

What has the ABA had to say about all of this? On Thursday, February 26, 2003, the head of the ABA, Alfred P. Carlton, Jr. sent a letter to Senators FRIST and DASCHLE. I was deeply disappointed by its content.

In that letter, the ABA declares that our criticism of Mr. Estrada's case is "unfair." The ABA goes on to say that we seek to:

Impugn the integrity of members of the Committee and of its process during the current Senate debate. . . .

I was also a little disappointed that Mr. Carlton failed to tell me about this letter when he met privately with me a day after the letter had been sent. I didn't ask for that meeting. He asked for it.

In that meeting, I strongly encouraged the ABA to strengthen its rules and disavow the process that led to Mr. Estrada's recommendation and possibly scores more of tainted recommendations. Mr. Carlton told me he would consider such a step.

I also encouraged Mr. Carlton to write to Senators FRIST and DASCHLE and tell them that the ABA would clean up its act. Mr. Carlton also told me he would consider sending such a letter.

He not only failed to mention that just the day before he had sent the leaders a letter, but also that the letter was a strongly worded defense of an indefensible process.

If the head of the ABA cannot be straight with me, what hope do we have for this process? The letter he sent the leaders reveals that we shouldn't have much hope.

The ABA says in the letter that we have been critical of Mr. Fielding's role based solely on the fact that he cofounded the Committee for Justice. The ABA letter implies that this fact is not problematic because the Committee for Justice was formed after Mr. Fielding made his glowing recommendation of Mr. Estrada. The letter fails to mention several things: First, that even this post-Estrada activity violates ABA's clear rules. Second, that Mr. Fielding was engaged in the Bush transition partisan activities at the time he was making his Estrada recommendation. The letter concludes that our attacks on this process are "baseless" . . .

If this is so, then the ABA's own rules are baseless. The ABA cannot claim that our criticism of the way Mr. Estrada's recommendations was handled is baseless when that recommendation violates the ABA's own rules. Is the ABA disavowing its own rules? Does it find them baseless?

Conflict of interest rules such as the ones that ABA has adopted are not just designed to prevent the actual exercise of a bias in a way that influences an outcome. These rules are also adopted to prevent the appearance of a conflict. Preventing the appearance of impropriety is important to assure the Senate and the American people that the process of evaluating our judges is as impartial as people expect judges to be.

Before we rely upon the judgment of the ABA in evaluating nominees for lifetime judicial appointments, the ABA should not just pledge to enforce existing rules but should strengthen those rules. They should revise them to provide that individuals so heavily steeped in partisan activities not be permitted to serve in these crucial roles at all. That is, the rules should be expanded to prevent partisans from passing judgment on judicial nominees. This shouldn't be limited merely to the time period during which the individual is serving on the ABA Committee.

It strains credulity to believe that someone who occupied partisan roles in the last several Republican administrations could be viewed as impartial in this case. If Mr. Fielding had started the committee for Justice after he left the committee would the specter of bias really be any less? Mr. Fielding moved seamlessly from passing judgment on Mr. Estrada to becoming a leading advocate for his nomination.

The fact that the advocacy followed the judgment doesn't render the judgment any less suspect. Much has also been made of the fact that the full ABA Committee endorsed Mr. Fielding's view of Mr. Estrada's qualifications. This doesn't cleanse the Fielding recommendation of its taint. Mr. Fielding is an important person, a powerful man.

Mr. President, the hour of 12:30 is nearly here. I guess he left—I saw my friend from Kansas here. I just have a couple of more minutes and it will run past 12:30. I ask unanimous consent I be allowed to finish my statement.

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

Mr. REID. It is impossible for us to know one way or another whether members of the committee felt pressure to endorse Mr. Fielding's view. It is certainly possible. And that possibility—like Mr. Fielding's clear conflict of interest—is the problem in this case.

There are thousands of lawyers in the United States, thousands who are not steeped in partisan politics—Democrat of Republican. That is every obvious because the poorest contributors to campaigns of any group in America are lawyers. So most of them are not involved at all in politics.

We rightly cast a skeptical eye on judicial nominees who are heavily involved in partisan activities. We do that because we want those who would define the breadth and depth of our constitutional protections to be impartial and without bias.

Regardless of what side of the aisle you are on—Democrats or Republican—we should be able to agree that those who occupy the most partisan roles of either party should not be part of the ABA process.

This does not, in the words of the ABA, impugn those partisans. It is to say that the fact of those partisan activities creates a clear appearance of

impropriety. It is that appearance that is impossible to avoid. It is that appearance—and the doubt that it creates in the underlying process—that is the heart of all conflict of interest rules.

This issue goes well beyond the nomination of Miguel Estrada. His nomination has simply brought to light a fatally flawed process that should not be relied upon in the case of any of our nominees.

As I have said before, I now agree with the majority that the ABA should be out of the process. I hope that the ABA will rethink the staunch defense it made of its flawed process and flawed recommendations. I hope that the head of the ABA will not continue to be disingenuous when he meets with Members privately. Perhaps then the ABA would merit the trusted role that it has long held by that, in my view, it no longer deserves.

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#### RECESS

The PRESIDING OFFICER. The hour of 12:30 p.m. having arrived, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:31 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

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

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I rise to speak on a few matters of importance to us related to the nomination of Miguel Estrada, which is what we are now focused on, as well as some of the issues we should be focused on which we are not doing because the majority leader has determined we will continue to debate Estrada.

Last week, something happened in the Judiciary Committee that more of our colleagues should know about because a lot of us find this very confounding.

First, I have tremendous respect for and, indeed, consider the senior Senator from Utah my friend. I know he cares deeply about the issues and about the Senate. What we are seeing in the Judiciary Committee is going to do some significant harm—I hope not irreparable harm—not only to the Judiciary Committee but to the whole body. Up until last week, when we were moving closer and closer and closer to the edge of violating the rules the Judiciary Committee has worked upon, there were a lot of traditions on our committee. It is an important committee, a committee steeped in great legal tradition. If you look at the pictures on the wall of the various chairs of the committee, it goes long and deep.

But we have seen changes, first, in my judgment, when three court of appeals nominees were brought to a hearing at the same time. A court of appeals is an extremely important court. Every judge appointed to that court has a lifetime appointment. So the last chance there is to vet who they are, what their views are, how they think, comes in the advise and consent process on the floor of the Senate and, in the first instance, in the Judiciary Committee.

Many of us protested to the chairman of the committee that to have three courts of appeals witnesses, none of whom was without controversy, come before us on a single day did not make much sense. He said, well, that is how he wanted to do it. Although in fairness to Chairman HATCH, he was apologetic and said he would not do it again. But when we asked that we change it prospectively because these are important positions and important nominees, he said, no, he wanted to go forward.

We went until 9 that night. I was there. Chairman HATCH was gracious. I had a previous engagement at 7:30 that I had to go to and came back. By 9:30, with the members of the committee who had stayed that long quite exhausted, we had only really finished asking questions of one nominee, Jeffrey Sutton, to the Sixth Circuit.

I asked Senator HATCH if we could bring the two other witnesses back. He said he didn't want to inconvenience them. With all due respect, I expressed my disagreement. To inconvenience a nominee for the court of appeals, whether it be the Sixth Circuit or the DC Circuit, Mr. Roberts and Judge Cook, to ask them to spend an extra day here in return for what is a lifetime appointment didn't seem to me to be too much.

If normal workers, people who apply for jobs, are asked to come back by their prospective employer for a second interview or because something happened and that employer couldn't see them that day, they would hardly say it would inconvenience them, if they wanted the job.

But we seem to be running on a different schedule. So two of the nominees never got questioned. I asked them some written questions. I much prefer to ask oral questions. Answers given before the committee in the give and take are much better.

For instance, some people asked why didn't I ask written questions of Miguel Estrada, because I questioned him for 90 minutes. His answers were so obtuse and unenlightening, simply saying he will follow the law, he can't answer that because he hasn't seen the briefs, asking any written questions would have made no sense, to get those same answers back.

In any case, we did that. And then, of course, there was the hearing for Miguel Estrada, and we have rehearsed and rehearsed that over and over and over again, where questions were sim-

ply not answered. To say he was before the committee for a lengthy number of hours, and he answered some 100, or 500, or however many questions, doesn't tell the story. We all know that, because the answers he gave were to the effect: I cannot answer that; without the briefs, I cannot answer that; because it might be in a pending case before me, I cannot answer that.

Those are not real answers. With all due respect, in this Senator's judgment, I have never seen such stonewalling when a nominee was faced with so many different questions. And we continue to debate the Estrada nomination on the floor, not because the minority wants to debate it—we are happy to move on—but because the majority has chosen to debate it by filibuster, which is not ours but, rather, theirs. I hear we are going to move to the Moscow Treaty this week—that being the choice of Majority Leader FRIST—which is proof that we don't have to stay and debate the issue of Miguel Estrada. The schedule is in the hands of Senator FRIST.

What happened in the Judiciary Committee last Thursday was even more disappointing. We have had a rule that has existed in the Judiciary Committee for quite a long period of time. I am not sure of the number of years, but it is certainly over a decade. That rule is not something that is whimsy or simply tradition, such as the issue that we should never have three judges before us—I have just been informed that rule has been on the books since 1979. That is a written rule of the Judiciary Committee. It has been abided by by chairpeople, Democrats and Republicans, repeatedly throughout that period of time. I will repeat that this is not a tradition, it is not something that is sort of fuzzy. This is not even like blue slips. That is another place where the committee just changed. I didn't mention that, but I will take a minute to mention that.

We have always had a tradition of blue slips where, if a Senator from a home State objected certainly to a district court judge, that judge would not go forward. Many colleagues on the other side of the aisle have used the blue slip with success, from their point of view, repeatedly in the nineties, particularly when President Clinton was President, and when they controlled the Senate, or when they didn't control it. That is a tradition simply cast aside by the majority.

So we have the way we conduct hearings, blue slips, and everything dealing with judicial nominees.

As I said, we were getting closer and closer to the edge of no longer having comity on the committee, abiding by traditions. It almost seems as if it is, like "Alice in Wonderland," first the verdict, then the trial; the majority determined the result they wanted and changed the rules to fit the result: We want a lot of nominees put on the bench quickly. OK, we will stack them up in hearings and not give every Sen-

ator a chance to ask all the questions he or she wants. We have a nominee whose views, in all likelihood, were questioned and gone over thoroughly at the White House, but we don't want the public or the Senate to know, so we will instruct him not to answer questions in any dispositive or enlightening way. We have nominees we could never get through, in terms of comity—bipartisan comity—so we will get rid of the blue slip rule, or weaken it significantly.

As I said, all of those were traditions of the committee. I have been told over and over again that this body is very mindful of traditions, but they seem to be falling one by one—we have had more traditions falling in this month and a half that we have been under new leadership than in all the time I can remember being here. That is only 4 years.

But last Thursday, we had an unprecedented action. That action was that a rule of the committee—not a tradition, not something subject to anybody's interpretation—was just steamrolled over—ignored, forgotten, et cetera. That is one of the reasons we may need courts. That rule, which was written and ratified by the members of the Judiciary Committee when we organized this year, is a simple one. Rule 4 says:

The chairman shall entertain a nondebateable motion to bring a matter before the committee to a vote.

The rule goes on to say:

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

I will repeat that:

... debate shall be terminated if the motion to bring the matter to a vote without further debate passes with 10 votes in the affirmative, one of which must be cast by the minority.

That is crystal clear. What it says is that if you want to cut off debate in the Judiciary Committee, you need one member of the minority party to vote to cut off that debate. It is obvious why it was put in the rules: so there would be some form of comity, so that the majority party—even if they had 15 members of the Judiciary Committee and the minority party only had 5—could not shut off debate. It doesn't relate to the actual vote itself. It relates to how long one is entitled to debate.

Well, last Thursday, when the committee was expected to vote on the three nominees I mentioned earlier, two of whom were not questioned because they were all stacked up to be debated at one point—I believe it was Senator LEAHY and Senator KENNEDY who were there; I was not because I was in the Banking Committee hearing Chairman Greenspan. But Senator LEAHY and Senator KENNEDY invoked rule 4 and said, "We want to continue debate." At that point in time, Chairman HATCH called for a vote.

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

Mr. SCHUMER. I am happy to yield.

Mr. DURBIN. I ask the Senator this basic question because there are some trying to follow this debate. Being lawyers and having been on Capitol Hill for a while working in this environment, we have a tendency to speak in terms that perhaps the average person may not understand. I want the Senator from New York to help me come to the basic question about why any average person following debate on the floor of the Senate in America should even care about the compliance with rules because I think the Senator has made this point.

The Senator said that now, with the new Republican majority in the Senate, with the Miguel Estrada nomination, they are violating the traditions of the Senate in terms of questions to be asked for those seeking lifetime appointments to the Federal judiciary. The chairman, ORRIN HATCH of Utah, of the Judiciary Committee has now said he is going to change the way Senators from a given State can approve of the nominees before they come up for consideration before the committee.

Senator HATCH, in one of his first acts as chairman, scheduled three controversial nominees for one day, in an unprecedented scheduling, which, frankly, called into question whether there would be enough time to ask important questions. And now, as late as last week, Senator HATCH has said he is going to virtually ignore the established rules of the Senate Judiciary Committee that have been in place through Democrats and Republicans, to cut off debate in the committee.

My basic question to the Senator is: Why is this important to the average citizen following this debate? Why should they care if Members of the Senate are twisted in knots over procedure and tradition? What is the bottom line here? Why is this significant? Is this the clash of titanic Senate egos, or is there something more at stake in this issue?

Mr. SCHUMER. I thank my colleague for asking the question which, as usual, from his lawyer-like mind, is able to pierce through the legalisms and reach the core of the debate that people can understand; it is an excellent question.

This is not simply a clash of egos, or even two lawyers arguing a point for the sake of it. The bottom line here is that this is what our country is all about in terms of protecting the rights of average people. The bottom line is that the Founding Fathers, and then Congresses from the very beginning—from 1789—understood the power a Federal judge has over an individual. The power of the judge is much closer to the power of a king—who also has a lifetime appointment—by definition, than is the power of a President or a Senator or a Congressman, because that judge is appointed for life and can just make up his or her mind and decide that should be done.

What we have had through the years of tradition is a very careful vetting of who should become a judge. The rules are simply a device to determine who those people are in terms of back-and-forth questioning, of hearings, of votes, et cetera.

The Founding Fathers certainly shied away from the idea of the President simply appointing judges. They knew the awesome power judges had, and they wanted to make sure there would be a thorough airing of who this person was before that person ascended to this lifetime appointment to a powerful position.

Every one of the rules the Senator mentioned goes to whether a person can organize in a union; whether a person can be discriminated against because of the color of his or her skin or their religion or their sex; whether a corporation can violate the Clean Water and Clean Air Acts and affect our lungs and affect our children's health; whether, for instance, an issue I know my friend from Illinois has been very much involved in, whether a meat packing company can decide how clean their plant ought to be, given there are Federal laws that govern them. The judges have all this kind of power.

The very reason we debate these issues and have these rules is we want to make sure the people who become judges will, indeed, follow the law and not simply get up there and say: I promise you I will follow the law. We have been there.

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

Mr. SCHUMER. I will be happy to yield.

Mr. DURBIN. If this is not an ego trip between titanic Senate egos as to who is going to prevail, I ask the Senator from New York, what is the agenda here? Why would the Republicans in the new majority of the Senate Judiciary Committee change the rules, change the traditions, change the approach, take away power of individual Members of the Senate to ask questions of nominees, to have the time to try to come to understand the values they are going to bring to the judiciary, to have time to at least debate the nominations? What is the larger question here? What is it that is driving this kind of radical transformation of the Senate Judiciary Committee?

At this moment in our history, having just come off the last Presidential election so closely decided, followed by a congressional biennial election which, again, was closely decided, what is it that is driving this effort, does the Senator believe, on the Senate Judiciary Committee to make such radical changes in the way we choose Federal judges?

Mr. SCHUMER. I thank my colleague for the question. It is a very good question. Of course, it would involve us going into the heads of our colleagues, both on the other side of the aisle and the White House, in figuring this out. But I will tell my colleague what I think.

For some reason, the other side fears an open debate. For some reason, the White House and the other side do not want their nominees fully questioned. They have gone through every device and, as of last Thursday, even breaking the Senate rules. If the average citizen broke the rules, whether it be the driving rules, the parking rules, the rules of how you have to maintain your house or your sidewalk, there would be some recourse. I do not know what the recourse is here, but to abjectly break the rules and just say, I am breaking it, tough rocks, Jack, is so against the traditions we have had. For some reason, they do not want these nominees to be questioned. Why is that? We can only speculate, but I will tell my colleague what I think. I think some of these nominees' views are probably, and in some cases certainly, so far out of the mainstream that they do not want those views to become public because then it would either be, at minimum, an embarrassment for them, because this is not how President Bush was elected or most of the Senators were elected. We have mainstream conservatives and mainstream liberals, but very few Americans say: Have such a change in the way the courts and the Government functions that we should go back to the days of the 1930s or the 1890s.

There is a movement called the Federalist movement which basically has been devoted to cutting back dramatically on Federal power, giving that power to the States, giving that power to corporations, giving that power to others. I did not hear any mandate in the elections of 2000 or 2002 to go back to the 1930s, to go back to the 1890s, the way, say, I believe Justice Scalia, who has gone through the process, thinks. In fact, not only was there no mandate, there was no discussion. So when one asks oneself the very good question my friend from Illinois has asked me, which is, Why are they so afraid of questions of nominees, of debate, it is not certainly because they are afraid we are going to slow it down. We asked for 1 extra day of debate for Judge Cook and for Mr. ROBERTS. We did not get it. All we want from Miguel Estrada is some answers to questions and some papers, which they could have sent months ago. So this is, clearly, not just an issue of delay. If it were simply an issue of delay, we could work out an agreement, put in a time limit, and vote.

In my judgment, it is clear they do not want these questions answered. They do not even want them asked. That is why we are cutting off debate. Why? My guess—and it can only be a guess—is because the nominees to the judiciary, at least some of them, are so far over that if their real views were ascertained, the American people would be aghast.

Mr. DURBIN. If the Senator will yield for another question, yesterday in Chicago a reporter came up to me on the Miguel Estrada nomination. He

said: Senator, isn't it a fact the reason you are blocking the Miguel Estrada nomination is because he is pro-life and you are pro-choice? You disagree on the abortion issue.

I ask the Senator from New York who sat through the Judiciary Committee with me over the last few years, is it not a fact that with over 100 nominees from the White House that President Bush has successfully guided through this Senate, is it not a fact the overwhelming majority of those disagree with our position on choice, on abortion, and yet they have gone through this committee, almost all of them, without controversy, many of them with routine rollcall votes? I ask the Senator from New York, does this difference of opinion come down to whether or not we are going to receive conservative nominees from the Bush White House and now we have the Democrats in the Senate Judiciary Committees stopping conservative nominees; is that what is at issue here?

Mr. SCHUMER. I do not believe so at all. I do believe—and this is another excellent question—a President should be given some degree of flexibility and latitude because the Constitution says the President should nominate judges. We advise and consent.

If choice were the issue, then I probably would have voted against—I think of the 106 nominees who have come before us, more or less, I have voted for 100. My guess is of those 100, given they were nominated by President Bush who made commitments to the pro-life groups, that they would agree with them and try to get judges to “think like Scalia and Thomas,” that the overwhelming majority were pro-life. In fact, I know some of them were because I have read their decisions. I have read what they said in lower courts. I voted for them. I do not believe in a litmus test. I believe very few Members of this Chamber on either side of the aisle believe in a litmus test.

My guess—and I cannot speak for others—when on issue after issue a judge would have such extreme views that he would take the courts and the rulings so far out of the mainstream that Americans would be aghast, that ideological-type judges, whether on the far left or the far right, instead of doing what the Constitution says, interpret the law, rather make law because they feel so strongly that they have to pull the country in a direction way beyond, those are the few judges we—at least I—have objected to. Again, I have to use my judgment. Obviously, this is not an objective meter here, but that is what we have done.

I say to my colleague, the irony is this: Our good friend from Utah and many of the others on the other side of the aisle played the same watchdog role when President Clinton was President, and we have quote after quote from Senator HATCH, from Senator SESSIONS, from Senator Ashcroft, from the leaders of the Judiciary Committee

back in the nineties, that they had to be on guard against what they called “activist judges.”

To them, activist meant too far left. To me, activist means either too far left or too far right. An activist judge—I sort of sympathize with that comment. An activist judge means that because they feel strongly, instead of just interpreting the law and trying to figure out what Congress meant, they will impose their own views.

Mr. DURBIN. May I ask the Senator from New York—I think it is important in this debate that we take this general and theoretical analysis of judges and their impact on America and try to make it something closer to home so the average person following this debate understands what is at stake.

I can recall—and I am sure we were both Members of Congress at the time—when we passed the Americans with Disabilities Act.

Mr. SCHUMER. Right.

Mr. DURBIN. This was amazing legislation because it was so strongly bipartisan. TOM HARKIN, Democrat of Iowa, then Senator Bob Dole of Kansas, they came through and said, on a bipartisan basis, let us extend freedoms and opportunities to people in America who have been denied those opportunities; let us pass a Federal law—Congress passes it, and the President signs it—and establish opportunities for disabled Americans.

I think this is a good illustration of what happens with the Court when it goes too far in one direction. I ask the Senator from New York if he could give us an illustration of what happened with the Americans with Disabilities Act when it came to the highest court in the land when they had a chance to take a look at it and say whether we will protect disabled Americans and whether Congress had gone too far or not far enough, so that people can put in context what we are debating. Can the Senator give us an illustration of what happened with this law?

Mr. SCHUMER. Yes. The bottom line is the Court, despite the fact that Congress, on a bipartisan basis—by the way, supported by George H.W. Bush, the 41st President of the United States, who signed it into law—somehow comes up with an interpretation that parts of the law are beyond the Constitution and millions of disabled people are deprived of rights. That did not just happen for disabled people. In that case, which was the Garrett case, I believe my colleague is referring to, they said the States did not have to abide by this. Even though it was clear that the intent of Congress was that everyone had to abide by it, they said the States could discriminate against disabled people.

I know my colleague from Illinois was involved in a law that says someone cannot bring a gun into school. Again, somehow the Supreme Court comes to the determination that a person can, or that the law that we passed,

which seemed to be a general mainstream consensus law—because some of these folks tend to be ideologues, they came up with some God-forsaken reason that that could not happen.

Another one on which I worked long and hard, along with our colleague from Delaware, Senator BIDEN, and our colleague from California, Senator BOXER—I know the Senator from Illinois was very supportive—was something called the Violence Against Women Act, which for the first time said that the Federal Government could be involved in helping women who were abused by their spouses. Before that, it was a sort of dirty little secret hidden under the rug. The law had amazing effect.

I know this one better than I know the Garrett case, but it is the same type of thing. It affects average people. For the first time, women were able to get hotlines, find out whom they could call when they were abused. Shelters sprung up. When a woman was beaten in the past, all too often there would be nowhere to go and she would have to go home to the same husband who beat her before.

On issue after issue, we helped women who were abused come out of hiding and seek help and become productive citizens again, having a huge effect not only on them but on their children. Studies show that if a child is abused, which this act would have affected, or the child's mom was abused by the husband, they are much more likely to be criminals. So it affected all of us. All of a sudden, the Supreme Court says that Congress's finding that this law affected commerce in the United States was undone and throws out part of the Violence Against Women Act.

So this is not an abstract argument, this is not a bunch of lawyers just arguing how many angels can fit on the head of a pin, this is not partisanship—to me, at least. I have devoted my life to government. I was elected when I was 23. I want to make the Government help people. I want people to believe Government is on their side. When non-elected judges come in and take years of work that Congress does—whether it affects disabled people, kids in school, the cleanliness of the water we drink, how a meatpacker has to obey certain laws, or the Violence Against Women Act—and throws it out on reasoning that 10 years before would have been regarded as crazy, the very least we owe our constituents, in my judgment, is the obligation—it is not simply a right, it is an obligation—to question nominees for the bench.

Mr. DURBIN. If I may ask the Senator another question?

Mr. SCHUMER. Please.

Mr. DURBIN. I will yield the floor to him after this. At the same hearing, Chairman HATCH basically rejected a rule that I think has been in place almost 20 years in the Senate Judiciary Committee—

Mr. SCHUMER. If I might interrupt the Senator. Since 1979.

Mr. DURBIN. So for 14 years this had been the rule under Democrats and Republicans.

Mr. SCHUMER. Twenty-four.

Mr. DURBIN. Twenty-four—I am sorry. This has been the rule.

Mr. SCHUMER. He is not on the math committee. He is on the Judiciary Committee.

Mr. DURBIN. Right. Math was a minor. Law was a major.

But in this situation, where a decision was made that we can no longer debate these nominees, we also had before us a nominee from Ohio, a justice on the Ohio Supreme Court, Deborah Cook, whom I had a chance to ask a few questions of in that marathon hearing where three controversial nominees were scheduled for the same day. I do not know if the Senator from New York was present. But I sent a written question to this justice and asked her point blank: Tell me a little about your thinking, about your judicial philosophy, particularly the concept of strict construction of the Constitution—that is a cliché almost, but it is a catch phrase that is used to try to judge whether someone is far to the right, far to the left, or whatever it happens to be.

Justice Cook, in her reply to me, said that she did not characterize herself as a strict constructionist, but she went on to say that those who were strict constructionists—and I wish I had the direct quote in front of me—were less likely to decide in favor of such things as *Brown v. The Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade*.

My staff has been kind enough to give me this question.

I asked her the following:

Do you think the Supreme Court's most important decisions—*Brown*, *Miranda* and *Roe*—are consistent with strict constructionism?

This is her answer, a judicial nominee:

If strict constructionism means that rights do not exist unless explicitly mentioned in the Constitution, then the cases you mention likely would not be consistent with that label.

I said in the committee and I say here, that is a painful answer for me to hear, to think that those who believe that a strict construction of the Constitution would not lead them to integrate America's schools, to protect a woman's privacy, or to give to criminal defendants the most basic rights, knowledge of their constitutional rights—painful for me to read this, but painfully honest.

The point I make to the Senator from New York, and then I will let him finish: Is that not what we are looking for? Are we not looking for candor and honesty from the nominees to reach a conclusion on an up-or-down vote?

In a situation where candidates, nominees, such as Miguel Estrada, refuse to answer the traditional questions asked by Republicans of Democratic nominees, where Senators from a home State do not have a voice in

whether a judicial nominee comes before the committee, when three controversial nominees are put in a hearing in one day on the Judiciary Committee, where the chairman of the Judiciary Committee eliminates the protection of the right to debate nominees, do we not have a closing down of this kind of candor, openness, and honesty that we are seeking, moving instead towards secrecy and stealth? Does this not get to the heart of the issue as to whether or not the judges we select for lifetime appointments to the highest courts of the land are people whom we know, who answer questions honestly before they are given that terrific opportunity to serve our Nation?

Mr. SCHUMER. If I might answer, I think my colleague has hit the nail on the head. This is so important. What we have come to is the fact that nominees are often told not to answer questions.

There is an article in the *Legal Times* where one of the leading conservative judges of the court of appeals instructed nominees not to answer questions. Why would someone say, do not answer questions; fudge on the questions? I think I know why, as we talked about before. Because if they gave their honest answers, they would become so controversial that many of them would not pass. But imagine the alternative: Not asking the question, or not getting the question answered, and then this nominee who has views way beyond the mainstream gets on the court and starts doing things. Do you know what would happen? Our constituents would come to us and say: Do something.

We would try, but it would be very difficult. We would probably have people on the other side saying: Well, I didn't know he thought like that. Yet when we have the opportunity to ask that nominee questions, to try and get some idea of how he thinks, we are denied the answers—either because we did not have time, as in the case of the three nominees, or in the case of not allowing discussion to go on in the Judiciary Committee, or because we had the time—with Miguel Estrada we had plenty of time, but the nominee refused to answer the questions, simply saying: I will follow the law.

We have been through that. It is legendary that when Clarence Thomas was up for the Supreme Court, people wanted to know his view on *Roe v. Wade*. For me, it is an important issue, but it is not a litmus test. Of the 100 people I voted for judge, most are against *Roe v. Wade*, but I don't have a litmus case.

But for a nominee to the Supreme Court to say he had never discussed it before while in law school—lawyers always discuss these cases—struck many as disingenuous. I was not in the Senate then, but people vowed they were not going to let that happen again; that was a mockery of the process. This is too solemn a process.

Before I yield to my friend from Utah, and I appreciate him yielding to me and yielding to all Members, and I will yield to him, speaking for myself, this transcends any one nominee. We are beginning to see a complete vitiation of the process whereby nominees will be nominated by the White House and rubberstamped by the Senate. In my judgment, nothing that we do here could do more damage to the fundamental underpinnings of our Republic than that.

I remind my colleagues, that is not what the Founding Fathers intended. The very first nomination to the Supreme Court was, I believe, Rutledge—I always forget if it was Randolph or Rutledge; my daughter was in the play "1776" and she played Rutledge, and I was constantly calling her Randolph, much to her chagrin. But in any case, Rutledge was defeated because the Senate had the temerity, I guess, in the opinion of my good friend from Utah, to ask Rutledge's judgment on something very controversial at the time, the Jay Treaty. The Jay Treaty was not what judges rule on, but the Founding Fathers—by the way, we just heard at our lunch that a large percentage of the first Senators were members of the Constitutional Conference, so they certainly knew what they wanted to do.

If they were questioning Rutledge on the Jay Treaty, then certainly asking Miguel Estrada how he feels about the commerce clause and the right to privacy and the 11th amendment and the first amendment and all of these things could hardly be out of bounds.

In fact, I would argue if the Founding Fathers were watching this debate, they would say: Yes, that is what we intended.

With that, I yield to my friend from Utah for a question only.

Mr. HATCH. I ask the Senator, is it possible the Senator could put together the questions he believes Miguel Estrada has not answered appropriately, and I will do my best to get him to answer them? If not appropriately, as defined by the Senator, but at least in more detail than the Senator seems to be indicating here.

I know he answered a lot of questions appropriately, and I believe all of them appropriately, but I would be glad to assist the Senator if he will give me a list of questions the Senator would like to have Miguel Estrada answer. I will do my best to see he answers them for the Senator, and hopefully that will have the Senator feel a little bit better and cause him to vote for him.

Mr. SCHUMER. I thank the Senator for his question, and I think it is a good-faith statement to break this deadlock which I hope we will do because we have made the arguments over and over again.

Let me make an alternative suggestion and see what the Senator thinks and then I yield to him. Why don't we bring Miguel Estrada back for a second

day of questioning? I find written questions never to bring out the same analysis, the same understanding of how a person thinks. That is why we do not conduct trials by written question. Miguel Estrada may say something, and I will want to immediately ask him, well, what about this, and to take another week and ask another question and another question and another question, I am sure within a short amount of time my colleagues on the other side of the aisle will be saying we are being dilatory.

If we could have another hearing of Miguel Estrada and if he could let us see the documents he authored as attorney general, I think it was my good friend's junior colleague from Utah who suggested we do that, and then we would set—I cannot speak for my whole caucus, but I will state what I would be for. I would be for setting a time certain when we vote for him, another day of hearings, ask Miguel Estrada to come back for a day.

It cannot be too much to ask when one is 42 years old and, may God grant him a long and healthy life.

Mr. HATCH. Will the Senator yield?

Mr. SCHUMER. And to ask him for a day of questions and to give up these documents which are very important, then we can settle this whole issue.

I yield.

Mr. HATCH. As the Senator knows—

Mr. SCHUMER. For a question only.

Mr. HATCH. As the Senator knows, he cannot give up those documents. He has no control over them. And the administration will not and neither would any other administration.

Would the Senator be willing to get the Democrats to agree to an up-and-down vote if we had one more day of hearings where the Senators could ask additional questions? I am not saying we are going to do that, I am just saying would we have an up-and-down vote.

We cannot produce those documents because they are privileged. I think the Senator knows that. But if you had one more day of hearings where you could ask the questions, could we get the Democrats to agree to an up-and-down vote if you did that? I cannot say I can do that, but I certainly would look at it.

Mr. SCHUMER. Let me try to answer my colleague.

Mr. HATCH. I know the Senator cannot speak for all the Democrats, but if all the Democrats would agree, or if you can get the majority leader to agree and the Democrats to agree to stop the filibuster, I might consider that—not because I don't think he answered the questions the first time; he did, in a very thick transcript—as a gesture.

I would have to look at this. I would have to talk to the administration, the people on our side, and Miguel Estrada himself, but if I was assured we would have an up-and-down vote where people could vote whatever way they wanted

to, I would give some consideration to that, subject to my talking to our leadership on this side and talking to the White House. But there is no question they cannot give up these documents. He has no authority over those documents and the administration will not give up those documents no matter what we do. But I guess you would at least have an opportunity to ask additional questions, in spite of the fact that the distinguished Senator who conducted the hearing said it was conducted fairly, that he asked every question he wanted to ask, that he had the right to ask any other questions he wanted to, that he could have filed written questions, in addition.

But the Senator has said if he could have one more day of hearings, because written questions do not cut it as well as oral testimony, if he could have one more day of hearings, I would consider this, and I would talk to my side and I would talk to Mr. Estrada and the White House if I knew there would be an up-and-down vote, the filibuster would end, this threat to the process would end. I would certainly give every consideration to it and try to do that.

The PRESIDING OFFICER (Mr. CRAPO). The Senator from New York.

Mr. SCHUMER. Let me try to answer my colleague. Again, I have the same caveat he does, even more so. I cannot speak for my Democrat colleagues. I am not even chairman of anything.

I would say this to my colleague and make a couple of points. The best evidence of how Miguel Estrada feels—given that he has not written articles, he has not been a judge where we can see his record—are these documents. We have debated this over and over again. There is no privilege. There is no anything else.

Senator LEAHY and Senator DASCHLE, in a letter to my colleague—and I will be delighted to yield when I have finished my answer—have laid out the conditions by which we believe we would at least get some bit of evidence to see who Miguel Estrada really is. That is not in terms of his history, which has been repeated over and over again on the floor, and a wonderful history it is, but in terms of how he thinks and how he would think and how he would rule as a judge.

So the best evidence is not hearsay evidence; it is the written evidence. But let me just say in regard to the hearing—and here is my problem with the offer and why the written evidence is so important—let us say Miguel Estrada again refuses. He sits for 10 hours and refuses to answer—or answers, let's characterize it, in the same way.

I ask him—DIANNE FEINSTEIN asks him his feelings on *Roe v. Wade*, and he says I can't tell you that.

And Senator DURBIN, for instance, asks him how he feels, widely or narrowly, the commerce clause should be interpreted, and he says: Because I might rule on a case about the commerce clause, I can't answer that.

By the way, I have checked with a whole bunch of legal ethicists, and the canons—you know, what the lawyers say you are allowed to do when you are nominated to be a judge—have nothing to do with broad questions like that. They deal with specific cases.

So let us say we get, as we would characterize it, or as I would, stonewalled, no answers on anything.

As my colleague well knows, when I asked Miguel Estrada about previous cases he liked or didn't like, he said: Well, I would have to read the briefs.

I have asked subsequent witnesses how they feel on cases and they have given answers to me. I had an interview with someone the President is thinking of nominating in my State. I asked her what is a case you like, what is a case you don't like? She was very forthcoming—you know, that had already been ruled on. So we would be in a complete—

Mr. HATCH. Will the Senator yield?

Mr. SCHUMER. I would be happy to yield in a minute. We would be giving away the store without accomplishing our goal if we agreed, before we heard the answers, that we would agree to a date certain on the vote.

Perhaps we should have the hearing, see how he answers those questions, and then see where we are. If he is much more forthcoming, whatever his answers are, we might be able to make some progress. But if he gives the same exact answers as he gave 3 weeks ago, I for one could not agree to just having a vote on him unless we get the best evidence, the written evidence, which the administration will not give up. You are right. It is not Miguel Estrada, but it is the administration which has nominated him. So they are not sort of players from far away; they are part of this whole process. Other administrations, Democrat and Republican, have given up the same types of documents.

I don't want to get into a debate about that now, but that is our confirmed view.

So an alternative which I cannot even—I would have to talk to my colleagues about—would be: Let us have another day of hearings and then let us see what happens there and see where we go. But I think it would not make any sense, any sense whatsoever, to say today, or tomorrow, we will have a vote as long as he comes back. Because what if he does the same exact thing he did last time, which I know you find was fulsome and reliable—not reliable, but fulsome and elucidating testimony, but I found to be completely evasive.

I am happy to yield to my colleague for the purposes of another question only.

Mr. HATCH. Sure. Let us be honest about it. If you are going to ask him how he feels about a case or how he feels about the commerce clause, I have to admit I don't think those are legitimate questions. What he feels is not important. What he is going to do as a judge is important.

I am hardly going to bring him back for another day, after we had one of the

longer hearings for a Circuit Court of Appeals nominee, after it was conducted by the distinguished Senator from New York and the Democrats, when my colleagues on the other side have said it was a fair hearing, questions were asked—I am hardly going to bring him back for another day unless we have some sort of agreement we are going to have a vote.

Mr. SCHUMER. I'm sorry, I couldn't hear the Senator.

Mr. HATCH. I say I am hardly going to bring him back just on the speculation he is going to answer questions the way you think he ought to answer them when in fact he answered questions the way all of his predecessors have answered them. Basically, they were answered this way:

With regard to *Roe v. Wade*, he basically said regardless of my personal feelings, I am going to uphold the law. That is the law. That is what everybody has said who appeared before my committee when I was chairman during the 6 years of the Clinton administration. They didn't come out and say yes, I am for *Roe v. Wade*. If they had, I would not have held that against them because I presumed they were, anyway. But the fact of the matter is virtually every one of them basically said: Regardless of my personal views, I am going to uphold the law, which is what he said.

I guess what I am asking is—if you will give me a list of your questions that you asked, that you feel there was not a forthright answer—I don't know of any where there wasn't a forthright answer; it may not have been what you wanted—I will be happy to take those back to him again and get you answers that would be more detailed, if that is what you want.

Or, as an alternative, would it be possible for us to have 1 day of hearings where we encourage him to answer questions in more detail, because that is what you appear to want—even though I thought his answers were more than adequate—and I would attempt to do that. Of course, with the approval of my side; if I can. I would work in good faith to do that.

But I would certainly want to have the filibuster ended, because this is a damaging thing to this institution, and it would be my way—if I could do it and pull it off—of saying, look, we'll try to accommodate our friends on this side, but let's be fair and let us have a vote up or down.

It may be that vote will go the way you want it to go. You may vote for him in the end. I don't know. But the point is, I would try to do that in order to get this off of this filibuster, which I find extremely dangerous, and even beyond consideration of Miguel Estrada. It is something I had to stop, as chairman during my 6 years, because we had a few on our side who felt we should filibuster people like Marsha Berzon and Judge Paez and even Margaret Morrow.

As you know, as much as I have been maligned by at least one Senator on

your side, they would not have been sitting on the Ninth Circuit Court of Appeals if it hadn't been for me, and I think some of the accusations that have been made have been very unfair about the time I was chairman.

Mr. SCHUMER. Let me reclaim my time because I am running out.

Mr. HATCH. But let me make that offer. I will either get him to offer more detailed answers in writing or I will get him—I will do my very best to have him answer more detailed answers in a 1-day hearing.

Mr. SCHUMER. Reclaiming my time, Mr. President.

Mr. HATCH. But I would want to have a vote.

Mr. SCHUMER. I make a counter-proposal to my colleague. Either we have him come back for 1 day, and the administration, his nominator, releases the papers as Senator DASCHLE and Senator LEAHY have asked, and we agree to a vote ahead of time; the papers and a day of hearings—again, I can only speak for myself that that would satisfy me—or, in an effort to break the deadlock, we have the day of hearings without any commitment. Because, in all candor—you know, the Senator from Utah is a very fine lawyer and probably a lot better than I am. But I am not going to give away the store for a pig in a poke.

If we were to agree to a vote right now and Miguel Estrada were to come before us and just verbatim give the exact same answers he gave before, we would not have accomplished anything.

So I say to my colleague, in an effort to break the deadlock which we all want to break, believe me, let us have Mr. Estrada come back for a day of hearings, no preconditions. There will be lots more people paying attention to those hearings now. And let the American people make a judgment as to whether he is being forthcoming or not. Maybe his answers will change and they will say he is. Then we will decide where we go from there.

Because I will say this: This is one place I disagree with what my colleague said. To say, poor Mr. Estrada, he sat through 9 hours of hearings and to ask him to do it again is not fair seems to me to be—we are lawyers. Probably right now Mr. Estrada, who is earning a great salary because he is an excellent lawyer, sits through far more than 9 hours to try to win a single case. This, appointment to the second most important court in the land, is a lot more serious than any one single case Mr. Estrada is arguing.

Mr. HATCH. Will the Senator yield?

Mr. SCHUMER. So I say to my colleague, to achieve a lifetime appointment on this very serious court, Mr. Estrada ought to be willing to sit—I am not saying we should do this—for a week or a week and a half. He is 42 years old. He is likely to be on the bench for 30 years, God willing he has good health. So that should not be the consideration.

Mr. HATCH. Will the Senator yield?

Mr. DURBIN. Will the Senator yield?

Mr. SCHUMER. I yield to my colleague from Illinois.

Mr. DURBIN. Mr. President, I want to make this as brief as I can. I commend the Senator from Utah coming to the floor. I would like to ask this question of the Senator from New York.

I think you have taken a reasonable position. Having practiced law for a number of years, as the Senator from Utah did, and I believe the Senator from New York, you know, in the discovery process, when the other side refuses to turn over a document, goes into this long fight, you begin to suspect, on your side of the case, there is something very important in that document.

These documents of Miguel Estrada have become the crux, the center point, of the debate about what this man has said and done and thought as assistant to the Solicitor General in the Department of Justice. So I think the Senator from New York is right in insisting that be part of any compromise ending this deadlock.

I also hope we will insist, on the Democratic side, that if we are going to end this deadlock, we return to the regular order of the Judiciary Committee, that we do not put three controversial nominees on the calendar in the same day, that we do not ignore the blue slips required of each Senator from the State, that we do not violate the rules of the Senate that have been in place for 24 years in relation to debate in the committee.

I think all of those would be a good-faith effort to go back to the regular order and establish some comity and understanding between us, which I hope will guarantee that we will not face this kind of situation in the future.

Mr. SCHUMER. Answering my colleague's question, he is exactly right. I am not someone who has practiced law, like my colleague from Illinois and my colleague from Utah—I was elected to the assembly right after law school—but every good lawyer knows, even every good law student knows, that hearsay evidence is not as good as written evidence.

So when we hear all these people say—I have heard my good colleague from Utah say: This one and this one and this one say he is great, and this one and this one say he will follow the law. If my colleague truly believes that, then he has nothing to hide in terms of giving up these documents because they will show that Miguel Estrada will follow the law.

The problem is, we have just as many people who worked with him in the Solicitor General's Office who said: Oh, no, this guy is so far over that he writes his own laws, and he would write his own laws.

Mr. HATCH. Name one. Name one person. Give me a name.

Mr. SCHUMER. I don't know which is true and which isn't.

His superior.

Mr. HATCH. Who? Bender?

Mr. SCHUMER. Bender, who was his immediate superior.

Mr. HATCH. That is the only name you can come up with?

Mr. SCHUMER. I am going to reclaim my time.

Mr. HATCH. Give me a break.

Mr. SCHUMER. He was his immediate superior. But the bottom line is this: My colleague from Utah immediately discounts Mr. Bender because he does not agree with his view on certain issues. OK. If, if, if, if Mr. Bender is wrong, the documents will show it. If Mr. Bender is right, the documents will show it.

Mr. HATCH. Will the Senator yield?

Mr. SCHUMER. Not yet. I will in a minute.

But the bottom line is, as my colleague from Illinois stated, when somebody will not release documents, that you know can be released, then you say to yourself, What is in there?

Again, we are not just dealing with one case. We are not dealing with just one situation. We are dealing with a lifetime appointment to the second most important court in the land.

Why won't Mr. Estrada or the administration—which is his sponsor, his mentor in this particular situation—why won't he give up these documents?

I will tell you what most people think when they hear about it. And I have talked to my constituents, the few who ask me about this. They say he is hiding something. Do I know he is hiding something? Absolutely not. I have not seen the documents. But I tell you one thing: The great lengths that the administration and my colleagues on the other side have gone to not give up these documents makes one suspect there is something there they do not want people to see.

So the documents are crucial. And I, for one, believe we cannot agree to a date certain to vote until those documents are given up or unless Mr. Estrada somehow answers the questions in a truly dispositive way.

By the way, I say to my colleague, he said everyone else answered questions the same way. Absolutely not. And we have shown, in case after case, in nominee after nominee—the very nominee after Mr. Estrada, when I asked him the same exact question, was far more forthcoming than saying, "I can't," or "I will follow the law."

So the bottom line is, I would repeat my tentative offer—because I would have to check with my colleagues—let's have a day of hearings of Mr. Estrada and see where that leaves us, see if he gives the same answers. And let everyone see him answer the questions the way we saw him. And let's see if they think he is being forthcoming. And let's see if they think—when he is asked crucial questions that will affect people's lives—he gives answers that satisfy people that he be appointed to the second most powerful court in the land. That is a way to resolve this.

Shakespeare once said: Me thinks the lady doth protest too much. There has

been so much protestation about figuring out Miguel Estrada's record—not his legal qualities, not his story of being the son of an immigrant coming to America when he was 17, not speaking English. That is all great. He deserves a pat on the back for that. But that alone, in my judgment, does not entitle him to appointment to the second highest court in the land with a lifetime appointment.

I will be happy to yield to my colleague in 1 minute. But, again, it is certainly worth, with all due respect, the chairman's time, and all of our time, to hear him again. And maybe he will be somewhat more forthcoming. And then maybe we can come up with a compromise.

Several Senators addressed the Chair.

Mr. SCHUMER. I yield to my colleague from Massachusetts for a question.

Mr. KENNEDY. I thank the Senator for really—

The PRESIDING OFFICER. The Senator from New York has the floor.

Mr. SCHUMER. Yes.

The PRESIDING OFFICER. Does the Senator yield for a question?

Mr. SCHUMER. I yield to my colleague from Massachusetts for a question only.

Mr. KENNEDY. Without losing his right to the floor.

Mr. SCHUMER. Without losing my right to the floor.

Mr. KENNEDY. Mr. President, first of all, I thank the Senator from New York for his presentation today. I want to ask him a question or two.

In looking at his position in the broader context—which I think is fair to do, which is important for the American people to understand—the debate on what institution should have the power for nominating judges was an issue that was before the Constitutional Convention.

I heard earlier in the debate that the Senator from New York pointed out this was an issue that was considered by the Constitutional Convention—to just have the sole power with the President—and that was overwhelmingly defeated—overwhelmingly defeated.

I ask the Senator whether he would not agree with me that at least it appears there are some Members of this body who still believe it is the President who has the sole power and kind of exercise of responsibility that the Senator from New York and others have attempted to provide in exercising an informed and balanced judgment in fulfilling their constitutional role of advice and consent.

Does the Senator not agree with me that any fair reading of the debates of the Constitutional Convention put a prime responsibility on the Senate of the United States to exercise good judgment? And, further, would he not agree with me that if there is not going to be a response to Senators' inquiries, so they cannot have the information to

carry forward and make a judgment, then this is a failure of the nominee in meeting their responsibility under the Constitution, being nominated by the President of the United States?

Would the Senator not agree with me that this is a constitutional issue? We hear a great deal about what is constitutional and that the Senator from New York and others are basically undermining the Constitution by refusing to let the Senate make its will. On the other hand, I think the Senator, as I understand it, is doing exactly what the constitutional Founders intended the Senate to do; and that is, to have a shared responsibility and give a balanced and informed judgment in meeting the requirements of the advice and consent provisions of the Constitution.

I am just asking the Senator if he does not agree with me that we ought to have some understanding among at least ourselves as to what the role is because often we hear those voices saying, what are you objecting to? The President has nominated him. Why aren't you just going along? I would be interested in the Senator's answer.

Mr. SCHUMER. The Senator is right on the money. The bottom line is, the Founding Fathers wanted the Senate to be actively involved in the process. It is my understanding, as I read the Federalist papers and the deliberations of the Founding Fathers, for a good period of time they were so afraid of the President, so much like a king, having too much power and knowing that judges would have lifetime appointments and have absolute power, at least on the cases they rendered, that for a long period of time they wanted the Senate to appoint the judges.

Mr. KENNEDY. Without the President involved?

Mr. SCHUMER. Without the President involved, exactly. I can't remember if it was Madison or somebody else, but they argued it would be too diffuse, that the buck will have to stop somewhere, so they were going to have the President nominate. But to keep the President's power in check, the very thing they intended—my good friend from Massachusetts is exactly on the money—was that the Senate play an active role.

Let me repeat, many of the very first Senators who debated whether the first nominee, Mr. Rutledge, should become a judge on the Supreme Court were members of the Constitutional Convention. We heard today that of the first eight who showed up, six were members of the Constitutional Convention. I don't know how many out of the original 22 because I think there were just 11 States that had ratified the Constitution then. And guess what debate they had in rejecting Mr. Rutledge? They debated his views on the Jay treaty, which was a treaty involving France and England and all sorts of foreign entanglements, as they used to refer to it in those days.

Let me say that if the Jay Treaty was legitimate grounds to determine

whether the Senate should consent, then certainly someone's views on the commerce clause and the first amendment and the second amendment and the fourth amendment and the 11th amendment and the right to privacy and the right to free speech should be.

Let's just get some corroboration for my colleague's excellent question. Here is what our good friend from Utah said when the shoe was on the other foot, when President Clinton was nominating people, and many of our colleagues on the other side were worried they would be too activist, which meant too many people who would let their own liberal views trump accurate interpretation of the law. I have great respect for the Senator from Utah. He knows this stuff inside out.

He said:

Determining which of President Clinton's nominees will become activists is complicated and it will require the Senate to be more diligent and extensive in its questioning of nominees' jurisprudential views.

Well, one day of hearings and no other record, is that extensive when one is considering a lifetime appointment? I would argue not. It is not even close to extensive enough.

Let me read another quote from Senator HATCH:

The careful scrutiny of a judicial nominee is one important step in the process, a step reserved to the Senate alone . . . I have no problem with those who want to review these nominees with great specificity.

Well, I hope the Senator who had no problem then when Senator SESSIONS and Senator Ashcroft and other Senators on the Judiciary Committee wanted to ask a whole lot of questions—and believe me they did, of the people they were worried about, the Paezes and the Bersons, not to mention them, but all the nominees who never got hearings. Great specificity? Nine hours of hearings for the second most important job on the judicial side of the Government? Nine hours, when the answers, when talking about his history, Miguel Estrada was specific. It is not a character trait. It is only when he was asked his views on matters of great judicial importance, this is with great specificity, to simply say, on question after question: I will follow the law, is that answering questions with great specificity?

Mr. KENNEDY. Would the Senator yield on that point?

Mr. SCHUMER. I am happy to yield.

Mr. KENNEDY. Was the Senator trying to elicit from the nominee the outcomes of particular cases or was he inquiring of the nominee to have the nominee's general understanding of the particular provisions, constitutional provisions which are the basis for protecting individual rights and liberties? If you listen to the debate, some would say the members of the Judiciary Committee who were asking questions were trying to basically unethically demand answers of the nominee as to the outcome of particular cases. Nothing could be further from the truth. As I under-

stand, what the Senator is talking about now is to try and gain an understanding about whether the nominee had an understanding of the core provisions of the Constitution and the protections of those core provisions and understood the context with which they were at least passed or considered and interpreted over time.

Mr. SCHUMER. I thank the Senator for his question. He is exactly right once again in terms of his question. No one said: How will you rule on this case that is now in the lower courts in DC. No one said, there is a case in Texas about a meat packing company that refuses to go along with what the FDA wants them to or the Department of Agriculture wants them to. No one asked even close to that degree of specificity.

When one asks, what is your view on the commerce clause and how expansively or narrowly it should be interpreted, what is your view on the first amendment—I asked him, for instance, how it would affect his view on campaign finance spending. These are not questions of specific cases. In fact, the Senator was off the floor when I mentioned that I have made inquiries of some of the legal ethicists in our country who make a living by interpreting the canons of the ABA, what a lawyer can and cannot do. Not one of them thought any of the questions even came close in terms of the level of specificity.

One might think that was just a ruse, that that was a way to avoid giving one's opinions. And when one sees the article that was in the *Legal Times* in 1986, where it was reported that at a Federalist society meeting, Judge Silberman, already a member of the DC Court of Appeals, suggested to prospective nominees that Ronald Reagan might nominate, don't answer the questions, that was the beginning. That was the seed we are now seeing bear its evil fruit, which is to stonewall. And basically the Senator was exactly right in his previous question, at least in my opinion, going back to the view that the President should appoint.

Do you know what these hearings would be? They would be hearings for show.

Mr. KENNEDY. Will the Senator yield for another point?

Mr. SCHUMER. I am happy to yield.

Mr. KENNEDY. I can remember the time when the nominees for the Supreme Court, nominated by Democrat or Republican Senators, when Senators actually gave the questions to the nominees. I used to do that for years and years so that the nominee would have an opportunity to think about these issues and be able to talk about the fundamental protections of the Constitution and constitutional rights. This was never viewed to be a game in the Judiciary Committee. It was to try to elicit from the nominee their understanding and the nature of their kind of commitment to core values. That was always the case.

Now we find, as the Senator has historically interpreted, we can never get the responses, the answers. I mentioned the other day about understanding what the roles are of these two institutions. There is an extremely important and vital responsibility on every Member of this body in exercising their judgment. It is a shared responsibility. I can understand the chairman of the Judiciary Committee would rather have it so it is just the President's responsibility. But that defies history and what our Founding Fathers wanted. This is a shared responsibility.

I again ask the Senator, how are we going to ever fulfill our responsibilities under the Constitution when the nominees are basically going blank, refusing to respond to members of the committee? I further ask the Senator, is he not concerned this is beginning to be a trend, in terms of nominees we are having now before the committee, where they believe they just don't have to respond?

Mr. SCHUMER. Yes.

Mr. KENNEDY. Would the Senator agree this isn't just a matter for the Senators from New York and Massachusetts, this is a matter for the American people? That is what our Founding Fathers, who were the architects of the greatest Constitution in the history of the world, intended: If we fail to exercise our rights on this, we fail our responsibilities under the Constitution? I feel that way very strongly. I just inquire of the Senator.

Mr. SCHUMER. I thank my colleague. Again, I completely agree with him on every one of the questions he has asked. I would like to cite for my colleagues this article I mentioned. It was in the *Legal Times* of April 22, 2002. Here is a quote from the article:

President George Bush's judicial nominees received some very specific confirmation advice last week: "Keep your mouth shut."

That statement in that article makes a mockery, as my good friend from Massachusetts has stated in his question, of the U.S. Constitution. "Keep your mouth shut." One has to ask: Why should you keep your mouth shut? It is not because there is anything unethical you did. I don't think Miguel Estrada has done anything unethical. It is not because you are ashamed of your history or of something that happened in your past. Why are these nominees being told to keep their mouth shut, if this article is true?

We all know why. Because the people who are advising them are afraid if they gave their whole views, they would be rejected not only by the Senate but by the American people. And then there would have to be something different. The Senator is exactly right. We are on the road to mutilating our Constitution. I believe in this document. The older I get, the more in awe I am of the Constitution. The Founding Fathers called this country "God's noble experiment." I believe that.

America took my family as refugees from Europe a hundred years ago—a

little more than that. They were discriminated against; they could not have any kind of job; but they were given a chance. My father never graduated from college and his son is a Senator. This is an amazing place. It is not just in the way my teenage children would say it, but in the biblical sense, an awesome place, where the angels tremble before God in awe.

Part of that awe that we so cherish is the fact that we try to fulfill what the Founding Fathers wanted and wished. For an immediate political purpose, to put before the courts people who might be out of the mainstream, to make a mockery of the process by having three controversial court of appeals nominees appear on the same day so that two could not be questioned, to change by fiat the blue slip rule, which had been in existence for quite a while, and not debate and vote on what should happen on the blue slip rule—but to just change it—to then take a rule that had been in the Judiciary Committee since the Senator was on the Judiciary Committee before in 1979—

Mr. KENNEDY. It was before.

Mr. SCHUMER. The rule was even before he was chairman. It said you could debate an issue and not shut off debate, unless one member of the minority side—by the way, it wasn't written for a 10-to-9 minority; it could have been written for a 19-to-1 minority. On the Judiciary Committee some comity would have to reign. To take all these, and then this hearing, this nomination, where Miguel Estrada, being the good student he is, basically kept his mouth shut, I don't care how many thick books they put on the table. Read the answers, I say to my friends in America. Compare them to the answers of other judges, and then look at the fact that the only records we have of Miguel Estrada, his work as an Assistant Solicitor General, where we could determine how he thinks, other than by what he said at the hearing, where he didn't answer dispositively on anything in terms of his views—and the administration all of a sudden says we are not giving up such documents—it makes you scratch your head and wonder.

So I say to my colleague—and I will relinquish the floor in a minute—to me, this is not a fight over Miguel Estrada or Mr. Jeffrey Sutton or Judge Cook or John Roberts or Mr. Bybee or Mr. Tymkovich or any of the others; this is a fight for the sacredness of our Constitution. This is not the first time people who are a lot smarter than I am have tried to figure out ways around the Constitution and just say they are invoking the Constitution. That has happened repeatedly throughout our history.

But I believe, based on the patriotism that burns within me, based on my belief that this America still is "God's noble experiment," it is our job to try to keep the flame of that Constitution burning brightly. Part of that flame is to have a full vetting of nominees for

the one nonelected part of the Government, the article III part of the Government; and to rush nominees through and say they don't have any more time for a 40-year lifetime appointment, to say that they can answer every question by basically obfuscating, I believe in my heart of hearts is not what Madison or Hamilton or Jay or Washington or any of the Founders intended.

I yield for a final question to my colleague from Massachusetts.

Mr. KENNEDY. I thank the Senator. This will be my last intervention at this time. I wanted to ask whether this understanding and this presentation is your understanding, again, about the Constitutional Convention. I will take a moment. I ask him whether this is his understanding as well.

On May 29, 1787, the convention began its work on the Constitution with the Virginia Plan, introduced by Governor Randolph, which provided "that a National Judiciary be established, to be chosen by the National Legislature." Under this plan, the President had no role at all in the selection of judges.

When this provision came before the convention on June 5, several members were concerned that having the whole legislature select judges was too unwieldy. James Wilson suggested an alternative proposal that the President be given sole power to appoint judges.

That idea had no support. Rutledge of South Carolina said that he "was by no means disposed to grant so great a power to any single person."

A week later, Madison offered a formal motion to give the Senate the sole power to appoint judges, and this motion was adopted without a single objection. On June 19, the convention formally adopted a working draft of the Constitution, and it gave the Senate the exclusive power to appoint judges.

July of 1787 was spent reviewing the draft Constitution. All the decisions having been made, this issue was revisited three different times. On July 18, the convention reaffirmed its decision to grant the Senate the sole, exclusive power. James Wilson again proposed "that the judges be appointed by the Executive," and again his motion was defeated.

The issue was considered on July 21 and the Convention again agreed to the exclusive Senate appointment of judges.

In a debate concerning the provision, George Mason called the idea of executive appointment of Federal judges a "dangerous precedent."

Not until the final days of the Convention was the President given power to nominate. On September 4, 2 weeks before the Convention's work was completed, the committee proposed the President should have a role in selecting judges. It stated:

The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the supreme Court. . . ."

The debates made clear, however, that while the President had the power to nominate the judges, the Senate still had a central role. Governor Morris of Pennsylvania described the provision as giving—

Mr. SCHUMER. Will the Senator yield?

Mr. KENNEDY. Let me read this. Governor Morris of Pennsylvania described the provision as giving the Senate the power "to appoint Judges nominated to them by the President." The Constitutional Convention adopted this reworded provision giving the President the power, with the advice and consent of the Senate, to nominate and appoint judges.

It could not be clearer what our role is. It could not be clearer as to what the constitutional Founders wanted us to do.

I commend the Senator from New York for fulfilling that responsibility with regard to nominees. There are others who believe we ought to be a rubberstamp. The Senator from New York is speaking now to his responsibilities as outlined by our Founding Fathers. I welcome the opportunity to join with him. I commend him for his contribution to this debate.

Mr. SCHUMER. I thank my colleague. Again—and I am going to yield the floor; we have had it a long time—that sums it up: The central role is the Senate. Can the Senate engage in a central role, not the President—and we hear all the people who are criticizing what we are doing, saying the President should be able to choose. Those very same people want to be strict constructionists.

My colleague from Massachusetts, in outlining what happened at the Constitutional Convention, shows who are the real strict constructionists in this Senate today. It is those of us who are trying to make sure the Senate has some real say in who the judges are—not a hearing at nine at night, not failure to answer questions, not somebody who will not give up their whole record. This is a job for which we would have lines from here to Baltimore if we offered it to every lawyer in America. How many of them would say: I won't give up my records, or I won't come and answer your questions. This is a standard that perverts the views of the Founding Fathers.

Again, I say to the American people, why is it Miguel Estrada and those supporting him are so afraid that we learn of his views? If they are mainstream, if they are moderate, if they are not way off the deep end, would not release of documents, would not his answering questions without evasion vindicate him? But instead, we have had a 3-, 4-, 5-week battle to get simple answers out of a man who seeks to be appointed to the second most powerful court in the land that will affect every one of the 280 million Americans who are living today, their lives and the lives of their children and the lives of their grandchildren. My colleague is exactly right.

Mr. KENNEDY. Will the Senator agree, if I can ask him one other question, particularly seeing our leaders on the floor, would the Senator not agree with me that actually this is the wrong priority for the Senate to be debating for weeks and weeks when we have serious economic challenges facing this country, and I see our Democratic leader trying to get his proposal before the Senate, and the Republicans saying no; or to try and get a prescription drug program before the Senate. I do not know whether the Senator has had an opportunity to see the President's proposal which effectively says to the senior citizens they will no longer have the choice of their own doctor if they want to get the prescription drug they need. A prescription drug program should be part of the Medicare system and should not be a gift to the HMOs and the private insurance companies.

Would not the Senator finally agree with me that we have had this debate, and we ought to be debating the country's business in terms of our economic recovery, the issues of prescription drugs, or even the issue of going to war with Iraq?

Mr. SCHUMER. I thank my colleague for that question. First, I say to him, certainly, and let the American people who are watching today and everybody else understand the reason we have been on the issue of Miguel Estrada is not the choice of the Senator from Massachusetts, the Senator from New York, or our Democratic leader. It is the choice of the Republican side. It is the choice of the Senator from Tennessee.

Any moment—we do not control the floor; we are in the minority—any moment our friend from Tennessee, the majority leader, should say, Let's start debating how we are going to start getting jobs for the American people, more than 2 million of whom have lost jobs, any time the majority leader from Tennessee should say, let's debate prescription drugs, we would be off this issue of Miguel Estrada and debating those issues. I say to my colleague, as long as our colleagues insist on debating Miguel Estrada, I for one, and I speak, I think, for many of us, will not let the Constitution be rolled over, will not allow the very discussion that the good Senator from Massachusetts outlined, where it is clear the Senate should have more power than the President in appointing judges, be made a laughingstock. This document, the Constitution, is far too sacred.

It is my preference, to be honest, that the majority leader, the Republican leader from Tennessee say: Let's start debating other issues. It is his choice. But as long as he does not, I will be here at 10 of 4 in the afternoon or 10 of 4 in the middle of the night to defend this Constitution and prevent it from becoming a laughingstock because of some temporary whim of a small number of people in this country.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, the majority leader is here to propound a request. Let me make a couple of remarks, and I ask unanimous consent that I be able to retain the floor after he finishes with his request.

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

Mr. HATCH. Mr. President, all I can say is the Pharisees of the meridian of time would have loved these arguments. In fact, they are very worthy of that type of reasoning that existed during the meridian of time of our society. To stand here and talk like they are supporting and sustaining the Constitution when they are saying Republicans think the President should have the sole power, nobody is arguing that. That is what you call another red herring along with their requests for documents that they know no self-respecting administration will give, as evidenced by the seven former Solicitors General, four of whom are Democrats, who said those documents should not be given because they would interfere with the work of the Solicitor General, the people's representative.

The fact of the matter is that the Founding Fathers—and I have enjoyed this wonderful discussion by the Pharisees of modern times, because to say we are arguing that only the President has some role here is not only ridiculous, it is ridiculously sublime. It is almost unbelievable for me to hear this as constitutional argument. Why, they would be thrown out of the Supreme Court and asked never to come back again by the liberals on the Supreme Court.

Madison himself offered a resolution to have a supermajority vote by the Senate, and it was rejected 6 to 3—rejected 6 to 3. The appropriate language is right here in article II of the Constitution. If we are going to talk about the Constitution, let's talk about the Constitution, not a bunch of gibberish. It says, talking about the President:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur:—

That is a supermajority vote written in the Constitution, where supermajority votes should show up.

and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by Law vest the Appointment. . . .

But it says, "by and with the advice and consent of the Senate."

Here are my colleagues acting holier than thou, acting as constitutional experts, who are arguing that they should be able to sustain a filibuster that would require a supermajority vote out of that clause, which says advice and consent, which very clearly made it clear they are talking about an up-or-down vote. When Madison tried to get a supermajority vote, he was voted

down. Madison, the Founder of the Constitution, was voted down 6 to 3.

These specious arguments, in my opinion, are not worthy of the Senate. There is a lot more I have to say, and I will complete my remarks after the majority leader takes the floor to make a unanimous consent request. I have never heard such arguments before as have been made throughout this afternoon, and I intend to answer some of them. It is not worthy of our time to answer all of them, but I am certainly going to answer some of them.

I respect my colleagues. It can be truthfully said I love my colleagues. People know that. And especially these two who have been arguing back and forth. But, again, they would have made wonderful Pharisees in the meridian of time because they would beat an issue to death even though the issue does not exist.

In this particular case, some of these arguments never existed in constitutional law or principle.

The PRESIDING OFFICER. The majority leader.

UNANIMOUS CONSENT AGREEMENT—S. RES. 71

Mr. FRIST. Mr. President, as in legislative session, I ask unanimous consent that at 4:20 p.m. today, the Senate proceed to the consideration of S. Res. 71 regarding the recent decision relating to the Pledge of Allegiance; provided further that no amendments be in order to the resolution or preamble, and that there then be 10 minutes for debate equally divided between the two leaders or their designees; that upon the use or yielding back of that time, the Senate proceed to a vote on adoption of the resolution without any intervening action or debate. I further ask unanimous consent that if the resolution is adopted, the preamble be agreed to and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. DASCHLE. Mr. President, I ask the majority leader if it is his intention to schedule any additional votes today after we have had the vote on this particular resolution.

Mr. FRIST. Mr. President, that would be the final vote of the day, and that would be at 4:30.

Mr. DASCHLE. I thank the majority leader.

ELECTING WILLIAM H. PICKLE, OF COLORADO, AS SERGEANT AT ARMS AND DOORKEEPER OF THE SENATE

Mr. FRIST. Mr. President, as in legislative session, I send to the desk a resolution and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The senior assistant bill clerk read as follows:

A resolution (S. Res. 72) electing William H. Pickle of Colorado as the Sergeant at Arms and Doorkeeper of the Senate.

There being no objection, the Senate proceeded to consider the resolution.

Mr. FRIST. I ask unanimous consent that the resolution be agreed to and that the motion to reconsider be laid upon the table.

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

The resolution (S. Res. 72) was agreed to, as follows:

*Resolved*, That William H. Pickle of Colorado be, and he is hereby, elected Sergeant at Arms and Doorkeeper of the Senate effective March 17, 2003.

Mr. FRIST. Mr. President, I welcome and introduce to my colleagues, which the Democratic leader and I have had the opportunity to do to our respective caucuses today, Bill Pickle, to be our new Sergeant at Arms, effective March 17. Currently, Bill is the Federal director at the Denver International Airport. He was the first director appointed when the Transportation Security Administration was created last year. Prior to that point, he served briefly as the Deputy Inspector General at the Department of Labor.

His real experience and career is with the Secret Service, which he served for a period of 26 years. He served in a number of senior manager positions, the most recent ones being Deputy Director for Training and Human Resources, Special Agent in charge of the Vice Presidential Division, and head of the Secret Service Congressional Affairs Office.

Bill is a highly decorated Vietnam veteran. He served with the first Air Cavalry Division from 1968 to 1969 as an infantry sergeant and medevac helicopter doorgunner. Mr. Pickle attended American University, as well as Metro State College in Denver, and holds a degree in political science. He is married and has two children.

Again, I welcome him to this body.

The PRESIDING OFFICER. The minority leader.

Mr. DASCHLE. Mr. President, first let me commend the distinguished majority leader for his choice in this proper position. In this time of uncertainty and with the experiences that the Senate has endured over the course of the last couple of years in particular, we are all the more sensitive about the role and the responsibilities of the Sergeant at Arms.

The Senate owes a big debt of gratitude to Al Lenhardt, the man who has filled this position so admirably for the last couple of years. He has endured, he has led, he has inspired. So we say farewell to Mr. Lenhardt, and we acknowledge once again the extraordinary contribution he has made not only to the Senate but to his country. I am proud of his work. I am proud to call him a friend.

I am pleased that Bill Pickle has agreed to take on this enormous responsibility. He comes extraordinarily well qualified. His experiences will serve him well as he begins to undertake the responsibilities and the expectations of the Senate as we look to the many challenges the Senate faces in dealing with security and the many

other issues that will be on his desk as he holds this position. I congratulate him. I wish him well. I know I can say without equivocation that unanimously our caucus expresses our willingness to work closely with him as he begins his work in the Senate.

I thank the distinguished majority leader, and I yield the floor.

Mr. FRIST. Mr. President, I also want to add my appreciation to Al Lenhardt, our current Sergeant at Arms. I have had the opportunity to work with Al closely in that he came right before the time when anthrax first struck Washington, DC. I have had the chance to work with him on an intimate basis through that challenge and also over the last year and a half as he brought a current state-of-the-art discipline to that position to give the protection we depend on each and every day.

I had the opportunity to share my gratitude directly with the Democratic leader yesterday in his office as we met with Al and Bill Pickle.

UNANIMOUS CONSENT AGREEMENT—THE MOSCOW TREATY, DOCUMENT NO. 107-8

Mr. FRIST. Mr. President, I ask unanimous consent that at 12 tomorrow the Senate proceed to Executive Session to consider Calendar No. 1, the Moscow Treaty; provided further it be considered under the following limitation: The treaty be considered advanced through its various parliamentary stages, up to and including the presentation of the resolution of ratification; all recommended committee conditions and declarations be considered agreed to and provided further that all amendments to the resolution of ratification be relevant; further, that following the disposition of the relevant amendments and the conclusion of the debate on the resolution, the Senate then immediately proceed to a vote on the adoption of the resolution of ratification, as amended, with no further intervening action or debate, and that following the vote the President then be notified of the Senate's action.

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

Mr. FRIST. Mr. President, I want to turn to a final matter of business for me, and it concerns the subject of the Estrada nomination. I want to take a couple of minutes to comment on where we are today. This nomination, as my colleagues know, has been pending on the floor since February 5. It has been just about a month ago that the distinguished chairman of the Judiciary Committee brought forth this nomination. Over that period of time, we have had ample opportunity to have a very good debate. We have had a thorough discussion, and we have had thoughtful discussion, and we have had reasonable discussion. Both sides of the aisle, indeed, have been patient, recognizing the importance of this nomination.

We have listened very carefully to the arguments of the other side of the

aisle to see if there is any way possible we could get an up-or-down vote, a vote to confirm or not to confirm, but to have the vote. The response to that has been a filibuster, which has been ongoing now, for an exceptional nominee.

Again, after a lot of time, a lot of focus, a lot of patience, a lot of thorough discussions, I feel it is time to give more definition to where we are in this nomination. Over this last month we have had 12 session days dedicated to the nomination. We have had active debate and discussion for over 85 hours. We have put forth 17 separate unanimous consent requests which have been denied. We have seen mounds of editorial support accumulate from across the country. The latest count, from 29 States and the District of Columbia, 72 editorials calling for the end of the filibuster and/or support of Miguel Estrada; only ten supporting the other side. We have had the McConnell-Miller letter which was signed by 52 Senators, indicating strong support for Miguel Estrada. We have had offers by the White House to make Miguel Estrada available to Senators who might want to visit with him one on one.

I outline that to demonstrate we are doing everything possible to achieve a very simple goal. That goal, consistent with the Constitution, consistent with the advice and consent, is to have an up-or-down vote on this nominee, allowing each Senator to express their will, either yes or no.

As I said, the time has come, after being patient, to give increased definition to the debate for people to actually stand up and be counted. I have been denied the only other means I have to reach a vote, and that is through unanimous consent. Thus I have to rely on my only alternative now. That is to generate a vote so that people in this body and indeed the American people can know where each Member stands. That vote will be filing cloture. I do want to point out that filing of cloture is intended to identify where individuals stand and in no way means any walking away from this nomination. In fact, it is just the opposite. If cloture fails, it is the real beginning, I believe, of this important debate that has been underway now for almost 30 days, but which we permitted to continue in order to have that up-or-down vote. If cloture is successful, which I hope, we will be able to go immediately to the vote and we will be able to have this nominee confirmed. If Democrats go on record through this vote as supporting an active filibuster, we and their constituents will be able to address each one of them and ask for an explanation.

Filing of cloture represents, in my mind, an active campaign to ensure this fine nominee ultimately is voted upon and thus will win because we know we have the majority votes for him to be confirmed. Thus, this is our first step.

By filing this cloture motion we will be, if unsuccessful, ratcheting up the attention level for this well-qualified

nominee. Members will have that opportunity to decide whether this man deserves that up-or-down vote I referred to. Members will get a chance to say whether the President of the United States deserves to have his nominee, the President's nominee, acted upon, voted upon, in this Senate—again, an opportunity for the President's nominee to have an up-or-down vote.

## CLOTURE MOTION

With that said, I now send a cloture motion with 51 signatures to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The legislative clerk read as follows:

## CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 21, the nomination of Miguel A. Estrada to be United States circuit judge for the District of Columbia circuit.

Bill Frist, Orrin Hatch, Trent Lott, Bob Bennett, Peter Fitzgerald, Kay Bailey Hutchison, Lisa Murkowski, Conrad Burns, John Warner, John E. Sununu, Lindsay Graham, Jeff Sessions, Gordon Smith, Elizabeth Dole, James Talent, Saxby Chambliss, Christopher Bond, Susan Collins, Wayne Allard, Lamar Alexander, Norm Coleman, Pat Roberts, Craig Thomas, Larry E. Craig, Olympia Snowe, John McCain, James Inhofe, Jon Kyl, Lincoln Chafee, Rick Santorum, Judd Gregg, Don Nickles, George Allen, Richard G. Lugar, Charles Grassley, George V. Voinovich, Mike Crapo, Michael B. Enzi, Thad Cochran, Mike DeWine, Arlen Specter, Sam Brownback, Ben Nighthorse Campbell, Richard Shelby, Ted Stevens, Chuck Hagel, John Cornyn, Pete Domenici, John Ensign, Mitch McConnell, Jim Bunning.

Mr. FRIST. For the information of all Senators, this vote will occur Thursday morning. We will alert Members to the precise timing of this vote.

At this time, I ask unanimous consent the live quorum under rule XXII be waived.

The PRESIDING OFFICER (Mr. CHAFEЕ). Without objection, it is so ordered.

The Democratic leader.

Mr. DASCHLE. I listened carefully to the words of the distinguished majority leader and certainly understand his decision to file cloture. Many of us had anticipated a cloture motion would be filed. We are more than ready to have one or more votes when and if they are scheduled. Those votes, of course, would not be necessary were the information we requested from the beginning provided. We have simply asked that Mr. Estrada fill out his application for this lifetime employment, as every other one of his predecessors has, providing information about his record, providing information about his position, providing information in ways that will allow Senators a far better appreciation of the vote they are taking on this important matter prior to the time he begins serving on the second highest court in the land.

We welcome the vote. As I said, we will welcome subsequent votes if they are filed. We believe the constitutional obligation we have as Senators requires we demand the same degree of compliance to the rules, the same degree of willingness to cooperate that all those who have served in the past and have provided that information have been willing to provide in their cases, as well.

We will certainly anticipate that vote, the recognition that this debate goes on unnecessarily. It would not have to take 30 days. It would not have had to take 12 legislative days. It would not have had to take 85 hours for Mr. Estrada to be more forthcoming, more willing to provide the information his predecessors have provided.

I understand the actions just announced by the majority leader. But I will say it really does not change anything. The only thing that will change the circumstances we currently face is if Mr. Estrada becomes more cooperative and he fulfills his obligations under the Constitution, as his predecessors have so ably done for so many years.

I yield the floor.

Mr. HATCH. Mr. President, one thing it does establish is that there really is a filibuster by our colleagues on the other side. They have been denying this right up to now, so that is why we have to have a cloture vote to show that there is a filibuster; for the first time in history, a true filibuster against a circuit court of appeals nominee.

That is a constitutional issue and it is an important constitutional issue. I was really blown away by my colleague's assertion that we are trying to just make an imperial President. That is not at all the case. We know the Senate has an obligation to look at these judges. As a matter of fact, whenever we say we treated their judges better than they are treating Miguel Estrada, they are using a double standard on Miguel Estrada, and they say their judges were not controversial.

Give me a break. I will be willing to ask Miguel Estrada to give detailed answers to every question that was asked of Marsha Berzon, every question that was asked of Judge Paez, every question that was asked of Margaret Morrow. Those hearings lasted minutes. This lasted a solid day, more than most nominees in the history of the country for the Circuit Court of Appeals.

By the way, for those on the other side who keep trying to imply—I was interested in my words that were put up. What was wrong with those words? They were absolutely true. We should not have activist judges on the bench.

I disagree with their characterization that activist means anything but activist. I agree with Senator SCHUMER's discussion on activism. I don't like activism from the left and I don't like it from the right. I don't think it is right in either case. Activism is ignoring the law; using your judicial position to

make laws from the bench that you were never nominated and confirmed to make.

Judges are not elected to make laws. The purpose of judges is to interpret the laws made by those of us who have to stand for reelection. We are the ones who make the laws. The President and the executive branch also can make laws.

But where in the Constitution, or in anything said by the Founding Fathers, does it say that a minority of the Senate has a right to prevent a vote up or down on a President's nominee? Nowhere.

In that provision I read, where does it say you can have a supermajority vote? In fact, the only supermajority vote mentioned in article II is the clause I read from, that is a two-thirds vote for the ratification of treaties. But in that same paragraph it said the Senate has a right to advise and consent on nominees.

Those words they put up of mine regarding activist judges, I don't see anything wrong with those words. They apply today, and I have always gone by them. But to imply that their judges were not treated properly when we put through 377 Clinton judges, the second all-time record in the history of the Senate, in the history of the nomination process, 5 less than the all-time champion Ronald Reagan, while 6 years the Judiciary Committee was in the control of the Republicans, the opposition party, where President Reagan had 6 years of his own party to assist him—and to act like that was not a remarkable job of fairness to President Clinton, again makes my point that these are modern-day Pharisees who would distort anything in order to make their arguments.

I would like to get to a couple of things that have really been a little irritating to me. I have heard a lot of whining about last week's Judiciary Committee markup where I had to rule we are not going to filibuster in committee and we were going to have votes up and down on the circuit court nominees.

I have also heard arguments that to have three nominees in one hearing is just awful. It has never been done before. I am going to talk about those two things just for a minute or two, because I think it is important to understand.

First of all, on that rule, I checked with our parliamentarians, two of them, in this body. They upheld me and told me I was right in the interpretation of the rules that I made. But the rule they are hiding behind is rule 4. They are saying that rule 4 prevented me from being able to call for a vote unless I got at least one member of the other side to agree.

By the way, each one of those judges had at least two members of the other side in agreement, so there is nothing to complain about, even then. But the text of rule 4 says this:

The chairman shall entertain a nondebatable motion to bring a matter before the committee to a vote.

A nondebatable motion. There was no motion made. There was a point of order raised which I overruled. There was an objection raised, which I overruled. Listen to this again:

The chairman shall entertain a nondebatable motion to bring a matter before the committee to a vote.

There has to be a motion. That didn't happen.

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

That is the rule that allows any Senator to make a motion to bring any matter to a vote, so long as that Senator has all of his own party and one, at least one from the other. It is not a rule that can be used to stop the chairman from having a vote and from ending debate, which had clearly ended, and to stop a filibuster in the committee.

So all this whining and crying about that is a total misinterpretation of the very expressly worded rule. You would think they were mistreated. Not at all. They were treated very fairly. They just want to be able to slow down this process so President Bush's judges do not get hearings, they don't get mark-ups in committee, and when they come to the floor they are going to filibuster some of them—maybe all of them, for all I know.

By the way, their argument there is specious. It is wrong. It is irrelevant. It is a misinterpretation of the very rule they are citing. And it is unworthy because I happen to know that they checked with the parliamentarians who said I was right in what I did. And I was right in what I did.

With regard to their other argument attacking me for putting three circuit court of appeal nominees on one hearing, I put those three up in the spring of 2001. I was told by the Democrats they didn't want to go forward, that they would like me to give them a little more time. I agreed.

In the intervening time, Senator JEFFORDS decided to go independent and void with the Democrats, and the committee chairmanship changed. So I was unable to bring them up at that time. They will have been sitting here for almost 2 years. These are some of the top appointees in the history of the judiciary. I might add that John Roberts has been sitting there for 12 years, three nominations by two different Presidents. It just plain is not right.

I might also add that, having been attacked for holding what a number of Members on the other side of the aisle called an unprecedented hearing because the agenda included three circuit court nominees, you might be interested to hear I have subsequently found out that January 29 hearing was the 13th time since President Carter's administration that this committee has

considered more than two circuit nominees in a single hearing. The 13th time—not unprecedented, I would say. Hardly at all.

But that is not all I learned. One of those 13 hearings was chaired by Senator KENNEDY, who was then the committee chairman, on June 25, 1979. I was there. That included seven circuit judges.

What they throw out is: Well, they weren't controversial. I assure you that every Carter circuit judge was controversial. But there was a comity in the Senate then and there was also a 62-vote majority of the Democrats in the Senate versus 38 Republicans. But there was a comity, that people just didn't raise the kind of ridiculous arguments that are being raised today in the Judiciary Committee. I assure you, those were controversial nominees, but nobody complained about that because of the comity and also because of the overwhelming control of the Democrats. They knew they could get away with it, and they did. And nobody really raised a fuss about it.

They were all nominated by President Carter and all for the same circuit court of appeals. Talk about balance, which is what we are hearing right now from the other side.

Three weeks later, on July 18, 1979, Chairman KENNEDY held another hearing with four more Carter circuit nominees—all controversial—maybe not all but controversial ones again.

Then, on September 21 of that year, he held yet another multiple circuit hearing that included three circuit nominees. All three hearings occurred within a 4-month period. So it is all right for them to hold multiple circuit court nominee hearings, but it is an unprecedented thing for us. I agree, it probably is, because I do not know that we have ever been in charge long enough to do that before we held three.

But I know this, I held, I think, 11 or 13 two-nominee hearings when I was chairman, and Mr. Clinton, their President, was President. I certainly do not mean to single out my friend Senator KENNEDY, so I should also point out that when Senator BIDEN was chairman of this committee, he held two hearings that included three circuit nominees each; one on July 21, 1987, another on October 5, 1990. Senator Thurmond held five such hearings when he was chairman. And Senator Eastland, back in November 1977, who was chairman at that time, held a hearing for three circuit judges in one hearing. So much for the precedent.

Senator KENNEDY's advice and consent argument, while interesting, is wrong on the law and wrong on the facts. His argument ignores the basic underpinnings of the Senate's role in the advise and consent process.

In fact, I would submit that the other side's effort to demand Mr. Estrada's personal views on certain legal issues is itself an unconstitutional threat to the separation of powers inherent in our system of government and to the

Framer's desire to maintain an independent judiciary.

It has never been the case that the Senate is constitutionally entitled to an answer to any question it chooses to ask a nominee while exercising its advise and consent responsibility. The reason for this is clear: the Framers sought to ensure that the judicial branch would remain independent of the legislative branch.

According to Federalist Papers 78, judicial independence "is an excellent barrier to the despotism of the prince" and "in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."

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

The Framers' intent to insulate Federal judges from the political influence of the legislative branch also informed their decision to restrict the role of the Senate in the confirmation process.

The Senate's limited function is apparent from the Constitution's very text. To state the obvious, the President holds the power to nominate candidates to the Federal bench, while the Senate's role is restricted to providing "advice and consent."

The Constitution assigns the Senate a limited role in the selection of judicial nominees; it simply allows that body to ratify the President's choices, or decline to do so. Put simply, the President selects, then the Senate reviews and reacts.

As Alexander Hamilton explained in the Federalist No. 66:

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

This is not to say that the Senate must act as a "rubber stamp" to a President's choices for the judiciary. As has been the case throughout history, the Senate is entitled to detailed information about a nominee's background, career and qualifications for the bench. And Mr. Estrada has provided ample information to allow the Senate to determine his qualifications.

First, it bears repeating that the American Bar Association unanimously rates Mr. Estrada "Well qualified" for this position. The Democrats' "gold standard."

Second, Mr. Estrada testified for a full day in the Senate Judiciary Committee on a range of subjects, and then answered within followup questions for committee members. It should be mentioned that only two members of the

committee decided to pose such questions.

Third, Mr. Estrada has received broad bipartisan support from lawyers who know him best, including former Clinton Solicitor General Seth Waxman.

Vice President Gore's former Chief of Staff Ron Klain, former Clinton Justice Department officials Randolph Moss and Bob Litt, as well as 14 former colleagues of his in the Solicitor General's Office. All have written glowing recommendations of Mr. Estrada.

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

All of this information is more than adequate to address Mr. Estrada's qualifications. However, this body must, in order to maintain the proper constitutional balance, refrain from seeking just the sort of information Mr. Estrada's opponents now demand: his personal views on legal issues.

Many distinguished Democrats have themselves noted that seeking personal views simply is inappropriate:

Justice Thurgood Marshall made this point in 1967, when he refused to answer questions at his confirmation hearing about the Fifth Amendment:

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

Lloyd Cutler, President Clinton's former White House Counsel who also was at the other end of Pennsylvania Avenue at the same time as the Senator from New York, disagrees with efforts to discern a nominee's ideology during the confirmation process. According to Mr. Cutler:

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

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

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

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

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

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

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

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

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

During the course of this debate, there have been many serious misrepresentations of the record on Mr. Estrada. I want to address in some detail one of the more serious distortions, which concerns the answers that Mr. Estrada gave to questions that members of the Judiciary Committee asked him.

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

It is important to remember the circumstances under which this hearing took place. The hearing was held on September 26, 2001. It was chaired by my Democratic friend, the senior Senator from New York. It lasted all day. Both Democratic and Republican Senators asked scores of questions, which Mr. Estrada answered. And if any Senator was dissatisfied with Mr. Estrada's answers, every member of the committee had the opportunity to ask Mr. Estrada followup questions—although only two of my Democratic colleagues did.

Now, a number of the questions Mr. Estrada was asked sought, directly or indirectly, to pry from him a commitment on how he would rule in a particular case. Previous judicial nominees confirmed by the Senate have rightly declined to answer questions on that basis, just as Mr. Estrada did.

Let me give you some examples.

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

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

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

It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential justice must pass the litmus test of any single-issue interest group.

Likewise, Justice John Paul Stevens testified during his confirmation 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 thought through they might be given significance that they really did not merit.

Justice Ruth Baker Ginsburg also declined to answer certain questions, stating:

Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative Chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.

Like these previous nominees, all of whom the Senate confirmed, Mr. Estrada refused to violate the code of ethics for judicial nominees by declining to give answers that would appear to commit him on issues that he will be called upon to decide as a judge. But again and again, he provided answers, in direct response to questions, that make his judicial philosophy an open book.

Let me share some specific examples.

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

process that is intended to give the right answer. These are not extreme views. I don't think we could ask more from any judge.

When asked about the appropriate temperament of a judge, he responded that a judge should be impartial, open minded and unbiased, courteous yet firm, and one who will give ear to people that come into his courtroom. These are the qualities of Miguel Estrada. He testified that he is and would continue to be the type of person who listens with both ears and be fair to all litigants.

Mr. Estrada was asked a number of questions about his views and philosophy on following legal precedent. Let me highlight a bit of that exchange:

Question:

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

Answer:

Absolutely, Senator.

Question:

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

Answer:

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

Question:

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

Answer:

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

This exchange illustrates clearly Miguel Estrada's respect for the law and his willingness and ability to faithfully follow the law. He further testified, in response to other questions:

I will follow binding case law in every case. Even in accordance with the case law that is not binding, but seems instructive on the area, without any influence whatsoever from any personal view I may have about the subject matter.

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

When asked about the role of political ideology in the legal process, Mr. Estrada replied with a response that, in my view, was entirely appropriate and within the mainstream of what all Americans expect from their judiciary. He said:

[A]lthough 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 with an open mind and listen to the parties. And, to the best of his human capacity, to give judgment based solely on the arguments on the law. I think my basic idea of judging is to do it on the

basis of law and to put aside whatever view I might have on the subject to the maximum extent possible.

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

I recognize that the Supreme Court has said on numerous occasions in the area of privacy and elsewhere that there are unenumerated rights in the Constitution. And I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the Court. But I think the Court has been quite clear that there are unenumerated rights in the Constitution. In the main, the Court has recognized them as being inherent in the right of substantive due process and the Liberty Clause of the 14th Amendment.

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

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

At the same time, he recognized that, as a circuit court judge, he would be bound to follow the precedent established by Lopez and other Supreme Court cases.

So, it is clear from the record that Mr. Estrada did answer the questions put to him at his hearing. His judicial philosophy is an open book. But if my Democratic colleagues are still inclined to vote against him—as misguided as I believe that choice to be—they should do so. Vote for him or vote against him; do what your conscience dictates. Just votes. And stop the unfairness of this filibuster.

And let me make one more point. Even if my colleagues still believe, despite the facts and precedent, that Mr. Estrada should answer more questions, well they have their chance. In a February 27 letter, White House Counsel Al Gonzales made the following offer.

Mr. President, I ask unanimous consent that a copy of this 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, February 27, 2003.

DEAR SENATOR FRIST, SENATOR DASCHLE, SENATOR HATCH, and SENATOR LEAHY: I write in connection with the nomination of Miguel Estrada. Some Democrat Senators have indicated that they would like to know more about Mr. Estrada's record before a vote occurs. As I stated in my letter of February 12 to Senator Daschle and Senator Leahy, we believe that the Senate has had sufficient time and possesses sufficient information to vote on Miguel Estrada. More important, a majority of Senators have indicated that they possess sufficient information and would vote to confirm him.

But if some Senators believe they must have more information before they will end the filibuster of this nomination, we respectfully suggest that there are three different and important sources of information that have been and remain available and that would appropriately accommodate the request for additional information. We ask that you encourage interested Senators to avail themselves of these sources as soon as possible.

First, as I have written to you previously, individual Senators who wish to meet with Miguel Estrada may and should do so immediately. We continue to believe that such meetings could be very useful to Senators who wish to learn more about Mr. Estrada's record and character.

Second, Senators who have additional questions for Mr. Estrada should immediately pose such questions in writing to him. We propose that additional questions (in a reasonable number) be submitted in writing to Mr. Estrada by Friday, February 28. Mr. Estrada would endeavor to answer such questions in writing by Tuesday, March 4. He would answer the questions forthrightly, appropriately, and in a manner consistent with the traditional practice and obligations of judicial nominees, as he has before.

Third, Senators who wish to know more about Mr. Estrada's performance and approach when working in the United States Government—and, in particular, how that relates to his possible future performance as a Circuit Judge—should immediately ask in writing for the views of the Solicitors General, United States Attorney, and Judges for whom Mr. Estrada worked and ask them to respond by Tuesday, March 4. In particular, interested Senators could immediately send a joint letter to each of the following individuals for whom Mr. Estrada has worked in the United States Government: Judge Amalya Kears, Justice Anthony Kennedy, former United States Attorney Otto Obermaier, former Solicitor General Ken Starr, former Solicitor General Drew Days, former Solicitor General Walter Dellinger, and former Solicitor General Seth Waxman. In our judgment, these men and women could provide their views on Mr. Estrada's background and suitability to be a Circuit Judge by March 4 without sacrificing the integrity of the decisionmaking processes of the Judiciary, United States Attorney's office, and Solicitor General's office. And their views could assist Senators who seek more information about Mr. Estrada.

We believe that these sources of information, which have been available for some time, would readily accommodate the desire for additional information expressed by some Senators who have thus far supported the filibuster of a vote on this nominee. We ask that you encourage Senators who have objected to the scheduling of a vote to avail themselves of these sources of information. And we respectfully ask that the Senate vote up or down as soon as possible on Mr. Estrada's nomination, which has been pending for nearly two years.

Please do not hesitate to contact me with any questions.

Sincerely,

ALBERTO R. GONZALES,  
Counsel to the President.

Mr. HATCH. To my knowledge, no Senators have taken advantage of this offer, which makes me question how serious they are about the merits of Mr. Estrada's nomination, which brings me to another point. Mr. Estrada's hearing was held under Democratic control of the committee on September 26, 2002. If

there was any question about the quality of Mr. Estrada's testimony, they could have held another hearing, since they controlled the committee for another 3 months.

My colleague from New York has stated that, according to an article that appeared in the *Legal Times* in April 2002, D.C. Circuit Judge Laurence Silberman has advised President Bush's judicial nominees to "keep their mouths shut."

In fact, as the rest of the article explains, Judge Silberman simply explained that the rules of judicial ethics prohibit nominees from indicating how they would rule in a given case or on a given issue—or even appearing to indicate how they would rule.

As the same article reported, Judge Silberman stated:

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

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

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

JUDGE NOMINEES TOLD TO SPEAK VERY SOFTLY

ON A PANEL LAST WEEK, SILBERMAN OFFERED SAME ADVICE HE GAVE ANTONIN SCALIA

(By Jonathan Groner)

President George W. Bush's judicial nominees received some very specific confirmation advice last week: Keep your mouths shut.

The warning came from someone who has been a part of the process: Laurence Silberman, a senior judge on the U.S. Court of Appeals for the D.C. Circuit, told an audience of 150 at a Federalist Society luncheon that he served as an informal adviser to his then-D.C. Circuit colleague Antonin Scalia when Scalia was nominated to the Supreme Court in 1986.

"I was his counsel, and I counseled him to say nothing [at his confirmation hearings] concerning any matter that could be thought to bear on any cases coming before the Court," Silberman said.

Silberman said his advice led to Scalia's speedy confirmation by keeping the nominee out of trouble on Capitol Hill. He also explained that the advice was intended to be rather far-reaching.

Scalia called Silberman at one point, the latter recalled, and told him he was about to be questioned about his views about *Marbury v. Madison*, the nearly 200-year-old case that established the principle of judicial review.

"I told him that as a matter of principle, he shouldn't answer that question either," Silberman said. He explained that once a prospective judge discusses any case at all, the floodgates open and he would be forced to discuss other cases.

"It is unethical to answer such questions," Silberman said. "It can't help but have some effect on your decision-making process once you become a judge."

In contrast, Silberman said, "my friend Bob Bork" ventured into the legal thickets and suffered for it. Bork "thought he could turn the confirmation process into a Yale Law School classroom," Silberman explained.

The Supreme Court nomination of Robert Bork, also a D.C. Circuit judge, was defeated in 1987, partly because Bork expressed con-

troversial views in his writings and on the stand.

Silberman went on to say that for many nominees, landing a judgeship might not be the best result. Referring to a recent Supreme Court decision not to review a case brought by judges seeking pay raises, Silberman said that anyone who is not already wealthy "faces an immediate decline in his or her real income" if seated on the federal bench.

"The first prize is not to get a hearing," he noted. "The second prize is to get a hearing and not to be confirmed. The third prize is to get confirmed."

Other panelists at the Federalist Society's discussion on judicial independence were Sen. Joy Kyl (R-Ariz.), former presidential counsel Fred Fielding of Wiley Rein & Fielding, and moderator Stuart Taylor Jr. of *National Journal*.

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

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

Justice Thurgood Marshall made the same point in 1967, when he refused to answer questions about the Fifth Amendment during his confirmation hearing for the Supreme Court. He said:

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

Mr. President, my remarks make it very clear that they were controversial nominees and these arguments are not worth the time they have taken to make them. I think it is time to quit making the very same type arguments and start talking about the truth.

The truth is, we have a filibuster on our hands. One of the Democratic Senators even said on network TV 2 weeks ago they are not filibustering. Well, now we know they are. So let's let everybody in the country know that a double standard is being applied to Miguel Estrada.

EXPRESSING SUPPORT FOR THE PLEDGE OF ALLEGIANCE

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of S. Res. 71.

Mr. REID. Mr. President, I have no objection to the Senator, the chairman of the Judiciary Committee, using his 5 minutes any way he wants. I will reserve the 5 minutes for Senator LEAHY and the majority leader.

Mr. HATCH. Mr. President, I see the distinguished Senator from Alaska is in the Chamber.

The PRESIDING OFFICER. Does the Senator yield the floor?

Mr. HATCH. I reserve my time.

Mr. REID. Mr. President, this resolution, which resolves that the Senate strongly—

The PRESIDING OFFICER. Will the Senator permit the clerk to report the resolution.

The legislative clerk read as follows:

A resolution (S. Res. 71) expressing support for the Pledge of Allegiance.

The Senate proceeded to consider the resolution.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Mr. President, I support what I am confident the Senate's position will be, to strongly disapprove the decision of the panel of the Ninth Circuit in the *Newdow* case and the decision of the full court not to consider this case en banc.

The reason I wanted the floor for a few minutes this afternoon is there have been statements made today by the majority that the whole problem with the Pledge of Allegiance case has been caused by Democratic appointees. There could not be anything further from the truth.

The original Ninth Circuit panel opinion holding that the Pledge of Allegiance violated the first amendment was authored by a person who was appointed by a Republican President. Several Ninth Circuit judges, nominated by Republican Presidents, such as Judges Trott, Rymer, and Nelson, did not join in the dissent that criticized the original petition. Before the Ninth Circuit, they were holding a hearing to determine if they would rehear this. That would have been something that would support the position we are taking here on the Senate floor today.

Now, Mr. President, listen to this. The majority of the judges who we know voted to rehear the case en banc—and the only reason we are able to determine this is because of dissenting opinions filed, because the hearing was, in effect, off the record—were, in fact, Clinton appointees. Six out of nine dissenting judges were Clinton nominees.

So, Mr. President, simple arithmetic says there were 24 active sitting judges who were allowed to vote on this rehearing. If we had seven of the Republican nominees, there would have been a majority, and there would have been a rehearing. I repeat, if we had seven judges, who were appointed by Republicans, together with the six judges who were appointed by President Clinton, there would have been a rehearing.

So let's decide this matter, not on what we do not know but what the facts are. Six of the nine dissenting judges were Clinton nominees. These six judges, appointed by Clinton, either authored or joined dissenting opinions that advocated for a rehearing of the *Newdow* case by an en banc panel.

So, Mr. President, I disagree with what the Ninth Circuit did, but let's not blame it on judges appointed by Democratic Presidents. In fact, the reverse is true.

Mr. HATCH. Mr. President, I yield 2 minutes to the distinguished Senator from Alaska.