

Dinh, Viet

From: Dinh, Viet
Sent: Monday, May 12, 2003 2:40 PM
To: 'Diana_L._Schacht@opd.eop.gov'; 'Kavanaugh, Brett';
'Jennifer_G._Newstead@who.eop.gov'; 'Daryl_L._Joseff (b) (6) [REDACTED]';
'wgrubbs@who.eop.gov'
Cc: Wilson, Karen L; Benczkowski, Brian A; Charnes, Adam; Kesselman, Marc (OLP)
Subject: Class Action Testimony

Y'all,

Just got word that House Judiciary wants me to testify on class action reform on Thursday. (b) (5) [REDACTED]

[REDACTED] Just wanted to give you a heads up and ask for you help in clearing the testimony (going to OMB tomorrow morning) by Wednesday morning. thanks,

viet

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Tuesday, May 6, 2003 12:44 PM
To: Charnes, Adam; Benczkowski, Brian A; Brown, Jamie E (OLA); Dinh, Viet
Subject: Judge Gonzales letter to Sen. Schumer
Attachments: judges schumer letter 5 6 03 #2.pdf

(See attached file: judges schumer letter 5 6 03 #2.pdf)

THE WHITE HOUSE

WASHINGTON

May 6, 2003

Dear Senator Schumer:

On behalf of President Bush, I write in response to your letter of April 30.

You propose that the President and Senate leader of the opposite party select in equal numbers members of citizen judicial nominating commissions in each State and circuit who would then select one nominee for each judicial vacancy. The President then would be required to nominate the individual selected by the commission and the Senate required to confirm that individual, at least absent “evidence” that the candidate is “unfit for judicial service.” You propose this as a permanent change to the constitutional scheme for appointment of federal judges.

We appreciate and share your stated goal of repairing the “broken” judicial confirmation process and the “vicious cycle” of “delayed” Senate nominees. But we respectfully disagree with your proposal as inconsistent with the Constitution, with the history and traditions of the Nation’s federal judicial appointments process, and with the soundest approach for appointment of highly qualified federal judges, as the Founders determined. Rather, as President Bush and many Senators of both parties have stated in the past, the solution to the broken judicial confirmation process is for the Senate to exercise its constitutional responsibility to vote up or down on judicial nominees within a reasonable time after nomination, no matter who is President or which party controls the Senate.

I. The Constitution, the Current Problem, and the Solution

Article II of the Constitution provides: The President “shall nominate, and by with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States” During the first Congress and throughout most of this Nation’s history, the Senate has both recognized and exercised its constitutional responsibility under Article II to hold majority, up-or-down votes on a President’s nominees within a reasonable time after nomination. The Framers intended that the Senate vote on nominations would prevent Presidential appointment of “unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.” *Federalist* 76.

Your proposal would effectively transfer the nomination power of the President and the confirmation power of the Senate to a group of unelected and unaccountable private citizens. As the Supreme Court has explained, however, the Appointments Clause is “more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. This disposition was also designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to

interest-group pressure and personal favoritism than would a collective body.” *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citations omitted). Importantly, as the Supreme Court has also explained, the Appointments Clause not only guards against encroachment “but also preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.” *Freytag v. CIR*, 501 U.S. 868, 878 (1991). Therefore, “neither Congress nor the Executive can agree to waive this structural protection” afforded by the Appointments Clause. *Id.* at 880. These principles and precedents amply demonstrate the constitutional and structural problems with any proposal to transfer the constitutional responsibilities of the President and the Senate to a group of unelected and unaccountable private citizens.

That said, we very much appreciate your recognition that the Senate’s judicial confirmation process is “broken.” The precise problem, in our judgment, is that the Senate has too often failed in recent years to hold votes on judicial nominees within a reasonable time after nomination (often because a *minority* of Senators has used procedural tactics to prevent the Senate from voting and expressing its majority will). Many appeals court nominees have waited years for votes; many others have never received votes. Today, for example, although the Senate never before has denied a vote to an appeals court nominee on account of a filibuster, a minority of Senators are engaged in unprecedented simultaneous filibusters to prevent up or down votes on *two* superb nominees, Priscilla Owen and Miguel Estrada, who were nominated two years ago and who have the support of a majority of the Senate.

The problem of the Senate not holding votes on certain judicial nominees is a relatively recent development, albeit not new to this Presidency. In the Administrations of both President George H.W. Bush in the 102nd Congress and President Clinton in the 106th Congress, for example, too many appeals court nominees never received up-or-down votes. As President Bush has explained, however, the problem has persisted and significantly worsened in the 107th and 108th Congresses during this President’s tenure.

President Bush’s commitment to solving this problem also is not new. In June 2000, during the Presidential campaign, then-Governor Bush emphasized that the Senate should hold up-or-down votes on all nominees within a reasonable time after nomination (60 days). Last fall, after two additional years of Senate delays that were causing a judicial vacancy crisis (an “emergency situation,” in the words of the American Bar Association), the President proposed a comprehensive three-Branch plan to solve the problem. President Bush stated that this three-Branch plan should apply now and in the future, no matter who is President or which party controls the Senate. In particular, he proposed that judges provide one-year advance notice of retirement where possible; in March 2003, the Judicial Conference adopted the President’s recommendation. The President proposed that Presidents nominate judges within 180 days of learning of a vacancy; the President is complying with this part of the plan and already has submitted nominations, for example, for the 15 new judgeships created on November 2, 2002. The President also proposed that the Senate vote up or down on judicial nominees within 180 days of receiving a nomination, a generous period of time for all Senators to evaluate nominees and to have their voices heard and their votes counted.

In the past, you and Senators of both parties have publicly agreed with the need for timely Senate votes on judicial nominees. On March 7, 2000, for example, you stated: “The basic problem is it takes so long for us to debate those qualifications. It is an example of Government not fulfilling its constitutional mandate because the President nominates, and *we are charged with voting on the nominees*. . . . I also plead with my colleagues to move judges with alacrity *vote them up or down*. But this delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of very sincere people who have put themselves forward to be judges and then they hang out there in limbo.”

In the 2000 campaign, moreover, several Democrat Senators such as Senator Leahy and Senator Harkin publicly and expressly agreed with then-Governor Bush’s proposal for timely votes on nominees. In addition, Senator Specter in 2002, Senator Leahy in 1998, and Senator Bob Graham in 1991 all introduced Senate proposals to ensure timely up-or-down votes on judicial nominees. The Chief Justice, speaking on behalf of the federal Judiciary, also has expressly asked the Senate to ensure prompt up-or-down votes on nominees. And the American Bar Association, for its part, adopted a resolution last summer asking the Senate to hold prompt votes on judicial nominations, stating: “Vote them up or down, but don’t hang them out to dry.”

In seeking to fix the broken Senate confirmation process, we respectfully ask that you and other Senators consider these past statements, a sample of which are listed below, advocating timely up-or-down Senate votes on judicial nominees and ensure such votes no matter who is President or which party controls the Senate:

- *Senator Leahy* on October 3, 2000, stated: “Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don’t leave them in limbo. *Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no not vote maybe.* When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting ‘maybe,’ but we are doing a terrible disservice to the man or woman to whom we do this.”
- *Senator Leahy* on June 18, 1998, stated: “I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. *If we don’t like somebody the President nominates, vote him or her down.* But don’t hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.”
- *Senator Daschle* on October 5, 1999, stated: “As Chief Justice Rehnquist has recognized, ‘The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote

him down.’ *An up or down vote, that is all we ask for Berzon and Paez. And after years of waiting, they deserve at least that much. . . . I find it simply baffling that a Senator would vote against even voting on a judicial nomination.*”

- *Senator Harkin* on September 14, 2000, stated: “I’ll just close by saying that *Governor Bush had the right idea*. He said the candidate should get an up or down vote within 60 days of their nomination.”
- *Senator Harkin* on October 6, 2000, stated that then-Governor Bush’s proposal for an up-or-down vote within 60 days of nomination was a “great idea.”
- *Senator Biden* on March 19, 1997, stated: “I respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor *and have a vote on the floor.*”
- *Senator Bob Graham* on April 24, 1991, introduced a bill that would require the Judiciary Committee to report a nomination within 90 days of nomination and *would require an up-or-down vote on the floor within 120 days of nomination*. Senator Graham stated: “I consider it a judicial emergency when a judgeship is vacant for one day more than necessary.”
- *Senator Kennedy* on February 3, 1998, stated: “We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don’t like them, vote against them. *But give them a vote.*”
- On September 21, 1999, *Senator Kennedy* stated: “It is true that some Senators have voiced concerns about these nominations. But that should not prevent a roll call vote which gives every Senator the opportunity to vote ‘yes’ or ‘no.’ . . . *These delays can only be described as an abdication of the Senate’s constitutional responsibility to work with the President and ensure the integrity of our federal courts.*”
- *Senator Durbin* on September 28, 1998, stated: “I am not suggesting that we would give our consent to all of these nominees. I am basically saying that this process should come to a close. *The Senate should vote.*”
- *Senator Feinstein* on September 16, 1999, stated: “*A nominee is entitled to a vote. Vote them up; vote them down.*”
- *Senator Feinstein* on October 4, 1999, stated: “Our institutional integrity requires an up-or-down vote.”
- *Senator Harry Reid* on June 9, 2001, stated: “I think we should have up-or-down votes in the committee and on the floor.”

- *Senator Feingold* on March 8, 2000, stated: “All Judge Paez has ever asked for was this opportunity: an up or down vote on his confirmation. Yet for years, the Senate has denied him that simple courtesy.”
- *Senator Kohl* on September 21, 1999, stated: “These nominees, who have to put their lives on hold waiting for us to act, *deserve an up or down vote.*”
 - *Senator Kohl* on May 15, 1997, stated: “[L]et’s breathe life back into the confirmation process. Let’s vote on the nominees who already have been approved by the Judiciary Committee, and let’s set a timetable for future hearings on pending judges. *Let’s fulfill our constitutional responsibilities.*”
- *Senator Lincoln* on September 14, 2000, stated: “If we want people to respect their government again, then government must act respectably. It’s my hope that we’ll take the necessary steps to give these men and these women especially *the up or down vote that they deserve.*”
- *Senator Boxer* on January 28, 1998, stated: “I think, whether the delays are on the Republican side or the Democratic side, let these names come up, *let us have debate, let us vote.*”
 - *Senator Boxer* on May 14, 1997, stated: “According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. *It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.*”
- *Senator Sarbanes* on December 15, 1997, stated: “This politicization . . . has been extended to include the practice of denying nominees an up or down vote on the Senate floor or even in the Judiciary Committee. *If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served.*”
 - *Senator Sarbanes* on March 19, 1997, stated: “It is not whether you let the President have his nominees confirmed. *You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today.*”
- *Senator Levin* on September 14, 2000, stated: “The truth of the matter is that the leadership of the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts.”

- *Senator Levin* on May 24, 2000, stated: “These Michigan candidates . . . deserve to have *an up or down vote* on their nominations. . . . The Senate slowdown has a serious impact on the administration of justice.”

II. Additional Points Regarding Your Proposal

I also want to make three other points regarding your proposal.

First, contrary to an implicit suggestion in your proposal, the members of these citizen committees themselves will bring their own views about the best qualities for judicial candidates, and their own preferences and visions and ideologies. But there is an important difference between these private citizens, on the one hand, and the President and 100 Senators, on the other. The American people did not elect these citizens to exercise this critical constitutional responsibility and cannot hold them accountable for their exercise of it.

Moreover, the Framers of the Constitution expressly considered and rejected a committee nomination process, concluding that such a process was unlikely to focus on the “intrinsic merit of the candidate.” *Federalist* 76. As Hamilton explained, “in every exercise of the power of appointing to offices by an assembly of men we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly.” *Id.* It will “rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.” *Id.*

By contrast, “[t]he sole and undivided responsibility of one man” the President “will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.” *Id.* The Framers wanted the President alone to exercise the power of nomination, moreover, because the “blame of a bad nomination would fall upon the President singly and absolutely.” *Federalist* 77. In a committee nomination process, by contrast, “all idea of responsibility is lost.” *Id.*

For these reasons, the Framers concluded that the President alone was to nominate and the Senate as a body was to vote up or down on the President’s nominations.

Second, you explain that your proposal would ensure the merit of federal judges. In your letter to President Bush of March 16, 2001, however, you and Senator Leahy expressed the view that the American Bar Association ratings provide “unique, unbiased and essential information” about judicial candidates, and provide an “independent, apolitical” evaluation of their qualifications. You referred to the ABA rating as the “gold standard” for evaluating nominees. All 42 of the President’s appeals court nominees rated so far have received “well-qualified” or “qualified” ABA ratings. By the standard outlined in your letter of March 16, 2001, all of these appeals court nominees warrant your support.

Third, you explain that your proposal would avoid “extremist” judges. The Framers intended that the President would nominate judges and the Senate as a body would vote up-or-down on the nominations to express the majority will of the Senate. The constitutional scheme of Presidential appointment and majority vote in the Senate ensures that the nominees are not unfit. And your proposal would not preclude judges you might label as “extremist” from emerging from the citizen committees. Indeed, even more troubling is the fact that your proposal would not prevent judges whom both the President *and* a majority of the Senate might view as “extremist” from emerging from the citizen committees, yet the President and Senate would be essentially powerless to prevent the appointment.

One final point warrants mention. We assume that you include Miguel Estrada and Priscilla Owen in your description of “extremists” given the extraordinary ongoing filibusters of their nominations. But Miguel Estrada and Priscilla Owen represent the mainstream of American law and American values, as indicated by the fact that the President nominated them and a majority of the Senate supports them. Moreover, Miguel Estrada is supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and by a bipartisan group of 14 former colleagues in the Solicitor General’s office, among many others. He worked for four years in the Clinton Administration. He was unanimously rated “well-qualified” by the American Bar Association. Priscilla Owen is supported by three former Democrat Justices on the Texas Supreme Court with whom she served and 15 past Presidents of the State Bar of Texas. She also received a *unanimous* “well-qualified” rating from the American Bar Association.

These two nominees are the mainstream. It bears note, moreover, that you and other Democrat Senators have supported nominees such as Jay Bybee and Michael McConnell who (unlike Mr. Estrada and Justice Owen) have taken strong public positions contrary to yours on significant issues of concern to you. We believe that an unfair double standard is being applied to both Miguel Estrada and Priscilla Owen.

* * *

We appreciate your desire to fix the broken judicial confirmation process. The President believes that the fix is for the Senate to exercise its constitutional responsibility and ensure that every judicial nominee receives an up-or-down Senate vote within a reasonable time after nomination, no matter who is President or which party controls the Senate.

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable Charles Schumer
United States Senate
Washington, DC 20510

Copy: The Honorable Bill Frist
The Honorable Thomas Daschle
The Honorable Orrin Hatch
The Honorable Patrick Leahy
The Honorable John Cornyn
The Honorable Russ Feingold

Sales, Nathan

From: Sales, Nathan
Sent: Wednesday, May 7, 2003 1:20 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Hall, William; Benedi, Lizette D; Brown, Jamie E (OLA); 'Brett Kavanaugh (E-mail)'; 'Kyle Sampson (E-mail)'; 'Theodore_W._Ulliyot@who.eop.gov'; 'bberenson@sidley.com'
Cc: 'Jeffrey Sutton (E-mail)'
Subject: RE: Important Sutton meeting

Slight change in plans. Let's meet at 6:00. That way, we'll be able to include Viet and Brian, who have to catch a flight to London. (b) (6) Shall we say Signatures at 801 Pennsylvania?

-----Original Message-----

From: Sales, Nathan
Sent: Tuesday, May 06, 2003 10:01 AM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Hall, William; Benedi, Lizette D; Brown, Jamie E (OLA); Brett Kavanaugh (E-mail); Kyle Sampson (E-mail)
Cc: Jeffrey Sutton (E-mail)
Subject: Important Sutton meeting

I just spoke with Jeff--make that Judge--Sutton, and he tells me he's going to be in town tomorrow for new judges school. He suggests that we meet tomorrow evening (b) (6) Is everyone free around seven?

Best,
Nathan

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, May 1, 2003 2:45 PM
To: 'Kavanaugh, Brett'; 'David_G._Leitch@who.eop.gov'
Subject: FW: Judiciary Markup

-----Original Message-----

From: Scottfinan, Nancy
Sent: Thursday, May 01, 2003 2:43 PM
To: Dinh, Viet; Benczkowski, Brian A; Remington, Kristi L; Joy, Sheila; 'JGRoberts@HHLaw.com'
Cc: 'wendy j. grubbs@who.eop.gov'; Brown, Jamie E (OLA)
Subject: RE: Judiciary Markup

Prado vote 97-0

There is a UC for a time agreement for 4 hours of debate on Cook on Monday, May 5, with a vote set for 4:45 pm. One of the hours of debate is reserved for Senator Kennedy.

They have been talking about a UC on the Roberts nomination--6 hours of debate to begin next Thursday with a vote to occur before the end of the week; they are still working on that agreement.

-----Original Message-----

From: Scottfinan, Nancy
Sent: Thursday, May 01, 2003 12:21 PM
To: Dinh, Viet; Benczkowski, Brian A; Remington, Kristi L; Joy, Sheila; Peacock, Claudia; Gambatesa, Donald; Murphy, Paul B; Higbee, David
Cc: 'wendy j. grubbs@who.eop.gov'
Subject: Judiciary Markup

Kuhl and Roberts held over; Roberts to be voted on next week with a floor vote within a week after that.

Minaldi out by voice vote

U.S. Marshal Torres out by voice vote

Holmes voted out without recommendation 10-9 after lengthy debate

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, May 1, 2003 9:26 AM
To: 'David_G._Leitch@who.eop.gov'; 'Kavanaugh, Brett'
Subject: FW: Owen Cloture vote

-----Original Message-----

From: Scottfinan, Nancy
Sent: Wednesday, April 30, 2003 7:12 PM
To: Dinh, Viet; Benczkowski, Brian A; Remington, Kristi L; Joy, Sheila; Goodling, Monica; Cutchens, Heather
Cc: Brown, Jamie E (OLA); 'wendy j. grubbs@who.eop.gov'
Subject: Owen Cloture vote

set for 10:15 am tomorrow. If they do not get cloture, they will go to the Prado nomination. There is no time agreement but hope to have one. They tried to get an agreement to do Prado tomorrow, Cook on Monday and Roberts as soon as he comes out of Committee; the Ds objected.

Dinh, Viet

From: Dinh, Viet
Sent: Monday, March 24, 2003 6:21 PM
To: Ciongoli, Adam; 'Brett_M._Kavanaugh@who.eop.gov'; Coughlin, Robert; 'Noel_Francisco@who.eop.gov'; (b) (6)
Cc: Bryant, Dan; Garre, Gregory G; Philbin, Patrick; 'H._Christopher_Bartolomucci@who.eop.gov'; 'Brian.Jones@ed.gov'; 'Theodore_W._Ulliot@who.eop.gov'
Subject: Help

Guys,

OLP has several positions at all levels for which we are starting to interview people. Can you refer folks directly to me? You know the criteria--smart, aggressive solid citizens. Thanks.

Viet

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, March 18, 2003 4:13 PM
To: Brown, Jamie E (OLA); Benczkowski, Brian A; 'Kavanaugh, Brett'
Subject: RE: Your letter

a-ok with me. nicely done.

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Tuesday, March 18, 2003 3:08 PM
To: Dinh, Viet; Benczkowski, Brian A; 'Kavanaugh, Brett'
Subject: RE: Your letter

OK, if it weren't (b) (5) That being said and after taking advice from all of the various quarters, how is this?

(b) (5)

-----Original Message-----

From: Dinh, Viet
Sent: Tuesday, March 18, 2003 2:32 PM
To: Benczkowski, Brian A; Brown, Jamie E (OLA); Clement, Paul D; Olson, Theodore B; 'David_G_Leitch@who.eop.gov'; 'Kavanaugh, Brett'
Subject: RE: Your letter

Jamie,

Independent of my own recollection, I have double checked with Paul and Ted: (b) (5)
(b) (5) The reason we are certain is that some time after Leahy sent his request, there was a suggestion from some quarter that the SG's office collate and review the materials--(b) (5)

(b) (5)

(b) (5)

Viet

-----Original Message-----

From: Benczkowski, Brian A
Sent: Tuesday, March 18, 2003 2:24 PM
To: Dinh, Viet
Subject: FW: Your letter

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Tuesday, March 18, 2003 2:10 PM
To: Benczkowski, Brian A
Subject: FW: Your letter

-----Original Message-----

From: Cohen, Bruce (Judiciary) [mailto:Bruce_Cohen@Judiciary.senate.gov]
Sent: Tuesday, March 18, 2003 2:07 PM
To: Brown, Jamie E (OLA)
Subject: Your letter

Can you double check on the representations you made and correct them if not well informed. It took weeks for DOJ to respond to Senator Leahy's letter and, quite frankly, we would all be surprised if you all had not reviewed the documents. bac

Dinh, Viet

From: Dinh, Viet
Sent: Monday, March 17, 2003 6:13 PM
To: Brown, Jamie E (OLA); 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Benczkowski, Brian A; 'Wendy_J._Grubbs@who.eop.gov'
Subject: RE: Estrada letter re: SG memos

Jamie has the pen.

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Monday, March 17, 2003 5:09 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Dinh, Viet
Cc: Benczkowski, Brian A; 'Wendy_J._Grubbs@who.eop.gov'
Subject: RE: Estrada letter re: SG memos

One more - Brett and I just spoke a (b) (5)

(b) (5)

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, March 17, 2003 5:01 PM
To: Dinh, Viet
Cc: Benczkowski, Brian A; Brown, Jamie E (OLA);
Wendy_J._Grubbs@who.eop.gov
Subject: RE: Estrada letter re: SG memos

wait, don't sign just yet. (b) (5)

(b) (5)

(b) (5)

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image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
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Record Type: Record

To: "Brown, Jamie E (OLA)" <Jamie.E.Brown@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Benczkowski, Brian A" <Brian.A.Benczkowski@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc: Wendy J. Grubbs/WHO/EOP@EOP
Subject: RE: Estrada letter re: SG memos

here is the final, which incorporates comments and some edits from me. Take it away, Mikey.

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Monday, March 17, 2003 4:37 PM
To: Benczkowski, Brian A; 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Dinh, Viet; 'Wendy_J._Grubbs@who.eop.gov'
Subject: RE: Estrada letter re: SG memos

Consider me Mikey of Life cereal fame - I'll sign anything.

-----Original Message-----

From: Benczkowski, Brian A
Sent: Monday, March 17, 2003 4:21 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Brown, Jamie E (OLA); Dinh, Viet; 'Wendy_J._Grubbs@who.eop.gov'
Subject: RE: Estrada letter re: SG memos

Will make those edits and recirculate. Other comments? Jamie- will you sign if I edit?

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, March 17, 2003 4:18 PM
To: Benczkowski, Brian A
Cc: Brown, Jamie E (OLA); Dinh, Viet; Wendy_J._Grubbs@who.eop.gov
Subject: Re: Estrada letter re: SG memos

I am in favor. (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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image moved "Benczkowski, Brian A"
to file: <Brian.A.Benczkowski@usdoj.gov>
pic04424.pcx) 03/17/2003 03:32:44 PM

Record Type: Record

To: "Brown, Jamie E (OLA)" <Jamie.E.Brown@usdoj.gov>, Brett M. Kavanaugh/WHO/EOP@EOP, Wendy J. Grubbs/WHO/EOP@EOP

cc: "Dinh, Viet" <Viet.Dinh@usdoj.gov>
Subject: Estrada letter re: SG memos

In keeping with the theme of sending love notes to the Senate re: Miguel, attached please find for your consideration a letter which corrects the record regarding whether the Administration has reviewed the content of Miguel's SG memos. (b) (5)
Please let me know your thoughts.

BAB

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, March 4, 2003 1:46 PM
To: 'wgrubbs@who.eop.gov'; 'Kavanaugh, Brett'
Subject: FW: Harkin press conference re Sutton
Importance: High

FYI, Wendy and Brett

-----Original Message-----

From: Charnes, Adam
Sent: Tuesday, March 04, 2003 11:53 AM
To: Brown, Jamie E (OLA)
Cc: Dinh, Viet; Sales, Nathan; Benczkowski, Brian A
Subject: Harkin press conference re Sutton
Importance: High

Jamie, when you get back from the hill, please call Nathan asap. Harkin is having an event tomorrow against Jeff, which will feature individuals "impacted by" Jeff -- including, e.g., Patricia Garrett of the Garrett case, etc. We have some ideas about what to do but need your help.

Also, we have been trying to (b) (5) [REDACTED] [REDACTED]
[REDACTED] [REDACTED] please let me know.

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, February 26, 2003 9:49 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Charnes, Adam; Benczkowski, Brian A
Subject: RE: FW: Just saw the letter; they

(b) (5)

thanks

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Tuesday, February 25, 2003 9:07 PM
To: Dinh, Viet
Cc: Charnes, Adam; Benczkowski, Brian A
Subject: Re: FW: Just saw the letter; they

this was sent shortly after receiving their letter (See attached file: 2 25 03 Response to Senators.pdf)

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 02/25/2003 01:55:56 PM
pic03816.pcx)

Record Type: Record

To: David G. Leitch/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP

cc: "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested), "Benczkowski, Brian A"
<Brian.A.Benczkowski@usdoj.gov> (Receipt Notification Requested) (IPM
Return Requested)

Subject: FW: Just saw the letter; they

on this

(b) (5)

(b) (5)

b) (5)

(b) (5)

-----Original Message-----

From: Scottfinan, Nancy

Sent: Tuesday, February 25, 2003 1:47 PM

To: Dinh, Viet; Brown, Jamie E (OLA)

Subject: RE: Just saw the letter; they

being faxed right now

response to our reaching out to Sen. Kennedy when he said he wanted to meet with Cook and Roberts

-----Original Message-----

From: Dinh, Viet

Sent: Tuesday, February 25, 2003 1:35 PM

To: Scottfinan, Nancy; Brown, Jamie E (OLA)

Subject: RE: Just saw the letter; they

what letter??? please fax to 514-2424. thanks so much

-----Original Message-----

From: Scottfinan, Nancy

Sent: Tuesday, February 25, 2003 1:29 PM

To: Dinh, Viet; Brown, Jamie E (OLA)

Subject: Just saw the letter; they

Importance: High

are turning the request for a courtesy visit into another hearing!!!!

THE WHITE HOUSE

WASHINGTON

February 25, 2003

Dear Senators:

I write in response to your letter of today in which you effectively request a second hearing for John Roberts and Deborah Cook. The Committee and Chairman Hatch will determine, of course, the appropriate scheduling of hearings and mark-ups for judicial nominees.

As to Mr. Roberts and Justice Cook, we respectfully do not agree that a second hearing is necessary or appropriate. At their hearing, Chairman Hatch permitted Committee members as much time as they wanted (well into the evening) to ask questions. Senators also had the opportunity to submit follow-up questions. Several Senators did so, and the nominees answered promptly. (I also note that your letter of today does not identify any particular issues or cases or matters that require further inquiry or, more important, why such questions were not asked at the hearing or in written follow-up questions.)

We also believe there is no legitimate justification for the extraordinary delays that already have occurred with respect to these two nominees, who were nominated on May 9, 2001. And there is no justification for further delay. On several occasions during the 2000 campaign, Senator Leahy expressly agreed with then-Governor Bush that every judicial nominee should receive an up-or-down Senate floor vote within 60 days of nomination.

Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo. *Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no not vote maybe.* When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting 'maybe,' but we are doing a terrible disservice to the man or woman to whom we do this.

October 3, 2000.

Both of these superb nominees have been pending nearly two years since their nominations on May 9, 2001. Indeed, John Roberts was first nominated to the D.C. Circuit more than 11 years ago. The Senate has had more than enough time to assess their records, qualifications, and integrity. We respectfully suggest that it is time to hold a vote in Committee and then an up-or-down vote on the floor.

We always offer the opportunity for Senators to meet individually with nominees, and that opportunity has existed for more than 21 months. Given the time that has passed since nomination, however, we do not believe that any additional meetings must or should delay Committee mark-up or Senate floor votes on these two outstanding nominees.

Thank you for your letter. I respectfully urge you to support Mr. Roberts and Justice Cook.

Sincerely,

/s/

Alberto R. Gonzales

The Honorable Patrick J. Leahy
The Honorable Edward M. Kennedy
The Honorable Joseph R. Biden, Jr.
The Honorable Herbert Kohl
The Honorable Dianne Feinstein
The Honorable Russell D. Feingold
The Honorable Charles E. Schumer
The Honorable Richard J. Durbin
The Honorable John Edwards
United States Senate
Washington, D.C. 20510

cc: The Honorable Orrin G. Hatch

Benczkowski, Brian A

From: Benczkowski, Brian A
Sent: Sunday, February 23, 2003 2:41 PM
To: Brown, Jamie E (OLA); 'wgrubbs@who.eop.gov'; 'Kavanaugh, Brett'
Cc: Dinh, Viet
Subject: RE: Capitol Hill Meeting

All-

Can you let me know by early this coming week whether you have any objections to Viet speaking on judicial nominations to the Capitol Hill chapter of the Federalist Society.

Thanks.

BAB

-----Original Message-----

From: Dinh, Viet
Sent: Friday, February 21, 2003 2:32 PM
To: (b)(6) Leonard Leo email
Cc: Brown, Jamie E (OLA); 'wgrubbs@who.eop.gov'; Benczkowski, Brian A; 'Kavanaugh, Brett'
Subject: RE: Capitol Hill Meeting

Leonard,

Thank you and Congrats to you on the new chapter. I would love to oblige, but because it is on the Hill, I want input from DoJ and WH leg shops before I commit. Looks like I am pretty open in March, though.

Best,

viet

-----Original Message-----

From: (b)(6) Leonard Leo email
Sent: Friday, February 21, 2003 2:01 PM
To: Dinh, Viet
Subject: Capitol Hill Meeting

Viet-

I hope this email finds you well. (b) (6)
both!

I am writing in the hopes that you'd be willing to do a brief talk on the Hill regarding the judicial confirmations crisis, probably for some time in March. As you may have heard, the Federalist Society now has a Capitol Hill chapter that has received status as a CSO (Congressional Staff Organization). This would be the group's third meeting (Congressman John Shadegg and Boyden were the first two).

You would expect a lunch crowd of 50-70 staff and members. We probably would hold the meeting on the Senate side given the topic.

What do you think? Are there any dates in March where the 12-1 pm hour would not work?

mail2web - Check your email from the web at <http://mail2web.com/> .

From: Sales, Nathan
Sent: Tuesday, February 11, 2003 9:26 PM
To: 'Kavanaugh, Brett'; Brown, Jamie E (OLA); 'Heather_Wingate@who.eop.gov'; Benczkowski, Brian A; Chenoweth, Mark
Subject: RE: Sutton and Estrada
Attachments: Estrada and Sutton.doc

Revised version:

-----Original Message-----

From: Sales, Nathan
Sent: Tuesday, February 11, 2003 8:50 PM
To: 'Kavanaugh, Brett'; Brown, Jamie E (OLA); 'Heather Wingate@who.eop.gov'; Benczkowski, Brian A; Chenoweth, Mark
Subject: RE: Sutton and Estrada

Here are some TPs.

<< File: Estrada and Sutton.doc >>

-----Original Message-----

From: Dinh, Viet
Sent: Tuesday, February 11, 2003 6:04 PM
To: Chenoweth, Mark; Sales, Nathan
Cc: 'Kavanaugh, Brett'; Brown, Jamie E (OLA); 'Heather Wingate@who.eop.gov'; Benczkowski, Brian A
Subject: Sultton and Estrada

Mark and Nathan,

Can you put together a one pager explaining wh (b) (5)
 (b) (5) ? (b) (5)
 (b) (5)
 (b) (5)
 (b) (5)
 (b) (5) thanks

Dinh, Viet

From: Dinh, Viet
Sent: Tuesday, February 11, 2003 6:16 PM
To: Brown, Jamie E (OLA); Sales, Nathan; Chenoweth, Mark
Cc: 'Kavanaugh, Brett'; 'Heather_Wingate@who.eop.gov'; Benczkowski, Brian A
Subject: RE: Sutton and Estrada

(b) (5)

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Tuesday, February 11, 2003 6:15 PM
To: Sales, Nathan; Dinh, Viet; Chenoweth, Mark
Cc: 'Kavanaugh, Brett'; 'Heather_Wingate@who.eop.gov'; Benczkowski, Brian A
Subject: RE: Sutton and Estrada

(b) (5)

-----Original Message-----

From: Sales, Nathan
Sent: Tuesday, February 11, 2003 6:08 PM
To: Dinh, Viet; Chenoweth, Mark
Cc: 'Kavanaugh, Brett'; Brown, Jamie E (OLA); 'Heather_Wingate@who.eop.gov'; Benczkowski, Brian A
Subject: RE: Sutton and Estrada

I'll handle it.

-----Original Message-----

From: Dinh, Viet
Sent: Tuesday, February 11, 2003 6:04 PM
To: Chenoweth, Mark; Sales, Nathan
Cc: 'Kavanaugh, Brett'; Brown, Jamie E (OLA); 'Heather_Wingate@who.eop.gov'; Benczkowski, Brian A
Subject: Sutton and Estrada

Duplicative

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, February 06, 2003 3:30 PM
To: 'Kavanaugh, Brett'; 'Heather_Wingate@who.eop.gov'
Subject: FW: Nominee schedule for next week

-----Original Message-----

From: Benczkowski, Brian A
Sent: Thursday, February 06, 2003 3:12 PM
To: Charnes, Adam; Dinh, Viet; Remington, Kristi L; Benedi, Lizette D; Chenoweth, Mark; Joy, Sheila; Koebele, Steve
Cc: Brown, Jamie E (OLA); Scottfinan, Nancy
Subject: Nominee schedule for next week

All-

As you are aware, the SJC has scheduled another nominations hearing for Wednesday on the following nominees:

Timothy Tymkovich	10th Circuit
William Steele	AL,S
Thomas Varlan	TN, E
Daniel Breen	TN,W
Timothy Stanceu	Trade
Marian Horn	Federal Claims

This is the schedule from OLP's end for next week:

Monday:

10 a.m.-noon: Tymkovich moot at OLP (need to invite Hatch staff)
1-3 pm: Steele moot at OLP (Sessions staff invited)
3:15-4:15 pm: brief SJC and R-side counsels on Tymkovich and Steele at Hart SOB (need to confirm with SJC)

Tuesday:

2-4 pm: Moot session for all nominees at OLP.

Please plan Hill visits, etc according to this schedule. Thanks.

BAB

Brian A. Benczkowski
Senior Counsel
Office of Legal Policy
United States Department of Justice
950 Pennsylvania Ave., NW
Room 7214
Washington, DC 20530
Telephone: (202) 616-2004

Fax: (202) 514-1685

E-mail: Brian.A.Benczkowski@usdoj.gov

Charnes, Adam

From: Charnes, Adam
Sent: Thursday, January 23, 2003 7:24 PM
To: Brown, Jamie E (OLA); Brett M. Kavanaugh (E-mail)
Cc: Benczkowski, Brian A; Dinh, Viet
Subject: URGENT: Response to Schumer
Attachments: Schumer response 1-24-03.doc
Importance: High

Jamie, attached is OLP's draft for your review. We really would like Brett's OK; Brett is at the undisclosed location, but please wait as long as possible for Brett to weigh in.

If you want to discuss, please call me (cell (b) (6)) or Brian (cell (b) (6)).

Joy, Sheila

From: Joy, Sheila
Sent: Thursday, January 23, 2003 10:29 AM
To: Dinh, Viet; Willett, Don; Charnes, Adam; Benczkowski, Brian A; Remington, Kristi L; Sales, Nathan; Hall, William; Koebele, Steve; Benedi, Lizette D
Cc: 'Brett_M._Kavanaugh@who.eop.gov';
'H._Christopher_Bartolomucci@who.eop.gov';
'Bradford_A._Berenson@who.eop.gov'; Goodling, Monica; Scottfinan, Nancy;
'Carolyn_Nelson@who.eop.gov'
Subject: Pre-hearing Prep Session for Judicial Nominees

There is a judicial hearing scheduled for Wednesday, 1/29/03, at 9:30 am in 224 Dirksen . The nominees scheduled for this hearing are
Circuit nominees -Cook, Sutton, Roberts; District nominees - Adam, Junell & Otero.

Prep session for them (I don't know if circuit judge candidates will be able to attend) is on TUESDAY, 1/28/03, at 2:00 pm in OLP
4th floor conference room - Room 4237.

For WH staff, please let me know who might be coming and I will let the security desk know. Thanks

Sales, Nathan

From: Sales, Nathan
Sent: Wednesday, January 22, 2003 3:42 PM
To: Dinh, Viet; Charnes, Adam; Benczkowski, Brian A; Hall, William; Benedi, Lizette D; Brown, Jamie E (OLA); Brett Kavanaugh (E-mail); Kyle Sampson (E-mail); Jeffrey Sutton (E-mail)
Subject: Jeff Sutton prep session

OLP will be hosting a moot court for Jeff Sutton on Monday, January 27, at 12:30. The session will take place in room 4237 at the Justice Department. For non-DOJ types, we'll make sure that you're pre-cleared through security.

Thanks,
Nathan

Washington, Tracy T

From: Washington, Tracy T
Sent: Monday, November 18, 2002 3:11 PM
To: Adam Charnes; Andrew Schauder; Anne_Womack@who.eop.gov;
Bradford_A._Berenson@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov;
Brian Benczkowski; Dan Bryant; Don Willett;
H._Christopher_Bartolomucci@who.eop.gov; Heather_Wingate@who.eop.gov;
Jamie Brow (b)(60 Jennifer Oschal email) Kristi Remington; Kyle_Sampson@who.eop.gov;
Lizette Benedi; Lori SharpeDay; Matthew_E._Smith@who.eop.gov; Monica
Goodling; Nathan Sales; Pat O'Brien; Sheila Joy; Steve Koebele;
Tim_Goeglein@who.eop.gov; Viet Dinh; Wendy Keefer; William Hall
Subject: Reminder 4:00pm Judicial Working Group Conference Call TODAY.
Importance: High

Tracy T. Washington
U.S. Department of Justice
Office of Legal Policy
Main Building, Room 4234
(202) 514-2737

Sales, Nathan

From: Sales, Nathan
Sent: Monday, October 7, 2002 12:49 PM
To: Brown, Jamie E (OLA); Charnes, Adam; 'Brett M. Kavanaugh (E-mail)'; 'Heather Wingate (E-mail)'
Cc: Benczkowski, Brian A
Subject: RE: New Estrada Letter

(b) (5)

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Monday, October 07, 2002 12:35 PM
To: Charnes, Adam; 'Brett M. Kavanaugh (E-mail)'; 'Heather Wingate (E-mail)'
Cc: Benczkowski, Brian A; Sales, Nathan
Subject: RE: New Estrada Letter

I have only one additional question: (b) (5)

(b) (5)

Faith Burton had the following style suggestions:

(b) (5)

Other than that, OLA is on board. Please let me know when you have a final version ready for Dan's signature and we'll get that out the door.

-----Original Message-----

From: Charnes, Adam
Sent: Thursday, October 03, 2002 9:37 AM
To: Brett M. Kavanaugh (E-mail); Brown, Jamie E (OLA); Heather Wingate (E-mail)
Cc: Benczkowski, Brian A; Sales, Nathan
Subject: New Estrada Letter

Importance: High

Attached is a revised -- and shorter -- version of the letter. This version incorporates some additional edits from OLP, OLC, and OSG. (b) (5)

[REDACTED]

[REDACTED]

Once you comment and we proof it a few more times, I think it is ready to go whenever Heather advises is best. (Jamie, am I correct that we don't need any further Department clearance?)

Adam

<< File: judges estrada memo 10.3.02.doc >> << File: jud list alpha.doc >> << File: no prior jud exp.doc >> << File: former SG office.doc >>

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, September 26, 2002 4:17 PM
To: 'brett_m._kavanaugh@who.eop.gov'; Charnes, Adam
Subject: Fw: Estrada

Brett, can you call ed directly a (b) (5) Thanks

-----Original Message-----

From: Charnes, Adam <Adam.Charnes@USDOJ.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>; 'Brett_M._Kavanaugh@who.eop.gov'
<Brett_M._Kavanaugh@who.eop.gov>
Sent: Thu Sep 26 16:03:00 2002
Subject: Fw: Estrada

-----Original Message-----

From: Whelan, M Edward III <M.Edward.Whehan@USDOJ.gov>
To: Charnes, Adam <Adam.Charnes@USDOJ.gov>
Sent: Thu Sep 26 16:01:24 2002
Subject: Estrada

Adam: (b) (5)

(b) (5)

(b) (5)

If you have something

else in mind, please let me know. -- Ed

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, September 26, 2002 3:01 PM
To: 'brett_m._kavanaugh@who.eop.gov'; Benczkowski, Brian
A; 'h._christopher_bartolomucci@who.eop.gov'; Charnes, Adam; Comstock,
Barbara; Sales, Nathan
Subject: Fw: SJC Nominations Hearing Transcript (Panels I and II)
Attachments: 09.26.02 SJC Nominations Hearing (Panels I and II).doc

-----Original Message-----

From: Brown, Jamie E (OLA) <Jamie.E.Brown@USDOJ.gov>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>
Sent: Thu Sep 26 14:57:54 2002
Subject: Fw: SJC Nominations Hearing Transcript (Panels I and II)

--- Sent from my BlackBerry.

-----Original Message-----

From: Rybicki, James E <James.E.Rybicki@USDOJ.gov>
To: Bryant, Dan <Dan.Bryant@USDOJ.gov>; O'Brien, Pat <Pat.O'Brien@USDOJ.gov>; Brown, Jamie E
(OLA) <Jamie.E.Brown@USDOJ.gov>; Scottfinan, Nancy <Nancy.Scottfinan@USDOJ.gov>; Estrada,
Laury (OLA) <Laury.Estrada2@USDOJ.gov>
Sent: Thu Sep 26 14:55:51 2002
Subject: SJC Nominations Hearing Transcript (Panels I and II)

PANELS I AND II OF A HEARING OF THE SENATE JUDICIARY COMMITTEE TOPIC: JUDICIAL
NOMINATIONS CHAIRMAN: SENATOR CHARLES SCHUMER (D-NY)
PANEL I WITNESSES: SENATOR JOHN W. WARNER (R-VA); SENATOR GEORGE ALLEN (R-VA)
PANEL II WITNESS: MIGUEL ESTRADA, NOMINATED TO THE D.C. CIRCUIT PANEL

106 DIRKSEN SENATE OFFICE BUILDING
10:05 A.M. EDT, THURSDAY, SEPTEMBER 26, 2002

SEN. SCHUMER: (Sounds gavel.) Okay, ladies and gentlemen, the hearing will come to order. And I
want to welcome everybody to today's hearing. What we are going to do today is begin with
introductions by the home state senators of the nominees from their states. Then we'll proceed to
opening remarks by myself and Senator Hatch. Then we will move to questioning of the nominees.

So, with that, let me first call on Senator Warner of Virginia.

SEN. WARNER: Mr. Chairman, and Senator Hatch and members of the committee, I thank you very much. I am going to defer to my colleague, Senator Allen, to lead off, and then I'll do a few wrap-up remarks. Senator Allen has worked very closely with this nominee, and spoke yesterday on this subject. And out of deference to you, I will let you lead off.

SEN. SCHUMER: Thank you, Senator Warner, and very much appreciate your being here. And now we'll hear from Senator Allen.

SEN. ALLEN: Thank you, Mr. Chairman, Senator Hatch, Senator Grassley, Senator Kyl, Senator Brownback and other and other members of the committee. It's a pleasure to join with my colleague, Senator Warner, in presenting and introducing to the Judiciary Committee Miguel Estrada.

You all have had this nomination and have looked at his record over his many years, and you have had 16 months, and you know about his experience as a U.S. Attorney arguing cases before the United States Supreme Court, his work in the solicitor general's office. Miguel Estrada, Mr. Chairman and members of the committee, is truly a man of great character. He is the embodiment of everything we talk about, about opportunity and the American dream. He's an example of a young man who came to this country and perfected his knowledge and expression in the English language, obtained a good education. He worked hard, he persevered and advanced in his professional career. You also see in Miguel Estrada a man who fortunately for us lives now in Virginia with his wife Laurie, who is here in green, his mother, Clara Castenada, lives in Ohio, once having lived in New York at one time. And his sister of Maria is also with him.

The other thing that I know that you will care about is his judicial philosophy, and I have found him to have the proper judicial philosophy, understanding the role of a judge, to interpret the law based upon the case and the facts and evidence, and in this case an appellate court reviewing the case file; as well as the importance of precedent in protecting the United States Constitution.

He has been reviewed by many groups, and you have seen -- whether it's the U.S. Chamber of Commerce or the Hispanic Chamber of Commerce have reviewed him. They endorse him. The Hispanic National Bar Association and also the ABA has given Miguel Estrada the very highest possible rating.

There are four vacancies, I would remind the committee, on the D.C. Court of Appeals. There are certain courts and circuits that are very important. The D.C. Court of Appeals though is one that handles and is the primary forum for determining the legality of federal regulations that control vast aspects of American life. There are four vacancies on that court. The chief justice last year was talking about out of the 12 slots four vacancies was certainly harming their ability to expeditiously handle appeals. And so that is very important that you move as promptly as possible.

I would say, Mr. Chairman, and members of the Judiciary Committee, in addition to all the sterling legal qualifications, education and other matters -- judicial philosophy -- which are important for all judges, there is another aspect of Miguel Estrada that matters a lot to many people in this country, and those are Hispanic Americans, whether they're from Cuba or Puerto Rico or Mexico, Central America or South America. And he is a role model. This is a prestigious, important position. And in his life story many people can get inspiration. I am inspired, and I think all members of this committee will be inspired, and as are many Americans.

And so I know that you will closely examine him, ask him questions as appropriate. And I hope though that when you're through with that that we all have an opportunity obviously to vote on the

Senate floor on this outstanding candidate. And I will say on behalf of my Latino constituents in Virginia to this august committee, adelante con Miguel Estrada.

Thank you very much.

SEN. SCHUMER: Thank you. Thank you very much, Senator Allen. Now we'll go to Senator Warner.

SEN. WARNER: Mr. Chairman, I'll put my statement in the record. But I would like to just share a few words with this committee. I visited yesterday briefly on another matter with Chairman Leahy, and we enjoy a very warm and cordial friendship in the United States Senate. Senator Leahy jokingly says that Virginia is his second state, because he has his home there for many years. But I said to him as I look over this nomination -- and I interviewed with Senator Allen and this nominee very carefully -- I said this is an extraordinary example of achievement on the American scene. And certainly everything that my colleague and I and others have seen indicates that he is eminently qualified, extraordinarily well qualified. And in my 24 years here in the Senate -- Senator Hatch and I have shared this conversation many times -- we understand judicial nominations and the politics that rock it back and forth from time to time. But I say that the public is sometimes confused about the cases. But this case is so absolutely clear on its face. Now, it will become a test case, a litmus case of the fairness of the process. So if the committee will accept me with humility, having been here for many years and watched many nominations, I would just like to make that observation. And I am confident this committee, under the chairmanship of Senator Leahy, myself, and my long-time friend Senator Hatch, and other colleagues, that this will be an exemplary performance by this case -- by this committee as it goes through this nomination by the president of the United States.

I started my modest legal career as a law clerk to Judge E. Barrett Prettyman, a federal circuit judge, and then had the opportunity one night to slip in a little bill to name the courthouse after him. So I feel very strongly about the Circuit Court, and take a special interest, and I thank the committee for sharing these few words with them here this morning.

SEN. SCHUMER: Well, thank you, Senator Warner. And, as you know, I have enormous respect for you, as does every other member of this committee, and we thank you for your words.

SEN. WARNER: I thank the chair.

SEN. SCHUMER: We are going to proceed in the seniority order of those from the home state nominees. So we will next go to Senator Grassley, who is here as a member of this committee.

SEN. DON NICKLES (R-OK): Mr. Chairman?

SEN. SCHUMER: The senator from Oklahoma.

SEN. NICKLES: If you're not going to call on us to make a very brief comment?

SEN. SCHUMER: No, I'd be happy to. But we are going to stick to the order you came here as non-home state nominees, and you're here, and we will give you the courtesy. But I want to call the home state nominees first.

SEN. NICKLES: I'd just ask consent if you would put my statement in the record.

SEN. SCHUMER: Sure. That would be -- without objection Senator Nickles' statement will be read

into the record. Do you want to do the same, Senator Domenici?

SEN. PETE DOMENICI (R-NM): Yes, I want to do the same.

SEN. SCHUMER: Thank you very much.

(Remaining members' introductions omitted.)

SEN. SCHUMER: Thank you, Senator Dorgan. And I guess with that we are finished with the members testifying. So with that let me invite Mr. Estrada, Mr. Miguel Estrada, forward. I would like to tell the District Court nominees that we won't get to them until this afternoon. So they are welcome to stay, but if you wish to leave and come back at 2:15, you will not miss your place. I know you have all waited long and hard to get here, and so don't worry if you want to spend some time in Washington with your family and be back at 2:15, that's just fine.

SEN. PATRICK LEAHY (D-VT): And, Mr. Chairman, if I might, I have a statement to place in the record.

SEN. SCHUMER: Thank you. Without objection it will be placed.

Okay, first -- you may sit down, Mr. Estrada. We will swear you in after Senator Hatch and I do our opening statements. And thank you for being here.

Well, today we take up the nomination of Miguel Estrada to the District Court. It's no understatement to say that this is the single most important confirmation hearing this committee has conducted or will conduct this year -- and there have been many hearings. The District Court is often called the nation's second-highest court -- and with good reason. More judges have been nominated and confirmed to the Supreme Court from the District Court than from any other court in the land. The District Court is where presidents look when they need someone to step in and fill an important hole in the line-up. It's sort of like a bullpen court, having given us three of our current Supreme Court nominees -- Justices Scalia, Thomas and Ginsberg -- not to mention others like Robert Bork, Ken Starr and Abner Mikva.

The court to which Mr. Estrada has been nominated doesn't just take cases brought by the residents of Washington, D.C.; it handles the vast majority of challenges to actions taken by federal agencies. Congress has given plaintiffs the power to choose the D.C. Circuit, and in fact some cases we force them to go to the D.C. Circuit because we've decided, for better or for worse -- I think better -- that when it comes to these administrative decisions one court should decide what the law is for the whole nation. The judges on the D.C. Circuit review the decisions by the agencies that write and enforce the rules that determine how much, quote, "reform," unquote there will be in campaign finance reform. They determine how clean water has to be for it to be safe for our families to drink. They establish the rights workers have when they are negotiating with corporate powers.

The D.C. Circuit opinions frequently cover dents in inaccessible material, but certainly not always. And the decisions coming from that court go to the heart of what makes our government tick. The D.C. Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And in doing so it directly impacts the daily lives of all Americans more than any other court in the country with the exception of the Supreme Court. If anyone thinks this court's docket isn't chock full with cases with national ramifications, they should check the record. Let me give you some examples.

When it comes to communications, the court plays a big role. It has exclusive jurisdiction over appeals from FCC decisions. That's a pretty big chunk of law, with massive impact on American consumers. Just a few years ago the circuit upheld the constitutionality of the Telecommunications Act of 1996, guaranteeing more competition in the local and long-distance markets, which in turn guaranteed better and cheaper phone service for all of us.

When it comes to privacy this court plays a big role. Earlier this year the court was called upon to assess the FTC's power to protect consumer privacy when it comes to the private personal information credit reporting agencies may make public.

When it comes to the environment, the court plays a big role. When Congress passed the Clean Air Act in 1970, we gave the EPA the authority to set clean air standards -- the power to determine how much smog and pollution is too much. In 1997, having reviewed literally thousands of studies, it toughened standards for smog and soot. The EPA's actions were going to improve air quality but cost businesses money. Industry groups appealed the EPA decision, and a majority Republican panel on the D.C. Circuit reversed the EPA's ruling. In doing so the court relied on an arcane and long-dead concept known as the non-delegation doctrine. It was a striking moment of judicial activism that was pro-business, anti-environment and, in the opinion of many, highly political. While that decision ultimately was reversed by a unanimous Supreme Court, most other significant decisions of the D.C. Circuit have been allowed to stand without review.

With the Supreme Court taking fewer and fewer cases each year, the judges on the D.C. Circuit have the last word on so many important issues that affect Americans lives. And perhaps more than any other court, aside from the Supreme Court, the D.C. Circuit votes break down on ideological lines with amazing frequency. Several recent studies have proven the point. Let me give you one example.

Professor Cass Sunstein from Chicago, a professor who is respected by members of both sides -- he recently advocated the judgeship nomination of Mr. McCollum, has put together some pretty striking numbers that he will be publishing soon, but he has allowed us to give everyone a sneak peak at today. When you look, say, at the environment cases where industry is challenging pro-environmental rulings, you get some pretty clear results. When they are all Republican panels, industry is proved 80 percent of the time; when they're all Democratic panels, 20 percent of the time. And it's in between when they're two to one on either side. If every judge were simply reading the law, following the law, you would not get this kind of disparity. But we know; it's obvious. We don't like to admit it, but it's true that ideology plays a role in this court.

Throughout the '90s, conservative judges had a strong majority on this court, and in case after case during the recent Republican domination of the circuit, simply because there were many years of Republican presidencies, the DC circuit has second-guessed the judgment of federal agencies and struck down fuel economy standards, wetlands protection and pro-worker rulings by the NLRB.

The DC circuit became the court of first resort for corporations that wanted to get relief from government actions they objected to. Now, for the first time in a long time, there is balance on the DC circuit -- four Republican judges, four Democrats. That doesn't mean each case is always decided right down the middle, but there's balance.

Some of us believe that this all-important court should be kept in balance, not moved too far left, not moved too far right. Judicial nominees, we know, have world views they bring with them to the bench. They come to these positions of power with predilections, with leanings, with biases.

those biases influence the way they look at the law and at the facts of the cases coming before them. It's natural. And I'm not saying there's anything nefarious or even wrong about this. It's just the way we all know how things are.

I wrote an op-ed piece in the New York Times a year ago suggesting we do away with "gotcha" politics and game-playing on this issue and we be honest about our concerns. I published a report last week showing that the vast majority of the time that Democrats vote against a judicial nominee, it's a Republican nominee; and the vast majority of the time Republicans vote against a judicial nominee, it's a Democratic nominee. Big shock, huh?

But it's proof positive that ideology matters. If it didn't, if all we were looking at is legal excellence and judicial temperament, the votes against the nominees would be spread all over the place. Democrats would vote against an equal number of Democratic and Republican nominees, and the same with Republicans. That's not what happened, and we know that.

Now, I've taken a lot of flak for saying this over and over again, but I think we've already proven the point. Now, every single senator on this side of the aisle has voted for conservative nominees. A lot of our friends are begging us to slow down. We're not going to slow down. Senator Leahy has done an admirable job of bringing nominees to the bench, as today's hearing shows.

And a lot of our -- but we're also not going to speed things up and not give fair review to everybody -- important review, important not just to the nominee, although that is important, but to the American people. We're going to take the time we need to review the records of all the nominees the president sends up here.

Conservative but non-ideological nominees like Rina Rodgy (sp), who last week was unanimously confirmed to the second circuit in near-record time, will go through this committee with the greatest of ease. But those for whom red flags are raised will wait until we've done our due diligence. We owe the country, we owe the Constitution, nothing less.

Ideology is not the only factor in determining how we vote, or most of us would have voted against just about every one of the judges who came forward. But for most of us, whether we want to admit it or not, it is a factor, and that's how it should be. And anyone who thinks it's okay for the president to consider ideology but not okay for the Senate is using doublethink.

The White House is saying that they want to nominate conservatives in the mold of Scalia and Thomas. The president has said that. It's hard to believe that at least some of their nominees don't have a pretty strong agenda. Ideology is obviously being considered by the White House. When the White House starts nominating equal numbers of liberals and conservatives, equal numbers of Republicans and Democrats, that's when the Senate should ignore nominees' ideologies.

We had a hearing on Tuesday where Fred Fielding, a brilliant lawyer who served President Reagan well as counsel, testified. In his written testimony, he said that the administration never considered ideology when deciding who to nominate to the bench.

So I asked him if President -- if he could name five liberals that President Reagan nominated. After all, if he wasn't considering ideology, just temperament and legal excellence, you'd get balance. His response was, "I certainly hope not. I hope we didn't nominate a single liberal nominee." And he couldn't -- I asked him to name one. He couldn't. Of course that's true. I appreciate his candor. It proves that ideology plays a role when the president selects judges.

I'm befuddled by those who say the Senate shouldn't consider ideology when the president obviously does. It just doesn't make sense. So let's stop hurling invective and just be straight with each other. Since we know that this is such an important court and since we know that ideology matters, whether we admit it or not, it's essential that this committee conduct a thorough and exhaustive examination of judicial nominees. Again, we'd be derelict in our duty to the Constitution and our constituents if we did anything less.

We should demand that we hear more from nominees than the usual promises to follow the law as written. It's not enough to say, "I will follow the law, Senator," and expect us to just accept that. We need to be convinced that the nominees aren't far out of the mainstream. We need to be convinced that nominees will help maintain balance, not imbalance, on the courts.

A decade ago, our present president's father sent the Senate the nomination of Clarence Thomas. I wasn't in the Senate then, but I watched those hearings. And I've talked to a lot of my current colleagues who were here at that time. Clarence Thomas came before this distinguished committee and basically said he had no views on many important constitutional issues of the day. He said that he'd never even discussed *Roe v. Wade* when he was in law school or since.

But the minute Justice Thomas got to the court, he was doctrinaire. Whether you agreed with him or not, he obviously had deeply held views that he shielded from the committee. It wasn't a confirmation conversion. It was a confirmation subversion. And there's still a lot of simmering blood up here about that. We should do everything we can to prevent that from happening again.

We had a very good hearing last week on a very conservative nominee. Professor Michael McConnell has been nominated to the tenth circuit. He came before this committee, openly discussed his views, some of which I very much disagree with. But I'll say this: He was candid with us about his beliefs. He engaged in honest discussion with us about his viewpoints. And he showed himself to be more of an iconoclast than an ideologue. I haven't made up my mind as to how I'll vote on Professor McConnell, but by answering our questions he put himself in a much better position, in my book.

The nominee before us today stands in contrast to Professor McConnell and to most other circuit court nominees for whom we've held hearings these past 14 months; not his fault, but we know very little about who he is and what he thinks and how he arrives at his positions.

There have been red flags raised by some who know him, but we don't know so far whether there's merit to those red flags or not. There's some support for him in the community and some opposition. We need to understand why. As you know, a former supervisor of yours, Mr. Estrada, in the Office of Solicitor General has stated you were too much of an ideologue and do not have the temperament to merit confirmation. And you'll be given the full opportunity to address those arguments.

Now, this committee has asked for the memos you wrote while you served in the solicitor general's office. Everyone I've spoken with believes such memoranda will be useful in assessing how you approach the law. The role of the SG's office is to determine what positions the United States should take on important constitutional questions. The attorneys in that office engage in quintessentially judge-like behavior.

So the memoranda will be illuminating. There is ample historical precedent for the production of such memos. DOJ has routinely turned them over during the confirmation process. It was done for

such memos. DOJ has routinely turned them over during the confirmation process. It was done for judicial nominees Bork, Rehnquist, Easterbrook (sp). They've been turned over for executive branch nominees Benjamin Civiletti and Bradford Reynolds.

And earlier this year, this White House -- a White House more protective of executive privilege than any White House since the Nixon administration, I might note -- turned over memoranda written by Jeffrey Holmstead, a nominee to a high post at the EPA. Mr. Holmstead's memoranda were from his years of service in the White House counsel's office, a more political and legally privileged post than the one you held when you were in the Department of Justice in the office charged with protecting and defending the Constitution.

I, for one, would think you would want the memoranda to be released so you could more ably defend your record. I know you haven't been blocking their release. But today you'll have a chance to urge DOJ to make the record more complete by releasing the documents. I hope you'll do so, because from what I know thus far, I would have to say that I would be reluctant to support moving your nominee until we see those memoranda.

There's a lot we do not know about Miguel Estrada. Hopefully we'll take some meaningful steps today towards filling in the gaps in the record.

Mr. Estrada, you're going to have a chance today to answer many of the questions regarding your views.

Some believe that once the president nominates a candidate, the burden falls on the Senate to prove why he shouldn't be confirmed. I believe the burden is on the nominee, especially when it comes to a lifetime seat on the nation's second-highest court, to prove why he should be nominated or she should be nominated.

Just as the nominees to the Supreme Court are subject to higher scrutiny, nominees to this unique and powerful circuit merit close and careful review. Our job is not just to rubber-stamp. Our job is to advise and to decide whether to consent. Today's testimony will help us decide how to exercise our constitutional powers in this process, and we all look very much forward to hearing your testimony today.

Thank you.

Senator Hatch.

SEN. ORRIN HATCH (R-UT): Thank you, Mr. Chairman. I have to say that your remarks are some of the most creative and remarkable bits of analysis of constitutional roles that I've ever heard. By your analysis, it means that President Clinton, every time he appointed -- when he appointed Justice Ginsberg, he should have then appointed somebody in the nature of Justice Scalia, or at least more conservative, in order to have balance.

I suspect the second circuit court of appeals should have every judge for the next four or five years be a conservative to make up for the liberal balance on the court, or the ninth circuit court of appeals, where, of 23 judges, I think 17 of them have been appointed by Democrats, and almost all, to a person, very liberal. I think 13 of those or 14 of those were appointed by none other than President Clinton and confirmed by this committee.

All I can say is that balance is in the eye of the beholder. That's why we have presidents. That's why occasionally our Democrat presidents are naturally going to appoint more liberal nominees to the

various courts in this country, and that's why we have Republican presidents who, I think, by nature will appoint more moderate to conservative people to the courts; not necessarily all Republicans, or not necessarily, in the case of the Democrat presidents, all Democrats, but, by and large, mostly. I mean, that's just the nature of our process.

The key here is, is the person competent? Is the person worthy? Is the person a person who understands the role of judging is not to make the laws but to interpret the laws? It seems to me balance is in the eye of the beholder. That's why the constitutional system provides for a president to make these nominations.

Unless we have a very good reason for rejecting a nominee, that nominee ought to be approved. And over the last 20-plus years, I've only rejected one. And to be honest with you, I don't feel good about that one, but I had to, because the two home-state senators were opposed to the person. And we've always -- I think all of us have followed that rule.

Now, there's no question that every senator on here can consider ideology if they want to. But if we want to be fair to the president, to the process, if we want to be fair to the nominees, then we should consider their qualifications. And the fact that a person might be liberal is no good reason for rejecting that nominee, or the fact that a person may be conservative is no good reason for rejecting that nominee, just because we ourselves have our own biases and prejudices.

I'd like to get rid of the biases and prejudices and realize that the process here is trying to get the best judges we can. And, by and large, conservative and liberal judges work well together. In that regard, what's important to know about the DC circuit that has been brought up here -- and it is a very important circuit; I think it's the most important circuit in the country. And I think the distinguished senator did a very good description of that circuit.

But what's important to know about the DC circuit is that very often the judges agree on hard and politically-charged questions. For example, recent cases unanimously decided by panels consisting of both Democratic and Republican appointed judges include the widely followed, closely watched Microsoft case, the contentious case of Mary Frances Barry and the Civil Rights Commission, and the Freedom of Access to Abortion Clinics Act, which the court unanimously upheld. The court's agreement on these important cases demonstrates that ideology, in fact, really doesn't matter.

As a matter of fact, I felt that the distinguished senator, and I have a lot of respect for him as a friend and as a senator, but I think his analysis was very creative in -- in almost every way. I'd have to say I was amused by Senator Schumer's report. We took a closer look, and we find those studies that he quoted to be based on a very small sample of cases, mostly environmental cases. Also, only -- only certain time periods were used and others were excluded. Now, we all know how to play the numbers game, but the real fact of the matter is that in all cases counted over a three-year period, 97 percent of them were decided unanimously, by Democrats and Republicans joining together on the committee.

So, again, it's nice to talk about ideology. The real issue here is Miguel Estrada. Is he competent to serve on this committee? Does he have the qualifications? Well, the American Bar Association certainly thinks so unanimously -- gave him the highest rating that they could possibly give.

Let me first of all say that I'm grateful for you chairing this hearing, Mr. Chairman, for Miguel Angel Estrada, who was nominated for the D.C. Circuit Court of Appeals. There are many people who have been waiting for this event, and many more people who are watching today, for the first time as we display our American institutions and the value we give to the independence of our judiciary. The fact that this hearing comes near the beginning of Hispanic Heritage Month is surely not lost on all my

fact that this hearing comes near the beginning of Hispanic heritage month is surely not lost on all my colleagues on this committee. I am hopeful that this committee will join me in seeking -- that the confirmation of the highly qualified lawyer before us today will occur before Hispanic Heritage Month is over.

As a very special matter, I would like to welcome to this hearing, the Honorable Mario Canawati, the ambassador of Honduras to the United States who is with us today. I believe he's right back there. Mr. Ambassador, please stand up. We're delighted to have you here. (Applause.) We're delighted to have you here, and honored to have you with us.

And I would also like to welcome many leaders of many -- of the Hispanic communities and organizations in the United States who are here to express support for this nomination, as well as the Senators from Virginia and the members of the Republican Senate Leadership, and my good friend Senator Domenici of New Mexico, who I think works tirelessly on behalf of Hispanics and the Hispanic community.

Now Mr. Chairman, I'd like to make a general comment on the context of judicial confirmations in which this hearing is being held. For over a year, we've had a very troubling debate over issues that we -- we thought our founding fathers had settled long ago with our Constitution. I'm heartened to read the scores of editorials all around this country that have addressed the notion of injecting ideology into the judicial confirmation process because this notion has been near universally rejected, except, of course, for a handful of professors and well-paid lobbyists, some of whom are in the back of the room, and a few diehards. I have already made some comments regarding my views on efforts to inject ideology into this nomination, at the hearing this committee held two days ago, which I thought should have been labeled "contra-Estrada." So, in the interest of time, I will not go into them now, and put my expanded remarks in the record.

SEN. SCHUMER: Without objection.

SEN. HATCH: Now, it seems to me that the only way to make sense of the advice and consent rule that our Constitution framers envisioned for the Senate is to begin with the assumption that the president's constitutional power to nominate should be given a fair amount of deference, and that we should defeat nominees only where problems of character or inability to follow the law are evident. In other words, the question of ideology in judicial confirmations is answered by the American people and the Constitution when the president is constitutionally elected.

As Alexander Hamilton records for us, the Senate's task of advice and consent is to advise and to query on the judiciousness and character of nominees, not to challenge by our naked power the people's will in electing who shall nominate. To do otherwise, it seems to me, is to risk making the federal courts an extension of this political body. This would threaten one of the cornerstones of this country's unique success and independent judiciary. And I believe the independent judiciary has saved the Constitution through the years, and this country in many respects.

We must accept that the balance in the judiciary will change over time as presidents change, but much more slowly. For the Senate to do otherwise is to ignore the constitutional electoral process and to usurp the will of the American people. To attempt to bring balance to courts in any other way is to circumvent the Constitution yet again without a single vote of support being cast by the American people.

Now, these are not just my views. This is our Anglo-American judicial tradition. It is reflected in everything that marks a good judge, not the least of which is Canon 5 of the Code of Judicial Conduct

of the American Bar Association, that expressly forbids nominees to judicial from making, quote, "pledges or promises of conduct in office or statements that commit or appear to commit the nominee with respect to cases, controversies, or issues that are likely to come before the courts." Unquote. I should expect that no senator on this committee would invite a nominee to breach this code of ethics, and it worries me that we've come so close from time to time.

Now, I'm glad to welcome today Miguel Estrada. I'd like to speak a little on why Miguel Estrada is here before us today, beyond the obvious, and beyond the obvious fact that the president nominated him. Miguel Estrada is here today because he deserves to be here under any standard that any disinterested person could devise. We have all read about his impressive credentials. Mr. Estrada graduated from Columbia University magna cum laude, and is a phi beta kappa. He went on to Harvard Law School where he graduated again magna cum laude, and after serving as editor of the Harvard Law Review.

He went on to clerk for the Second Circuit Court of Appeals in New York, and then he was chosen to clerk for Associate Justice of the United States Supreme Court Anthony Kennedy. Mr. Estrada later served as assistant U.S. attorney and deputy chief of the appellate division of the appellate section in the U.S. attorney's office for the Southern District of New York.

Then between 1992 until 1997, Mr. Estrada returned to Washington to work for the Clinton Administration as assistant to the solicitor general in the Department of Justice. Now, with regard to that, it is highly unusual, even though there may be some precedent in the past, but it's highly unusual to ask attorneys for opinions that they gave and writings that they made while in the solicitor's office. That would put a chill across honest thinking, it seems to me, like never before. And keep in mind, he served the administrations he served. And, I presume that many of the briefs that were written, and the opinions that were given, were consistent with the administration that he served.

Mr. Estrada has argued 15 cases before the United States Supreme Court and is today one of America's leading appellate advocates, and he's won most of them. It is evident that Miguel Estrada is here today for no other reason than this: he is qualified for the position for which President Bush has nominated him. I know it, and after today's hearing, so will the American people know it.

But notwithstanding all of Mr. Estrada's hard work and unanimous rating of highly qualified by the American Bar Association, he has been subjected so far to the pinata confirmation process with which we have become all too familiar this year. The extreme left-wing Washington groups go after judicial nominees like kid after a pinata. They beat it and beat it until they hope something comes out that they can then chew and distort. In the case of Mr. Estrada, the ritual has been slightly different. They have been unable to find anything they can chew on and spit out at us, so they now say that we simply do not know enough about Mr. Estrada to confirm him.

Well, it's not that we do not know enough. We know as much about him as we have known about any nominee. Their complaint is that we -- that we know all there is and the usual character-destroyers haven't found anything to distort.

But surely we should not expect to hear it suggested today that Mr. Estrada does not have enough judicial experience. Only three of the 18 Democrat-appointed judges on the D.C. Circuit Court have had any prior judicial experience before their nominations. These include Ruth Bader Ginsburg and Abner Mikva. Likewise, judicial luminaries such as Louis Brandeis and Byron White had no judicial experience before being nominated to the Supreme Court, and Thurgood Marshall, the first African-American on the Supreme Court had no judicial experience before he was nominated to the Second Circuit. You could go on and on on that

nominated to the Second Circuit. You could go on and on on that.

I would like to address another aspect of Mr. Estrada's background. I know Miguel Estrada, and I know how proud he is in ways that he is unable to express about being the first Hispanic nominated to the D.C. Circuit Court of Appeals, so I will express it. This is a matter of pride for him for the same reason that it is for any of us, not just because Mr. Estrada is a symbol for Hispanics in America, but because Miguel Estrada's story is the best example of the American dream of all immigrants. He and I are proud because we love this great country and the future it continues to promise to young immigrants. In fact, I have never seen any Hispanic nominee whose nomination has so resonated with the Latino community. Let me just give you an illustration.

In this newspaper, The Washington Hispanic, there's Miguel on this side between Lieutenant-Governor Townsend and -- and Secretary of State Colin Powell. Miguel was born in Tegucigalpa, Honduras. He was so bright at an early age that he was enrolled in a Jesuit school at the age of 5. He was raised in a middle-class family. At age 17, he came to live with his mother, who had immigrated to New York, knowing very little English. Today, he sits before the Senate of the United States waiting to be confirmed to one of the greatest courts in this land.

And I am embarrassed, therefore, by the new lows that some have gone to attack Mr. Estrada. Detractors have suggested that because he has been successful and has had the privilege of a fine education, he is somehow less than a full-blooded Hispanic. Even more offensive, it seems to me, are the code words that some of his detractors use about him, code words which perpetuate terrible stereotypes about Latinos, used, in effect, to diminish Miguel Estrada's great accomplishments and the respect he has from colleagues of all political persuasions.

As chairman and founder 13 years ago of the non-partisan Republican Hispanic Task Force, which despite the name is made up of both Republicans and Democratic members, tried to achieve greater inclusion of Hispanics in the federal government. And I am concerned by the obstacles they face. One new obstacle Hispanics face today is this: Liberals in this town fear that there could be role models for Hispanics that might be conservative, that would not kow-tow to the liberal line. That is despite the fact that the polls show that the great majority of Hispanics are conservatives. But surely the advancement of an entire people cannot be dependent on one party being in power.

This past week, I met with a number of leaders of Hispanic organizations from all across this country. I asked them what they think or what they thought about the subtle prejudices that Mr. Estrada is facing, and they agree. Perhaps they are more offended even than I could ever be. The Hispanic experience in fact sheds new light on this debate -- new light that we've been having about ideology and judicial confirmations. Many new Hispanic-Americans have left countries without independent judiciaries, and they are all too familiar with countries with political parties that claim cradle-to- grave rights over their allegiances and future.

I have a special affinity for Hispanics and for the potential of the Latin culture in influencing the future of this country. Polls show that Latinos are among the hardest working Americans. That is because, like many immigrant cultures in this country, Hispanics often have two and sometimes three jobs. Surveys show they have strong family values and a real attachment to their faith traditions. They value education as the vehicle to success for their children. In short, they have reinvigorated the American dream, and I expect that they will bring new understandings of our nationhood that some of us might not fully see with tired eyes.

I would ask for unanimous consent that the balance of my remarks be placed in the record.

SEN. SCHUMER: Without objection.

SEN. HATCH: Could I say one more thing?

SEN. SCHUMER: Please.

SEN. HATCH: I'm sorry that I've gone so long, but these are important issues, and I feel very deeply about them.

SEN. SCHUMER: Take as long as you wish, Senator.

SEN. HATCH: My colleague, Mr. Chairman, Senator Schumer, specifically mentioned the allegations that Paul Bender has recently leveled against Mr. Estrada. Well, I have to say Mr. Bender supervised Mr. Estrada at the Clinton solicitor general's office, and I want to caution my Democratic colleagues that before they rely too heavily on Mr. Bender to make their case against Mr. Estrada, there are many reasons why Mr. Bender's allegations lack credibility.

First of all, Mr. Bender is an extremist by even the most liberal standards, as his 30-year history of hostility to federal efforts to regulate pornography illustrates. From 1968 to 1970, Mr. Bender served as the chief counsel to the President's Commission on Obscenity and Pornography. As such, Mr. Bender was the architect of the commission's report that recommended the abolishment of all federal state and local laws interfering with the rights of adults to obtain and view any type of pornography, including hard-core pornography. The report was so controversial that in 1970 the Senate voted 60 to 5 for a resolution rejecting it, with nine additional senators announcing that if they had been present they would have supported the -- I think that was 90 -- it's got to be more than 60 to 5 -- they would have supported the resolution. No current member of the Senate supported Mr. Bender's views. One Democratic senator noted during the debate on the resolution that, quote, "The Congress might just have well have asked the pornographers to write the report, although I doubt that even they would have had the temerity and effrontery to make the ludicrous recommendations that were made by the commission," unquote.

Then in 1977, Mr. Bender testified before this committee against tough anti-child pornography laws, in a hearing entitled "Protection of Children Against Sexual Exploitation." In his testimony he rejected the notion that Congress could prohibit child pornography in order to protect children from harm because, quote, "The conclusion that child pornography causes child abuse involves too much speculation in view of the social situation as we know it. And the fact that it seems that most kids who act in these films probably are doing these acts aside from the films anyway," unquote.

Then again, in 1993, Mr. Bender advanced his agenda on pornography while serving a principal deputy solicitor general, forcing President Clinton and the United States Congress, including nine of my Democratic colleagues on this committee, to publicly reject his views. Now, Mr. Bender's opportunity came in the form of a case of the United States v. Knox. Mr. Bender approved a brief in that case, but sought to overturn the conviction of a repeat child pornographer and known pedophile. His brief represented a reversal of the first Bush administration's policy of liberally protecting the Child Protection Act as -- no, to define as child pornography any materials which showed clothed but suggestively posed young children.

In response, on November 3rd, 1993, the United States Senate voted 100 to nothing for a resolution condemning Mr. Bender's position in the case. The House passed a similar resolution by a vote of 425 to 3. Mr. Bender's brief prompted President Clinton to write Attorney General Reno that the

vote of 423 to 37. Mr. Bender's offer prompted President Clinton to write Attorney General Reno that the Justice Department's new interpretation of the Child Protection Act left the child pornography law too narrow and emphasized that he wanted, quote, "The broadest possible protections against child pornography and exploitation," unquote. Each of my Democratic colleagues on this committee who were members of the Congress at the time voted for either the Senate or House resolutions rejecting Mr. Bender's views. Yet they inexplicably seemed to put full faith, lock, stock and barrel -- or some have -- in his opinion of Mr. Estrada.

In addition to Mr. Bender's extreme views, his public statements criticizing Mr. Estrada lack credibility when they are compared to his contemporaneous statements praising Mr. Estrada's work as the assistant solicitor general. At the request of the committee, Mr. Estrada's provided copies of his annual performance evaluations during this tenure at the solicitor general's office. The evaluation showed that during each year that Mr. Estrada worked at the solicitor general's office he received the highest possible rating of, quote, "outstanding," unquote. in every job performance category. The rating official who prepared and signed the performance review from 1994 to 1996 was none other than Mr. Bender.

Let me read a few excerpts from the evaluations that Mr. Bender signed. They say that Mr. Estrada, quote, "states the operative facts and of applicable law completely and persuasively with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity and conciseness."

Quote, "Is extremely knowledgeable of resource materials and uses them expertly, acting independently, goes directly to the point of the matter and gives reliable, accurate responsive information in communicating his position to others."

Quote, "All dealings oral and written with the courts, clients and others are conducted in a diplomatic, cooperative and candid matter."

Quote, "All briefs, motions or memoranda reviewed consistently; reflect no policies at variance with departmental or governmental policies, or fails to discuss and analyze relevant authorities."

Quote, "Is constantly sought for advice and counsel. Inspires co-workers by examples" -- all of that in quotes.

Now, these comments unmask Mr. Bender's more recent statements made after Mr. Estrada's nomination for whatever they are, a politically motivated effort to smear Mr. Estrada and hurt his chances for confirmation. The performance evaluations also confirm what other Clinton administration lawyers and virtually every lawyer who knows Mr. Estrada have said about him -- that he is a brilliant attorney who will make a fine federal judge. Ron Klank, former chief of staff to Vice President Gore and top Democrat counsel here on this committee praised Mr. Estrada, saying that he would be able to, quote, "faithfully follow the law," unquote.

Former solicitor general Drew Days, a friend of Mr. Estrada, quote: "I think he's a superb lawyer," unquote.

Another Clinton era solicitor general -- and I have great respect for all of these men -- Seth Waxman -- called Mr. Estrada an, quote, "exceptionally well-qualified appellate advocate," unquote.

Randolph Moss, former chief of the Justice Department's Office of Legal Counsel wrote the committee, quote, "to express my strong support for the nomination of Miguel Estrada. Although I am

a Democrat and Miguel Estrada and I do not see eye to eye on every issue, I hold Miguel in the highest regard, and I urge the committee to give favorable consideration to his nomination," unquote.

And Robert Litt, deputy assistant attorney general in the Clinton Justice Department, said, quote, "Miguel has an absolutely brilliant mind. He is a superb analytical lawyer and he's an outstanding oral advocate," unquote.

Now, with all of this glowing support from former high-ranking well-respected Clinton administration lawyers, you have to wonder why there has been some of the criticism that has been leveled at Mr. Estrada, and you really have to wonder why anybody -- anybody -- would choose to listen instead to the incredible criticisms of Mr. Bender, a liberal extremist who is out of the mainstream views -- has been twice condemned by the whole United States Senate. Thank you, Mr. Chairman. That's all I have to say..

SEN. SCHUMER: Thank you, Senator Hatch. And now we will begin with the -- we will now proceed with the nomination. We are going to administer the oath to you, Mr. Estrada. So will you please stand to be sworn? Do you swear that that the testimony you are about to give before this committee will be the truth, the whole truth and nothing but the truth, so help you God?

MR. ESTRADA: I do. (Witness sworn.)

SEN. SCHUMER: Thank you. You may be seated. And before we proceed with questions, I'd like to give you the opportunity, Ministry of Information, to introduce your family, whom I've had the privilege of meeting, and make any statement that you wish.

MR. ESTRADA: Thank you, Senator Schumer, for having me here this morning. I also wish to thank our chief executive for giving me the opportunity to come before you. I do not have a statement, but I would like to take just a few moments to point out some members of my family who are here. My wife Laurie (sp), who is a government lawyer here in town. My mother, Clara Castenada, whom you met earlier, was until very recently, as she told you, one of your constituents. She recently retired from her job as a bank examiner in the state of New York, and now lives in Columbus, Ohio. My sister is a pediatric intensive care doctor at Children's Hospital in Ohio. She is here as well. There are a couple of other family members who could not be here today. My mother-in-law, Ruby Gordon -- he is probably watching us on television in Birmingham, Alabama, and my father -- my late father's sister, my Aunt Gloria, my uncle, her husband, William Spiker (sp), and my three cousins, William, Edward and Marilyn could not be here today. And I assure you, senator, I did not pick my family based on the membership of the committee. They are in San Francisco. And that is all I have. Thank you.

SEN. SCHUMER: Well, thank you, Mr. Estrada. And I met your family -- they're a lovely group. In fact, I can see that the apple didn't fall far from the tree in terms of sharpness of mind. When I was introduced to your mother, she said, "Well, I hope you'll repay the favor." And I said, "Well, please?" She said, "Well, I voted for you." (Laughter.) So, thank you all, Estrada Family, for being here.

And now we will proceed with questions. We'll allow each member 10 minutes for questions. We'll do the usual Democrat-Republican, go back and forth. And then we will have a second round if the members so wish. Thank you.

Okay, Mr. Estrada, as I mentioned in my opening remarks, you served for years in the office of the solicitor general. Your record in that office has been called into question by your former supervisor there -- my colleague Orrin Hatch both quoted favorably and unfavorably about Mr. Bender, but he's

there -- my colleague Orrin Hatch both quoted correctly and accurately about Mr. Bender, but he's not the issue. He has said that you are too much of an ideologue and temperamentally unfit to merit confirmation to the seat.

Now, the real way to get to the bottom of this is not listen to Mr. Bender or go past his record -- he may be right, he may be wrong -- I don't know the man. I have no idea -- but is to examine your record in the solicitor general's office, which is probably the best detail we would have of what you did, at least in the public sector.

As you know, the Department of Justice has declined to release the memoranda you wrote serving in that office, claiming a privilege that at least in my opinion doesn't really exist. I understand you haven't opposed the release of these memoranda. Will you commit today to writing to Attorney General Ashcroft and urge him to turn over those documents so we can work towards resolving any of these allegations and get a fuller view of your record, which as you know is very important to me?

MR. ESTRADA: Thank you, senator, for the question. You are right that I have not opposed the release of those records. I have been a lawyer in practice for many years now, and I would like to know that I am exceptionally proud of every piece of legal work that I have done in my life. If it were up to me as a private citizen, I would be more than proud to have you look at everything that I have done for the government or for a private client. I do recognize that there are certain interests that have been asserted in this case that go beyond my own personal interests -- and those are the institutional interests of the Justice Department, and that those interests have been -- have been second as it were by men, and unfortunately only men, who have held the job of solicitor general in both administrations, going back to President Kennedy. I am more than happy to write to the attorney general and convey your request. And I am certain that he knows that I am very proud of my work. And, as I say, if it were entirely up to me, I would more than happily have the world --

SEN. SCHUMER: What I am asking you to do, sir, is not convey my request -- I've made that request already. As you know, shyness is not one of the qualities at the top of the list when it comes to my -- me. And so I would ask you to make that request, and it might help us get those records and expedite this hearing. I hope you will do that. I don't see why not. As you know, other solicitors general, other people who worked in the solicitor general's office -- I mentioned the name of Rehnquist and Bork and Judge Easterbrook -- have had those documents revealed. It hasn't done damage to the Constitution. It hasn't done damage to the way the executive branch functions. And as a judge I would assume that you would want all of the facts before making a ruling. I think we should have the same rights. So why wouldn't you just make a request to them and ask that those records be released? They may not accede to it; they may. But then at least this committee would be satisfied that you've done everything to try and get us those records.

MR. ESTRADA: I understand your point of view, Senator Schumer. I have been a practicing lawyer for all these years, and one of the things I have come to learn is that a practicing lawyer -- such as I am -- ought not to put his own interests ahead of the stated interests of his client. I do think it would be appropriate for me to do more than to convey your request to my former client, because they have a publicly-stated view that is not in accord with what I would be urging them to do. And, as I said, as much as I would dearly love to have the entire world see every aspect of my work, for which I am proud, I do not think that I am in a position to, in my own personal capacity --

SEN. SCHUMER: I would say to you sir, in all due respect, you are no longer anybody's lawyer. When you are here to be nominated to the independent branch of the judiciary, you should be making -- in my judgment at least -- this decision on your own. I understand your loyalty to the solicitor general's office, and you are no longer working there. It would seem to me that as an independent nominee,

which you clearly are, with an exemplary record, as my colleague Orrin Hatch has gone over, that you are no longer -- you no longer have to play the role as a lawyer but rather as nominee you are playing the role -- you are nominee for judge. And to me at least it is not satisfying that says, Well, I have to still defend my old client there. Would you think about that, because I think it would be a shame if we couldn't get that evidence? Would you think about --

MR. ESTRADA: Certainly. I mean, I will think -- I have thought about it, and I will think about it some more. Senator Schumer, let me say that I would like to think that my life in the law is an open book, and that there are tons and tons and reams of stuff out there that can speak to the committee about the sort of thinker that I am, and the sort of lawyer that I have been. Obviously, as I have said, I have been in practice or I have been a lawyer since 1986. I have had people on the other side of the table. I have had co-counsel. I have appeared in front of numerous judges, including all the justices of the Supreme Court. I am aware that as part of its process of review the American Bar Association undertook to conduct a survey of those who have been my colleagues and those who have been my opponents, and of judges and justices before whom I have appeared. And they found a record from which --

SEN. SCHUMER: Sir, your record in terms of legal excellence I don't dispute. I doubt any members of this committee does. But we have lots of other things, as I mentioned in my opening statement, we want to know. When you represent clients, you are representing clients -- and you have done a very good job of that. The closest we have to seeing how you might be as a judge was when you represented the government in the solicitor general's office and made arguments to your superiors, to the solicitor general, about what position the United States government would take. In all due respect, at least to me, knowing that you are a good lawyer and seeing that you are a good lawyer is not enough. And knowing that you have a record as a lawyer that I could examine is not enough, because there are cases -- you've said it in some of the interviews that you didn't agree with the view but you were representing a client. But you are no longer representing a client. You have to -- you are on your own now as a very, very intelligent, accomplished person. And I would again urge you to think about making that request for us.

Let me move on to the next question here. I assume that you've read published reports that said that you attempted to block liberal applicants from clerking from your former boss, Justice Anthony Kennedy. I am sure you can understand why that would trouble people. If you are trying to preclude Justice Kennedy from hearing all sides argued in his chamber, it would suggest an ideological agenda when it comes to the court. So I want to ask you a simple yes-or-no question: Have you ever told anyone that you do not believe that any person should clerk for Justice Kennedy, because that person is too liberal, not conservative enough, because that person did not have the appropriate ideology, politics or judicial philosophy, or because you were concerned that person would influence Justice Kennedy to take positions you did not want him taking? Let me repeat the question, because it's an important one, at least to some of us: Have you ever told anyone that you don't believe that any person should clerk for Justice Kennedy -- (audio break) -- you were concerned that person would influence Justice to take positions you did not want him to be taking? Can you give us a yes or no to that, please.

MR. ESTRADA: Senator Schumer, I have taken a cab up to Capitol Hill and sat in Justice Kennedy's office to make sure he hired people that I knew to be liberal.

SEN. SCHUMER: No, but I'm asking you yes or no in terms of the question I asked.

MR. ESTRADA: I don't believe I have.

SEN. SCHUMER: The answer's no. Thank you.

Well, I have 17 seconds left, and you'll give longer than 17 seconds to my answer (sic). I'm going to go to Orrin Hatch. I have more questions which we'll go to in the second round.

SEN. HATCH: Well, thank you, Mr. Chairman. Again, I would -- I should comment on the request for internal Justice Department memoranda. As Senator Schumer mentioned in his opening statement, committee Democrats have requested that the Department of Justice turn over attorney work product, specifically appeals, certiorari and amicus memoranda that Mr. Estrada wrote as the career attorney in the Office of the Solicitor General of the United States of America.

Now, I heard my friend from New York, much to my surprise, say that everyone he's spoken to believes that these memoranda would be helpful. My friend must not have seen the letter written by --

SEN. SCHUMER: Excuse me. I didn't say everyone. I said many people, I think.

SEN. HATCH: Many. Okay. Well, let me say that many believe that, but he must not have seen the letter from the solicitor generals. All seven living former solicitors general wrote to the committee expressing their concern about this request and defending the need to keep such documents confidential. The letter was signed by Democrats Seth Waxman, Walter Dellinger and Drew Day, three excellent solicitor generals, as well as by Republicans Ken Starr, Charles Fried, Robert Bork and Archibald Cox, all of whom have excellent credentials.

The letter notes that when each of the solicitors general make important decisions regarding whether to seek Supreme Court review of adverse appellate decisions and whether to participate as amicus curiae in other high-profile cases, they, quote, "relied on frank, honest and thorough advice from their staff attorneys like Mr. Estrada," unquote.

The letter explains that the open exchange of ideas which must occur in such a context, quote, "simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all but vulnerable to public disclosure."

Their letter, these former solicitors general, Democrat and Republican, concludes that, quote, "Any attempt to intrude into the office's highly-privileged deliberations would come at a cost of the solicitor general's ability to defend vigorously the United States litigation interests, a cost that also would be borne by Congress itself," unquote.

Now, Mr. Chairman, I would like to submit a copy of this letter for the record at this point, if I can.

SEN. SCHUMER: Without objection.

SEN. HATCH: Now, the former solicitors general aren't the only ones who are disturbed by my Democrat colleagues' efforts to obtain privileged Justice Department memoranda. The editorial boards of two prominent newspapers have also criticized the attempt to obtain these records. On May 28th of this year, the Washington Post editorialized that the request, quote, "for an attorney's work product would be unthinkable if the work had been done for a private client. The legal advice by a line attorney for the federal government is not fair game either," unquote.

According to the Post, quote, "Particularly in elite government offices such as that of the solicitor general, lawyers need to speak freely without worrying that the positions they are advocating today

will be used against them if they ever get nominated to some other position," unquote.

On May 24th of this year, the Wall Street Journal also criticized this request by my colleagues and, interestingly enough, noted its curious timing.

Quote: "On April 15th, the Legal Times newspaper reported that a leader of the anti-Estrada liberal coalition was considering launching an effort to obtain internal memos that Estrada wrote while at the solicitor general's office," unquote. A month later, on May 15th, Mr. Estrada received the letter seeking those internal memos by this committee.

Once again, to me it becomes painfully clear that the liberal interest groups may very well be the ones controlling the actions and agenda of this committee. It's starting to really worry me. And the Journal continued to voice its criticism in a subsequent editorial which appeared on June 11th calling the request, quote, "outrageous," unquote, and noting that the true goal was, quote, "to delay, to try to put off the day when Mr. Estrada takes a seat on the DC circuit court of appeals from which President Bush could promote him to become the first Hispanic-American on the U.S. Supreme Court," unquote.

Now, Mr. Chairman, I would like to submit copies of these editorials for the record.

SEN. SCHUMER: Without objection.

SEN. HATCH: I am aware, as some of my colleagues have pointed out, that the New York Times took a different view from the Washington Post and the Wall Street Journal by supporting the Democrats' effort to obtain Mr. Estrada's internal memoranda during his tenure at the solicitor general's office.

But the Times fails completely to even acknowledge that all seven living solicitors general opposed this request. And since the Times appears to have failed to take this important factor into account in formulating its position, I'm inclined to disregard its view on the issue altogether. Now, I have to admit, I didn't agree with them anyway. (Laughter.) But anybody would --

SEN. SCHUMER: You rarely do.

SEN. HATCH: No, that's not true. I've been finding especially the Washington Post lately has been writing some pretty good editorials on the judgeship situation in the United States Senate.

Now, contrary to the claims of one of my Democratic colleagues, the Department of Justice has never, to my knowledge, disclosed such sensitive information as the memoranda detailing the appeal, certiorari and amicus recommendations and legal opinions of an assistant -- of a clear liberal assistant to the solicitor general in the context of a judicial nomination.

During Robert Bork's Supreme Court confirmation hearings, the department did turn over some memoranda Bork wrote while serving as solicitor general. But to my knowledge, none of these memos contained the sort of deliberative materials requested of Mr. Estrada. The Bork materials included memos containing Bork's opinions on such subjects as the constitutionality of the pocket veto and on President Nixon's assertions of executive privilege and his views of the Office of Special Prosecutor.

None of the memos, to my knowledge, contained information regarding internal deliberations of career attorneys on appeal decisions or legal opinions in connection with appeal decisions. Moreover, the Bork documents reflected information transmitted between a political appointee, the solicitor general, and political advisers to the president, not the advice of a career Department of Justice attorney to his superior. There is a big difference.

The bottom line is that my friends are seeking privileged materials. Their attempts have been criticized by all seven living former solicitors general and by two major newspapers, and perhaps more that I'm unaware of. But more fundamental is the fact that Mr. Estrada does not object to turning over this memoranda. He has nothing to hide.

It is the Department of Justice that has an institutional interest in refusing to comply with my Democrat colleagues' request. And I, for one, understand and agree with the department's position. But the department's recalcitrance in this dispute should neither be imputed to nor held against Mr. Estrada.

Now, to be honest with you, if I were solicitor general, I'd be outraged by that request. And I think the seven solicitors general were not happy with that request, to say the least. That's why they took the time to write the letter, which is (an embarrassing?) letter to this committee at the very least.

Now, Mr. Estrada, when you were at the solicitor general's office, you had a lot of issues come before you that you had to give your honest opinion on. And others who are continuing long after you are going through the same experience. At any time did you place your own personal ideological opinions over that of what the law really was or you believe should be?

MR. ESTRADA: No, Senator, never. The job of being a lawyer in that office, as you point out, is difficult and complex, and it entails consideration of a large number of factors, including how a particular ruling going one way or the other might affect the interests of this agency or that other agency.

And sometimes you have to marshal those interests for the solicitor general, for his consideration, and give him a full understanding of where all of the government's departments may be with respect to an issue that is in the Supreme Court, for example. That sometimes may mean saying statements about the legal views of one agency which, if it became public, would hurt the litigating situation of that agency.

And that is probably the type of consideration that has impelled the former solicitors general to take that view, having spoken to them. But I am not worried in the least that anybody could detect any bias or lack of skill in my legal work.

I do recall having made some pretty ruthless assessments of the legal views of some agencies, which, I'm sad to say, sometimes were vindicated in the courts later. And I would not think that those agencies, as a general matter, would want those types of work product papers out in the public domain.

SEN. HATCH: Thank you, sir. My time is up. Thank you, Mr. Chairman.

SEN. SCHUMER: I'm just going to take the liberty of adding to the record. I have to point out that my friend Senator Hatch's claim that memos from career DOT attorneys reflecting the deliberative role -- the deliberative process have not been turned over to Congress isn't true.

And I'd just like to submit, just for example, some of those exact memos from Judge Frank Easterbrook, now a seventh circuit judge, exactly the kind of memos we're looking for from Mr. Estrada, that were turned over. And I'd ask unanimous consent to submit these for the record.

Senator Leahy.

SEN. LEAHY: Thank you, Mr. Chairman. I also have a statement that I'd ask to be included in the record.

SEN. SCHUMER: Without objection.

SEN. LEAHY: I will not go into the unfortunate character attack made against Mr. Paul Bender, a man I've never met, do not know, but I would hope that this would not deter people who are for or against any nominee, you or anybody else, that they would not hesitate to send information and their views to this committee and would not fear that they're just going to have their character shredded on C-SPAN if they do. I think it's beneath this committee when that happens.

I would refer, because there's been so much said about the Waxman letter -- it's an interesting letter, because the former solicitors general -- and I'm sure you noted this, Mr. Estrada -- they cited no legal citation, no authority whatsoever in their letter. It simply says, as a policy matter, memos written to the solicitor general should be kept confidential.

Now, I agree that the interest in candor is a significant one. But it's not an absolute interest, such as the interest of the Senate in addressing allegations made about somebody who's going to -- is up for confirmation, not to a short-term position but to a lifetime position.

In fact, one of the people in that letter, former Solicitor General Robert Bork, knows full well that memos to the solicitor general have been disclosed without any damage to the department. When he was nominated to the Supreme Court, the Senate Judiciary Committee requested and was provided with written memoranda, written by him or to him when he worked in the solicitor general's office. That didn't chill subsequent members of the Justice Department from providing candid opinion. We're talking about something from the 1970s.

Memoranda to and from the solicitor general's office and also the office of legal counsel were provided to the Senate during the consideration of Judge Stephen Trott, who was confirmed to the ninth circuit, as well as Chief Justice Rehnquist when he was confirmed as chief justice; also William Bradford Reynolds, the former head of the civil rights division in the Reagan administration, who was nominated to the position of associate attorney general.

And then the suggestion that there's an attorney-client privilege, I mean, that's so far-fetched, it almost seems a shame to waste time talking about it. I think Senator Fred Thompson made it very clear. He said in case after case, the courts have concluded that allowing attorney-client privilege to be used against Congress would be an impediment to Congress. And he says it's well-settled the implication of attorney-client privilege is not binding on Congress.

As another senior member of the United States Senate said, the attorney-client privilege exists as only a narrow exception to broad rules of disclosure. No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules. That senior member of the Senate was Orrin Hatch of Utah, as a matter of fact. I just happened to mention that one.

The Congressional Research Service says it's not binding on the Congress. Professor Ronald Rotunda has declared that it doesn't. And the person who normally does the privacy and political statements for the Department of Justice, Mr. Viet Dinh, said that the government's employer is not a

single person but the United States of America. He said both the United States of America and the government obviously includes the United States Senate. And, of course, the seventh, the eighth, the District of Columbia circuits have agreed with that. I mention that for whatever it's worth. Now -- and also to clear it up.

As a grandson of immigrants, with a wife who is the daughter of immigrants, I know that no matter where you come from, family takes pride in the success of their children. And I'm sure your family does you, and they have a great deal to be proud of in your accomplishments.

You've got a successful law career in a prominent corporate law firm. It was the firm of President Reagan's first attorney general, William French Smith, President Bush's current solicitor general, Theodore Olsen; who joined the Office of the Solicitor General of the United States; worked for Kenneth Starr. Supreme Court Justice Scalia is a friend of yours. You worked on the legal team with Mr. Olsen that secured the United States Supreme Court's intervention in the presidential election in 2000 in behalf of then-Governor Bush. You showed your brilliance as a lawyer there.

So I congratulate you on those. You know, you're in a high- powered law firm. You've got a lot going for you. I am interested; the White House keeps talking about that you came from great poverty, arrived in this country not speaking any English. I know you and I talked about that, and you point out it's a little bit different than the story the White House passes out.

Your mother was a bank examiner, daughter of an educator. Your father was a prominent lawyer. You attended private school. You studied English before coming to the United States. In fact, you were so good in that, you earned a B in college-level English classes in your first full year of higher education here.

We have a lot of people who are born in this country where English was their first language. If I judge from some of the letters I get from college students, they couldn't earn a B. They'd be darn lucky to make it through. So you seem to have followed your father's legacy in law school by assisting a banking law professor, and also I -- I just wanted to make sure -- have I pretty well described your -- your background?

MR. ESTRADA: I'm somewhat embarrassed to enter a little bit of a correction --

SEN. LEAHY: Oh no, please do.

MR. ESTRADA: -- because it doesn't really put me in the best light and has always embarrassed me, but I did get a B-minus in -- in my first English class -- (laughter) -- not a B.

SEN. LEAHY: Grade inflation has happened before around here, so, don't -- we won't hold that against you. (Laughter.) Everything else is okay, though?

MR. ESTRADA: You were probably right to point out that it was probably actually some sort of a C, but okay.

I would not say my father was a prominent lawyer. He was a lawyer. My mom just retired as a bank examiner in New York, as I just told you. I went to a Catholic school, for which I think my father had to pay something like \$10 or \$20 a month. I -- I have never known what it is to be poor, and I am very thankful to my parents for that. And I have never known what it is to be incredibly rich either, or

even very rich, or rich. I have been in public service for the great bulk of my life, as you know. I don't -- I don't, as a person having -- having come here, I don't keep a lot of money in hand. I have been very fortunate in all of the opportunities I've had in this country, and it's allowed me to rise to a standard of living in this country which I certainly would not have enjoyed in my home country -- that's why I'm here.

But I think, in broad outline, what you've said is right, and I take a good deal of pride in the fact that I have been able to do these things, thanks to having come here, though it is true that I was fortunate enough in Honduras to have parents who -- who gave me a good, honest middle class upbringing.

SEN. LEAHY: And I think -- and I think these are things to be proud of. I -- my grandparents spoke virtually no English, and I think they were proud their grandson went on not to make a lot of money but to have a life of public service, and I'm -- I see the look of pride on your family behind you, and I'm sure they feel that way. I just wanted to make sure that we got -- I wanted you to have a chance to give the -- your background, because I didn't want that to become a political issue because of the somewhat different one the White House gave. I think yours is a more accurate and more compelling. And we've heard that you have many strongly held beliefs. You're a zealous advocate, and that's great. You know, lawyers who win cases are not the ones who are on the -- one the one hand this, the other hand that. They -- they are zealous. But you also have to make sure that if you're going to enforce laws that your personal views don't take over the law. Senator Thurmond has every single nominee that I've ever heard him speak to, Republican or Democrat, has spoken to that effect.

What would you say is the most important attribute of a judge, and do you possess that?

MR. ESTRADA: The most important quality for a job -- for a judge, in my view, Senator Leahy, is to have an appropriate process for decision-making. That entails having an open mind. It entails listening to the parties, reading their briefs, going back behind those briefs and doing all of the legwork needed to ascertain who is right in his or her claims as to what the law says and what the facts. In a court of appeals court, where judges sit in panels of three, it is important to engage in deliberation and give ear to the views of colleagues who may have come to different conclusions. And in sum, to be committed to judging as a process that is intended to give us the right answer, not to a result. And, I can give you my level best solemn assurance that firmly think I do have those qualities, or else I would not have accepted the nomination.

SEN. LEAHY: Does that include the temperament of a judge?

MR. ESTRADA: Yes, that includes the temperament of a judge. I think, to borrow somewhat from the American Bar Association, a temperament of a judge includes whether the individual, whether he or she is impartial and open-minded and unbiased, whether he is courteous yet firm, and whether he will give ear to people that come into his room, into his courtroom who do not have -- who come with a claim about which the judge may be at first skeptical.

SEN. LEAHY: Thank you, Mr. Chairman. I'll have -- have other questions, of course, for our next round.

SEN. SCHUMER: We'll have a second round. Thank you, Chairman Leahy.

Just two things. I want to -- I was asked by Senator Hatch to please announced that Senator Kyl had to go to the Intelligence Committee and he's going to try to come back. I'd also want to just ask unanimous consent to put the letter of January 27, 2000, from the U.S. Department of Justice Office of

Legislative Affairs in the record, which states the current Justice Department position, as I understand it, on giving up these documents. And they say "Our experience indicates that the department" -- the Justice Department -- "can develop accommodations with congressional committees that satisfy their needs for information that may be contained in deliberative material while at the same time protecting the department's interest in avoiding a chill on the candor of future deliberations." And I'd like to add that for the record, because I think it's not exactly on all fours with what was said before.

Let me call on Senator Grassley.

SEN. CHUCK GRASSLEY (R-IA): Before I make some comment, I want ask three very basic questions, and they kind of get at the foundation for the selection of judges.

In general, Supreme Court precedents are binding on all lower federal courts, and circuit court precedents are binding on district courts within a particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

MR. ESTRADA: Absolutely, Senator.

SEN. GRASSLEY: What would you do if you believed the Supreme Court or the court of appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or would you use your own judgment of the merits, or the best judgment of the merits?

MR. ESTRADA: 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.

SEN. GRASSLEY: And if there were not controlling precedent dispositively concluding an issue with which you were presented in your circuit, to what sources would you turn for persuasive authority?

MR. ESTRADA: When facing a problem for which there is not a decisive answer from a higher court, my cardinal rule would be to seize aid from anyplace where I could get it. Depending on the nature of the problem, that would include related case law in other areas that higher courts had dealt with that had had some insights to teach with respect to the problem at hand. It could include the history of the enactment, including in the case of a statute legislative history. It could include the custom and practice under any predecessor statute or document. It could include the views of academics to the extent that they purport to analyze what the law is instead of -- instead of prescribing what it should be. And in sum, as Chief Justice Marshall once said, to attempt not to overlook anything from which aid might be derived.

SEN. GRASSLEY: I thank you for those answers. I'm not going to go into the statements that have been exchanged between my colleagues on Mr. Bender, but I do have -- I don't have -- I don't know Mr. Bender, but I do work -- I did work with an issue that he played a prominent role in in the previous administration, and that was dealing with the Knox case. And I guess since I sponsored a resolution that disapproved of the Clinton administration's position on that Knox case, as it was heavily influenced by Mr. Bender's decisions, and that passed 100 to zero, so that we would not have arguments against a case that would let a twice-convicted child pornographer free to continue his tendency to lure underage girls into criminal relationships, I think that when that sort of person comes out in opposition to you, that it ought to be pointed out, as it probably has been pointed out in stronger ways than I will, that that's reason to ignore, to a considerable extent, his distraction from your qualifications to be on the circuit court of appeals.

And I fought this very hard to get the legislation through that ended up in the Knox decision, so obviously I wanted a president, and an attorney general, and a solicitor general to fight hard for upholding that legislation, and we had a reversal of -- of the administration's position on that legislation that was highly influenced by Mr. Bender, who obviously has some extreme positions on whether -- or on the harm of child pornography.

So, I'll just leave it at that, and -- and suggest that our colleagues not take the opinions of Mr. Bender in finding fault with your qualifications for being on the court very seriously. In fact, just the opposite, I guess, from news reports that are out -- he had very complimentary things to say about you while you had a working relationship with him, and I would think that -- how do you get this dramatic change of opinion from -- from a Mr. Bender's opinion of you prior to your nomination to the circuit court, and a different opinion after you're nominated to the Supreme Court (sic) -- or to the circuit court of appeals.

So, I think that I am glad that the president nominated you. Obviously, I don't make a final decision until the record's clear, but I think with the ratings that you've had and how you've expressed yourself so far at this hearing, plus the reputation you have, that it's going to be hard for somebody to find reasons for voting against you.

Thank you.

SEN. SCHUMER: Thank you, Senator Grassley. Senator Kennedy.

SENATOR KENNEDY: Mr. Chairman, just before -- I want to congratulate the nominee, and to -- enormous tribute, and you're to be congratulated, and we want to welcome your family.

MR. ESTRADA: Thank you, Senator.

SEN. KENNEDY: Thank you very much.

Just before questioning the nominee, Mr. President, I want to just join with those that are rejecting these personal attacks of Mr. Bender. I do not know Mr. Bender. But Professor Bender graduated magna cum laude from Harvard Law School, law review, clerked for Judge Learned Hand, court of appeals. He was a clerk for Justice Felix Frankfurter in the Supreme Court. He has spent 24 years as a faculty member at the University of Pennsylvania Law School and he was the dean of the law school. And he's also argued 20 cases on behalf of the United States before the Supreme Court. Now, I think it's one thing to disapprove of those that are going to support the nominee and to question those that disagree, but to have the kind of personal attacks on Mr. Bender, I think demeans this committee and demeans those who have made them.

Now, on the question of the release of the various materials, and I want to do this very quickly because I have questions of substance, did you ever talk with the attorney general about the release of these personally?

Did you ever say, "Look, I'm all for -- since I don't have a great deal of decision-making, I haven't published a great deal, I know there's going to be interest in my work in the solicitor's general, and I want to see these released," did you ever talk to him personally?

MR. ESTRADA: No. I have only met General Ashcroft, I believe, once in my life, on the day when I was nominated.

SEN. KENNEDY: So, you've never made the personal request, either of him -- or did you say so to anybody in the White House?

MR. ESTRADA: No. No.

SEN. KENNEDY: So, you haven't, as a personal matter, made that request yourself, even though that you knew that there was going to be widespread interest in this and that the members of the committee were going to ask for it?

MR. ESTRADA: Promptly when I got the letter from Chairman Leahy, I forwarded it to -- I think it was to the White House counsel's office, and may also have sent it on to the solicitor general -- no, actually I didn't do that, just the White House counsel's office.

SEN. KENNEDY: And then they just gave you a reaction and that was it?

MR. ESTRADA: Ah --

SEN. KENNEDY: You didn't go back and say, "I can understand how the Judiciary Committee, in its consideration, would want to know these kinds of questions. There are others -- Bork, Rehnquist, Easterbrook, Civiletti, Brad (ph), Reynolds all have done this in the past. In the sense of openness, I'd like the committee to have these kinds of documents as well"?

MR. ESTRADA: No, Senator, I did not.

SEN. KENNEDY: But you're going to do that now?

MR. ESTRADA: I have told Senator Schumer that I will think about doing that now.

SEN. KENNEDY: Well, you better think about it. Is that your answer, you're just going to think about it?

MR. ESTRADA: Well, Senator --

SEN. KENNEDY: You can't just -- that's your answer? We'll go on to another -- another question, if that's what your answer is going to be, you're just going to think about it.

SEN. HATCH: Do you care to add anything else to it?

SEN. KENNEDY: Now, Mr. --

SEN. HATCH: Well, if he does --

SEN. KENNEDY: -- I want to ask Mr. Estrada, as -- as the -- Senator Schumer pointed out, the D.C. Circuit Court of Appeals probably has a greater impact on the lives of people than any other court for the reasons that he has outlined, but I'll just mention them again. It makes the decisions about the protections health care workers, their exposure to toxic chemicals. It does it with regards to fair -- the labor laws, interpreting the protections of our labor laws for workers, whether they -- these laws are going to apply to workers and whether there's going to be adequate compensation or fair compensation. It has a whole range of employment discrimination cases on race, on gender, on disability. It has important regulations, it makes judgments about drinking water, the safety of drinking water, toxic substances, pesticides, environmental issues -- about energy and so on. Numerous have

water, toxic sites, brown fields, again, environmental issues -- about smog and soot. Now we have -- we've doubled the number of children that are dying from asthma every year now. It's one of the few child's diseases that is going up in terms of deaths. They make important decisions about smoke and soot in the air. Right choose. The rights of gay men and lesbians, like Joseph Stafford, a midshipman at the U.S. Navy Academy, discharged because he told his classmates that he's gay. First Amendment rights on television. Sentencing commission. Equal protection and due process of the law.

Now, these affect many people that don't have great advocates, great lobbyists, great special interests here, but they look to this court as being the court really of last resort. Can you tell me why any of those groups that will be affected by these laws would feel that you would be fair to them, understand their problems, understand their needs, and that they, before you, could get the kind of fair shake and someone that could really understand the background of their own kind of experience.

MR. ESTRADA: Certainly, Senator. I would ask those people to look at my record of public service and what I have done with my life as a lawyer. As you may know, one of the things that I have done after leaving my years of public service, both in the U.S. attorney's office and in the prosecutor, is to be an attorney in private practice. While in private practice, I have done my share of work for free that I think benefits the community, including taking on the death row appeal of an inmate who had been sentenced to death and whose case was accepted by the Supreme Court of the United States. The reason I did that, and it took a significant part of my year a couple of years ago, is because I looked at the record after his then-current lawyer came to me asking for help, and I said, "This isn't right. You know, we've got to do something about this." And I am the type of person who can look at what I think is an injustice and try to use my skills as an advocate to make sure that I make every effort to set it right. And I did that in that case. I have done that in my life as a public servant. And I would continue to do that as a judge.

SEN. KENNEDY: Did you have the other -- I would hope that we could have printed in the record the cases that you did handle. I believe there was another case as well, am I right?

MR. ESTRADA: There were other cases -- there was a case for an inmate that I handled in New York, yes.

SEN. KENNEDY: How many cases would you say, roughly, that you did of a public bono?

MR. ESTRADA: I have done cases in litigation, I can think of right now of four. I haven't been in private practice for very long, and during my period of public service it was not lawful for me to take on -- (inaudible) --

SEN. KENNEDY: You could -- you could understand, could you, about how the concerns that people that would be affected by these would wonder whether you would be able to understand their plight -- do you think, or not?

MR. ESTRADA: Well certainly, Senator. I am a practicing lawyer. I work -- I walk into courtrooms pretty much it is all the time, and whether it is one of my firm's corporate clients or whether it is Tommy Strickler, the death row inmate, I always have a knot in my stomach about whether I am going to do right by that client.

SEN. KENNEDY: One of the areas that you have been every active in on the pro bono also was on the issues of challenging the various anti-loitering cases. One in particular comes to mind, and that is the position that you took with regards to the NAACP Indianapolis anti-loitering case. In that case the NAACP, which is a premier organization in terms of knocking down the walls of discrimination over a

long period of time -- enormous credibility -- and here that they felt that those particularly loitering were interfering in their programming, counseling teenagers that were involved in crime and drugs, and also the conduct -- to conduct voter outreach and registration.

Now, you made the case before the court that the NAACP should not be granted standing to represent the members, these members. And as I look through the case I have difficulty in understanding why you would believe that the NAACP would not have standing in this kind of a case when it has been so extraordinary in terms of fighting for those who have been left out and left behind, and in this case was making the case of intervention, because of their concern about the youth in terms of their employment, battling drugs, and also in terms of voting.

MR. ESTRADA: The laws that were at issue in that case, Senator Kennedy, and in an earlier case, which is how I got involved in the issue, deal with the subject of street gangs that engage in or may engage in some criminal activity. The -- I got involved in the issue as a result of being asked by the city of Chicago, which had passed a similar ordinance dealing with street gangs, and I was called by somebody that works for Mayor Daley when they needed help in the Supreme Court in a case that was pending on the loitering issue. I mention that, because after doing my work in that case I got called by the attorney for the city of Annapolis, which is the case to which you are making reference. They had a somewhat similar law to the one that had been at issue in the Supreme Court -- not the same law -- and they were already in litigation, as you mentioned, with the NAACP. By the time he had called me he had filed -- this is the lawyer for the city -- he had filed a motion for summary judgment, making the argument that you've outlined. And he had been met with the entrance into the case by a prominent Washington, D.C. law firm on the other side. He went to the state and local legal center and asked who I could turn to for help, and they sent him to me because of the work I had done on the Chicago case.

Following that, I did the brief. And the point on the standing issue that you mention is that in both Chicago and in the Annapolis ordinance you were dealing with types of laws that had been passed with significant substantial support from minority communities. And I've always thought that was part of my duty as a lawyer to make sure that when people go to their elected representatives and ask for these types of laws to be passed, to make the appropriate argument that a court might accept to uphold the judgment of the democratic people.

In the context of the NAACP, that was relevant to the legal issue, because one of the requirements we argued for representational standing was that the case that the organization wants to get into is germane to the goal of the organization, which in this case, as everybody knows, was to combat discrimination. And the basic point of the brief was that these were not racist laws. I take a backseat to no one in my abhorrence of race discrimination in law enforcement or anything else. But the basic point was that these were laws that were passed by the affected minority communities. To be sure, not with the unanimous support of minority communities, but that these were laws that had significant minority community support. And I thought that that was an argument that the court should consider in the context of this narrow legal doctrine that it was adverting to.

SEN. KENNEDY: Well, my time is up. It's my understanding that the elected officials opposed those laws -- the elected officials in those communities opposed the laws. But the district court effectively rejected your position. And the point that I am bringing, and I think you have given us your view about it, is that the issues on standing are enormously difficult and complex for needy people, poor people, underrepresented people.

And your argument in this to deny the NAACP standing in this case I find troublesome. I think -- as I understand, that's one of the reasons that the -- both MALDF and the Puerto Rican Legal Defense Fund have concerns as well.

I just want to raise that. I understand my time is up. Mr. Chairman

I just want to raise that. I understand my time is up, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator Kennedy. Before I turn to Senator Sessions, Senator Brownback just wanted you to know and everyone to know that he had to go to the floor to co-manage the homeland security bill and hopes to be back this afternoon.

Senator Sessions.

SEN. JEFF SESSIONS (R-AL): Thank you, Mr. Chairman. I will submit a statement for the record, and would just raise a couple of points at the beginning, because I did participate with you yesterday on the hearing involving the 10th Circuit, and previous hearings on the question of the appropriateness of considering ideology in selecting judges. I believe that as we approach this we ought not to change the ground rules. I know you have a chart there you referred to -- prepared by Professor Cass Sunstein. I believe that was the professor that appeared before Democrat senators in a retreat two years ago and urged that the ground rules for nomination to be changed. And since that time we've raised several issues -- notably the issue that we should not consider a person's ideology or political views when considering a judge; and also that the burden is on the nominee. Both of those, as we have researched it carefully, are contrary to history and tradition of this Senate. It is no doubt that any member, Mr. Estrada, of this committee can use any standard they want. They are elected, as you know, and they can use any standard they want. But we have to be careful that the standard we use can be applied across the board over a period of time, and it's a healthy standard for America. So I think those two issues are important and should not be adopted here.

I would note that Lloyd Cutler, who served as President Clinton's White House counsel, and is a distinguished lawyer of many years' service, has stated it would be a tragic development, testifying before this subcommittee, "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." Would you have any comment on that, Mr. Estrada?

Do you see the legal process as a political thing or a legal matter?

MR. ESTRADA: Senator Sessions, I am very firmly of the view that although we all have views on a number of subjects from A to Z, the first duty of a judge is to self-consciously put that aside and look at each case by starting withholding judgment with an open mind and listen to the parties. So I think that the job of a judge is to put all of that aside, and to the best of his human capacity to give a judgment based solely on the arguments and the law.

SEN. SESSIONS: I agree, and that's what is the strength of our rule of law in America, which I think has helped make this country free, independent and prosperous economically. And we must, must, must not politicize the rule of law. And I think some of the things that we are seeing in this committee are steps in that direction. We have professors who believe that the law is merely a tool to oppress; judges are tools of passions. And it is a myth to believe that we can follow and ascertain the law objectively. I reject that. And if we ever move away from that in this country, I believe we will be endangering our system.

The Reves (ph) study that was highlighted -- and Mr. Sunstein's numbers are also, by the chairman, should be taken with caution. Just looking at the Reves (ph) study, it points out that there was some differences in Republican and Democratic judges. But look what the issues are that they dealt with. They looked only at environmental cases. They don't look at agriculture, federal trade, IRS cases. The study found no significant difference in Republican and Democratic voting patterns on statutory environmental cases; only regulatory cases where there is a -- where unelected bureaucrats are

actually enforcing -- fleshing out rules to enforce laws we made. They found no industry favoritism by the Republicans in seven of the 10 time-period studies. They found no activist group favoritism by Democrats in procedural environmental cases in four of the 10 timeframe studies. I think that study is greatly overstated. And I believe the ideal we should adhere to, that a judge, Republican or Democrat personally liberal or personally conservative, should rule the same in every case. Isn't that the basic ideal of America, based on the same law in fact?

MR. ESTRADA: I think my basic idea of judging is to do it on the basis of law, and to put aside on whatever view I might have on the subject, to the maximum extent possible, senator.

SEN. SESSIONS: You finished high in your class at Harvard, was an editor of the Harvard Law Review. Being on the law review itself is a great honor of any graduate -- one of the highest law honors a person can have. You served in the solicitor general's office, which many consider to be the greatest lawyer's job in the entire world to represent the United States of America in court. Everyone selected there are selected on a most competitive basis. You served one of the great law firms in America, doing appellate litigation work -- Gibson, Dunn and Crutcher -- one of the great law firms in the world. And you have been evaluated very, very carefully by the American Bar Association. As Mr. Fred Fielding said yesterday, the ABA considers judicial temperament. And after a careful review of your record, they concluded unanimously that you have the gifts and graces to make an outstanding judge. They gave you the highest possible rating, unanimously, well-qualified. I see nothing in your record that would indicate otherwise. Your testimony has been wonderful here today. It reflects thoughtfulness, a gentleness. You are patient with some of the questions you received. You have demonstrated the kind of temperament that I think would make a great judge. You had -- in the appellate section of Gibson, Dunn and Crutcher -- people don't hire you in that section unless they believe you can do good work. So I just am most impressed. I believe you would be an outstanding nominee.

One -- let's talk a little bit briefly more about the internal memorandums in the Department of Justice. You just raised in your original comments the critical point: those memorandum -- when a lawyer does work for a client and produces product for that client, who owns the product? Is it the lawyer or the client?

MR. ESTRADA: In my understanding as a general matter it is the client, senator.

SEN. SESSIONS: And when you give internal advice to a client and memorandums to a client, that is the client's duty to either review it or not review it, and you would have to have permission from that client?

MR. ESTRADA: That's usually the case.

SEN. SESSIONS: And as a lawyer -- well, maybe it's the criminal investigation or something -- but if it's a lawyer's duty here to carry out their responsibilities effectively, it's also in my view very nearly improper to ask them to give up something that you have no right to ask them to give up. I think that's appropriate to say. You have no objection to their releasing it, but if this committee wants those documents, they have to ask the Department of Justice. And I think it's very significant that all those former solicitor generals, including every single living solicitor general, has opposed releasing those documents as a matter of policy. So I believe you have nothing to be ashamed of there, and I think this is making a mountain out of a mole hill. It is an attempt to suggest there is something to hide when we have an important legal policy at stake.

And I know the questions get asked -- well, what do you think these groups might say? They maybe can't see you to be objective. After groups have gotten -- have been stirred up, or certain liberal activist groups attack a nominee, and they are not members of the committee, then turn and ask the nominee, Well, they don't -- they've said these things that you've refuted -- and the nominee is often knocked down totally as being inaccurate -- but then they say, Well, we can't confirm you because somebody might think you can't be fair. And I think that's an unfair thing to the nominee.

Mr. Estrada, if you are confirmed to this position, and I hope that you will be, how do you see the rule of law, and will you tell us, regardless of whether you agree with it or not, that you will follow binding precedent?

MR. ESTRADA: I will follow binding case law in every case, and I don't even know that I can say where I concur in the case or not without actually having gone through all the work of doing it from scratch. I may have a personal, moral, philosophical view on the subject matter. But I undertake to you that I would put all that aside and decide cases in accordance with binding case law, and even in accordance with the case law that is not binding but seems constructive on the area, without any influence whatsoever from any personal view I may have about the subject matter.

SEN. SESSIONS: Thank you for your outstanding testimony. I believe if confirmed you will be one of the greatest judges on that court, and I do believe that if you are not confirmed it will be because this committee has changed the ground rules for confirmation of judges, and that would be a tragic thing.

SEN. SCHUMER: Senator Kohl.

SEN. HERBERT KOHL (D-WI): Thank you, Mr. Chairman. Mr. Estrada, when we decide to support or oppose a nominee, we of course need to have an idea of their public approach --

SEN. SCHUMER: Excuse me, senator -- I'm sorry -- we said we would break at 12:30, but in courtesy to Senator Feinstein who has been waiting here for a while, we will do Senator Kohl, Senator McConnell, Senator Feinstein. But anyone else who comes in, we are going to have to wait until two o'clock when we resume -- if that's okay with everybody. Okay. Thank you. Sorry to interrupt, senator.

SEN. KOHL: When we decide whether to support or oppose a nominee, we need to have an idea about their approach to the law, of course, and we need to determine what kind of a judge they may be. Some of us here -- in fact, many of us vote for almost all of the nominees for federal bench. I personally have voted for 99 percent of the nominees that have come before this committee.

In all of those cases I felt that I knew what we were getting when we voted. There was some record or some writing that gave me an idea about how the nominee might perform as a judge.

We do not have, as you know, much of a public record or written record of you. You have opinions of course on many issues, I am sure, but we do not hardly know what any of them might be. And some of us might have a tough time supporting your nomination when we know so little.

With that in mind, I would like to know your thoughts on some of the following issues. Mr. Estrada, what do you think of the Supreme Court's efforts to curtail Congress's power, which began with the Lopez case back in 1994, gun-free schools zone law?

MR. ESTRADA: Yes, I know the case, senator. I -- as you may know, I was in the government at the

time, and I argued a companion case to Lopez that was pending at the same time, and in which I took the view that the United States was urging in the Lopez case and in my case for a very expansive view of the power to Congress to pass statutes under the Commerce Clause and have them be upheld by the court. Although my case, which was the companion case to Lopez, was a win for the government on a very narrow theory, the court did reject the broad theory that I was urging on the court on behalf of the government. And even though I worked very hard in that case to come up with every conceivable argument for why the power of Congress would be as vast as the mind can see, and told the court so at oral argument, I understand that I lost that issue in that case as an advocate and I would be constrained to follow his office case.

Lopez has given us guidance on when it is appropriate for the court to exercise the (commerce ?) power. It is binding law and I would follow it.

SEN. KOHL: In light of growing evidence that a substantial number of innocent people have been sentenced to the death penalty, does that provide support, in your mind, for the two federal district court judges who have recently struck down the death penalty as unconstitutional?

MR. ESTRADA: I am not -- I am not familiar with the cases, Senator, but I think it would not be appropriate for me to offer a view on how these types of issues, which are currently coming in front of the courts and may come before me as a judge if I am fortunate enough to be confirmed, should be resolved.

SEN. KOHL: What is the government's role in balancing protection of the environment against protecting private property rights?

MR. ESTRADA: There -- as you know, Senator, there is a wealth of case law on that subject matter. Generally, Congress has passed a number of statutes that try to safeguard the environment, things like the Clean Air Act, NEPA, any number of other statutes that are enforced sometimes by the EPA, for example. And as a general matter, I think all judges would have to greet those statutes when they come to court with a strong presumption of constitutionality. There are claims in the courts that sometimes, in a particular case, those statutes, like some other statutes, may be used to transgress the Constitution. And I know that there are people who may claim that there may be takings or arguments of that nature.

Obviously one would have to look carefully at the case law from the Supreme Court under the just-compensation clause of the Fifth Amendment, but I don't know that I can tell you in the abstract how those cases should come out, other than to say that I recognize that as a general matter, the enactment of Congress in this area, as in any other, come to the courts with a strong presumption of constitutionality.

SEN. KOHL: All right. In the past few years, Mr. Estrada, there has been a growth in the use of so-called protective orders in product liability cases. We saw this, for example, in the recent settlements arising from the Bridgestone-Firestone lawsuits. Critics argue that these protective orders oftentimes prevent the public from learning about the health and safety hazards in the products that are involved.

So let me ask you. Should a judge be required and to what extent should a judge be required to balance the public's right to know against a litigant's right to privacy when the information sought should be sealed -- that could be sealed and could keep secret a public health and safety hazard? How strongly do you feel about the public's right to know in these cases?

MR. ESTRADA: Senator, there is a long line of authority in the DC circuit, as it happens, dealing

MR. ESTRADA: Senator, there is a long line of authority in the DC circuit, as it happens, dealing with public access in cases that are usually brought to gain access to government records by news organizations. And those cases, as I recall -- I haven't looked at them in some time -- do recognize a common-law right of access to public records, which must be balanced against the interests of the governmental actor that is asserting a need for confidentiality.

I am not aware of any case, though there may be some, that has dealt with this issue in the context that you've outlined. But I would hesitate to say more than that, because I don't know how likely is it that the very issue that you've just outlined would come before me in the DC circuit if I were fortunate enough to be confirmed.

SEN. KOHL: All right, one last question. With all due respect to your answers, I'm trying to know more about you, and I'm not sure I --

MR. ESTRADA: I'm trying to help you.

SEN. KOHL: Are you saying you're sorry you can't help me?

MR. ESTRADA: No, I said I'm trying my best to help you, Senator.

SEN. KOHL: All right, last question, sir. In their letter, the Puerto Rican Legal Defense & Education Fund criticized you for making, and I quote, "several inappropriately judgmental and immature comments" about their organization. They also called you, quote, "contentious, confrontational, aggressive, and even offensive," unquote.

Why do you think they said these things about you? What happened at that meeting that would lead this organization to make such a strong statement? And what statements were you referring to when you said "bone-headed"? (Laughter.)

MR. ESTRADA: (Laughs.) I --

SEN. KOHL: Or can't you answer that either?

MR. ESTRADA: I'm happy to answer all of your questions, Senator. The Fund, as you may know, pretty much almost right after I was nominated, sent a letter to Chairman Leahy saying some fairly unflattering things about my candidacy for this office. The letter asked for a meeting with me, which I was delighted to give them, because I think of myself as a fair-minded person who is very concerned if there's anybody out there who may think that I am biased or that I have any other character trait that would make me less of a person.

So I was very concerned that these people, whom I had not met, had already sent this letter. I told them that I would meet with them. And I did meet with them, I think, in April of this year. I was happy to clear for them an entire day of my calendar. As it happens, there were three of them. They took about three and a half hours, and we had what I thought at the time was, by and large, a cordial conversation.

It was clear to me at the time that one of the individuals in the meeting was very frustrated by what I thought was my inability to give very expansive views in certain areas of law that are of interest to the Fund. And it was also clear at the meeting that he was very concerned that he would not -- that this meeting was not enabling him to ascertain how I might vote on a case, which I thought was what I had to do in my conversations with anybody.

Ultimately, during the conversation -- which, as I say, by and large, was pretty cordial -- he expressed the view -- actually, a series of three related views which went something like this. "Number one, you, Mr. Estrada, were nominated solely because you're Hispanic. Number two, that makes it fair game for us to look into whether you're really Hispanic. And number three, we, having been involved in Hispanic bar activities for 10 these many years, are in a position to learn that you're not sufficiently Hispanic," to which my response was -- and I felt that very strongly -- to point out that the comments were offensive, and deeply so, and bone-headed. And they're still offensive.

SEN. KOHL: And bone-headed. Thank you. I think you've done very well. I appreciate your comments.

SEN. SCHUMER: Senator McConnell.

SEN. MITCH MCCONNELL (R-KY): Thank you, Mr. Chairman.

Well, Mr. Estrada, I want to congratulate you on your nomination. Your story is truly inspiring. And being the proud husband of a lady who's done rather well in the United States, coming to this country at age eight and not speaking English, your nomination reminds me of what I think about frequently when I'm around the secretary of Labor, that this is a great country. So I congratulate you on your nomination.

I think the president has made a number of truly outstanding nominations. Yours is quite possibly the best, and I hope you will be speedily confirmed after some delay that your nomination has encountered here over the last year and a half.

I really have no questions, but I do want to make a statement. One of the dilemmas of being the least senior member of the committee is you have to wait around for a while. My friends on the other side have said they want mainstream judges. I think that you, Mr. Estrada, fit this category quite nicely.

As others have said, you received the ABA's highest rating, unanimously well-qualified. As part of its rating, the ABA considers judicial temperament. You donated over 400 hours pro bono defending an individual in a capital case. You've received glowing letters of recommendation from prominent Democrats, including the former solicitor general under President Clinton, Walter Dellinger; former chief of staff to Vice President Gore.

But mainstream, of course, is a relative term. At this point, it is clear that what many of us on this side of the aisle think is mainstream is quite different from what some of our friends on the other side think is mainstream.

I thought Priscilla Owen, for example, was in the mainstream. She was rated, as you were, unanimously well-qualified by the ABA. She was endorsed by the past 16 state bar presidents, both Democrats and Republicans. She was twice elected to statewide judicial office, the last time receiving 84 percent of the vote.

Yet my colleagues on the other side of the aisle killed her nomination because of her interpretation of a Texas law saying minor girls cannot freely get abortions behind their parents' backs. On this subject, well over 80 percent of Americans agreed with Justice Owen. So I was astounded that our friends on the other side would conclude that she was not in the, quote "mainstream."

So I thought the best way to determine who, in my colleagues' view, is in the mainstream is to look at decisions of some of the 377 Clinton judges whom my colleagues strenuously supported and argued were, quote, "in the mainstream." For example, one of the class of 1984 (sic/means 1994), Judge Shira Sheindlin, recently, in a case regarding a terrorist witness, a terrorist witness -- federal Awadalla.

Osama Awadalla knew two of the 9/11 hijackers and met with at least one of them 40 times. His name was found in the car parked at Dulles Airport by one of the hijackers of the American Airlines Flight 77. Photos of his better-known namesake, Osama bin Laden, were found in Osama Awadalla's apartment.

Under the law, a material witness may be detained if he has relevant information and is a flight risk. DOJ thought that Osama Awadalla met these two tests. It didn't seem to me like they were going out on much of a limb there. While detained, Awadalla was indicted for perjury.

Judge Sheindlin, of the Clinton class of '94, dismissed the perjury charges and released Mr. Awadalla on the street. Her reason: She ruled that the convening of a federal grand jury investigating a crime was not a criminal proceeding, and therefore it was unconstitutional to detain Mr. Awadalla.

This was quite a surprise to prosecutors, who for 30 years had used the material-witness law in the context of grand jury proceedings for everyone from mobsters to mass murderer Timothy McVeigh. So much for following well-settled law.

If you want to read a good article about this, I'd recommend the Wall Street Journal's editorial from June 4th entitled "Osama's Favorite Judge." It concludes by saying, "Mr. Awadalla is out on bail. We wonder how he's spending his time."

Another judge that I expect was considered by the other side to be in the mainstream, Judge Jed Rakoff, one of Judge Sheindlin's colleagues from the Clinton class of '95, has ruled that the federal death penalty in all applications, in all applications, is unconstitutional. Some of our colleagues share this position, but that position is at odds with the views of the majority of Americans.

It is also very clearly a failure to follow Supreme Court precedent. Indeed, Judge Rakoff's ruling was so brazenly violative of the precedent that even the Washington Post, which is against the death penalty as a policy matter, came out against his decision as "gross judicial activism."

In an editorial entitled "Right Answer, Wrong Branch," the Post noted that the Fifth Amendment specifically contemplates capital punishment three separate times. It then noted that the Supreme Court has been clear that it regards the death penalty as constitutional. The high court has, in fact, rejected far stronger arguments against capital punishment.

"Individual district judges may not like this jurisprudence," the Post went on, "but it is not their place to find ways around it. The arguments Judge Rakoff makes should rather be embraced and acted upon in the legislative arena. The death penalty must be abolished, but not because judges beat a false confession out of the Fifth Amendment."

I also note another editorial from the Wall Street Journal entitled "Run For Office, Judge." With

respect to Judge Rakoff's moderation and fidelity and precedent, the Journal says, "It hardly advances the highly-charged debate on capital punishment to have a federal judge allude to members of Congress who support capital punishment as murderers. If Judge Rakoff wants to vote against the death penalty, he ought to resign from the bench and run for Congress or the state legislature, where the founders thought such debates belong."

On Tuesday, another Clinton judge, William Sessions of Vermont, appointed by the previous president in 1995, issued a similar ruling. The rulings of Judge Rakoff and Sessions would prevent the application of the death penalty against mass murderers like Timothy McVeigh and Osama bin Laden.

As an aside, I note that the second circuit, which reviews the rulings of Judge Sheindlin, Rakoff and Sessions, has a two-to-one ratio of Democratic judges to Republican judges. So for my colleagues who are so concerned about a party having a single-seat advantage on the DC circuit, I assume they recognize the need for common-sense conservatives to balance out the second circuit.

Another Clinton appointee in '94, Judge Henry McKay (sp), had an interesting theory about a constitutional right to transsexual therapy. When Professor Tribe appeared before this committee, he implied that a conservative's view of the Eighth Amendment proscription against cruel and unusual punishment was confined to protecting against the lopping off of hands and arms.

Well, Judge McKay (sp) of the tenth circuit has held that it is far broader than that. Specifically, a transsexual inmate, Josephine Brown, brought a 1983 action against the state of Colorado alleging that by not providing female estrogen therapy, Colorado had, in fact, punished her and that its punishment was of such cruel and unusual nature as to be violative of the Eighth Amendment to the Constitution.

Now, as Judge Henry noted in his opinion, the tenth circuit, along with the majority of courts, had held that it was not, not an Eighth Amendment violation to deny an inmate estrogen. The law of the circuit did not, however, stop Judge Henry, although the complaint had three times specified that it was the denial of estrogen that was the gravamen of the complaint. Judge Henry and two Carter appointees rewrote the complaint and reinstated it. So much for judicial restraint and following precedent.

Various ninth circuit appointees, defining the right to long- distance procreation for prisoners. My friends on the other side believe very strongly in a living and breathing Constitution and that the rule of law should not be confined to the mere words of the document and the framers' intent.

I was truly surprised, however, to read what a panel of the ninth circuit had tried to breathe into the Constitution. A three-time felon, William Gerber, is serving a life sentence for, among other things, making terrorist threats. Unhappy with how prison life was interfering with his social life, Mr. Gerber alleged that he had a constitutional right to procreate via artificial insemination.

A California district judge rejected Mr. Gerber's claim. A split decision of the ninth circuit, though, reversed. Judge Stephen Reinhardt joined President Johnson's appointee, Myron Bright, and they concluded that, yes, the framers had intended for the right to procreate to survive incarceration.

In dissent, Judge Barry Silverman, a Clinton appointee, who was recommended by Senator Kyl, wrote that this is a seminal case in more ways than one, because the majority simply does not accept the fact that there are certain down sides to being confined in prison. One of them is the interference with normal family life. Judge Silverman noted that while the Constitution protects against forced sterilization, that hardly establishes a constitutional right to procreate from prison via FedEx.

I'm getting notes here that I have one minute remaining, and I won't take any more than one minute. The ninth circuit en banc reversed this decision, but only barely, and it did so against the wishes of Clinton appointees Tishema (sp), Hawkins (sp), Paez (sp) and Berzon (sp), who dissented.

The point I'm trying to make, Mr. Chairman, is mainstream is a very, very subjective determination that each of us is trying to make here. And what many on the other side might consider mainstream, most Americans consider completely out of bounds.

And so the best way to judge a nominee such as the nominee we have before us is on the basis of the qualifications -- unanimously well-qualified by the ABA, supported by Democrats and Republicans, not a shred of evidence of any reason not to confirm this nomination. And so I hope Mr. Estrada will be rapidly confirmed to a position to which he is uniquely, uniquely qualified.

Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator McConnell. I'll bet you wish that we had spent a little more time learning the records of Judge Rakoff and some of the others before we nominated them.

SEN. MCCONNELL: Actually, if I might respond, I voted for most of these judges. I felt the president should be given great latitude. After all, he had won the election. And it seems to me that is an appropriate latitude to be given to the nominees of President Bush.

SEN. SCHUMER: You did vote against 12 of President Clinton's nominees. I don't know if it was temperament, ideology or what. And the only other thing I'd mention is that the -- that I've supported, and I think this Congress -- two on -- two of President Bush's nominees on the second circuit, including recently Rena Rodgy (sp), who is a conservative.

Now I'll go to Senator Feinstein.

SEN. FEINSTEIN: Thank you very much, Mr. Chairman. I don't want to respond to the distinguished senator from Kentucky, but I have a hard time figuring out how a judge confirmed in 1984 relates to Mr. Estrada today.

But Mr. Estrada, I'd like to thank you for spending some time with me yesterday. I found it very, very helpful. And I wanted to concentrate in two areas. I come from a state that is bigger than 21 states plus the District of Columbia put together, so there are a lot of people. And I kind of pride myself at least of knowing where there is a majority of opinion. And there is a substantial majority of opinion, I believe, that surrounds a woman's right to choose, and surrounds the right to privacy. We had a chance to talk a little bit about this yesterday, but I'd like to ask your view with respect to a fundamental case, and that's the 1973 case of Roe v. Wade, when the Supreme Court held that the Constitution's right to privacy encompassed a woman's right to choose to have an abortion, and the government regulations that burdened her exercise of that right were subject to judicial scrutiny. Do you believe that the Constitution encompasses a right to privacy?

MR. ESTRADA: The Supreme Court has so held and I have no view of any nature whatsoever, whether it be legal, philosophical, moral, or any other type of view that would keep me from apply that case law faithfully.

SEN. FEINSTEIN: Do you believe that Roe was correctly decided?

MR. ESTRADA: I have -- my view of the judicial function, Senator Feinstein, does not allow me to answer that question. I have a personal view on the subject of -- of abortion, as I think you know. And -- but I have not done what I think the judicial function would require me to do in order to ascertain whether the court got it right as an original matter. I haven't listened to parties. I haven't come to an actual case of controversy with an open mind. I haven't gone back and run down everything that they have cited.

And the reason I haven't done any of those things is that I view our system of law as one in which both me as an advocate, and possibly if I am confirmed as a judge, have a job of building on the wall that is already there and not to call it into question. I have had no particular reason to go back and look at whether it was right or wrong as a matter of law, as I would if I were a judge that was hearing the case for the first time. It is there. It is the law as it has subsequently refined by the Casey case, and I will follow it.

SEN. FEINSTEIN: So, you believe it is settled law?

MR. ESTRADA: I believe so.

SEN. FEINSTEIN: Thank you very much. I wanted for a moment to touch on a response you made to Senator Schumer's question. As he was answering the question, I happened to be reading an article in The Nation magazine, and I wanted just to be sure because you answered his question about whether he screened judge -- screened clerks for Justice Kennedy and prevented him from hiring any liberal clerk, you said the answer to that was no. I'd like to read you a brief couple of sentences and see if the "no" applies to this.

Perhaps the most damaging evidence against Estrada comes from two lawyers he interviewed for Supreme Court clerkships. Both were unwilling to be identified for fear of reprisal. The first told me, and I quote, "Since I know Miguel -- since I knew Miguel, I went to him to help me get a Supreme Court clerkship. I knew he was screening candidates for Justice Kennedy. And Miguel told me 'No way, you're way too liberal.' I felt he was definitely submitting me to an ideological litmus test, and I am a moderate Democrat.

When I asked him why I was being ruled out even without an interview, Miguel told me his job was to prevent liberal clerks from being hired. He told me he was screening out liberals because a liberal clerk had influenced Justice Kennedy to side with the majority and write a pro-gay rights decision in a case known as *Roemer v. Evans*, which struck down a Colorado statute that discriminated against gays and lesbians."

Did this happen?

MR. ESTRADA: Senator, let me -- maybe I should explain what it is that I do from time to time for Justice Kennedy. Justice Kennedy picks his own clerks. As other judges and justices, he will sometimes ask for help by former clerks with the interviewing of some candidates. I have been asked to do that from time to time. I do not do it every year. I haven't done it for two or three years now. And sometimes I will get a file. It is in the nature of my role in the process that I could not do that which is alleged in the excerpt that you read since I don't have control over the pool of candidates.

SEN. FEINSTEIN: So, your answer is that this is false?

MR. ESTRADA: As far as I know, unless it is a very bad joke that I have forgotten, the answer is no. As I started telling Senator Schumer, I know that I don't do that. I know that Justice Kennedy has other people who help him, including my former co-clerk, Harry Littman (sp), who was a U.S.

attorney in Pennsylvania who was appointed by former President Clinton, and who is a Democrat. I know that that's not what Justice Kennedy does. And I know that I personally, as I started to say to Senator Schumer, have from time to time, even though my role is simply to take people that he sends me to interview and give him my comments for his consideration, from time to time, I have met an exceptionally bright lawyer who I think warrants his attention and whose application otherwise may not have come to his attention.

And I think I have probably put the effort of interjecting myself into this process in that fashion twice in my life. One of them was for a young woman who I knew for a fact was a Democrat and who is currently working for -- for Senator Leahy. And I thought very highly of her, and I spent a lot of my time telling Justice Kennedy of what a high view I had of her talent, and why he should hire her.

SEN. FEINSTEIN: No, I just wanted to ask that question because since you answered Senator Schumer's question no, I wanted to corroborate that this incident was a false incident, and you have effectively said to me it was a false --

MR. ESTRADA: Yes --

SEN. FEINSTEIN: -- this did not happen.

MR. ESTRADA: -- I mean, as you read it, Senator Feinstein, the only thing that I could think is that it has -- that if I said anything remotely on that subject that is anywhere near, within the same solar system even, it could only have been a joke. It was not -- it is not what I do for Justice Kennedy.

SEN. FEINSTEIN: Right. Right. I understand.

Now, since your case is a little different because you have been a very strong advocate in the sense as a U.S. attorney, you have represented private clients. I don't really judge from your representation of a private client your personal philosophy necessarily, but I can make a judgment as to whether you're a competent attorney, and you certainly are that, and certainly have the potential even, I think, of brilliance. I think that is -- that is clearly there. And I happen to believe it's desirable to have brilliant people, if we can, as federal judgeships -- as federal judges. You know, many people have looked back and seen people who were advocates become judges and really change, really become wise, prudent, temperate. They've seen people do things. Certainly Earl Warren led the court -- he was a Republican governor of my state -- he led the court in a unanimous decision that segregation was unconstitutional. And I think he's well-respected for that historically, and well respected for his -- for his fairness. You do not have a judicial record, so for me, I can't make a judgment on whether you would follow the law or not, so I've got to kind of try in different areas.

I was interested in your answer to Senator Kohl's case with respect to the Lopez case. The Lopez case struck down a law regulating guns near schools based on the argument that Congress had overstepped its bounds. And for many of us, this question might be appropriate in judging you. To what extent do you believe that Congress can regulate in the area of dangerous firearms, particularly when those weapons travel in interstate commerce, when they affect commerce and tourism, and when they have such a devastating impact on the children of this country?

MR. ESTRADA: Senator, as I recall, I haven't looked into the area of guns and commerce since the Lopez case. I do recall that there is still another case, a pre-Lopez case that -- that as I sit here and I try to think about it, I am pretty certain was not called into any question by the court in Lopez itself -- a case by the name of Scarborough, I think, versus the U.S., where the court ruled that if -- if a statute passed by Congress in the area of gun control, and I think in that case it was the Gun Control Act of 1968, has a jurisdictional element that attaches to the crime, that that is all right under the Commerce

1966, has a jurisdictional element that attaches to the crime, that that is all right under the Commerce Clause. As I recall, the Scarborough case, what the court ruled, is that if the government were to prove that the firearm had at any time in its lifetime been in interstate commerce, even if that had nothing to do with the crime at issue, that that would be an adequate basis for the exercise of Congress' power. And I haven't looked at the case law, and I suppose if I had something that I had to rule on I would have to, but my best recollection, as I said, now is that the court left standing the Scarborough rule, and that that's still a good law, that I would, of course, follow.

SEN. SCHUMER: Thank you.

SEN. FEINSTEIN: Thank you very much. My time is up. Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator. Thank you, Mr. Estrada. It's be a -- a -- we've been here close to three hours, and we're going to take a one-hour break for lunch, and we're going to resume at 2:00.

MR. ESTRADA: Thank you, Senator.

SEN. SCHUMER: Thank you. (End morning session. Afternoon session will be sent as a separate event.)

END.

PANELS I AND II OF A HEARING OF THE SENATE JUDICIARY COMMITTEE TOPIC:
JUDICIAL NOMINATIONS CHAIRMAN: SENATOR CHARLES SCHUMER (D NY) PANEL I
WITNESSES: SENATOR JOHN W. WARNER (R VA); SENATOR GEORGE ALLEN (R VA)
PANEL II WITNESS: MIGUEL ESTRADA, NOMINATED TO THE D.C. CIRCUIT PANEL
LOCATION: 106 DIRKSEN SENATE OFFICE BUILDING TIME: 10:05 A.M. EDT DATE:
THURSDAY, SEPTEMBER 26, 2002

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SEN. SCHUMER: (Sounds gavel.) Okay, ladies and gentlemen, the hearing will come to order. And I want to welcome everybody to today's hearing. What we are going to do today is begin with introductions by the home state senators of the nominees from their states. Then we'll proceed to opening remarks by myself and Senator Hatch. Then we will move to questioning of the nominees.

So, with that, let me first call on Senator Warner of Virginia.
SEN. WARNER: Mr. Chairman, and Senator Hatch and members of the committee, I thank you very much. I am going to defer to my colleague, Senator Allen, to lead off, and then I'll do a few wrap up remarks. Senator Allen has worked very closely with this nominee, and spoke yesterday on this subject. And out of deference to you, I will let you lead off.

SEN. SCHUMER: Thank you, Senator Warner, and very much appreciate your being here. And now we'll hear from Senator Allen.

SEN. ALLEN: Thank you, Mr. Chairman, Senator Hatch, Senator Grassley, Senator Kyl, Senator Brownback and other and other members of the committee. It's a pleasure to join with my colleague, Senator Warner, in presenting and introducing to the Judiciary Committee Miguel Estrada.

You all have had this nomination and have looked at his record over his many years, and you have had 16 months, and you know about his experience as a U.S. Attorney arguing cases before the United States Supreme Court, his work in the solicitor general's office. Miguel Estrada, Mr. Chairman and members of the committee, is truly a man of great character. He is the embodiment of everything we talk about, about opportunity and the American dream. He's an example of a young man who came to this country and perfected his knowledge and expression in the English language, obtained a good education. He worked hard, he persevered and advanced in his professional career. You also see in

Miguel Estrada a man who fortunately for us lives now in Virginia with his wife Laurie, who is here in green, his mother, Clara Castenada, lives in Ohio, once having lived in New York at one time. And his sister of Maria is also with him.

The other thing that I know that you will care about is his judicial philosophy, and I have found him to have the proper judicial philosophy, understanding the role of a judge, to interpret the law based upon the case and the facts and evidence, and in this case an appellate court reviewing the case file; as well as the importance of precedent in protecting the United States Constitution.

He has been reviewed by many groups, and you have seen whether it's the U.S. Chamber of Commerce or the Hispanic Chamber of Commerce have reviewed him. They endorse him. The Hispanic National Bar Association and also the ABA has given Miguel Estrada the very highest possible rating.

There are four vacancies, I would remind the committee, on the D.C. Court of Appeals. There are certain courts and circuits that are very important. The D.C. Court of Appeals though is one that handles and is the primary forum for determining the legality of federal regulations that control vast aspects of American life. There are four vacancies on that court. The chief justice last year was talking about out of the 12 slots four vacancies was certainly harming their ability to expeditiously handle appeals. And so that is very important that you move as promptly as possible. I would say, Mr. Chairman, and members of the Judiciary Committee, in addition to all the sterling legal qualifications, education and other matters judicial philosophy which are important for all judges, there is another aspect of Miguel Estrada that matters a lot to many people in this country, and those are Hispanic Americans, whether they're from Cuba or Puerto Rico or Mexico, Central America or South America. And he is a role model. This is a prestigious, important position. And in his life story many people can get inspiration. I am inspired, and I think all members of this committee will be inspired, and as are many Americans.

And so I know that you will closely examine him, ask him questions as appropriate. And I hope though that when you're through with that that we all have an opportunity obviously to vote on the Senate floor on this outstanding candidate. And I will say on behalf of my Latino constituents in Virginia to this august committee, adelante con Miguel Estrada.

Thank you very much.

SEN. SCHUMER: Thank you. Thank you very much, Senator Allen. Now we'll go to Senator Warner.

SEN. WARNER: Mr. Chairman, I'll put my statement in the record. But I would like to just share a few words with this committee. I visited yesterday briefly on another matter with Chairman Leahy, and we enjoy a very warm and cordial friendship in the United States Senate. Senator Leahy jokingly says that Virginia is his second state, because he

has his home there for many years. But I said to him as I look over this nomination and I interviewed with Senator Allen and this nominee very carefully I said this is an extraordinary example of achievement on the American scene. And certainly everything that my colleague and I and others have seen indicates that he is eminently qualified, extraordinarily well qualified. And in my 24 years here in the Senate Senator Hatch and I have shared this conversation many times we understand judicial nominations and the politics that rock it back and forth from time to time. But I say that the public is sometimes confused about the cases. But this case is so absolutely clear on its face. Now, it will become a test case, a litmus case of the fairness of the process. So if the committee will accept me with humility, having been here for many years and watched many nominations, I would just like to make that observation. And I am confident this committee, under the chairmanship of Senator Leahy, myself, and my long time friend Senator Hatch, and other colleagues, that this will be an exemplary performance by this case by this committee as it goes through this nomination by the president of the United States.

I started my modest legal career as a law clerk to Judge E. Barrett Prettyman, a federal circuit judge, and then had the opportunity one night to slip in a little bill to name the courthouse after him. So I feel very strongly about the Circuit Court, and take a special interest, and I thank the committee for sharing these few words with them here this morning.

SEN. SCHUMER: Well, thank you, Senator Warner. And, as you know, I have enormous respect for you, as does every other member of this committee, and we thank you for your words.

SEN. WARNER: I thank the chair.

SEN. SCHUMER: We are going to proceed in the seniority order of those from the home state nominees. So we will next go to Senator Grassley, who is here as a member of this committee. SEN. DON NICKLES (R OK): Mr. Chairman?

SEN. SCHUMER: The senator from Oklahoma.

SEN. NICKLES: If you're not going to call on us to make a very brief comment?

SEN. SCHUMER: No, I'd be happy to. But we are going to stick to the order you came here as non home state nominees, and you're here, and we will give you the courtesy. But I want to call the home state nominees first.

SEN. NICKLES: I'd just ask consent if you would put my statement in the record.

SEN. SCHUMER: Sure. That would be without objection Senator Nickles' statement will be read into the record. Do you want to do the same, Senator Domenici?

SEN. PETE DOMENICI (R NM): Yes, I want to do the same.

SEN. SCHUMER: Thank you very much.

(Remaining members' introductions omitted.)

SEN. SCHUMER: Thank you, Senator Dorgan. And I guess with that we are finished with the members testifying. So with that let me invite Mr. Estrada, Mr. Miguel Estrada, forward. I would like to tell the District Court nominees that we won't get to them until this afternoon. So they are welcome to stay, but if you wish to leave and come back at 2:15, you will not miss your place. I know you have all waited long and hard to get here, and so don't worry if you want to spend some time in Washington with your family and be back at 2:15, that's just fine.

SEN. PATRICK LEAHY (D VT): And, Mr. Chairman, if I might, I have a statement to place in the record.

SEN. SCHUMER: Thank you. Without objection it will be placed.

Okay, first you may sit down, Mr. Estrada. We will swear you in after Senator Hatch and I do our opening statements. And thank you for being here.

Well, today we take up the nomination of Miguel Estrada to the District Court. It's no understatement to say that this is the single most important confirmation hearing this committee has conducted or will conduct this year and there have been many hearings. The District Court is often called the nation's second highest court and with good reason. More judges have been nominated and confirmed to the Supreme Court from the District Court than from any other court in the land. The District Court is where presidents look when they need someone to step in and fill an important hole in the line up. It's sort of like a bullpen court, having given us three of our current Supreme Court nominees Justices Scalia, Thomas and Ginsberg not to mention others like Robert Bork, Ken Starr and Abner Mikva.

The court to which Mr. Estrada has been nominated doesn't just take cases brought by the residents of Washington, D.C.; it handles the vast majority of challenges to actions taken by federal agencies. Congress has given plaintiffs the power to choose the D.C. Circuit, and in fact some cases we force them to go to the D.C. Circuit because we've decided, for better or for worse I think better that when it comes to these administrative decisions one court should decide what the law is for the whole nation. The judges on the D.C. Circuit review the decisions by the agencies that write and enforce the rules that determine how much, quote, "reform," unquote there will be in campaign finance reform. They determine how clean water has to be for it to be safe for our families to drink. They establish the rights workers have when they are negotiating with corporate powers.

The D.C. Circuit opinions frequently cover dents in inaccessible material, but certainly not always. And the decisions coming from that court go to the heart of what makes our government tick. The D.C.

Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And in doing so it directly impacts the daily lives of all Americans more than any other court in the country with the exception of the Supreme Court. If anyone thinks this court's docket isn't chock full with cases with national ramifications, they should check the record. Let me give you some examples.

When it comes to communications, the court plays a big role. It has exclusive jurisdiction over appeals from FCC decisions. That's a pretty big chunk of law, with massive impact on American consumers. Just a few years ago the circuit upheld the constitutionality of the Telecommunications Act of 1996, guaranteeing more competition in the local and long distance markets, which in turn guaranteed better and cheaper phone service for all of us.

When it comes to privacy this court plays a big role. Earlier this year the court was called upon to assess the FTC's power to protect consumer privacy when it comes to the private personal information credit reporting agencies may make public.

When it comes to the environment, the court plays a big role. When Congress passed the Clean Air Act in 1970, we gave the EPA the authority to set clean air standards the power to determine how much smog and pollution is too much. In 1997, having reviewed literally thousands of studies, it toughened standards for smog and soot. The EPA's actions were going to improve air quality but cost businesses money. Industry groups appealed the EPA decision, and a majority Republican panel on the D.C. Circuit reversed the EPA's ruling. In doing so the court relied on an arcane and long dead concept known as the non delegation doctrine. It was a striking moment of judicial activism that was pro business, anti environment and, in the opinion of many, highly political. While that decision ultimately was reversed by a unanimous Supreme Court, most other significant decisions of the D.C. Circuit have been allowed to stand without review.

With the Supreme Court taking fewer and fewer cases each year, the judges on the D.C. Circuit have the last word on so many important issues that affect Americans lives. And perhaps more than any other court, aside from the Supreme Court, the D.C. Circuit votes break down on ideological lines with amazing frequency. Several recent studies have proven the point. Let me give you one example.

Professor Cass Sunstein from Chicago, a professor who is respected by members of both sides he recently advocated the judgeship nomination of Mr. McCollum, has put together some pretty striking numbers that he will be publishing soon, but he has allowed us to give everyone a sneak peak at today. When you look, say, at the environment cases where industry is challenging pro environmental rulings, you get some pretty clear results. When they are all Republican panels, industry is proved 80 percent of the time; when they're all Democratic panels, 20 percent of the time. And it's in between when they're two to one on either side. If every judge were simply reading the law, following the law, you would not get this kind of disparity. But we know; it's obvious. We don't like to admit it, but it's true that ideology plays a role in this court.

Throughout the '90s, conservative judges had a strong majority on this court, and in case after case during the recent Republican domination of the circuit, simply because there were many years of Republican presidencies, the DC circuit has second guessed the judgment of federal agencies and struck down fuel economy standards, wetlands protection and pro worker rulings by the NLRB.

The DC circuit became the court of first resort for corporations that wanted to get relief from government actions they objected to. Now, for the first time in a long time, there is balance on the DC circuit four Republican judges, four Democrats. That doesn't mean each case is always decided right down the middle, but there's balance.

Some of us believe that this all important court should be kept in balance, not moved too far left, not moved too far right. Judicial nominees, we know, have world views they bring with them to the bench. They come to these positions of power with predilections, with leanings, with biases. Those biases influence the way they look at the law and at the facts of the cases coming before them. It's natural. And I'm not saying there's anything nefarious or even wrong about this. It's just the way we all know how things are.

I wrote an op ed piece in the New York Times a year ago suggesting we do away with "gotcha" politics and game playing on this issue and we be honest about our concerns. I published a report last week showing that the vast majority of the time that Democrats vote against a judicial nominee, it's a Republican nominee; and the vast majority of the time Republicans vote against a judicial nominee, it's a Democratic nominee. Big shock, huh? But it's proof positive that ideology matters. If it didn't, if all we were looking at is legal excellence and judicial temperament, the votes against the nominees would be spread all over the place. Democrats would vote against an equal number of Democratic and Republican nominees, and the same with Republicans. That's not what happened, and we know that.

Now, I've taken a lot of flak for saying this over and over again, but I think we've already proven the point. Now, every single senator on this side of the aisle has voted for conservative nominees. A lot of our friends are begging us to slow down. We're not going to slow down. Senator Leahy has done an admirable job of bringing nominees to the bench, as today's hearing shows.

And a lot of our but we're also not going to speed things up and not give fair review to everybody important review, important not just to the nominee, although that is important, but to the American people. We're going to take the time we need to review the records of all the nominees the president sends up here.

Conservative but non ideological nominees like Rina Rodgy (sp), who last week was unanimously confirmed to the second circuit in near record time, will go through this committee with the greatest of ease. But those for whom red flags are raised will wait until we've done our

due diligence. We owe the country, we owe the Constitution, nothing less.

Ideology is not the only factor in determining how we vote, or most of us would have voted against just about every one of the judges who came forward. But for most of us, whether we want to admit it or not, it is a factor, and that's how it should be. And anyone who thinks it's okay for the president to consider ideology but not okay for the Senate is using doublethink.

The White House is saying that they want to nominate conservatives in the mold of Scalia and Thomas. The president has said that. It's hard to believe that at least some of their nominees don't have a pretty strong agenda. Ideology is obviously being considered by the White House. When the White House starts nominating equal numbers of liberals and conservatives, equal numbers of Republicans and Democrats, that's when the Senate should ignore nominees' ideologies.

We had a hearing on Tuesday where Fred Fielding, a brilliant lawyer who served President Reagan well as counsel, testified. In his written testimony, he said that the administration never considered ideology when deciding who to nominate to the bench.

So I asked him if President if he could name five liberals that President Reagan nominated. After all, if he wasn't considering ideology, just temperament and legal excellence, you'd get balance. His response was, "I certainly hope not. I hope we didn't nominate a single liberal nominee." And he couldn't I asked him to name one. He couldn't. Of course that's true. I appreciate his candor. It proves that ideology plays a role when the president selects judges.

I'm befuddled by those who say the Senate shouldn't consider ideology when the president obviously does. It just doesn't make sense. So let's stop hurling invective and just be straight with each other. Since we know that this is such an important court and since we know that ideology matters, whether we admit it or not, it's essential that this committee conduct a thorough and exhaustive examination of judicial nominees. Again, we'd be derelict in our duty to the Constitution and our constituents if we did anything less.

We should demand that we hear more from nominees than the usual promises to follow the law as written. It's not enough to say, "I will follow the law, Senator," and expect us to just accept that. We need to be convinced that the nominees aren't far out of the mainstream. We need to be convinced that nominees will help maintain balance, not imbalance, on the courts.

A decade ago, our present president's father sent the Senate the nomination of Clarence Thomas. I wasn't in the Senate then, but I watched those hearings. And I've talked to a lot of my current colleagues who were here at that time. Clarence Thomas came before this distinguished committee and basically said he had no views on many important constitutional issues of the day. He said that he'd never even discussed Roe v. Wade when he was in law school or since.

But the minute Justice Thomas got to the court, he was doctrinaire. Whether you agreed with him or not, he obviously had deeply held views that he shielded from the committee. It wasn't a confirmation conversion. It was a confirmation subversion. And there's still a lot of simmering blood up here about that. We should do everything we can to prevent that from happening again.

We had a very good hearing last week on a very conservative nominee. Professor Michael McConnell has been nominated to the tenth circuit. He came before this committee, openly discussed his views, some of which I very much disagree with. But I'll say this: He was candid with us about his beliefs. He engaged in honest discussion with us about his viewpoints. And he showed himself to be more of an iconoclast than an ideologue. I haven't made up my mind as to how I'll vote on Professor McConnell, but by answering our questions he put himself in a much better position, in my book.

The nominee before us today stands in contrast to Professor McConnell and to most other circuit court nominees for whom we've held hearings these past 14 months; not his fault, but we know very little about who he is and what he thinks and how he arrives at his positions.

There have been red flags raised by some who know him, but we don't know so far whether there's merit to those red flags or not. There's some support for him in the community and some opposition. We need to understand why. As you know, a former supervisor of yours, Mr. Estrada, in the Office of Solicitor General has stated you were too much of an ideologue and do not have the temperament to merit confirmation. And you'll be given the full opportunity to address those arguments.

Now, this committee has asked for the memos you wrote while you served in the solicitor general's office. Everyone I've spoken with believes such memoranda will be useful in assessing how you approach the law. The role of the SG's office is to determine what positions the United States should take on important constitutional questions. The attorneys in that office engage in quintessentially judge like behavior.

So the memoranda will be illuminating. There is ample historical precedent for the production of such memos. DOJ has routinely turned them over during the confirmation process. It was done for judicial nominees Bork, Rehnquist, Easterbrook (sp). They've been turned over for executive branch nominees Benjamin Civiletti and Bradford Reynolds.

And earlier this year, this White House a White House more protective of executive privilege than any White House since the Nixon administration, I might note turned over memoranda written by Jeffrey Holmstead, a nominee to a high post at the EPA. Mr. Holmstead's memoranda were from his years of service in the White House counsel's office, a more political and legally privileged post than the one you held when you were in the Department of Justice in the office charged with protecting and defending the Constitution.

I, for one, would think you would want the memoranda to be released so you could more ably defend your record. I know you haven't been blocking their release. But today you'll have a chance to urge DOJ to make the record more complete by releasing the documents. I hope you'll do so, because from what I know thus far, I would have to say that I would be reluctant to support moving your nominee until we see those memoranda.

There's a lot we do not know about Miguel Estrada. Hopefully we'll take some meaningful steps today towards filling in the gaps in the record. Mr. Estrada, you're going to have a chance today to answer many of the questions regarding your views.

Some believe that once the president nominates a candidate, the burden falls on the Senate to prove why he shouldn't be confirmed. I believe the burden is on the nominee, especially when it comes to a lifetime seat on the nation's second highest court, to prove why he should be nominated or she should be nominated.

Just as the nominees to the Supreme Court are subject to higher scrutiny, nominees to this unique and powerful circuit merit close and careful review. Our job is not just to rubber stamp. Our job is to advise and to decide whether to consent. Today's testimony will help us decide how to exercise our constitutional powers in this process, and we all look very much forward to hearing your testimony today.

Thank you.

Senator Hatch.

SEN. ORRIN HATCH (R UT): Thank you, Mr. Chairman. I have to say that your remarks are some of the most creative and remarkable bits of analysis of constitutional roles that I've ever heard. By your analysis, it means that President Clinton, every time he appointed when he appointed Justice Ginsberg, he should have then appointed somebody in the nature of Justice Scalia, or at least more conservative, in order to have balance.

I suspect the second circuit court of appeals should have every judge for the next four or five years be a conservative to make up for the liberal balance on the court, or the ninth circuit court of appeals, where, of 23 judges, I think 17 of them have been appointed by Democrats, and almost all, to a person, very liberal. I think 13 of those or 14 of those were appointed by none other than President Clinton and confirmed by this committee.

All I can say is that balance is in the eye of the beholder. That's why we have presidents. That's why occasionally our Democrat presidents are naturally going to appoint more liberal nominees to the various courts in this country, and that's why we have Republican presidents who, I think, by nature will appoint more moderate to conservative people to the courts; not necessarily all Republicans, or not necessarily, in the case of the Democrat presidents, all Democrats,

but, by and large, mostly. I mean, that's just the nature of our process.

The key here is, is the person competent? Is the person worthy? Is the person a person who understands the role of judging is not to make the laws but to interpret the laws? It seems to me balance is in the eye of the beholder. That's why the constitutional system provides for a president to make these nominations.

Unless we have a very good reason for rejecting a nominee, that nominee ought to be approved. And over the last 20 plus years, I've only rejected one. And to be honest with you, I don't feel good about that one, but I had to, because the two home state senators were opposed to the person. And we've always I think all of us have followed that rule.

Now, there's no question that every senator on here can consider ideology if they want to. But if we want to be fair to the president, to the process, if we want to be fair to the nominees, then we should consider their qualifications. And the fact that a person might be liberal is no good reason for rejecting that nominee, or the fact that a person may be conservative is no good reason for rejecting that nominee, just because we ourselves have our own biases and prejudices.

I'd like to get rid of the biases and prejudices and realize that the process here is trying to get the best judges we can. And, by and large, conservative and liberal judges work well together. In that regard, what's important to know about the DC circuit that has been brought up here and it is a very important circuit; I think it's the most important circuit in the country. And I think the distinguished senator did a very good description of that circuit.

But what's important to know about the DC circuit is that very often the judges agree on hard and politically charged questions. For example, recent cases unanimously decided by panels consisting of both Democratic and Republican appointed judges include the widely followed, closely watched Microsoft case, the contentious case of Mary Frances Barry and the Civil Rights Commission, and the Freedom of Access to Abortion Clinics Act, which the court unanimously upheld. The court's agreement on these important cases demonstrates that ideology, in fact, really doesn't matter.

As a matter of fact, I felt that the distinguished senator, and I have a lot of respect for him as a friend and as a senator, but I think his analysis was very creative in in almost every way. I'd have to say I was amused by Senator Schumer's report. We took a closer look, and we find those studies that he quoted to be based on a very small sample of cases, mostly environmental cases. Also, only only certain time periods were used and others were excluded. Now, we all know how to play the numbers game, but the real fact of the matter is that in all cases counted over a three year period, 97 percent of them were decided unanimously, by Democrats and Republicans joining together on the committee.

So, again, it's nice to talk about ideology. The real issue here is Miguel Estrada. Is he competent to serve on this committee? Does he have the qualifications? Well, the American Bar Association certainly thinks so unanimously gave him the highest rating that they could possibly give.

Let me first of all say that I'm grateful for you chairing this hearing, Mr. Chairman, for Miguel Angel Estrada, who was nominated for the D.C. Circuit Court of Appeals. There are many people who have been waiting for this event, and many more people who are watching today, for the first time as we display our American institutions and the value we give to the independence of our judiciary. The fact that this hearing comes near the beginning of Hispanic Heritage Month is surely not lost on all my colleagues on this committee. I am hopeful that this committee will join me in seeking that the confirmation of the highly qualified lawyer before us today will occur before Hispanic Heritage Month is over.

As a very special matter, I would like to welcome to this hearing, the Honorable Mario Canawati, the ambassador of Honduras to the United States who is with us today. I believe he's right back there. Mr. Ambassador, please stand up. We're delighted to have you here. (Applause.) We're delighted to have you here, and honored to have you with us.

And I would also like to welcome many leaders of many of the Hispanic communities and organizations in the United States who are here to express support for this nomination, as well as the Senators from Virginia and the members of the Republican Senate Leadership, and my good friend Senator Domenici of New Mexico, who I think works tirelessly on behalf of Hispanics and the Hispanic community.

Now Mr. Chairman, I'd like to make a general comment on the context of judicial confirmations in which this hearing is being held. For over a year, we've had a very troubling debate over issues that we thought our founding fathers had settled long ago with our Constitution. I'm heartened to read the scores of editorials all around this country that have addressed the notion of injecting ideology into the judicial confirmation process because this notion has been near universally rejected, except, of course, for a handful of professors and well paid lobbyists, some of whom are in the back of the room, and a few diehards. I have already made some comments regarding my views on efforts to inject ideology into this nomination, at the hearing this committee held two days ago, which I thought should have been labeled "contra Estrada." So, in the interest of time, I will not go into them now, and put my expanded remarks in the record.

SEN. SCHUMER: Without objection.

SEN. HATCH: Now, it seems to me that the only way to make sense of the advice and consent rule that our Constitution framers envisioned for the Senate is to begin with the assumption that the president's constitutional power to nominate should be given a fair amount of deference, and that we should defeat nominees only where problems of character or inability to follow the law are evident. In other words,

the question of ideology in judicial confirmations is answered by the American people and the Constitution when the president is constitutionally elected.

As Alexander Hamilton records for us, the Senate's task of advice and consent is to advise and to query on the judiciousness and character of nominees, not to challenge by our naked power the people's will in electing who shall nominate. To do otherwise, it seems to me, is to risk making the federal courts an extension of this political body. This would threaten one of the cornerstones of this country's unique success and independent judiciary. And I believe the independent judiciary has saved the Constitution through the years, and this country in many respects.

We must accept that the balance in the judiciary will change over time as presidents change, but much more slowly. For the Senate to do otherwise is to ignore the constitutional electoral process and to usurp the will of the American people. To attempt to bring balance to courts in any other way is to circumvent the Constitution yet again without a single vote of support being cast by the American people. Now, these are not just my views. This is our Anglo American judicial tradition. It is reflected in everything that marks a good judge, not the least of which is Canon 5 of the Code of Judicial Conduct of the American Bar Association, that expressly forbids nominees to judicial from making, quote, "pledges or promises of conduct in office or statements that commit or appear to commit the nominee with respect to cases, controversies, or issues that are likely to come before the courts." Unquote. I should expect that no senator on this committee would invite a nominee to breach this code of ethics, and it worries me that we've come so close from time to time.

Now, I'm glad to welcome today Miguel Estrada. I'd like to speak a little on why Miguel Estrada is here before us today, beyond the obvious, and beyond the obvious fact that the president nominated him. Miguel Estrada is here today because he deserves to be here under any standard that any disinterested person could devise. We have all read about his impressive credentials. Mr. Estrada graduated from Columbia University magna cum laude, and is a phi beta kappa. He went on to Harvard Law School where he graduated again magna cum laude, and after serving as editor of the Harvard Law Review.

He went on to clerk for the Second Circuit Court of Appeals in New York, and then he was chosen to clerk for Associate Justice of the United States Supreme Court Anthony Kennedy. Mr. Estrada later served as assistant U.S. attorney and deputy chief of the appellate division of the appellate section in the U.S. attorney's office for the Southern District of New York.

Then between 1992 until 1997, Mr. Estrada returned to Washington to work for the Clinton Administration as assistant to the solicitor general in the Department of Justice. Now, with regard to that, it is highly unusual, even though there may be some precedent in the past, but it's highly unusual to ask attorneys for opinions that they gave and writings that they made while in the solicitor's office. That would put

a chill across honest thinking, it seems to me, like never before. And keep in mind, he served the administrations he served. And, I presume that many of the briefs that were written, and the opinions that were given, were consistent with the administration that he served.

Mr. Estrada has argued 15 cases before the United States Supreme Court and is today one of America's leading appellate advocates, and he's won most of them. It is evident that Miguel Estrada is here today for no other reason than this: he is qualified for the position for which President Bush has nominated him. I know it, and after today's hearing, so will the American people know it.

But notwithstanding all of Mr. Estrada's hard work and unanimous rating of highly qualified by the American Bar Association, he has been subjected so far to the pinata confirmation process with which we have become all too familiar this year. The extreme left wing Washington groups go after judicial nominees like kid after a pinata. They beat it and beat it until they hope something comes out that they can then chew and distort. In the case of Mr. Estrada, the ritual has been slightly different. They have been unable to find anything they can chew on and spit out at us, so they now say that we simply do not know enough about Mr. Estrada to confirm him.

Well, it's not that we do not know enough. We know as much about him as we have known about any nominee. Their complaint is that we that we know all there is and the usual character destroyers haven't found anything to distort.

But surely we should not expect to hear it suggested today that Mr. Estrada does not have enough judicial experience. Only three of the 18 Democrat appointed judges on the D.C. Circuit Court have had any prior judicial experience before their nominations. These include Ruth Bader Ginsburg and Abner Mikva. Likewise, judicial luminaries such as Louis Brandeis and Byron White had no judicial experience before being nominated to the Supreme Court, and Thurgood Marshall, the first African American on the Supreme Court had no judicial experience before he was nominated to the Second Circuit. You could go on and on on that.

I would like to address another aspect of Mr. Estrada's background. I know Miguel Estrada, and I know how proud he is in ways that he is unable to express about being the first Hispanic nominated to the D.C. Circuit Court of Appeals, so I will express it. This is a matter of pride for him for the same reason that it is for any of us, not just because Mr. Estrada is a symbol for Hispanics in America, but because Miguel Estrada's story is the best example of the American dream of all immigrants. He and I are proud because we love this great country and the future it continues to promise to young immigrants. In fact, I have never seen any Hispanic nominee whose nomination has so resonated with the Latino community. Let me just give you an illustration.

In this newspaper, The Washington Hispanic, there's Miguel on this side between Lieutenant Governor Townsend and and Secretary of State Colin Powell. Miguel was born in Tegucigalpa, Honduras. He was so bright at an early age that he was enrolled in a Jesuit school at the age

of 5. He was raised in a middle class family. At age 17, he came to live with his mother, who had immigrated to New York, knowing very little English. Today, he sits before the Senate of the United States waiting to be confirmed to one of the greatest courts in this land.

And I am embarrassed, therefore, by the new lows that some have gone to attack Mr. Estrada. Detractors have suggested that because he has been successful and has had the privilege of a fine education, he is somehow less than a full blooded Hispanic. Even more offensive, it seems to me, are the code words that some of his detractors use about him, code words which perpetuate terrible stereotypes about Latinos, used, in effect, to diminish Miguel Estrada's great accomplishments and the respect he has from colleagues of all political persuasions.

As chairman and founder 13 years ago of the non partisan Republican Hispanic Task Force, which despite the name is made up of both Republicans and Democratic members, tried to achieve greater inclusion of Hispanics in the federal government. And I am concerned by the obstacles they face. One new obstacle Hispanics face today is this: Liberals in this town fear that there could be role models for Hispanics that might be conservative, that would not kow tow to the liberal line. That is despite the fact that the polls show that the great majority of Hispanics are conservatives. But surely the advancement of an entire people cannot be dependent on one party being in power.

This past week, I met with a number of leaders of Hispanic organizations from all across this country. I asked them what they think or what they thought about the subtle prejudices that Mr. Estrada is facing, and they agree. Perhaps they are more offended even than I could ever be. The Hispanic experience in fact sheds new light on this debate new light that we've been having about ideology and judicial confirmations. Many new Hispanic Americans have left countries without independent judiciaries, and they are all too familiar with countries with political parties that claim cradle to grave rights over their allegiances and future.

I have a special affinity for Hispanics and for the potential of the Latin culture in influencing the future of this country. Polls show that Latinos are among the hardest working Americans. That is because, like many immigrant cultures in this country, Hispanics often have two and sometimes three jobs. Surveys show they have strong family values and a real attachment to their faith traditions. They value education as the vehicle to success for their children. In short, they have reinvigorated the American dream, and I expect that they will bring new understandings of our nationhood that some of us might not fully see with tired eyes.

I would ask for unanimous consent that the balance of my remarks be placed in the record.

SEN. SCHUMER: Without objection.

SEN. HATCH: Could I say one more thing?

SEN. SCHUMER: Please.

SEN. HATCH: I'm sorry that I've gone so long, but these are important issues, and I feel very deeply about them.

SEN. SCHUMER: Take as long as you wish, Senator.

SEN. HATCH: My colleague, Mr. Chairman, Senator Schumer, specifically mentioned the allegations that Paul Bender has recently leveled against Mr. Estrada. Well, I have to say Mr. Bender supervised Mr. Estrada at the Clinton solicitor general's office, and I want to caution my Democratic colleagues that before they rely too heavily on Mr. Bender to make their case against Mr. Estrada, there are many reasons why Mr. Bender's allegations lack credibility. First of all, Mr. Bender is an extremist by even the most liberal standards, as his 30 year history of hostility to federal efforts to regulate pornography illustrates. From 1968 to 1970, Mr. Bender served as the chief counsel to the President's Commission on Obscenity and Pornography. As such, Mr. Bender was the architect of the commission's report that recommended the abolishment of all federal state and local laws interfering with the rights of adults to obtain and view any type of pornography, including hard core pornography. The report was so controversial that in 1970 the Senate voted 60 to 5 for a resolution rejecting it, with nine additional senators announcing that if they had been present they would have supported the I think that was 90 it's got to be more than 60 to 5 they would have supported the resolution. No current member of the Senate supported Mr. Bender's views. One Democratic senator noted during the debate on the resolution that, quote, "The Congress might just have well have asked the pornographers to write the report, although I doubt that even they would have had the temerity and effrontery to make the ludicrous recommendations that were made by the commission," unquote.

Then in 1977, Mr. Bender testified before this committee against tough anti child pornography laws, in a hearing entitled "Protection of Children Against Sexual Exploitation." In his testimony he rejected the notion that Congress could prohibit child pornography in order to protect children from harm because, quote, "The conclusion that child pornography causes child abuse involves too much speculation in view of the social situation as we know it. And the fact that it seems that most kids who act in these films probably are doing these acts aside from the films anyway," unquote.

Then again, in 1993, Mr. Bender advanced his agenda on pornography while serving a principal deputy solicitor general, forcing President Clinton and the United States Congress, including nine of my Democratic colleagues on this committee, to publicly reject his views. Now, Mr. Bender's opportunity came in the form of a case of the United States v. Knox. Mr. Bender approved a brief in that case, but sought to overturn the conviction of a repeat child pornographer and known pedophile. His brief represented a reversal of the first Bush administration's policy of liberally protecting the Child Protection Act as no, to define as child pornography any materials which showed clothed but suggestively posed young children.

In response, on November 3rd, 1993, the United States Senate voted 100 to nothing for a resolution condemning Mr. Bender's position in the case. The House passed a similar resolution by a vote of 425 to 3. Mr. Bender's brief prompted President Clinton to write Attorney General Reno that the Justice Department's new interpretation of the Child Protection Act left the child pornography law too narrow and emphasized that he wanted, quote, "The broadest possible protections against child pornography and exploitation," unquote. Each of my Democratic colleagues on this committee who were members of the Congress at the time voted for either the Senate or House resolutions rejecting Mr. Bender's views. Yet they inexplicably seemed to put full faith, lock, stock and barrel or some have in his opinion of Mr. Estrada.

In addition to Mr. Bender's extreme views, his public statements criticizing Mr. Estrada lack credibility when they are compared to his contemporaneous statements praising Mr. Estrada's work as the assistant solicitor general. At the request of the committee, Mr. Estrada's provided copies of his annual performance evaluations during this tenure at the solicitor general's office. The evaluation showed that during each year that Mr. Estrada worked at the solicitor general's office he received the highest possible rating of, quote, "outstanding," unquote. in every job performance category. The rating official who prepared and signed the performance review from 1994 to 1996 was none other than Mr. Bender.

Let me read a few excerpts from the evaluations that Mr. Bender signed. They say that Mr. Estrada, quote, "states the operative facts and of applicable law completely and persuasively with record citations, and in conformance with court and office rules, and with concern for fairness, clarity, simplicity and conciseness."

Quote, "Is extremely knowledgeable of resource materials and uses them expertly, acting independently, goes directly to the point of the matter and gives reliable, accurate responsive information in communicating his position to others."

Quote, "All dealings oral and written with the courts, clients and others are conducted in a diplomatic, cooperative and candid matter."

Quote, "All briefs, motions or memoranda reviewed consistently; reflect no policies at variance with departmental or governmental policies, or fails to discuss and analyze relevant authorities."

Quote, "Is constantly sought for advice and counsel. Inspires co workers by examples" all of that in quotes.

Now, these comments unmask Mr. Bender's more recent statements made after Mr. Estrada's nomination for whatever they are, a politically motivated effort to smear Mr. Estrada and hurt his chances for confirmation. The performance evaluations also confirm what other Clinton administration lawyers and virtually every lawyer who knows Mr. Estrada have said about him that he is a brilliant attorney who will make a fine federal judge. Ron Klank, former chief of staff to Vice President Gore and top Democrat counsel here on this committee praised

Mr. Estrada, saying that he would be able to, quote, "faithfully follow the law," unquote.

Former solicitor general Drew Days, a friend of Mr. Estrada, quote: "I think he's a superb lawyer," unquote.

Another Clinton era solicitor general and I have great respect for all of these men Seth Waxman called Mr. Estrada an, quote, "exceptionally well qualified appellate advocate," unquote.

Randolph Moss, former chief of the Justice Department's Office of Legal Counsel wrote the committee, quote, "to express my strong support for the nomination of Miguel Estrada. Although I am a Democrat and Miguel Estrada and I do not see eye to eye on every issue, I hold Miguel in the highest regard, and I urge the committee to give favorable consideration to his nomination," unquote.

And Robert Litt, deputy assistant attorney general in the Clinton Justice Department, said, quote, "Miguel has an absolutely brilliant mind. He is a superb analytical lawyer and he's an outstanding oral advocate," unquote.

Now, with all of this glowing support from former high ranking well respected Clinton administration lawyers, you have to wonder why there has been some of the criticism that has been leveled at Mr. Estrada, and you really have to wonder why anybody anybody would choose to listen instead to the incredible criticisms of Mr. Bender, a liberal extremist who is out of the mainstream views has been twice condemned by the whole United States Senate. Thank you, Mr. Chairman. That's all I have to say..

SEN. SCHUMER: Thank you, Senator Hatch. And now we will begin with the we will now proceed with the nomination. We are going to administer the oath to you, Mr. Estrada. So will you please stand to be sworn? Do you swear that that the testimony you are about to give before this committee will be the truth, the whole truth and nothing but the truth, so help you God?

MR. ESTRADA: I do. (Witness sworn.)

SEN. SCHUMER: Thank you. You may be seated. And before we proceed with questions, I'd like to give you the opportunity, Ministry of Information, to introduce your family, whom I've had the privilege of meeting, and make any statement that you wish.

MR. ESTRADA: Thank you, Senator Schumer, for having me here this morning. I also wish to thank our chief executive for giving me the opportunity to come before you. I do not have a statement, but I would like to take just a few moments to point out some members of my family who are here. My wife Laurie (sp), who is a government lawyer here in town. My mother, Clara Castenada, whom you met earlier, was until very recently, as she told you, one of your constituents. She recently retired from her job as a bank examiner in the state of New York, and now lives in Columbus, Ohio. My sister is a pediatric intensive care doctor

at Children's Hospital in Ohio. She is here as well. There are a couple of other family members who could not be here today. My mother in law, Ruby Gordon he is probably watching us on television in Birmingham, Alabama, and my father my late father's sister, my Aunt Gloria, my uncle, her husband, William Spiker (sp), and my three cousins, William, Edward and Marilyn could not be here today. And I assure you, senator, I did not pick my family based on the membership of the committee. They are in San Francisco. And that is all I have. Thank you.

SEN. SCHUMER: Well, thank you, Mr. Estrada. And I met your family they're a lovely group. In fact, I can see that the apple didn't fall far from the tree in terms of sharpness of mind. When I was introduced to your mother, she said, "Well, I hope you'll repay the favor." And I said, "Well, please?" She said, "Well, I voted for you." (Laughter.) So, thank you all, Estrada Family, for being here.

And now we will proceed with questions. We'll allow each member 10 minutes for questions. We'll do the usual Democrat Republican, go back and forth. And then we will have a second round if the members so wish. Thank you.

Okay, Mr. Estrada, as I mentioned in my opening remarks, you served for years in the office of the solicitor general. Your record in that office has been called into question by your former supervisor there my colleague Orrin Hatch both quoted favorably and unfavorably about Mr. Bender, but he's not the issue. He has said that you are too much of an idealogue and temperamentally unfit to merit confirmation to the seat.

Now, the real way to get to the bottom of this is not listen to Mr. Bender or go past his record he may be right, he may be wrong I don't know the man. I have no idea but is to examine your record in the solicitor general's office, which is probably the best detail we would have of what you did, at least in the public sector.

As you know, the Department of Justice has declined to release the memoranda you wrote serving in that office, claiming a privilege that at least in my opinion doesn't really exist. I understand you haven't opposed the release of these memoranda. Will you commit today to writing to Attorney General Ashcroft and urge him to turn over those documents so we can work towards resolving any of these allegations and get a fuller view of your record, which as you know is very important to me?

MR. ESTRADA: Thank you, senator, for the question. You are right that I have not opposed the release of those records. I have been a lawyer in practice for many years now, and I would like to know that I am exceptionally proud of every piece of legal work that I have done in my life. If it were up to me as a private citizen, I would be more than proud to have you look at everything that I have done for the government or for a private client. I do recognize that there are certain interests that have been asserted in this case that go beyond my own personal interests and those are the institutional interests of the Justice Department, and that those interests have been have been second as it were by men, and unfortunately only men, who have held the job of solicitor general in both administrations, going back to President

Kennedy. I am more than happy to write to the attorney general and convey your request. And I am certain that he knows that I am very proud of my work. And, as I say, if it were entirely up to me, I would more than happily have the world SEN. SCHUMER: What I am asking you to do, sir, is not convey my request. I've made that request already. As you know, shyness is not one of the qualities at the top of the list when it comes to my me. And so I would ask you to make that request, and it might help us get those records and expedite this hearing. I hope you will do that. I don't see why not. As you know, other solicitors general, other people who worked in the solicitor general's office I mentioned the name of Rehnquist and Bork and Judge Easterbrook have had those documents revealed. It hasn't done damage to the Constitution. It hasn't done damage to the way the executive branch functions. And as a judge I would assume that you would want all of the facts before making a ruling. I think we should have the same rights. So why wouldn't you just make a request to them and ask that those records be released? They may not accede to it; they may. But then at least this committee would be satisfied that you've done everything to try and get us those records.

MR. ESTRADA: I understand your point of view, Senator Schumer. I have been a practicing lawyer for all these years, and one of the things I have come to learn is that a practicing lawyer such as I am ought not to put his own interests ahead of the stated interests of his client. I do think it would be appropriate for me to do more than to convey your request to my former client, because they have a publicly stated view that is not in accord with what I would be urging them to do. And, as I said, as much as I would dearly love to have the entire world see every aspect of my work, for which I am proud, I do not think that I am in a position to, in my own personal capacity

SEN. SCHUMER: I would say to you sir, in all due respect, you are no longer anybody's lawyer. When you are here to be nominated to the independent branch of the judiciary, you should be making in my judgment at least this decision on your own. I understand your loyalty to the solicitor general's office, and you are no longer working there. It would seem to me that as an independent nominee, which you clearly are, with an exemplary record, as my colleague Orrin Hatch has gone over, that you are no longer you no longer have to play the role as a lawyer but rather as nominee you are playing the role you are nominee for judge. And to me at least it is not satisfying that says, Well, I have to still defend my old client there. Would you think about that, because I think it would be a shame if we couldn't get that evidence? Would you think about

MR. ESTRADA: Certainly. I mean, I will think I have thought about it, and I will think about it some more. Senator Schumer, let me say that I would like to think that my life in the law is an open book, and that there are tons and tons and reams of stuff out there that can speak to the committee about the sort of thinker that I am, and the sort of lawyer that I have been. Obviously, as I have said, I have been in practice or I have been a lawyer since 1986. I have had people on the other side of the table. I have had co counsel. I have appeared in front of numerous judges, including all the justices of the Supreme Court. I am aware that as part of its process of review the American Bar

Association undertook to conduct a survey of those who have been my colleagues and those who have been my opponents, and of judges and justices before whom I have appeared. And they found a record from which

SEN. SCHUMER: Sir, your record in terms of legal excellence I don't dispute. I doubt any members of this committee does. But we have lots of other things, as I mentioned in my opening statement, we want to know. When you represent clients, you are representing clients and you have done a very good job of that. The closest we have to seeing how you might be as a judge was when you represented the government in the solicitor general's office and made arguments to your superiors, to the solicitor general, about what position the United States government would take. In all due respect, at least to me, knowing that you are a good lawyer and seeing that you are a good lawyer is not enough. And knowing that you have a record as a lawyer that I could examine is not enough, because there are cases you've said it in some of the interviews that you didn't agree with the view but you were representing a client. But you are no longer representing a client. You have to you are on your own now as a very, very intelligent, accomplished person. And I would again urge you to think about making that request for us.

Let me move on to the next question here. I assume that you've read published reports that said that you attempted to block liberal applicants from clerking from your former boss, Justice Anthony Kennedy. I am sure you can understand why that would trouble people. If you are trying to preclude Justice Kennedy from hearing all sides argued in his chamber, it would suggest an ideological agenda when it comes to the court. So I want to ask you a simple yes or no question: Have you ever told anyone that you do not believe that any person should clerk for Justice Kennedy, because that person is too liberal, not conservative enough, because that person did not have the appropriate ideology, politics or judicial philosophy, or because you were concerned that person would influence Justice Kennedy to take positions you did not want him taking? Let me repeat the question, because it's an important one, at least to some of us: Have you ever told anyone that you don't believe that any person should clerk for Justice Kennedy (audio break) you were concerned that person would influence Justice to take positions you did not want him to be taking? Can you give us a yes or no to that, please.

MR. ESTRADA: Senator Schumer, I have taken a cab up to Capitol Hill and sat in Justice Kennedy's office to make sure he hired people that I knew to be liberal.

SEN. SCHUMER: No, but I'm asking you yes or no in terms of the question I asked.

MR. ESTRADA: I don't believe I have.

SEN. SCHUMER: The answer's no. Thank you.

Well, I have 17 seconds left, and you'll give longer than 17 seconds to my answer (sic). I'm going to go to Orrin Hatch. I have more questions which we'll go to in the second round.

SEN. HATCH: Well, thank you, Mr. Chairman. Again, I would I should comment on the request for internal Justice Department memoranda. As Senator Schumer mentioned in his opening statement, committee Democrats have requested that the Department of Justice turn over attorney work product, specifically appeals, certiorari and amicus memoranda that Mr. Estrada wrote as the career attorney in the Office of the Solicitor General of the United States of America.

Now, I heard my friend from New York, much to my surprise, say that everyone he's spoken to believes that these memoranda would be helpful. My friend must not have seen the letter written by SEN. SCHUMER: Excuse me. I didn't say everyone. I said many people, I think.

SEN. HATCH: Many. Okay. Well, let me say that many believe that, but he must not have seen the letter from the solicitor generals. All seven living former solicitors general wrote to the committee expressing their concern about this request and defending the need to keep such documents confidential. The letter was signed by Democrats Seth Waxman, Walter Dellinger and Drew Day, three excellent solicitor generals, as well as by Republicans Ken Starr, Charles Fried, Robert Bork and Archibald Cox, all of whom have excellent credentials.

The letter notes that when each of the solicitors general make important decisions regarding whether to seek Supreme Court review of adverse appellate decisions and whether to participate as amicus curiae in other high profile cases, they, quote, "relied on frank, honest and thorough advice from their staff attorneys like Mr. Estrada," unquote.

The letter explains that the open exchange of ideas which must occur in such a context, quote, "simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all but vulnerable to public disclosure."

Their letter, these former solicitors general, Democrat and Republican, concludes that, quote, "Any attempt to intrude into the office's highly privileged deliberations would come at a cost of the solicitor general's ability to defend vigorously the United States litigation interests, a cost that also would be borne by Congress itself," unquote.

Now, Mr. Chairman, I would like to submit a copy of this letter for the record at this point, if I can.

SEN. SCHUMER: Without objection.

SEN. HATCH: Now, the former solicitors general aren't the only ones who are disturbed by my Democrat colleagues' efforts to obtain privileged Justice Department memoranda. The editorial boards of two prominent newspapers have also criticized the attempt to obtain these

records. On May 28th of this year, the Washington Post editorialized that the request, quote, "for an attorney's work product would be unthinkable if the work had been done for a private client. The legal advice by a line attorney for the federal government is not fair game either," unquote.

According to the Post, quote, "Particularly in elite government offices such as that of the solicitor general, lawyers need to speak freely without worrying that the positions they are advocating today will be used against them if they ever get nominated to some other position," unquote. On May 24th of this year, the Wall Street Journal also criticized this request by my colleagues and, interestingly enough, noted its curious timing. Quote: "On April 15th, the Legal Times newspaper reported that a leader of the anti Estrada liberal coalition was considering launching an effort to obtain internal memos that Estrada wrote while at the solicitor general's office," unquote. A month later, on May 15th, Mr. Estrada received the letter seeking those internal memos by this committee.

Once again, to me it becomes painfully clear that the liberal interest groups may very well be the ones controlling the actions and agenda of this committee. It's starting to really worry me. And the Journal continued to voice its criticism in a subsequent editorial which appeared on June 11th calling the request, quote, "outrageous," unquote, and noting that the true goal was, quote, "to delay, to try to put off the day when Mr. Estrada takes a seat on the DC circuit court of appeals from which President Bush could promote him to become the first Hispanic American on the U.S. Supreme Court," unquote.

Now, Mr. Chairman, I would like to submit copies of these editorials for the record.

SEN. SCHUMER: Without objection.

SEN. HATCH: I am aware, as some of my colleagues have pointed out, that the New York Times took a different view from the Washington Post and the Wall Street Journal by supporting the Democrats' effort to obtain Mr. Estrada's internal memoranda during his tenure at the solicitor general's office.

But the Times fails completely to even acknowledge that all seven living solicitors general opposed this request. And since the Times appears to have failed to take this important factor into account in formulating its position, I'm inclined to disregard its view on the issue altogether. Now, I have to admit, I didn't agree with them anyway. (Laughter.) But anybody would

SEN. SCHUMER: You rarely do.

SEN. HATCH: No, that's not true. I've been finding especially the Washington Post lately has been writing some pretty good editorials on the judgeship situation in the United States Senate.

Now, contrary to the claims of one of my Democratic colleagues, the Department of Justice has never, to my knowledge, disclosed such sensitive information as the memoranda detailing the appeal, certiorari and amicus recommendations and legal opinions of an assistant of a clear liberal assistant to the solicitor general in the context of a judicial nomination.

During Robert Bork's Supreme Court confirmation hearings, the department did turn over some memoranda Bork wrote while serving as solicitor general. But to my knowledge, none of these memos contained the sort of deliberative materials requested of Mr. Estrada. The Bork materials included memos containing Bork's opinions on such subjects as the constitutionality of the pocket veto and on President Nixon's assertions of executive privilege and his views of the Office of Special Prosecutor.

None of the memos, to my knowledge, contained information regarding internal deliberations of career attorneys on appeal decisions or legal opinions in connection with appeal decisions. Moreover, the Bork documents reflected information transmitted between a political appointee, the solicitor general, and political advisers to the president, not the advice of a career Department of Justice attorney to his superior. There is a big difference.

The bottom line is that my friends are seeking privileged materials. Their attempts have been criticized by all seven living former solicitors general and by two major newspapers, and perhaps more that I'm unaware of. But more fundamental is the fact that Mr. Estrada does not object to turning over this memoranda. He has nothing to hide.

It is the Department of Justice that has an institutional interest in refusing to comply with my Democrat colleagues' request. And I, for one, understand and agree with the department's position. But the department's recalcitrance in this dispute should neither be imputed to nor held against Mr. Estrada.

Now, to be honest with you, if I were solicitor general, I'd be outraged by that request. And I think the seven solicitors general were not happy with that request, to say the least. That's why they took the time to write the letter, which is (an embarrassing?) letter to this committee at the very least.

Now, Mr. Estrada, when you were at the solicitor general's office, you had a lot of issues come before you that you had to give your honest opinion on. And others who are continuing long after you are going through the same experience. At any time did you place your own personal ideological opinions over that of what the law really was or you believe should be?

MR. ESTRADA: No, Senator, never. The job of being a lawyer in that office, as you point out, is difficult and complex, and it entails consideration of a large number of factors, including how a particular ruling going one way or the other might affect the interests of this agency or that other agency.

And sometimes you have to marshal those interests for the solicitor general, for his consideration, and give him a full understanding of where all of the government's departments may be with respect to an issue that is in the Supreme Court, for example. That sometimes may mean saying statements about the legal views of one agency which, if it became public, would hurt the litigating situation of that agency. And that is probably the type of consideration that has impelled the former solicitors general to take that view, having spoken to them. But I am not worried in the least that anybody could detect any bias or lack of skill in my legal work.

I do recall having made some pretty ruthless assessments of the legal views of some agencies, which, I'm sad to say, sometimes were vindicated in the courts later. And I would not think that those agencies, as a general matter, would want those types of work product papers out in the public domain.

SEN. HATCH: Thank you, sir. My time is up. Thank you, Mr. Chairman.

SEN. SCHUMER: I'm just going to take the liberty of adding to the record. I have to point out that my friend Senator Hatch's claim that memos from career DOT attorneys reflecting the deliberative role the deliberative process have not been turned over to Congress isn't true.

And I'd just like to submit, just for example, some of those exact memos from Judge Frank Easterbrook, now a seventh circuit judge, exactly the kind of memos we're looking for from Mr. Estrada, that were turned over. And I'd ask unanimous consent to submit these for the record.

Senator Leahy.

SEN. LEAHY: Thank you, Mr. Chairman. I also have a statement that I'd ask to be included in the record.

SEN. SCHUMER: Without objection.

SEN. LEAHY: I will not go into the unfortunate character attack made against Mr. Paul Bender, a man I've never met, do not know, but I would hope that this would not deter people who are for or against any nominee, you or anybody else, that they would not hesitate to send information and their views to this committee and would not fear that they're just going to have their character shredded on C SPAN if they do. I think it's beneath this committee when that happens.

I would refer, because there's been so much said about the Waxman letter it's an interesting letter, because the former solicitors general and I'm sure you noted this, Mr. Estrada they cited no legal citation, no authority whatsoever in their letter. It simply says, as a policy matter, memos written to the solicitor general should be kept confidential.

Now, I agree that the interest in candor is a significant one. But it's not an absolute interest, such as the interest of the Senate in addressing allegations made about somebody who's going to be up for confirmation, not to a short term position but to a lifetime position.

In fact, one of the people in that letter, former Solicitor General Robert Bork, knows full well that memos to the solicitor general have been disclosed without any damage to the department. When he was nominated to the Supreme Court, the Senate Judiciary Committee requested and was provided with written memoranda, written by him or to him when he worked in the solicitor general's office. That didn't chill subsequent members of the Justice Department from providing candid opinion. We're talking about something from the 1970s.

Memoranda to and from the solicitor general's office and also the office of legal counsel were provided to the Senate during the consideration of Judge Stephen Trott, who was confirmed to the ninth circuit, as well as Chief Justice Rehnquist when he was confirmed as chief justice; also William Bradford Reynolds, the former head of the civilrights division in the Reagan administration, who was nominated to the position of associate attorney general.

And then the suggestion that there's an attorney client privilege, I mean, that's so far fetched, it almost seems a shame to waste time talking about it. I think Senator Fred Thompson made it very clear. He said in case after case, the courts have concluded that allowing attorney client privilege to be used against Congress would be an impediment to Congress. And he says it's well settled the implication of attorney client privilege is not binding on Congress.

As another senior member of the United States Senate said, the attorney client privilege exists as only a narrow exception to broad rules of disclosure. No statute or Senate or House rule applies the attorney client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules. That senior member of the Senate was Orrin Hatch of Utah, as a matter of fact. I just happened to mention that one.

The Congressional Research Service says it's not binding on the Congress. Professor Ronald Rotunda has declared that it doesn't. And the person who normally does the privacy and political statements for the Department of Justice, Mr. Viet Dinh, said that the government's employer is not a single person but the United States of America. He said both the United States of America and the government obviously includes the United States Senate. And, of course, the seventh, the eighth, the District of Columbia circuits have agreed with that. I mention that for whatever it's worth. Now and also to clear it up.

As a grandson of immigrants, with a wife who is the daughter of immigrants, I know that no matter where you come from, family takes pride in the success of their children. And I'm sure your family does you, and they have a great deal to be proud of in your accomplishments.

You've got a successful law career in a prominent corporate law firm. It was the firm of President Reagan's first attorney general, William French Smith, President Bush's current solicitor general, Theodore Olsen; who joined the Office of the Solicitor General of the United States; worked for Kenneth Starr. Supreme Court Justice Scalia is a friend of yours. You worked on the legal team with Mr. Olsen that secured the United States Supreme Court's intervention in the presidential election in 2000 in behalf of then Governor Bush. You showed your brilliance as a lawyer there.

So I congratulate you on those. You know, you're in a high powered law firm. You've got a lot going for you. I am interested; the White House keeps talking about that you came from great poverty, arrived in this country not speaking any English. I know you and I talked about that, and you point out it's a little bit different than the story the White House passes out.

Your mother was a bank examiner, daughter of an educator. Your father was a prominent lawyer. You attended private school. You studied English before coming to the United States. In fact, you were so good in that, you earned a B in college level English classes in your first full year of higher education here.

We have a lot of people who are born in this country where English was their first language. If I judge from some of the letters I get from college students, they couldn't earn a B. They'd be darn lucky to make it through. So you seem to have followed your father's legacy in law school by assisting a banking law professor, and also I I just wanted to make sure have I pretty well described your your background?

MR. ESTRADA: I'm somewhat embarrassed to enter a little bit of a correction

SEN. LEAHY: Oh no, please do.

MR. ESTRADA: because it doesn't really put me in the best light and has always embarrassed me, but I did get a B minus in in my first English class (laughter) not a B.

SEN. LEAHY: Grade inflation has happened before around here, so, don't we won't hold that against you. (Laughter.) Everything else is okay, though?

MR. ESTRADA: You were probably right to point out that it was probably actually some sort of a C, but okay.

I would not say my father was a prominent lawyer. He was a lawyer. My mom just retired as a bank examiner in New York, as I just told you. I went to a Catholic school, for which I think my father had to pay something like \$10 or \$20 a month. I I have never known what it is to be poor, and I am very thankful to my parents for that. And I have never known what it is to be incredibly rich either, or even very rich, or rich. I have been in public service for the great bulk of my

life, as you know. I don't I don't, as a person having having come here, I don't keep a lot of money in hand. I have been very fortunate in all of the opportunities I've had in this country, and it's allowed me to rise to a standard of living in this country which I certainly would not have enjoyed in my home country that's why I'm here.

But I think, in broad outline, what you've said is right, and I take a good deal of pride in the fact that I have been able to do these things, thanks to having come here, though it is true that I was fortunate enough in Honduras to have parents who who gave me a good, honest middle class upbringing.

SEN. LEAHY: And I think and I think these are things to be proud of. I my grandparents spoke virtually no English, and I think they were proud their grandson went on not to make a lot of money but to have a life of public service, and I'm I see the look of pride on your family behind you, and I'm sure they feel that way. I just wanted to make sure that we got I wanted you to have a chance to give the your background, because I didn't want that to become a political issue because of the somewhat different one the White House gave. I think yours is a more accurate and more compelling. And we've heard that you have many strongly held beliefs. You're a zealous advocate, and that's great. You know, lawyers who win cases are not the ones who are on the one the one hand this, the other hand that. They they are zealous. But you also have to make sure that if you're going to enforce laws that your personal views don't take over the law. Senator Thurmond has every single nominee that I've ever heard him speak to, Republican or Democrat, has spoken to that effect.

What would you say is the most important attribute of a judge, and do you possess that?

MR. ESTRADA: The most important quality for a job for a judge, in my view, Senator Leahy, is to have an appropriate process for decision making. That entails having an open mind. It entails listening to the parties, reading their briefs, going back behind those briefs and doing all of the legwork needed to ascertain who is right in his or her claims as to what the law says and what the facts. In a court of appeals court, where judges sit in panels of three, it is important to engage in deliberation and give ear to the views of colleagues who may have come to different conclusions. And in sum, to be committed to judging as a process that is intended to give us the right answer, not to a result. And, I can give you my level best solemn assurance that firmly think I do have those qualities, or else I would not have accepted the nomination.

SEN. LEAHY: Does that include the temperament of a judge?

MR. ESTRADA: Yes, that includes the temperament of a judge. I think, to borrow somewhat from the American Bar Association, a temperament of a judge includes whether the individual, whether he or she is impartial and open minded and unbiased, whether he is courteous yet firm, and whether he will give ear to people that come into his room, into his courtroom who do not have who come with a claim about which the judge may be at first skeptical. SEN. LEAHY: Thank you, Mr.

Chairman. I'll have have other questions, of course, for our next round.

SEN. SCHUMER: We'll have a second round. Thank you, Chairman Leahy.

Just two things. I want to I was asked by Senator Hatch to please announced that Senator Kyl had to go to the Intelligence Committee and he's going to try to come back. I'd also want to just ask unanimous consent to put the letter of January 27, 2000, from the U.S. Department of Justice Office of Legislative Affairs in the record, which states the current Justice Department position, as I understand it, on giving up these documents. And they say "Our experience indicates that the department" the Justice Department "can develop accommodations with congressional committees that satisfy their needs for information that may be contained in deliberative material while at the same time protecting the department's interest in avoiding a chill on the candor of future deliberations." And I'd like to add that for the record, because I think it's not exactly on all fours with what was said before.

Let me call on Senator Grassley.

SEN. CHUCK GRASSLEY (R IA): Before I make some comment, I want ask three very basic questions, and they kind of get at the foundation for the selection of judges.

In general, Supreme Court precedents are binding on all lower federal courts, and circuit court precedents are binding on district courts within a particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

MR. ESTRADA: Absolutely, Senator.

SEN. GRASSLEY: What would you do if you believed the Supreme Court or the court of appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or would you use your own judgment of the merits, or the best judgment of the merits?

MR. ESTRADA: 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.

SEN. GRASSLEY: And if there were not controlling precedent dispositively concluding an issue with which you were presented in your circuit, to what sources would you turn for persuasive authority?

MR. ESTRADA: When facing a problem for which there is not a decisive answer from a higher court, my cardinal rule would be to seize aid from anyplace where I could get it. Depending on the nature of the problem, that would include related case law in other areas that higher courts had dealt with that had had some insights to teach with respect to the problem at hand. It could include the history of the enactment, including in the case of a statute legislative history. It

could include the custom and practice under any predecessor statute or document. It could include the views of academics to the extent that they purport to analyze what the law is instead of instead of prescribing what it should be. And in sum, as Chief Justice Marshall once said, to attempt not to overlook anything from which aid might be derived.

SEN. GRASSLEY: I thank you for those answers. I'm not going to go into the statements that have been exchanged between my colleagues on Mr. Bender, but I do have I don't have I don't know Mr. Bender, but I do work I did work with an issue that he played a prominent role in in the previous administration, and that was dealing with the Knox case. And I guess since I sponsored a resolution that disapproved of the Clinton administration's position on that Knox case, as it was heavily influenced by Mr. Bender's decisions, and that passed 100 to zero, so that we would not have arguments against a case that would let a twice convicted child pornographer free to continue his tendency to lure underage girls into criminal relationships, I think that when that sort of person comes out in opposition to you, that it ought to be pointed out, as it probably has been pointed out in stronger ways than I will, that that's reason to ignore, to a considerable extent, his distraction from your qualifications to be on the circuit court of appeals.

And I fought this very hard to get the legislation through that ended up in the Knox decision, so obviously I wanted a president, and an attorney general, and a solicitor general to fight hard for upholding that legislation, and we had a reversal of of the administration's position on that legislation that was highly influenced by Mr. Bender, who obviously has some extreme positions on whether or on the harm of child pornography.

So, I'll just leave it at that, and and suggest that our colleagues not take the opinions of Mr. Bender in finding fault with your qualifications for being on the court very seriously. In fact, just the opposite, I guess, from news reports that are out he had very complimentary things to say about you while you had a working relationship with him, and I would think that how do you get this dramatic change of opinion from from a Mr. Bender's opinion of you prior to your nomination to the circuit court, and a different opinion after you're nominated to the Supreme Court (sic) or to the circuit court of appeals.

So, I think that I am glad that the president nominated you. Obviously, I don't make a final decision until the record's clear, but I think with the ratings that you've had and how you've expressed yourself so far at this hearing, plus the reputation you have, that it's going to be hard for somebody to find reasons for voting against you. Thank you.

SEN. SCHUMER: Thank you, Senator Grassley. Senator Kennedy.

SENATOR KENNEDY: Mr. Chairman, just before I want to congratulate the nominee, and to enormous tribute, and you're to be congratulated, and we want to welcome your family.

MR. ESTRADA: Thank you, Senator.

SEN. KENNEDY: Thank you very much.

Just before questioning the nominee, Mr. President, I want to just join with those that are rejecting these personal attacks of Mr. Bender. I do not know Mr. Bender. But Professor Bender graduated magna cum laude from Harvard Law School, law review, clerked for Judge Learned Hand, court of appeals. He was a clerk for Justice Felix Frankfurter in the Supreme Court. He has spent 24 years as a faculty member at the University of Pennsylvania Law School and he was the dean of the law school. And he's also argued 20 cases on behalf of the United States before the Supreme Court. Now, I think it's one thing to disapprove of those that are going to support the nominee and to question those that disagree, but to have the kind of personal attacks on Mr. Bender, I think demeans this committee and demeans those who have made them.

Now, on the question of the release of the various materials, and I want to do this very quickly because I have questions of substance, did you ever talk with the attorney general about the release of these personally? Did you ever say, "Look, I'm all for since I don't have a great deal of decision making, I haven't published a great deal, I know there's going to be interest in my work in the solicitor's general, and I want to see these released," did you ever talk to him personally?

MR. ESTRADA: No. I have only met General Ashcroft, I believe, once in my life, on the day when I was nominated.

SEN. KENNEDY: So, you've never made the personal request, either of him or did you say so to anybody in the White House?

MR. ESTRADA: No. No.

SEN. KENNEDY: So, you haven't, as a personal matter, made that request yourself, even though that you knew that there was going to be widespread interest in this and that the members of the committee were going to ask for it?

MR. ESTRADA: Promptly when I got the letter from Chairman Leahy, I forwarded it to I think it was to the White House counsel's office, and may also have sent it on to the solicitor general no, actually I didn't do that, just the White House counsel's office.

SEN. KENNEDY: And then they just gave you a reaction and that was it?

MR. ESTRADA: Ah

SEN. KENNEDY: You didn't go back and say, "I can understand how the Judiciary Committee, in its consideration, would want to know these kinds of questions. There are others Bork, Rehnquist, Easterbrook, Civiletti, Brad (ph), Reynolds all have done this in the past. In the

sense of openness, I'd like the committee to have these kinds of documents as well"?

MR. ESTRADA: No, Senator, I did not.

SEN. KENNEDY: But you're going to do that now?

MR. ESTRADA: I have told Senator Schumer that I will think about doing that now. SEN. KENNEDY: Well, you better think about it. Is that your answer, you're just going to think about it?

MR. ESTRADA: Well, Senator

SEN. KENNEDY: You can't just that's your answer? We'll go on to another another question, if that's what your answer is going to be, you're just going to think about it.

SEN. HATCH: Do you care to add anything else to it?

SEN. KENNEDY: Now, Mr.

SEN. HATCH: Well, if he does

SEN. KENNEDY: I want to ask Mr. Estrada, as as the Senator Schumer pointed out, the D.C. Circuit Court of Appeals probably has a greater impact on the lives of people than any other court for the reasons that he has outlined, but I'll just mention them again. It makes the decisions about the protections health care workers, their exposure to toxic chemicals. It does it with regards to fair the labor laws, interpreting the protections of our labor laws for workers, whether they these laws are going to apply to workers and whether there's going to be adequate compensation or fair compensation. It has a whole range of employment discrimination cases on race, on gender, on disability. It has important regulations, it makes judgments about drinking water, the safety of drinking water, toxic sites, brown fields, again, environmental issues about smog and soot. Now we have we've doubled the number of children that are dying from asthma every year now. It's one of the few child's diseases that is going up in terms of deaths. They make important decisions about smoke and soot in the air. Right choose. The rights of gay men and lesbians, like Joseph Stafford, a midshipman at the U.S. Navy Academy, discharged because he told his classmates that he's gay. First Amendment rights on television. Sentencing commission. Equal protection and due process of the law.

Now, these affect many people that don't have great advocates, great lobbyists, great special interests here, but they look to this court as being the court really of last resort. Can you tell me why any of those groups that will be affected by these laws would feel that you would be fair to them, understand their problems, understand their needs, and that they, before you, could get the kind of fair shake and someone that could really understand the background of their own kind of experience.

MR. ESTRADA: Certainly, Senator. I would ask those people to look at my record of public service and what I have done with my life as a lawyer. As you may know, one of the things that I have done after leaving my years of public service, both in the U.S. attorney's office and in the prosecutor, is to be an attorney in private practice. While in private practice, I have done my share of work for free that I think benefits the community, including taking on the death row appeal of an inmate who had been sentenced to death and whose case was accepted by the Supreme Court of the United States. The reason I did that, and it took a significant part of my year a couple of years ago, is because I looked at the record after his then current lawyer came to me asking for help, and I said, "This isn't right. You know, we've got to do something about this." And I am the type of person who can look at what I think is an injustice and try to use my skills as an advocate to make sure that I make every effort to set it right. And I did that in that case. I have done that in my life as a public servant. And I would continue to do that as a judge.

SEN. KENNEDY: Did you have the other I would hope that we could have printed in the record the cases that you did handle. I believe there was another case as well, am I right?

MR. ESTRADA: There were other cases there was a case for an inmate that I handled in New York, yes.

SEN. KENNEDY: How many cases would you say, roughly, that you did of a public bono?

MR. ESTRADA: I have done cases in litigation, I can think of right now of four. I haven't been in private practice for very long, and during my period of public service it was not lawful for me to take on (inaudible)

SEN. KENNEDY: You could you could understand, could you, about how the concerns that people that would be affected by these would wonder whether you would be able to understand their plight do you think, or not?

MR. ESTRADA: Well certainly, Senator. I am a practicing lawyer. I work I walk into courtrooms pretty much it is all the time, and whether it is one of my firm's corporate clients or whether it is Tommy Strickler, the death row inmate, I always have a knot in my stomach about whether I am going to do right by that client.

SEN. KENNEDY: One of the areas that you have been every active in on the pro bono also was on the issues of challenging the various anti loitering cases. One in particular comes to mind, and that is the position that you took with regards to the NAACP Indianapolis anti loitering case. In that case the NAACP, which is a premier organization in terms of knocking down the walls of discrimination over a long period of time enormous credibility and here that they felt that those particularly loitering were interfering in their programming, counseling teenagers that were involved in crime and drugs, and also the conduct to conduct voter outreach and registration. Now, you made the case

before the court that the NAACP should not be granted standing to represent the members, these members. And as I look through the case I have difficulty in understanding why you would believe that the NAACP would not have standing in this kind of a case when it has been so extraordinary in terms of fighting for those who have been left out and left behind, and in this case was making the case of intervention, because of their concern about to the youth in terms of their employment, battling drugs, and also in terms of voting.

MR. ESTRADA: The laws that were at issue in that case, Senator Kennedy, and in an earlier case, which is how I got involved in the issue, deal with the subject of street gangs that engage in or may engage in some criminal activity. The I got involved in the issue as a result of being asked by the city of Chicago, which had passed a similar ordinance dealing with street gangs, and I was called by somebody that works for Mayor Daley when they needed help in the Supreme Court in a case that was pending on the loitering issue. I mention that, because after doing my work in that case I got called by the attorney for the city of Annapolis, which is the case to which you are making reference. They had a somewhat similar law to the one that had been at issue in the Supreme Court not the same law and they were already in litigation, as you mentioned, with the NAACP. By the time he had called me he had filed this is the lawyer for the city he had filed a motion for summary judgment, making the argument that you've outlined. And he had been met with the entrance into the case by a prominent Washington, D.C. law firm on the other side. He went to the state and local legal center and asked who I could turn to for help, and they sent him to me because of the work I had done on the Chicago case.

Following that, I did the brief. And the point on the standing issue that you mention is that in both Chicago and in the Annapolis ordinance you were dealing with types of laws that had been passed with significant substantial support from minority communities. And I've always thought that was part of my duty as a lawyer to make sure that when people go to their elected representatives and ask for these types of laws to be passed, to make the appropriate argument that a court might accept to uphold the judgment of the democratic people.

In the context of the NAACP, that was relevant to the legal issue, because one of the requirements we argued for representational standing was that the case that the organization wants to get into is germane to the goal of the organization, which in this case, as everybody knows, was to combat discrimination. And the basic point of the brief was that these were not racist laws. I take a backseat to no one in my abhorrence of race discrimination in law enforcement or anything else. But the basic point was that these were laws that were passed by the affected minority communities. To be sure, not with the unanimous support of minority communities, but that these were laws that had significant minority community support. And I thought that that was an argument that the court should consider in the context of this narrow legal doctrine that it was adverting to.

SEN. KENNEDY: Well, my time is up. It's my understanding that the elected officials opposed those laws the elected officials in

those communities opposed the laws. But the district court effectively rejected your position. And the point that I am bringing, and I think you have given us your view about it, is that the issues on standing are enormously difficult and complex for needy people, poor people, underrepresented people. And your argument in this to deny the NAACP standing in this case I find troublesome. I think as I understand, that's one of the reasons that the both MALDF and the Puerto Rican Legal Defense Fund have concerns as well. I just want to raise that. I understand my time is up, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator Kennedy. Before I turn to Senator Sessions, Senator Brownback just wanted you to know and everyone to know that he had to go to the floor to co manage the homeland security bill and hopes to be back this afternoon.

Senator Sessions.

SEN. JEFF SESSIONS (R AL): Thank you, Mr. Chairman. I will submit a statement for the record, and would just raise a couple of points at the beginning, because I did participate with you yesterday on the hearing involving the 10th Circuit, and previous hearings on the question of the appropriateness of considering ideology in selecting judges. I believe that as we approach this we ought not to change the ground rules. I know you have a chart there you referred to prepared by Professor Cass Sunstein. I believe that was the professor that appeared before Democrat senators in a retreat two years ago and urged that the ground rules for nomination to be changed. And since that time we've raised several issues notably the issue that we should not consider a person's ideology or political views when considering a judge; and also that the burden is on the nominee. Both of those, as we have researched it carefully, are contrary to history and tradition of this Senate. It is no doubt that any member, Mr. Estrada, of this committee can use any standard they want. They are elected, as you know, and they can use any standard they want. But we have to be careful that the standard we use can be applied across the board over a period of time, and it's a healthy standard for America. So I think those two issues are important and should not be adopted here.

I would note that Lloyd Cutler, who served as President Clinton's White House counsel, and is a distinguished lawyer of many years' service, has stated it would be a tragic development, testifying before this subcommittee, "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." Would you have any comment on that, Mr. Estrada? Do you see the legal process as a political thing or a legal matter?

MR. ESTRADA: Senator Sessions, I am very firmly of the view that although we all have views on a number of subjects from A to Z, the first duty of a judge is to self consciously put that aside and look at each case by starting withholding judgment with an open mind and listen to the parties. So I think that the job of a judge is to put all of that

aside, and to the best of his human capacity to give a judgment based solely on the arguments and the law.

SEN. SESSIONS: I agree, and that's what is the strength of our rule of law in America, which I think has helped make this country free, independent and prosperous economically. And we must, must, must not politicize the rule of law. And I think some of the things that we are seeing in this committee are steps in that direction. We have professors who believe that the law is merely a tool to oppress; judges are tools of passions. And it is a myth to believe that we can follow and ascertain the law objectively. I reject that. And if we ever move away from that in this country, I believe we will be endangering our system.

The Reves (ph) study that was highlighted and Mr. Sunstein' numbers are also, by the chairman, should be taken with caution. Just looking at the Reves (ph) study, it points out that there was some differences in Republican and Democratic judges. But look what the issues are that they dealt with. They looked only at environmental cases. They don't look at agriculture, federal trade, IRS cases. The study found no significant difference in Republican and Democratic voting patterns on statutory environmental cases; only regulatory cases where there is a where unelected bureaucrats are actually enforcing fleshing out rules to enforce laws we made. They found no industry favoritism by the Republicans in seven of the 10 time period studies. They found no activist group favoritism by Democrats in procedural environmental cases in four of the 10 timeframe studies. I think that study is greatly overstated. And I believe the ideal we should adhere to, that a judge, Republican or Democrat personally liberal or personally conservative, should rule the same in every case. Isn't that the basic ideal of America, based on the same law in fact?

MR. ESTRADA: I think my basic idea of judging is to do it on the basis of law, and to put aside on whatever view I might have on the subject, to the maximum extent possible, senator.

SEN. SESSIONS: You finished high in your class at Harvard, was an editor of the Harvard Law Review. Being on the law review itself is a great honor of any graduate one of the highest law honors a person can have. You served in the solicitor general's office, which many consider to be the greatest lawyer's job in the entire world to represent the United States of America in court. Everyone selected there are selected on a most competitive basis. You served one of the great law firms in America, doing appellate litigation work Gibson, Dunn and Crutcher one of the great law firms in the world. And you have been evaluated very, very carefully by the American Bar Association. As Mr. Fred Fielding said yesterday, the ABA considers judicial temperament. And after a careful review of your record, they concluded unanimously that you have the gifts and graces to make an outstanding judge. They gave you the highest possible rating, unanimously, well qualified. I see nothing in your record that would indicate otherwise. Your testimony has been wonderful here today. It reflects thoughtfulness, a gentleness. You are patient with some of the questions you received. You have demonstrated the kind of temperament that I think would make a great judge. You had in the appellate section of Gibson, Dunn and Crutcher

people don't hire you in that section unless they believe you can do good work. So I just am most impressed. I believe you would be an outstanding nominee.

One let's talk a little bit briefly more about the internal memorandums in the Department of Justice. You just raised in your original comments the critical point: those memorandum when a lawyer does work for a client and produces product for that client, who owns the product? Is it the lawyer or the client?

MR. ESTRADA: In my understanding as a general matter it is the client, senator.

SEN. SESSIONS: And when you give internal advice to a client and memorandums to a client, that is the client's duty to either review it or not review it, and you would have to have permission from that client?

MR. ESTRADA: That's usually the case.

SEN. SESSIONS: And as a lawyer well, maybe it's the criminal investigation or something but if it's a lawyer's duty here to carry out their responsibilities effectively, it's also in my view very nearly improper to ask them to give up something that you have no right to ask them to give up. I think that's appropriate to say. You have no objection to their releasing it, but if this committee wants those documents, they have to ask the Department of Justice. And I think it's very significant that all those former solicitor generals, including every single living solicitor general, has opposed releasing those documents as a matter of policy. So I believe you have nothing to be ashamed of there, and I think this is making a mountain out of a mole hill. It is an attempt to suggest there is something to hide when we have an important legal policy at stake.

And I know the questions get asked well, what do you think these groups might say? They maybe can't see you to be objective. After groups have gotten have been stirred up, or certain liberal activist groups attack a nominee, and they are not members of the committee, then turn and ask the nominee, Well, they don't they've said these things that you've refuted and the nominee is often knocked down totally as being inaccurate but then they say, Well, we can't confirm you because somebody might think you can't be fair. And I think that's an unfair thing to the nominee.

Mr. Estrada, if you are confirmed to this position, and I hope that you will be, how do you see the rule of law, and will you tell us, regardless of whether you agree with it or not, that you will follow binding precedent?

MR. ESTRADA: I will follow binding case law in every case, and I don't even know that I can say where I concur in the case or not without actually having gone through all the work of doing it from scratch. I may have a personal, moral, philosophical view on the subject matter. But I undertake to you that I would put all that aside and

decide cases in accordance with binding case law, and even in accordance with the case law that is not binding but seems constructive on the area, without any influence whatsoever from any personal view I may have about the subject matter.

SEN. SESSIONS: Thank you for your outstanding testimony. I believe if confirmed you will be one of the greatest judges on that court, and I do believe that if you are not confirmed it will be because this committee has changed the ground rules for confirmation of judges, and that would be a tragic thing.

SEN. SCHUMER: Senator Kohl.

SEN. HERBERT KOHL (D WI): Thank you, Mr. Chairman. Mr. Estrada, when we decide to support or oppose a nominee, we of course need to have an idea of their public approach

SEN. SCHUMER: Excuse me, senator I'm sorry we said we would break at 12:30, but in courtesy to Senator Feinstein who has been waiting here for a while, we will do Senator Kohl, Senator McConnell, Senator Feinstein. But anyone else who comes in, we are going to have to wait until two o'clock when we resume if that's okay with everybody. Okay. Thank you. Sorry to interrupt, senator.

SEN. KOHL: When we decide whether to support or oppose a nominee, we need to have an idea about their approach to the law, of course, and we need to determine what kind of a judge they may be. Some of us here in fact, many of us vote for almost all of the nominees for federal bench. I personally have voted for 99 percent of the nominees that have come before this committee.

In all of those cases I felt that I knew what we were getting when we voted. There was some record or some writing that gave me an idea about how the nominee might perform as a judge. We do not have, as you know, much of a public record or written record of you. You have opinions of course on many issues, I am sure, but we do not hardly know what any of them might be. And some of us might have a tough time supporting your nomination when we know so little.

With that in mind, I would like to know your thoughts on some of the following issues. Mr. Estrada, what do you think of the Supreme Court's efforts to curtail Congress's power, which began with the Lopez case back in 1994, gun free schools zone law?

MR. ESTRADA: Yes, I know the case, senator. I as you may know, I was in the government at the time, and I argued a companion case to Lopez that was pending at the same time, and in which I took the view that the United States was urging in the Lopez case and in my case for a very expansive view of the power to Congress to pass statutes under the Commerce Clause and have them be upheld by the court. Although my case, which was the companion case to Lopez, was a win for the government on a very narrow theory, the court did reject the broad theory that I was urging on the court on behalf of the government. And even though I worked very hard in that case to come up with every conceivable argument

for why the power of Congress would be as vast as the mind can see, and told the court so at oral argument, I understand that I lost that issue in that case as an advocate and I would be constrained to follow his office case.

Lopez has given us guidance on when it is appropriate for the court to exercise the (commerce ?) power. It is binding law and I would follow it.

SEN. KOHL: In light of growing evidence that a substantial number of innocent people have been sentenced to the death penalty, does that provide support, in your mind, for the two federal district court judges who have recently struck down the death penalty as unconstitutional?

MR. ESTRADA: I am not I am not familiar with the cases, Senator, but I think it would not be appropriate for me to offer a view on how these types of issues, which are currently coming in front of the courts and may come before me as a judge if I am fortunate enough to be confirmed, should be resolved.

SEN. KOHL: What is the government's role in balancing protection of the environment against protecting private property rights?

MR. ESTRADA: There as you know, Senator, there is a wealth of case law on that subject matter. Generally, Congress has passed a number of statutes that try to safeguard the environment, things like the Clean Air Act, NEPA, any number of other statutes that are enforced sometimes by the EPA, for example. And as a general matter, I think all judges would have to greet those statutes when they come to court with a strong presumption of constitutionality. There are claims in the courts that sometimes, in a particular case, those statutes, like some other statutes, may be used to transgress the Constitution. And I know that there are people who may claim that there may be takings or arguments of that nature. Obviously one would have to look carefully at the case law from the Supreme Court under the just compensation clause of the Fifth Amendment, but I don't know that I can tell you in the abstract how those cases should come out, other than to say that I recognize that as a general matter, the enactment of Congress in this area, as in any other, come to the courts with a strong presumption of constitutionality.

SEN. KOHL: All right. In the past few years, Mr. Estrada, there has been a growth in the use of so called protective orders in product liability cases. We saw this, for example, in the recent settlements arising from the Bridgestone Firestone lawsuits. Critics argue that these protective orders oftentimes prevent the public from learning about the health and safety hazards in the products that are involved.

So let me ask you. Should a judge be required and to what extent should a judge be required to balance the public's right to know against a litigant's right to privacy when the information sought should be sealed that could be sealed and could keep secret a public health

and safety hazard? How strongly do you feel about the public's right to know in these cases?

MR. ESTRADA: Senator, there is a long line of authority in the DC circuit, as it happens, dealing with public access in cases that are usually brought to gain access to government records by news organizations. And those cases, as I recall I haven't looked at them in some time do recognize a common law right of access to public records, which must be balanced against the interests of the governmental actor that is asserting a need for confidentiality.

I am not aware of any case, though there may be some, that has dealt with this issue in the context that you've outlined. But I would hesitate to say more than that, because I don't know how likely is it that the very issue that you've just outlined would come before me in the DC circuit if I were fortunate enough to be confirmed.

SEN. KOHL: All right, one last question. With all due respect to your answers, I'm trying to know more about you, and I'm not sure I

MR. ESTRADA: I'm trying to help you.

SEN. KOHL: Are you saying you're sorry you can't help me?

MR. ESTRADA: No, I said I'm trying my best to help you, Senator.

SEN. KOHL: All right, last question, sir. In their letter, the Puerto Rican Legal Defense & Education Fund criticized you for making, and I quote, "several inappropriately judgmental and immature comments" about their organization. They also called you, quote, "contentious, confrontational, aggressive, and even offensive," unquote. Why do you think they said these things about you? What happened at that meeting that would lead this organization to make such a strong statement? And what statements were you referring to when you said "bone headed"? (Laughter.)

MR. ESTRADA: (Laughs.) I

SEN. KOHL: Or can't you answer that either?

MR. ESTRADA: I'm happy to answer all of your questions, Senator. The Fund, as you may know, pretty much almost right after I was nominated, sent a letter to Chairman Leahy saying some fairly unflattering things about my candidacy for this office. The letter asked for a meeting with me, which I was delighted to give them, because I think of myself as a fair minded person who is very concerned if there's anybody out there who may think that I am biased or that I have any other character trait that would make me less of a person.

So I was very concerned that these people, whom I had not met, had already sent this letter. I told them that I would meet with them. And I did meet with them, I think, in April of this year. I was happy to clear for them an entire day of my calendar. As it happens, there were

three of them. They took about three and a half hours, and we had what I thought at the time was, by and large, a cordial conversation.

It was clear to me at the time that one of the individuals in the meeting was very frustrated by what I thought was my inability to give very expansive views in certain areas of law that are of interest to the Fund. And it was also clear at the meeting that he was very concerned that he would not that this meeting was not enabling him to ascertain how I might vote on a case, which I thought was what I had to do in my conversations with anybody.

Ultimately, during the conversation which, as I say, by and large, was pretty cordial he expressed the view actually, a series of three related views which went something like this. "Number one, you, Mr. Estrada, were nominated solely because you're Hispanic. Number two, that makes it fair game for us to look into whether you're really Hispanic. And number three, we, having been involved in Hispanic bar activities for 10 these many years, are in a position to learn that you're not sufficiently Hispanic," to which my response was and I felt that very strongly to point out that the comments were offensive, and deeply so, and bone headed. And they're still offensive.

SEN. KOHL: And bone headed. Thank you. I think you've done very well. I appreciate your comments.

SEN. SCHUMER: Senator McConnell. SEN. MITCH MCCONNELL (R KY): Thank you, Mr. Chairman.

Well, Mr. Estrada, I want to congratulate you on your nomination. Your story is truly inspiring. And being the proud husband of a lady who's done rather well in the United States, coming to this country at age eight and not speaking English, your nomination reminds me of what I think about frequently when I'm around the secretary of Labor, that this is a great country. So I congratulate you on your nomination.

I think the president has made a number of truly outstanding nominations. Yours is quite possibly the best, and I hope you will be speedily confirmed after some delay that your nomination has encountered here over the last year and a half.

I really have no questions, but I do want to make a statement. One of the dilemmas of being the least senior member of the committee is you have to wait around for a while. My friends on the other side have said they want mainstream judges. I think that you, Mr. Estrada, fit this category quite nicely.

As others have said, you received the ABA's highest rating, unanimously well qualified. As part of its rating, the ABA considers judicial temperament. You donated over 400 hours pro bono defending an individual in a capital case. You've received glowing letters of recommendation from prominent Democrats, including the former solicitor general under President Clinton, Walter Dellinger; former chief of staff to Vice President Gore.

But mainstream, of course, is a relative term. At this point, it is clear that what many of us on this side of the aisle think is mainstream is quite different from what some of our friends on the other side think is mainstream.

I thought Priscilla Owen, for example, was in the mainstream. She was rated, as you were, unanimously well qualified by the ABA. She was endorsed by the past 16 state bar presidents, both Democrats and Republicans. She was twice elected to statewide judicial office, the last time receiving 84 percent of the vote.

Yet my colleagues on the other side of the aisle killed her nomination because of her interpretation of a Texas law saying minor girls cannot freely get abortions behind their parents' backs. On this subject, well over 80 percent of Americans agreed with Justice Owen. So I was astounded that our friends on the other side would conclude that she was not in the, quote, "mainstream."

So I thought the best way to determine who, in my colleagues' view, is in the mainstream is to look at decisions of some of the 377 Clinton judges whom my colleagues strenuously supported and argued were, quote, "in the mainstream." For example, one of the class of 1984 (sic/means 1994), Judge Shira Sheindlin, recently, in a case regarding a terrorist witness, a terrorist witness federal agents did their job by detaining a material witness to the attacks of 9/11, a Jordanian named Osama Awadalla.

Osama Awadalla knew two of the 9/11 hijackers and met with at least one of them 40 times. His name was found in the car parked at Dulles Airport by one of the hijackers of the American Airlines Flight 77. Photos of his better known namesake, Osama bin Laden, were found in Osama Awadalla's apartment.

Under the law, a material witness may be detained if he has relevant information and is a flight risk. DOJ thought that Osama Awadalla met these two tests. It didn't seem to me like they were going out on much of a limb there. While detained, Awadalla was indicted for perjury.

Judge Sheindlin, of the Clinton class of '94, dismissed the perjury charges and released Mr. Awadalla on the street. Her reason: She ruled that the convening of a federal grand jury investigating a crime was not a criminal proceeding, and therefore it was unconstitutional to detain Mr. Awadalla.

This was quite a surprise to prosecutors, who for 30 years had used the material witness law in the context of grand jury proceedings for everyone from mobsters to mass murderer Timothy McVeigh. So much for following well settled law.

If you want to read a good article about this, I'd recommend the Wall Street Journal's editorial from June 4th entitled "Osama's Favorite Judge." It concludes by saying, "Mr. Awadalla is out on bail. We wonder how he's spending his time."

Another judge that I expect was considered by the other side to be in the mainstream, Judge Jed Rakoff, one of Judge Sheindlin's colleagues from the Clinton class of '95, has ruled that the federal death penalty in all applications, in all applications, is unconstitutional. Some of our colleagues share this position, but that position is at odds with the views of the majority of Americans. It is also very clearly a failure to follow Supreme Court precedent. Indeed, Judge Rakoff's ruling was so brazenly violative of the precedent that even the Washington Post, which is against the death penalty as a policy matter, came out against his decision as "gross judicial activism."

In an editorial entitled "Right Answer, Wrong Branch," the Post noted that the Fifth Amendment specifically contemplates capital punishment three separate times. It then noted that the Supreme Court has been clear that it regards the death penalty as constitutional. The high court has, in fact, rejected far stronger arguments against capital punishment.

"Individual district judges may not like this jurisprudence," the Post went on, "but it is not their place to find ways around it. The arguments Judge Rakoff makes should rather be embraced and acted upon in the legislative arena. The death penalty must be abolished, but not because judges beat a false confession out of the Fifth Amendment."

I also note another editorial from the Wall Street Journal entitled "Run For Office, Judge." With respect to Judge Rakoff's moderation and fidelity and precedent, the Journal says, "It hardly advances the highly charged debate on capital punishment to have a federal judge allude to members of Congress who support capital punishment as murderers. If Judge Rakoff wants to vote against the death penalty, he ought to resign from the bench and run for Congress or the state legislature, where the founders thought such debates belong."

On Tuesday, another Clinton judge, William Sessions of Vermont, appointed by the previous president in 1995, issued a similar ruling. The rulings of Judge Rakoff and Sessions would prevent the application of the death penalty against mass murderers like Timothy McVeigh and Osama bin Laden.

As an aside, I note that the second circuit, which reviews the rulings of Judge Sheindlin, Rakoff and Sessions, has a two to one ratio of Democratic judges to Republican judges. So for my colleagues who are so concerned about a party having a single seat advantage on the DC circuit, I assume they recognize the need for common sense conservatives to balance out the second circuit.

Another Clinton appointee in '94, Judge Henry McKay (sp), had an interesting theory about a constitutional right to transsexual therapy. When Professor Tribe appeared before this committee, he implied that a conservative's view of the Eighth Amendment proscription against cruel and unusual punishment was confined to protecting against the lopping off of hands and arms.

Well, Judge McKay (sp) of the tenth circuit has held that it is far broader than that. Specifically, a transsexual inmate, Josephine Brown, brought a 1983 action against the state of Colorado alleging that by not providing female estrogen therapy, Colorado had, in fact, punished her and that its punishment was of such cruel and unusual nature as to be violative of the Eighth Amendment to the Constitution.

Now, as Judge Henry noted in his opinion, the tenth circuit, along with the majority of courts, had held that it was not, not an Eighth Amendment violation to deny an inmate estrogen. The law of the circuit did not, however, stop Judge Henry, although the complaint had three times specified that it was the denial of estrogen that was the gravamen of the complaint. Judge Henry and two Carter appointees rewrote the complaint and reinstated it. So much for judicial restraint and following precedent.

Various ninth circuit appointees, defining the right to long distance procreation for prisoners. My friends on the other side believe very strongly in a living and breathing Constitution and that the rule of law should not be confined to the mere words of the document and the framers' intent.

I was truly surprised, however, to read what a panel of the ninth circuit had tried to breathe into the Constitution. A three time felon, William Gerber, is serving a life sentence for, among other things, making terrorist threats. Unhappy with how prison life was interfering with his social life, Mr. Gerber alleged that he had a constitutional right to procreate via artificial insemination.

A California district judge rejected Mr. Gerber's claim. A split decision of the ninth circuit, though, reversed. Judge Stephen Reinhardt joined President Johnson's appointee, Myron Bright, and they concluded that, yes, the framers had intended for the right to procreate to survive incarceration.

In dissent, Judge Barry Silverman, a Clinton appointee, who was recommended by Senator Kyl, wrote that this is a seminal case in more ways than one, because the majority simply does not accept the fact that there are certain down sides to being confined in prison. One of them is the interference with normal family life. Judge Silverman noted that while the Constitution protects against forced sterilization, that hardly establishes a constitutional right to procreate from prison via FedEx.

I'm getting notes here that I have one minute remaining, and I won't take any more than one minute. The ninth circuit en banc reversed this decision, but only barely, and it did so against the wishes of Clinton appointees Tishema (sp), Hawkins (sp), Paez (sp) and Berzon (sp), who dissented.

The point I'm trying to make, Mr. Chairman, is mainstream is a very, very subjective determination that each of us is trying to make here. And what many on the other side might consider mainstream, most Americans consider completely out of bounds.

And so the best way to judge a nominee such as the nominee we have before us is on the basis of the qualifications unanimously well qualified by the ABA, supported by Democrats and Republicans, not a shred of evidence of any reason not to confirm this nomination. And so I hope Mr. Estrada will be rapidly confirmed to a position to which he is uniquely, uniquely qualified.

Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator McConnell. I'll bet you wish that we had spent a little more time learning the records of Judge Rakoff and some of the others before we nominated them.

SEN. MCCONNELL: Actually, if I might respond, I voted for most of these judges. I felt the president should be given great latitude. After all, he had won the election. And it seems to me that is an appropriate latitude to be given to the nominees of President Bush.

SEN. SCHUMER: You did vote against 12 of President Clinton's nominees. I don't know if it was temperament, ideology or what. And the only other thing I'd mention is that the that I've supported, and I think this Congress two on two of President Bush's nominees on the second circuit, including recently Rena Rodgy (sp), who is a conservative.

Now I'll go to Senator Feinstein.

SEN. FEINSTEIN: Thank you very much, Mr. Chairman. I don't want to respond to the distinguished senator from Kentucky, but I have a hard time figuring out how a judge confirmed in 1984 relates to Mr. Estrada today.

But Mr. Estrada, I'd like to thank you for spending some time with me yesterday. I found it very, very helpful. And I wanted to concentrate in two areas. I come from a state that is bigger than 21 states plus the District of Columbia put together, so there are a lot of people. And I kind of pride myself at least of knowing where there is a majority of opinion. And there is a substantial majority of opinion, I believe, that surrounds a woman's right to choose, and surrounds the right to privacy. We had a chance to talk a little bit about this yesterday, but I'd like to ask your view with respect to a fundamental case, and that's the 1973 case of Roe v. Wade, when the Supreme Court held that the Constitution's right to privacy encompassed a woman's right to choose to have an abortion, and the government regulations that burdened her exercise of that right were subject to judicial scrutiny. Do you believe that the Constitution encompasses a right to privacy?

MR. ESTRADA: The Supreme Court has so held and I have no view of any nature whatsoever, whether it be legal, philosophical, moral, or any other type of view that would keep me from apply that case law faithfully.

SEN. FEINSTEIN: Do you believe that Roe was correctly decided?

MR. ESTRADA: I have my view of the judicial function, Senator Feinstein, does not allow me to answer that question. I have a personal view on the subject of abortion, as I think you know. And but I have not done what I think the judicial function would require me to do in order to ascertain whether the court got it right as an original matter. I haven't listened to parties. I haven't come to an actual case of controversy with an open mind. I haven't gone back and run down everything that they have cited. And the reason I haven't done any of those things is that I view our system of law as one in which both me as an advocate, and possibly if I am confirmed as a judge, have a job of building on the wall that is already there and not to call it into question. I have had no particular reason to go back and look at whether it was right or wrong as a matter of law, as I would if I were a judge that was hearing the case for the first time. It is there. It is the law as it has subsequently refined by the Casey case, and I will follow it.

SEN. FEINSTEIN: So, you believe it is settled law?

MR. ESTRADA: I believe so.

SEN. FEINSTEIN: Thank you very much. I wanted for a moment to touch on a response you made to Senator Schumer's question. As he was answering the question, I happened to be reading an article in The Nation magazine, and I wanted just to be sure because you answered his question about whether he screened judge screened clerks for Justice Kennedy and prevented him from hiring any liberal clerk, you said the answer to that was no. I'd like to read you a brief couple of sentences and see if the "no" applies to this.

Perhaps the most damaging evidence against Estrada comes from two lawyers he interviewed for Supreme Court clerkships. Both were unwilling to be identified for fear of reprisal. The first told me, and I quote, "Since I know Miguel since I knew Miguel, I went to him to help me get a Supreme Court clerkship. I knew he was screening candidates for Justice Kennedy. And Miguel told me 'No way, you're way too liberal.' I felt he was definitely submitting me to an ideological litmus test, and I am a moderate Democrat. When I asked him why I was being ruled out even without an interview, Miguel told me his job was to prevent liberal clerks from being hired. He told me he was screening out liberals because a liberal clerk had influenced Justice Kennedy to side with the majority and write a pro gay rights decision in a case known as Roemer v. Evans, which struck down a Colorado statute that discriminated against gays and lesbians."

Did this happen?

MR. ESTRADA: Senator, let me maybe I should explain what it is that I do from time to time for Justice Kennedy. Justice Kennedy picks his own clerks. As other judges and justices, he will sometimes ask for help by former clerks with the interviewing of some candidates. I have been asked to do that from time to time. I do not do it every year. I haven't done it for two or three years now. And sometimes I will get a file. It is in the nature of my role in the process that I

could not do that which is alleged in the excerpt that you read since I don't have control over the pool of candidates.

SEN. FEINSTEIN: So, your answer is that this is false?

MR. ESTRADA: As far as I know, unless it is a very bad joke that I have forgotten, the answer is no. As I started telling Senator Schumer, I know that I don't do that. I know that Justice Kennedy has other people who help him, including my former co clerk, Harry Littman (sp), who was a U.S. attorney in Pennsylvania who was appointed by former President Clinton, and who is a Democrat. I know that that's not what Justice Kennedy does. And I know that I personally, as I started to say to Senator Schumer, have from time to time, even though my role is simply to take people that he sends me to interview and give him my comments for his consideration, from time to time, I have met an exceptionally bright lawyer who I think warrants his attention and whose application otherwise may not have come to his attention. And I think I have probably put the effort of interjecting myself into this process in that fashion twice in my life. One of them was for a young woman who I knew for a fact was a Democrat and who is currently working for for Senator Leahy. And I thought very highly of her, and I spent a lot of my time telling Justice Kennedy of what a high view I had of her talent, and why he should hire her.

SEN. FEINSTEIN: No, I just wanted to ask that question because since you answered Senator Schumer's question no, I wanted to corroborate that this incident was a false incident, and you have effectively said to me it was a false

MR. ESTRADA: Yes

SEN. FEINSTEIN: this did not happen.

MR. ESTRADA: I mean, as you read it, Senator Feinstein, the only thing that I could think is that it has that if I said anything remotely on that subject that is anywhere near, within the same solar system even, it could only have been a joke. It was not it is not what I do for Justice Kennedy.

SEN. FEINSTEIN: Right. Right. I understand.

Now, since your case is a little different because you have been a very strong advocate in the sense as a U.S. attorney, you have represented private clients. I don't really judge from your representation of a private client your personal philosophy necessarily, but I can make a judgment as to whether you're a competent attorney, and you certainly are that, and certainly have the potential even, I think, of brilliance. I think that is that is clearly there. And I happen to believe it's desirable to have brilliant people, if we can, as federal judgeships as federal judges. You know, many people have looked back and seen people who were advocates become judges and really change, really become wise, prudent, temperate. They've seen people do things. Certainly Earl Warren led the court he was a Republican governor of my state he led the court in a unanimous decision that segregation was

unconstitutional. And I think he's well respected for that historically, and well respected for his for his fairness. You do not have a judicial record, so for me, I can't make a judgment on whether you would follow the law or not, so I've got to kind of try in different areas.

I was interested in your answer to Senator Kohl's case with respect to the Lopez case. The Lopez case struck down a law regulating guns near schools based on the argument that Congress had over stepped its bounds. And for many of us, this question might be appropriate in judging you. To what extent do you believe that Congress can regulate in the area of dangerous firearms, particularly when those weapons travel in interstate commerce, when they affect commerce and tourism, and when they have such a devastating impact on the children of this country?

MR. ESTRADA: Senator, as I recall, I haven't looked into the area of guns and commerce since the Lopez case. I do recall that there is still another case, a pre Lopez case that that as I sit here and I try to think about it, I am pretty certain was not called into any question by the court in Lopez itself a case by the name of Scarborough, I think, versus the U.S., where the court ruled that if if a statute passed by Congress in the area of gun control, and I think in that case it was the Gun Control Act of 1968, has a jurisdictional element that attaches to the crime, that that is all right under the Commerce Clause. As I recall, the Scarborough case, what the court ruled, is that if the government were to prove that the firearm had at any time in its lifetime been in interstate commerce, even if that had nothing to do with the crime at issue, that that would be an adequate basis for the exercise of Congress' power. And I haven't looked at the case law, and I suppose if I had something that I had to rule on I would have to, but my best recollection, as I said, now is that the court left standing the Scarborough rule, and that that's still a good law, that I would, of course, follow. SEN. SCHUMER: Thank you.

SEN. FEINSTEIN: Thank you very much. My time is up. Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you, Senator. Thank you, Mr. Estrada. It's be a a we've been here close to three hours, and we're going to take a one hour break for lunch, and we're going to resume at 2:00.

MR. ESTRADA: Thank you, Senator.

SEN. SCHUMER: Thank you. (End morning session. Afternoon session will be sent as a separate event.)

END.

Dinh, Viet

From: Dinh, Viet
Sent: Friday, September 20, 2002 5:12 PM
To: 'Kavanaugh, Brett'; Benczkowski, Brian A; Remington, Kristi L
Subject: FW: Judgeship bill intel
Attachments: 550 one page talker.wpd

FYI

-----Original Message-----

From: Brown, Jamie E (OLA)
Sent: Friday, September 20, 2002 5:06 PM
To: Bryant, Dan; O'Brien, Pat; Dinh, Viet; Charnes, Adam
Subject: Judgeship bill intel

I have been conversing with our friends on the hill about the possibilities for introduction of a judgeship bill before adjournment. The assessment of staff to Hatch and Sessions (Courts Subcommittee RM) is that Leahy and Schumer (Courts Sub. Chair) would not agree to sponsor the Judicial Conference plan. Since the change in Administration, Leahy has not introduced or supported a bill implementing the Judicial Conference plan.

(b) (5)

(b) (5)

Section 312 of S. 1319 provides for 8 new permanent district judgeships and 1 new temporary district judgeship. (b) (5)

(b) (5)

I wanted to provide this information for consideration going into next week's events with the Judicial Conference.

Judgeship Amendment

Background:

- For FY 2000, the Republican controlled Senate created 9 new judgeships. Pub. L. No. 106-113, § 1000(a)(1) (enacting H.R. 3421, § 309), 113 Stat. 1501, 1501 app. at 37 (1999).
- For FY 2001, the Republican controlled Senate created 10 new judgeships. Pub. L. No. 106-553, § 1 (a)(2) (enacting H.R. 5548, § 305), 114 Stat. 2762 (2000).
- On September 13, 2001, at the Judiciary Committee Executive Business Meeting, Senator Feinstein offered an amendment to S. 1319, the DOJ Reauthorization Bill to add several district court judgeships. This amendment was included after the markup. The bill now adds 9 new district judgeships (5 S.D. Cal., 2 W.D. Tex, 1 W.D.N.C., and 1 Temp. W.D.N.C.), make 2 temporary district judgeships permanent (1 C.D. Ill., 1 S.D. Ill.), and extend a temporary judgeship (N.D. Ohio).

Conference Amendment:

- The Conference Amendment would strike the language of Section 312 from S. 1319 and add the judgeships that are currently in Section 312 plus an additional 15 district judgeships (a total of 24 new district judgeships).
- These new judgeships would be for those districts with a weighted average caseload in excess of 550 (the A.O. recommends a new judgeship at 430), creating the judgeships where the need is greatest.

Reasons to Support:

(b) (5)

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, September 18, 2002 5:17 PM
To: 'Flanigan, Timothy'; 'Kavanaugh, Brett'
Subject: FW: Estrada Hearing (DC Circuit) announced by Senator Leahy for

-----Original Message-----

From: Scottfinan, Nancy
Sent: Wednesday, September 18, 2002 5:15 PM
To: Bryant, Dan; O'Brien, Pat; Brown, Jamie E (OLA); Dinh, Viet; Charnes, Adam; Willett, Don; Benczkowski, Brian A; Joy, Sheila; Goodling, Monica
Cc: Williams, Paula; 'heather wingate@who.eop.gov'; 'anne womack@who.eop.gov'
Subject: Estrada Hearing (DC Circuit) announced by Senator Leahy for

Thursday, Sept. 26 at 10 am. I was told there would be district court judges on the hearing as well.

Dennis Shedd (4th Circuit) is on the agenda for markup tomorrow. I have not yet heard whether he will be held over

Scottfinan, Nancy

From: Scottfinan, Nancy
Sent: Tuesday, September 10, 2002 11:46 AM
To: 'Heather_Wingate@who.eop.gov'; Dinh, Viet
Cc: Bryant, Dan; Brown, Jamie E (OLA); O'Brien, Pat; 'Anne_Womack@who.eop.gov'; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Film crew covering Senator Brownback

I will get that commitment.

-----Original Message-----

From: Heather_Wingate@who.eop.gov [mailto:Heather_Wingate@who.eop.gov]
Sent: Tuesday, September 10, 2002 11:42 AM
To: Scottfinan, Nancy; Dinh, Viet
Cc: Bryant, Dan; Brown, Jamie E (OLA); O'Brien, Pat;
Anne_Womack@who.eop.gov; Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Film crew covering Senator Brownback

I think we would be fine with this so long as the (b) (5) and then the meeting would be (b) (5)

----- Original Message -----

From:<Nancy.Scottfinan@usdoj.gov>
To:<Viet.Dinh@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested),
Heather Wingate/WHO/EOP@EOP
Cc:<Dan.Bryant@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested),
<Jamie.E.Brown@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested),
<Pat.O'Brien@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)
Date: 09/10/2002 11:26:42 AM
Subject: Film crew covering Senator Brownback

The documentary crew are following his work on immigration and want to highlight meeting with an Hispanic nominee (Miguel Estrada). There will be no questions. It will probably air sometime next year. The documentary is being done by Sherry Robertson and Michael Camerini, whose work appears on PBS and HBO. They can be found at www.EPIDAVROS.org

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, April 17, 2002 7:09 PM
To: 'Philip_J._Per (b) (6)'; 'jgraha (b) (6)';
'Brett_M._Kavanaugh@who.eop.gov'; 'Jay_P._Lefkowitz@opd.eop.gov';
'Diana_L._Schacht@opd.eop.gov'
Subject: Thank you.

Thank you so much for all your help in clearing the emergency INS rule. (b) (5)

Hinchman, Robert

From: Hinchman, Robert
Sent: Wednesday, April 17, 2002 12:27 PM
To: 'Philip_J._Per (b) (6)'; 'jgraha (b) (6)';
'Brett_M._Kavanaugh@who.eop.gov'; 'Jay_P._Lefkowitz@opd.eop.gov';
'Diana_L._Schacht@opd.eop.gov'; Dinh, Viet; Ciongoli, Adam; Clement, Paul D;
Cooper, Owen B; Flippin, Laura; Heytens, Toby J; Hussey, Thom; Katsas, Gregory;
Kneedler, Edwin S; Lamken, Jeffrey A; Levey, Stuart; Lindemann, Michael;
Nielson, Howard; Stern, Mark; Whelan, M Edward III
Cc: Jones, Kevin R; Beck, Leland E (OLP); Hart, Rosemary; Sloan, Richard A; Tarragon,
Stephen R
Subject: INS 2203 has been formally submitted to OMB - "Release of Information
Regarding INS Detainees in Non-Federal Facilities"
Attachments: ins2203 detainee info reg8cln omb formal.wpd; ins2203 v 7 to 8 RS.wpd
Importance: High

This is to inform you that a short time ago the Department formally submitted to OMB for review pursuant to Executive Order 12866 the INS interim rule ***"Release of Information Regarding INS Detainees in Non-Federal Facilities"*** (INS 2203; RIN 1115-AG67).

A copy of this rule along with a redline/strikeout copy showing changes from the informal version sent to OMB earlier are attached.

Bob Hinchman
Office of Legal Policy
514-8059

-----Original Message-----

From: Hinchman, Robert
Sent: Wednesday, April 17, 2002 11:52 AM
To: 'Lee, Karen (OMB)'; 'Beverly, Pam (OMB Docket Library)'
Cc: Jones, Kevin R; Beck, Leland E (OLP)
Subject: Formal submission of INS 2203; RIN 1115-AG67 - "Release of Information Regarding INS Detainees in Non-Federal Facilities"
Importance: High

TO: OMB - Karen Lee, Pam Beverly

cc: OLP - Kevin R. Jones, Lee Beck

Attached to this email is INS an **formal** copy of the INS interim rule ***"Release of Information Regarding INS Detainees in Non-Federal Facilities"*** (INS 2203; RIN 1115-AG67).

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, April 17, 2002 8:55 AM
To: 'Philip_J._Per (b) (6)'; 'jgraha (b) (6)';
'Brett_M._Kavanaugh@who.eop.gov'; 'Jay_P._Lefkowitz@opd.eop.gov';
'Diana_L._Schacht@opd.eop.gov'
Cc: Levey, Stuart; Nielson, Howard; Dinh, Viet; Jones, Kevin R; Beck, Leland E (OLP)
Subject: Emergency INS Rule Submission.
Attachments: detainee info reg7cln.wpd

Dear All,

We have provided to OMB informally and will submit formally later today a (b) (5) rule to address an issue in pending litigation.

ACLU v. Hudson County is a case pending in New Jersey state court, in which the ACLU seeks a list of, among other things, the (1) names, (2) age, (3) birthplace, (4) nationality, (5) date of entry, (6) date of discharge, (7) reason for commitment, and (8) lawyer, if any, for all persons held in the Hudson County, New Jersey and Passaic County, New Jersey jails since September 1, 2001. INS detainees, taken into custody in the wake of the terrorism investigations after September 11, have been housed in these jails pursuant to contracts between the INS and the counties. The plaintiffs sued the counties in state court and invoked state public records laws to obtain this information. DoJ intervened as a defendant. The trial court held that the state statutes and regulations at issue mandated disclosure, and granted a stay pending appeal only until April 22. On the current record, we are limited to arguing that disclosure is not mandated under state law and that, in any event, the disclosure of these records should be governed exclusively by federal law because they involve the administration of federal government contracts and immigration matters in which federal power is plenary and exclusive.

(b) (5)

Because the trial court stay expires on Monday, we must commence emergency litigation for a further stay pending appeal in the intermediate appellate courts (and, if necessary, in the state and United States supreme courts) immediately.

I ask for your immediate consideration. The draft rule, which will be formalized this morning, is attached for your convenience. Thank you so much.

Viet

Dinh, Viet

From: Dinh, Viet
Sent: Friday, April 12, 2002 7:16 PM
To: 'gary_malphrus@opd.eop.gov'
Cc: Benedi, Lizette D; 'brett_m._kavanaugh@who.eop.gov'; Ho, James
Subject: Fw: can we talk Sat morning?

--- Sent from my BlackBerry.

-----Original Message-----

From: Matthew Lamberti </DDV=Matthew_Lamberti@judiciary.senate.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A=TELEMAIL/C=US/>
To: Dinh, Viet <Viet.Dinh@USDOJ.gov>; Stephen Higgins <(b)(6) Stephen Higgins Senate email Twist; Steve <sttwist@viad.com>; David Hantman <David_Hantman@judiciary.senate.gov>
Sent: Fri Apr 12 18:29:31 2002
Subject: can we talk Sat morning?

We need to talk about 2 issues: 1) the 7-year time limitation issue (I sent you an email earlier) and 2) a problem that Larry Tribe has now raised. He thinks that the addition of "in such public proceeding" after the word "decisions" is problematic because it would make the victim's constitutional interest in due consideration of his safety contingent on whether the government made the decision at a public proceeding. He points to the case discussed in his recent op-ed in the Boston Globe where the authorities released a rapist after he was convicted rather than bother to jail him (the rapist is now at large). The victim has yet to be heard on this matter. Under the current draft, government can avoid giving the victim's interest in safety appropriate consideration by making the decision w/o holding a public proceeding or outside the public proceeding.

I don't see how we can proceed without resolving these issues. Can we set up a conference call tomorrow at 10:00 am to discuss?

-Matt

Dinh, Viet

From: Dinh, Viet
Sent: Friday, October 12, 2001 10:24 AM
To: Bryant, Dan; Thorsen, Carl; Newstead, Jennifer; O'Brien, Pat; Daley, Cybele K; Walter, Sheryl L; Bernhardt, Gena; Burton, Faith; Burton, Dawn; Chertoff, Michael; Elwood, John; Tucker, Mindy; Israelite, David
Cc: Painter, Christopher; Cassella, Stefan; Kris, David; Burton, Dawn; 'brett_m._kavanaugh@who.eop.gov'; 'courtney_s._elwood@who.eop.gov'; Israelite, David
Subject: RE: The House Bill being considered today

I wholly endorse Dan's (b) (5)
(b) (5). Thanks.

-----Original Message-----

From: Bryant, Dan
Sent: Friday, October 12, 2001 10:21 AM
To: Thorsen, Carl; Newstead, Jennifer; Dinh, Viet; O'Brien, Pat; Daley, Cybele K; Walter, Sheryl L; Bernhardt, Gena; Burton, Faith; Burton, Dawn; Chertoff, Michael; Elwood, John; Tucker, Mindy; Israelite, David
Cc: Painter, Christopher; Cassella, Stefan; Kris, David; Burton, Dawn; 'brett_m._kavanaugh@who.eop.gov'; 'courtney_s._elwood@who.eop.gov'; Israelite, David
Subject: RE: The House Bill being considered today

Please beware calls from the Hill today (b) (5)

(b) (5)

(b) (5)

-----Original Message-----

From: Thorsen, Carl
Sent: Friday, October 12, 2001 10:05 AM
To: Thorsen, Carl; Newstead, Jennifer; Dinh, Viet; Bryant, Dan; O'Brien, Pat; Daley, Cybele K; Walter, Sheryl L; Bernhardt, Gena; Burton, Faith; Burton, Dawn
Cc: Painter, Christopher; Cassella, Stefan; Kris, David; Burton, Dawn;

'brett_m._kavanaugh@who.eop.gov'; 'courtney_s._elwood@who.eop.gov';
Israelite, David
Subject: RE: The House Bill being considered today

Comments on this bill by cob today would be optimum. One document per title as much as possible.
(ps darn that spell check...but maybe "containing" effort does make the most sense!)

-----Original Message-----

From: Thorsen, Carl

Sent: Friday, October 12, 2001 9:56 AM

To: Newstead, Jennifer; Dinh, Viet; Bryant, Dan; O'Brien, Pat; Daley,
Cybele K; Walter, Sheryl L; Bernhardt, Gena; Burton, Faith; Burton, Dawn

Cc: Painter, Christopher; Cassella, Stefan; Kris, David; Burton, Dawn;

'brett_m._kavanaugh@who.eop.gov'; 'courtney_s._elwood@who.eop.gov';

Thorsen, Carl; Israelite, David

Subject: The House Bill being considered today

Duplicative

Dinh, Viet

From: Dinh, Viet
Sent: Monday, October 8, 2001 11:22 AM
To: 'Richard_E_Green (b) (6)'; Newstead, Jennifer; 'Courtney_S_Elwood@who.eop.gov'
Cc: 'Brett_M_Kavanaugh@who.eop.gov'; 'Bradford_A_Berenson@who.eop.gov'; 'Heather_Wingate@who.eop.gov'; 'Irene_Kho (b) (6)'
Subject: RE: LRM IKK115 -- Statement of Administration Policy on S1510 Uniting and Strengthening America Act of 2001

Here is what I propose as the final two sentences in the SAP to take care of (b) (5)

(b) (5)

(b) (5)

-----Original Message-----

From: Richard_E_Green (b) (6) [mailto:Richard_E_Green (b) (6)]
Sent: Monday, October 08, 2001 10:32 AM
To: Newstead, Jennifer; Courtney_S_Elwood@who.eop.gov
Cc: Dinh, Viet; Brett_M_Kavanaugh@who.eop.gov; Bradford_A_Berenson@who.eop.gov; Heather_Wingate@who.eop.gov; Irene_Kho (b) (6)
Subject: RE: LRM IKK115 -- Statement of Administration Policy on S1510 Uniting and Strengthening America Act of 2001

Duplicative

Dinh, Viet

From: Dinh, Viet
Sent: Monday, October 8, 2001 10:43 AM
To: 'Richard_E._Green (b) (6)'; Newstead, Jennifer; 'Courtney_S._Elwood@who.eop.gov'
Cc: 'Brett_M._Kavanaugh@who.eop.gov'; 'Bradford_A._Berenson@who.eop.gov'; 'Heather_Wingate@who.eop.gov'; 'Irene_Kho (b) (6)'
Subject: RE: LRM IKK115 - - Statement of Administration Policy on S1510 Uniting and Strengthening America Act of 2001

I am working on it right now.

-----Original Message-----

From: Richard_E._Green (b) (6) [mailto:Richard_E._Green (b) (6)]
Sent: Monday, October 08, 2001 10:32 AM
To: Newstead, Jennifer; Courtney_S._Elwood@who.eop.gov
Cc: Dinh, Viet; Brett_M._Kavanaugh@who.eop.gov; Bradford_A._Berenson@who.eop.gov; Heather_Wingate@who.eop.gov; Irene_Kho (b) (6)
Subject: RE: LRM IKK115 - - Statement of Administration Policy on S1510 Uniting and Strengthening America Act of 2001

Duplicative

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, October 4, 2001 2:30 PM
To: Newstead, Jennifer; 'Elizabeth_N._Camp@who.eop.gov';
'David_S._Addington@ovp.eop.gov';
'/DDV=H._Christopher_Bartolomucci@who.eop.gov/DDT=RFC-822/O=INETGW/
P=GOV+DOJ/A=TELEMAIL/C=US/'; 'John_B._Belling (b) (6)';
'Rachel_L._Brand@who.eop.gov'; 'Robert_W._Cobb@who.eop.gov';
'Courtney_S._Elwood@who.eop.gov'; 'Timothy_E._Flanigan@who.eop.gov';
'Laura_L._Flippin@who.eop.gov'; 'Noel_J._Francisco@who.eop.gov';
'Brett_M._Kavanaugh@who.eop.gov'; 'Helgard_C._Walker@who.eop.gov';
'Allison_L._Riepenhoff@who.eop.gov'; 'Alberto_R._Gonzales@who.eop.gov';
'Kyle_Sampson@who.eop.gov'; 'Bradford_A._Berenson@who.eop.gov'
Subject: FW: Approved at Senate Judiciary Cmte markup today
Importance: High

(b) (5)

-----Original Message-----

From: Williams, Paula
Sent: Thursday, October 04, 2001 12:49 PM
To: Bryant, Dan; Thorsen, Carl; O'Brien, Pat; Joy, Sheila; Newstead, Jennifer; Dinh, Viet; Ayres, David; Israelite, David; Bertucci, Theresa; Meckley, Tammy; Coughlin, Robert; McNulty, John; Thompson, Larry D
Cc: Scottfinan, Nancy
Subject: Approved at Senate Judiciary Cmte markup today
Importance: High

The following was just provided by Nancy Scott-Finan.

Parker 19-0
Mills 19-0

By voice vote:

Jay Stephens - Associate AG
Benigno Reyna - USMS

USA

Brooks
Brownlee
Burgess
Colloton
Graves
Harris
Iglesias
Larson
Lockhart
Mattice
McCampbell

Mead
Mosman
Suthers

Bryant, Dan

From: Bryant, Dan
Sent: Monday, October 1, 2001 3:09 PM
To: Newstead, Jennifer; Dinh, Viet; 'brett_m._kavanaugh@who.eop.gov'; 'courtney_s._elwood@who.eop.gov'
Cc: Yoo, John C
Subject: RE: New draft

(b) (5) I'll wait until I hear from WH Counsel that you're good to go before I send it.

-----Original Message-----

From: Newstead, Jennifer
Sent: Monday, October 01, 2001 2:41 PM
To: Dinh, Viet; Bryant, Dan; 'brett_m._kavanaugh@who.eop.gov'; 'courtney_s._elwood@who.eop.gov'
Cc: Yoo, John C
Subject: FW: New draft

John has redrafted the letter to respond to the only concern raised by the White House. Does anyone object to sending the letter out as redrafted (attached)? Please advise ASAP so that we can close this issue if possible today.

thanks

-----Original Message-----

From: Yoo, John C
Sent: Monday, October 01, 2001 1:09 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Newstead, Jennifer
Cc: Dinh, Viet; 'Courtney_S._Elwood@who.eop.gov'
Subject: New draft

With that change made.

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov [mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Monday, October 01, 2001 12:52 PM
To: Newstead, Jennifer
Cc: Yoo, John C; Dinh, Viet; Courtney_S._Elwood@who.eop.gov
Subject: Re: FW: New FISA draft

<< File: significant.wpd >> << File: pic02854.pcx >> I have reviewed again.

(b) (5)

(b) (5)

(Embedded
image moved "Newstead, Jennifer" <Jennifer.Newstead@usdoj.gov>
to file: 10/01/2001 11:12:52 AM
pic02854.pcx)

Record Type: Record

To: "Dinh, Viet" <Viet.Dinh@usdoj.gov> (Receipt Notification Requested) (IPM
Return Requested), Courtney S. Elwood/WHO/EOP@EOP, Brett M.
Kavanaugh/WHO/EOP@EOP

cc: "Yoo, John C" <John.C.Yoo@usdoj.gov> (Receipt Notification Requested) (IPM
Return Requested)
Subject: FW: New FISA draft

All -- attached is a redraft of the letter designed to address (b) (5) Please
review and let us know your comments. thanks

-----Original Message-----

From: Yoo, John C
Sent: Monday, October 01, 2001 10:40 AM
To: Newstead, Jennifer
Subject: New FISA draft

John Yoo
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530
202.514.2069
202.305.8524 (fax)

Dinh, Viet

From: Dinh, Viet
Sent: Friday, September 28, 2001 9:33 AM
To: Newstead, Jennifer; Bryant, Dan; Silas, Adrien; O'Brien, Patrick
Cc: Yoo, John C; 'brett_m._kavanaugh@who.eop.gov'
Subject: RE: FISA Letter URGENT: DO NOT SUBMIT TO CONGRESS YET.

ALL:

(b) (5)

thanks.

-----Original Message-----

From: Newstead, Jennifer
Sent: Friday, September 28, 2001 9:18 AM
To: Bryant, Dan; Silas, Adrien; O'Brien, Patrick
Cc: Dinh, Viet; Yoo, John C; 'brett_m._kavanaugh@who.eop.gov'; Newstead, Jennifer
Subject: FISA Letter -- NEW / FINAL

All --

Please disregard the version I circulated last night. The attached version contains two additional changes made by Viet with John Yoo's concurrence this morning (on p. 1 and p. 14 -- you can call me if you want details.)

We do not plan to make additional changes, so this version should be OK for OMB clearance and sending to the hill ASAP.

Newstead, Jennifer

From: Newstead, Jennifer
Sent: Thursday, September 27, 2001 7:34 PM
To: Bryant, Dan; Silas, Adrien; O'Brien, Patrick
Cc: Dinh, Viet; Yoo, John C; 'brett_m._kavanaugh@who.eop.gov'
Subject: FISA letter
Attachments: fisa.orig

All --

Attached for OMB clearance is the new version of the FISA letter reflecting the latest and last round of discussion between the White House and John Yoo.

Newstead, Jennifer

From: Newstead, Jennifer
Sent: Thursday, September 27, 2001 4:53 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Silas, Adrien; Yoo, John C; Dinh, Viet; 'Courtney_S._Elwood@who.eop.gov'; Bryant, Dan; O'Brien, Patrick; Thorsen, Carl
Subject: RE: FISA letter

Brett -- I forwarded this to Dan and Pat in OLA. Viet is not here now, but it seems to me that he needs to speak with OLA, OLC and you / Tim about this before we can decide. Adrien, I think you should check with Dan on that before it goes to the hill if we get the OMB clearance soon. thanks

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, September 27, 2001 4:47 PM
To: Newstead, Jennifer
Cc: Silas, Adrien; Yoo, John C; Dinh, Viet;
Courtney_S._Elwood@who.eop.gov
Subject: RE: FISA letter

Having provided our suggestions and thoughts, we defer to the Department on the contents of the letter. Per Tim, we suggest (b) (5)

(b) (5)

(Embedded
image moved "Newstead, Jennifer" <Jennifer.Newstead@usdoj.gov>
to file: 09/27/2001 04:20:38 PM
pic24227.pcx)

Record Type: Record

To: "Silas, Adrien" <Adrien.Silas@usdoj.gov> (Receipt Notification Requested)
(IPM Return Requested)

cc: "Yoo, John C" <John.C.Yoo@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Dinh, Viet" <Viet.Dinh@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP, Courtney S. Elwood/WHO/EOP@EOP Subject: RE: FISA letter

Attached is a final draft of the letter from OLA to the hill. This is essentially the original draft with a few edits from the White House that John found acceptable. John, while we're awaiting OMB clearance you might want to check to make sure we're OK. thanks

-----Original Message-----

From: Silas, Adrien
Sent: Thursday, September 27, 2001 4:08 PM
To: Newstead, Jennifer
Subject: FW: FISA letter

Has John Yoo gotten back to you as to the accuracy of the redraft? I would like to get it to OMB as quickly as possible.

-----Original Message-----

From: Newstead, Jennifer
Sent: Thursday, September 27, 2001 12:10 PM
To: Yoo, John C
Cc: Dinh, Viet; O'Brien, Patrick; 'brett_m._kavanaugh@who.eop.gov'; Silas, Adrien
Subject: FISA letter

John --

Attached is a revised redline and clean draft of the letter from OLA to Congressman Graham that was circulated yesterday. The only changes made are those proposed by the White House Counsel's office as suggestions, rather than directions, for revising it. I'm sending it to you for your confirmation that the changes do not effect any change in the substantive analysis or conclusions of your OLC opinion. Please advise if this is OK or if other changes are needed.

Thanks

Jennifer

Newstead, Jennifer

From: Newstead, Jennifer
Sent: Thursday, September 27, 2001 4:23 PM
To: Bryant, Dan; Dinh, Viet; O'Brien, Patrick; 'brett_m._kavanaugh@who.eop.gov'
Cc: Yoo, John C
Subject: RE: FISA Letter

Dan -- I just sent Adrian a redraft with a few edits that John is OK with. I think we're done except for OMB approval.

-----Original Message-----

From: Bryant, Dan
Sent: Thursday, September 27, 2001 4:22 PM
To: Newstead, Jennifer; Dinh, Viet; O'Brien, Patrick; 'brett m. kavanaugh@who.eop.gov'
Cc: Yoo, John C
Subject: RE: FISA Letter

What's the status of this? People on the Hill are clamoring for something to clarify the constitutionality of our proposal.

-----Original Message-----

From: Newstead, Jennifer
Sent: Thursday, September 27, 2001 2:19 PM
To: Dinh, Viet; O'Brien, Patrick; 'brett m. kavanaugh@who.eop.gov'; Bryant, Dan
Cc: Yoo, John C
Subject: FW: FISA Letter

All -- Please see below (b) (5)

(b) (5)

I defer to the group.

Jen

-----Original Message-----

From: Yoo, John C
Sent: Thursday, September 27, 2001 2:14 PM
To: Newstead, Jennifer
Subject: FISA Letter

Jen:

I've looked through this, and I have to say (b) (5)

(b) (5)

(b) (5)

(b) (5)

Give me a call about this later.

John

John Yoo
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530
202.514.2069
202.305.8524 (fax)

Dinh, Viet

From: Dinh, Viet
Sent: Thursday, September 27, 2001 2:20 PM
To: 'Diana_L._Schacht@opd.eop.gov'
Cc: Wood, John F; Colborn, Paul P; 'Brett_M._Kavanaugh@who.eop.gov'; Miller, Brian D
Subject: RE: FOIA
Attachments: foialetter.fin2.fin.whc

Diana,

Attached is the latest, final text as cleared by OLC and WH Counsel. Can you give us sign off? For what it's worth, (b) (5) Thanks

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, September 27, 2001 1:22 PM
To: Miller, Brian D
Cc: Wood, John F; Colborn, Paul P; Dinh, Viet
Subject: Re: FOIA

Looks good to me. I would (b) (5)
(b) (5) Otherwise, WH Counsel has signed off. Still waiting for WH DPC. Will check with them again today.

(Embedded
image moved "Miller, Brian D" <Brian.D.Miller@usdoj.gov>
to file: 09/27/2001 12:32:20 PM
pic16424.pcx)

Record Type: Record

To: "Dinh, Viet" <Viet.Dinh@usdoj.gov> (Receipt Notification Requested) (IPM

Return Requested), "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), "Wood, John F" <John.F.Wood@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: FOIA

Attached is a revised version of DOJ's final draft. I think that (b) (5)

(b) (5)

Colborn, Paul P

From: Colborn, Paul P
Sent: Thursday, September 27, 2001 9:36 AM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Cc: Miller, Brian D.; Dinh, Viet
Subject: RE: FOIA letter

Brett, the re-sending worked. I can open it.

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Thursday, September 27, 2001 9:33 AM
To: Brett_M._Kavanaugh@who.eop.gov
Cc: Miller, Brian D.; Colborn, Paul P; Dinh, Viet
Subject: Re: FOIA letter

re-send

Brett M. Kavanaugh
09/26/2001 05:22:41 PM

Record Type: Record

To: brian.miller@usdoj.gov @ inet, viet.dinh@usdoj.gov @ inet,
Paul.p.colborn@usdoj.gov

cc:
Subject: FOIA letter (Document link: Brett M. Kavanaugh)

a proposed redrafted redraft, (b) (5) still waiting to hear from
Diana Schacht and then ready to sign off from here .
.. (See attached file: foia letter 4.doc)

Brett_M._Kavanaugh@who.eop.gov

From: Brett_M._Kavanaugh@who.eop.gov
Sent: Wednesday, September 26, 2001 8:10 PM
To: Dinh, Viet
Cc: Miller, Brian D.; Colborn, Paul P
Subject: RE: FOIA letter
Attachments: pic25082.pcx

(b) (5)

(Embedded
image moved "Dinh, Viet" <Viet.Dinh@usdoj.gov>
to file: 09/26/2001 06:04:06 PM
pic25082.pcx)

Record Type: Record

To: "Colborn, Paul P" <Paul.P.Colborn@usdoj.gov> (Receipt Notification Requested), "Miller, Brian D." <Brian.Miller@usdoj.gov> (Receipt Notification Requested), Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: RE: FOIA letter

(b) (5)

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, September 26, 2001 5:33 PM

Duplicative

Colborn, Paul P

From: Colborn, Paul P
Sent: Wednesday, September 26, 2001 6:16 PM
To: Dinh, Viet; 'Brett_M._Kavanaugh@who.eop.gov'; Miller, Brian D.
Subject: RE: FOIA letter

I'm not sure that (b) (5)

(b) (5)

-----Original Message-----

From: Dinh, Viet
Sent: Wednesday, September 26, 2001 6:04 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'; Colborn, Paul P; Miller, Brian D.
Subject: RE: FOIA letter

Duplicative

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, September 26, 2001 12:04 PM
To: 'Richard_E._Green (b) (6)'; 'Courtney_S._Elwood@who.eop.gov'
Cc: Newstead, Jennifer; Elwood, John; 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE: Anti-Terrorism Bill

Courtney,

(b) (5)

-----Original Message-----

From: Richard_E._Green (b) (6) [mailto:Richard_E._Green (b) (6)]
Sent: Wednesday, September 26, 2001 11:56 AM
To: Dinh, Viet; Courtney_S._Elwood@who.eop.gov
Subject: Anti-Terrorism Bill

Some agencies are asking us if there is a version of the Administration's anti-terrorism bill being handed out that is later than the version I received from Viet on Thursday, September 20th. Can you tell me, and, if there is, can I be sent a copy of the later version?

Dinh, Viet

From: Dinh, Viet
Sent: Wednesday, September 19, 2001 12:18 PM
To: 'Brett_M._Kavanaugh@who.eop.gov'
Subject: RE:

No problem my friend

-----Original Message-----

From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Wednesday, September 19, 2001 12:05 PM
To: Dinh, Viet
Subject:

sorry about that; we fought to keep cuts light; I knew they were coming

AC
KR

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

Facsimile
Cover Sheet

Phone:
Fax:

(b) (6)

Date: Nov. 26, 2002
Time: 2:00 PM

To:

Viet Dinh

Fax:

202 514 2424

From:

Brett Kavanaugh

Number of Pages: 2

Message:

Confidentiality Notice

The document accompanying this telecopy transmission contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, or distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone to arrange for return of the original documents to us.

Supreme Court of the United States
Washington, D. C. 20543

Brett

CHAMBER OF
THE CHIEF JUSTICE

November 21, 2002

Honorable George W. Bush
President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

I am writing in response to your letter of October 30, in which you outline your plan to address the judicial confirmation process. I agree that the rising number of judicial vacancies threatens the effective functioning of our federal courts and that the confirmation process has not worked well for the past several years. The Federal Judiciary, however, has no real role in the confirmation process other than to urge the President promptly to nominate candidates to fill judicial vacancies and the Senate to vote on those nominees within a reasonable time after receiving the nomination.

You ask that, in order to avoid additional delay in the confirmation process, Court of Appeals and District Court judges notify the President of their intention to retire at least a year in advance if possible, so that the President can make a nomination well in advance of an actual vacancy. For a number of years, the policy of the Judicial Conference of the United States has been to urge active federal judges to inform the President of their intention to retire six to twelve months in advance.

I hope that you and the Senate can successfully work together to break the logjam that has stalled the confirmation process for several years.

Sincerely,

William H. Rehnquist

THE WHITE HOUSE
WASHINGTON
OFFICE OF THE COUNSEL TO THE PRESIDENT
FACSIMILE COVER SHEET

Date 1-23-02 Time _____

To: Viet Dinh, Jennifer Newstead

Fax: 514-2424, 353-9163

From: Brett Kavanaugh

Phone: **(b) (6)**

Fax: **(b) (6)**

Number of Pages (including cover sheet): _____

Message:

Washington State Letter

Confidentiality Notice

The document accompanying this telecopy transmission contains confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, or distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone to arrange for return of the original documents to us.

THE WHITE HOUSE
WASHINGTONCOPY
Brett

August 15, 2001

The Honorable Patty Murray
The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senators Murray and Cantwell:

As you know, members of my staff recently met with members of your staff regarding a proposed commission for selection of district court judges in Washington. We understand that you have attempted to reach agreement with Congresswoman Jennifer Dunn (President Bush's designee for these purposes) about a proposed commission, but that you thus far have been unable to do so.

Historically, as you know, bipartisan commissions rarely have been employed in the judicial nomination process. Bipartisan commissions necessarily intrude on the President's power of nomination, which the Constitution expressly assigned to the President alone. To be sure, a bipartisan commission process has been employed for many years in Wisconsin and is being employed now in California. But those are isolated exceptions to the traditional practice by which the President selects the nominee of his choice after consulting and receiving input from Senators, Members of the House of Representatives, other elected officials, and experienced members of the bar, among others.

We acknowledge that a bipartisan commission assisted President Clinton in the selection of Washington district court judges. That prior practice, although not binding on President Bush, has led us to consider agreeing to a bipartisan commission process in Washington if it incorporated certain core principles. First, any commission must submit at least three names to the President for consideration (and the commission should be free to submit as many additional names as it sees fit). Second, the President must retain the right not to select any of the three individuals recommended by the commission, but rather to nominate an individual of his choosing. Third, absent extraordinary circumstances (for example, a nominee's previously unknown personal background issue), you must agree in advance to support the President's nominee if the President selects one of the names submitted by the commission. Fourth, the commission must not address court of appeals vacancies, but only district court vacancies.

Your staff made clear to us that you would prefer not to agree in advance to support the President's nominee even if the nominee were one of the names submitted by the commission. We understand your point of view, but we respectfully disagree. The President necessarily cedes a certain degree of his constitutional authority to nominate judges when he both agrees to a commission process and nominates one of the individuals produced by a commission, rather than conducting his own independent search for a nominee. If the President is to do so, in our opinion

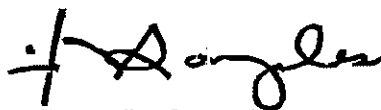
it is only fair that you agree, absent extraordinary circumstances relating to the nominee's personal background, to support the President's nominee if the nominee is one of the names submitted by the commission. That is particularly so because any candidate supported by a majority of the commission contemplated in this instance necessarily would have the support of at least one of your appointees (we understand that the commission being contemplated apparently would have four Senatorial appointees and four of Congresswoman Dunn's appointees).

We recognize that your negotiations with Congresswoman Dunn, based on her articulation of these principles, have not produced a result satisfactory to you. As observers of your negotiations with Congresswoman Dunn, we have come to believe that the continued disagreement may simply be a function of the inherent difficulty in overly formalizing a process to which the Constitution and tradition already speak in general terms that have stood the test of time. Under the Constitution, of course, the President ordinarily selects the nominee of his choice, and the Senate retains the power to reject the President's nominee when there are special and strong reasons for the refusal.

Given that you have been unable to reach agreement with Congresswoman Dunn thus far, I believe we may be near the point when we should terminate attempts to devise a precise structure that would satisfy all sides and instead should follow the ordinary processes ordained by the Constitution. We are confident that adherence to the traditional constitutional processes - including prior consultation with you - would produce excellent and widely respected judges for the district courts in Washington.

We very much thank you and your staff for the time you have spent on this, and we look forward to your response.

Sincerely,



Alberto R. Gonzales
Counsel to the President

cc: The Honorable Jennifer Dunn

WASHINGTON OFFICE:
1501 LONGWORTH BUILDING
WASHINGTON, D.C. 20515
(202) 225-7761
dunnwa08@mail.house.gov

DISTRICT OFFICE:
2737 78TH AVENUE, SE
SUITE 202
MERCER ISLAND, WA 98040
(206) 375-3436
(800) 955-3666



UNITED STATES
HOUSE OF REPRESENTATIVES

August 31, 2001

The Honorable Patty Murray
United States Senate
173 Russell Building
Washington, D.C. 20510

The Honorable Maria Cantwell
United States Senate
717 Hart Building
Washington, D.C. 20510

Dear Patty and Maria:

Since February of this year we have been in discussions over how to structure a bipartisan process in Washington State to select judges in western Washington for vacancies on the U.S. District Court. I believe these negotiations have been productive in that they have produced consistent movement toward principles we all have articulated: a bipartisan process that produces highly qualified jurists who are widely respected as fair-minded and balanced.

One point central to the negotiations was your insistence that the committee established to review applicants and recommend nominees be composed of an equal number of Republicans and Democrats. After the shift in control of the Senate, I believed this request to be fair. In June, I submitted a proposal to you that would establish such a committee and further outlined that the President would choose only from at least three prospective nominees who received a majority vote from the committee if he were to receive your consent. Although this clearly limits his ability to select a candidate of his choosing, I believe this process would have the effect of producing quality candidates who can be quickly confirmed. And, because of the equal division of the committee it would ensure that no jurist could qualify for this list without the consent of your representatives. If the President were to choose to nominate a candidate who had not received a majority vote by the committee, you would be under no obligation to support him or her. This is the essence of compromise: both sides giving up a degree of their constitutional powers in the interest of comity.

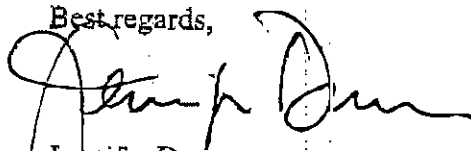
Through your written counterproposal and extended discussions among our staff, however, it appears to me that although the President is willing to cede some of his Executive Branch authority to this committee, you are unwilling to do the same. The principal points of contention are your refusal to support any of the three candidates who emerge from the committee with bipartisan support and your demand that you choose the final candidate to be sent to the President. Since I appreciate that it is possible that an unknown personal background issue may arise that causes us to question a candidate's fitness for the bench, I have agreed to include an exception that would relieve you of a

The Honorable Patty Murray
The Honorable Maria Cantwell
August 31, 2001
Page Two

commitment to support such a candidate. Creating further conditions on your support begs the question, why have the committee in the first place?

Constitutionally the right to choose federal judges is delegated to the President. I cannot agree to a process that limits the President's ability to nominate the candidate of his choosing while providing him nothing in return. If you are unwilling to provide your consent to candidates who receive majority support from this bipartisan committee, perhaps the answer is simply to rely on the traditional constitutional method of nominating federal judges that has served our country well throughout history.

Best regards,



Jennifer Dunn
MEMBER OF CONGRESS

United States Senate

WASHINGTON, D.C. 20516

November 15, 2001

The Honorable Alberto R. Gonzales
Counsel to the President of the United States
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Judge Gonzales:

Given the enormous progress that we have made in the past months in working towards a structure for a Judicial Selection Commission for selecting candidates for federal judgeships in Washington State, it was with surprise that we received notice that Representative Jennifer Dunn has submitted four candidates for nomination to a District Court vacancy in our state.

Over the last eight months our staff have met on a number of occasions, and have corresponded repeatedly on the subject of how to select federal judges from Washington state. Despite promising negotiations, we did not participate in the selection of these candidates, and we find it most irregular that the White House is considering moving forward in this manner without our input.


As you know, Washington state has long benefited from a judicial selection process that includes substantive input from the state's U.S. Senators. We remain committed to efforts to develop a mutually agreeable Commission structure and believe that we have made tremendous progress. We believe that further efforts to establish a bipartisan commission would likely be successful, and we are confident that we could implement this Commission structure quickly and smoothly and produce candidates that would lead to the prompt nomination and confirmation of a new District Court judge for our state. We are simply asking for the same structure that was established between Senators Gordon and Murray during the previous administration - nothing more and nothing less.

We, and our colleagues in the United States Senate, take our constitutional duty to advise and provide consent for the President's nominees most seriously. The courts should not be treated as an extension of the political process for either of the other two branches of our government. In their wisdom, the founders mandated the involvement of both the Executive Branch and Senate to provide balance and ensure that the bench succeeds in its most fundamental duty of ensuring the constitutional rule of law.

We continue to believe that a Judicial Selection Commission would be beneficial both for the White House and for the people of Washington state. This process has several advantages over proceeding with the nomination of any of the candidates forwarded without our consultation. It removes politics - both personal and partisan - from the judicial selection process, honors the constitutional roles of all parties, ensures the selection of fair-minded and balanced judges, and improves the likelihood of quick confirmation.

Sincerely,


Patty Murray
United States Senator


Maria Cantwell
United States Senator

FILE

THE WHITE HOUSE
WASHINGTON

November 21, 2001

The Honorable Patty Murray
The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senator Murray and Senator Cantwell:

We have received a copy of your November 15 letter in which you express "surprise" that the Administration has moved forward with interviews of applicants for the district court vacancy in the Western District of Washington. We do not understand the basis for your surprise. For many months in the spring and summer, Congresswoman Dunn and you attempted to reach agreement on the structure of a committee that would recommend candidates to the President for this seat. Although those discussions were conducted in good faith, I understand that differences of opinion prevented an agreement on the committee structure and process. That disagreement, in our view, reflected the inherent difficulty of overly formalizing a nomination process to which the Constitution already speaks directly and in terms that have stood the test of time. I therefore informed you on August 15 -- and Congresswoman Dunn then also informed you on August 31 -- that the President may have to move forward with respect to this seat pursuant to the ordinary constitutional processes, that is, without a formal bipartisan commission of the kind you had proposed. You never responded to those letters. We also understand that Congresswoman Dunn's staff subsequently informed your staff that she, on behalf of the President, would begin to seek out candidates for this seat. She did so (and she did so thoroughly and expeditiously), and she subsequently provided the names of four highly qualified candidates to the President.

The President's overarching goal here is to nominate highly qualified judges who will be a credit to the federal judiciary. In my August 15 letter, I stated that we were confident that "adherence to the traditional constitutional processes -- including prior consultation with you -- would produce excellent and widely respected judges for the district courts in Washington." That remains true. My staff has already consulted with your staff to seek your views on the four current candidates for this seat (Mr. Leighton, Mr. Blair, Judge Chushcoff, and Ms. Jensen). We have yet to receive a response from either of you, and we therefore renew our request to obtain your thoughts about those candidates as soon as possible. The President intends to submit a nomination for this seat by January, and FBI background investigations of one or more potential nominees thus must begin soon.

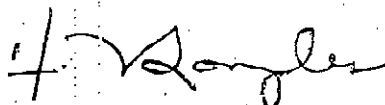
Finally, your letter suggests that a bipartisan commission "honors the constitutional roles of all parties" and that "the founders mandated the involvement of both the Executive Branch and Senate to provide balance." In fact, the Framers deliberately insisted on assigning the power of nomination solely to the President and the power of confirmation solely to the Senate.

November 21, 2001
Page Two

Presidents traditionally select judicial nominees after receiving input from Senators, Members of the House of Representatives, other elected officials, or experienced members of the bar, among others. A bipartisan commission process, however, is neither part of the constitutional design nor reflective of the traditional practice. I would be happy to meet with you at your convenience to discuss this further.

We very much thank you and your staff for the time you have spent on this important issue, and we look forward to receiving your input about the four current candidates for the vacancy in the Western District of Washington.

Sincerely,



Alberto R. Gonzales
Counsel to the President

cc: The Honorable Patrick Leahy
The Honorable Orrin Hatch
The Honorable Jennifer Dunn

United States Senate

WASHINGTON, DC 20510

November 27, 2001


The Honorable Alberto R. Gonzales
Counsel to the President of the United States of America
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear Judge Gonzalez:

While we appreciate your prompt response to our November 15 letter we would like to inform you and the President that we do not intend to support any nominee for a Washington state Federal bench vacancy who has not come through a bipartisan commission process.

We continue to believe that we have made enormous progress in our discussions regarding formation of a committee process and that further efforts would likely be successful. To that end, we request a meeting with you as soon as possible.

Sincerely,


Patty Murray
U.S. Senator


Maria Cantwell
U.S. Senator

THE WHITE HOUSE
WASHINGTON

FILE

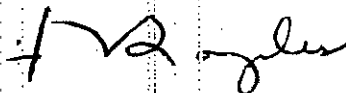
December 10, 2001

The Honorable Patty Murray
The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senator Murray and Senator Cantwell:

Thank you for meeting with me on December 5 about the nomination of district court judges in Washington and for discussing the process again earlier today. At this time, I am deliberating further about the best approach to the entire Washington situation and have not reached any final decision. I intend to reach a decision in the next few days and will promptly inform you of our proposal when I have done so.

Sincerely,



Alberto R. Gonzales
Counsel to the President

cc: The Honorable Jennifer Dunn

United States Senate
WASHINGTON, DC 20510

December 11, 2001

The Honorable Alberto R. Gonzales
Counsel to the President of the United States of America
1600 Pennsylvania Avenue NW
Washington, DC 20500

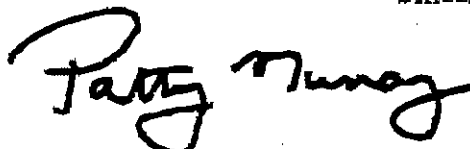
Dear Judge Gonzales:

Thank you for yesterday's letter regarding judicial appointments to the Federal bench for Washington state vacancies. While we are pleased that real progress has been made in recent days, yesterday's letter indicates something of a retreat from our discussions, most notably our telephone conversations on Monday, December 10. Based on our telephone conversations, we have proceeded to name three members of a newly constituted, six-member bipartisan commission to select potential candidates to be nominated for the position currently vacant in Tacoma.

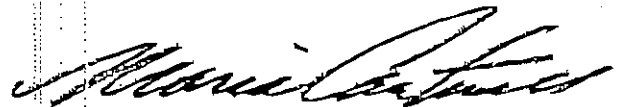
These outstanding individuals are all well respected members of the legal community and represent the geographic diversity that the Tacoma court exercises jurisdiction over. Based on our conversations, they will act expeditiously to identify qualified individuals for the Tacoma vacancy to forward to the President for his consideration.

We are eager for you to contact us with the three individuals you have identified to serve on the new, bipartisan commission so we may proceed to fill the Tacoma vacancy as quickly as possible.

Sincerely,



Patty Murray
U.S. Senator



Maria Cantwell
U.S. Senator

THE WHITE HOUSE

WASHINGTON

December 12, 2001

FILE

The Honorable Patty Murray
The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senator Murray and Senator Cantwell:

Thank you for meeting with me on December 5 about the nomination of district court judges in Washington and for discussing the process again on December 10. I thought it would be useful to summarize our thoughts regarding the use of commissions to identify judicial candidates in Washington.

First, with respect to the current vacancy in the Western District of Washington, after careful reflection, we do not see a good reason at this point for the President to start the process anew in light of how far the selection process has proceeded for a district court seat that has been vacant for over a year. Commissions, in our view, are simply one of several possible methods to provide names of potential nominees to the President. As I told you in our meeting on December 5, the work of finding candidates who are experienced, highly qualified, and well respected by attorneys of different ideological and political viewpoints in Washington has already been done for this vacancy. While we appreciate your willingness to work with us to quickly assemble a bipartisan commission for this vacancy, we respectfully intend to move ahead with a nomination to this seat, most likely in January, and we are confident that the President's nominee will gain your support and serve the people of Washington well.

Second, as to future vacancies, you have requested that there be a bipartisan commission to identify and screen candidates for district court seats. As I have discussed with you, the Administration is not generally supportive of bipartisan commissions. Historically, bipartisan commissions rarely have been employed in the judicial nomination process precisely because they have the effect of limiting the President's choices among all eligible lawyers in a state. Bipartisan commissions thus intrude substantially on the President's power of nomination, which the Constitution expressly assigns to the President alone. In addition, we are now convinced, based on our experience, that bipartisan commissions do not uniformly produce the most highly qualified candidates for the federal judiciary.

We recognize that a bipartisan commission has been employed on some occasions in the past for district court vacancies in Washington. Thus, as I discussed with you, we are willing to consider a bipartisan commission process for future vacancies in Washington, subject to our agreement on certain core principles. First, the President may nominate an individual whose name was not forwarded to the White House by either you or the commission. Second, your decision whether to support a hearing for a candidate will not depend on whether the commission forwarded that candidate. Third, as the President is not required to nominate an individual

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recommended by you or the commission, you are not constrained to support any of the individuals recommended by the commission. Finally, the commission should not address court of appeals vacancies, but only district court vacancies.

We would like to thank you for your willingness to discuss and consider various options to identify judicial candidates in Washington. We appreciate your patience and look forward to continuing to work together.

Sincerely,



Alberto R. Gonzales
Counsel to the President

cc: The Honorable Patrick Leahy
The Honorable Orrin Hatch
The Honorable Jennifer Dunn