada, there is only one thing that the Democratic leadership can do to stop him. There is only one tool of obstruction left and that is to change the rule and to create an unfair double standard.

Mr. President, the only tool of obstruction left for those who oppose this nominee is simply to change the rules. The American people will not stand for such unfair and childish behavior in the Senate.

Faced with a nomination of the President's exceptional nominee, the Democratic leadership has no real evidence, no real facts, no real justification with which to oppose Mr. Estrada. As the Austin American Statesman has editorialized: ''If Democrats have

something substantive to block Miguel Estrada's confirmation to the U.S. Court of Appeals for the District of Columbia, it's past time they share it.''

I would refer Members to an excellent letter of February 12, 2003, signed by White House Counsel Alberto Gonzales, which responds to Senator DASCHLE's and Senator LEAHY's renewed request for confidential Department of Justice memos written while Mr. Estrada worked in the Office of Solicitor General, including for 4 years during the Clinton administration.

Mr. President, I ask unanimous consent that a copy of that letter be printed in the RECORD.

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

THE WHITE HOUSE,
*Washington, DC, 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 this 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 allday 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. This is highly unfair and 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.

L. MIGUEL ESTRADA'S QUALIFICATIONS AND BIPARTISAN SUPPORT

Miguel Estrada is an extraordinary 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 not 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 there 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 Democratic 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 affirmations 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 prochoice, 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 Defense Division of the Legal Aid Society of New York, wrote that ''Miguel would make an excellent Circuit Court Judge. He is a 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 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 consicieness.''

''[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 and memoranda reviewed consistently reflect no policies at variance with Department 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 courts 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 Farmers, 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 appeal 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 confirmation 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 of October 30, 2002, President Bush reiterated that every judicial nominee deserves a timely up-or-down 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 a 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 of 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 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 the 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 States 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 D.C. 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 questions 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 we would seek to resolve cases as he analyzed them ''without any preconception about law 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 President 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 Nomination 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 who I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.'' Similarly, Justice John Paul Stevens stated in his hearing: ''I really don't think I should discuss this subject generally, Senator. I don't mean to be unresponsive but in all candor I must say 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 though through they might be given significance that they really did not merit.''

Justice Ginsburg 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 'in 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 serves 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 question 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 occasions in the area of privacy and elsewhere that there are unenumerated rights in the Constitution, and I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the court. But I think the court has been quite clear that there are 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 no 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 than 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 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.''

When Senator Kohl asked him about environmental statutes, for example, Mr. Estrada explained that those statutes come 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 an 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 of 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 some insights to teach with respect to the problem at hand. It 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, Mr. 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 fact-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 the 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 D.C. Circuit, Senator Specter asked him: ''Do you favor, as a personal matter, capital punishment?'' Judge Farland 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 is 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 mater'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 to 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, and the filibuster, allow an up-or-down vote, and vote to confirm Mr. Estrada.

Sincerely,

ALBERTO R. GONZALES,
*Counsel to the President.*

Mr. CORNYN. The first instance of a double standard being applied to Mr. Estrada by those who oppose an up-or-down vote is that, as opponents charge, Mr. Estrada cannot serve on the D.C. Circuit Court because he has no judicial experience. Yet the fact is that a majority of the judges who currently serve on that court had no prior judicial experience. That's right, they never served as a judge before the Senate voted to confirm them to serve in that important position.

Let's take one case as an example. Judge Merrick Garland was nominated by President Clinton and confirmed by a Republican-controlled Senate. Like Mr. Estrada, Judge Garland graduated from Harvard Law School magna cum laude, clerked for a prominent judge on the Second Circuit, and then later clerked for a Supreme Court Justice. Both Mr. Estrada and Mr. Garland served as assistant U.S. attorneys. Both worked at the Department of Justice in Washington, D.C. Both practiced law in the private sector. Both enjoyed bipartisan support, and neither had prior judicial experience. It took the Senate just a few months to confirm Judge Garland.

Meanwhile, Mr. Estrada has waited 21 months, and still the Democratic leadership will not allow a vote on his confirmation.

But why stop there? If prior judicial experience were really so important to serving on a Federal court of appeals, why did the Senate vote to confirm Thurgood Marshall to the Second Circuit? Why did the Senate vote to confirm Stephen Breyer to the First Circuit? Why did the Senate vote to confirm Ruth Bader Ginsburg to the DC Circuit? And why did the Senate confirm John Paul Stevens to the Seventh Circuit? Indeed, why did the Senate confirm Anthony Kennedy to the Ninth Circuit? None of these individuals, all of whom have subsequently served on the U.S. Supreme Court, had any prior judicial service before they were nominated to the circuit courts and confirmed.

Moreover, since the beginning of the Carter administration in 1977, the Senate has approved 38 nominees to the Federal courts of appeals who have previously worked at the Justice Department but never held judicial office, exactly like Miguel Estrada.

There is also a double standard being applied when opponents to calling an up-or-down vote, advocates and proponents of this obstructionism, claim that Mr. Estrada cannot be confirmed until the Justice Department hands over all confidential documents he wrote as an Assistant to the Solicitor General.

This request would be too laughable if it was not so transparent and so cynical. First, Mr. Estrada does not even have control of these memos, and he has said he does not object if the Justice Department decides to release them. Second, Senator DASCHLE and Senator LEAHY know, were Mr. Estrada to somehow provide it, that it would violate ethical rules which benefit the American people and the entire U.S. Government, including Congress, whose acts the Department of Justice is charged with defending and enforcing in court.

Of course, this fishing expedition is unprecedented evidence, again, of a double standard being applied to Mr. Estrada. Since the beginning of the Carter administration in 1977, the Senate has confirmed 67 nominees to the Federal courts of appeals who have previously worked for the Justice Department, including seven who worked as Deputy Solicitors General, or Assistants to the Solicitor General. Yet in none of these cases was the nominee required to produce such materials protected by the attorney-client privilege. In fact, the Justice Department has determined that the Senate did not even request such materials for a single one of those 67 nominees.

Again, Mr. Estrada served in the Solicitor General's Office during the entire first term of the Clinton Administration, from 1993 to 1997. That means

the Solicitors General for whom he worked during that time were all Democratic political appointees of President Clinton. None of these Solicitors General, I believe it is significant, have raised any objection to Mr. Estrada. Moreover, all former Solicitors General, all former living Solicitors General, both Democratic and Republican, for ethical reasons, oppose the request for these documents made by Senator DASCHLE and Senator LEAHY.

There is a third double standard being applied to Miguel Estrada by the Democratic leadership, those who would obstruct an up-or-down vote on this highly qualified nominee. They claim he has inappropriately refused to answer specific questions indicating how he would rule on specific legal questions that might come before him as a judge. Mr. President, Miguel Estrada is not running for election. He seeks to be a judge. It would be both wrong and unfair for him to prejudge those issues, issues that might well come before him as a judge. Indeed, this principle has been recognized by Supreme Court Justices Stevens, Souter, Breyer, and Ginsburg, who recently explained:

> [H]ow a prospective nominee for the bench would resolve particular contentious issues would certainly be ''of interest'' to the President and the Senate in the exercise of their respective nomination and confirmation powers. . . . But in accord with a longstanding norm, every Member of [the Supreme] Court declined to furnish such information to the Senate. . . . [T]he line each of us drew in response to preconfirmation questioning . . . is crucial to the health of the Federal Judiciary.

I will not belabor the point here, but the letter written by White House Counsel Alberto Gonzales documents numerous Clinton judicial Federal nominees who answered just as Mr. Estrada did, just as these U.S. Supreme Court Justices did, to similar questions posed by the Senate Judiciary Committee. Yet all of these nominees were confirmed.

It becomes abundantly clear on examination that the Democratic leadership, so bent on obstruction of any up-or-down vote on Mr. Estrada's confirmation, is not really interested in the answers to these questions as they claim. Consider this: After a whole day of hearings, the Senate Judiciary Committee released Mr. Estrada. They didn't ask him to come back and answer more questions. They released him. While it is common practice for members to submit follow-up questions to the nominee, only 2 of the 10 Democratic Senators on the committee bothered to ask only a few followup questions, in stark contrast to other nominees who have received voluminous written questions.

So I say there is really no objection that Mr. Estrada has failed to comply with the Senate's traditional standards for confirming nominees by refusing to answer specific questions. Yet this is just another example of the Democratic leadership's double standard that seeks to stop Miguel Estrada.

Finally, Democrat leaders are seeking to impose a double standard by insisting that 60 Senators must vote to close debate before a vote can be had on Mr. Estrada's confirmation.

This is not legislation. This is a confirmation. The Constitution does not say 60 Senators must approve a judicial nomination. The Constitution does not say two-thirds of Senators must give advice and consent to a judicial nomination, as it does specifically say with regard to treaties. It just says the Senate shall give its advice and consent, which means a simple majority vote—not two-thirds of the Senate, but 51 votes. The fact is that 51 Senators—indeed, 54, as I count them, a bipartisan majority of this Senate—stand ready to confirm Mr. Estrada to the U.S. Court of Appeals for the District of Columbia Circuit if they would just be allowed to vote.

According to the Congressional Research Service, no judicial nominee to the circuit court of appeals has ever been denied confirmation by filibuster—not once in the entire history of the Senate. Yet the Democratic leadership has seen fit to change the rules again—another double standard—as their only hope for stopping a bipartisan majority of the Senate from confirming the superbly qualified Miguel Estrada.

But one of the most remarkable things I have seen in the last 3 weeks as I have observed this debate was an argument that was featured on the final day of Senate debate before the President's Day recess. On Friday, February 14, the senior Senator from Illinois argued in effect that the Constitution forbids confirming Mr. Estrada because the Senate has not sufficiently investigated him.

I quote from my colleague's speech on the Senate floor:

> [U]nder the Constitution, which we have sworn to uphold, and which we take very seriously, in article II, section 2, it says:
>
> 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. . . .
>
> This tells those who are watching that what is at stake here is not just a discretionary decision by the Senate as to whether or not we will investigate a judicial nominee. We have a constitutional obligation. And if we believe in that investigation that a nominee is wanting, might not be a person suited to serve in the Federal judiciary, I think we are duty bound to vote against him.

I am dumbfounded by this constitutional argument, particularly coming from a member of the Senate Judiciary Committee. Of course, we would welcome that vote he speaks of, even if some, based upon an erroneous constitutional standard, would choose to vote no on this nominee.

But for the life of me, I cannot understand why the Senator can make such an argument based on any review of the Constitution or the history of judicial confirmations. The only thing I can think of is that my colleagues on the other side of the aisle—some of them anyway, because, as I said, there is a bipartisan majority of the Senate that stands ready to confirm Mr. Estrada today—but at least the Democratic leadership has simply decided to do whatever it takes and to make any argument, no matter how implausible, however devoid of any basis in law or in fact, to maintain this unprecedented filibuster against an exceptionally qualified nominee.

The filibuster effort appears to have become so desperate, in fact, that they might even argue that the Constitution requires a filibuster. I know, however, that the Senator from Illinois takes the Constitution very seriously, as all of us do. And so I hope I can just take a few moments to discuss what the Constitution contemplates in this regard and convince my colleague to reconsider his argument.

My distinguished colleague, the senior Senator from Illinois, argues that for the Senate to confirm Mr. Estrada now would violate the Constitution because the Senate has failed to conduct an adequate investigation. I would be the first to say the Senate's advice and consent function is indeed an important function, particularly when you are dealing with lifetime-tenured judicial appointees. Each of us indeed has undertaken an oath to ''support and defend the Constitution of the United States.''

That Constitution includes a firm commitment to the doctrine of separated powers. Under the Constitution, the Congress legislates, the President executes the laws, and it is the courts that interpret the laws—not make laws.

It bears repeating. Judges interpret laws. They aren't legislators wearing black robes—at least they are not supposed to be. The only body of our Government that legislates is the Congress. The Constitution, of course, demands that judges respect this fundamental distinction—one that, in the debates on this nominee, some seem to have been glossed over. I recall even one argument by the senior Senator from Vermont to the effect that Mr. Estrada ought to have to basically run on a platform, as he would when he runs for election to the U.S. Senate from Vermont, making no distinction between the fact that a Senator is a representative, and a judge is a representative of no one other than the law.

I believe in the last 3 weeks that our solemn duty to advise and consent and investigate this particular nominee has been more than complied with. Certainly in the last 2 years every Senator in this body has had more than an adequate opportunity to investigate and study Mr. Estrada's qualifications. I can't imagine any judicial nominee who has been more vigorously investigated than Mr. Estrada. So we are hardly talking about the Senate being

railroaded into confirming an individual without time to think, without time to reflect, without time to investigate, and after a full and thorough debate.

Mr. Estrada has been very clear about his judicial philosophy. He has said that nothing in his personal views would prevent him from following the law. That is very important in a judge. We want to make sure that the only judges we confirm are those who will follow the law as written by the legislature and is handed down in precedents by the U.S. Supreme Court.

The Senate has undertaken a substantial investigation into Mr. Estrada already, and in so doing has developed a record that amply supports Mr. Estrada's sworn testimony about how he would conduct himself as a judge.

That record includes strongly supported statements from numerous witnesses across the political spectrum, including prominent Clinton Administration lawyers. I go back to Ron Klain, whom I mentioned earlier was Vice President Gore's Chief of Staff and a former Democratic chief counsel to the Senate Judiciary Committee. He has known Mr. Estrada since their days together at Harvard, and has concluded that Mr. Estrada would ''faithfully follow the law.''

President Clinton's Solicitor General, Seth Waxman, flatly rejected any notion that ''the recommendations Mr. Estrada made or the analyses that he prepared were colored in any way by his personal views.'' A bipartisan group of 14 of Mr. Estrada's former colleagues in the Office of Solicitor General have written:

> 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.

I could go on and on.

The FBI has investigated Mr. Estrada and given him a clean bill of health. The American Bar Association has investigated him and given him a unanimous well-qualified rating—the highest that the American Bar Association has to offer.

The Senate has more than discharged its responsibility, with respect to Mr. Estrada, to confirm as judges only those individuals who respect the law and who respect the distinction between judging and legislating, those who will not politicize our courts, and those who will put aside personal views and enforce laws as written by Congress and by our Founders.

I submit that our colleagues who oppose this vote on this highly qualified nominee have again changed the rules and imposed a double standard by contending that, not withstanding this ample record and vigorous investigation, the Senate must still go further and must inquire evermore deeply into Mr. Estrada's personal views. When confirmed, Mr. Estrada will behave as a judge and not as a legislator. The Senate needs nothing further in order to confirm him to the Federal bench other than to simply vote.

The Constitution requires a majority of the Senate for an individual to be confirmed to judicial office. Although this is an important function, it is also the lowest threshold level of Congressional participation contemplated anywhere in the Constitution. By contrast, to enact legislation requires a majority of both Houses of Congress, not just the Senate. To authorize the President to ratify a treaty requires a two-thirds vote of this body. To impeach and convict a Federal official requires the approval of both Houses of Congress, including two-thirds of the Senate. Amending the Constitution and overriding a Presidential veto requires two-thirds of both Houses of Congress. In other words, the Constitution makes it easier for the Senate to confirm judicial nominees than it does to enact legislation, consent to treaties, punish an official during an impeachment effort, or to amend the Constitution.

Professor Michael Gerhardt, a constitutional scholar and author of a scholarly volume called ''The Federal Appointments Process,'' has reviewed all of these constitutional provisions and compared them to the Senate's advice and consent function with respect to nominees and concluded that ''[t]he Constitution . . . establishes a presumption of confirmation''—a presumption of confirmation—''that works to the advantage of the President and his nominees.'' In fact, I think Mr. Gerhardt is on to something.

Here again, this is not just about Miguel Estrada. The Democratic leadership seeks to defeat a constitutional presumption of confirmation in the judicial confirmation process. They are still fighting the last election by and through the person of Miguel Estrada. Although the country has embraced this President and his great leadership, the Democratic leadership is still fighting against it, seeking to defeat President Bush wherever and whenever they can.

The constitutional structure demonstrates that the Senate's role is satisfied when the record makes clear that whatever a nominee's personal views, that they will play no role in how the nominee will judge specific cases and controversies. After all, to do otherwise would mean that it would take practically all of the Senate's time to confirm Presidential nominees, leaving no room for legislation, treaties, and other matters to which the Constitution gives even more responsibility to Congress than in the confirmation process.

The Constitution nowhere requires a majority of the Senate to undertake a full-blown trial of a judicial nominee. Yet that seems to be what the Democratic leadership is asking for. Quite to the contrary, the Framers of the Constitution well understood that the Senate's role in the process is really quite limited—something it does us well to reflect on, with the confirmation process today so skewed and so poisoned, and so toxic, toxic not only to the nominees but also to this body.

As Alexander Hamilton explained in the Federalist Papers, the Constitution gives the Senate a confirmation role to ensure that the President has not injected cronyism into his appointment process. Alexander Hamilton does not say that the Senate is supposed to second-guess the President's judgment or to conduct a deep and searching inquiry into the legal views of the nominee—the sorts of things that are being asked for here. Instead, Alexander Hamilton writes, in Federalist No. 76:

> To what purpose then require the cooperation of the Senate? . . . It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Indeed, far from indicating that substantial hearings and investigation would be required, Hamilton noted that the Senate's confirmation role would be, ''in general, a silent operation.''

Hamilton's understanding of the confirmation process—that it would largely be what he called ''a silent operation''—is reflected in the text of the Constitution. By contrast, the impeachment provisions of the Constitution require the Senate to undertake an actual trial before an official can be punished, including removal from office.

So it is clear that the text, the structure, the original understanding, and, indeed, the tradition of confirmation proceedings handed down these last 200 years all refute the theory of Senate advice and consent suggested by those who would obstruct this vote, including the views expressed by the senior Senator from Illinois and those who would espouse a new standard, one made of whole cloth, again changing the rules and applying a double standard to Miguel Estrada.

Once the Senate has determined that an otherwise qualified judicial nominee respects the law and understands that judges interpret the law and do not make the law, that nominee may be confirmed to the Federal bench. It is absurd to think that the Constitution would require anything else.

Moreover—and this is significant, to show how far afield we have come from the confirmation process as practiced by the Founding Fathers and those in the last 200 years—for much of our Nation's history, the Senate did not even conduct confirmation hearings, not even for nominees to the U.S. Supreme Court. Instead, the Senate either deferred to the President's determination that the nominee would abide by constitutionally required distinctions between judging and law making, or would reject nominees without resort to intrusive hearings.

Indeed, the Senate Committee on the Judiciary did not even exist during the first half century of this country's existence—nearly 30 years after the ratification of the Constitution. It did not even exist until 1816. And even when such hearings were later held in our Nation's history, by custom, the nominee would not even appear.

The first extensive hearings on a Supreme Court nominee were not held until the nomination of Louis Brandeis in 1916. Yet despite those hearings, Mr. Brandeis never even appeared in person before the Senate or a committee.

On September 5, 1922, the day after Justice John Hessin Clarke resigned, President Harding nominated George Sutherland to the Supreme Court, and the Senate confirmed him that very day. It was not until Harlan Fiske Stone, in 1925, that the first nominee for the U.S. Supreme Court would actually appear in person before the Judiciary Committee, and even that was a novel episode, after which nominees would revert back to the tradition of not appearing personally before the Judiciary Committee. That tradition continued for over a decade, until Felix Frankfurter testified before the Senate Judiciary Committee in 1939. Even then, Justice Frankfurter read a prepared statement in which he said he would not express his personal views on controversial issues before the court, the same answer that Mr. Estrada has given in response to the questions asked him during these proceedings.

As late as 1949, Sherman Minton refused to appear before the Senate Judiciary Committee and was still confirmed. And it was not until 1955, when John Marshall Harlan started the modern tradition of judicial nominees appearing and testifying before the Senate. And even then, confirmation hearings have typically been brief, even in cases of Supreme Court nominations. Justice Byron White's confirmation, for example, in 1962, lasted less than 2 hours.

Can it really be the position of the senior Senator from Illinois or our colleagues across the aisle who are blocking a vote on this nomination that the countless Federal judges and Supreme Court Justices who were confirmed following a less extensive investigation than that already inflicted on Mr. Estrada all served pursuant to illegal confirmations? Did so many of our predecessors in the Senate violate the constitutional oath they took on each and every one of those occasions? Of course not.

The nomination of Miguel Estrada is the unfortunate culmination of a destructive judicial confirmation process that must stop. It must stop for the health and the proper functioning of this institution. It must stop so that the confidence of the public in the job we are here performing on their behalf can continue. This destructive judicial confirmation process must stop, so that Presidents, now and in the future, will be able to nominate candidates for judicial office, who otherwise might not be willing to subject themselves to this unreasonable process that has been so much in evidence during the course of Miguel Estrada's confirmation.

The obstruction must stop. The double standard for Miguel Estrada must stop. This filibuster especially must stop.

Across the country, the American people are insisting that the Senate take a vote on this exceptional and inspiring candidate for the Federal bench. Newspapers across my State of Texas—the Dallas Morning News, the El Paso Times, the Austin American-Statesman, the Fort Worth Star-Telegram—are all urging that the Democratic leadership permit a vote on this nominee.

I say let's stop the games. Let's stop the double standard. Let's vote. Of course, every Senator is entitled to vote according to the dictates of their conscience, but let's vote.

There is no basis for the current unprecedented attempt to deny a bipartisan majority of the Senate from the opportunity to even vote up or down on this nominee. That has never before happened in the history of the United States.

It should not start today. It should certainly not start against a nominee of such exceptional talent. In the words of the Washington Post: ''Just vote.''

I yield the floor.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). The Senator from Nevada.

Mr. REID. Mr. President, I ask unanimous consent that following my statement, the Senator from California be recognized to speak on a subject not related to this nomination and following that Senator GRASSLEY be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. CORNYN. Reserving the right to object, and I probably will not, I understand the Senator from California wishes to speak on a topic other than the nomination of Miguel Estrada. If I am correct, I am wondering why, if there is no further debate on the nomination, we cannot proceed to a vote. With that said, I withdraw my reservation.

We do have speakers for this afternoon on the nomination. I would hope that we can remain on the nomination. I believe Senator GRASSLEY will be here about 2 o'clock.

Mr. REID. Mr. President, is there objection or is there not objection?

Mr. CORNYN. I ask unanimous consent that Senator GRASSLEY be recognized following Senator FEINSTEIN's remarks.

The PRESIDING OFFICER. Does the Senator object or not object?

Mr. CORNYN. With that, I withdraw my objection.

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

Mr. REID. Mr. President, that was part of the unanimous consent request, that Senator GRASSLEY be recognized.

I have been involved in many debates in the Senate. I have been involved in the debate since the beginning on the Estrada nomination. Senator HATCH and I have been here until 1 o'clock in the morning. Never have I heard the name calling and the statements such as ''heard people talking about payback.'' If there are statements that strong, they should be inserted in the RECORD.

In addition, in my many years in the Senate, I have not heard statements such as ''desperate,'' ''laughable,'' ''cynical,'' and then part of it I was not able to hear because the Presiding Officer was talking to me, but I hope the debate on this matter will remain senatorial and not go to name calling. We have a right to speak about this nomination for as long as we want until the majority or someone files a motion to invoke cloture. That is the way to stop debate.

There has been a lot of talk about not allowing a vote. We are not stopping a vote. The only situation is, the Senate rules are such that if you want to have a vote and you want to stop the debate, you invoke cloture. It takes 16 or 17 Senators to file a cloture motion. That is how it works.

We need to understand that there are certain issues that are important. I recognize there is a lot more to do in this country. We have a lot to do. I believe that what is happening here is an effort to cover for the fact that there is nothing being done by the majority. They could pull off this anytime they wanted. If they have other things to do, let the majority move to something else or invoke cloture to stop the debate from going forward.

There have been statements made that this has never happened before. Of course, you shouldn't talk to the Abe Fortas family. The fact is, if you read a history book, that is how that was stopped, his nomination to be Chief Justice of the Supreme Court.

In the years I have served in the Senate, there have not been, as Senator HATCH said, real filibusters, but sometimes those nonreal filibusters have stopped nominations from going forward. It is a fact. Mr. President, the ABA gold standard—let's talk about that a little bit. My friend from Texas talks about this ABA stamp of approval being so important. As the Presiding Officer knows, and I am sure most every Senator knows, the majority, when they were in the majority before we took over, wanted to do away with the ABA. We thought it was a good thing that it continue. I still feel that way, in spite of the lack of credibility of this nomination.

The reason I say that is the person who moved forward on this nomination for the ABA—I am sure he asked for it and he got it—was a man by the name of Fred Fielding. Mr. Fielding, of course, likes Estrada. That is very clear.

Mr. Fielding, who evaluated Mr. Estrada's record and qualifications, is

a partner at Wiley, Rein & Fielding. While serving on the ABA committee to evaluate judicial nominees, Mr. Fielding continued to be actively involved in partisan activities, such as working with counsel for the Republican National Committee. He served on the Bush-Cheney transition team. Of course, then he wrote a report recommending Miguel Estrada to the DC Circuit Court.

If those partisan activities were not enough, take this and see if it has any bearing on whether this was an impartial evaluation. While still serving on the ABA committee responsible for peer review ratings, Fielding cofounded the Committee for Justice with Bush confidant and former Bush White House counsel C. Boydon Gray. They formed this committee to help the White House with public relations and in its effort to pack the court and run ads against Democrats who dare vote against their judicial nominees.

In addition to forming this group, he served as deputy counsel to President Nixon. He served on the Reagan-Bush campaign team, the Lawyers for Reagan advisory group. With the Reagan-Bush transition team, he was conflict-of-interest counsel—which is really interesting to me—in that process. He served in the Office of Counsel to the President. He worked as deputy counsel to President Reagan. He served on the Bush-Quayle campaign. He was Republican National Committee legal advisor, campaign counsel to Senator Quayle, and he served as deputy director to the Bush-Quayle campaign in 1992 as a senior legal advisor. He served then as legal advisor to the Dole-Kemp campaign.

Virtually all of Mr. Fielding's substantial Federal election contributions are for Republican candidates or the Republican National Committee. The Bush White House could not have handpicked someone with better partisan credentials than Mr. Fielding to evaluate its DC Circuit Court nominees—and especially Mr. Estrada. Which lawyers, Republican or Democrat, would be courageous enough to be candid with any concerns that may have been existing about Mr. Estrada's qualifications, temperament, or rating, with an insider like Fielding writing the evaluation and recommending the ratings?

It is noteworthy that when Fielding testified before the Judiciary Committee last September, he was asked about the Senate's consideration of ideology of judicial nominees, as well as the White House's. When asked whether the Republican Presidents he served ever appointed a liberal, he said he hoped not.

Obviously, the White House took ideology into account in choosing Estrada. How fortunate it was for the White House that the loyalist, Mr. Fielding, was there to recommend such a high rating for Estrada, despite his youth, lack of experience, and the types of cases he handled in the DC Circuit, and temperament and fairness issues that have been raised by many others.

We do appreciate the ABA's continued efforts, but if there were ever a review and revamping that needs to take place, take a look at Fielding and Estrada. It is simply unethical for this to take place. If there were ever a conflict of interest, this is it.

Now, there were continued statements by the distinguished junior Senator from Texas, who has served in the Senate now going on 2 months, about the need for a vote. I agree. As I said earlier, if the majority wants a vote, it is up to them. They can have one in 2 days. File a cloture motion and it ripens in 2 days. The vote is up to them.

There are also statements made that the Democratic leaders have failed to make a case. If the case is so bad, let them file a cloture motion. My friend from Texas said the Democratic leaders—I assume I am one of those—are obsessed with obstruction. If that is the case and we are name-calling here, it appears with what has happened to the economy, the Republican majority must be obsessed with deficits. The President takes office and there is a $7 trillion surplus. Now, in this year alone, we will have the largest single deficit in the history of the world. You see it printed in the paper, that it is $350 billion. That is without the disguise that takes place because of the Social Security surpluses. It is closer to $500 billion. The surplus of $7 trillion is history—gone, every penny of it. It is not because of the war; it is because of economic policies of this administration and the tax cuts.

Now, it is very difficult for me to do, but I listened, and my friend from Texas says what they are doing is cleaning up the mess from the last Congress. As I recall, the Senate passed all 13 appropriations bills out of committee. But we could not get the House to move on them. Why? Because they refused to take votes prior to the November elections because they knew the American people would not stand for the draconian cuts they had in their bills. So nothing was done. We went on a continuing resolution. If there was a mess created last Congress, it wasn't by the Senate. We reported out of committee, chaired by Senator BYRD, with ranking member Senator STEVENS, every one of the appropriations bills. We did that. The House refused to take hard votes.

Mr. President, the speaker before me also indicated the fact that Mr. Estrada has no judicial experience should not matter, should not be determinative. I agree. There are great judges who had no judicial experience. We are not making that an issue.

LULAC. As most everyone knows, the vast majority of Hispanic groups in the country, 85 to 90 percent of them, support the position we are taking, which is that Miguel Estrada should not be a member of the DC Circuit Court until he answers questions and has his memos from when he worked at the Solicitor General's Office made public. We believe that to be the case. That is why the Hispanic groups support our position.

LULAC, which is a fine organization, wrote a letter last week. It was written to Senators HATCH and DASCHLE. Among other things, it said:

> We do not subscribe to this view at all and we do not wish to be associated with such accusations.

What are those? The accusations that the Senate Democrats and Congressional Hispanic Caucus are opposing the nomination because of his ethnicity.

What does LULAC say?

> We do not subscribe to this view at all and we do not wish to be associated with such accusations.

They should just back away from that. The letter says:

> LULAC has had a long and productive working relationship with Senate Democrats and all the members of the Congressional Hispanic Caucus, and our experience is they would never oppose any nominee because of his or her race or ethnicity.
>
> On the contrary, it is most often the Democratic Members of the Senate who support LULAC'S priority issues and score highest on the national Hispanic leadership agenda congressional scorecard which LULAC helps to compile. It is the Congressional Hispanic Caucus that is the champion of our legislative priority as outlined in the enclosed LULAC legislative platform.

Mr. President, when talking about LULAC being the determinative factor, I think people should read the letter they sent to us.

I repeat, if the majority wants a vote on Miguel Estrada, the only vote they are going to get is whether to invoke cloture. They made a decision, obviously, not to go forward on cloture. I suggest we have a lot of business to do, and that is what we should be doing.

I repeat what I said earlier this afternoon that this matter is not moving forward because there is no agenda, no plan, no program by the majority. This is filling up time so they cannot be criticized for doing nothing. If we were not doing this Estrada nomination, we would be doing nothing.

I returned from Nevada a few days ago. People in Nevada are concerned about the war. They are concerned about economic problems. They are concerned about health care. There are a lot of issues, not the least of which is homeland security. I have no concern with the Secretary of Homeland Security suggesting that people learn about duct tape and plastic wrap, but certainly there is more to homeland security.

If the majority does not have a program, we do. We have a Democratic stimulus package that we think would be most helpful to the American people. It would be immediate tax relief, it would go to the middle class, and it would not have any impact on the long-term deficit. Let's move to that this afternoon. Let's move to it tomorrow. We can have a long, full debate on that stimulus package. The longer we

wait for a stimulus package, the worse it is going to be for our country. But the majority does not want to do that because they know the tax plan submitted to us by the Bush administration is not going anywhere. The Speaker said it was not. My friend, who was on the floor just a minute ago, Senator GRASSLEY, initially said he had problems with it. The chairman of the Ways and Means Committee in the House and scores of Nobel Prize winners in economics have said the plan is no good. That is why they are unwilling to move on cloture and want to stay on this nomination.

People wonder why we are on this nomination. My friend, the junior Senator from Texas, said: On treaties, we need a two-thirds vote; on impeachment, we need a supermajority; and on filibusters, we need 60 votes. For legislative measures, we need a simple majority. That is right. But this is something the Senate has been dealing with, and that is a filibuster. That is what is going on here. It is part of the Senate tradition.

Talk about tradition, this is it, and there is a way to get rid of it. One way is to invoke cloture, the other way is to get off the legislation, and another way would be to do what we have asked be done: Let Miguel Estrada come back and answer questions and submit—with which he said he has no problem—the memoranda from the Solicitor General's Office. He said he does not care. It is being held back by, I assume, the administration.

There are those who ask why we have some questions about Miguel Estrada. Let me show my colleagues why we have some concerns.

Miguel Estrada's answers to the Judiciary Committee's questions, summarized on this chart, amount to nothing. The answers he has given us do not answer anything. There were a lot of words but no answers.

We have also asked about these legal memoranda. Why are people trying to keep these memoranda from us? Is there a reason? We want to look at those memoranda. Those are the only legal records we have where we can find out what his legal philosophy might be.

Some have said he has argued some cases before the Supreme Court, and he has handled other cases. From all the cases I handled, one could not determine what my political philosophy was. Legal philosophy maybe; maybe not because I represented people who had causes they brought to me and they paid me and I did the best I could to represent them in their causes. We need those legal memoranda to find out about Miguel Estrada's philosophy.

The same applies to his legal philosophy. We do not know what it is. We do know there has been a lot of talk about some of the people he went to law school with thinking he is a great guy. I have no doubt he is a very nice man. I am sure he is a fine man. He appears to have been a good law student, but the fact is that some people do not think it would be good for him to serve on the court.

The person who was his supervisor, a man by the name of Paul Bender, who was in the Solicitor General's Office, has qualifications that match that of Miguel Estrada. He received an LLD magna cum laude from Harvard Law School. He wrote as an editor for the Harvard Law Review. After graduation, he clerked for a U.S. Supreme Court Justice. He worked as a law clerk to Judge Learned Hand, one of the most distinguished judges in the history of this country. As I indicated, Paul Bender worked as a law clerk for Justice Felix Frankfurt. He was a law professor at the University of Pennsylvania, an Ivy League school, for 24 years. He was dean of the Arizona State University College of Law. He was principal Deputy Solicitor General of the United States from 1993 to 1996, and that is where Miguel Estrada worked for him.

He has since been working at Arizona State University as a law professor. He has argued more cases before the Supreme Court than Miguel Estrada.

The point I am trying to make is this guy is not some kind of slouch. He said it would not be in the best interest of our country if this man set on the court. He was too much of an ideologue. Those were his words.

In more detail, there was some question that Paul Bender really meant what he said in his letter to Senator HATCH, dated February 10. He makes a number of important points, including the point that some Republicans are misrepresenting his position and suggesting that Professor Bender has changed his opinion about the nomination, and he said that is wrong. Professor Bender, who was Miguel Estrada's direct supervisor at the Solicitor General's Office, notes:

> I have not changed my opinion of the nomination, nor have I ever said to anyone I changed my opinion. Someone must have inadvertently given you incorrect information about this letter to Senator Hatch.

Mr. President, Professor Bender is a person who worked directly with Miguel Estrada.

Then, of course, they bring in all the evaluations showing he did a good job. Professor Bender also answered that point. He said every person who worked there received the same evaluation. That is what he was supposed to do.

There has been another point raised recently that it is inappropriate to answer questions about judicial philosophy; it would be inappropriate and would violate the ABA ethics code. In fact, the Republican National Committee, through the National Republican Lawyers Association, sent out a press release. The ABA said it is the wrong thing to do.

The fact is that judicial candidates should not make pledges how they will vote or make statements that appear to commit them on controversies or issues likely to come before the court. But they are using this to defend the new threshold that people have tried to set for Estrada by having him refuse to answer even the most basic questions about judicial philosophy or his view of legal decisions prior to entrusting him to a lifetime seat on the second highest court in the country.

This is hypocritical, given the fact the Republican Party sued the State of Minnesota to ensure that their candidates for judicial office could give their views on legal issues without violating judicial ethics. Republicans took the case to the U.S. Supreme Court, and they won. In an opinion by Justice Scalia, one of Bush's model jurists, the Supreme Court ruled that the ethics code did not prevent candidates for judicial office from expressing their views on cases or legal issues.

In its recent letter to Senators DASCHLE and LEAHY, the White House, contrary to citing Scalia, cites the dissent by Ginsburg in that case. They refuse to mention the word ''Scalia.''

Some people may disagree with the judicial philosophy of Antonin Scalia but no one can dispute his brilliance. He is a man who I am sure is an advocate on that court. When they go behind those curtains, I am sure they have a handful to try to handle his logic because he is really good. He is a smart man. So we have to accept something that he would say, and Scalia has said that anyone coming to a judgeship is bound to have opinions about legal issues and the law and there is nothing improper about expressing them, so long as a candidate does not pledge to always rule a certain way. Specifically, in Republican Party of Minnesota v. White, the U.S. Supreme Court overruled ABA model restrictions against candidates for elected judicial office from indicating their views on legal issues while campaigning or seeking judicial office. In his opinion, Justice Scalia wrote that making statements of honestly held views would not make a candidate unfit.

In that majority opinion, Justice Scalia explained that even if it were possible to select judges who do not have preconceived views on legal issues, it would hardly be desirable to do so. Proof that a justice's mind at the time he joined a court was a blank slate in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the appearance of that type of impartiality can hardly be a compelling state of interest, either. That is Scalia. Was that a brilliant statement? One may not agree with it but don't they understand what he is saying? Of course, they do.

Accordingly, prior to last summer, some judicial candidates may have thought that they could not share their views on legal issues, although some tried to answer questions as best they could. Some candidates tried to view

the ABA modeling rules expansively to try to avoid sharing their views.

Professor McConnell, who was confirmed last year, answered all the questions. It is clear that the ethical rules do not prevent a candidate from sharing his or her views, a result sought by Republicans eager to use these views to try to win the election of Republican judges to short-term positions. They went to the Supreme Court to prove this. Of course, a judicial candidate cannot be compelled to share his views but he refuses to do so at his own peril. That is what we are talking about.

Scalia said that even if it were possible to select judges who do not have preconceived views on legal issues, it would hardly be desirable to do so. Proof that a justice's mind at the time he joined the court was complete—and he uses a Latin word. I did not take much Latin, but it is tabula rasa, which means a blank slate—in the areas of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Scalia was quoting from Justice Rehnquist's 1971 opinion in Laird v. Tatum in which he refused to recuse himself on a case involving an issue on which he had previously expressed a view.

So expressing a view on a legal issue or case does not violate legal ethics and would also be unlikely to require recusal.

I do not serve on the Judiciary Committee but I have talked to a number of my colleagues, and a man by the name of McConnell came before the committee and all of the red flags came up on this side of the aisle: He is too conservative; Senator HATCH has handpicked him. All of these kinds of things came up.

He appeared before the Judiciary Committee, and even though some may have disagreed, I am told, with some of the things he said, they thought he answered every question, and he is now a member of a circuit court of appeals. He did not hide his views. He answered the questions. So people knew what he was talking about.

We do not know anything about Estrada, other than he is smart. That is not enough to get you to be a circuit court judge.

Saying, as Mr. Estrada has, that you cannot give your view of any Supreme Court case without reading the briefs, listening to oral argument, conferring with colleagues and doing your own independent legal research is just a fancy way of saying I am not going to tell you guys anything. It also defies the experiences of law students, lawyers, and citizens. It is especially evasive when a nominee has a reputation for being outspoken, passionate, and an aggressive debater on legal issues and decisions from a strong ideological perspective so much that he is a front-runner in right-wing circles for the Supreme Court, and the notion that he could be counted on to rule their way, even more so than the counsel to the President, Mr. Gonzales.

Yesterday I saw a prominent faculty member from a law school in this metropolitan area. I am not going to give his name. It may embarrass him in some way, and I did not get permission to quote him publicly, but he is a very conservative law professor, I can guarantee that. He came up to me and he said, you would make a mistake going with Estrada. Now, this is from a conservative, prominent, constitutional scholar.

So we are entitled to know his views. He should answer the questions.

There has been a lot quoted from editorials from this paper and that, most of them from Texas, which certainly my friend who just spoke is from Texas and that would be the place he should go to look for his editorials, but there was a syndicated column written by a man named E.J. Dionne, Jr., on last Friday. I am going to quote some things from his article, although not everything. It is entitled ''They Started It.''

So why are Senate Democrats filibustering President Bush's nomination of Miguel Estrada to one of the nation's most important courts?. . .

To say the guy is no slouch is an understatement. But the fight over Estrada's nomination to the U.S. Court of Appeals for the District of Columbia Circuit is not simply about him. It is about a concerted effort to pack our courts with representatives of a single point of view. If Democrats just rolled over on Bush's judicial nominations, they would be guilty of oppositional malpractice.

To understand this battle, you could go back to Richard Nixon's campaign against liberal judges. But let's just look at what happened to Bill Clinton's effort to get two highly qualified nominees onto the D.C. Circuit.

The DC Circuit is the circuit that Estrada wants to go to.

Elena Kagan, who served in the Clinton White House, graduated at the top of her class at Estrada's law school and now teaches there, saw her nomination languish in the Republican Senate for 18 months. Allen Snyder clerked for that well-known left-winger, U.S. Chief Justice William Rehnquist, and was also at the top at Harvard Law School. His nomination languished for 15 months.

If Republicans believe in voting for quality—their argument for Estrada—why didn't they confirm Kagan and Snyder? The answer is obvious: We have before us, sadly, a fierce political struggle for control of the courts.

It's not good enough to say that the way out of this politicized process is for Democrats to ignore the past and cave in to the Republicans. To do that would be to reward a determined conservative effort to control the courts for a generation. Stage One involved obstructing Clinton's nominees. Stage Two involves using any means necessary—including outrageous charges of ethnic bias—to ram conservative choices through.

I read from the LULAC statement that that simply is invalid.

The stakes go beyond any single nominee. Do we want courts entirely dominated by one side, or do we want a fair and balanced judiciary?

Consider these statistics, gathered by the Democratic staff of the Senate Judiciary Committee. There are 13 circuits: 11 regional plus the D.C. Circuit and the federal court that handles specialized cases. If all of Clinton's nominees had been approved, the circuits would have been evenly balanced in partisan terms by the time he left office. Six would have had majorities appointed by Democratic presidents, six by Republicans, and one would have been evenly split.

But if Bush succeeds in filling every open seat, some of them vacant because Clinton nominees were blocked, 11 of the 13 circuits will have Republican-appointed majorities. In eight of the 13, Republican nominees would have majorities of 2 to 1 or more. Is that a formula for careful, balanced decision-making?

To push attention away from this fundamental question, Republican who say they don't want a politicized nominating process—and who regularly accuse Democrats of ''playing the race card''—are doing all they can to turn the Estrada fight into an ethnic imbroglio.

''If we deny Mr. Estrada the position on the D.C. Circuit, it would be to shut the door on the American dream of Hispanic Americans everywhere,'' Sen. Chuck Grassley (R-Iowa) said in January. Last year, Republican Sen. Trent Lott if Mississippi said of the Democrats: ''They don't want Miguel Estrada because he's Hispanic.''

Never mind that eight of the 10 Hispanic appellate judges were appointed by Clinton. And never mind that Republicans had no problem blocking such Hispanic Clinton nominees as Enrique Moreno, Jorge Rangel and Christine Arguello.

Mr. President, the congressional Hispanic Caucus, which wants as many Hispanics involved in Government and the judiciary as is possible, opposes this man. We believe the debate today is where it was a week ago, 2 weeks ago, that there are ways we can move this nomination. Give us the information, answer questions, give us the memo, pull the nomination, or invoke cloture. That is about all there is.

I hope the majority leader will make a decision of what he is going to do and we can move, I hope tomorrow, to our proposal to give a stimulus package to the country—that certainly would be appropriate—or move to something the majority wants to do.

I repeat for the third time, one reason we are so tied up is the majority has nothing to do. They do not know what they want to move to next. I certainly hope we do not spend more time on this nomination.

The Presiding Officer is going to get the Golden Gavel Award probably within the next few months and is spending so much time here presiding. For those listening, Golden Gavel, as I understood, is someone who presides for 100 hours, and they get a plaque. It is hard to preside 100 hours during the year. I hope the Presiding Officer does that. It is a great way to learn about what goes on in the Senate. I can remember doing that myself.

The Presiding Officer has heard me say this on other occasions: We have more we can do. There are other things we should do. We approved 100 judges during the time we were under control. The only three judges who have come before the floor this year we approved unanimously. We can continue this debate for a week, 2 weeks, 3 weeks, whatever it takes. We can spend time here at night. That is no punishment.

The majority is the one that has to have Presiding Officers. If you want to punish yourselves, that is fine, go ahead and do that. We will have someone here making sure everything is done properly.

Everything has been said about Miguel Estrada. I could take a test on Miguel Estrada's life and I would get an A+. I would either do multiple choice, true and false, or an essay question. I can do just fine on Miguel Estrada. I know everything there is to know about Miguel Estrada. But everything we have to know today about Miguel Estrada from our perspective is not much. I can tell you he was 17 when he came here, he was a fine student at Harvard. Everyone seems to like him. He seems like a nice guy. I met him. I saw him on television when he was questioned by the Judiciary Committee. He obviously is very bright. He is very opinionated. But we do not know all those opinions. We only get that from people he has talked with.

Everything has been said. We are getting to the point where almost everyone has said it. But we can repeat it. Who knows, maybe the majority will decide, with the help of Mr. Gonzales, the counsel of the President, that we can get the information we want. Senators DASCHLE and LEAHY wrote a letter and asked for the memos and that he appear again. We got a 15-page letter in response. Obviously this is not a matter where everyone can compromise. That is too bad.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I have spoken twice about Miguel Estrada and have made my views rather well known. However, in response to the distinguished Senator from Texas, who is a relative newcomer on the Senate Judiciary Committee, I want to just quickly point out what I found in my 10 years of service on that committee.

From the 104th to the 106th Congress, when Republicans controlled the Senate, 53 Clinton judges were refused even a hearing in committee; six had a hearing but no vote; 11 came out of committee, but no floor vote.

What is my point in this? My point is there is more than one way of filibustering a judge. Right now, there is a filibuster going on over a nominee to the D.C. Circuit. However, that filibuster can occur in a couple of ways. One, someone can object to unanimous consent to come to a vote. A cloture vote can happen. If there are 60 votes there, it ends the filibuster.

But another kind of filibuster is a filibuster in committee when an individual is nominated and they wait year after year, some for an appellate court as long as 4 years, and never have a hearing. Some of President Clinton's nominees withdrew rather than continue this painful process.

The fact of the matter is every Presidential nominee who comes over to the Judiciary Committee for review, for a hearing, and for a vote, does not receive that review, that hearing, and that vote. That is just a fact. So you could say 70 Clinton judicial nominees were essentially filibustered by a Republican-controlled Judiciary Committee—53 never had a hearing, six had their hearing, but were never brought to a committee vote, and 11 were actually reported out of committee, but never had a vote in the Senate.

I do not think what is happening with respect to Mr. Estrada is anything that is very unusual. There are good reasons for it. There is probably no circuit more sensitive than the DC Circuit. The Presiding Officer, who is a very bright individual, understands this. We all understand the circuit is evenly split. We all understand that President Clinton proposed nominees, two of whom never got a vote, for that particular circuit. Therefore, whoever is appointed to this circuit has a special predominance in our thinking. We would like to know what that individual believes. We would like to know their jurisprudence. We would like to be able to know their temperament. Mr. Estrada, to a great extent, through his own volition, has prevented that from happening.

ENERGY

I come to the floor today in another capacity, and that is as a member of the Energy and Natural Resources Committee. I quickly bring to the Senate recent disclosures about how a number of energy firms have engaged in deceptive trading practices to drive up prices for consumers in the western energy market. I believe strongly this recent evidence requires the Federal Energy Regulatory Commission to take additional strong and aggressive steps to keep energy markets from continually being abused. I will update the Senate on these revelations that have been uncovered in the past year.

Earlier this month, Jeffrey Richter, the former head of Enron's Short-Term California energy trading desk, pled guilty to conspiracy to commit fraud as part of Enron's well known schemes to manipulate western energy markets. Richter's plea follows that of head Enron trader Tim Belden in the fall of 2002. Belden admitted that he schemed to defraud California during the Western energy crisis and also plead guilty to conspiracy to commit wire fraud.

The Enron plea came on the heels of FERC's release of transcripts from Reliant Energy that reveal how their traders intentionally withheld power from the California market in an attempt to increase prices. This is one of the most egregious examples of fraud and manipulation that affected the western energy market in 2000 and 2001 and it is clear and convincing evidence of coordinate schemes to defraud consumers.

Let me read just one part of the transcript to demonstrate the greed behind the market abuse by Reliant and its traders.

On June 20, 2000 two Reliant employees had the following conversation that reveals the company withheld power from the California market to drive prices up. Let me read to you this phone call transcript.

Reliant Operations Manager 1: ''I don't necessarily foresee those units being run the remainder of this week. In fact you will probably see, in fact I know, tomorrow we have all the units at Coolwater off.''

Reliant Plant Operator 2: ''Really?''

Reliant Operations Manager 1: ''Potentially. Even number four. More due to some market manipulation attempts on our part. And so, on number four it probably wouldn't last long. I would probably be back on the next day, if not the day after that. Trying to uh . . .''

Reliant Plant Operator 2: ''Trying to shorten supply, uh? That way the price on demand goes up.''

Reliant Operations Manager 1: ''Well, we'll see.''

Reliant Plant Operator 2: ''I can understand. That's cool.''

Reliant Operations Manager 1: ''We've got some term positions that, you know, that would benefit.''

Six months after this incident, as the Senate Energy Committee was attempting to get to the bottom of why energy prices were soaring in the west, the President and CEO of Reliant testified before Congress that the State of California ''has focused on an inaccurate perception of market manipulation.''

Reliant's President and CEO went on to say:

We are proud of our contributions to keep generation running to try to meet the demand for power in California. Reliant Energy's plant and technical staffs have worked hard to maximize the performance of our generation.

These transcripts prove otherwise and reveal the truth about market manipulation in the energy sector.

If you think that is a lot of money, remember that the cost of energy for California went from $8 billion 1 year to $28 billion the next year. So the fraud and the manipulation was huge during that period of time.

Despite this clear and convincing evidence of fraud, on January 31 of this year, the Federal Energy Regulatory Commission chose to give Reliant a slap on the wrist for this behavior. The company paid only $13.8 million to sweep this criminal behavior under the rug and settle with FERC.

Let me turn to some other recent examples that demonstrate how other energy companies manipulated the western energy market as Reliant did. On December 11 FERC finally released audio tapes that show how traders at Williams conspired with AES Energy plant operators to keep power offline and drive prices up.

The tapes depict how on April 27, 2000, Williams outage coordinator Rhonda Morgan encouraged an AES operator at the company's Alamitos plant to extend a plant outage because the California grid operator was paying ''a premium'' for power at the time. The Williams employee stated:

That's one reason it wouldn't hurt Williams' feelings if the outage ran long.

Later that day, Eric Pendergraft, a high-ranking AES employee called to confirm with Ms. Morgan that Williams wanted the plant to stay offline by saying:

> You guys were saying that it might not be such a bad thing if it took us a little while longer to do our work? I don't want to do something underhanded, Ms. Morgan responded, but if there is work you can continue to do . . .''

At this point Mr. Pendergraft interrupted to cut off their suspicious conversation, saying:

> I understand. You don't have to talk anymore.

Clearly, this is evidence of a calculated intent to withhold power to raise prices. I find it unconscionable.

Let's turn to some other examples.

On January 27, 2003, Michelle Marie Valencia, a 32-year-old former senior energy trader for Dynegy was arrested on charges that she reported fictitious natural gas transactions to an industry publication.

On December 5, 2002, Todd Geiger, a former vice president on the Canadian natural gas trading desk for El Paso Merchant Energy, was charged with wire fraud and filing a false report after allegedly telling a trade publication about the prices for 48 natural gas trades that he never made in an effort to boost prices and company profit.

These indictments are just the latest examples of how energy firms reported inaccurate prices to trade publications to drive energy prices higher.

Industry publications claimed they could not be fooled by false prices because deviant prices are rejected, but this claim was predicated on the fact that everyone was reporting honestly—which we now know they weren't doing.

CMS Energy, Williams, American Electric Power Company, and Dynegy have each acknowledged that its employees gave inaccurate price data to industry participants. On December 19 Dynegy agreed to pay a $5 million fine for its actions.

In September an Administrative Law Judge at FERC issued a landmark ruling concluding that El Paso Corporation withheld natural gas from California and recommended penalty proceedings against the company. Since the El Paso Pipeline carries most of the natural gas to Southern California, this ruling has tremendous implications. The FERC Commissioners are expected to take up this case for a final judgment soon.

This is one of the things I tried to see the President about, but he wouldn't see me, because it became very clear during this period of time that natural gas going into San Juan, NM, was trading at about $5 to $6 a decatherm, whereas natural gas going just a short distance away into southern California was trading at $60 a decatherm, and natural gas forms the basis for the price of electricity. I had hoped if I could give this information to the President of the United States at that time that he might look into it and we might have prevented some of what happened in the western energy markets. Unfortunately—and I wrote four letters—he refused to see me on this subject.

This past summer, California State Senate investigators uncovered how Perot Systems—a company which set up the computer system for California's electricity market—provided its energy clients with a detailed blueprint of how to exploit holes in the state's bidding system to drive prices up.

These have been the latest revelations in a series of energy disclosure bombshells that began on Monday, May 6, when the Federal Energy Regulatory Commission posted a series of documents on their website that revealed Enron manipulated the western energy market by engaging in a number of suspect trading strategies.

These memos revealed for the first time how Enron used schemes called ''Death Star,'' ''Get Shorty,'' ''Fat Boy,'' and ''Ricochet'' to fleece families and businesses in the West.

By using Death Star, for example, Enron would ''get paid for moving energy to relieve congestion without actually moving energy or relieving any congestion.'' That is according to their own internal memo.

Just on its face, that is fraud. We are going to move energy without moving energy—fraud.

In another strategy detailed in these memos, Enron would ''create the appearance of congestion through the deliberate overstatement of loads'' to drive prices up.

Create ''the appearance of congestion through the deliberate overstatement of loads''—fraud.

The above-mentioned strategy reveals an intentional and coordinated attempt to manipulate the western energy market for profit.

This is an important piece of the puzzle, and some former Enron traders helped fill in the blanks.

CBS news reported in May that former Enron traders admitted that the energy company was directly responsible for rolling blackouts in California. Yet, interestingly enough, no one has followed up on this report.

Anybody who has ever been through a rolling blackout knows what it is like. Everything goes off and you cannot predict where it goes off next. Street lights, hospitals—literally everything goes off.

According to CBS news, the traders said Enron's former President, Jeff Skilling, pushed them to trade aggressively in California and told them: If you can't do that, then you need to find a job at another company or go trade pork bellies.

The CBS article mentions that Enron traders played a disturbing role in blackouts that hit California. The report mentioned specific manipulative behavior by Enron on June 14 and 15 in the summer of 2000 when traders said they intentionally clogged Path 26. That is a key transmission path connecting northern and southern California. Here is what one trader said about that event:

> What we did was overbook the line we had the rights on during the shortage or in a heat wave. We did this in June of 2000 when the Bay Area was going through a heat wave and the ISO couldn't send power to the north. The ISO has to pay Enron to free up the line in order to send power to San Francisco to keep the lights on. But by the time they agreed to pay us rolling blackouts had already hit California and the price for electricity went through the roof.

California lost billions. Yet, according to the traders, Enron made millions of dollars by employing this strategy alone.

On top of all of this, traders disclosed that Enron's manipulative trading strategy helped force California to sign expensive long-term contracts. It is no surprise that Enron and others were able to profit so handsomely during the crisis.

Financial statements show that revenue and income surged for energy trading companies in 2000 and 2001. Many firms such as Duke, Dynegy, Enron, Mirant, Reliant, and Williams greatly increased their revenues by taking advantage—taking advantage—of the California market.

And the evidence suggests that other companies were—and may continue to be—engaging in these manipulative strategies and that the Enron memos may well be the tip of the iceberg. One of the Enron memos said: Enron may have been the first to use this strategy, others have picked up on it, too.

Dynegy, Duke Energy, El Paso, Reliant Resources, CMS Energy, and Williams all admitted engaging in false ''round-trip'' or ''wash'' trades.

What is a ''round-trip'' or ''wash'' trade, one might ask? ''Round-trip'' trades occur when one firm sells energy to another and then the second firm simultaneously sells the same amount of energy back to the first company at exactly the same price. No commodity ever changes hands. But when done on an exchange, these transactions send a price signal to the market and they artificially boost revenue for the company. Fraud again.

How widespread are ''round-trip'' trades? The Congressional Research Service looked at trading patterns in the energy sector over the last few years. This is what they reported:

> This pattern of trading suggests a market environment in which a significant volume of fictitious trading could have taken place. Yet since most of the trading is unregulated by the Government, we have only a slim idea of the illusion being perpetrated in the energy sector.

Consider the following recent confessions from energy firms about ''round-trip'' trades:

> Reliant admitted 10 percent of its trading revenues came from ''round-trip'' trades. The announcement forced the company's president and head of wholesale trading to both step down.

DMS Energy announced 80 percent of its trade in 2001 were ''round-trip'' trades.

That means 80 percent of all of their trades that year were bogus trades where no commodity changed hands, and yet the balance sheets reflect added revenue. If that isn't fraudulent, I do not know what is.

Remember, these trades are sham deals where nothing was exchanged.

Duke Energy disclosed that $1.1 billion worth of trades were ''round-trip'' since 1999. Roughly two-thirds of these were done on the InterContinental Exchange; that is, the online, nonregulated, nonaudited, nonoversight for manipulation and fraud entity run by banks in this country. That means thousands of subscribers would see false pricing.

A lawyer for J.P. Morgan Chase admitted the bank engineered a series of ''round-trip'' trades with Enron.

Dynegy and Williams have also admitted to ''round-trip'' trades.

Although these trades mostly occurred with electricity, there is evidence that suggests that ''round-trip'' trades were made in natural gas and even broad band.

By exchanging the same amount of commodity at the same price, I believe these companies have not engaged in meaningful transactions but deceptive practices to fool investors and drive up energy prices for consumers. It is, therefore, imperative that the Department of Justice, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, the Commodities Futures Trading Commission, and every other oversight agency within this Federal Government conduct an aggressive and vigorous investigation into all of the energy companies that participated in these markets.

Beyond that, I believe Congress must reexamine what tools the Government needs to better keep watch over these volatile markets that are, frankly, little understood.

In the absence of vigilant Government oversight of the energy sector, firms have the incentive to create the appearance of a mature, liquid, and well-functioning market. But it is unclear, and I think improbable, that such a market actually exists.

The ''round-trip'' trades and the Enron memos raise questions about illusions in the energy market. To this end, I believe it is critical for the Senate to act soon on the legislation I offered last April to regulate online energy trading.

This week, I plan to reintroduce this legislation with Senators FITZGERALD, LUGAR, HARKIN, CANTWELL, WYDEN, and LEAHY, to subject electronic exchanges like Enron On-Line to the same oversight, reporting, and capital requirements as other commodity exchanges such as the Chicago Mercantile Exchange, the New York Mercantile Exchange, and the Chicago Board of Trade.

This legislation will be called the Energy Market Oversight Act. Without this type of legislation, there is insufficient authority to investigate and prevent fraud and price manipulation and, also, the parties making the trade are not required to keep any records, nor are the trades transparent. In other words, they are secret trades with no audit trails, no oversight for fraud and manipulation. They cannot exist over a regular exchange like that, but the Internet, the online trading community is exempt from this oversight. It is a huge loophole, and it has cost my State billions.

I strongly believe that in order to restore confidence in the economy, we must bolster the authority of the Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Commodity Futures Trading Commission, and other regulatory agencies.

The marketplace must be fair and transparent, and regulatory bodies such as FERC must show they will act in the public interest and release to the public all information on fraud and manipulation. This includes removing the ''protective order'' FERC has placed on evidence uncovered by the State of California and other interested parties, information the Commission has on wrongdoing in the energy sector but hasn't disclosed. With something as broadly based as energy, as important to people as energy, it is unconscionable to have all this information protected in a lockbox. It must change.

I strongly believe families and businesses that suffered during the western energy crisis have a right to know the extent of the fraud and manipulation that was wrought upon them. So I intend to help ensure that FERC fulfills its public duty so this abuse cannot happen again. Unfortunately, at this time, none of us can give this guarantee to the people of America. And that must change.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from Arizona.

Mr. KYL. Mr. President, I will speak about the nomination of Miguel Estrada to be a judge for the District of Columbia Circuit Court of Appeals.

That is, of course, the pending business before the Senate, and it is the business which we will complete before we can move on to other matters, such as the adoption of a budget, and the consideration of the President's economic growth and jobs creation package. But I do not think the President is going to back down on his nomination. Yet I heard a member of the other side of the aisle yesterday, on television, say as far as he was concerned, that nomination would never come up for a vote; that is to say, at least until he ''answered'' the questions of the Members of the other side.

I would like to set the record straight. Through an entire day of hearings, and some 30 questions that were asked of him, Miguel Estrada answered the questions posed. There has been an opportunity to follow up with written questions. If Members have not availed themselves of that opportunity, then that is their problem, not his.

Miguel Estrada has answered all of the questions put before him. He is one of the most competent, qualified, brilliant lawyers the President could have nominated for this position. And really nobody disputes that. So the business about not answering questions is really a smokescreen. It is a smokescreen for opposition to his candidacy based upon the fact that President Bush nominated him and President Bush is a conservative President.

President Bush, I suspect, is more representative of the mainstream of the thinking in this country than certain people on the fringe of either the Democratic party or the Republican party. So I do not think one can simply say because President Bush has nominated somebody that they are extremist or rightwing or that they are ideologves. In fact, the people who have opposed Judge Estrada's nomination have confirmed as much by saying they simply do not know enough about him. So I am a little tired of those who say, on the one hand, we do not know enough about him but, on the other hand, he is some kind of an ideologve. The fact is, he isn't. They do not have anything to suggest he is. It seems to me in the great American idiom, it is time to put up or shut up.

Now, we are not going to shut the Democratic side up. If they want to keep talking about Miguel Estrada, they can talk, as far as we are concerned, as long as they want to. But they should be addressing his nomination instead of speaking about other things or simply not being here on the Senate floor debating his confirmation. His confirmation is the pending business. If Members have a concern about him, they ought to bring it forth. If they have some evidence that he has done something in his background that isn't right, then they ought to bring it forth. If they have an objection to one of his opinions, then they should bring that forth. None of this has happened or will happen because, in fact, there is nothing there. That is why they are regulated to saying: Well, we just don't know enough about him.

It is time for those who oppose Miguel Estrada to be honest about their opposition, to come forth and talk to the American people about it, and find out what the American people think about their opposition to Miguel Estrada.

I put together just a few quotations of people around the country who have commented on his nomination. I would like to just read a few of them.

We are all aware of the fact the American Bar Association—whose opinion used to be the ''Gold Standard'' for Democrat Members in the Senate on judicial nominations—rated Miguel Estrada well qualified unanimously. That is their highest rating. And they take into consideration everything, from judicial temperament, to educational background, to experience. Obviously, if someone were way outside the mainstream or too political, the

American Bar Association would not have unanimously indicated their approval of the candidate.

This is from Ruben Navarette, who wrote in the Dallas Morning News—by the way, a very competent journalist who used to write for the Arizona Republic, one of my hometown newspapers:

> Miguel Estrada deserves a hearing, and Mr. Bush deserves to have his nominees considered in a timely manner. The only thing preventing that in the case of Mr. Estrada is Democrat fear of the political damage they could sustain from such a nomination.

So spoken by Ruben Navarette.

Ron Klain is a former counsel to Vice President Gore. He said this just about a year ago:

> I have no doubt that on the bench, Miguel will faithfully apply the precedents of his court, and the Supreme Court, without regard to his personal views or his political perspectives. His belief in the rule of law, in a limited judiciary, and in the separation of powers is too strong for him to act otherwise.

That goes directly to this business that somehow or other Miguel Estrada—though he has not written anything or said anything that would lead to this conclusion—could not be trusted to apply the rule of law as he understands it from the U.S. Supreme Court.

Here is a former counsel to Vice President Gore saying he knows Miguel Estrada is beyond that, that Miguel Estrada is a person who understands his role as a judge, his belief in the rule of law, and a limited judiciary, and the separation of powers and, therefore, that he would act in accordance with what we understand to be the correct role of a judge in these circumstances.

There was a statement I thought particularly interesting from former Solicitors General. Remember that Miguel Estrada was an Assistant Solicitor General. This is the office in the Department of Justice that actually represents the Government before the U.S. Supreme Court.

Miguel Estrada has argued 15 cases before the U.S. Supreme Court. In a letter signed by colleagues from the Office of the Solicitor General under Presidents Clinton and George H. W. Bush, dated September 19, 2002, I quote:

> Miguel is a brilliant lawyer, with an extraordinary capacity for articulate and incisive legal analysis and a commanding knowledge of an appreciation for the law. Moreover, he is a person whose conduct is characterized by the utmost integrity and scrupulous fairness, as befits a nominee to the federal bench. In addition, Miguel has a deep and abiding love for his adopted country and the principles for which it stands, and in particular for the rule of law.

Again, Democrats and Republicans alike affirm the fact that Miguel Estrada is above partisan politics and appreciates his role as a judge, applying the law of the precedents of the courts and of the Supreme Court.

Seth Waxman was former Solicitor General during the Clinton administration, a well-respected lawyer. This is what he 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.

It is astounding to me that our friends on the other side of the aisle, despite the recommendations of high level Clinton administration lawyers affirming the professionalism and honesty and credentials of Miguel Estrada, would still contend that they don't have enough information about him. I suggest to my colleagues that they consult some of their friends in the former Clinton administration, former Solicitors General, and ask them about Miguel Estrada. If they are saying they don't know enough about him, there are some very highly qualified people to whom they could speak. I doubt there is anybody they could speak to who knows Miguel Estrada well that wouldn't confirm his qualifications to be on the court.

Instead they are relegated to dark, suspicious comments such as, ''Well, maybe he believes things that we don't know about because he just hasn't answered our questions thoroughly enough.'' I suggest they talk to those who have worked with him on a day-in and day-out basis. They will find that he is not only highly qualified but very fair.

Just perhaps one or two other comments. Then I will yield to my friends.

Rick Davolina, LULAC national president, said:

> We are confident that Mr. Estrada will fulfill the duties of the United States Circuit Judge for the District of Columbia Circuit with fairness, intelligence, and commitment to the ideals of the United States.

I had a call from one of the local LULAC officials over the weekend who confirmed LULAC's position and support of his nomination.

Elizabeth Lisboa-Farrow, chair of the U.S. Hispanic Chamber of Commerce, said:

> From his humble beginnings as an immigrant from Honduras who achieved a stellar academic career . . . to his varied and impressive achievements in the Justice Department and private firms, Mr. Estrada has shown himself to be one of superior talents and accomplishments.

From the Hispanic community, from newspapers around the country, from former Clinton administration officials and others who know Miguel Estrada well, there is no doubt in their mind that he is not only qualified to serve but that he would do so applying the precedents of his court and the U.S. Supreme Court.

Therefore, I again ask my colleagues again on the other side of the aisle, if you have concerns about Miguel Estrada, bring them to the floor. Let's talk about them. Let's debate them. But at the end of the day, it is only fair to give Miguel Estrada a vote so that he can be confirmed as a judge on the DC Circuit Court of Appeals.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, I compliment my friend and colleague from Arizona and wish to join him in urging our colleagues to vote in favor of Miguel Estrada to be on the DC Circuit Court of Appeals. Senator KYL said it all and said it well. I compliment him. I compliment Senator HATCH for his leadership.

I urge my colleagues to support Miguel Estrada. I did something I haven't done in my many years in the Senate. I suggested to some of our colleagues that because, in the last couple of years, we had had a hard time moving forward circuit court nominees before the Senate, that we individually take one or two of these nominees and more or less adopt them, get to know them well and encourage their nomination.

We had good success. I thank my friend, the former chairman of the Judiciary Committee. We had good success in moving through a lot of the district court nominees. Senator LEAHY was very accommodating with us. We moved through four Oklahoma judges to serve on the district court. It didn't take very long. A lot of district court nominees were confirmed.

But on the appellate level, on the circuit court level, it wasn't the same. In fact, I believe in the last 2 years, the first 2 years, or the 107th Congress, President Bush submitted 32 nominees to the circuit court and only 17 were confirmed—53 percent. That compares to President Clinton. In his first 2 years he got 87 percent; President Bush, 96 percent; and President Reagan, 95 percent. This President Bush in the 107th Congress only got 53 percent.

I suggested to our colleagues, let's take special attention, individual Senators take special attention to some of the nominees and then encourage that they be confirmed. The reason I would do that is obviously home State Senators are going to encourage their particular nominees for district court, but maybe when you talk about the circuit court, since it applies to many States, many areas, it doesn't have quite the same degree of support from an individual Senator.

It so happens on Miguel Estrada, Senator PETE DOMENICI and I both decided that we would take particular interest in Miguel Estrada. By that we got to know him. We had meetings with him. We had press conferences on his behalf. We encouraged others to join in the effort to confirm Miguel Estrada. We were not successful in the last 2 years. He was eventually approved by the committee but not on the floor of the Senate.

That is with great regret. Now we are before the Senate trying to confirm Miguel Estrada. We haven't been able to get a vote. We have been talking for a long time. Now people want to talk, I don't know how long, but we will spend some time because this is an outstanding nominee.

I got to know him. He is a truly a success story. He immigrated to this country from Honduras at age 17. Then he graduated magna cum laude and Phi Beta Kappa from Columbia. He also graduated magna cum laude from Harvard Law School where he distinguished himself as editor of the Harvard Law Review. What a remarkable accomplishment for somebody who immigrated to this country at age 17 and could hardly speak English.

Since then he has argued 15 cases before the U.S. Supreme Court. He won 10 of those cases. Find the number of attorneys in the United States who have argued 15 cases before the Supreme Court. It is a pretty elite group. Almost by definition he is an outstanding attorney or he would not have argued 15 cases before the Supreme Court.

He was rated unanimously well qualified by the American Bar Association, its highest possible rating. President Clinton's Solicitor General, a Democrat, Seth Waxman, had this to say about Miguel Estrada:

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 [views] 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.

That is from President Clinton's Solicitor General. Some people are saying, we want to see his notes when he was giving advice or memos as Assistant Solicitor General. That should not be done.

Ron Klain, former counsel to Vice President Gore, wrote to Senator LEAHY on January 16, 2002:

Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. Miguel will rule justly towards all without showing favor towards any group or individual.

Is there any higher standard that we should hold our judges to than that? This is from the counsel to former Vice President Gore, also a Democrat.

Mr. Estrada has extensive appellate practice, and he is widely regarded as one of the country's best appellate lawyers. He is currently a partner in the prestigious Washington, DC, law firm of Gibson, Dunn & Crutcher. He also clerked for Judge Kearse, President Carter's well-respected appointee to the Second Circuit Court of Appeals. In 1998 and 1999, he clerked for Supreme Court Justice Anthony Kennedy. It goes without saying that somebody who clerks for a Supreme Court Justice is an exceptionally talented individual. He served as Assistant Solicitor General of the United States under both Presidents Clinton and Bush. He held that position for 5 years.

This is an exceptionally well-qualified individual. He has performed significant pro bono service, including representation of a death row inmate before the Supreme Court, a case to which he dedicated approximately 400 hours.

So I don't think anyone can dispute that he is well qualified, and he is an outstanding success story. I find no legitimate reason whatsoever to oppose his nomination. I am very concerned about colleagues trying to say, ''Now, you are going to have to get 60 votes to confirm Miguel Estrada as a Federal judge.'' I am concerned about that.

I have been in the Senate for 22 years. I have heard people talk about filibustering judges, but it has never happened in my Senate career. We have filed cloture a few times—maybe for procedural reasons, or whatever; but most of the time, even when cloture was filed, it was granted overwhelmingly, with 85 or 90 votes in most cases. Those were not filibusters. The only successful filibuster goes back to 1968. So that is the only filibuster of a judicial nominee that has happened in the history of the United States. That was on Abe Fortas' nomination. It was filibustered by Democrats and Republicans. I am not saying it was right. I think it was probably wrong. But this hasn't been done since 1968.

I think it has been implied that many people in the Democrat Party are talking about filibustering several judges. So we are going to have a new standard now—that confirmation of judges is not 50 or 51, but it is going to be 60. We didn't do that with Judge Bork, Justice Thomas, or Justice Rehnquist, or in previous nominations that were fairly controversial.

I urge my colleagues to think about this. If they are going to march down this road and say you need 60 votes to confirm Mr. Estrada and others, that may be a serious mistake. One may look back on his or her Senate career and say we made a mistake. Both sides can play that game. I don't want this side to play that game, and I don't want the other side to play that game. Two wrongs don't make a right. We should not make the first bad mistake on Miguel Estrada.

Other people have said they want to have more information. They don't know enough about this young man. Compare. What did we know about many of the judges who have been confirmed? They don't commit themselves on how they would rule on a future case. Well, I hope they don't. They should not. He is not turning over his memoranda that he did as Assistant Solicitor General. First, those are confidential attorney-client memoranda, which were not requested by the seven previous nominees who worked in the Solicitor General's Office. We didn't request them previously, and we should not today. Every former Solicitor General, including Democrats Archibald Cox, Seth Waxman, Drew Days, and Walter Dellinger, signed a letter to the Judiciary Committee stating their opposition to the production of these documents, saying, ''By doing that, they would have a debilitating effect on the ability of the Department of Justice to represent the United States before the Supreme Court.''

Heaven forbid, if you have somebody working for a client saying, I cannot give a memo because it might not be politically correct, or it might not help me if I wish to be confirmed before the Senate in the future, that is a terrible idea. Seth Waxman, a Democrat Solicitor General under President Clinton, already said he represented the interests of the United States. That may not have coincided with his interest. It was in the interest of his client on whose behalf he was advocating.

Also, it so happens—I believe Mr. Estrada has said he would be willing to come forward with those, but the Justice Department rightly says that would be a very negative precedent to set, and they are rightfully saying they should be withheld, as all the former living Solicitors General have said. They are correct.

Again, we didn't request these memoranda from the seven other nominees who worked as Assistant Solicitors General. We should not do it in this case.

Somebody said: What about Judge Paez and Judge Berzon? They were both on the Ninth Circuit Court of Appeals, the most liberal circuit court in the country. Yes, there was a cloture vote on both of them. I will note that the cloture vote on both of them was—first, Marsha Berzon's was 86 to 13. Cloture on Richard Paez was 85 to 14. So there wasn't a filibuster on those two judges. We had a vote. I voted against them. I think I made a good vote. They were confirmed.

We should vote on Miguel Estrada, and if people don't wish to confirm him, they can vote no. The fact is, they know he would be confirmed, so they are trying to deny him a vote. I urge my colleagues to step back a little bit and ask what would this be doing to the Senate? The Constitution gives the right to the Senate in the confirmation to give advice and consent. That implies a vote. We should vote on Miguel Estrada and we should confirm Miguel Estrada. I have every confidence, having known him probably better than almost any circuit court nominee in my 22 years, that he will make an outstanding circuit court judge, one that we will be proud to have confirmed, one that the people who are obstructing his confirmation will regret. I think they will soon find out that he is an outstanding nominee and he will make an outstanding judge.

I urge my colleagues who have maybe participated in dragging this thing on—and we have been on it for a couple weeks—after talking to Majority Leader FRIST, I think we will be on it for a long time. Mr. Estrada deserves a vote. He deserves our vote of confidence, and he deserves to be confirmed by the Senate.

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

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

CONFERENCE AGREEMENT ON H.J. RES. 2

Mr. NICKLES. Mr. President, I submit for the RECORD a table which summarizes the conference agreement on H.J. Res. 2, the fiscal year 2003 omnibus appropriations resolution. This table was prepared by my staff based upon the estimates of the Congressional Budget Office.

I congratulate our majority leader and the chairman of the Appropriations Committee for working to provide no more in total appropriations for fiscal year 2003 than was requested by the President. The conference agreement on H.J. Res. 2 contains $397.855 billion in discretionary spending which, when added to amounts in the Defense and military construction appropriations bills already enacted, totals $763.184 billion in fiscal year 2003 discretionary spending. These totals increased from the Senate-passed levels primarily to accommodate additional defense spending requested by the President. The totals also include a 0.65 percent across-the-board reduction, amounting to $2.622 billion, from most accounts in the 11 appropriation bills included in the conference agreement.

Compared to fiscal year 2002, total discretionary spending after enactment of H.J. Res. 2 will grow by 3.9 percent. Defense discretionary spending will grow by 8.7 percent, and domestic discretionary spending will decline by 0.7 percent.

Compared to fiscal year 2002 less spending for one-time nonrecurring projects, total discretionary spending after enactment of H.J. Res. 2 will grow by 6.2 percent, defense discretionary spending will grow by 9.1 percent, and domestic discretionary spending will grow by 3.4 percent.

The conference agreement includes $25.385 billion in advance appropriations, an increase of $2.227 billion over the level of advance appropriations provide in fiscal year 2002 appropriations bills.

The conference agreement on H.J. Res. 2 also includes several increases in mandatory spending programs. The increased spending, which totals $4.257 billion in 2003 and $54.792 billion from 2003 to 2013 includes changes in agriculture payments for drought, payments to physicians and rural hospitals, and TANF payments to States.

Mr. President, I ask for unanimous consent that a table displaying the Budget Committee scoring of the conference agreement on H.J. Res. 2 and enacted appropriations, with a comparison to 2002, be printed in the RECORD.

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

CBO ESTIMATES OF THE CONFERENCE APPROPRIATIONS BILLS FOR FY 2003 COMPARED TO FY 2002

[Budget authority, in billions of dollars]

| Subcommittees | 2002 [1] | Senate appropriations bills [2] | Percent increase or decrease |
|---|---|---|---|
| Divisions A–K and Defense and Military Construction Bills: | | | |
| Agriculture | 17.171 | 17.995 | 4.8 |
| CJS | 42.995 | 41.387 | −3.7 |
| Defense | 0.560 | 0.574 | 2.5 |
| Nondefense | 42.435 | 40.813 | −3.8 |
| Defense | 334.113 | 354.830 | 6.2 |
| DC | 0.607 | 0.512 | −15.7 |
| Energy and Water | 25.334 | 26.164 | 3.3 |
| Defense | 15.164 | 15.898 | 4.8 |
| Nondefense | 10.170 | 10.266 | 0.9 |
| Foreign Ops | 16.433 | 16.300 | −0.8 |
| Interior | 19.135 | 19.057 | −0.4 |
| Labor, HHS | 127.659 | 133.399 | 4.5 |
| Legislative | 3.254 | 3.360 | 3.3 |
| Mil Con | 10.604 | 10.499 | −1.0 |
| Transportation [3] | 23.095 | 21.200 | −8.2 |
| Defense | 0.440 | 0.340 | −22.7 |
| Nondefense | 22.655 | 20.860 | −7.9 |
| Treasury, Postal | 18.515 | 18.326 | −1.0 |
| VA, HUD | 95.758 | 90.350 | −5.6 |
| Defense | 0.153 | 0.144 | −5.9 |
| Nondefense | 95.605 | 90.206 | −5.6 |
| Deficiencies | −0.350 | 0.000 | ..... |
| Defense | −0.196 | 0.000 | ..... |
| Nondefense | −0.154 | 0.000 | ..... |
| Total, Divisions A–K | 734.323 | 753.379 | 2.6 |
| Defense | 360.838 | 382.285 | 5.9 |
| Nondefense | 373.485 | 371.094 | −0.6 |
| Division: Classified Defense Programs | 0.000 | 10.000 | ..... |
| Division N: | | | |
| Election Reform—Title I | 0.000 | 1.500 | ..... |
| Wildland Fire Management—Title III | 0.000 | 0.825 | ..... |
| Fisheries Disasters—Title V | 0.000 | 0.100 | ..... |
| 0.65 percent across the board rescission on accounts (with exceptions) in 11 bills—Title V | 0.000 | −2.622 | ..... |
| Subtotal | 0.000 | −0.197 | ..... |
| Division P: U.S.-China Commission | 0.000 | 0.002 | ..... |
| Total, Discretionary | 734.323 | 763.184 | 3.9 |
| Defense | 360.838 | 392.175 | 8.7 |
| Nondefense | 373.485 | 371.009 | −0.7 |
| One-time, non-recurring projects [4] | 15.946 | 0.000 | ..... |
| Defense | 1.338 | 0.000 | ..... |
| Nondefense | 14.608 | 0.000 | ..... |
| Total, Discretionary less one-time | 718.377 | 763.184 | 6.2 |
| Defense | 359.500 | 392.175 | 9.1 |
| Nondefense | 358.877 | 371.009 | 3.4 |
| Total, without enacted Defense and Mil Con | ..... | 397.855 | ..... |
| Defense | ..... | 26.846 | ..... |
| Nondefense | ..... | 371.009 | ..... |
| Memo: | | | |
| Mandatory Items in Division N:. | | | |
| Title II—Agriculture Drought Relief, as amended | ..... | 3.084 | ..... |
| Title IV—Medicare Physicians | ..... | 0.800 | ..... |
| Title IV—Rural Hospitals | ..... | 0.250 | ..... |
| Title IV—Welfare Payments to States | ..... | 0.098 | ..... |
| Title IV—QI–1 Program | ..... | 0.025 | ..... |
| Title VII—Bonneville Power Administration | ..... | 0.000 | ..... |
| Total | ..... | 4.257 | ..... |
| Total, with Mandatories | ..... | 767.441 | ..... |
| Total, without enacted Defense and Mil Con | ..... | 402.112 | ..... |

[1] The 2002 figures include the levels enacted in the FY 2002 appropriations bills, as well as the $24.2 billion in BA in P.L. 107–206 (the Emergency Supplemental Appropriations and Rescissions, 2002), as estimated by CBO.

[2] This represents Divisions A through P of the Conference Report on H.J. Resolution 2 (Making Further Continuing Appropriations for the Fiscal Year 2003, and for Other Purposes), as well as the FY 2003 Defense (P.L. 107–248) and Military Construction (P.L. 107–249) appropriations bills. These bills also include $25.385 billion in advance appropriations, $2.227 billion more than the $23.158 billion in advances for the FY 2002 appropriation bills.

[3] Includes mass transit budget authority of $1.445 billion.

[4] The $15.946 billion in one-time, nonrecurring projects and activities were identified in Attachment C of OMB Bulletin 02–06, Supplement No. 1, dated October 4, 2002.

Source: Congressional Budget Office; Senate Budget Committee Republican Staff.

H.J. RES. 2: 2003 OMNIBUS APPROPRIATIONS BILL, CONFERENCE

[Fiscal year 2003, in millions of dollars]

| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2004–13 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Mandatory: | | | | | | | | | | | | |
| Division N: | | | | | | | | | | | | |
| Title 2—Agricultural assistance: | | | | | | | | | | | | |
| BA | 3,084 | 60 | 47 | 54 | (10) | (213) | (375) | (498) | (603) | (703) | (849) | (3,090) |
| O | 3,137 | 535 | 184 | 153 | 62 | (168) | (344) | (479) | (599) | (702) | (848) | (2,206) |
| Title 4—Medicaid: | | | | | | | | | | | | |
| Section 401: | | | | | | | | | | | | |
| TANF: | | | | | | | | | | | | |
| BA | 64 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| O | 71 | 6 | 3 | (7) | ..... | (6) | (3) | ..... | ..... | ..... | ..... | (7) |
| Transitional Medicaid: | | | | | | | | | | | | |
| BA | 34 | 85 | 9 | 3 | ..... | ..... | (2) | ..... | ..... | ..... | ..... | 95 |
| O | 32 | 80 | 11 | 3 | ..... | ..... | 1 | ..... | ..... | ..... | ..... | 95 |
| Total, section 401: | | | | | | | | | | | | |
| BA | 98 | 855 | 9 | 3 | ..... | ..... | (2) | ..... | ..... | ..... | ..... | 95 |
| O | 103 | 86 | 14 | (4) | ..... | (6) | (2) | ..... | ..... | ..... | ..... | 88 |
| Section 402(a)—physicians' fee schedule: | | | | | | | | | | | | |
| BA | 800 | 2,200 | 3,000 | 4,000 | 5,200 | 6,500 | 7,300 | 7,000 | 6,300 | 5,800 | 5,500 | 52,800 |
| O | 800 | 2,200 | 3,000 | 4,000 | 5,200 | 6,500 | 7,300 | 7,000 | 6,300 | 5,800 | 5,500 | 52,800 |
| Section 402(b)—Hospitals: | | | | | | | | | | | | |
| BA | 250 | 30 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 30 |
| O | 250 | 30 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 30 |
| Section 403—QI-1 program: | | | | | | | | | | | | |
| BA | 25 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| O | 25 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| Total, title 4: | | | | | | | | | | | | |
| BA | 1,173 | 2,315 | 3,009 | 4,003 | 5,200 | 6,500 | 7,298 | 7,000 | 6,300 | 5,800 | 5,500 | 52,925 |
| O | 1,178 | 2,316 | 3,014 | 3,996 | 5,200 | 6,494 | 7,298 | 7,000 | 6,300 | 5,800 | 5,500 | 52,918 |
| Title 7—Bonneville Power Administration: | | | | | | | | | | | | |
| BA | ..... | 300 | 300 | 100 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 700 |
| O | ..... | 60 | 210 | 260 | 140 | 30 | ..... | ..... | ..... | ..... | ..... | 700 |
| Total, H.J. Res. 2, mandatory: | | | | | | | | | | | | |
| BA | 4,257 | 2,675 | 3,356 | 4,157 | 5,190 | 6,287 | 6,923 | 6,502 | 5,697 | 5,097 | 4,651 | 50,535 |
| O | 4,315 | 2,911 | 3,408 | 4,409 | 5,402 | 6,356 | 6,954 | 6,521 | 5,701 | 5,098 | 4,652 | 51,412 |

Mr. LEAHY. Mr. President, I will speak for a few minutes regarding the debate on Mr. Estrada. The reason I say this, when I came on the floor I heard a great deal of discussion about the Hispanic National Bar Association. I heard from my friends on the other side of the aisle the current president of the Hispanic National Bar Association has led the support of this organization for Mr. Estrada's nomination, which is so. However, it jogged my memory that this morning I received a letter from 15 former presidents of the Hispanic National Bar Association. These 15 take an entirely different position than the current president: 15 well-respected former national leaders of this important bar association. They date back to the founding of it in 1972.

They have written to the Senate to oppose this nomination. They wrote to Senator HATCH and they wrote to Senator FRIST, as well as to Senator DASCHLE and myself. I am sure the speakers earlier this morning, when they spoke of the importance of the position of the president of the Hispanic National Bar Association, were probably not aware that but one is in favor of Mr. Estrada and 15 were opposed. It is very weighty opposition for 15 prior presidents of the Hispanic National Bar Association, based on the criteria to evaluate judicial nominees that this association has formally used since 1991, which has been the practical standard for the past 30 years, to make this assessment.

In addition to the candidate's professional experience and temperament, the criteria for endorsement includes the extent to which a candidate has been involved, supportive of, and responsive to the issues, needs, and concerns of Hispanic Americans and, secondly, the candidate's demonstrated commitment to the concept of equal opportunity and equal justice under the law.

In the view of the overwhelming majority of the living past presidents of the Hispanic National Bar Association, Mr. Estrada's record does not provide evidence that meets those criteria. But they say his candidacy ''falls short in these respects.''

They conclude:

We believe that for many reasons including: his virtually non-existent written record, his verbally expressed and unrebutted extreme views, his lack of judicial or academic teaching experience (against which his fairness, reasoning skills and judicial philosophy could be properly tested), his poor judicial temperament, his total lack of any connection whatsoever to, or lack of demonstrated interest in the Hispanic community, his refusals to answer even the most basic questions about civil rights and constitutional law, his less than candid responses to other straightforward questions of Senate Judiciary Committee members, and because of the Administration's refusal to provide the Judiciary Committee the additional information and cooperation it needs to address these concerns, the United States Senate cannot and must not conclude that Mr. Estrada can be a fair and impartial appellate court judge.

This is a significant letter because during the tenure of these past presidents, the Hispanic National Bar Association has had a fair nonpartisan record of following its criteria, and endorsing or not endorsing or rejecting nominees, regardless of whether the nominee is Republican or Democrat. They follow the same criteria for Republicans and Democrats. The HNBA has been at the forefront of the effort to increase diversity on the Federal bench and improve the public confidence among Hispanics and others in the fairness of the Federal courts. They have supported Republican nominees as well as Democratic nominees. But these 15 individuals, who devoted a great deal of time in their legal careers to advancing the careers of Hispanics in the legal community, have felt compelled publicly to oppose the Estrada nomination, although they publicly supported both Democrats and Republicans before. This one they opposed.

I ask unanimous consent the letter that was sent to me, to Senator HATCH, to Senator FRIST, and to Senator DASCHLE be printed in the RECORD.

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

HNBA'S PAST PRESIDENTS' STATEMENT, FEBRUARY 21, 2003

We the undersigned past presidents of the Hispanic National Bar Association write in strong opposition to the nomination of Miguel A. Estrada for a judgeship on the Court of Appeals for the District of Columbia Circuit.

Since the HNBA's Establishment in 1972, promoting civil rights and advocating for judicial appointments of qualified Hispanic Americans throughout our nation have been our fundamental concerns. Over the years, we have had a proven and respected record of endorsing or not endorsing or rejecting nominees on a non-partisan basis of both Republican and Democratic presidents.

In addition to evaluating a candidate's professional experience and judicial temperament, the HNBA's policies and procedures governing judicial endorsements have required that the following additional criteria be considered:

1. The extent to which a candidate has been involved in, supportive of, and responsive to the issues, needs and concerns of Hispanic Americans, and

2. The candidate's demonstrated commitment to the concept of equal opportunity and equal justice under the law.

Based upon our review and understanding of the totality of Mr. Estrada's record and life's experiences, we believe that there are more than enough reasons to conclude that Mr. Estrada's candidacy falls short in these respects. We believe that for many reasons including: his virtually non-existent written record, his verbally expressed and un-rebutted extreme views, his lack of judicial or academic teaching experience, (against which his fairness, reasoning skills and judicial philosophy could be properly tested), his poor judicial temperament, his total lack of any connection whatsoever to, or lack of demonstrated interest in the Hispanic community, has refusals to answer even the most basic questions about civil rights and constitutional law, his less than candid responses to other straightforward questions of Senate Judiciary Committee members, and because of the Administration's refusal to provide the Judiciary Committee the additional information and cooperation it needs to address these concerns, the United States Senate cannot and must not conclude that Mr. Estrada can be a fair and impartial appellate court judge.

Respectfully submitted,

Signed by 15 past HNBA presidents.

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

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

## LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the hour of 3:30 p.m. having arrived, the Senate will now return to legislative session.

## PROSECUTORIAL REMEDIES AND TOOLS AGAINST THE EXPLOITATION OF CHILDREN ACT OF 2003

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to consider S. 151, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 151) to amend title 18, United States Code, with respect to the sexual exploitation of children.

The Senate proceeded to consider the bill which had been reported from the Committee on the Judiciary with amendments, as follows:

[Strike the parts shown in boldface brackets and insert the parts shown in italic.]

S. 151

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003'' or ''PROTECT Act''.

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under Miller v. California, 413 U.S. 15 (1973) (obscenity), or New York v. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. ''The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,'' New York v. Ferber, 458 U.S. 747, 757 (1982) (emphasis added), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. ''[T]he most expeditious if not the only practical method of law