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, party because Bork expressed controversial views in this 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.

The PRESIDING OFFICER. The Senator from Alaska.

AMENDMENT NO. 249

Ms. MURKOWSKI. Mr. President, I have a technical amendment at the desk to S. Res. 71. I ask unanimous consent that it be in order at this time, and I send it to the desk.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The clerk will report.

The legislative clerk read as follows:

The Senator from Alaska (Ms. MURKOWSKI) proposes an amendment numbered 249:

On page 3, line 7 of the resolution strike ''again'' and insert ''either''

On page 3, line 9 of the resolution strike ''and, if unable to intervene,'' and insert ''or''

Ms. MURKOWSKI. Mr. President, I ask unanimous consent that the amendment be agreed to, and the motion to reconsider be laid upon the table.

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

The amendment (No. 249) was agreed to.

Ms. MURKOWSKI. Mr. President, I ask unanimous consent that the list of 43 cosponsors be added to my resolution.

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

Ms. MURKOWSKI. Mr. President, I think all of us can agree that last week's decision by the full Ninth Circuit refusing to review an earlier decision that bars children in public schools from voluntarily reciting the Pledge of Allegiance was fundamentally wrong.

Unfortunately, citizens in the States who are within the Ninth Circuit's jurisdiction have had to contend for decades with the court's dysfunctional jurisprudence. The pledge decision highlights how out of touch this court is from common sense and constitutional values. We who live within the court's jurisdiction know that the judges on this court too often ignore the law and the Constitution and, instead, seek to substitute their values for constitutional values.

I think Judge O'Scannlain, writing for six judges in dissent, said it best. He called the panel decision:

> wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not a ''religious act'' as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

The judge went on to say: ''If reciting the pledge is truly 'a religious act' in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto or the singing of the National Anthem,'' a verse of which says: ''And this our motto: In God is our trust.''

I have no doubt that the Supreme Court will hear the appeal of this case. And if one considers that the Ninth Circuit is the court with the highest reversal rate in the country, I expect the Court will summarily overturn this ill-conceived decision.

I urge all of my colleagues to support the resolution.

I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Ms. MURKOWSKI. Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I compliment the distinguished Senator from Alaska for her work in this regard and for getting so many cosponsors in such a short period of time.

A panel in the Ninth Circuit declared the Pledge of Allegiance to be unconstitutional. This is so, two of the three judges decided, because it contains the words ''under God.'' It did not matter to the judges that these two words endorse no particular religion or denote any specific being. Nor did it matter to the majority that no student is required to recite these words—much less any other portion of the Pledge of Allegiance. And worse yet, the majority completely failed to explain how its remarkable ruling could be squared with out government's long-established reference to God in other areas.

The United States Supreme Court begins each session with the phrase: ''God save the United States of America and this Honorable Court.'' ''God Bless America'' is routinely sung at many Government functions. And this body not only elects a Chaplin, but also has begun every session for 207 years with a prayer.

This activist ruling is—as so many of the Ninth Circuit's rulings have been—bad law. It is flatly inconsistent with a unanimous, decade-old ruling of the Seventh Circuit, where the court held that ''schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate.'' The Ninth Circuit disagreed, citing the supposed ''coercive effect'' on a child from being required to listen every day in school to the phrase ''one nation under God.'' And from this purported coercion, the Ninth Circuit went on to divine unconstitutionality. This is truly a remarkable feat of judicial activism.

This country was founded on religious freedom by founders, many of whom were deeply religious. For this reason, the first amendment does not prohibit religion, but an ''establishment'' of religion. In fact, it also plainly guarantees to each American the freedom of religion and the free exercise of religion. As every court prior the Ninth Circuit's decision has recognized, the mere reference to a higher being does not amount to a religious act or a formal religious observance.

The Ninth Circuit is the biggest and most ungainly federal circuit court of appeals. It is also a court that is seriously out of balance, with 17 of its 24 active judges appointed by Democratic Presidents. The Ninth Circuit is also the most reversed circuit court of appeals in the nation—by a wide margin. I would like to say that rulings like Newdow represent an anomaly, but I can't do that because there have been so many other recent rulings in the Ninth Circuit that were unanimously reversed by the Supreme Court.

I fully expect the Supreme Court to review this decision and, yet again, reverse the Ninth Circuit and set this ludicrous ruling right. While we wait for that to happen, however, millions of students in the Ninth Circuit will be prevented from pledging allegiance to our flag and our Nation. It is truly regrettable that they will be prevented from doing so at a time when our Nation is under attack by terrorists and when we particularly need everyone to come together and support our President and our troops all over the world.

It is about time we let the Ninth Circuit Court of Appeals know, as the most reversed court in the country, that they really ought to think twice before they do something like this. Just think about it. The Constitution does not prohibit religion; it prohibits the establishment of religion. In fact, it plainly guarantees to each American the freedom of religion and the free exercise of religion.

As every court prior to the Ninth Circuit decision has recognized, the mere reference to a Higher Being does not amount to a religious act or a formal religious observance. The Ninth Circuit is the largest and most ungainly Federal circuit court of appeals.

It is also a court that is seriously out of balance, with 17 out of its 24 active judges appointed by Democratic Presidents. Thirteen of those 17 were appointed by President Clinton. And the Ninth Circuit is also the most reversed circuit court of appeals in the Nation—by a wide margin.

The PRESIDING OFFICER. Time controlled by the Senator from Utah has expired.

Mr. HATCH. Let me just say, this is a very important resolution. It shows how important it is to have good judges on the bench rather than activists. This decision was made by activists.

The PRESIDING OFFICER. All time has expired.

The question is on agreeing to the resolution, S. Res. 71, as amended.

The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. FRIST. I announce that the Senator from New Mexico (Mr. DOMENICI), and the Senator from Kentucky (Mr. MCCONNELL) are necessarily absent.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS), the Senator from Florida (Mr. GRAHAM), the Senator from Massachusetts (Mr. KERRY), the Senator from

Louisiana (Ms. LANDRIEU) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. EDWARDS), the Senator from Massachusetts (Mr. KERRY) would each vote ''Aye''.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 94, nays 0, as follows:

[Rollcall Vote No. 39 Leg.]

YEAS—94

Akaka	DeWine	Lugar
Alexander	Dodd	McCain
Allard	Dole	Mikulski
Allen	Dorgan	Miller
Baucus	Durbin	Murkowski
Bayh	Ensign	Murray
Bennett	Enzi	Nelson (FL)
Biden	Feingold	Nelson (NE)
Bingaman	Feinstein	Nickles
Bond	Fitzgerald	Pryor
Boxer	Frist	Reed
Breaux	Graham (SC)	Reid
Brownback	Grassley	Roberts
Bunning	Gregg	Rockefeller
Burns	Hagel	Santorum
Byrd	Harkin	Sarbanes
Campbell	Hatch	Schumer
Cantwell	Hollings	Sessions
Carper	Hutchison	Shelby
Chafee	Inhofe	Smith
Chambliss	Inouye	Snowe
Clinton	Jeffords	Specter
Cochran	Johnson	Stabenow
Coleman	Kennedy	Stevens
Collins	Kohl	Sununu
Conrad	Kyl	Talent
Cornyn	Lautenberg	Thomas
Corzine	Leahy	Voinovich
Craig	Levin	Warner
Crapo	Lieberman	Wyden
Daschle	Lincoln	
Dayton	Lott	

NOT VOTING—6

Domenici	Graham (FL)	Landrieu
Edwards	Kerry	McConnell

The resolution (S. Res. 71), as amended, was agreed to, as follows:

S. RES. 71

Whereas a 3-judge panel of the Ninth Circuit Court of Appeals has ruled in *Newdow v. United States Congress* that the words ''under God'' in the Pledge of Allegiance violate the Establishment Clause when recited voluntarily by students in public schools;

Whereas the Ninth Circuit has voted not to have the full court, en banc, reconsider the decision of the panel in *Newdow*;

Whereas this country was founded on religious freedom by the Founding Fathers, many of whom were deeply religious;

Whereas the First Amendment to the Constitution embodies principles intended to guarantee freedom of religion both through the free exercise thereof and by prohibiting the Government establishing a religion;

Whereas the Pledge of Allegiance was written by Francis Bellamy, a Baptist minister, and first published in the September 8, 1892, issue of the Youth's Companion;

Whereas Congress, in 1954, added the words ''under God'' to the Pledge of Allegiance;

Whereas the Pledge of Allegiance has for almost 50 years included references to the United States flag, the country, to our country having been established as a union ''under God'' and to this country being dedicated to securing ''liberty and justice for all'';

Whereas Congress in 1954 believed it was acting constitutionally when it revised the Pledge of Allegiance;

Whereas the 107th Congress overwhelmingly passed a resolution disapproving of the panel decision of the Ninth Circuit in *Newdow*, and overwhelmingly passed legislation recodifying Federal law that establishes the Pledge of Allegiance in order to demonstrate Congress's opinion that voluntarily reciting the Pledge in public schools is constitutional;

Whereas the Senate believes that the Pledge of Allegiance, as revised in 1954 and as recodified in 2002, is a fully constitutional expression of patriotism;

Whereas the National Motto, patriotic songs, United States legal tender, and engravings on Federal buildings also refer to ''God''; and

Whereas in accordance with decisions of the United States Supreme Court, public school students are already protected from being compelled to recite the Pledge of Allegiance: Now, therefore, be it

Resolved, That the Senate—

(1) strongly disapproves of a decision by a panel of the Ninth Circuit in *Newdow*, and the decision of the full court not to reconsider this case en banc; and

(2) authorizes and instructs the Senate Legal Counsel again to seek to intervene in the case to defend the constitutionality of the words ''under God'' in the Pledge, and, if unable to intervene, to file an amicus curiae brief in support of the continuing constitutionality of the words ''under God'' in the Pledge.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I ask unanimous consent that I be recognized for 5 minutes to speak as in morning business.

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

Mr. DURBIN. I thank the Chair.

THE CITY OF CHICAGO AND SIS DALEY

Mr. DURBIN. Mr. President, today marks the 166th birthday of the city of Chicago, and it would have been the 96th birthday of a great Chicago legend, Eleanor ''Sis'' Daley. I would like to talk about each briefly.

On March 4, 1837, Chicago was incorporated as a city with a population of 4,170 by the Illinois State Legislature. Today, Chicago is one of our Nation's largest and most vibrant cities, with 2.9 million residents, and it remains a vital center of business, finance, education, the arts, sports, and tourism.

Chicago's early history is a great American story of a great city, from Father Marquette to du Sable, a Haitian immigrant, in the 17th and 18th centuries, to Fort Dearborn, Northwestern University, Abraham Lincoln's Presidential nomination, the Chicago fire, and the World's Columbian Exposition in the 19th century.

In fact, ''City of The Century,'' a book and a documentary, detailed this city's humble beginnings and chronicled the development of the ''city that works.'' Chicago's modern history is synonymous with one family, the Daley family. Mayor Richard J. Daley was elected a record six consecutive terms and served 21 years in city hall. His son, Richard M. Daley, was reelected Chicago mayor last week and will shortly begin his 15th year in office. A Daley has been mayor of Chicago for 34 of the past 50 years.

The family glue was well-known to be Eleanor ''Sis'' Daley, the current mayor's mother and the wife of the former mayor for over 40 years. Today would have marked Sis Daley's 96th birthday. She shared a birthday with the city of Chicago. Sadly, Sis Daley passed away in her Bridgeport home on February 16, leaving behind 6 surviving children—Mayor Richard M. Daley, former U.S. Commerce Department Secretary Bill Daley, Cook County Commissioner John Daley, and Michael, Patricia, and Mary Carol; in addition, 20 grandchildren, including John Daley, a member of my Governmental Affairs Committee staff; a number of great grandchildren, and many admirers.

Much has been said and written about Sis Daley in recent weeks, a devoted mother, a loyal fan of the Chicago White Sox. She was really devoted to her family more than anything. She raised all seven kids in what was originally a bungalow in Bridgeport, a section of Chicago which was built by her and her husband in 1939. During her husband's first election night victory in 1955, the mayor-elect and his wife Sis abruptly ended the celebration party, packed up the kids, and headed home at 10:15 and said, it is bedtime at the Daley home.

Sis Daley was not afraid to speak her mind when it was necessary. When an unflattering book about her husband appeared in a local grocery store in 1971, she was offended and she asked the store manager to remove it, after she turned around the book so people could not read the cover. He and the entire chain removed it, but not before it became a national story, bringing a lot more money to the author, but Sis Daley had stood up for her family, as she did every single day.

In 1972, she very publicly appealed for the restoration of the main Chicago library building, an 83-year-old structure targeted for demolition by the mayor, her husband. The building was saved, and today it serves as the Chicago Cultural Center. She greeted queens and presidents, politicians and stars, never forgetting where she came from.

The last time I saw her was with her son Bill Daley, at a little gathering for Hillary Clinton in the city of Chicago. It was great to see that warm Irish smile on her face. In turn, Eleanor ''Sis'' Daley will never be forgotten in Chicago and in the hearts and minds of her family and those who knew her. It is fitting that the city of Chicago shares its birthday with Sis Daley.

I yield the floor.

The PRESIDING OFFICER (Mrs. DOLE). The Senator from Kansas.

Mr. BROWNBACK. Madam President, I ask unanimous consent to speak as in morning business for up to 10 minutes.

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