From: "Horning, Liz A. EOP/WHO" (b)(6)
To: "Talley, Brett (OLP)" (b)(6)
Subject: FW: Opening Statement for Submission Tomorrow
Date: Wed, 26 Sep 2018 16:57:26 +0000
Importance: Normal
Attachments: BK_Sept_27_Opening_Statement_-_submission_for_Sept_26.docx

---

This was my (b)(5)

Liz Horning
(b)(6)
O:(b)(6)
C:(b)(6)

From: Horning, Liz A. EOP/WHO
Sent: Tuesday, September 25, 2018 11:17 PM
To: Donaldson, Annie M. EOP/WHO (b)(6); McGahn, Donald F. EOP/WHO (b)(6)
Subject: FW: Opening Statement for Submission Tomorrow

If you wanted my two cents…… (b)(5).

Liz Horning
(b)(6)
O:(b)(6)
C:(b)(6)

From: Michel, Christopher G. EOP/WHO
Sent: Tuesday, September 25, 2018 9:20 PM
To: Horning, Liz A. EOP/WHO (b)(6)
Subject: FW: Opening Statement for Submission Tomorrow

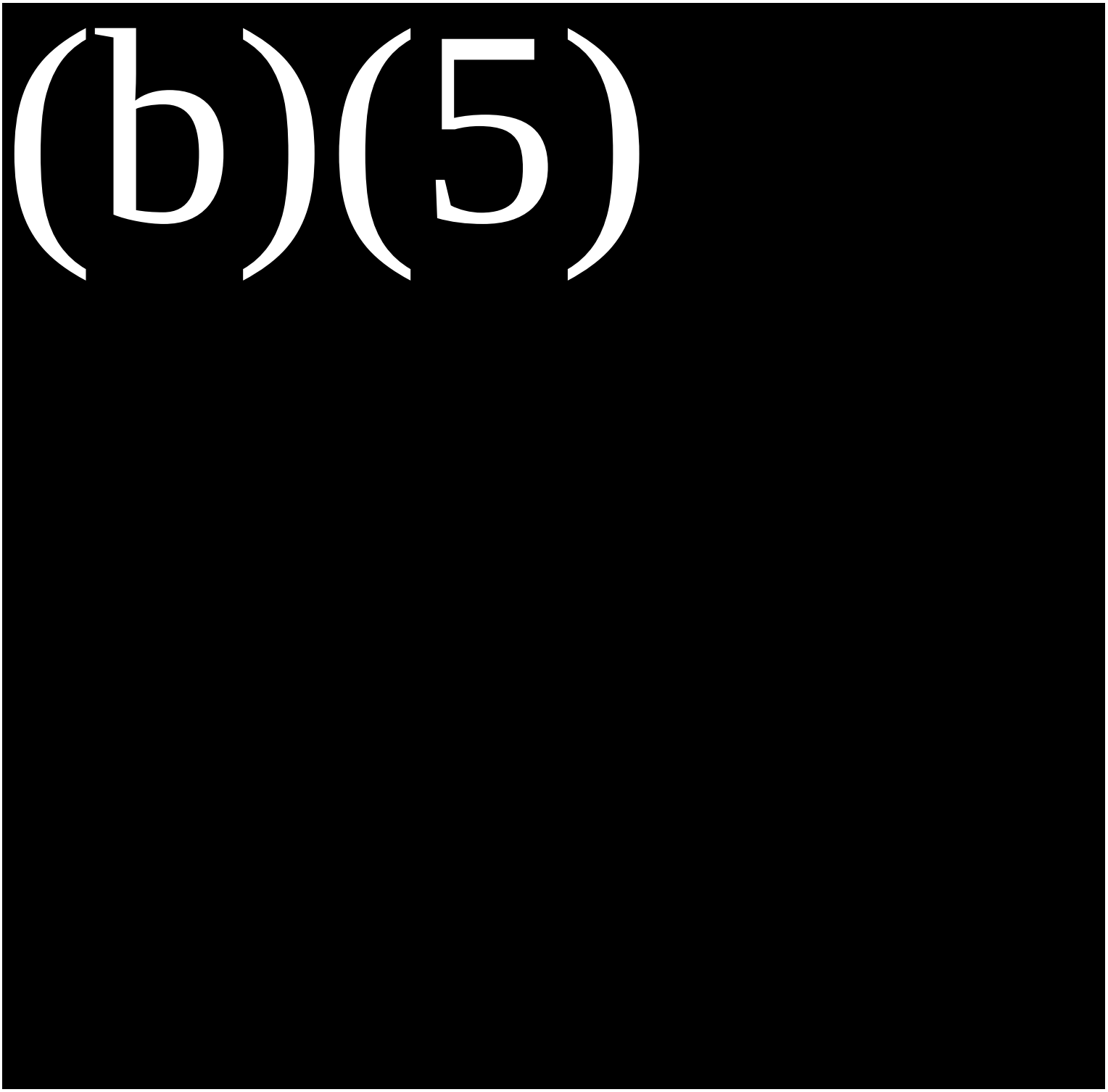
Should have copied you.

From: Michel, Christopher G. EOP/WHO
Sent: Tuesday, September 25, 2018 9:19 PM
To: McGahn, Donald F. EOP/WHO (b)(6); Donaldson, Annie M. EOP/WHO (b)(6)
Subject: Opening Statement for Submission Tomorrow

Don and Annie: Attached and pasted below is a draft opening statement for BK to submit to the SJC tomorrow. This is, in essence, the first page of his full planned opening statement (the rest of which he's still working on). We think this excerpt (b)(5) Happy to discuss or revise in any way, of course. Chris

Prepared Opening Testimony of Judge Brett M. Kavanaugh
Nomination Hearing to Serve as an Associate Justice of the Supreme Court

September 27, 2018 (submitted September 26, 2018)



[Additional Testimony To Follow]

From: "Donaldson, Annie M. EOP/WHO" (b)(6)
To: (b)(6) Brett Talley (OLP)
Subject: Fwd: Opening Statement for Submission Tomorrow
Date: Wed, 26 Sep 2018 02:37:13 +0000
Importance: Normal
Attachments: BK_Sept_27_Opening_Statement_-_submission_for_Sept_26.docx; ATT00001.htm

---

Begin forwarded message:

From: "Michel, Christopher G. EOP/WHO" (b)(6)
Date: September 25, 2018 at 9:19:23 PM EDT
To: "McGahn, Donald F. EOP/WHO" (b)(6), "Donaldson, Annie M. EOP/WHO" (b)(6)
Subject: Opening Statement for Submission Tomorrow

Duplicative Material

From: "Kingo, Lola A. (OLP)" (b)(6)

To: "Talley, Brett (OLP)" (b)(6) , "King, Kara (ATR)" (b)(6)

Subject: RE: FBI

Date: Mon, 1 Oct 2018 13:09:42 +0000

Importance: Normal

Gah, I thought you might ask for it for this very reason. Let me see what I can dig up ...

-----Original Message-----
From: Talley, Brett (OLP)
Sent: Monday, October 01, 2018 8:15 AM
To: Kingo, Lola A. (OLP) (b)(6) ; King, Kara (ATR) (b)(6)
Subject: RE: FBI

Lola! Can you send me (b)(5) ? It's possible (b)(5)

-----Original Message-----
From: Kingo, Lola A. (OLP)
Sent: Monday, October 1, 2018 8:13 AM
To: Talley, Brett (OLP) (b)(6) ; King, Kara (ATR) (b)(6)
Subject: RE: FBI

Talley! If I understand your question, (b)(5) --I believe--
(b)(5) (I don't think (b)(5)

-----Original Message-----
From: Talley, Brett (OLP)
Sent: Sunday, September 30, 2018 5:15 PM
To: Kingo, Lola A. (OLP) (b)(6) ; King, Kara (ATR) (b)(6)
Subject: FBI

(b)(5) ?

Sent from my iPhone

From: "King, Kara (ATR)" (b)(6)

To: "Talley, Brett (OLP)" (b)(6) , "Kingo, Lola A. (OLP)" (b)(6)

Subject: RE: FBI

Date: Mon, 1 Oct 2018 12:52:18 +0000

Importance: Normal

Brett and Lola! I have no ideas other than what Lola said, sorry to not be more helpful.

-----Original Message-----
From: Talley, Brett (OLP)
Sent: Monday, October 1, 2018 8:15 AM
To: Kingo, Lola A. (OLP) (b)(6) ; King, Kara (ATR) (b)(6)
Subject: RE: FBI

From: "Donaldson, Annie M. EOP/WHO" (b)(6)

To: "Clark, Justin R. EOP/WHO" (b)(6)

Cc: "Kupec, Kerri A. EOP/WHO" (b)(6), "Shah, Raj S. EOP/WHO" (b)(6), "Brett.Talley@usdoj.gov" (b)(6)

Subject: Re: Surrogate talkers

Date: Sun, 23 Sep 2018 02:21:44 +0000

Importance: Normal

Yes. Raj and Kerri, can we (b)(5) I think a lot of this is (b)(5)

> On Sep 22, 2018, at 10:18 PM, Clark, Justin R. EOP/WHO (b)(6) wrote:
>
> Have the statement. Do we have talkers for distribution yet? Could use them.
>
>> On Sep 22, 2018, at 10:13 PM, Donaldson, Annie M. EOP/WHO (b)(6) wrote:
>>
>> (b)(5)
>>
>>> On Sep 22, 2018, at 10:13 PM, Donaldson, Annie M. EOP/WHO (b)(6) wrote:
>>>
>>> (b)(5)

From: "Davis, Mike (Judiciary-Rep)" (b)(5)
To: "Davis, Mike (Judiciary-Rep)" (b)(5)
Subject: Grassley: Committee Stands Ready to Hear from Dr. Ford
Date: Wed, 19 Sep 2018 17:18:37 +0000
Importance: Normal
Inline-Images: image005.png; image006.png; image007.png; image008.png

---

COMMITTEE on the JUDICIARY
CHAIRMAN CHUCK GRASSLEY WWW.JUDICIARY.SENATE.GOV

FOR IMMEDIATE RELEASE
Wednesday, September 19, 2018

Grassley: Committee Stands Ready to Hear from Dr. Ford

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) today reiterated the Judiciary Committee's invitation to hear from Dr. Christine Blasey Ford in whatever format she deems appropriate. In a letter today to Dr. Ford's attorney, Grassley noted that the Committee is investigating claims Dr. Ford made in a July letter to Ranking Member Dianne Feinstein (D-Calif) and in a *Washington Post* report over the weekend.

The letter described the FBI's role in collecting and providing background information for nominations.

"The FBI does not make a credibility assessment of any information it receives with respect to a nominee. Nor is it tasked with investigating a matter simply because the Committee deems it important. The Constitution assigns the Senate, and only the Senate, with the task of advising the President on his nominee and consenting to the nomination if the circumstances merit. We have no power to commandeer an Executive Branch agency into conducting our due diligence. The job of assessing and investigating a nominee's qualifications in order to decide whether to consent to the nomination is ours, and ours alone," Grassley said in the letter.

The committee is following standard procedures to evaluate new information that comes to light in the course of evaluating a nomination, and speaking with Dr. Ford is an important step in that process. Grassley has offered to hear from Dr. Ford in public or private settings as well as in staff-led interviews.

"I sincerely hope that Dr. Ford will accept my invitation to do so, either privately or publicly, on Monday. In the meantime, my staff would still welcome the opportunity to speak with Dr. Ford at a time and place convenient to her," Grassley said in the letter.

-30-

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Megan Lacy (b)(6) , "Mark Champoux (b)(6) , (b)(6) Brett Talley (OLP) , "Fragoso, Michael (OLP)" (b)(6)
Subject: FW: BI call today
Date: Tue, 18 Sep 2018 00:33:33 +0000
Importance: Normal

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 8:33 PM
To: Brest, Phillip (Judiciary-Dem) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; Lola A. Kingo, (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6)
Cc: Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

Disagree. But noted.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Brest, Phillip (Judiciary-Dem)
Sent: Monday, September 17, 2018 3:58 PM
To: Davis, Mike (Judiciary-Rep) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; Lola A. Kingo, (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6)

Cc: Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

Mike/Mike/Lola,

I am not sure where the confusion comes from, however, Senator Feinstein stated her objections to going forward with phone calls at the staff-level in a letter to Chairman Grassley this morning. All Judiciary Democrats also sent a letter to Chairman Grassley requesting that the FBI to complete its work or if it has not begun, re-open the background information. Democratic Members have also made clear that this should not be done without the knowledge and participation of Members directly and not behind closed doors. Separately, it is of concern that the staff scheduled to question the nominee has already questioned the motives and seriousness behind these allegations.

To the extent you elect to press forward against our opposition, we ask that you make it clear to Judge Kavanaugh that the Democratic members are opposed to this process. We would appreciate, as well, if you give him the option of waiting to proceed until there is bipartisan participation. It is not the normal course to proceed with questioning a nominee before performing any due diligence on the allegations. We want to ensure a fair process to all parties and do not believe that pressing forward with staff-level phone calls is the appropriate way to do this.

Phil

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 1:30 PM
To: Brest, Phillip (Judiciary-Dem) ; Mehler, Lauren (Judiciary-Rep) ; Lola A. Kingo, (OLP) ; Fragoso, Michael (OLP)
Cc: Kader, Gabe (Judiciary-Dem)
Subject: RE: BI call today

Phil:

I just tried to call you. Please call me, so I can clear up your confusion.

In the meantime, the Chairman would like to setup a routine follow-up BI call with the nominee and the committee staff, as requested below.

When is the nominee available?

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Brest, Phillip (Judiciary-Dem)
Sent: Monday, September 17, 2018 1:19 PM
To: Davis, Mike (Judiciary-Rep) (b)(6) ; Mehler, Lauren (Judiciary-Rep)
(b)(6) ; Lola A. Kingo, (OLP) (b)(6) ; Fragoso, Michael (OLP)
(b)(6)

Cc: Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

All,

At this point, Ranking Member Feinstein does not believe the Committee should be moving forward with any staff-level follow-up calls until the FBI has had an opportunity to conduct further investigation. The Ranking Member has asked the FBI to do this. She is also following up in an effort to ensure that career professionals first investigate and then provide the results of their investigation to the Senate.

In light of this, we ask that you not proceed with until there is a bipartisan agreement regarding moving forward.

Phil

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 12:34 PM
To: Mehler, Lauren (Judiciary-Rep) (b)(6) ; Lola A. Kingo, (OLP) (; Fragoso, Michael (OLP) (b)(6)
Cc: Brest, Phillip (Judiciary-Dem) (b)(6) ; Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

+ Phil Brest and Gabe Kader. (Normally, we do not copy the Minority on these scheduling emails. But I am copying, as a courtesy.)

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Mehler, Lauren (Judiciary-Rep)
Sent: Monday, September 17, 2018 12:21 PM
To: Lola A. Kingo, (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6) ; Davis, Mike (Judiciary-Rep) (b)(6)
Subject: BI call today

Hi Lola,

Is Judge Kavanaugh free for a follow up BI call later this afternoon? Thanks much,

Lauren

From: "Burnham, James M. EOP/WHO" (b)(6)
To: "Fragoso, Michael (OLP)" (b)(6)
Cc: "Lacy, Megan M. EOP/WHO" (b)(6), "Kingo, Lola A. (OLP)" (b)(6), "Talley, Brett (OLP)" (b)(6), "Donaldson, Annie M. EOP/WHO" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 21:29:57 +0000
Importance: Normal

What number should he call?

James Burnham
(b)(6)

On Sep 17, 2018, at 4:05 PM, Fragoso, Michael (OLP) (b)(6) wrote:

FYI

Sent from my iPhone

Begin forwarded message:

From: "Brest, Phillip (Judiciary-Dem)" (b)(6)
Date: September 17, 2018 at 3:57:47 PM EDT
To: "Davis, Mike (Judiciary-Rep)" (b)(6), "Mehler, Lauren (Judiciary-Rep)" (b)(6), "Lola A. Kingo, (OLP)" (b)(6), "Fragoso, Michael (OLP)" (b)(6)
Cc: "Kader, Gabe (Judiciary-Dem)" (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Fragoso, Michael (OLP)" (b)(6)
To: "Talley, Brett (OLP)" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 20:06:04 +0000
Importance: Normal

Just sent you an email. They won't.

Sent from my iPhone

On Sep 17, 2018, at 4:01 PM, Talley, Brett (OLP) (b)(6) wrote:

> Did we confirm Dems are going to be on?
>
> Sent from my iPhone
>
> On Sep 17, 2018, at 3:59 PM, Fragoso, Michael (OLP) (b)(6) wrote:
>
> > Got it. (b)(5)
> >
> > Sent from my iPhone
> >
> > On Sep 17, 2018, at 3:41 PM, Burnham, James M. EOP/WHO (b)(6) wrote:
> >
> > > His personal counsel (Alex Walsh) and Don.
> > >
> > > James Burnham
> > > (b)(6)
> > >
> > > On Sep 17, 2018, at 3:36 PM, Fragoso, Michael (OLP) (b)(6) wrote:
> > >
> > > > They've asked if Travis will be on and what number to call.
> > > >
> > > > Sent from my iPhone
> > > >
> > > > On Sep 17, 2018, at 3:22 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:
> > > >
> > > > > Also, does he get a personal witness?
> > > > >
> > > > > Sent from my iPhone
> > > > >
> > > > > On Sep 17, 2018, at 2:54 PM, Talley, Brett (OLP) (b)(6) wrote:
> > > > >
> > > > > > So Dems are on board?

Sent from my iPhone

On Sep 17, 2018, at 2:50 PM, Fragoso, Michael (OLP) (b)(6) wrote:

Some permutations of Kolan, Mike, Lauren, Kenny, Roz, Duck, Sawyer, Brest, and Kadeem.

Sent from my iPhone

On Sep 17, 2018, at 2:36 PM, Donaldson, Annie M. EOP/WHO (b)(6) wrote:

If we have intel on who will be on the call, that's helpful.

On Sep 17, 2018, at 2:31 PM, Fragoso, Michael (OLP) (b)(6) wrote:

Davis:

Great. Let's setup the call for 3:30 pm today. Lauren will get back to you with details.

Thank you,
Mike Davis

Sent from my iPhone

On Sep 17, 2018, at 2:26 PM, Burnham, James M. EOP/WHO (b)(6) wrote:

Any word on timing?

James Burnham
(b)(6)

On Sep 17, 2018, at 1:51 PM, Fragoso, Michael (OLP) (b)(6) wrote:

I told them 3 or later.

Sent from my iPhone

On Sep 17, 2018, at 1:42 PM, Burnham, James M. EOP/WHO (b)(6) wrote:

Also adding Annie and Megan.

James Burnham
(b)(6)

On Sep 17, 2018, at 1:40 PM, Burnham, James M. EOP/WHO (b)(6) wrote:

(b)(5) Bk is free at or after 3.

James Burnham
(b)(6)

On Sep 17, 2018, at 1:31 PM, Fragoso, Michael (OLP) (b)(6) wrote:

Thoughts?

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 17, 2018 at 1:29:31 PM EDT
To: "Brest, Phillip (Judiciary-Dem)" (b)(6), "Mehler, Lauren (Judiciary-Rep)" (b)(6), "Lola A. Kingo, (OLP)" (b)(6), "Fragoso, Michael (OLP)" (b)(6)
Cc: "Kader, Gabe (Judiciary-Dem)" (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Burnham, James M. EOP/WHO" (b)(6)
To: "Fragoso, Michael (OLP)" (b)(6)
Cc: "Lacy, Megan M. EOP/WHO" (b)(6), "Talley, Brett (OLP)" (b)(6) "Donaldson, Annie M. EOP/WHO" (b)(6), "Kingo, Lola A. (OLP)" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 20:00:36 +0000
Importance: Normal

(b)(5)

James Burnham
(b)(6)

On Sep 17, 2018, at 3:59 PM, Fragoso, Michael (OLP) (b)(6) wrote:

Duplicative Material

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Cc: "Mark Champoux (b)(6), (b)(6) Brett Talley (OLP) (b)(6), "Fragoso, Michael (OLP)" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 21:31:59 +0000
Importance: Normal

Mike,

Do you want the Judge to call your desk?

Megan

Sent from my iPhone

On Sep 17, 2018, at 2:39 PM, Davis, Mike (Judiciary-Rep) (b)(6) wrote:

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 2:39 PM
To: Megan Lacy (b)(6); Mark Champoux (b)(6); (b)(6) Brett Talley (OLP); Fragoso, Michael (Judiciary-Rep) (b)(6)
Subject: FW: BI call today

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

(b)(6) (direct)
(cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 2:38 PM
To: 'Fragoso, Michael (OLP)' (b)(6)
Cc: Brest, Phillip (Judiciary-Dem) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; 'Kingo, Lola A. (OLP)' (b)(6) ; Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

Sorry, I meant to say 5:30 pm, not 3:30 pm.

Phil and Gabe: We will do the call from Dirksen 181.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 1:54 PM
To: 'Fragoso, Michael (OLP)' (b)(6)
Cc: Brest, Phillip (Judiciary-Dem) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; Kingo, Lola A. (OLP) (b)(6) ; Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

Great. Let's setup the call for 3:30 pm today. Lauren will get back to you with details.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Fragoso, Michael (OLP) (b)(6)
Sent: Monday, September 17, 2018 1:49 PM
To: Davis, Mike (Judiciary-Rep) (b)(6)

Cc: Brest, Phillip (Judiciary-Dem) (b)(6) Mehler, Lauren (Judiciary-Rep) (b)(6) Kingo, Lola A. (OLP) (b)(6) ; Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: Re: BI call today

Sorry, slight change: he's available at or after 3.

Mike

Sent from my iPhone

On Sep 17, 2018, at 1:30 PM, Davis, Mike (Judiciary-Rep) (b)(6) wrote:

From: "Talley, Brett (OLP)" (b)(6)
To: "Lacy, Megan M. EOP/WHO" (b)(6)
Cc: "Donaldson, Annie M. EOP/WHO" (b)(6), "Burnham, James M. EOP/WHO" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 18:43:05 -0000
Importance: Normal

It is fine.

Sent from my iPhone

On Sep 17, 2018, at 2:42 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:

Frags said at or after 3 — can tell him to ask to change

Sent from my iPhone

On Sep 17, 2018, at 2:40 PM, Donaldson, Annie M. EOP/WHO (b)(6) wrote:

Killing us. Why?

On Sep 17, 2018, at 2:39 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:

FYI BI now 530

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 17, 2018 at 2:38:37 PM EDT
To: "Megan Lacy (b)(6) "Mark Champoux (b)(6) (b)(6) Brett Talley (OLP) , "Fragoso, Michael (Judiciary-Rep)" (b)(6)
Subject: FW: BI call today

Duplicative Material

From: "Donaldson, Annie M. EOP/WHO" (b)(6)
To: "Fragoso, Michael (OLP)" (b)(6)
Cc: "Lacy, Megan M. EOP/WHO" (b)(6), "Kingo, Lola A. (OLP)" (b)(6), "Burnham, James M. EOP/WHO" (b)(6), "Talley, Brett (OLP)" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 18:50:01 +0000
Importance: Normal

Ok

On Sep 17, 2018, at 2:49 PM, Fragoso, Michael (OLP) (b)(6) wrote:

Change of plans

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 17, 2018 at 2:37:49 PM EDT
To: "Fragoso, Michael (OLP)" (b)(6)
Cc: "Brest, Phillip (Judiciary-Dem)" (b)(6), "Mehler, Lauren (Judiciary-Rep)" (b)(6), "Kingo, Lola A. (OLP)" (b)(6), "Kader, Gabe (Judiciary-Dem)" (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Burnham, James M. EOP/WHO" (b)(6)
To: "Lacy, Megan M. EOP/WHO" (b)(6)
Cc: "Donaldson, Annie M. EOP/WHO" (b)(6), (b)(6) Brett Talley (OLP)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 18:27:38 +0000
Importance: Normal

Thanks.

James Burnham
(b)(6)

On Sep 17, 2018, at 2:27 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:

Sorry — thought frags was looping James

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 17, 2018 at 1:54:09 PM EDT
To: "Megan Lacy (b)(6), "Mark Champoux (b)(6) (b)(6) Brett Talley (OLP), "Fragoso, Michael (OLP)" (b)(6)
Subject: FW: BI call today

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 1:54 PM
To: 'Fragoso, Michael (OLP)' (b)(6)
Cc: Brest, Phillip (Judiciary-Dem) (b)(6); Mehler, Lauren (Judiciary-Rep) (b)(6); Kingo, Lola A. (OLP) (b)(6); Kader, Gabe (Judiciary-

Dem) (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Megan Lacy (b)(6) , "Mark Champoux (b)(6) , (b)(6) Brett Talley (OLP) , "Fragoso, Michael (OLP)" (b)(6)
Subject: FW: BI call today
Date: Mon, 17 Sep 2018 17:29:55 +0000
Importance: Normal

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 1:30 PM
To: Brest, Phillip (Judiciary-Dem) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; Lola A. Kingo, (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6)
Cc: Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Burnham, James M. EOP/WHO" (b)(6)
To: "Fragoso, Michael (OLP)" (b)(6)
Cc: "Talley, Brett (OLP)" (b)(6), "Donaldson, Annie M. EOP/WHO" (b)(6), "Lacy, Megan M. EOP/WHO" (b)(6)
Subject: Re: BI call today
Date: Mon, 17 Sep 2018 17:31:39 +0000
Importance: Normal

Tell them yes, he is available at any time other than 3.

When?

James Burnham
(b)(6)

On Sep 17, 2018, at 1:04 PM, Fragoso, Michael (OLP) (b)(6) wrote:

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 17, 2018 at 12:34:06 PM EDT
To: "Mehler, Lauren (Judiciary-Rep)" (b)(6), "Lola A. Kingo, (OLP)" (b)(6), "Fragoso, Michael (OLP)" (b)(6)
Cc: "Brest, Phillip (Judiciary-Dem)" (b)(6), "Kader, Gabe (Judiciary-Dem)" (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Megan Lacy (b)(6) , "Mark Champoux (b)(6) , (b)(6) Brett Talley (OLP) , "Fragoso, Michael (OLP)" (b)(6)
Subject: FW: BI call today
Date: Mon, 17 Sep 2018 16:34:29 +0000
Importance: Normal

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Monday, September 17, 2018 12:34 PM
To: Mehler, Lauren (Judiciary-Rep) (b)(6) ; Lola A. Kingo, (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6)
Cc: Brest, Phillip (Judiciary-Dem) (b)(6) ; Kader, Gabe (Judiciary-Dem) (b)(6)
Subject: RE: BI call today

Duplicative Material

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Megan Lacy (b)(6) , "Mark Champoux (b)(6) , (b)(6) Brett Talley (OLP) , (b)(6) Michael Fragoso (OLP)
Subject: FW: BI call today
Date: Mon, 17 Sep 2018 16:32:15 +0000
Importance: Normal

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Mehler, Lauren (Judiciary-Rep)
Sent: Monday, September 17, 2018 12:21 PM
To: Lola A. Kingo, (OLP) (b)(6) Fragoso, Michael (OLP) (b)(6) ; Davis, Mike (Judiciary-Rep) (b)(6)
Subject: BI call today

Duplicative Material

From: "Shah, Raj S. EOP/WHO" (b)(6)

To: "Donaldson, Annie M. EOP/WHO" (b)(6), "McGahn, Donald F. EOP/WHO" (b)(6), "Kupec, Kerri A. EOP/WHO" (b)(6), "Lacy, Megan M. EOP/WHO" (b)(6), "Brett.Talley@usdoj.gov" (b)(6), "Burnham, James M. EOP/WHO" (b)(6)

Subject: Kavanaugh ex-classmate denies being at party in assault allegation - CNNPolitics

Date: Wed, 19 Sep 2018 04:41:51 +0000

Importance: Normal

---

https://www.cnn.com/2018/09/18/politics/pj-smyth-brett-kavanaugh/index.html

Sent from my iPhone

From: "Champoux, Mark (OLP)" (b)(6)

To: "Murray, Claire M. EOP/WHO" (b)(6), "Talley, Brett (OLP)" (b)(6)

Cc: "Wong, Candice (OLP)" (b)(6), "Shah, Raj S. EOP/WHO" (b)(6), "LaCour, Alice (OLP)" (b)(6), "Bumatay, Patrick (OAG)" (b)(6), "Lichter, Jennifer (OLP)" (b)(6), "Michel, Christopher G. EOP/WHO" (b)(6), "Lacy, Megan M. EOP/WHO" (b)(6)

Subject: RE: [EXTERNAL] Manny Miranda documents

Date: Wed, 19 Sep 2018 17:24:58 +0000

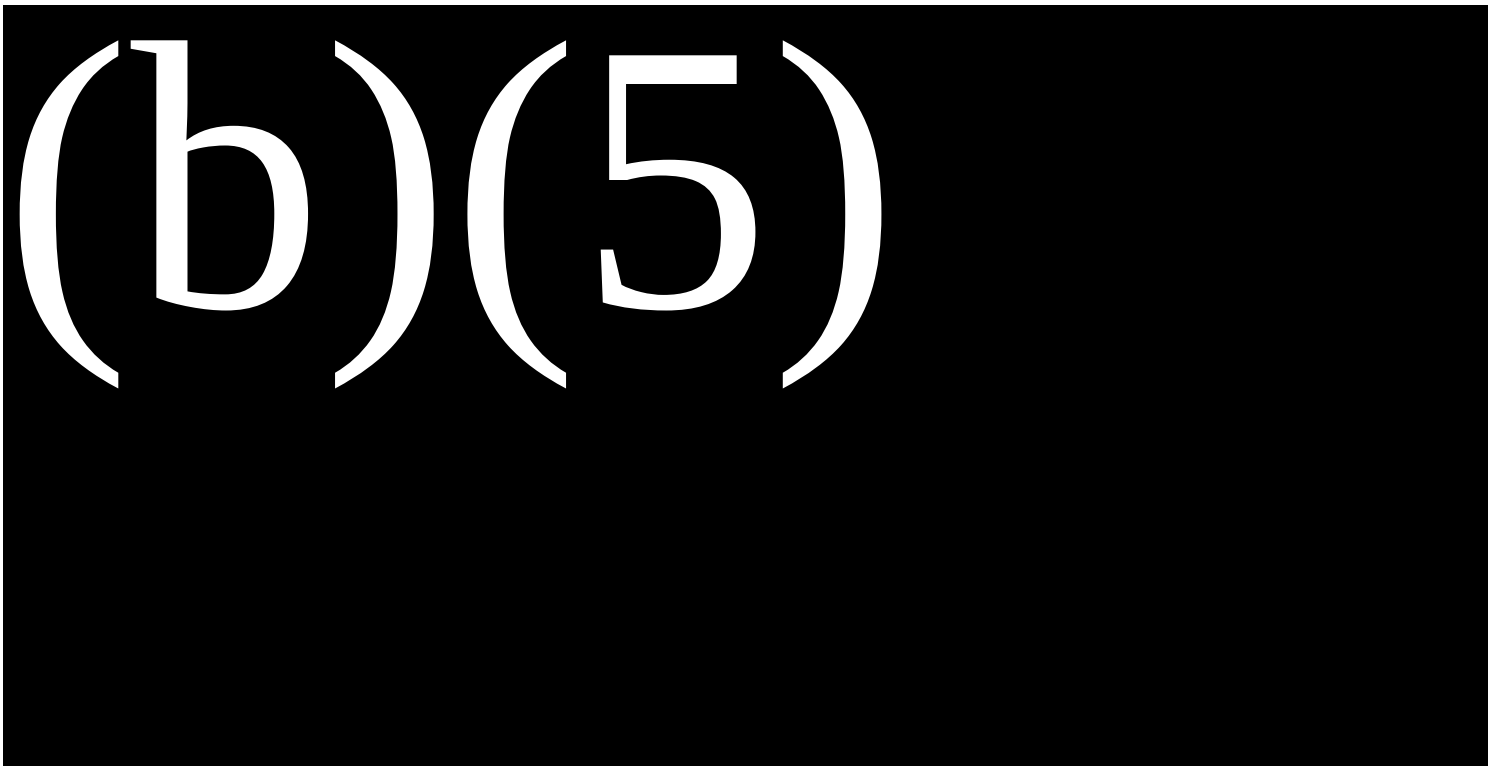
Importance: Normal

Attachments: 1_-_CREC-2003-02-25-pt1-PgS2646-2.pdf; 3_-_CREC-2003-02-27-pt1-PgS2876-2.pdf; 2_-_CREC-2003-02-26-pt1-PgS2724-2.pdf

---

In addition to Claire's broader points, all of which I agree with, here are some document-specific points:

(b)(5)



MC

(b)(6)

From: Champoux, Mark (OLP)
Sent: Wednesday, September 19, 2018 12:15 PM
To: 'Murray, Claire M. EOP/WHO' (b)(6) ; Talley, Brett (OLP) (b)(6)
Cc: Wong, Candice (OLP) (b)(6) ; Shah, Raj S. EOP/WHO (b)(6) ; LaCour, Alice (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6) ; Lichter, Jennifer (OLP) (b)(6) ; Michel, Christopher G. EOP/WHO (b)(6) ; Lacy, Megan M. EOP/WHO (b)(6)
Subject: RE: [EXTERNAL] Manny Miranda documents

Attached are the two docs referenced. I agree with Claire's points and will follow up shortly with a couple more thoughts.

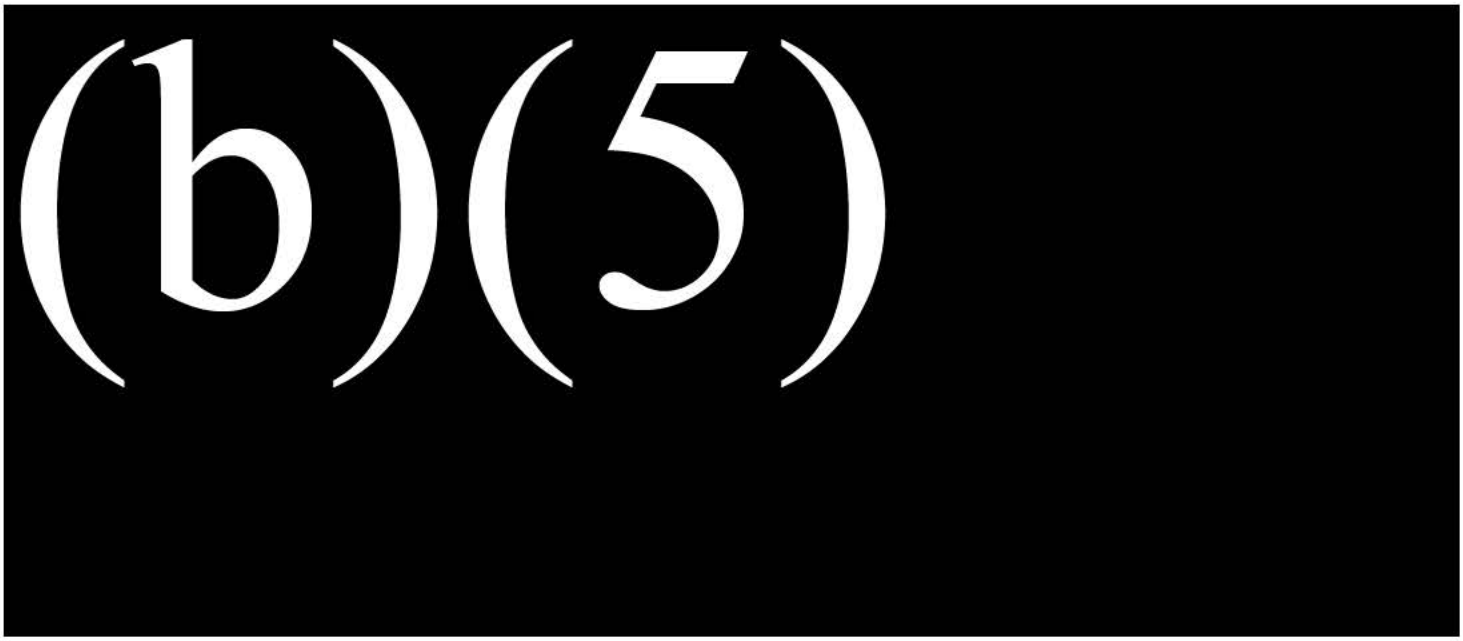
MC

(b)(6)

From: Murray, Claire M. EOP/WHO (b)(6)
Sent: Wednesday, September 19, 2018 12:06 PM
To: Chris Michel (b)(6) ; Talley, Brett (OLP) (b)(6)
Cc: Wong, Candice (OLP) (b)(6) ; Shah, Raj S. EOP/WHO (b)(6) ; LaCour, Alice (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6) ; Lichter, Jennifer (OLP) (b)(6) ; Michel, Christopher G. EOP/WHO (b)(6) ; Lacy, Megan M. EOP/WHO (b)(6)
Subject: RE: [EXTERNAL] Manny Miranda documents

+Megan

Isn't the point just that:



From: Chris Michel (b)(6)
Sent: Wednesday, September 19, 2018 11:52 AM
To: Talley, Brett (OLP) (b)(6)
Cc: Wong, Candice (OLP) (b)(6) ; Shah, Raj S. EOP/WHO (b)(6) ; (b)(6) Alice LaCour (OLP) ; (b)(6) Mark Champoux (OLP) ; (b)(6) Patrick Bumatay (OAG) ; Lichter, Jennifer (OLP) (b)(6) ; Murray, Claire M. EOP/WHO (b)(6) ; Michel, Christopher G. EOP/WHO (b)(6)
Subject: Re: [EXTERNAL] Manny Miranda documents

Looping in my WH email.

On Wed, Sep 19, 2018 at 11:51 AM Talley, Brett (OLP) (b)(6) wrote:

> Looping in Claire for her thoughts.
>
> ---
>
> **From:** Wong, Candice (OLP)
> **Sent:** Wednesday, September 19, 2018 11:50 AM
> **To:** Talley, Brett (OLP) (b)(6) ; Shah, Raj S. EOP/WHO (b)(6) ; (b)(6) Chris Michel ; LaCour, Alice (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6) ; Lichter, Jennifer (OLP) (b)(6)
> **Subject:** RE: [EXTERNAL] Manny Miranda documents
>
> Can someone send the docs he's referencing?
>
> ---
>
> **From:** Talley, Brett (OLP)
> **Sent:** Wednesday, September 19, 2018 11:03 AM
> **To:** Shah, Raj S. EOP/WHO (b)(6) ; (b)(6) Chris Michel ; Wong, Candice (OLP) (b)(6) ; LaCour, Alice (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6)
> **Subject:** RE: [EXTERNAL] Manny Miranda documents
>
> On the last point, (b)(5)

(b)(5)

As to the first point, (b)(5) but happy to let others weigh in.

From: Shah, Raj S. EOP/WHO (b)(6)
Sent: Wednesday, September 19, 2018 11:00 AM
To: (b)(6) Chris Michel ; Wong, Candice (OLP) (b)(6) ; LaCour, Alice (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Talley, Brett (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6)
Subject: Fwd: [EXTERNAL] Manny Miranda documents

I have our doc. What do we think is the best response to this?

Sent from my iPhone

Begin forwarded message:

From: "Rizzo, Salvador" (b)(6)
Date: September 19, 2018 at 10:57:39 AM EDT
To: "Shah, Raj S. EOP/WHO" (b)(6)
Subject: [EXTERNAL] Manny Miranda documents

Raj,

We didn't get to cover the Manny Miranda stuff in the fact-check from Monday. We're planning to do a fact-check for tomorrow on this. Judge Kavanaugh testified that he did not suspect what he was seeing had been improperly obtained. There are references to a confidential letter sent by Collyn Peddie to Leahy about Priscilla Owen, including what appear to be precise quotations from the letter, and a rundown of substantive points she made, and a response to those points by Kavanaugh in a subsequent email. There is also a long internal Democratic memo running down in minute detail a series of arguments and data points about the precedent for releasing Solicitor General documents, written amid the standoff over the Estrada nomination.

Kavanaugh was well versed in the inside baseball of the judicial confirmation process and had gone through heated partisan battles at that point. It seems like this information he received from Miranda – both detailed and sensitive, going to the core of two contested nomination battles – on its face appeared to go beyond the normal scope of information-sharing between both parties on the Judiciary Committee. (By the time Kavanaugh testified in 2004, the Senate sergeant at arms report had been released, detailing how the documents were improperly obtained.)

If these two emails didn't raise red flags, what does that say about Judge Kavanaugh's discernment on the bench?

Deadline is 6 p.m. Thanks.

Regards,

Sal Rizzo
Reporter, The Fact Checker
The Washington Post
(b)(6) desk
(b)(6) cell
@rizzoTK

Oh, then this is about constituent politics.

There's another constituent-oriented facet: Miguel Estrada is a successful immigrant, current front-runner to become the first Hispanic Supreme Court justice and an obvious role model—in short, a poster boy for Republican recruitment of minorities away from the one, true political faith.

This isn't about suspicions; Estrada is Democrats' worst nightmare from a partisan perspective.

From a personal perspective, Democrats who have worked with him in the Clinton administration have high praise. Seth Waxman, Clinton's solicitor general, called Estrada a ''model of professionalism.'' Former Vice President Al Gore's top legal adviser, Ron Klain, said Estrada is ''genuinely compassionate. Miguel is a person of outstanding character (and) tremendous intellect.''

During Judiciary Committee hearings in September, Estrada said: ''although we all have views on a number of subjects from A to Z, the first duty of a judge is to a put all that aside.''

That's good advice for a judge, and it's good advice for senators sitting in judgment of a nominee. Put aside pure partisan considerations; weight Estrada's qualifications, character and intellect; end the filibuster and put this nomination to a vote.

[From the Daily Lobo, Feb. 24, 2003]

ESTRADA NAYSAYERS HYPOCRITICAL

(By Scott Darnell)

Miguel Estrada isn't probably someone with an immense amount of name recognition—yet.

President Bush appointed him to an open seat on the U.S. Court of Appeals, District of Columbia Circuit on May 9, 2001; he immigrated to the United States from Honduras when he was 15 years old, graduated from Harvard Law School magna cum laude in 1986, has been a clerk for a Supreme Court justice, an assistant U.S. attorney and the assistant solicitor general, among other stints in private practice. He is supported by many national organizations, including the Hispanic Business Council, the Heritage Foundation, the Washington Legal Foundation and the Hispanic Business Roundtable.

Unfortunately, Estrada's confirmation has been delayed and prevented by many Democrats within the Senate, an action fueled by many leftist groups, organizations and lobbyists in America. Currently, Senate Democrats are planning to, or may actually be carrying out, an intense filibuster against Estrada's nomination; filibustering, or taking an issue to death, is definitely a method for lawmakers to prevent a policy or other initiative from ever coming to fruition—ending a filibuster is difficult, especially in our closely divided Senate, taking a whopping 60 votes.

The most unfortunate part of the Senate Democrats' obstruction on Capitol Hill lies in the fact that many high-ranking Senate Democrats have at one time condemned nomination filibusters quite harshly, leaving their intense efforts to carry out a filibuster today very hypocritical. For example, Patrick Leahy, the senior Democrat on the Judiciary Committee, said, from Congressional Record in 1998, that ''I have stated over and over again . . . that I would object and fight any filibuster on a judge, whether it is somebody I opposed or supported.''

Sen. Ted Kennedy said, from Congressional Record in 1995, that, ''Senators who feel strongly about the issue of fairness should vote for cloture, even if they intend to vote against the nomination itself. It is wrong to filibuster this nomination, and Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate.''

Finally, Sen. Barbara Boxer, from California said, from Congressional Record in 1995, that, ''The nominee deserves his day, and filibustering this nomination is keeping him form his day.''

It seems people can change quite a bit in only a matter of years.

But why are Senate Democrats and many leftist organizations so dead set against Estrada's nomination? The obvious answer lies in the fact that the court he is being nominated to is considered the second-highest court in the nation and often times though of as a stepping stone to the Supreme Court.

Secondly, Senate Democrats and organizations such as the NAACP or the AFL–CIO recognize Estrada's ethnicity—they recognize his heritage and the future he is making for himself—but let's face it, he's just the wrong type of minority. He's Hispanic and these politicians and organizations are all for the pro-active advancement of Hispanics, just not his type of Hispanic. The National Association for the Advancement of Colored People is now going to read ''The National Association for the Advancement of Colored People Who Believe in ONLY Leftist Principles and Ideology.''

Miguel Estrada will not, while in whatever courtroom he may preside over, pander to the interests of those who wish to establish and ingrain a persistent racial inequality in America, those who do not now carry out the legacies of past civil rights leaders, but instead bastardize those past efforts by forcing racial tension upon Americans to keep society at their beck and call while gaining personal notoriety, prestige and wealth.

If the Senate Democrats try to filibuster Estrada's nomination, they will be holding back debate and action on the immediate national and foreign issues affecting this country, such as creating and passing the appropriate economic stimulus package, among other important topics.

If the Senate feels that Estrada has committed a criminal or moral transgression at some point in his life that would injure the integrity and standing of his service as justice of one of our nation's highest courts, they should provide sufficient evidence to that end and take whatever measures necessary to disallow a moral or actual criminal from taking the bench. But, in this case, no such criminal or moral transgression can be seen, and the argument against his nomination is purely idealogical; a filibuster would represent a blatant obstruction of our political system and a disservice to the American people. So, as Democratic Sen. Barbara Boxer put it so succinctly a few years ago, ''Let the nominee have his day.''

Mr. DOMENICI. Mr. President, I repeat, it is one thing to delay; it is another thing to talk a lot; and it is yet another thing to attempt to get the issue that is before us and find a way around it and cloud the issue. That is all that is happening this morning with the discussion by the Democratic leadership, joined by certain Democratic Senators, when they argue that Republicans, by insisting that we vote on this nominee, are in some way failing to do justice to the economic problems that exist in our country.

I hope it doesn't take a lot more discussion for people to understand that is absolutely an untruth. It is an absolutely irrelevant argument. They can talk all they like about the economy and quit talking about Miguel Estrada and not one single thing will happen to benefit the American workers, not one thing.

We need to do something, and what we must do is decide whether we want the President's plan or some modification of it. The only way we can do that is to move with dispatch on the issues before us, those issues, in the way prescribed under our rules. There is no one suggesting we should throw away our rules and pass a plan tomorrow morning. Nobody is suggesting we do that.

In due course, in the matter of only a few weeks, we will be voting on whose plan should be adopted to help the American economy move forward.

I submit that the facts are overwhelming that the arguments against Miguel Estrada are not justified. Those arguments do not justify these delays.

I yield the floor.

RECESS

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

Thereupon, the Senate, at 12:30 p.m., recessed until 2:30 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

EXECUTIVE SESSION

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

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, nearly 2 years ago, President George Bush nominated Miguel Estrada to serve on the U.S. Court of Appeals for the District of Columbia. When confirmed, he will be the first Hispanic member of this court. But the other side of the aisle has stalled. In fact, as I look back, we have been on this particular nomination since February 5. The other side has continued to stall this nomination, preventing something that is very simple, that I think the American people now understand, and that is a very simple up-or-down vote.

Every Senator in this body can decide either they support this nomination or they do not. Earlier today, attempts were made from the other side of the aisle to bring up other legislation with the call that it is time to move on, and I agree; it is time to move on. We have had hours and days and nights to debate and discuss the opportunity given to both sides of the aisle, and now it is time for us to vote on this nominee.

For nearly 2 years, the nomination of this man—now, remember, the American Bar Association has deemed him well qualified—has languished as some in this body have played politics with his future. They have consistently refused to give Miguel Estrada this very

simple right, I would argue, and that is an up-or-down vote.

In fact, the tactic, which is a filibuster—and the American people understand it is a filibuster—is something my colleagues on the other side of the aisle have said they would not use, filibustering of such a nominee. They have said that in the past. Yet they are filibustering this nomination on the floor of the Senate. We feel that is wrong. We will continue to fight for this up-or-down vote for this qualified nominee.

We came back from a recess yesterday. It is fascinating as we look around the country, even the newspapers, if we look at the top 57 newspapers—I do not think one can say the top 57, but to read what 57 major newspapers in this country are seeing and saying in terms of their editorials, indeed, 50 newspapers from 25 States and the District of Columbia have editorialized either in favor of the Estrada nomination and/or, I should say, against this filibuster of a nominee, in essence saying, yes, please give him an up-or-down vote.

It seems, because we are demanding a supermajority to become the standard, that the other side of the aisle is holding this Hispanic nominee, Miguel Estrada, to a higher standard than any other nominee to this court has ever been held. I think this is wrong. It is unreasonable, using a filibuster and forcing a judicial nominee to effectively gather 60 votes rather than 50 votes for confirmation. It sets a new and unreasonable precedent.

In the sense of fairness, I once again appeal to my colleagues on the other side of the aisle to give us that vote. Clearly, Senators have had adequate time to debate this nominee. I myself have come to this floor on five separate occasions to attempt to reach an agreement with the other side of the aisle for a time certain for a vote on the confirmation, and each time my Democratic colleagues object to giving him a simple up-or-down vote.

The two arguments I am hearing from the other side of the aisle are, one, they want unprecedented access to this confidential memoranda and, secondly, they need more information.

The first, to my mind, is a specious argument. It has been talked about again and again on the floor. It is almost a fig leaf because they know it cannot and should not be complied with.

I do want to address the second argument very briefly, not so much in substance but in terms of how we can bring this matter to a conclusion for the American people and for this nominee, so we can get to an up-or-down vote, and that is if they really feel there are specific questions that have not been answered, to reach out and figure some reasonable way to get the information to those questions. Again, outside of the rhetoric that flows back and forth and outside the heat of the argument, in the spirit of working together, I do want to suggest we work together on both sides of the aisle—and I would be happy to do it with the Democratic leader or his representative—toward putting together a reasonable list of questions that Members may wish to pose to Miguel Estrada. I would hope that once we agree upon the questions, submit them, and get the answers back, that process would allow us to come back to what I think we should be able to turn to immediately, but with the filibuster we are unable to, and that is to have a vote this week on the nomination.

I am really talking more process at this point, with an appeal to the other side for us to put together questions to submit and, once we receive those answers, be able to have a vote this week. Thus, I ask unanimous consent that the vote on the confirmation of the nomination of Miguel Estrada occur at 9:30 on Friday, February 28.

Before the Chair puts the question, I would add, and I want to stress, that I will work toward getting answers to any reasonable list of questions that could be worked out on both sides of the aisle.

The PRESIDING OFFICER. Is there objection?

The Senator from Nevada.

Mr. REID. I ask the majority leader to modify his proposal in the following manner: I ask unanimous consent that after the Justice Department complies with the request for documents we have sought, namely the memoranda from the Solicitor's Office which were first requested on May of 2001, the nominee then appear before the Judiciary Committee to answer the questions which he failed to answer in his confirmation hearing and additional questions that may arise from receiving any such documents.

Mr. FRIST. Mr. President, I will not modify my unanimous consent request as spelled out.

Mr. REID. I object.

The PRESIDING OFFICER. The objection is heard.

The Senator from Texas.

Mrs. HUTCHISON. Mr. President, as we have just heard from our distinguished majority leader, the Senate has had the nomination of Miguel Estrada since May 9, 2001. This man has been waiting for confirmation for almost 2 years. This is the most qualified person who has never gotten a vote in the Senate. In fact, the American Bar Association rated Miguel Estrada unanimously well qualified, the highest possible rating. Never before have Senators filibustered such a nominee.

Mr. Estrada would be the first Hispanic to serve on the Nation's second most important Federal court, adding diversity to our judicial system. Miguel Estrada's nomination is supported by a number of Hispanic organizations, including the Hispanic National Bar Association, the League of United Latin American Citizens, and the U.S. Hispanic Chamber of Commerce. The Austin American Statesman wrote last Friday: If Democrats have something substantive to block Miguel Estrada's confirmation to the U.S. Court of Appeals for the District of Columbia, it is past time they share it.

Miguel Estrada's nomination was announced in May of 2001 and has been held hostage since by the Senate Democrats who have yet to clearly articulate their objections to him.

Mr. Estrada is widely regarded as one of the Nation's top appellate lawyers, having argued 15 cases before the Supreme Court of the United States. He is currently a partner in a Washington, DC, law firm and practices law. He is truly an American success story.

Miguel Estrada emigrated to the United States from Honduras at the age of 17, speaking very little English. He graduated magna cum laude from Harvard Law School and served as a law clerk to U.S. Supreme Court Justice Anthony Kennedy. He has been in the judicial system. He is an esteemed academic. He has a stellar record. Yet Miguel Estrada cannot get a vote on the floor of the Senate. He has been a highly respected Federal prosecutor in New York City. He served as Assistant Solicitor General under President George H.W. Bush for 1 year and under President Clinton for 4 years.

His nomination has broad bipartisan support, including support from high-ranking Clinton administration officials such as former Solicitor General Seth Waxman and Ron Klain, the former counselor to Vice President Al Gore.

Mr. Estrada has worked throughout his career while he has been in the public sector and the private sector to uphold our Constitution and preserve justice.

That we cannot get a vote on this qualified man is incredible. I am afraid it could be the beginning of a precedent that, in my opinion, is unconstitutional.

Our Founding Fathers understood the need to have three separate and equal branches of government so there would be checks and balances throughout our system. They gave to the President the right to appoint a Federal judiciary, a Federal judiciary that has lifelong appointments. They gave to the Senate the right of confirmation—advise and consent as it is called in the Constitution—that has always meant a majority vote. If a two-thirds vote has ever been required by the Constitution, it is specified. So we are talking a simple majority, a simple majority to confirm the nominees of the President. That is the check and the balance in the system.

What we see today is an amendment to the Constitution, but it has not gone through the process required under the Constitution where an amendment would get a two-thirds vote of both Houses of Congress and then it would go to the States to be passed. That is the requirement to change the Constitution of this country.

However, today we are changing the Constitution because we are, in essence, requiring 60 votes to break a filibuster in order to confirm this judge, Miguel Estrada. Why have we set a bar of 60 votes for this man? What is the thought process of the Democrats who are filibustering this appointment that they would substitute a 60-vote requirement for the constitutional provision that has always meant 51 votes or a majority of those present, a simple majority? And yet we are setting a new bar, a 60-vote bar, without going to the people, without going through the process of a constitutional amendment. This is not right. This man has been pending for 21 months.

We are now in the Chamber. He has come out of committee. We are in the Chamber trying to get a vote of a simple majority to put the first Hispanic on the DC Court of Appeals, a Hispanic who graduated with honors, magna cum laude, from Harvard Law School, with years of experience as one of the most highly esteemed appellate lawyers in America, and we cannot get a vote on Miguel Estrada.

Let me read some of the editorials that have been written about this nomination. On February 18, 2003, the Washington Post wrote:

The Senate has recessed without voting on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit. Because of a Democratic filibuster, it spent much of the week debating Mr. Estrada, and, at least for now, enough Democrats are holding together to prevent the full Senate from acting. The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such material, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only because he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised a substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway—just for good measure. It's long past time to stop these games and vote.

Mr. President, the Washington Post has shown the fallacy of all the arguments that have been thrown out there against Mr. Estrada: Well, he did not answer questions; well, he is too young; well, he is not Hispanic enough.

Give me a break. This is ridiculous. This is a man who is one of the most highly qualified appellate lawyers in America, who has a stellar academic record, who has a stellar reputation in public life, who has strong bipartisan support, and who cannot get a vote in the Senate because he is being filibustered.

This just is not right. It is time we call this what it is. It is a filibuster. It is a change of the constitutional requirement for advice and consent from the Senate. It is a change of the Constitution without any procedure that is required to amend our Constitution. It is setting a new standard that Democrats and Republicans before have always agreed would never be done. When Democrats were in control, they did not filibuster nominees or they did not allow filibusters of nominees by Republicans, and Republicans are in control. And we are asking for the same courtesy, the same tradition, and, in fact, the same respect for the Constitution. The Constitution says advise and consent. When the Constitution requires more than a 51-vote margin or a simple majority, it so states. That is not the case in confirmation of judges, and it has not happened before on a partisan basis. There was one bipartisan filibuster. There has never been a partisan filibuster before.

There is no controversy about this nominee. There have been controversies before—controversies where you could legitimately see a difference in qualifications or in background issues or in experience issues. None of that applies to this nominee.

I think it is time the Democrats state if there are real objections. For instance, if there are more questions to be answered, have another hearing, or submit the questions in writing and let Miguel Estrada have a chance to answer these questions. Miguel Estrada has offered to go and visit with many Democrats who have not found the time to be able to see him. Yet we can't get a vote in the Senate on this distinguished nominee.

Let me read an article by Rick Martinez from the Raleigh News & Observer:

Once again, a minority is being denied a vote. Democrats in the U.S. Senate have threatened a filibuster to block the confirmation of Hispanic Miguel Estrada, nominated by President Bush to the federal Court of Appeals for the D.C. circuit.

If Estrada were applying to the University of Michigan law school, Democrats, it seems, would support giving him 20 points just for being Hispanic. Given the party's unqualified support of affirmative action, why shouldn't it ante up to 10 or 15 Senate votes for confirmation simply because of his ethnicity? Goodness knows that Hispanics, now the nation's largest ethnic group, are largely unrepresented in the federal judiciary.

Democrats counter that their opposition is based on Estrada's views and qualifications. If so, at what point along the ladder from law student to the federal bench is race no longer relevant?

For Democrats, it was when Estrada stepped on a rung they viewed as conservative. Once that ideological line was crossed, all the benefits of affirmative action—increased representation, diversity of social experience, providing an example for minority youth—no longer applied to the Honduran-born lawyer.

Mr. Martinez says:

The whole Estrada tiff is the latest warning to Hispanics that racial politics is about power, not equality. Hispanics have been given fair warning that those who wander off their pre-assigned ideological plantation will pay a heavy price. Ethnic hit man, Rep. Bob Menendez, a New Jersey Democrat, unleashed an ugly personal attack on Estrada by questioning his Hispanic heritage. To date not one Democratic leader has taken Menendez to task for his unwarranted remarks. That they came from a man with a Latin surname doesn't make them any more legitimate or any less offensive than if they came from Sen. Trent Lott.

Democrats, write this down. We Hispanics don't all look alike, we don't all think alike, and God has yet to appoint Menendez to pass judgment on our ethnicity. Ideology has never been an ethnic prerequisite, and it shouldn't be for one on the federal bench either.

There are approximately 50 editorials written throughout the country about the qualifications of this man. This one written by Rick Martinez in Raleigh, NC, basically says there is a different standard for Hispanics—that Hispanics are not a monolith and they shouldn't be judged as a monolith. In fact, Miguel Estrada is one of the most qualified people—not one of the most qualified Hispanics, one of the most qualified people who—have ever been nominated for an appellate court in our country. He has the experience. He has the background. He has the academic credentials. And he has a reputation that is sterling. Yet we can't get a vote on Miguel Estrada.

I hope those who are refusing to allow a vote on Miguel Estrada will listen to the League of United Latin American Citizens—LULAC—which has come out strongly for this qualified man and that does not really understand why there is a different standard being set for him than is being set for other appellate court nominees.

I urge my colleagues to listen to the Hispanic National Bar Association president, who represents 25,000 Hispanic American lawyers in the United States, endorsing Mr. Estrada, the National Association of Small Disadvantaged Businesses, which came out in

strong support of Mr. Estrada, and a bipartisan group of 14 former colleagues in the Office of the Solicitor General at the U.S. Department of Justice who have come out foursquare for Miguel Estrada.

There is no legitimate reason being stated not to give Miguel Estrada a vote. To say that he didn't answer questions, if legitimate—if they would ask him questions and let him answer them, but they haven't. Saying he is too young is ridiculous; saying he is not Hispanic when he came to our country from Honduras at the age of 17 speaking little English—and he wanted a part of the American dream. But he didn't want it given to him; he wanted to earn it.

He worked his way into Columbia University and was a Phi Beta Kappa. He worked his way into Harvard Law School and graduated magna cum laude. He worked to get a partnership with a major law firm after being a Supreme Court Justice clerk which is reserved for only the best graduates of law schools in our country.

This man deserves a vote. He deserves the respect of the Constitution, and he is not getting it as we speak today. The Constitution says advise and consent. The Constitution says a majority—not 60 votes out of 100 but a simple majority. It is what has always been required for the President's nominees. That is the check and balance in our system.

I hope the Senate will do the right thing. If there are legitimate questions, raise them. Let Mr. Estrada answer them. But this man deserves a vote, and the Constitution deserves respect and adherence by this body.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER (Mr. CRAPO). The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I ask for permission to speak on behalf of Miguel Estrada.

The PRESIDING OFFICER. The Senator is recognized.

Mr. CHAMBLISS. Mr. President, I am still new to this body having been here less than 2 months at this point in my career in the Senate. After spending 8 years in the House of Representatives, I am still feeling my way through with respect to finding the microphone, and things like that.

I am somewhat at a loss when it comes to the process through which we are now going. It is totally unlike any type of process that I experienced in the House of Representatives because we don't confirm judges anywhere except in the Senate. I spent 26 years as a lawyer before being elected to the House of Representatives. In my 26 years as a lawyer, I tried hundreds of cases, and on appeals dozens and dozens of cases, and I had a number of opportunities to appear before both trial judges and appellate judges, on a variety of different issues.

At any one moment before an appellate court, you can pretty well look at a judge and tell whether or not that judge has done his homework on your issue. You have a sense of whether or not he has the intellect to interpret the issue and be very responsive to your argument. And if you ever find a judge who is not responsive, you can check his background, and you may find out that maybe he did not have the intellect to follow the course of your argument.

So when I look at the background of Miguel Estrada and try to decide whether or not, were I to appear as a lawyer before him, he would be the type of individual to whom I could make an argument and have him interpret that argument, even though it is on a very complex issue, I believe he would be. I have to tell you, his is one of the most unusual profiles I have ever seen of any member of the bar, much less any potential member of the bench.

It is unusual not just because his is a true American dream story. It is unusual because this man, as a practicing lawyer in public service and in the private sector, has distinguished himself above all other lawyers with whom he has ever been associated.

He is a man who has distinguished himself by coming to the United States, not speaking much, if any, English, and not only attending major universities, but graduating from those universities with high honors: from Columbia University with an undergraduate degree, and Harvard Law School with a law degree.

At Harvard Law School he was a member of the editorial board of the Law Review. And those of us who went to law school know there are only a few Law Review editorial board members. I can still remember in my law school class those who were members of the law review. Out of my class, of the 200 who started in law school, there were—I think about five of them—who were members of the Law Review. So it is a very distinct intellectual group of students who make the Law Review. And the editors of the Law Review are the elite of those very few who are designated with law review status.

The intellectual background of this man is unquestioned. He does have the capability of interpreting and deciphering any complex issue that might be presented to him as a member of the appellate court bench.

So when I think about, again, appearing before a man with his type of background, to argue a complex case, I think it would be wonderful to know you have somebody with the qualifications and the capability of Miguel Estrada to really listen to your argument and make the kind of decision every lawyer wants to have made on his or her particular case.

One thing that confuses me about Miguel Estrada's nomination is, I was told while I was in law school that I should join the American Bar Association as a student. And I did. I was a very active member of the American Bar Association in my small, rural community in Georgia for all of the 26 years I practiced law.

The American Bar Association is a very well respected, very highly recognized peer group within our profession. The American Bar Association was asked to review Mr. Estrada, as they review every other judicial nominee, and to make a recommendation to this body as to whether or not he is qualified to be confirmed by this body to the District of Columbia Circuit Court. They came back and said: Not only is he qualified, not only does he possess the academic and intellectual and legal background to serve on the Circuit Court for the District of Columbia, but he is well qualified. We are giving him the highest recommendation that lawyers can give to a lawyer who seeks confirmation to any court.

As a member of the Judiciary Committee, I have already seen that we have some judges who come through the committee who do not receive the highest recommendation from the American Bar Association, but nevertheless get confirmed by this body. And they should, because everybody is not going to get that highest qualification recommendation from the American Bar Association.

But Mr. Estrada got the highest qualification from his peers—those men and women who practice law with him, who talked to other lawyers who practiced law with him, who know how he functions day in and day out in the practice of law, who know his temperament and his capabilities as well as his ability to serve in the capacity of an appellate court judge. And for that body to come forward and say, we are going to give him the highest recommendation possible is just another one of the assets he brings to this body from the standpoint of confirming his nomination.

I was not here when Mr. Estrada had his hearing before the Judiciary Committee. That took place in September of last year when the committee was controlled by the Democrats. At that point in time, from what I read in the record, Mr. Estrada appeared before the Judiciary Committee for a full day's hearing. Every member of the Judiciary Committee had the opportunity to ask Mr. Estrada any question they wanted to. And they did.

There has been some question about whether or not he was totally forthcoming in his answers, whether he gave complete responses to the questions that were asked of him. Well, in addition to having the opportunity to ask Mr. Estrada questions at the time of his hearing, whether Mr. LEAHY was chairman or now with Mr. HATCH as chairman, the members of the Judiciary Committee always have the opportunity to submit written questions in addition to those questions that are asked at the hearing.

If a Judiciary Committee member is not satisfied with answers to questions he or she asked, he or she simply has the right to come back and say, I want

you to go into further detail with respect to this particular issue, to tell me whatever it is I want to have answered. Only two members of the Judiciary Committee came forward and said: We have additional questions we want to ask. Those two were both Democrats. They had the right to do it. They did it. And I respect them for coming back with additional questions when they felt they did not get totally complete answers. The fact of the matter is, though, those questions were answered immediately by Mr. Estrada.

So for somebody to come forward now on the other side of the aisle and say, we do not think he fully answered our questions, where were they? Where were they at the time of the hearing? Why didn't they come forward after the hearing if they were not satisfied at the hearing and submit additional written questions?

To come to this body now and to say Mr. Estrada was not totally forthcoming at the time of the hearing just shows this particular nomination has dipped itself into the depths of political partisanship. And it is not right.

I am biased. I am a lawyer. I think I am a member of the greatest profession that exists in the United States of America. I think we have a great judicial system because even though a lot of people throw rocks at our system—and I myself even have criticized it from time to time—we have the best system in the world. We have the best system in the world because it works. And people of all walks and backgrounds have the opportunity to have their cases heard by a judge, whether it is Mr. Estrada or a magistrate court judge in Colquitt County, GA. People have the right to have their cases heard.

And now, for somebody to come forward and say, I asked this guy a question, and he did not really answer my question, therefore, I am going to vote against him, I think just throws another rock at our judicial system that should not be thrown.

Referring, again, to Mr. Estrada's qualifications being called into question, this is an issue that has been batted back and forth between political parties. I have listened to an extensive amount of the debate over the past 2 or 3 weeks, both as Presiding Officer as well as on and off the floor. I have listened to my colleagues on the other side of the aisle raise issues relative to Mr. Estrada. In talking about qualifications of anybody to go to the bench, particularly the circuit court versus the district court, you can look at an individual lawyer and say, this man or this woman has appeared before the highest court in the land, the Supreme Court, not once, not twice, not 3 times, but 15 times to argue cases, and he has distinguished himself very well in those 15 arguments. As we all know, sometimes you are on the winning side and sometimes you are on the losing side, but 10 out of the 15 times that Mr. Estrada has been to the U.S. Supreme Court, irrespective of whether he was on the appellate side, which is the losing side going in, or whether he was on the appellee's side, the winning side going in, he has prevailed at the end of the day. So for a guy to argue 15 times before the U.S. Supreme Court and to win 10 of them is a very distinguishable record.

The fact that he even argued cases before the Supreme Court very honestly puts him in a category of lawyers that is the most highly respected group of lawyers that exists in the United States today. There are just not many folks who have the opportunity to argue a case before the Supreme Court. Here we have a man who has argued 15 cases before them.

Another argument I have heard time and time again is that we should be able to see the memos that he submitted to his boss while he was assistant to the Solicitor General. Some believe we should be able to see what was in his mind from a legal perspective, and use those memos to try to determine whether or not he has the judicial qualifications and temperament to serve as a member of the DC Circuit Court of Appeals.

Let me tell you what that is like. As a practicing lawyer, if I have somebody come into my office and I interview them and take notes and I then take their case and go into my law library and do extensive research on the issue for my client to make sure that I am well prepared from a legal precedent standpoint and I then write a memorandum, which I have put in my file to make sure that at the appropriate time—when the case either comes to a hearing or I have an argument with opposing counsel—that memorandum is personal and privileged to me and my client.

What the Democrats have asked for is, to view the collateral memos that were prepared by Mr. Estrada for his boss, the Solicitor General, while he was working in the Clinton administration and while he was working in the Bush 41 administration. That is wrong. They should not ask for it in the first place, but the Justice Department is absolutely right in refusing to produce them. They should not produce those memos because those memos are personal. They are private. They are privileged.

Every lawyer in the country ought to be outraged that the Justice Department is even being asked for those memoranda to be presented to this body for review when they were prepared in a private setting, in a setting in which there was a lawyer-client relationship in existence. Those types of memos have never been allowed to be offered into court for proof of any issue, and they should not be required to be presented here in this body.

Speaking of politics being involved here, again, as a new Member of this body and a new member of the Judiciary Committee, I am having a little trouble understanding the politics of this issue. I could understand it if Mr. Estrada has been a lifelong Republican, had the tattoo of an elephant on him and was a known advocate or radical that held forth extreme positions. I could understand the politics involved in seeking to block this man by the folks on the other side of the aisle.

But that is not the case. Here we have a man who came to the United States speaking little or no English, a man who went to two of the finest schools in America not known for their conservative-leaning students or faculty, Columbia University and Harvard. I don't know where they lean, but they are certainly not conservative-leaning universities.

That is his background. He comes from an administration that was not a conservative-leaning administration, the Clinton administration. He worked for 4 years in that administration. He worked for the Solicitor General in the first Bush administration for a year and then the Clinton administration for 4 years. There is nothing to indicate that this man would have an off-the-wall conservative-leaning philosophy.

I do not understand the politics of somebody coming up and saying: Well, we think he may be too conservative or he may be radical.

Those kinds of statements were made within the Judiciary Committee, and there is simply no basis for them.

The fact is, every Solicitor General who lives today who has worked for any administration, whether it is Republican or Democratic, has come forward and signed a letter saying, No. 1, the privileged memoranda sought to be produced from the Justice Department should not be produced because they will compromise future administrations. They never should be produced. And No. 2, they recommend Mr. Estrada for confirmation by this body.

When somebody in that position makes a statement, it takes it totally out of the realm of politics and puts it in the realm of professionalism, which is where it ought to be. We ought to have good, quality, competent men and women going to the bench.

As a Member of the House of Representatives during the Clinton administration, I had a good friend who was nominated to the District Court for the Northern District of Georgia. She is a good lawyer. She was a really outstanding U.S. attorney. She is not a Republican, but I thought she ought to be put on the district court. She was, in fact, appointed, and she was confirmed by this body because she was a good lawyer. She was the type of person who ought to be on the bench.

The same thing holds true for Mr. Estrada. All you have to do is look at his record. It is pretty easy to tell that he is a good lawyer. When you talk to other lawyers about him, I promise you, in the legal profession, you know very quickly whether or not somebody is well respected and well thought of.

Mr. Estrada has the respect of his colleagues. We have searched high and

low. If anybody has anything negative to say about Mr. Estrada, it has come forward. Only one coworker who he worked with over the years has had anything negative to say about Mr. Estrada.

Do you know what is unusual about that? That same individual, who was his supervisor in the Office of Solicitor General during the Clinton years, gave him a rating on two different years. That review rating that was given to Mr. Estrada was ''outstanding'' by this particular individual who is now the only member of the Solicitor General's Office, or any other place where Mr. Estrada was employed, who has had anything whatsoever, to say in a negative capacity regarding Mr. Estrada.

So whether it is people he worked for, whether you look at his qualifications from an educational standpoint, vis-a-vis an intellectual standpoint, whether it is the Hispanic community that you look to for a recommendation on Mr. Estrada—everywhere you look, he gets nothing but the highest marks, the absolute highest marks.

One other area in which I think Mr. Estrada has really excelled is with respect to what we in the legal community refer to as pro bono work. Pro bono work is done different ways in different parts of the world. In my part of Georgia, a practicing lawyer does pro bono work when he or she takes appointed criminal cases usually. Occasionally, you will represent an individual in a civil matter and you don't get paid for it. That is what we talk about as a pro bono type case. Mr. Estrada has been very active in the world of pro bono service. In fact, he handled one case that was a death row inmate case, which is not the normal type of case that a lawyer of Mr. Estrada's background would handle. But he took the case and, obviously, he did the work necessary to fully, totally, and very professionally represent his client, because he spent almost 400 hours in research and preparation for representing this individual—a death row inmate's case.

For a man to spend 400 hours—I don't know what his billable rate is, but even at my billable rate in rural Georgia, that would have been an awful lot of money that Mr. Estrada sacrificed for the sake of making sure this death row inmate had more than adequate representation. In fact, with Mr. Estrada, the death row inmate was represented by an outstanding lawyer who had the capability—and I am absolutely certain he did—to do everything necessary to fully and totally represent his client.

Now, one final criticism of Mr. Estrada is that he has no judicial experience. Well, I don't buy this argument. In fact, I think, if anything, it may be to his advantage. Having judicial experience sometimes, I think, could be even a negative factor, although in a case where you had somebody as qualified as Mr. Estrada, it would not make any difference one way or the other. But you have an individual here who has legal experience. That is what is important. He has legal experience in being able to work on complex cases, and most of the time, cases that come before the circuit court are complex cases. Mr. Estrada has the ability to deal with those complex cases because he has handled them for years and years as a practicing attorney in the public and private sectors. He has the type of background that lends itself to being able to deal with those complex cases and make a rational, reasonable interpretation of the Constitution, which every judge is expected to do and which is exactly what Mr. Estrada said he would do at his hearing in September before the Judiciary Committee.

I close by saying there have been 57 newspaper editorials I have seen relative to the nomination of Mr. Estrada and the treatment of his nomination on the floor of the Senate. Of the 57 editorials that have appeared in newspapers all across America, 50 have been favorable toward Mr. Estrada. One of those editorials appeared in a newspaper in my home State, in Atlanta, GA. The Atlanta Journal-Constitution wrote an editorial—about 3 weeks ago now—that was complimentary to Mr. Estrada and critical of the Senate for not moving on his nomination.

Let me tell you, when it comes to politics, the Atlanta Journal-Constitution is not on one side most of the time; they are on one side all of the time. I have never received, in my political career, the endorsement of the Atlanta Journal-Constitution, except for the one time when I did not have an opponent and I guess they had to endorse me. To say that they are in any way leaning toward the conservative side on any issue would be outlandish. But even the Atlanta Journal-Constitution came out and said this is wrong.

This man is a good and decent man. He has the intellect and background to serve on the Circuit Court for the District of Columbia Court of Appeals, and he should be confirmed. That line has been repeated by newspapers in America day in and day out for the last several months.

The Augusta newspaper, also in my State, wrote a glowing editorial also recommending that this body confirm the nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia.

I think, without question, that the right arguments have been made in support of Mr. Estrada. Just in winding down—I see my friend from Nevada here, and I don't know whether he wants time or not—I want to say that, from the standpoint of support from the Hispanic community, there has been overwhelming support from every aspect of the Hispanic community. When you look at the League of United Latin American Citizens—that is what we call LULAC—which is the Nation's oldest and largest Hispanic civil rights organization, the president of that organization, Mr. Rick Dovalina, wrote a letter, and this is what he said about Mr. Estrada:

> On behalf of the League of United Latin American Citizens, the nation's oldest and largest Hispanic civil rights organization, I write to express our strong support for the confirmation of Mr. Miguel A. Estrada. . . . Few Hispanic attorneys have as strong educational credentials as Mr. Estrada who graduated magna cum laude and Phi Beta Kappa from Columbia and magna cum laude from Harvard Law School, where he was editor of the Harvard Law Review. He also served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court, making him one of a handful of Hispanic attorneys to have had this opportunity. He is truly one of the rising stars in the Hispanic community and a role model for our youth.

The Hispanic National Bar Association president, Rafael A. Santiago, stated as follows:

> The Hispanic National Bar Association, national voice of over 25,000 Hispanic lawyers in the United States, issues its endorsement. . . . Mr. Estrada's confirmation will break new ground for Hispanics in the judiciary. The time has come to move on Mr. Estrada's nomination. I urge the Senate Committee on the Judiciary to schedule a hearing on Mr. Estrada's nomination and the U.S. Senate to bring this highly qualified nominee to a vote, said Rafael A. Santiago, of Hartford, Connecticut, National President of the Hispanic National Bar Association.

So this man has the qualifications. He has the educational background. He has the legal background. He has the intellect. He has the support of Democrats. He has the support of Republicans. He has the support of liberals. He has the support of conservatives. He has the support of the Hispanic community. The only support he is lacking to bring this nomination to a vote on the floor of the Senate is the support from our colleagues on the other side of the aisle.

Not allowing this nomination to come to the floor for a vote is not fair, it is not judicially just. It is not just in any way from an ethical, moral, or judicial standpoint.

Mr. Estrada's nomination has been debated back and forth now for, gosh, going on 3 weeks. I guess 3 weeks starting tomorrow—a total of 4 weeks. We were here 2 weeks, we were out 1 week, and now we are back. So I guess it is a total of 4 weeks. We have a lot of business that needs to be brought before this body. We have a jobs growth package that needs to be debated and passed that the President has put forth. We have the impending conflict with Iraq and the continuing war on terrorism that needs to be dealt with on the floor of this body. We need to move to other business.

We need the folks on the other side of the aisle to come forward and say: OK, we will give you a vote. We do not think he is qualified, but we are willing to give Mr. Estrada a vote. That is the right thing to do, that is the just thing to do, and that is the judicial thing to do. If they want to vote against him, vote against him, but if we want to vote for him, we ought to have the opportunity to vote for him. We ought

not require 60 votes. We ought to require 51 votes, as I think our Constitution requires, and we ought to bring the name of Miguel Estrada to the floor of the Senate and have a vote.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. REID. Mr. President, will the Senator from Massachusetts yield for a question?

Mr. KENNEDY. Yes, I will be glad to yield.

Mr. REID. Mr. President, the distinguished Senator from Georgia just stated that there is a lot of business this Senate has to do and that we should get off the Estrada nomination and get on to these other matters. The Senator from Massachusetts, I am sure, agrees with my friend from Georgia that we have a lot of business to do.

I know from having worked with the Senator from Massachusetts over the years—and I ask the Senator if he will acknowledge this—there is business we need to do that we have been prevented from doing. For example, something we have not heard a word about is the minimum wage. People in Nevada are desperate. We have a service industry. Sixty percent of the people in Nevada who receive the minimum wage are women; for 40 percent of those women, that is the only money they get for the families. That would be a good issue to take up—minimum wage—doesn't the Senator from Massachusetts agree?

Mr. KENNEDY. The Senator is entirely correct. I was listening to my new friend from Georgia talking about the business that needs to be done. As the Senator remembers very well, our leader, Senator DASCHLE, tried to bring before the Senate an economic stimulus program that would have provided assistance to working middle-income families. It would have provided assistance to small business. It would have provided funding for education and the programs for which the Governors, Republicans and Democrats alike, indicated support. It would have provided additional assistance to the States to meet their Medicaid challenges. I hope to get to that in a moment. And it would have permitted funding in transportation. This would have made an important difference in trying to restore our economy.

The Senator, as part of the leadership, is familiar with the fact that Senator DASCHLE was prepared to bring that up and start that debate, but there was objection from the other side.

The Senator brings up the issue of minimum wage, and he knows how strongly I feel about an increase in the minimum wage which Republicans have denied us the opportunity to have. As the Senator has pointed out, more than 60 percent of those who are minimum wage recipients are women. So this is a women's issue. Of the women who receive the minimum wage, a majority of them have children, so it is a children's issue. It is a women's issue and it is a children's issue. Since a great number of those who receive minimum wage are men and women of color, it is a civil rights issue. It is a women's issue, a children's issue, a civil rights issue, and, most of all, it is a fairness issue because most Americans think that if someone works 40 hours a week, 52 weeks of the year, they should not live in poverty.

The great majority of Americans feel that way. We want to put that before the Senate and Republicans refuse to let us have a vote on that issue. We have been battling that issue not just for 10 days, not just for 2 weeks, but we have been battling that issue for the last 5 years.

I agree with the Senator when he says we have been trying to get matters before the Senate. We could bring up minimum wage. I am quite prepared as the principal sponsor—it is not a complicated issue. We have debated that issue time in and time out, year in and year out. It is not a complicated issue. We ought to be able to have debate and an up-or-down vote on that issue.

I think of all these statements of let the majority have a ruling on this nomination. Does the Senator remember as I do when we voted on a prescription drug program and a majority in the Senate was for the proposal of Senator GRAHAM of Florida and Senator MILLER, of which I was proud to be a cosponsor? That would have provided a comprehensive prescription drug program for all who needed it in the United States. We had 52 Members, a clear majority, for a prescription drug program, the third leg of the Medicare stool on which our seniors rely: hospitalization, physician care, prescription drugs. We had the 52 votes, and do you think we were permitted to have a vote in the Senate? No, our Republicans objected to that. How short is their memory.

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

Mr. KENNEDY. I will be glad to yield.

Mr. REID. The Senator is aware that this extended debate deals with the job of one person, a man by the name of Miguel Estrada. It is not as if he is not working. Does the Senator agree he is partner in one of the most prestigious law firms in America and pulling down hundreds of thousands of dollars a year? I say to my friend from Massachusetts, should not the Senate be more concerned about the millions of people who are underemployed, the millions of people who are unemployed, the people who are lacking health care—44 million people with no health care—and many people who are underinsured? Should not the Senate be dealing with those people rather than one person who is employed making hundreds of thousands of dollars a year?

Mr. KENNEDY. Mr. President, I say to the Senator from Nevada, I think he makes the case. It is such a compelling, overwhelming, rational case he makes about what is happening across this country. I know it is true, when the Senator from Nevada speaks about those who are unemployed, those who are underemployed, he is speaking for the people of Massachusetts. That statement the Senator just made is of central concern to the families in my State who are seeing now the highest unemployment in some 10 years, and the prospects are difficult, as people look down the road.

It was not always this way. We have seen it was not. I ask my colleague and friend, so many on the other side throw up their hands and say: It is the economic cycles. Is it not true that the longest periods of economic growth and price stability have been under Democratic Presidents? We had it over the last 8 years under President Clinton. That was not an accident. The time before that was in the early 1960s under President Kennedy. The longest periods of economic growth, price stability, and full employment were under Democrats. That is the record. That is the history.

We want to get back to a sound economic policy. A sound economic policy means creating jobs and having price stability, and the Senator understands this very clearly. Our minority leader, Senator DASCHLE does, and that is what we hope to resume with an effective economic program that can make a difference to families across this country.

The Senator from Nevada being a leader in this body, I am interested in whether the Senator agrees with me that the people in his State, as well as mine—I know I speak for all of New England on this. People are concerned, deeply concerned, about their economic future and they are concerned, obviously, about their security, the dangers which all of us are familiar with in terms of terrorist activities. In my State, they are concerned about their sons and daughters, especially if they are in the Reserve or the National Guard. We now have the highest calling up of the Reserves and the Guard since World War II. Communities are particularly concerned because more often than not, people who are being called up are those who have also been trained as auxiliary firefighters, police officers, or first responders in the medical professions.

What I hear the Senator from Nevada saying is we should try to respond to these kinds of anxieties. The leaders have provided a program which has galvanized many of our Members—all of the Members on our side—and his point is that as leaders in our party we should be focused on that program.

I was listening to my friend from Georgia talking about the attitude of some Hispanic leaders. I have a letter from 15 past presidents of the Hispanic National Bar: We, the undersigned past presidents, write in strong opposition to the nomination of Miguel Estrada for a judge on the Circuit Court of Appeals for the District of Columbia. I

will later come back to the statement they made.

Despite the pressure from our Senate Republicans and the White House to abandon our principles and our obligations, the Senate Democrats intend to abide by our constitutional duty to provide advice and consent in the judicial confirmation process. The White House, however, continues to refuse to give us the information necessary for our consideration of the nomination of Miguel Estrada. The White House is asking the Senate to rubberstamp its judicial nominees when those nominees will have enormous power over the lives of the people we serve. If we confirm nominees to a lifetime appointment to the Federal bench without looking into their record, we would open the door for the White House to roll back civil rights, workers' rights, and important environmental protections, along with many other Federal rights we have worked so hard to develop.

The danger involving the DC Circuit is even greater, because that court has exclusive jurisdiction over so many issues that affect all Americans. Since the Supreme Court hears relatively few cases in these areas, the DC Circuit is often the court of last resort for individuals to obtain the justice they deserve. If Mr. Estrada is confirmed, he will be called upon to decide many of these cases. Often, individuals have been victimized unfairly and in a manner not envisioned by the Constitution. They have come to the Federal courts for protection and relief. In doing so, they have changed America. They have made this country a stronger, better, and fairer land. They helped America fulfill its promise of equal opportunity, equal rights, and equal justice under the law. They have given real meaning in people's lives to the great principles of the Constitution and the many laws Congress has enacted over the years to protect these basic rights.

When we consider the nomination of Mr. Estrada, we need to understand the crucial importance of these cases and how the rights of so many others can be decided by a single case. These cases would not necessarily have turned out the way they did if we did not have Federal judges who are acutely aware of the rights and the needs of the most vulnerable Americans, and how their rulings affect so many people's lives.

Would Mr. Estrada be such a judge? Would he have this strong sense of justice of the needs of people he would serve? We do not know because we have been prevented from learning about this nominee, and the White House is trying to keep it that way.

Our response is clear. We will not confirm Mr. Estrada unless we know what kind of jurist he would be. Our constitutional responsibility requires no less.

Let me describe a few of the landmark cases the judges of the DC Circuit have decided. In Barnes v. Costle in 1977, the DC Circuit was faced with a situation that was and still is far too common in the American workplace. Paulette Barnes had been hired by the Environmental Protection Agency, but she quickly discovered she would not be able to do her work effectively. Her male supervisor repeatedly asked her to join him after work for social activities. She politely declined. He then made repeated sexual remarks and propositions to her. She refused. But her supervisor would not be deterred. He kept harassing her and even tried to convince her his behavior was common. Ms. Barnes could not escape these overtures and the unfair pressure she faced, because her job required her to work with her boss.

After she repeatedly refused to have an affair, he started to retaliate against her. He belittled her work. He took away many of her responsibilities. He harassed her continuously. Finally, he had her fired because she refused to go along with his demands.

Ms. Barnes sued her employer under title VII of the Civil Rights Act of 1964. Congress passed this important legislation in order to end workplace discrimination and open the doors to equal employment for all Americans, but the EPA did not see it this way. Its lawyers argued when Congress enacted title VII, we did not intend sexual harassment to be included in the ban on sexual discrimination.

What Ms. Barnes faced was not discrimination, they said. She was not fired because she was a woman but because she refused to engage in sexual activities with her supervisor. Fortunately, the judges of the DC Circuit understood the importance of the case. They took time to look into the record. They found our intent in passing title VII was to give women and minorities equal rights in the workplace so everyone would have a truly equal opportunity to succeed.

The judges agreed that so long as harassment of this kind was allowed to continue, women could not have equal rights in the workplace. They ruled that allowing female workers to suffer harassment to keep their jobs is a type of discrimination that has long relegated women to lower-level jobs and made it more difficult for them to have equal rights in the workplace.

The DC Circuit held that harassment of the type suffered by Ms. Barnes was illegal sex discrimination. If not for the judges of the DC Circuit, her case could have turned out very differently. Thus, the importance of the DC Circuit.

In 2003, the outcome of Ms. Barnes' case would almost certainly be a foregone conclusion. We know today the kind of behavior she faced is unacceptable, but in Ms. Barnes' case the trial judge dismissed her suit because he thought such harassment was not prohibited by title VII. That behavior was not unacceptable until the DC Circuit said it was unacceptable.

Would Mr. Estrada be the type of judge to give the meaning we intended to our legislation? Would he protect the rights of women and minorities? Would he take the time to consider how his rulings will affect them? We do not know, because the White House does not want us to know.

In a second case in 1981, Bundy v. Jackson, the DC Circuit considered the plight of another woman who had suffered severe harassment at work. Sandra Bundy proved at trial that while she was employed by the District of Columbia, she was repeatedly propositioned by some of her supervisors and they made crude and offensive remarks to her. She complained to another supervisor, but he replied it was natural for the other men in the office to harass. He then began the same type of abuse and propositioned her several times. A coworker obtained her home phone number, which she had unlisted, and started calling to proposition her. The facts in this case were so extreme and Ms. Bundy's situation was so oppressive that the district judge in the case actually made a formal finding that making of improper sexual advances to female employees was standard operating procedure, a fact of life, a normal condition of employment in her job. Miss Bundy began to complain more forcefully and her performance ratings began to suffer. She was denied a promotion and continued to endure anguish on the job.

When she took her case to court, the company admitted the harassment and argued it was legal. Can you believe that? The company admitted the harassment and argued it was legal. The company contended because Miss Bundy had not been fired or demoted, she could not claim a violation of title VII. The DC Circuit rejected this argument, as it obviously should have. The court held that the terms and conditions of employment include the psychological work environment. The court agreed that an employer can oppress an employee with such offensive and damaging remarks that the oppression rises to the level of discrimination, even if the employer does not demote or fire the employee.

As in Barnes, the court in Bundy showed thoughtful and careful consideration of what Congress intended to do for the American workplace when it passed title VII.

The court also considered the precarious situation in which Miss Bundy found herself and in which too many women often find themselves today. The court held unless Miss Bundy's rights were protected, many other workplaces could oppress and harass women in similar ways without any fear of legal repercussions. The DC Circuit held that title VII protects all Americans from harassment at work, whether or not harassment includes a formal change in job description.

We cannot dismiss these examples merely as evidence that America has changed since the 1970s and early 1980s. It was the courts such as the DC Circuit and opinions such as Barnes and

Bundy that made America change. The conclusion of these cases was not foregone. In both cases, the district judge had dismissed the claim, saying that what the women had alleged was not a violation of title VII. It took the judges on the DC Circuit, with genuine respect for the rule of law, to give effect to what Congress intended when it passed title VII. The DC Circuit did more than uphold the law. It gave practical effect to the right of women to be free from sexual harassment in the workplace.

We can now look back at the employers' arguments and in those cases say that they are preposterous. The sad truth, however, is that those arguments did not become preposterous until the DC Circuit said they were.

A third case to demonstrate the importance of this court is in Farmworker Justice Fund v. Brock. In 1987, the DC Circuit reviewed evidence developed over the course of many years that farm workers were being deprived of basic sanitation. The Department of Labor mandated the availability of drinking water, hand-washing facilities, and bathroom facilities in many other workplaces, but the Department said protections were not necessary for farm workers. The result was that many farm workers worked long hours in the heat and Sun without adequate drinking water. They worked under unacceptable hygiene conditions, without bathroom facilities, and with no place to wash their hands. Infectious diseases often spread quickly among farm workers.

Congress addressed this problem years before. The Occupational Safety and Health Act mandated that the Department issue rules on workplace conditions for farm workers but the Department disagreed. It thought that improving the working conditions of these laborers was a low priority, and for years the Department refused to say when it would even consider a rule to protect these workers. The Department also argued that although there was clear evidence of unacceptable risk to the health of farm workers, it would not promulgate a rule to end these conditions because the States were better able to do so. The DC Circuit correctly rejected that argument and brought safe and sanitary working conditions for farm workers across the country. The court held that the intent of Congress in passing OSHA was to limit the Department's discretion. The court ordered the Department to pass these regulations within a specific timeframe. The court said that workplace safety was precisely a matter for the U.S. Department of Labor to address to ensure safe conditions across the country. In deciding this case, the DC Circuit gave farm workers the protections they needed and ensured that a generation of workers would grow up healthier and safer.

A fourth excellent example of the importance of the DC Circuit is Laffey v. Northwest Airlines. In that case, decided in 1976, the DC Circuit considered the disparate pay that Northwest Airlines offered its male and female employees. Even before that case, it was clear that under the Equal Pay Act companies could not pay men and women different salaries for doing the same job. The airline thought it could avoid this requirement for its in-flight cabin attendants by creating two separate job categories for men and women. The two categories had essentially the same duties but different names and very different pay and promotion opportunities.

Both men and women would seat passengers and ensure their safety during the flight and both would deal with any medical problems that arose during the flight. They would both serve food and clean up the cabin. But the airline would only hire women to be stewardesses, a classification that meant being confined to domestic flights, while male persons were assigned to international flights. Even on domestic flights, stewardesses had to work in the more crowded sections of the plane while men worked in first class. In fact, if there was any real difference between the two jobs, it was that the women had the more difficult assignment. Yet the men received up to 55 percent more for doing essentially the same job.

The DC Circuit refused to allow the airline to design the jobs in a way that relegated women to low-paying positions with little chance of promotion. The court understood that when we passed the Equal Pay Act, Congress was not concerned with arbitrary technicalities. We were concerned with protecting the lives and livelihood of real people.

The DC Circuit gave effect to this intent. It held that where two individuals have jobs that are essentially identical because they have the same duties and responsibilities, an employer cannot discriminate against one of them by paying them less.

A fifth example of this indispensable role of the court is the Calvert Cliffs Coordinating Committee in which the DC Circuit in 1971 considered the National Environmental Protection Act which requires Federal agencies to balance their activities with their impact on the environment. In passing the act, Congress asks large agencies for the first time to consider ways to protect the environment.

In a challenge to this requirement, the Atomic Energy Commission was sued to stop activities that were adversely affecting the environment. The Commission said that it had taken environmental concerns into account and thought that these concerns were outweighed by the need for nuclear testing. The DC Circuit held that under the act, the Commission, as all other Federal agencies, must take environmental concerns seriously, must justify the burden that its activities would place on the environment.

Our duty, the court said, is to see that important legislative purposes prevailing in the Halls of Congress are not lost or misdirected in the vast hallways of the Federal bureaucracy. There is no better description of the unique demands on the DC Circuit. It has sole jurisdiction over many basic issues affecting the people of our country. The Senate needs to know that the judges of that court understand the enormous challenge of ensuring that the important policies we seek to achieve are actually implemented under the laws we pass.

In each of these examples, the DC Circuit has dealt with situations where real people face real problems in obtaining the justice they deserve. The court responded, as the Constitution says that it should, free from the pressures of politics. The DC Circuit respected the rule of law and applied it fairly.

Would Mr. Estrada continue this tradition? Or would he look for opportunities to limit or even roll back basic rights? We do not know because the White House insists on keeping the Senate and the country in the dark about this nomination. The fundamental rights of the American people are too important to be entrusted to a person about whom we know so little. Until we learn what kind of jurist Mr. Estrada can be, the Senate should not confirm him.

MEDICARE AND MEDICAID

Mr. President, a front page article in yesterday's New York Times should be essential reading for every Member of the Senate and for every American. It describes the Bush administration's stealth attack on Medicare and Medicaid—an attack driven by an extreme right-wing agenda and by powerful special interests.

The administration is proposing unacceptable changes in the obligations of government to its citizens. Under the Bush plan, the Nation's long-standing commitment to guarantee affordable health care to senior citizens, the poor, and the disabled would be broken. Medicare is a promise to the Nation's senior citizens, but for the administration, it is just another profit center for HMOs and other private insurance plans. Medicaid is a health care safety net for poor children and their parents, the disabled, and low income elderly, but the administration would shred that safety net to pay for tax cuts for the rich and to push its right-wing agenda.

The promise of Medicare could not be clearer. It says, play by the rules, contribute to the system during your working years, and you will be guaranteed affordable health care during your retirement years. For almost half a century, Medicare has delivered on that promise. All of us want to improve Medicare, but the administration's version of improving Medicare is to force senior citizens to give up their doctors and join HMOs. That is unacceptable to senior citizens and it should be unacceptable to the Congress. There is nothing wrong with

Medicare that the administration's policy can fix.

The administration has a variety of rationalizations for its assault on Medicare—and each of these rationalizations is wrong. Republicans have never liked Medicare. They opposed it from the beginning and have never stopped trying to undermine it. The Newt Gingrich Congress tried to destroy it a decade ago, but the American people rejected that strategy, and President Clinton vetoed it. Now that Republicans control both Houses of Congress and the Presidency, they are at it again. Their plan would say that no senior can get the Medicare prescription drug coverage they need without joining an HMO.

It is no accident that the administration's scheme hinges on forcing senior citizens into HMOs or other private insurance plans. Whether the issue is Medicare or the Patients' Bill of Rights, the administration stands with powerful special interests that seek higher profits and against patients who need medical care. If all senior citizens are forced to join an HMO, the revenues of that industry would increase more than $2.5 trillion over the next decade. Those are high stakes. There will be a big reward for HMOs and the insurance industry if the administration succeeds. But there is an even greater loss for senior citizens who have worked all their lives to earn their Medicare, and that loss should be unacceptable to all of us. Senior citizens should not be forced to give up the doctors they trust to get the prescription drugs they need.

The Bush administration cloaks this plan in the language of reasonableness. They say that they just want to reduce Medicare's cost, so that it will be affordable when the baby boom generation retires. But HMOs are a false prescription for saving money under Medicare.

Administrative costs under Medicare are just 2 percent. Ninety-eight cents of every Medicare dollar is spent on medical care for senior citizens. By contrast, profit and administrative costs for Medicare HMOs average eighteen percent, leaving far less for the medical care the plan is supposed to provide.

This chart is a pretty graphic reflection of this point. ''Private insurance, a recipe for reduced benefits or higher premiums.''

These are the administrative costs and profits: under Medicare, 2 percent; under private insurance, 18 percent.

I ask the administration, how is spending more money on administration and profit supposed to reduce Medicare costs?

In fact, Medicare has a better record of holding down costs than HMOs and private insurance. Since 1970, the cost per person of private insurance has increased 40 percent more than Medicare. Last year, the per person cost of Medicare went up 5.2 percent, but private insurance premiums went up more than twice as fast 12.7 percent. Across the country, families are seeing their health premiums soar and their health coverage cut back. If the administration really thinks this is the right prescription for Medicare, they should talk to working families in any community in America.

This chart indicates that private insurance will not reduce Medicare costs or improve its financial stability. It illustrates the increases in Medicare costs versus private insurance premiums: 5.2 percent under Medicare; 12.7 percent under private insurance.

The administration claims that drastic changes are needed because Medicare will become unaffordable as the ratio of active workers supporting the program to the number of retirees declines. But analyses from the Urban Institute, using the projections of the Medicare Trustees, show that Medicare will actually be less burdensome for the next generation of workers to support than it is for the current generation. Economic growth and productivity gains will raise incomes of workers by enough to more than offset both the change in the ratio of workers and the yearly increase in medical costs. In fact, the real product per worker—after Medicare is paid for—will increase from $66,000 to $101,000. The issue is priorities. For this administration, the priority is making the powerful and wealthy still more powerful and wealthy—not assuring affordable health care for senior citizens.

This administration also claims that the changes it is proposing are intended to help senior citizens by giving them more choices. The real choice that senior citizens want is the choice of the doctor and hospital that will give them the care they need—not the choice of an HMO that denies such care.

This chart, ''Senior citizens choose Medicare, not private insurance, shows the proportion of senior citizens choosing Medicare versus Medicare HMOs'': In 1999, 83 percent chose Medicare; 17 percent, HMOs; and in 2003, 89 percent, Medicare, while 11 percent, HMOs.

Seniors have a choice today and they choose Medicare. Even so, this administration's proposal will say to seniors: if you want to receive the prescription drug program, you will have to get it under an HMO.

Senior citizens who want it already have a choice of HMOs and private insurance plans that offer alternatives to Medicare. But by and large, senior citizens have rejected that choice. In 1999, 17 percent of senior citizens chose an HMO. By 2003, only eleven percent chose one.

Congress enacted Medicare in 1965, because private insurance could not and would not meet the needs of senior citizens. In 2003, private insurance still won't meet their needs. Vast areas of the country have no private insurance alternative to Medicare. Two hundred thousand seniors will be dropped by HMOs this year, because the HMOs are not making enough profit. Last year, HMOs dropped half a million seniors. In 2001, they dropped 900,000 seniors. Yet that is the system the administration wants to force on senior citizens.

This chart shows the number of senior citizens that have effectively been dumped from Medicare HMO coverage. We find that in 2001, 934,000 seniors were dropped; in 2002, 536,000 dumped; in 2003, 215,000; in the year 2000, 327,000; and 407,000 in 1999. HMOs have been dropping seniors who wanted voluntarily to be in the HMO system.

Under the Bush plan, states will have an incentive to cut back coverage for those in need and spend the money that should go for health care on other projects.

The Child Health Insurance Program, CHIP, which now gives more than five million children the chance for a healthy start in life will be abolished.

Millions of senior citizens will no longer be able to count on federal nursing home quality standards to protect them if they are unable to remain in their own homes.

Spouses of senior citizens who need nursing home care will no longer be guaranteed even a minimum amount of income and savings on which to live.

We know that state budgets are in trouble because of the faltering economy. The demands on Medicaid are greater than ever, as more families lose their job and their health care. Instead of the money that states need to maintain the Medicaid safety net, the Bush administration gives states a license to shred it. Every day, this administration makes it clearer that tax cuts to make the rich richer is a higher priority than health care for senior citizens, and low income children, and the disabled. It's time for Congress and administration to stand up for the priorities of the American people—not the priorities of the wealthy and powerful.

Medicare and Medicaid are two of the most successful social programs ever enacted. It makes no sense for the administration to try to impose its harsh right wing agenda on programs that have done so much to bring good health care and genuine health security to vast numbers of senior citizens, low-income families and the disabled. The American people will reject this misguided program and so should the Congress.

The administration is not in favor of real choices for the elderly. They don't favor letting senior citizens choose their own doctor. They don't favor a fair and unbiased choice between and HMO and Medicare. Senior citizens already have that. What the Bush administration favors is a Hobson's choice, where senior citizens are forced to choose between the doctor they trust and the prescription drugs they need. And that is an unacceptable choice. The administration's plan for Medicare will victimize 40 million senior citizens and the disabled on Medicare. I want to just draw the attention of the Members to this chart I have in the Chamber.

These are the Medicare HMOs. There are huge gaps for senior citizens, areas of the country with no Medicare+Choice plans. There are vast areas of the country, outlined in red, where they do not even have this program. And still, the administration wants to insist that seniors subscribe to it.

Under the Bush plan, long-term Federal spending for health care for the needy will be reduced under their new proposed block grant program for Medicaid. That idea was proposed under then-Congressman Gingrich almost a decade ago. Under the new program, long-term Federal funding for health care for the needy will be reduced so that more money will be available for tax cuts for the wealthy. Under the Bush plan, States will have an incentive to cut back coverage for those in need and spend the money that should go for health care on other projects.

The Child Health Insurance Program, the CHIP program, which now gives more than 5 million children the chance for a healthy start in life, will effectively be abolished.

Millions of senior citizens will no longer be able to count on the Federal nursing home quality standards to protect them if they are unable to remain in their own homes. I was here not many years ago when we took days to debate the kinds of protections that we were going to give to our seniors who were in nursing homes. The examples out there of the kinds of abuses that were taking place were shocking to all of us. So we passed rules and regulations. But under this particular proposal, the administration is recommending millions of seniors will no longer be able to count on Federal nursing home quality standards to protect them if they are unable to remain in their homes. Spouses of senior citizens who need nursing home care will no longer be guaranteed even a minimum amount of income or savings on which to live.

We know that State budgets are in trouble because of the faltering economy. The demands on Medicaid are greater than ever as more families lose their jobs and their health care. Instead of the money that States need to maintain the Medicaid safety net, the Bush administration gives States a license to shred it.

Every day, this administration makes it clearer that tax cuts to make the rich richer is a higher priority than health care for our senior citizens and low-income children and the disabled. That is the bottom line: Every day, this administration makes it clearer that tax cuts to make the rich richer is a higher priority than health care for our senior citizens and low-income children and the disabled.

It is time for Congress and the administration to stand up for the priorities of the American people, not the priorities of the wealthy and the powerful.

Medicare and Medicaid are two of the most successful social programs ever enacted. It makes no sense for the administration to try to impose its harsh right-wing agenda on programs that have done so much to bring good health care and genuine health security to vast numbers of senior citizens, low-income families, and the disabled.

The American people will reject this misguided program, and so should the Congress.

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

Mr. KENNEDY. I am glad to.

Mr. REID. I have listened on the floor and off the floor to the Senator's statement, and especially about Medicare and Medicaid.

I ask the Senator, we have heard now for 2 years from this administration that the answer to the problems of the country are tax cuts, tax cuts, tax cuts. I ask the Senator—and I am confident of the answer—if he is aware that the deficit this year will be the largest in the history of the world, about $500 billion if you do not mask it with the Social Security surpluses?

Now, I am asking the Senator from Massachusetts, will the proposals by this administration in their tax cut proposal do anything to help the people in Nevada and Massachusetts and the rest of the country who are desperate for help in regard to Medicare and Medicaid?

Mr. KENNEDY. Absolutely not. And your observation goes right to the heart of the central issue that we have in the Senate; that this is a question of choices. It is a question of priorities. It is a question of choices, whether we are going to allow this emasculation of Medicare and Medicaid—especially when Medicaid looks after so many needy children. About one-half of the coverage is actually for poor children, although more than two-thirds of the expenditures are for the elderly and the disabled. But it looks after an enormous number of the poorest of children, and also after the frail elderly.

And the Medicare system, we guaranteed in 1965—I was here at that time. I was here in 1964 when it was defeated. It was defeated in 1964, and then 8 months later it was proposed here on the floor of the Senate and it passed overwhelmingly. And 17 Senators who were against it in 1964 supported it in 1965. The only intervening act during that period of time was an election—an election. Finally, our colleagues had gone back home and listened to the needs of our elderly people, the men and women who had fought in the World Wars, who brought this country out of the Depression, who sacrificed for their children, who worked hard, played by the rules, and wanted some basic security during their senior years from the dangers of health care costs.

We made a commitment. The Senator remembers. I have heard him speak eloquently on it. And in that 1965 Medicare Act we guaranteed them hospitalization and we guaranteed them physician services, but we did not guarantee prescription drugs because only 3 percent of even the private insurance carriers were carrying it at that time.

I ask the Senator whether he would agree with me that now prescription drugs are as indispensable, are as essential to the seniors in Nevada as hospitalization and physician visits? They are in Massachusetts.

Mr. REID. Mr. President, I ask unanimous consent that I be allowed to answer the question of the Senator from Massachusetts without the Senator from Massachusetts losing the floor.

The PRESIDING OFFICER (Mr. CHAFEE). Is there objection?

Without objection, it is so ordered.

Mr. REID. I say to my friend from Massachusetts, while the Senator was serving in the Senate in those years, in the early 1960s and mid 1960s, I was serving on the hospital board of Southern Nevada Memorial Hospital, the largest hospital district in Nevada at that time. I was there when Medicaid came into being.

Now, does the Senator realize—and I think he has heard me say this before; and I ask this in the form of a question, although I don't need to; I have the floor to answer the Senator's question—prior to Medicaid coming into being, that for that hospital of ours, that public hospital, 40 percent of the senior citizens who came into that hospital had no health insurance?

And when we had people come into that hospital with, as I referred to them then, an old person—I don't quite look at it the same now—they would have to sign to be responsible for their mother, their father, their brother, their sister, whatever the case might be, that they would pay that hospital bill. And if they did not pay, do you know what we would do? We had a collection department. We would go out and sue them for the money.

Now, I say to my friend from Massachusetts, the distinguished Senator, for virtually every senior who comes to the hospital—it does not matter where they are in America—they have health insurance with Medicare.

Mr. KENNEDY. That is right.

Mr. REID. Medicare is an imperfect program, but it is a good program.

And I answer the question about pharmaceuticals, prescription drugs. When Medicare came into being, seniors did not need prescription drugs because we did not have the lifesaving drugs we have now. We did not have the drugs that made people feel better. We did not have the drugs that prevent disease. Now we have those.

I say to my friend from Massachusetts, rather than spending the time here, as we are dealing with a man who has a job, Miguel Estrada, making hundreds of thousands of dollars a year—rather than dealing with him, I would rather be dealing with people in Nevada who have no prescription drugs.

In America, the greatest power in the world, we have a medical program for senior citizens that does not have a prescription drug benefit. That is embarrassing to us as a country. And

what are we doing here? We are debating whether a man should have a job.

We understand the rules. If they want to get off this, then let them file cloture. If they want to get out of this, let them give us the memos from the Solicitor's Office. Let him come and answer questions or let them pull the nomination.

The reason they are not doing that is, they don't want to debate this stuff. Look at the chart the Senator has. Tax cuts of $1.8 trillion, what does that do to Medicare and Medicaid? I hope I have answered the Senator's question. A prescription drug benefit is a priority, and it has to be a program more than just in name only.

Mr. KENNEDY. I thank the Senator for his usual eloquence and passion.

Just to sum up two items, as we discussed earlier, we passed a prescription drug program. Fifty-two Members of the Senate did so last year. I don't know why we couldn't debate it. I am sure our leader would support that effort.

Finally, let me point out something the Senator has mentioned. This chart summarizes it all. Under the administration's program for the States, over a 10-year period, Medicaid will be cut $2.4 billion, while there will be $1.8 trillion in tax cuts.

This is a question of priorities. I went through the various charts that reflected how this $2.4 billion Medicaid cut will be achieved versus the $1.8 trillion in tax cuts. This is a question of choice. This is a question of priorities when it comes to the Medicare and Medicaid Programs. The quicker we get the chance to debate these and get some votes on them, the better off our seniors will be.

I yield the floor.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, the Senator from Nevada has asked that we vote on Miguel Estrada. I ask unanimous consent that we proceed to a vote on Miguel Estrada now.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Mr. President, I ask that the Senator's request be modified in the following fashion: I ask unanimous consent that after the Justice Department finds the requested documents relevant to Mr. Estrada's government service, which were first requested in May of 2001, the nominee then appear before the Judiciary Committee to answer the questions which he failed to answer in his confirmation hearing and any additional questions that may arise from reviewing such documents.

Mr. CRAIG. Mr. President, I object and restate my unanimous consent request.

Mr. REID. To which I object. I object.

Mr. CRAIG. Mr. President, I just heard the Democrat leader come to the floor to demand a vote on Miguel Estrada so we could move on to other important issues. He had the opportunity to have that vote, and he objected. He wants to raise the issue of moving judges to a supermajority vote, denying this man, Miguel Estrada, a vote on the floor of the Senate under the constitutional clause of advice and consent to the President.

Let me talk about that for a few moments. Before I talk about that, as the chairman of the Aging Committee who has spent countless hours, as has the Senator from Massachusetts, on the issue of Medicare, he and I would both agree that when Medicare was passed in 1965, some 33 years ago, medicine was practiced much differently than it is now. Yet he is saying we want Medicare just like it was, and we want to add a new program to it.

As the Senator from Massachusetts well knows, when he voted for Medicare in 1965, it was expected to be about a 10, 20-billion-dollar-plus program. Today it is verging on a quarter of a trillion dollars, at least by the end of the decade, and it will potentially, by 2030, consume a quarter of the U.S. Government's budget.

I know the Senator from Massachusetts knows as well as I that the world has changed and health care delivery has changed and that we are not going to practice 33-year-old medicine on 2003 seniors. They don't expect it. They don't want it. They demand change.

In that change comes prescription drugs as a reasonable and right approach. But as we offer that to America's seniors, let us offer them a modernized, contemporary health care delivery system. Let us not lurk in the concept of a 33-year-old system that is now close to pushing us to deny services simply because it has become so costly and so bureaucratic. To deny them anything more than a modern health care delivery system with prescription drugs in it is to deny them the obvious; that is, quality health care.

Those are the facts. Those are the statistics. We can certainly debate those today. But we ought to be debating Miguel Estrada. The Democrats want to debate him. They deny us the vote that he is entitled to have. So for a few moments today, I would like to visit about Miguel Estrada.

Before I do that, I found this most intriguing. This is a fascinating issue. We suggest that it is partisan, and it appears to be almost at times. Yet I noticed in the RECORD of today a few quotes from a Democrat Senator. He said:

> Mr. President, the court provides the foundation upon which the institutions of government and our free society are built. Their strength and legitimacy are derived from a long tradition of Federal judges whose knowledge, integrity, and impartiality are beyond reproach. The Senate is obligated, by the Constitution and the public interest, to protect the legitimacy and to ensure that the public's confidence in the court system is justified and continues for many years to come. As guardians of this trust, we must carefully scrutinize the credentials and qualifications of every man and woman nominated by the President to serve on the Federal bench. The men and women we approve for these lifetime appointments make important decisions each and every day which impact the American people. Once on the bench, they may be called upon to consider the extent of our rights to personal privacy, our rights to free speech, or even a criminal defendant's right to counsel. The importance of these positions and their influence must not be dismissed. We all have benefited from listening to the debate about Miguel Estrada's qualifications to serve on the district court. After reviewing Mr. Estrada's personal and professional credentials, including personally interviewing the nominee, I believe he is qualified to serve on the district court, and I will vote for him.

That is Senator NELSON of Nebraska. That Senator wants a vote. I want a vote. We owe Miguel Estrada a vote—not a supermajority vote, not an effort to change the rules of the Senate, not an effort to deny the constitutional responsibility of this body that the other side is now doing, tragically enough, for the politics of the business instead of the substance of the issue. That is a tragedy that ought not be laid upon the floor of this Senate nor ought to come before what has been a responsible process and very important procedure.

I have been out in my State for a week, as have many of my colleagues. I say oftentimes to Idahoans: We watch the President. We see him every night on television. We, Members of the Senate and the other body, make headlines and are often talked about in the press. But very seldom does the third and equally important branch of Government, the judicial branch, get the attention. There are no natural lobbyists in general. There is no influence out there urging and pushing that the courts be treated responsibly, that these vacant positions be filled so that courts can do their duty and responsibility under the Constitution and provide for fair judgment of those who might come before them.

That responsibility lies in the President of the United States and in the Senate. We are the ones responsible for assuring that the courts are filled when those positions are vacant by appropriate people who have great integrity, who have moral and ethical standards, and who believe in the Constitution of our country.

Miguel Estrada fails on none of those qualifications. Here today, for the first time, Mr. Estrada is a target for a much larger hit; that is to suggest that a minority of the Senate could ultimately control the Supreme Court of the United States. I believe that is the battleground, while a lot of subterfuge may go on, smoke and mirrors, or diversion of attention; and I think most people who are now watching this debate are beginning to understand there is something very strange about it.

There used to be an old advertisement on television asking, ''where's the beef.'' Well, where's the issue here? Where is the substance of the issue, after the committee of jurisdiction, the Judiciary Committee, on which I serve, and on which the Senator from Massachusetts serves, very thoroughly went

through the background of Miguel Estrada? He came out with high qualifications, having been reviewed by the ABA. Wherein lies the problem—the simple problem of allowing this name and nomination to come to the floor for a vote—a vote. I tendered that vote a few moments ago by unanimous consent, to see it denied on the other side of the aisle because they say you must have a super vote, a 60-plus vote. No, we suggest the Constitution doesn't say that. We suggest that threshold has never been required. So I think what is important here is the reality of the debate and how we have handled it.

I have the great privilege of serving from the West, from the State of Idaho. There are a lot of traditions out there. One of the great traditions is sitting around campfires, visiting, telling stories, and talking about the past. Probably one of the most popular stories to tell in the dark of night in only the glow of the campfire is a good ghost story. It scares the kids, and even the adults get a little nervous at times because their back side is dark and only their faces are illuminated. The imagination of the mind can go beyond what is really intended. So great stories get told at the campfire.

I have listened to this debate only to think that great stories are attempting to be told here—or should I suggest that ghost stories are being proposed here—about Miguel Estrada. Why would we want to be suggesting there is something about this man that is not known, that there is not full disclosure on all of the issues? I suggest there is full disclosure. The other side is deliberately obstructing a nomination that has been before the Senate for 21 months. In that 21 months, there were no ghost stories; nothing new was found, except the reality of the man himself—the reality of a really fascinating and valuable record for the American public to know.

Their argument is that because they cannot find anything wrong with him—no ghost stories—then there have to be bad things hidden. Somebody could not be quite as good as Miguel Estrada. Why not? There are a lot of people out there who achieve and are phenomenally successful, morally and ethically sound, and well based, and who believe in our Constitution and are willing to interpret it in relation to the law and not to the politics of something that might drive them personally.

I don't believe in activist judges on the courts. I don't believe they get to go beyond the law or attempt to take us where those of us who are lawmakers intend us not to go or where the Constitution itself would suggest we do not go. So search as they may, they cannot find. And when they cannot find, they will obstruct. They have obstructed. Week 1. We are now into week 2. My guess is we will be into week 3 or 4. Hopefully, the American people are listening and understanding something is wrong on the floor of the Senate; something is wrong in that there is an effort to change the Constitution of our country simply by process and procedure—or shall I say the denying of that. I think those are the issues at hand here. That is what is important.

Mr. President, there was nothing more in telling a ghost story than in the imagination that came to the mind. There is nothing wrong with Miguel Estrada, except in the imagination in the minds of the other side, who would like to find a story to tell. But they cannot find one, dig as they might. There have been 21 months of effort, 21 months of denial. Why? Are we playing out Presidential politics on the floor of the Senate this year? It is possible. I hope we don't have to go there, and we should not. These are issues that are much too important.

This President has done what he should do. It is his responsibility to find men and women of high quality and high integrity, who are well educated and well trained in the judicial process and system—search them out and recommend them, nominate them to fill these judgeships. That is what he has done. Now he is being denied that.

A difference of philosophy? Yes, sure. It is his right to choose those he feels can best serve. He has found and has offered to us men and women of extremely high quality. Yet, at these higher court levels, and here in the district court, they are being denied.

Miguel Estrada has been under the microscope and nobody has found the problem. On the contrary, we have found much to admire. At least let me speak for myself. I have found much to admire in Miguel Estrada. By now, I don't need to repeat his history. I don't need to repeat the story of a young man coming to this country at 17 years of age, hardly able to speak English, who changed himself and the world around him, so that he is now recognized by many as a phenomenal talent and a scholar. Let me just say I think he and his family should be very proud of his achievements. They should also be proud of his receiving the nomination. Of all the people, they surely do not deserve to have the judicial nomination process turned into some kind of gamut, in which you run a person through and you throw mud at them, or you allege, or you imply, or you search for the ultimate ghost story that doesn't exist, to damage their integrity, to damage the image and the value and quality of the person.

Senators are within their rights to oppose any judicial nominee on any basis they choose. In the last 8 years, when President Clinton was President, I voted for some of his judges; I voted against some of them because they didn't fit my criteria of what I thought would be a responsible judge for the court. But I never stood on the floor and denied a vote, obstructed a vote. I always thought it was important that they be brought to the floor for a vote. Then we could debate them and they would either be confirmed or denied on a simple vote by a majority of those present and voting. That is what our Constitution speaks to. That is what our Founding Fathers intended. They didn't believe we should allow a minority of the people serving to deny the majority the right to evaluate and confirm the nominations of a President to the judicial branch of our Government.

If they want to administer a particular litmus test, as one of our colleagues on the Judiciary Committee has been advocating, that is their choice. If they simply do not like the way a nominee answered the questions that were put to him, then they can vote against the nominee for all of the reasons and the responsibilities of a Senator. But to say they cannot vote because there is no information about the nominee, or because he has not answered their questions, or because critical information is being withheld, well, that is clearly a figment of their imagination. That is a ghost lurking somewhere in the mind of a Senator, because for 21 months, try as they might, that ghost, or that allegation, has not been found or fulfilled.

In the real world, there is an enormous record on this nominee, bigger than the records of most of the judiciary nominees who have been confirmed by the Senate. In the real world, Mr. Estrada has answered question after question, just not always the way his opponents wished he would answer them; not just exactly the way his opponents would wish he had answered them, but he did answer them. In the real world, there is no smoking gun in the privileged documents that the opposition is unreasonably and inappropriately requesting.

There is something very familiar about the tactic being used against Miguel Estrada, and I finally realized what it was. This is the same obstructionism we have seen again and again from our friends on the other side, the same process that denied us the right to a budget, the right to appropriations for 12 long months. They could not even produce a budget. So we brought it to the floor and in 4 weeks we finalized that process.

For the last year and a half, we have lived with that issue of obstructionism, and today we are with it again. Now we are in our second week of denying an up-or-down vote. What is wrong with having an up-or-down vote? That is our responsibility. That is what we are charged to do under the Constitution.

I believe that is the issue. Instead of fighting on policy grounds, they are simply wanting to deny this issue to death. In the last Congress, as I mentioned, we had no budget, we saw an Energy Committee shut down because they would not allow that Energy Committee to write an energy bill, and they would not allow authorizing committees to function in a bipartisan way when they controlled the majority. Denial and obstruction is not a way to run a system. It is certainly not the way to operate the Senate.

Now we have a personality. Now it is not an abstract concept. Now it is not a piece of a budget or a dollar and a cent, as important as those issues are. We are talking about an individual who has served our country well, who has achieved at the highest levels, who is a man of tremendous integrity, and because he does not fit their philosophic test, the litmus test of their philosophy as to those they want on the court, but he does achieve all of the recognition of all of those who judge those who go to the court on the standards by which we have always assessed nominees to the judiciary system, that is not good enough anymore. The reason it is not good enough is because it is President George Bush who has made that nomination.

In the current Congress, that is an issue with which we should not have to deal. We should be allowed to vote, and I hope that ultimately we can, and certainly we will work very hard to allow that to happen. That is what we ought to be allowed to offer: to come to the floor, have an up-or-down vote on Miguel Estrada, debating for 1 week, debating for 2 weeks, debating for 3 weeks, if we must, but ultimately a vote by Senators doing what they are charged to do.

That is the most important step and, of course, that is the issue. Or is the issue changing the name of the game, changing or raising the bar, in this instance, to a higher level of vote, not for Miguel Estrada but for future votes, possibly a Supreme Court Justice? I do not know what the strategy is, but there is a strategy.

It is undeniable because we have seen it day after day, time after time. We watched it when they chaired the Judiciary Committee last year. I now serve on the Judiciary Committee. I went there this year with the purpose of trying to move judges through, trying to get done what is our responsibility to do, trying to fill the phenomenal number of vacancies. When there are vacancies in the court and caseloads are building, that means somebody is being denied justice. We should not allow our judiciary system to become so politicized by the process that it cannot do what it is charged to do. Therein lies the issue. I believe it is an important issue for us, and it is one I hope we will deal with if we have to continue to debate it.

Let me close with this other argument because I found this one most interesting. They said: We are just rubberstamping George Bush's nominations. Have you ever used a rubberstamp? Have you ever picked up a stamp, tapped it to an ink pad, tapped it to a piece of paper? That is called rubberstamping. My guess is it takes less than a minute, less than a half a minute, less than a second to use a rubberstamp.

That is a false analogy. Twenty-one months does not a rubberstamp make; 21 months of thorough examination, hours of examination by the American Bar Association. I am not an attorney, but my colleague from Nevada is. It used to be the highest rating possible that the American Bar Association would give in rating the qualifications of a nominee. I used to say that rating was probably too liberal. Now I say it is a respectable rating. Why? Because the bar on the other side has been raised well beyond that rating. Now we are litmus testing all kinds of philosophical attitudes that the other side demands a nominee have, and if they say, We are simply going to enforce or carry out or interpret the law against the Constitution, that is no longer good enough. Rubberstamping? A 5-second process, a 2-second process, or a 21-month process? I suggest there is no rubberstamping here.

I suggest the Judiciary Committee, under the chairmanship of PAT LEAHY, now under the chairmanship of ORRIN HATCH, has done a thorough job of examining Miguel Estrada, who has a personal history that is inspiring, work achievement that is phenomenally impressive, a competence and a character that has won him testimonials from all of his coworkers and friends, Democrats and Republicans, liberal and conservative.

As I mentioned, I am a new member of the Judiciary Committee. It is the first time in 40 years that an Idahoan has served on that committee, and I am not a lawyer. So I look at these nominees differently than my colleagues who serve on that committee who are lawyers. But I understand records. I understand achievement. I understand integrity. I understand morals, ethics, and standards that are as high as Miguel Estrada's.

I am humbled in his presence that a man could achieve as much as he has in as short a time as he has. I am angered—no, I guess one does not get angry in this business. I am frustrated, extremely frustrated that my colleagues on the other side would decide to play the game with a human being of the quality of Miguel Estrada, to use him for a target for another purpose, to use him in their game plan for politics in this country, to rub themselves up against the Constitution, to have the Washington Post say: Time's up. Enough is enough. To have newspaper after newspaper across the country say: Democrats, you have gone too far this time. Many are now saying that, and that is too bad to allow that much partisan politics to enter the debate.

We all know that partisan politics will often enter debates, but it does not deny the process. It does not obstruct the process. It does not destroy the process. Ultimately, the responsibility is to vote, and it is not a supermajority. The Senator from Nevada knows that, and the Senator from Idaho knows that. I could ask unanimous consent again that we move to a vote on the nomination of Miguel Estrada, and the Senator would stand up and say: I object.

That is how one gets to the vote on the floor of the Senate. After the issue has been thoroughly considered, Senators ultimately move to a vote. That is my responsibility as a Senator. That is one that I will work for in the coming days. That is one that many of my colleagues are working for.

We will come to the floor, we will continue to debate the fine points of Miguel Estrada, but we will not raise the bar. We should not set a new standard. In this instance, we should not allow a minority of Senators to deny the process because there is now a substantial majority who would vote for Miguel Estrada because they, as I, have read his record, have listened to the debate, have thoroughly combed through all of the files to understand that we have a man of phenomenally high integrity who can serve this country well on the District Court of Appeals that he has been nominated by President Bush to serve on.

Our responsibility is but one: to listen, to understand, to make a judgment, and to vote up or down on Miguel Estrada. So I ask the question, Is that what the other side will allow? Or are they going to continue to deny that? Are they going to continue to demand that a new standard be set? The American people need to hear that. They need to understand what is going on on the floor of the Senate, and many are now beginning to grasp that.

As newspapers talk about it, some in the Hispanic community are now concerned that somehow this has become a racist issue. I do not think so. I hope not. It should not be. It must not be. Tragically, we are talking about a fine man who is ready to serve this country and who is being caught up in the politics of the day, and that should not happen on the floor of the Senate.

Before I got into politics, I was a rancher in Idaho, and I can vouch for the fact that a lot of cowboy traditions are still alive and well in the Intermountain West. One of those great traditions is storytelling—gathering around a campfire and telling ghost stories. Some of those stories can be pretty scary. But nobody really believes them—certainly not adults, and not in the light of day.

I am reminded of that storytelling tradition of the West when I look back on the debate surrounding Miguel Estrada to the U.S. Court of Appeals for the D.C. District. The reason this debate reminds me of those old ghost stories is that the opposition's arguments amount to just that: stories about imagined ghosts and monsters, told for the purpose of frightening people.

I have been serving in the Senate for better than a decade, and I have seen a lot of filibusters about a lot of things, but this is the first time I have seen a filibuster over nothing—that's right: nothing. The other side is deliberately obstructing the nomination of Miguel Estrada because after 21 months they can find nothing wrong with this nominee.

Their argument is that because they cannot find anything wrong with him,

all the bad things must be hidden, and therefore they need more time for their fishing expedition on this nomination. Only now, that fishing expedition is going into documents that are privileged, and public policy itself would be violated by breaking that privilege. That's not just my opinion—as we have heard again and again, it is the opinion of the seven living former Solicitors General, both Democrat and Republican.

With nothing to complain about, the opposition is trying to get us all to believe that there must be some terrible disqualifying information that is being withheld from the Senate. What that terrible information is, they leave us to imagine: maybe some writings that will reveal a monster who is going to ascend to the bench where he can rip the Constitution to shreds and roll back civil liberties. Maybe something even worse.

These are nothing more than ghost stories, deliberately attempting to frighten the American people and this Senate. It is time to shine the light of day on this debate, time to realize there is no monster under the bed.

And it is high time that the Democrat leadership put a stop to the politics of character assassination that go along with all this storytelling. It is outrageous to suggest that Miguel Estrada is hiding something, or being less than forthcoming with this Senate. The Senate Judiciary Committee had plenty of time over the last 21 months to find some real problem with this nominee—but no such problem was found. The American Bar Association reviewed him, found nothing wrong with him, and even gave him its highest rating—''well qualified.'' The Bush administration looked into his record before sending up the nomination. And let's not forget that he worked for the previous administration, too, which not only hired him but gave him good reviews.

So Miguel Estrada has been under the microscope, and nobody has found a problem with him. On the contrary, we have found much to admire—at least, let me speak for myself—I have found much to admire about Mr. Estrada. By now, his story is pretty well known to anyone who follows the daily news, let alone Senators who study the nominees who come before them, so I won't repeat it again. Let me just say that I think he and his family should be very proud of his achievements. They should also be proud of his receiving this nomination. And of all people, they surely do not deserve to have the judicial nomination process turned into some kind of grueling gauntlet through the mud being generated by the opposition.

Senators are within their rights to oppose any judicial nominee on any basis they choose. If they want to administer a particular litmus test, as one of our colleagues on the Judiciary Committee has been advocating, that is their choice. If they simply do not like the way a nominee answered the questions that were put to him, then they can vote against that nominee for that reason.

But to say they cannot vote because there is no information about this nominee, or because he has not answered their questions, or because critical information is being withheld—well, apparently they do not live in the same world the rest of us do. Because in the real world, there is an enormous record on this nominee—bigger than the records on most of the judicial nominees who have been confirmed by the Senate. In the real world, Mr. Estrada has answered question after question—just no always the way that his opponents wished he would have answered. And in the real world, there is no smoking gun in the privileged documents that the opposition is unreasonably and inappropriately requesting.

There is something very familiar about this tactic being used against Miguel Estrada, and I finally realized what it was: this is the same obstructionism that we have seen again and again from our friends on the other side. Instead of fighting on policy grounds, they just obstruct and delay the issue to death. In the last Congress, we never got a budget, we never got an energy bill—just more obstruction and delay. And in this current Congress, instead of having an honest up-or-down vote on this nominee, they filibuster about the past history of judicial nominees under former administrations.

Another of my colleagues revealed during this debate that obstructionism is a tactic out of a playbook for stopping President Bush from getting his nominees to the higher courts—maybe not every court, but certainly the circuit courts and maybe someday the Supreme Court. We have heard on this Senate floor about that playbook advising our Democrat colleagues to use the Senate rules to delay and obstruct nominees—first in committee and then on the Senate floor.

This is the first step in raising the bar for all of President Bush's nominees. That is the goal—to raise the bar, to impose new tests never envisioned in the Constitution, for anyone nominated by President Bush. Make no mistake about this: it is partisan politics at its most fundamental. Instead of the Senate performing its constitutional role of advise and consent, the Democrat leadership intends to put itself in a position to dictate to the President who his nominees can be. Instead of allowing the normal process to work—the process through which all judicial nominees have gone before—they are fashioning a new set of tests that will become the standard.

And while I am talking about raising the bar, let me anticipate the argument of the opposition. I have heard a lot from my Democrat colleagues about how they are offended at being expected to ''rubberstamp'' President Bush's nominees. Last I checked, it takes about two seconds to ''rubberstamp'' something; you just pound the stamp on an inkpad and then on a piece of paper, and you are done.

This nomination, on the other hand, has been in the works for 21 months, involved extensive hearings by a then-Democrat-led Judiciary Committee, included supplemental questions posed by Committee members, a non-unanimous vote of that Committee, and weeks of debate on this floor. For any Senator to say this amounts to being pushed into ''rubberstamping'' this nominee is hogwash.

Furthermore, anybody who wants to complain about ''rubberstamping'' ought to be out here standing side by side with Republicans, demanding an up-or-down vote on this nominee. I say to my colleagues, if you are not satisfied that this nominee will be a good judge on the Court of Appeals, then vote against him. If you are sincere about your objections, and not just playing political games, then you have nothing to lose by demanding a fair vote.

I do not see how anybody could read the record on this nominee and listen to the debate in this Senate and not conclude that Miguel Estrada will serve the United States with distinction on the Federal bench. His personal history is inspiring; his work achievements are impressive; his competence and character have won him testimonials from friends and coworkers of every political stripe.

I am a new member of the Judiciary Committee—the first Idahoan to serve on that committee in more than forty years—and I am proud to say that my first recorded vote on that committee was to confirm Mr. Estrada. I am now asking my colleagues to allow the full Senate to have the opportunity to vote on this nominee. Let us stop the storytelling, get back to the real world, and have a fair up-or-down vote on the confirmation of Miguel Estrada.

I yield the floor.

The PRESIDING OFFICER (Mrs. DOLE). The Democratic whip.

Mr. REID. Mr. President, the Democratic leader was on the floor this morning and spoke at some length about the problems facing this country. The problems facing this country are significant. It is untoward, as the Democratic leader stated, that we are not dealing with issues the people we represent, who are in our home States, want to talk about. They want us to do something about the health care delivery system in this country. That includes prescription drugs. It includes the Patients' Bill of Rights. It includes Medicare. It includes Medicaid.

The people at home want us to at least remember that we have environmental problems facing this country that we need to deal with. The people at home understand education is a significant issue. The people at home understand their State—there are only four States that do not have a budget deficit. All other States are spending in the red. They want some help. We, as a

Senate, deserve to deal with those and other issues that the people of our States believe we should be talking about.

There have been a number of requests made: Why do we not vote on this in 6 hours, 4 hours, 2 hours, 10 hours, 2 days, Friday by 9:30? And we have said very simply—this is the ninth day of this debate covering a period of approximately 3 weeks—Miguel Estrada needs to be candid and forthright. And how is that going to be accomplished? It is going to be accomplished by his giving us information, answering questions, and giving us the memos he wrote when he was at the Solicitor General's Office.

We should be dealing with the issues I have outlined, and others, issues that people really care about at home. But, no, we are not going to take up S. 414 that Senator DASCHLE asked unanimous consent that we move to, the economic stimulus package the Democrats prefer. What it does is give immediate tax relief to the middle class and has no long-term impact on the deficit of this country.

If we brought that up and the majority did not like our bill, we could have a debate on what is the best thing to do to deal with the financial woes of this country. That is what we should be dealing with.

As I have said earlier today, and I repeat, the reason we are not dealing with those issues of immense importance to this country is the majority does not have a plan or a program.

The President's tax cut proposal, his own Republicans do not like it. The chairman of the Ways and Means Committee of the House does not like it. Individual Members of the Senate, who are Republicans, who do not like his program, have written to him and talked to him. So that is why they are not bringing that up.

Why are we not going to do something dealing with health care? Because they do not have their act together. They do not know what they want.

So without running through each issue we should be talking about, let me simply say Miguel Estrada needs to be resolved and can be resolved in three ways: The nomination be pulled and we can go to more important issues; No. 2, he can answer the questions people want to propound to him and have propounded to him; and thirdly, he submit the memos he wrote when he was in the Solicitor General's Office and answer questions.

There has been a lot said in righteous indignation: We cannot give these memos because it would set a precedent that has never been set in the history of this country. Senators DASCHLE and LEAHY, the Democratic leader and the ranking member of the Judiciary Committee, wrote to the White House and said: Give us the memos. Let him answer the questions.

We get a 15-page letter back from Gonzales, the counsel to the President, saying: We are not going to do that.

My staff just showed me a letter—I guess he did not have time, as counsel to the President did, to write a 15-page letter—in two or three sentences saying that Gonzales, if he wanted to talk to Senator DASCHLE and I, they would have him come forward and he could sit down and talk to us.

We are not going to do that. The Democrats in the Judiciary Committee unanimously voted against Miguel Estrada because he did not answer the questions and he did not submit the memos.

My case to the Senate, my case to the American people, is there is no precedent set by his giving this information, and I say that for a number of reasons.

I have a detailed letter from the Department of Justice describing their efforts to respond to the Senate's request for Chief Justice Rehnquist's Office of Legal Counsel memos during his nomination—he was a Supreme Court Justice at the time, but now he is the Chief Justice—and a legal letter from the Department of Legislative and Intergovernmental Affairs, John Bolton, on August 7, 1986, which states and I quote:

We attach an index of those documents—

Rehnquist legal memorandum from when he was the Assistant Attorney General for the Office of Legal Counsel in the Solicitor's Office—

and will provide the Committee with access in accordance with our existing agreement.

The letter also indicates that numerous other legal memoranda were provided to the committee prior to that date. The letter also contains an attachment, ''Index to Supplemental Release to Senate Judiciary Committee,'' which lists three additional memos relating to legal constraints on possible use of troops to prevent movement of May Day demonstrators, possible limitations posed by the Posse Comitatus Act on the use of troops, authority of members of the Armed Forces on duty in civil disturbances to make arrests.

These are internal memos, obviously, written by attorneys containing legal analyses and deliberations about very sensitive issues. Again, it is obvious that legal memos similar to Mr. Estrada's were provided to the Senate Judiciary Committee, reviewed and returned to the Department. In fact, Senator BIDEN, still a member of this body, wrote to Attorney General Meese to thank him for his cooperation and then asked for additional memos that I assume were provided.

I ask unanimous consent that a letter dated July 23, 1986, written to the Honorable Strom Thurmond, chairman of the Senate Judiciary Committee, from JOE BIDEN asking that the Department of Justice supply certain information regarding the nomination of William B. Rehnquist to be Chief Justice, I ask simply that that matter be forwarded to the Senate and be printed in the RECORD.

As well, we have a request back—I am sorry. We have a letter written to JOE BIDEN from Senator EDWARD M. KENNEDY, Howard Metzenbaum, and Paul Simon, members of that Judiciary Committee, who asked for certain information dealing with memoranda that Rehnquist prepared. We have a letter written to Attorney General Meese from JOE BIDEN setting forth the materials that were requested, together with Rehnquist documents that are wanted. We have a letter dated August 7 to Chairman Thurmond from John Bolton that I referred to in more general terms. That lists in detail the material that was supplied.

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

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 23, 1986.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee, Washington, DC.

DEAR STROM: I have enclosed the request of the Department of Justice for documents concerning the nomination of William H. Rehnquist to be Chief Justice. Please forward the enclosed request for expedited consideration by the Department. I understand it may be necessary to develop mutually satisfying procedures should any of the requested documents be provided to the Committee on a restricted basis.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Ranking Minority Member.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 23, 1986.

Hon. JOSEPH R. BIDEN, Jr.,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR JOE: In preparation for the Senate Judiciary Committee hearings on the nomination of William H. Rehnquist be to Chief Justice of the United States, please ask Chairman Thurmond to provide the following information and materials, as soon as possible:

1. For the period from 1969–1971, during which Mr. Rehnquist served as Assistant Attorney General for the Office of Legal Counsel, all memoranda, correspondence, and other materials on which Mr. Rehnquist is designated as a recipient, or materials prepared by Mr. Rehnquist or his staff, for his approval, or on which his mane or initials appears, related to the following:

—executive privilege;

—national security, including but not limited to domestic surveillance, anti-war demonstrators, wiretapping, reform of the classification system, the May Day demonstration, the Kent State killings, and the investigation of leaks;

—the nominations of Harry A. Blackmun and G. Harrold Carswell to be Associate Justices of the Supreme Court;

—civil rights;

—civil liberties.

2. The memo prepared by law clerk Donald Cronson for Justice Jackson concerning the school desegregation cases, entitled, ''A Few Expressed Prejudices on the Segregation Cases''.

3. The original of the Cronson cable to Mr. Rehnquist in 1971, which appears in the Congressional Record of December 9, 1971.

4. Financial disclosure statements for Justice Rehnquist for the period from his appointment to the Court until 1982.

5. Any book contracts to which Justice Rehnquist is a signatory and which were in

effect for all or any part of the period from January 1984 to the present, or for which he was engaged in negotiations during the same period.

Sincerely,

EDWARD M. KENNEDY.
HOWARD M. METZENBAUM.
PAUL SIMON.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY
Washington, DC, August 6, 1986.

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

DEAR MR. ATTORNEY GENERAL: First, I wish to express my appreciation for the manner in which we were able to resolve the issue of access to documents which we requested in connection with Justice Rehnquist's confirmation proceedings. I am delighted that we were able to work out a mutually acceptable accommodation of our respective responsibilities.

We have now had an opportunity to conduct a preliminary examination of the materials which were provided to us last evening, and we have noticed that several of the items refer to other materials, most of which appear to be incoming communications to which the nominee was responding while he headed the Office of Legal Counsel. Attached hereto is a list of those other materials, and I would appreciate your taking appropriate steps to see that those items are made available as soon as possible.

Finally, once you have provided us with access to these additional materials, I would appreciate your providing us with a written description of the steps which have been taken, and the files which have been searched, in your Department's effort to be responsive to our requests.

Once again, thanks for your continuing assistance.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Ranking Minority Member.

REHNQUIST DOCUMENTS

A. Letter from Lt. Gen. Exton, dated Dec. 2, 1970. (This item is referenced in the attachments to I.2.)

B. The ''transmittal of June 5, 1969'' from Herbert E. Hoffman, (This item is referenced in II.1.)

C. The ''directive . . . sent out by General Haig on June 30.'' (This item is referenced on the first page of the first attachment to II.2.)

D. ''Haig memorandum of June 30.'' (This item is referenced on the first page of the first attachment to II.2.)

E. ''NSSM–113''. (This item is referenced in II.4.)

F. The ''request'' of William H. Rehnquist. (This is referenced in the first paragraph of II.5.)

G. The ''request'' of William H. Rehnquist. (This item is referenced in the first paragraph of II.6.)

H. John Dean's ''memorandum of Nov. 16, 1970.'' (This item is referenced in II.8.)

I. Robert Mardian's ''memorandum of January 18, 1971.'' (This item is referenced in II.10.)

J. The ''similar memorandum to Mr. Pellerzi and his response of January 21 concerning the above-captioned matter.'' (These *two* items are referenced in II.10.)

K. Kenneth E. BeLieu's ''request of October 28, 1969 for rebuttal material.'' (This item is referenced in V.1.)

L. William D. Ruckelshaus' ''memorandum of December 19, 1969.'' (This item is referenced in VI.2, and in VI.4.)

M. William D. Ruckelshaus' ''memorandum of February 6, 1970.'' (This item is referenced in VI.5.)

N. Mr. Revercomb's request. (This item is referenced in I.1.)

DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, August 7, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN THURMOND: This letter responds to Senator Biden's August 6 request for certain additional materials referred to in the documents from the Office of Legal Counsel (OLC) that were made available for the Committee's review, and for an explanation of the procedures followed by the Office of Legal Counsel in locating and reviewing those materials. Because OLC went to extraordinary lengths in responding to the document requests in a very short time, I think it would be useful to describe those efforts first.

The files of the Office of Legal Counsel for the years 1969–1971 are maintained in two, duplicative sets: one in hard copy (on a chronological basis) and the other on a computerized system (which can be searched by words or phrases). The Office's normal procedure in response to any request for documents—be it from the public, another government agency, or from a member of Congress—is to conduct a search through the computer system to locate the potentially responsive document or documents. The documents thus identified are then reviewed in hard copy to determine whether they are responsive to the request and whether they may be released, consistent with preserving the integrity of the Office's role as confidential legal advisor to the Attorney General and to the President. The computer search and review is supervised directly by senior career personnel of the Office.

In this case, the Office went far beyond its routine process to ensure the comprehensiveness of its response. In keeping with established procedures, members of the career OLC staff, under the supervision of the senior career lawyer who usually handles such matters, performed extensive subject matter searches of the computer data base to identify all documents in the files that were conceivably responsive to the request. Those documents were then reviewed by a senior career staff lawyer to determine their responsiveness. In addition, OLC career staff performed an overlapping review, from the hard copy files maintained by OLC for 1969–1971, of all documents prepared by or under the direction and supervision of Mr. Rehnquist. Finally, a staff lawyer worked with the Records Management Division of the Department of Justice to try to identify and locate any files stored in the federal records center that might possibly contain responsive documents.

I note that review of the stored files in this manner is extraordinary and to our knowledge unprecedented. The OLC files from the relevant time period were consolidated with other Departmental files by the Records Management Division, and then processed and maintained by that Division based on a complicated and incomplete filing system. It is virtually impossible to determine whether documents from the Office of Legal Counsel may be in a particular stored file, or indeed to determine whether particular files were maintained.

Nonetheless, in an effort to be as complete as possible in responding to the request, OLC undertook to try to identify any stored files that could conceivably contain responsive documents. Although an initial review of the index maintained by the Records Management Division did not suggest that those files contained responsive material that OLC had not previously located, in an abundance of caution OLC requested access to any possibly relevant files. Those files were received from the records center in Suitland, Maryland, late yesterday afternoon. Based on a review of those files by OLC career staff, OLC located three additional memoranda relating to the May Day arrests, each of which was prepared by OLC staff. We attach an index of those documents, and will provide the Committee with access in accordance with our existing agreement.

In addition, the files received from the federal records center included a copy of the December 2, 1970, letter from Lt. Gen. Exton, which is requested as item A by Senator Biden in his August 6 letter. We will also furnish this letter to the Committee under the same terms. With the exception of item M on Senator Biden's list, which has already been made available to the Committee, OLC has been unable to locate any of the other requested materials in its files or in the stored files. Many of these documents may, in fact, no longer exist. The various ''requests'' listed as items F, G, and K, for example, were most likely oral requests that were never memorialized in writing.

In sum, the staff of the Office of Legal Counsel went to extraordinary lengths to ensure that all responsive materials were located, putting literally hundreds of hours into this project.

Please let me know if we can be of further assistance.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

INDEX TO SUPPLEMENTAL RELEASE TO SENATE JUDICIARY COMMITTEE

1. 5/71 memo to file from Eric Fygi: ''Prevention by Use of Troops of Departure of Mayday Demonstrators from West Potomac Park for Demonstration Sites''

This memorandum discusses legal constraints on possible use of troops to prevent movement of May Day demonstrators.

2. 4/26/71 memo to WHR from Eric Fygi and Mary C. Lawton: ''Legal and Practical Considerations Concerning Protective Actions by the United States to Ameliorate the 'Mayday Movement' Traffic Project''

This memorandum discusses possible limitations posed by the Posse Comitatus Act on the use of troops in connection with the planned May Day demonstrations.

3. 4/29/71 memo to file from Mary C. Lawton (copy provided to WHR): ''Authority of members of the Armed Forces on duty in civil disturbances to make arrest''

This memorandum questions arising under federal and D.C. law and the Uniform Code of Military Justice with respect to arrests by members of the armed forces.

4. 12/3/70 letter from Lt. Gen. H.M. Exton to Attorney General Mitchell (as requested by Senator Biden's letter of August 6, 1986).

Mr. REID. Madam President, my friend from Idaho, the distinguished senior Senator—and he is my friend; I have the greatest respect for him; he is a fine man; he represents his State very well—I respectfully submit to this body my friend's statements regarding what the Senate did not do last year is a statement made through a pair of glasses that obviously are very foggy.

I say that because there is a lot of talk here about things that were not done. But the fact is the work that was left undone last year was left undone as a result of the President of the United States and the Republican-led House of Representatives not allowing us to move the appropriations bills. We

passed 2 bills, leaving 11 undone. The House of Representatives simply refused to take votes on those very difficult bills. They knew if they took votes on those bills as they wanted them in the House of Representatives, it would create chaos among the people in the country because the people would know then that the Republicans simply were not meeting the demands of the American people.

As a result of that, even though we passed every bill out of the Senate Appropriations Committee—all 13—we were not allowed to take them up. So we have to understand that is basically the way it is.

The senior Senator from Idaho has talked about the need to have a vote on Estrada. It is within the total power of the majority to have a vote. How do they have a vote? The rules in this body have been the same for a long time: File a motion to invoke cloture. Why does the Senate have a rule such as this? The Senate of the United States, as our Founding Fathers said, is the saucer that cools the coffee. The Constitution of the United States is a document that is not to protect the majority; this Constitution protects minorities. The majority can always protect itself. The Constitution protects the minority. If the majority wants to vote, it can invoke cloture—try to. It takes 60 votes. No question about that. Then they can have the up-or-down vote that they want.

All the crocodile tears are being shed for this man who is fully employed downtown here with a big law firm, making hundreds of thousands of dollars a year. We are holding up the work of this country that deals with problems that people who do not make that kind of money have, people who are struggling to make sure they can pay their rent, make their house payment, pay their car payment, that they can find enough money to get to work on public transportation, people who need a minimum wage increase, people who have no health care; they cannot take their children to the hospital when they are sick, and if they do, they know they are going to be billed large sums. Some places do not have indigent hospital care. We know there are many people who are underinsured, as Senator KENNEDY and I talked about. There are 44 million who do not have health insurance. Those are the problems with which we should be dealing.

The Clark County School District in Las Vegas is the fifth or sixth largest school district in America. A quarter of a million children need help. The school district is in dire need of help. The Leave No Child Behind is leaving a lot of kids behind because there is no money to take care of the problems. We met with Governors today for lunch, and they were told when they met with the President yesterday for Leave No Child Behind they are supposed to do the testing, and if that does not work out, they are supposed to take care of the other problems. That is not the deal we made. The States were desperate before that was passed. We do not fund the IDEA act, children with disabilities. These are the issues we should be dealing with—not spending 3 weeks of our time on a man who is fully employed. Let's talk about some of the people who have no jobs or are underemployed.

Having said that, my friend, the distinguished senior Senator from Idaho, cannot understand why there is not a vote on Estrada the way he believes a vote should occur. My friend, the distinguished senior Senator from Idaho, voted against 13 Clinton nominees on the floor, including Rosemary Barkett, born in Mexico, who emigrated to the United States. She had a great rating from the ABA, before Fred Fielding was on the committee, and he does not write her evaluation report.

By the way, the one thing on which I agree with the Republicans: They were right in saying the ABA should be out of the process. I will join with anyone in the future to get the ABA out of the process. It is corrupt, unethical; there are absolute conflicts of interest. The Republicans were right; it has been unfair.

I cannot imagine that body having thousands of——

Mr. CRAIG. Will the Senator yield?

Mr. REID. In one second, I will yield—thousands of lawyers, and they cannot get people who would be fair and reasonable and do not appear to have conflicts of interest? It is ripe to get rid of it.

Mr. CRAIG. I would not deny the Senator the right to the floor. I am curious, for the 8 years of the Clinton administration, this was the gold plate. The American Bar Association quality test was a gold plate. I said wait a moment here and voted against some of them.

Mr. REID. I respond to my friend, I said on the Senate floor today in the presence of the chairman of the Judiciary Committee, they were right. I acknowledge that.

Mr. CRAIG. A year makes a lot of difference, in the opinion of the Senator?

Mr. REID. Knowledge makes a difference. I am not a member of the Judiciary Committee.

Mr. CRAIG. And I am a freshman there.

Mr. REID. I think the ABA should be ashamed of themselves.

I said this morning, I practiced law quite a few years before coming here. I was not a member of the ABA for a number of reasons. Had I known this, I would really not have been a member. Lawyers all over America—we have, going back to biblical times, had problems with lawyers.

Mr. CRAIG. That is why——

Mr. REID. The ABA, I cannot think of a better phrase than that they should be ashamed of themselves for what they have done.

This is off the subject, but I will get back on the subject. I believe all Presidents, Democrat and Republican, have had trouble getting nominees—whether it is Cabinet officers, sub-Cabinet officers, members of the military, whether it is judges—trying to get them before the Senate because of the length of time the FBI investigations take and all the hoops people have to jump through now.

I say let's eliminate the ABA from the judges. I don't know how many of my colleagues here agree, but I agree, and I will join with the Republicans anytime to get the ABA out of the process.

My friend, the distinguished Senator from Idaho, voted against Judge Sonia Sotomayor, the first Hispanic female appointed to the circuit, and Judge Richard Paez confirmed to the Ninth Circuit after 1,520 days following his nomination. In fact, the distinguished senior Senator from Idaho not only voted against Judge Paez's confirmation, before that vote on March 9, 2000, but also voted on that day to indefinitely postpone the nomination of Richard Paez.

I find it fascinating that someone who voted to indefinitely postpone a vote on Paez would now say that Estrada is entitled to an immediate vote on his nomination.

Mr. CRAIG. Will the Senator yield?

Mr. REID. I am happy to yield, although I do not lose my right to the floor.

Mr. CRAIG. Madam President, the Senator is absolutely right. I did vote against those judges, as I said on the floor a few moments ago. I voted for some of the Clinton judges and against some of them based on philosophy. The question I ask, though, is, Did I ever deny the Senate the right to go to a vote? Did I ever filibuster as the Senator's party is now doing on this issue?

Mr. REID. I say to my friend that we had to vote cloture on Paez. That is how we got a vote on Paez. That is how that came about. We had to invoke cloture, and we had enough people of goodwill on the other side of the aisle who joined with us to invoke cloture. So the debate stopped.

Mr. CRAIG. I see.

Mr. REID. Madam President, as I was saying before, the question was asked. Senator CRAIG voted against the motion to invoke cloture on the debate on Paez who was pending for more than 1,500 days.

I want everyone within the sound of my voice to hear this. As Senator DASCHLE and I said, when the Democrats took over control of the Senate, we said it is not payback time no matter how bad President Clinton was treated. And we could go into a long harangue about how unfair it was. I will not even mention a few of the judges. The record is replete with examples of how poorly they were treated and how unfairly they were treated. We did not have payback time when we were in the majority, and it is not payback time when we are in the minority.

We approved, during the short time that we had control of the Senate, 100

judges—exactly. Three judges have come before this body for a vote. They were approved unanimously.

The situation with Miguel Estrada is a little bit different. It is a little bit different. It is a lot different. It is tremendously different because this is a man about whom speeches have been given all over town. He is so good that he is going to go to the Supreme Court.

It triggered something in the mind of the members of the Judiciary Committee. If that is the case, maybe we should ask him some questions. My dear friend from Utah, from our sister State and neighboring State, had on his desk books—look at all the answers he has given. There are answers, and then there are answers. He didn't answer the questions. That was our concern. He responded to questions, but he didn't answer them.

We believe that what has gone on in the past is not something we want, so in this situation I am able to say here that 2 days ago everything has been said but not everyone has said it. We are in a new phase of this debate. Everything has been said and everybody has said it. So now it is just repeat time. I am going to do a little repeat time.

I know my friend from New York wishes to speak. I will be as quick as I can, but I do want to respond to some of the questions that have been raised in the last bit by my colleagues on the other side of the aisle.

In 1996, Republicans allowed no—zero percent, absolute number zero—circuit court nominees to be confirmed. In 1997, they allowed 7 of just 21 of President Clinton's 21 circuit court nominees, one-third. Only 5 of President Clinton's first 11 circuit nominees that same year were confirmed. In 1998, Republicans allowed 13 of the 23 pending circuit court nominees to be confirmed. That percentage was pretty good—the best year for circuit court nominations and 6.5 years in control of the Senate. In 1999, Republicans backed down to 28 percent and allowed 7 of the 25 circuit court nominees to be confirmed—about 1 of over 4.

Four of President Clinton's first 11 circuit court nominations that year were not confirmed. In 2000, Republicans allowed only 8 of 26, 31 percent. All but one of the circuit court candidates were initially nominated that year without confirmation.

Republicans simply have no standing to complain that 100 percent of President George W. Bush's circuit court nominees have not be confirmed. The recent issue makes it plain. Democrats have been far better to this President than they were to President Clinton.

Under Republicans, as a consequence, the number of vacancies on the circuit courts more than doubled—from 16 in January 1995 to 33 by the time the Senate was reorganized in the summer of 2001. Republicans allowed only 7 circuit court judges to be confirmed per year; on average, we confirmed 17 in just 17 months.

The other thing that I find so interesting is the majority is complaining about the District of Columbia Circuit Court being so understaffed. What they are saying now is that this DC Circuit is so understaffed that we have to do something about this.

As my friend from Utah said to me, make a difference. As I indicated to him about the ABA, I didn't know as much then as I know now about the ABA.

But what I wanted to talk about here is the DC Circuit Court problems. They talked about double standards on that side of the aisle today. Let me give you a couple of examples.

DC Circuit Court nominees Elena Kagan, Allan Snyder, and Merrick Garland. Senator CORNYN remarked that Judge Garland was confirmed in only a few months. Today the Senator repeated that claim using the chart that said Garland waited only 71 days from his nomination to confirmation.

If only that were the case, but all you have to do is talk to Judge Garland and look at the real record. Judge Garland was first nominated in 1995—the year the Republicans took over the Senate—and not allowed to be confirmed until 1997, hardly a few months.

The prior two Republican administrations under President Reagan and George W. Bush appointed 11 judges to the 12-member court. When President Reagan came to Washington, there was a concerted effort to pack this court in particular with activist judges in the hopes of limiting opportunity for citizens to challenge regulations and limiting constitutional power to enforce hard-fought constitutional and statutory rights to protect workers and to protect the environment.

President Reagan, with the help of the Senate, put activist Robert Bork on the DC Circuit. Like Miguel Estrada, Bork was one of the first judges nominated by that President. Shortly after winning Bork's confirmation to the circuit in 1982, President Reagan pushed through the Scalia nomination to the DC Circuit, and Ken Starr the following year.

That is a real lineup. Bork, Starr, Scalia—quite amazing. He named another five conservatives after that for a total of eight appointments to the court alone in his 8 years as President.

The first President Bush took a similarly special interest in the DC Circuit and chose Clarence Thomas to be one of his first dozen nominees. Thomas, who I had the pleasure of voting against when he came before the Senate, was one of two other nominees of the first President Bush. Four of the 11 judges put on the District of Columbia Circuit were later nominated by the Republican Presidents to the Supreme Court.

During the period when Republicans had nominations to that court—when Scalia and Thomas served there—the court, clearly any legal scholar can tell you, began to limit opportunities for individual citizens and judges to represent them. To have standing to challenge Government action.

At the same time, the DC Circuit became less deferential to agency regulations intended to protect consumers and workers. These decisions were praised by Republican activists.

With a Democratic Senate, President Clinton was able to name two moderate judges to this court in order to moderate this bench. However, once Republicans took over, they tried to prevent any more Democratic appointees from getting on this court.

So it is simply incorrect—and I hope not intentionally—to claim that Garland waited only 71 days between his nomination and his confirmation. It was a matter of years, not days—almost 2 years.

Why did he have to wait so long? Once Republicans took over the Senate, they decided to try to prevent President Clinton from filling circuit court vacancies, especially in the DC Circuit. In fact, during their time in the majority, vacancies on the appellate courts more than doubled, to 33, during their 6½ years in control of the Senate.

I believe Republicans decided to prevent President Clinton from bringing any balance to the DC Circuit. As you know, the Republicans had named 11 judges to this powerful 12-member court.

First, when Garland was nominated to the 12th seat, Republicans said the DC Circuit did not need a 12th judge. For example, the distinguished senior Senator from Iowa, Mr. GRASSLEY, said that this judgeship cost $1 million a year and did not need to be filled due to those costs.

Then Senator GRASSLEY said he was relying on the view of a Republican appointee to this court, Judge Silberman. Judge Silberman—you can read about him in a number of different places, including the book ''Blinded by the Right,'' written by Mr. David Brock, where this man, who was an activist for the far right, would meet with this judge, while he was sitting on the bench, walking to his anteroom, and talk about political strategy on how to embarrass Democrats, talk about political strategy, what to do to embarrass the President of the United States and the First Lady of the United States. That is Judge Silberman.

Judge Silberman recently told the Federalist Society that judicial nominees should say nothing in their confirmation hearings—the same advice he gave Scalia when Silberman was in the Reagan White House. And, as you know with Scalia, a nominee's silence on an issue certainly does not guarantee that a nominee does not have deeply held views on an issue.

Yesterday, I went into some detail about my respect for the ability of Judge Scalia to reason. This is a logical man, a brilliant man. But we, for various reasons, knew quite a lot about Scalia. He had written opinions before he went to the Supreme Court. And

even though some of us may not have agreed with his judicial philosophy, no one—no one—can dispute his legal attributes, his legal abilities, his ability to reason and think.

Scalia recently authored a majority opinion for the Supreme Court in favor of the Republican Party of Minnesota that ABA-modeled ethics rules could not prevent a judicial candidate from sharing his views on legal issues. That was Scalia, the person I just bragged about.

While there might have been some ambiguity about how much a judicial candidate could say before that Supreme Court decision last summer, after that decision there is none now, and Mr. Estrada has no ethical basis for refusing to answer the questions that we say he has not answered.

Let's talk about Silberman a little more.

He told Senator GRASSLEY that the addition of another judge on that court would make it ''more difficult'' ''to maintain a coherent stream of decisions.'' Surely he did not mean that the addition of a Democrat appointee to that court filled with Republican appointees would make it more difficult to have unanimous decisions by mostly Republican panels.

My friend Senator GRASSLEY and other Republicans also relied on the views of another Republican appointee, Judge J. Harvie Wilkinson of the Fourth Circuit. I don't know much about Harvie Wilkinson. I don't know if he is giving advice about how to embarrass Democrats in his judicial capacity, which is unethical and against the canons of judicial ethics. But I don't know anything about Harvie Wilkinson, other than what I am going to tell you right now. He said:

> [W]hen there are too many judges . . . there are too many opportunities for Federal intervention.

So this makes me think that the opposition to Garland getting a vote was pretty political.

Well, then look at what happened. Another Republican appointee to the DC Circuit retired, and then the Republicans said the DC Circuit did not need an 11th judge on that court. Garland would have then been the 11th judge instead of the 12th.

So the Republicans came to the floor stating that the declining caseload of the DC Circuit did not warrant the appointment of a Clinton appointee. They argued that 10 judges could handle the 1,625 appeals filed in the then-most-recent year for which statistics were available.

I can only imagine what the Republicans would be saying now if Gore—who got more votes in the last election than did the President—if he had won the Supreme Court case in that election recount. Now, the number of cases filed in the DC Circuit has fallen by another 200 per year, down to 1,400 in 2001, the most recent year for which statistics are available. So under their analysis—that is, the analysis of Silberman and Wilkinson—the DC Circuit would need only 9 judges to handle these cases, not 10 or 11 or 12.

In fact, under their analysis, 8 DC Circuit judges could probably handle the 1,400 appeals if each judge took a few more cases on average—175 rather than 162. In fact, the First Circuit had 1,463 appeals that year, more than the DC Circuit, but they only have 6 judges.

So let me be as clear as I can. I am not saying that the DC Circuit needs only eight judges and that Estrada and Roberts are people for whom they should not have submitted their names. I am simply saying that these were the Republican arguments against confirming Merrick Garland and any other Clinton appointees to that court. Now they are strangely silent on the plummeting caseload of the DC Circuit and whether it is important we spend $1 million per year for each job.

These saviors of the budget—the majority—and they are responsible, along with the President, for the largest deficit in the history of the world, almost $500 billion this year—are not concerned, I guess, about $1 million per year. Because you are talking about four judges or so, and that is only $4 million. And when we have a deficit approaching $500 billion, I guess that is chump change.

After delaying Garland from 1995 to 1997, 23 Republicans still voted against the confirmation of this uncontroversial and well-liked nominee. I think it is important note that, despite Garland's unassailed reputation for fairness, Republicans forced him to wait on the floor all this time—even after he was voted out of committee—11 months on the floor.

Clinton's two other nominees to the DC Circuit were not nearly as fortunate. Elana Kagan and Allen Snyder were never allowed a committee vote or a floor vote. They were held up by anonymous Republicans.

That is worse than what we are doing—absolutely, totally worse. What we are doing is within the rules because you have rules that you can follow. If it is not put out of committee, you have no recourse. If they had brought it to the floor, we could have at least tried to invoke cloture. And that is what the majority can do now.

They did not even give these two qualified people—both of whom graduated first in their class, Harvard—they were never even allowed a committee vote, or certainly not a floor vote. They were held up by anonymous Republicans.

Now, we are not doing anything in the dark of the night. We do not have anonymous holds on Miguel Estrada. We are out here on the floor saying, we want information on him. Until we get it, we are going to vote against this man. And I assume these anonymous holds—I don't know how many it was—one, or two, or three, or four, or five Republicans in the dark of the night preventing a vote.

Now the Republicans want to say it is wrong and unconstitutional to need 60 votes. It is not quite worth a hearty laugh, but it is sure kind of funny for them to say it is unconstitutional. Unconstitutional that we are following the Constitution—article II, section 2, of the Constitution?

Now Republicans want to say it is wrong and unconstitutional to need 60 votes—more than a majority—to end a debate under longstanding Senate rules, but it is not antidemocratic and unfair for Republicans to allow just one member of their own party—maybe two or three—to prevent a vote up or down on a judicial nominee, or at least allow us to file a motion to invoke cloture; that is, when a Democrat was President.

Madam President, I know the Senator from New York is here to speak. Is that true? I will have plenty of opportunity at a subsequent time to speak. But there will be a time when I respond to the statement the junior Senator from Texas made yesterday regarding the Senate's role on confirmations. I look forward to doing that.

I apologize to my friend from New York. She had duty here at 5 o'clock, and I have taken far too much time.

I did want to respond to some statements made when the Senator from New York was not on the floor. I felt it was important that the record be made clear.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Madam President, I understand that the Senator from New York wishes to speak. I don't wish to delay her, but in the spirit of going back and forth, I have sought to be recognized. I will not take a great deal of time because I want to be sure the Senator from New York is given the proper opportunity to speak.

Mr. REID. Madam President, because of the graciousness of the Senator from Utah, I ask unanimous consent that following the statement of the Senator from New York, the Senator from Utah be recognized.

Mr. BENNETT. Madam President, I would object because I have the floor.

Mr. REID. I am sorry. I thought you were going to let her speak.

Mr. BENNETT. I do intend to let her speak, but I would like to give my statement first.

Mr. REID. I didn't understand that. Then I ask unanimous consent that the Senator from New York be recognized following the Senator from Utah. I would say to the Senator from Utah, the Senator from New York has been waiting a long time, so in the matter of who has been here the longest, it has been her.

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

Mr. BENNETT. I thank my friend from Nevada. I sit behind him. He may not have noticed how long I was waiting.

I have been interested in this debate. It goes on. As the Senator from Nevada

has said, just about everything that can be said has been said. But at the same time the country is beginning to discover this debate. While everything may have been said on the floor, it seems that not everything has been said out in the country. It is interesting to me that we are getting more and more editorial comment throughout the Nation on this issue.

One that came to my attention just this morning is in this morning's Washington Post. Those who get upset about what they believe is the liberal bias of the newspapers usually do not include the Washington Post among the list of those publications favorable to Republicans. There are columnists in the Washington Post that are considered favorable to Republicans. Mr. Novak comes to mind. But the Post itself is considered to be part of the leftwing media, according to those on talk radio.

So when someone who is part of the establishment of the Washington Post editorial page speaks out on this issue and says something contrary to that which is normally assumed to be the party line of the mainstream media, it is worth noting and commenting on.

In this morning's Washington Post, Benjamin Wittes, a member of the editorial page staff, has an op-ed piece entitled Silence is Honorable.

I would like to quote from it at some length. This is how Mr. Wittes begins:

Asked whether the Constitution evolves over time, the nominee to the U.S. Court of Appeals for the District of Columbia Circuit told the Senate Judiciary Committee that, while such debates were interesting, ''as an appellate judge, my obligation is to apply precedent.'' Asked whether he favored capital punishment, a nominee said only that the death penalty's constitutionality was ''settled law now'' and that he didn't ''see any way in which [his] views would be inconsistent with the law in this area.''

Miguel Estrada, one of President Bush's nominees to the D.C. Circuit, is facing a filibuster by Democratic senators who claim that his refusal to address their questions at his hearing—combined with the White House's refusal to release his memos from his days at the solicitor general's office—makes him an unreadable sphinx. Yet the careful answers quoted above are not Estrada's. The first was given by Judge Judith Rogers at her hearing in 1994, the second by Judge Merrick Garland the following year. Both were named to the bench by President Clinton. Neither was ever accused of stonewalling the committee. And both were confirmed.

But the rules they are a-changin', and answers barely distinguishable from these are no longer adequate. Asked whether he thought the Constitution contained a right to privacy, Estrada said that ''the Supreme Court has so held and I have no view of any nature whatsoever . . . that would keep me from apply[ing] that case law faithfully.'' Asked whether he believed Roe v. Wade was correctly decided, he declined to answer. While he has personal views on abortion, he said, he had not done the work a judge would do before pronouncing on the subject. Roe ''is there,'' he said. ''It is the law . . . and I will follow it.''

The real difference between Estrada's questioning and that of Garland and Rogers is not that Estrada held back. It is that Garland and Rogers faced nothing like the inquest to which Estrada was subjected. Both, along with Judge David Tatel—the other Clinton appointee now on the court—faced only a brief and friendly hearing.

I would note, outside of the article, that that brief and friendly hearing was under Republican auspices because Republicans controlled the Senate. Back to the article:

And none was pushed to give personal views on those matters on which his or her sense of propriety induced reticence. To be sure, there was no controversy surrounding the fitness of any of the Clinton nominees, so the situation is not quite parallel. When Garland, a moderate former prosecutor who had recommended the death penalty, said he could apply the law of capital punishment, there was no reason to suspect he might be shielding views that would make him difficult to confirm. By contrast, many Democrats suspect that Estrada's refusal to discuss Roe is intended to conceal his allegedly extremist views. But that only begs the question of why Estrada is controversial in the first place that Democrats think it appropriate to demand that he bare his judicial soul as a condition of even getting a vote.

This is the conclusion of this portion of the op-ed piece:

Nothing about his record warrants abandoning the respect for a nominee's silence that has long governed lower court nominations.

And silence is the only honorable response to certain questions. It is quite improper for nominees to commit or appear to commit themselves on cases that could come before them.

That is the end of that quote. This is the standard we followed in this body for many years. I will not pretend that members of the Judiciary Committee of both parties in Congress, controlled by both parties, would use the Judiciary Committee, the blue slip process and other patterns of senatorial courtesy to keep people from getting to the bench. That is part of our history. That has always been done. But once a hearing has been held and the committee has voted out a nominee, we have always allowed that nominee to go to a vote. That is the standard that has been established in this body. That is the standard that has been followed by Democrats and Republicans alike. And that is the standard that is being changed in this circumstance.

The Senator from Nevada talked a good bit about the Constitution and questions that have been raised about constitutionality by the Republicans. I would simply point out this obvious fact with respect to the Constitution on this question: The Founding Fathers gave the power to advise and consent in certain executive decisions to the Senate. The Founding Fathers recognized that the power to advise and consent was a very significant one, an unusual one held solely to the Senate. So they outlined those areas where the power to advise and consent would require a supermajority.

The Founding Fathers said: If you are advising and consenting on a treaty, which becomes law when it is ratified, equal to the Constitution, then you have to have a two-thirds majority. If you are amending the Constitution, you have to have a two-thirds majority. These are serious enough matters, with long-term impact, that they must have a two-thirds majority.

They could have said: The advise and consent power always requires a supermajority, but they did not. The Founding Fathers made it very clear those specific areas where a supermajority would be required and then left it to an ordinary majority on the advise and consent power with respect to Presidential nominations. And throughout the entire history of the Republic, we have followed the pattern of a simple majority for the advise and consent power to be exercised by the Senate.

Make no mistake, if the Senate sets the precedent in the Estrada case that the advise and consent power from this time forward requires a supermajority of 60 votes, they are changing forever the pattern of the Senate's relationship to the executive branch in this area. I am not one who says that is unconstitutional. I think it is within the power of the Senate. I disagree with those who are saying it violates the Constitution. I think it violates the intent of the Framers of the Constitution. I think that is very clear. But it is within the power of the Senate to do that if we want.

As I have said before, we on our side of the aisle discussed this when we were faced with those nominees from President Clinton whom we considered controversial. There were those in our conference who insisted that we must do that—change the pattern and require President Clinton's nominees to pass the 60 point bar. To his credit, my senior colleague from Utah argued firmly against that. Even though he was against the nominees in some cases, he said we must not change the historic pattern that says once a nominee is voted out of the committee, he or she gets a clear up-or-down vote by a majority. To his credit, the Republican leader at the time, the majority leader, Senator LOTT, said exactly the same thing: We must not go down that road. Those in our conference who said let's do it on that particular judge agreed and backed down, and no matter how strongly people on this side of the aisle felt about a particular judge, there was never an attempt to use the filibuster power to change what we considered to be the clear intent of the Founding Fathers and change the advise and consent situation, where there was an additional supermajority required, an additional supermajority added to that which the Founding Fathers themselves wrote into the Constitution.

Now the Democrats have decided they are going to do that. It is their right. To me, it signals a determination on their part that they expect to be in the minority for a long time. One of the reasons Senator HATCH gave for us not to do it was, we will have an opportunity in the future to be voting on nominees offered by a President of our

own party, and if we do this to the other party, they will then feel comfortable in doing it to the nominees of our party; let's just not do that.

I think by deciding to do this on this nominee, the Democrats have virtually conceded the fact that they do not expect another Democratic President for long time. They believe they will be in the minority for a long time and, therefore, they must establish this weapon as one of the weapons they will use as part of the minority to obstruct the activities in the Senate for a long time to come.

I hope they decide ultimately to bet on the future. I hope they decide ultimately they do expect that there will be a Democratic President sometime in the future, that they do expect there will be a Democratic Senate sometime in the future and they want to save for the future the right that every President, Democrat or Republican, and every Senate, Democrat or Republican, has maintained since the founding of the Republic 2½ centuries ago.

Madam President, if I may go back to the article written by Benjamin Wittes in this morning's Washington Post that summarizes the implications of going in this direction and what it will do long term, he says:

> Not knowing what sort of judge someone will be is frustrating, but that is the price of judicial independence. While it would be nice to know how nominees think and what they believe and feel, the price of asking is too high. The question, rather, is whether a nominee will follow the law. Estrada has said that he will. Those who don't believe him are duty bound to vote against him, but they should not oblige nominees to break the silence that independence requires.

That is what our friends on the Democratic side are doing. They have never demanded it before. We did not demand it of their nominees. They are changing the rules—''the rules they are a'changing,'' as Mr. Wittes points out. I ask my friends on the Democratic side to think long and hard about the long-term consequences of changing the rules—changing the rules, as Mr. Wittes talks about it, in terms of what is demanded of nominees; changing the rules as we are talking about it here in terms of the supermajority that would be added to the existing constitutional requirement of the Senate as it performs its role in advising and consenting to executive nominations.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mrs. CLINTON. Madam President, I thank the Senator from Utah for his kindness and consideration with respect to the order. I was happy to have the opportunity to hear him, as I often am.

With respect to the arguments that have been made in the last hour or so, I think it is clear that there is a fundamental difference of opinion regarding the Senate's obligation and duty under the advise and consent clause of the U.S. Constitution.

Mr. DORGAN. Will the Senator yield for a unanimous consent request?

Mrs. CLINTON. Yes.

Mr. DORGAN. I ask unanimous consent that I may speak following the speech of the Senator from New York.

Mr. BENNETT. I object. There is a Republican speaker coming. I would amend the UC request to say that Senator TALENT, if he is on the floor, be recognized first, and then Senator DORGAN be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. DORGAN. Reserving the right to object, I have not followed the order on the floor of the Senate today. I don't know whether the Senator from Utah has. I was told I would be recognized at 5:30 and was prepared to do that. If there has been a process today in which Republicans and Democrats follow each other precisely, then I will understand what the Senator from Utah is trying to do. If not, I am here. The reason I am here is to present remarks following the Senator from New York. If others wish to be involved in the lineup, I will be happy to entertain that. I guess I don't understand the circumstance under which the Senator from Utah is opposing this.

Mr. BENNETT. I am not sure what the circumstance was prior to my coming to the floor either. I was told we were going back and forth. If I might inquire as to how much time the Senator would use, perhaps there would be no problem.

Mr. DORGAN. It was my intention to consume an hour, but I will not do that; it will be a half hour. I would certainly be accommodating to anybody else. I would like to speak, and others are not here. I don't intend to interrupt. If there is an order established, I do not want to interrupt that. I don't know that to be the case.

Mr. BENNETT. I don't know that to be the case all day long. I do know that was the case earlier. Reserving the right for my friend who is anticipating to be here at 6, and was told in advance he could be here at 6, I renew my unanimous consent request that following the Senator from New York, the Senator from Missouri, Mr. TALENT, would be recognized to speak, after which the Senator from North Dakota, Mr. DORGAN, would be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. DORGAN. Reserving the right to object—and I will now object—if the other side wishes to protect people who are not here in deference to those who are here, I expect the Senator from Utah would want us to do the same thing on this side of the aisle. If a Republican is waiting to speak, and a Democrat is not yet on the floor, but someone here says it is really the opportunity for the Democrats to speak even if the Republican is here, we will object. So I guess I understand the point the Senator from Utah is making. I will not object to his request as long as he understands that we will do that, I suppose. I don't think it is the most efficient way of handling things. Those who are on the floor and prepared to speak, I expect that is the way we ought to recognize people.

Mr. BENNETT. I thank my friend for his consideration. I say to him he caught me at somewhat of a disadvantage in that I am the only one on the floor and didn't know what was going on. I am trying to accommodate people on both sides, which is why I want to make sure the Senator from North Dakota is recognized to speak.

Mr. DORGAN. Madam President, continuing to reserve the right to object, if this is the process, I will simply at some appropriate point ask for a time certain to speak tomorrow and will be here promptly at that time. I am here now and those who the Senator from Utah is attempting to protect are not here. I will not object because I do not want to interrupt an order apparently they think on that side exists. If that, in fact, is the order, we will certainly make sure that is the case for people on both sides of the aisle as we proceed.

Mr. BENNETT. I would expect the Democratic leader to be sure of enforcing the same process on behalf of Senators on his side of the aisle.

Mr. DORGAN. Madam President, I do not think that is the most efficient use of time in the Senate. It seems to me those who are here want to be recognized to proceed. Recognizing it is not the most efficient use of time, I will not object to the request by the Senator from Utah.

Mr. BENNETT. I thank my friend.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from New York.

Mrs. CLINTON. I thank the Chair. Madam President, I have been, as I said, listening with great interest to the debate on this issue. It is a very significant and important debate. As I often do when I come to the Chamber, I imagine, instead of being a Senator with the great honor of representing the State of New York and speaking in this Chamber, that I am just another citizen, as I have been most of my life, watching the debate on C–SPAN or one of the other television networks that might cover parts of it, and I would be asking myself: What is this all about? Why has so much time been consumed in the Senate over this one nominee?

The bottom line answer is that this side of the aisle has a very deep concern about any candidate seeking a lifetime position who refuses to answer the most basic questions about his judicial philosophy. And that, in fact, to permit such a candidate to be confirmed without being required to answer those questions is, in our view, a fundamental denial and repudiation of our basic responsibilities under the advice and consent clause of article II, section 2, of the U.S. Constitution.

Earlier this afternoon, as I was waiting for my opportunity to speak, I heard the Senator from Idaho admit that he had, based on philosophy, voted against certain nominees who had been sent to the Senate by President Clinton. I happen to think that is a totally

legitimate reason to vote for or against a nominee. I happened to agree with the Senator from Idaho when he said he voted against nominees by President Clinton based on philosophy. That is an integral part of the advise and consent obligation.

The problem that we have on this side of the aisle is we cannot exercise the advise and consent obligation because we do not get any answers to make a determination for or against this nominee based on philosophy. I could not have done a better job than the Senator from Idaho did in summing up what the problem is. I thank the Senator from Idaho for being candid, for saying he voted against President Clinton's nominees based on philosophy.

We could resolve this very easily if the nominee would actually answer some questions, legitimate questions that would permit those of us who have to make this important decision and are not just saluting and following orders from the other end of Pennsylvania Avenue, by being able to look into the philosophy and then deciding: Are we for this nominee or are we against this nominee?

This nomination would also be expedited if the President and his legal counsel would respond to the letter of February 11 sent to the President by the minority leader and the distinguished ranking member of the Judiciary Committee asking for additional information on which to make a decision concerning this nominee, and, in fact, both Senators Daschle and Leahy are very explicit about what information is required. I will reiterate the request. Specifically, they asked the President to instruct the Department of Justice to accommodate the request for documents immediately so that the hearing process can be completed and the Senate can have a more complete record on which to consider this nomination and, second, that Mr. Estrada answer the questions he refused to answer during the Judiciary Committee hearing to allow for a credible review of his judicial philosophy and legal views.

I would argue, we are not changing the rules. In fact, we are following the rules and the Constitution, and we are certainly doing what the Senator from Idaho said very candidly he did with respect to President Clinton's nominees. We are trying to determine the judicial philosophy of this nominee in order to exercise our advise and consent obligation.

I have also been interested in my friends on the other side of the aisle talking and reading from newspapers and asserting that we are somehow requesting more information from this nominee than from other nominees and that, in fact, it is honorable not to answer relevant questions from Judiciary Committee members. It may be honorable by someone's definition of honor, but it is not constitutional. It is fundamentally against the Constitution to refuse to answer the questions posed by a Judiciary Committee member.

If there were any doubt about this standard, all doubt was removed last year. How was it removed? It was removed in a Supreme Court opinion rendered by Justice Scalia arising out of a case brought by the Republican Party concerning the views of judges.

For the record, I think it is important we understand this because perhaps some of my colleagues have not been informed or guided by the latest Supreme Court decisions on this issue, but I think they are not only relevant, they are controlling, to a certain extent, when we consider how we are supposed to judge judges.

Republicans focus on the ABA model code that judicial candidates should not make pledges on how they will rule or make statements that appear to commit them on controversies or issues before the court. They are, understandably, using this as some kind of new threshold set by Mr. Estrada who refused to answer even the most basic questions about judicial philosophy or his view of legal decisions.

Some judicial candidates, it is true, go through with very little inquiry. They come before the Judiciary Committee. They are considered mainstream, noncontroversial judges. Frankly, the Senators do not have much to ask them. They go through the committee. They come to the floor. That is as it should be. Were it possible, that is the kind of judge that should be nominated—people whose credentials, background, experience, temperament, and philosophy is right smack in the center of where Americans are and where the Constitution is when it comes to important issues. When someone does not answer questions or when they are evasive, it takes longer and you keep asking and you ask again and again. That was, unfortunately, the case with this particular nominee.

The Republican Party sued the State of Minnesota to ensure their candidates for judicial office could give their views on legal issues without violating judicial ethics. Republicans took that case all the way to the Supreme Court. In an opinion by Justice Scalia, the Supreme Court ruled that the ethics code did not prevent candidates for judicial office from expressing their views on cases or legal issues. In fact, Justice Scalia said anyone coming to a judgeship is bound to have opinions about legal issues and the law, and there is nothing improper about expressing them.

Of course, we do not and should not expect a candidate to pledge that he is always going to rule a certain way. We would not expect a candidate, even if he agreed that the death penalty was constitutional, to say: I will always uphold it, no matter what. That would be an abuse of the judicial function and discretion.

Specifically, in Republican Party of Minnesota v. White, the Supreme Court overruled ABA model restrictions against candidates for elective judicial office from indicating their views. I think the reasoning is applicable to those who are nominated and confirmed by this body for important judicial positions within the Federal judiciary.

Justice Scalia explained in the majority opinion, even if it were possible to select judges who do not have preconceived views on legal issues it would hardly be desirable to do so.

I want my friends on the other side to hear the words of one of the two favorite Justices of the current President, Justice Scalia: Even if it were possible, it would not be desirable.

Why? Because, clearly, we need to know what the judicial philosophy is. Judges owe that to the electorate, if they are elected; to the Senate if they are appointed.

Justice Scalia goes on: Proof that a justice's mind at the time he joined the court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the appearance of that type of impartiality can hardly be a compelling State interest, either. In fact, that is Justice Scalia quoting Justice Rehnquist.

Before this decision, some judicial candidates may have thought—and some of my colleagues may have thought—that judicial candidates could not share their views on legal issues, and I think that might have been a fair assessment of the state of the law at that time. But that is no longer a fair assessment.

A judicial candidate cannot be compelled to share his views, but Justice Scalia tells us that a judicial candidate who does not share his views refuses to do so at his own peril, and that is exactly what this nominee has done. At his own peril, he has gotten his marching orders from the other end of Pennsylvania Avenue, from all those who advise judicial nominees, from the Federalist Society and all the rest of those organizations, not to answer any questions, to dodge all of the issues, to pretend not to have an opinion about any Supreme Court case going back to Marbury v. Madison.

Well, he does so, in Justice Scalia's words, at his peril. That is what has brought this nomination to this floor for all these days, because this nominee wants to be a stealth nominee. He wants to be a nominee who is not held accountable for his views so that we who are charged under the Constitution to make this important judgment cannot do so based on his judicial philosophy.

Justice Scalia has a lot to say to my friends on the other side. If it were possible to become a Federal judge, with lifetime tenure, on the second highest court of the land, without ever saying

anything about your judicial philosophy, I think that would be astonishing. It would be troubling. It would run counter to the Constitution and to this opinion written by one of the most conservative members of the current Court.

Mr. Estrada basically has come before this Senate and claimed he cannot give his view of any Supreme Court case without reading the briefs, listening to the oral argument, conferring with colleagues, doing independent legal research, and on and on. That is just a dressed up way of saying: I am not going to tell you my views, under any circumstances.

One has to ask himself—and I do not want to be of a suspicious mindset—why will this nominee not share his views? Are they so radical, are they so outside the mainstream of American judicial thought, that if he were to share his views, even my friends on the other side would say wait a minute, that is a bridge too far; we cannot confirm someone who believes that?

How can I go home and tell my constituents that I voted for somebody who actually said what he said? I cannot think of any other explanation. Why would a person, who clearly is intelligent—we have heard that constantly from the other side—who has practiced law, not be familiar with the procedures of the Judiciary Committee, of the constitutional obligation of advise and consent or even of Justice Scalia and Justice Rehnquist's opinions about the importance of answering such questions?

So I have to ask myself: What is it the White House knows about this nominee they do not want us to know? And if they do not want us to know, they do not want the American people to know. I find that very troubling.

I do not agree with the judicial philosophy of many of the nominees sent up by this White House. I voted against a couple of them. I voted for the vast majority of them, somewhere up in the 90 percentile. At least I felt I could fulfill my obligation so when I went back to New York and saw my constituents and they asked why did I vote for X, I could say to them it was based on the record. He may not be my cup of judicial tea, but he seems like a pretty straightforward person. Here is what he said and that is why I voted for him. Or to the contrary, I could not vote for this nominee because of the record that was presented.

I cannot do that with this particular nominee. And you know what. The other end of Pennsylvania Avenue that is calling the shots on this nomination does not want me to have that information.

I think that is a denial of the basic bargain that exists under the Constitution when it comes to nominating and confirming judges to the Federal courts.

It could have been different. The Founders could have said let's put all of this into the jurisdiction of the Executive; let him name whoever he wants. Or they could have said: No, let's put it in the jurisdiction of the legislature; let them name whoever they want. Instead, as is the genius of our Founders and of our Constitution, there was a tremendous bargain that was struck, rooted in the balance of power that has kept this Nation going through all of our trials and tribulations, all of our progress, that balance of power which said we do not want this power to rest in any one branch of Government; we want it shared. We want people to respect each other across the executive and legislative lines when it comes to the third branch of Government.

So, OK, Mr. President, you nominate. OK, Senators, you advise and consent. That is what this is about.

Sometimes I wonder, as my friends on the other side talk about it, how they can so cavalierly give up that constitutional obligation. The unfortunate aspect of this is we could resolve this very easily. All the White House has to do is send up the information. Let Mr. Estrada answer the questions. He may still have a majority of Senators who would vote to put him on the DC Circuit. I do not know how it would turn out because I do not have the information.

While we are in this stalemate caused by the other end of Pennsylvania Avenue, which for reasons that escape me have dug in their heels and said, no, they will not tell us anything about this person, there is a lot of other business that is not being done, business about the economy, the environment, education and health care, business that really does affect the lives of a lot of Americans.

On that list of business that I consider important is what is happening in our foster care system. Tomorrow evening, I will have the great privilege of hosting the showing of a tremendous movie about the foster care system, along with Congressman TOM DELAY. I invite all of my colleagues from both Houses of Congress to come and see this movie that vividly illustrates what happens in our foster care system.

I have worked in the past with Congressman DELAY to try to improve the foster care system. I look forward to doing that in the future. He has a great commitment to the foster care system and the foster children who are trapped within it. I use that word with great meaning because, indeed, that is often what happens to them. And the stories of abuse and neglect that first lead children to go into the foster care system are compounded by the stories of abuse and neglect once they are in that system.

Mr. Fisher will be joining Congressman DELAY and me at the Motion Picture Association screening room for this important movie. This is a screening just for Members of Congress. I think it will illustrate better than certainly my words could why it is so important we join hands and work on this issue along with many others who affect the lives of children as well as men and women across America.

Occasionally, a movie comes to the screen that brings to life the stories that have become routine in the newspapers and that we too often ignore—the stories of children living with abuse and neglect, shuffled in and out of our foster care system, often with little guidance from or connection to any one adult. Too often these stories end in the most tragic way possible:

7-year-old Faheem Williams in Newark, NJ was recently found dead in a basement with his two brothers where they were chained for weeks at a time.

6-year-old Alma Manjarrez in Chicago was beaten by her mother's boyfriend and left to die outside in the snow and cold of the winter.

And despite 27 visits by law enforcement to investigate violence, 7-year-old Ray Ferguson from Los Angeles was recently killed in the crossfire of a gun battle in his neighborhood.

Antwone Fisher's story is different.

Mr. Fisher overcame tremendous odds: He was born in prison, handed over to the State, and lived to tell his story of heartbreaking abuse. At the age of 18, he left foster care for the streets. With nowhere to turn, he found the support, education, and structure in the U.S. Navy. In the Navy, Fisher received a mentor and professional counselor, which helped him turn his life around.

Mr. Fisher survived his childhood and has lived to inspire us all and send us a stern reminder that it is our duty to reform the foster care system so that no child languishes in the system, left to find his own survival or to die. Antwone's success story should be the rule not the exception.

Tomorrow night, House Majority Leader TOM DELAY and I will be cohosting a screening of the movie ''Antwone Fisher'' for Members of Congress. We decided to host this together because we both feel that it is imperative that we raise national awareness about foster care—through one child's own experience—and encourage our colleagues to tackle this tough issue with us.

Congressman DELAY and I had received an award together in the year 2000 from the Orphan Foundation of America for the work that we both have done in this area. Earlier this year, I asked my staff to reach out to his staff to find ways we might work together to focus on this issue. This movie was a natural fit for both of us and I look forward to continuing to work with Representative DELAY as we take a hard look at reforming our foster care system. Congressman DELAY and his wife, Christine, are strong advocates for foster children and are foster parents themselves.

I hope that many of my colleagues in the Senate will take us up on the invitation and join us for this important movie.

But, for those who can't join us, I wanted to share a little bit about Antwone's story in his own words from his book, ''Finding Fish''—

The first recorded mention of me and my life was [from the Ohio State child welfare records]: Ward No. 13544.

Acceptance: Acceptance for the temporary care of Baby boy Fisher was signed by Dr. Nesi of the Ohio Revised Code.

Cause: Referred by division of Child Welfare on 8–3–59. Child is illegitimate; paternity not established. The mother, a minor is unable to plan for the child. The report when on to detail the otherwise uneventful matter of my birth in a prison hospital facility and my first week of life in a Cleveland orphanage before my placement in the foster care home of Mrs. Nellie Strange.

According to the careful notes made by the second of what would be a total of thirteen caseworkers to document my childhood, the board rate for my feeding and care cost the state $2.20 per day.

Antwone went on to document that the child welfare caseworker felt that his first foster mother had become ''too attached'' to him and insisted that he be given up to another foster home. The caseworker documents this change:

Foster mother's friend brought Antwone in from their car. Also her little adopted son came into the agency lobby with Antwone. . . . They arrived at the door to the lobby and the friend and the older child quickly slipped back out the door. When Antwone realized that he was alone with the caseworker, he let out a lust yell and attempted to follow them.

Caseworker picked him up and brought him in. Child cried until completely exhausted and finally leaned back against caseworkers, because he was completely unable to cry anymore.

Later he describes when the caseworker brought him to his next foster home—she too slipped out the door when he was not looking. He says, ''All through my case files, everybody always seemed to be slipping away in one sense or another.''

When Antwone arrived at the next foster home and as he grew, at first he was not told of his troubled entry into the world:

But for all that I didn't know and wasn't told about who I was, a feeling of being unwanted and not belonging had been planted in me from a time that came before my memory.

And it wasn't long before I came to the absolute conclusion that I was an uninvited quest. It was my hardest, earliest truth that to be legitimate, you had to be invited to be on this earth by two people—a man and a woman who loved each other. Each had to agree to invite you. A mother and a father.

Antwone Fisher never knew a permanent home—never knew a loving mother and father. Instead, he was left to fend for himself when he was expelled from foster care at 18—a time when the state cuts off payments to foster parents. Antwone found himself on the streets and homeless.

Thanks to the work of many on both sides of the aisle in Congress we have begun important work to make sure that Antwone's story is not repeated. No child should have to grow up in foster care from birth and never be adopted and no child should ever have to leave the system at 18, with absolutely no support.

There are approximately 542,000 children in our Nation's foster care system—16,000 of these young people leave the system every year having never been adopted. They enter adulthood the way they lived their lives, alone.

In 1999, when I was First Lady, I advocated for and Congress took an important step to help these young adults by passing the Chafee Foster Care Independence Act. This program provides states with funds to give young people assistance with housing, health care, and education. It is funded at $410 million annually, and should be increased. But it was an important start to addressing the population of children who ''age-out'' of our foster care system.

This bill came after the important bipartisan Adoption and Safe Families Act of 1997. As First Lady, it was an honor to work on what's considered to be one of the most sweeping changes in federal child welfare law since 1980.

It ensured that a child's safety is paramount in all decisions about a child's placements. For those children who cannot return home to their parents, they may be adopted or placed into another permanent home quickly. Since the passage of this law, foster child adoptions have increased by 78 percent.

The next major hurdle that I believe we need to tackle in reforming our child welfare system is the financing system.

Currently, we spend approximately $7 billion annually to protect children from abuse and neglect, to place children in foster care, and to provide adoption assistance. The bulk of this funding, which was approximately $5 billion in fiscal year 2001, flows to States as reimbursements for low-income children taken into foster care when there is a judicial finding that continuation in their home is not safe.

This funding provides for payments to foster families to care for foster children, as well as training and administrative costs.

This funding provides a critical safety net for children, who through difficult and tragic circumstances end up in the care of the state. It ensures that children are placed in foster care only when it is necessary for their safety, it ensures that efforts are made to reunify children with their families as soon as it safe, it works to make sure that the foster care placement is close to their own home and school, and it requires that a permanency plan is put in place. All of these safeguards are critical.

The financing, however, is focused on the time the child is in foster care and it continues to provide funding for States the longer and longer a child is in the system. The funding is not flexible enough to allow for prevention or to help children as they exit the system—critical times when children fall through the cracks.

President Bush has put a proposal on the table to change the way foster care is financed in order to provide greater flexibility so that states can do more to prevent children form entering foster care, to shorten the time spent in care, and to provide more assistance to children and their families after leaving.

While I absolutely do not support block granting our child welfare system—I do think that it is important that President Bush has come to the table with an alternative financing system and I believe that it provides us with an opportunity to carefully consider how to restructure our child welfare system.

We must ask critical questions:

Will States be required to maintain child safety protection that we passed as part of the Adoption and Safe Families Act?

Will States be required to target funds to prevention and post-foster care services?

What happens if there is a crisis and more foster care children enter the system? Will States receive additional funds?

While I believe all of these questions deserve answers, I applaud President Bush and Representative DELAY for being willing to tackle this hard problem. I look forward to working with them to find solutions so that we do not allow any child to fall through the cracks.

This is just one of the many issues that are basically left on the back burner while we engage in this constitutional debate that could be resolved if information were provided.

As I said, I have to question the reasons why that information is not forthcoming. It gives me pause. This administration is compiling quite a record on secrecy. That bothers me. It concerns me. I think the American people are smart enough and mature enough to take whatever information there is about whatever is happening in the world—whether it is threats we may face or the judicial philosophy of a nominee. That is how a democracy is supposed to work. If we lose our openness, if we turn over our rights to have information, we are on a slippery slope to lose our democracy. Now, of course, in times of national crisis and threat like we face now, there are some things you cannot share with everyone. But you certainly can and should share them with the people's elected representatives. That is why we are here. I err on the side of trying to make sure we share as much information as possible.

For the life of me, I cannot understand why the White House will not share information about this nominee. Until it does, until Mr. Estrada is willing to answer these questions, I have to stand with my colleague from Idaho—I cannot cast a vote until I know a little bit more about the judicial philosophy. This is not a Republican or Democratic request. This is a senatorial request.

This is what the Senate is supposed to be doing.

I urge our colleagues and friends on the other side of the aisle, do whatever you can to persuade the White House and the Justice Department to level with the Senate, to level with the American people, to provide the information that will enable us to make an informed decision and fulfill our constitutional responsibility.

It seems to me to be the very minimum we can ask. It certainly is what has been provided and asked for in the past. I hope it will be forthcoming, that the letter sent by Senators DASCHLE and LEAHY will get a favorable response, we will be able to get the information the Judiciary Committee has requested, that many Members feel we need, and we can move on. We can tend to the people's business, including the need to reform our foster care system to try to save the lives of so many children who would otherwise be left behind and left out of the great promise of America.

The PRESIDING OFFICER (Mr. ALEXANDER.) The Senator from Missouri.

Mr. TALENT. When I was growing up, there was a tradition in the Senate that I observed as an outsider, of course, about how the Senate handled its constitutional function of giving advice and consent for presidential nominees. The Senate pretty much understood on the basis of a bipartisan consensus that its role was secondary, that its power was a check rather than a primary power to appoint people, either to the executive branch or to the judicial branch. I observed that Senators pretty much voted to confirm Presidential nominees if they believed those nominees were competent and if they believed those nominees were honest, and they did not inquire too greatly of the nominees' philosophy for the executive or into the nominees' jurisprudence for the legislative. There would be flaps or personal problems, but basically that was the role the Senate played and the traditional understanding of its constitutional function.

Unfortunately, I think we will all agree, that consensus has broken down over the last few years. We will all agree that both sides have some responsibility for that consensus breaking down. What we are experiencing now from the Senators who are opposing and filibustering the Estrada nomination is so extreme given the past traditions of the Senate that it threatens the spirit and, I argue, even the letter of the Constitution, and it threatens the ability of the Senate and the integrity of the Senate to do the work of the people.

Let me go into that a little bit. First of all, I take it from my understanding of the debate that the Senators who are opposing Mr. Estrada are not questioning his abilities as a lawyer or his honesty or integrity as an individual. I appreciate that. This is not a personal attack on Mr. Estrada. No one is saying he is unqualified as a lawyer. No one is saying he is dishonest in terms of his professional dealings or dishonest as a man and, indeed, you could not say that based on his experience which is clearly well known after the hours of debate we have put into this nomination.

He arrived in this country knowing very little English. He worked his way up, if you will. He was a leader in his law school class. He was on the Law Review. An achievement he was able to get, as not all of us were able to get, he clerked for an outstanding judge, a Democratic appointee on the Second Circuit, and then on the Supreme Court, and did an outstanding job in the Solicitor General's Office, according to his supervisors of both parties.

No one is questioning his abilities or honesty, as I understand it. As I understand, no one is saying they think he is not competent or honest in the sense of the standard that traditionally had been applied. What they are saying is this. They are saying, first of all, they will vote against the nominee, even to an appellate court, because they disagree with that nominee's jurisprudence, which is, itself, a step beyond what the Senate ever did in the past. But they are going beyond that. They are saying they will vote against the nominee, even to an appellate court, not just because they disagree with his jurisprudence, but because they suspect they might disagree with his jurisprudence.

And if he answered questions no other nominee who worked for the Solicitor General's Office has ever been expected to answer, and which they should not have to answer, given the need for the integrity of the executive branch, but they are going beyond that.

The opponents on this floor of the Estrada nomination are not just saying they will vote against nominees if they disagree with their jurisprudence, or vote against them if they suspect they might disagree with their jurisprudence; they are saying they are not even going to allow a vote on a nominee even to an appellate court if they suspect they might disagree with that nominee's jurisprudence.

I ask my colleagues, I beg my colleagues who are opposing this nomination, to consider what this new standard, if it were to be adopted by the Senate as a whole, would mean for the Constitution, would mean for the Senate, and would mean for Estrada, as well.

As I said, the Constitution assigned, we can all agree, the primary power of appointment to the President. Yet the Constitution shares some of that power with the Senate and that is not unusual. Even though we have a separation of powers, there are a number of instances where the executive is given a little legislative power, or the legislative is given a little executive power. For example, when the President is given the power to negotiate treaties and conclude them with foreign countries but subject to the requirement that two-thirds of the Senate ratify those treaties. So the Senate is given, in effect, a little executive power.

The Framers of the Constitution knew how to provide for the Senate to exercise the executive power they gave it by a supermajority vote when they wanted to provide that.

When the Framers said, we want to actually take a little bit more power away from the President, they said, we are not only going to require that the Senate ratify treaties but we are going to require that they ratify them by a supermajority vote, a two-thirds vote. The Framers knew how do to that when they wanted to do it. The assumption is they didn't want to take that extra measure of power away from the executive. Yes, they wanted to share the power of appointments with the Senate, as several colleagues have said. They are correct in saying that. The Senate is a partner in this process. But according to its traditions, it has always been a junior partner. According to the spirit of the Constitution, it exercises this partnership by a majority vote and not a supermajority vote.

If we adopt the tradition in this body that we will filibuster nominees, if we suspect we might disagree with their jurisprudence, we are in effect saying it will require 60 votes for this body to confirm a judicial nomination. That, I submit to you, is a usurpation of the executive authority as granted under the Constitution. It is a shift in constitutional authority away from the executive and to the legislature—and not even to the Congress as a whole but to the Senate.

As much as I stand up for the Senator from New York in saying as much as we have to stand up for the prerogatives and the authority of the Senate under the Constitution, our first responsibility is to the Constitution and to the distribution of powers, as the letter of the Constitution indicates and as the traditions of this Senate have always confirmed.

I am deeply concerned. If we were to adopt the standards being applied here to Miguel Estrada across the board, we would be doing something which is unconstitutional and which violates the spirit and I believe the letter of the Constitution as well.

My second concern is that this kind of a filibuster under these circumstances will poison the operation of the Senate on other matters. The filibuster, whatever you think of it, is a power that should be reserved for issues of only the greatest seriousness. I am not saying an appellate court nomination isn't important, it is important, but it is an appellate court nomination. Mr. Estrada, if he is confirmed to this post, whatever my colleagues may suspect his jurisprudence might lead him to do, is not going to change settled interpretations of the Constitution of the United States that can only occur on the Supreme Court level. And to haul out the nuclear

weapon, if you will, of a filibuster on an issue that, while important, is not of the first letter of importance undermines the integrity and the ability of this Senate to pull together on issues that are of the first importance.

I agree with the Senator from New York. We need to get on to issues of health care. We need to get on to issues of education. We need to get on to issues of defense and of tax relief to create jobs. All of these things are very important. That is why we should not filibuster an appellate court nomination. Allow a vote at least, I ask my colleagues.

Let me say finally that I am concerned about the effect of this on the justice that we as a body and as Americans owe to the man whose interests and whose career are at stake here. Miguel Estrada is, after all, a person. Sometimes the great forces of history, of cultural division, and focus on personal disputes involving broader issues come to focus on one man or one woman. We have seen that happen sometimes in our history. And it may be unavoidable. But we should always keep in mind that we are dealing with a human being, a person who has done his best by his life to keep his obligations to his colleagues and to his country—a person who has excelled by any standard. None is questioning that—a person who has conducted himself with integrity and has done so in a town where it is sometimes difficult to conduct yourself with integrity. And his professional future is hanging, if you will, on a thread. We ought to consider what is just to him. He deserves this post. He has worked hard for it. His qualifications qualify him for the post. We should at least give him a vote.

That is why the newspapers and the opinion of this country for the last week or so have been decidedly in favor, if not of Mr. Estrada and I think most of the opinion of the country has indeed be in favor of confirming him for the reasons I have indicated—but at least in favor of giving him a vote.

I am not going to read all of the editorials, certainly. I ask unanimous consent to have printed in the RECORD an editorial of February 7, 2003, from the St. Louis Post-Dispatch, one my hometown newspapers, and also a letter—they may already be in the RECORD—and one in the New York Daily News by Gov. George Pataki.

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

[From the New York Daily News, Feb. 17, 2003]

THE SENATE SHOULD CONFIRM ESTRADA

(By Gov. George E. Pataki)

Miguel Estrada, President Bush's nominee for the District of Columbia Circuit Court of Appeals, is a New York success story—the embodiment of all that has made our state a beacon of freedom and opportunity around the globe.

His life is an inspiration to us all, especially to the children of new immigrants. Yet his nomination has gotten caught up in the all-too-familiar Washington game of partisan politics. That's wrong. When the Senate returns from its break, it should act quickly to end this senseless bickering.

Born in Tegucigalpa, Honduras, Estrada came to the U.S. in 1978. Just 17, he could barely speak English. He proved to be a quick study. Just five years later, he graduated with honors from Columbia University.

After a three-year stint at Harvard Law School, where he served as editor of the prestigious Harvard Law Review, Estrada came home to New York to clerk for a federal appellate judge, Amalya Kearse, who was appointed by Democratic President Jimmy Carter.

After a clerkship with the Supreme Court—one of the highest honors a young lawyer can receive—Estrada spent three years as a federal prosecutor in New York City. He argued numerous cases before appellate courts and 15 cases before the Supreme Court. No wonder the American Bar Association gave him its highest rating: well-qualified.

Estrada's compelling life story and superlative qualifications explain why his nomination has elicited such broad support. No fewer than 18 Hispanic organizations and countless individuals have called on the Senate to confirm him. Herman Badillo, a former Democratic congressman from New York, calls him ''a role model, not just for Hispanics, but for all immigrants and their children.''

The League of United Latin American Citizens calls Estrada ''one of the rising stars in the Hispanic community and a role model for our youth.'' And the U.S. Hispanic Chamber of Commerce calls his nomination a ''historic event.''

Estrada's nomination is equally popular among Democrats. Former vice President Al Gore's chief of staff testifies that he is ''a person of outstanding character and tremendous intellect'' with an ''incredible record of achievement.'' Former President Bill Clinton's solicitor general describes Estrada as ''a model of professionalism and competence.''

The support for Estrada is as deep as it is wide. Yet some Democrats in the Senate are filibustering his nomination—talking it to death and refusing to let their colleagues vote. That's just wrong. In fact, in the two centuries since our nation was founded, that has never happened to a nominee for the federal appellate courts.

Simply put, the Senate should do its job, put aside partisan politics and vote on Estrada's nomination. It's just common sense—but unfortunately, common sense all too often gets shoved aside by party politics in Washington.

Here in New York, we know that now more than ever we must put aside partisan differences and work together for the best interests of all New Yorkers. We also know that the efforts of new immigrants or their children who, through hard work, achieved the American dream—New Yorkers like Badillo, Secretary of State Powell and Estrada—must be rewarded and emulated, not held hostage to party politics.

Estrada has reached the pinnacle of his profession and is a credit to the people of New York. When the Senate finally confirms him, I have every confidence he likewise will prove a credit to America's judicial system.

[From the Washington Post, Feb. 18, 2003]

JUST VOTE

The Senate has recessed without voting on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit. Because of a Democratic filibuster, it spent much of the week debating Mr. Estrada, and, at least for now, enough Democrats are holding together to prevent the full Senate from acting. The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such materials, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only *because* he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised to substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway-just for good measure. It's long past time to stop these games and vote.

[From the St. Louis Post-Dispatch, Feb. 7, 2003]

A FILIBUSTER IS NOT A FIX

The process for appointing federal judges is badly broken. A filibuster won't fix it.

Democrats are trying to decide whether to filibuster the nomination of Miguel Estrada to the powerful federal appeals court for the District of Columbia. They consider Mr. Estrada a stealth conservative who is being groomed for the U.S. Supreme Court as a Hispanic Clarence Thomas.

The Democrats' fear may turn out to be valid. But the filibuster is the parliamentary equivalent of declaring war. Instead of declaring war, the Democrats should sue for peace and try and to fix the process.

The Senate's confirmation process is not supposed to be a rubber stamp. Judicial nominees have been defeated for political reasons—often good political reasons. The Supreme Court is a better place without Clement Haynsworth, Harrold Carswell and Robert Bork. But ever since Mr. Bork, the process of advise and consent has become attack and delay.

During Bill Clinton's presidency, the GOP-controlled Senate held up highly qualified nominees for ideological reasons. Then, during the two years of Democratic control, the Senate held up highly qualified nominees from President George W. Bush. Now the Republicans are ramming through judges as fast as McDonald's sling burgers.

The only consistent principle in this recent Senate history is that turnabout is fair play. That's a poor way to choose judges.

Mr. Bush, like Ronald Reagan, considers conservative ideology a key qualification for judgeship. Unfortunately, Senate Democrats have set upon highly qualified nominees—such as Michael McConnell, a brilliant law professor, who was eventually confirmed—as wolfishly as they have upon weaker nominees, such as Charles Pickering.

In an ideal world, Mr. Bush would realize that the lackluster Mr. Pickering, a friend of Sen. Trent Lott, R–Miss., raises divisive racial questions. In an ideal world, the president would nominate the best-qualified legal minds, not ideologies.

But in the real world, Mr. Pickering is acceptable and Mr. Estrada is well-qualified. Mr. Estrada is an immigrant from Honduras who went to Harvard Law School, clerked on the Supreme Court and worked in the Solicitor General's office. Democrats, frustrated by the absence of a paper trail, and Mr. Estrada's sometimes-evasive answers on issues such as abortion, tried to get legal memos that Mr. Estrada wrote while in the Solicitor General's office. But both Democratic and Republican solicitors general have urged that the memos be kept private so that future solicitors general receive candid views from their staff.

In short, the Democratic position doesn't justify a filibuster. Instead, Democrats should reach out to Republicans and try to develop a bipartisan truce that gives judges prompt, but thorough, hearings that will speed the important process of filling the many vacancies on the federal bench.

Mr. TALENT. Mr. President, I want to read an editorial from the February 18 issue of the Washington Post. It sums up the case better than or as well as I can:

The Senate has recessed without voting on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit. Because of a Democratic filibuster, it spent much of the week debating Mr. Estrada, and, at least for now, enough Democrats are holding together to prevent the full senate from acting.

We all know a filibuster is underway here, an obstruction tactic.

That is not from the editorial. That was my editorial comment.

The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such material, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only because he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate . . .

I ask you to listen carefully to this. . . . being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised a substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway—just for good measure. It's long past time to stop these games and vote.

I ask my colleagues to consider carefully—and I know there have been abuses of this process on both sides of the aisle—but I ask my colleagues to consider carefully whether, in the name of the Constitution, in the name of the obligation of this Senate to go on to other things and resolve them, in the name of comity and the traditions of this body, the Washington Post isn't right, and whether it isn't long past time to stop these games and vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, first, let me respond to my colleague and friend from the State of Missouri which adjoins my home State of Illinois.

I say to him, I do not disagree with many of the things he said. This debate over Miguel Estrada should not be about the person. I have met him. I sat down in my office with him. He has a very impressive life story to tell having come to the United States as an immigrant when he was about 17 years old, with a limited command of English. The man had some extraordinary achievements. He went on to become the editor of the Law Review at Harvard, served as a member of the Department of Justice, worked at the Supreme Court as a clerk. He is with a major, prestigious law firm. You would really be hard pressed to find anything in his background that is anything short of impressive. That is not the issue.

The fact that he is Hispanic, I say to my friend from Missouri, in my mind, is a plus in many respects. It certainly is not a minus. I was honored to name a Hispanic to the district court in Chicago when I had that opportunity a few years ago. I believe our judiciary should reflect the diversity of the United States. And if this is an example of affirmative action by the White House to put a Hispanic on the DC Circuit court, I say: Three cheers. I think it is the right thing to do.

It has nothing to do with his Hispanic heritage. As I said, that is a plus. There is nothing negative about that in any respect. What is at issue, and the reason the Senate has been tied up with this nomination, is the fact that Mr. Estrada has not been forthright in explaining who he is in terms of what he believes. And that is a fair question.

If we are going to give someone a lifetime appointment to the DC Circuit court—which is not just another court for the District of Columbia, but a major court in our Federal judicial system—I think it is not only reasonable, it is imperative that the Senate ask basic questions of Mr. Estrada. And we did. Time and time again, he stopped short of answering because that is now the drill at the Department of Justice.

The nominees go through this very rigorous training about how to handle a Senate judicial hearing. I am told they have videotapes and play them back and they ask them the questions most often asked of nominees. They school them in the answers to give to not reveal, at any point, what they really think, trying to get away with saying as little as possible, trying to get through the hearing with a smile on their face and their family behind them, and trying to get through the Senate without any controversy.

There is nothing wrong with that if a person has a history that you can turn to and say, well, this man or this woman has been on the bench for so many years and has handed down so many opinions. And we have read them. We know what they believe. They have expressed themselves over and over again. Or if they have published law journal articles, for example, that explain their point of view, that is all there for the record. You could draw your own conclusions.

But in the case of Mr. Estrada, none of that is there. He has not done that much in terms of publications nor involvement in cases. We said to him: Help us understand you. If you will not answer the question directly, let us at least look at the legal documents you prepared so we can see how you analyzed the law.

That has been done before. Other nominees have offered that information. Mr. Estrada said: I would be happy to share it with you as well. But the Department of Justice stepped in and the White House stepped in and said: No, we will not let the Senate see what Mr. Estrada has written as an attorney.

Why? Why would they want to conceal this information, unless, in fact, there is something very controversial and worrisome.

So we come here today not with any personal animus against Miguel Estrada. To the contrary, on a personal basis, he is a very extraordinary individual personally, academically, and professionally. But we have a right to ask these questions. Let me restate that. We have a responsibility to ask those questions, to make certain that each man and woman headed for this awesome lifetime appointment, this awesome position of responsibility, really is the person we want in that position.

Now, make no mistake, with President Bush in the White House, the nominees are more than likely to be Republican, more than likely to be conservative, more than likely to be members—proud members—of the Federalist Society. I know that. That is the nature of this process, the nature of politics. Yet it is still our responsibility to make certain they are just conservative and not extreme in their positions. We cannot draw that conclusion on Miguel Estrada because he has carefully concealed what he really believes. And that is why we are here.

So as a result of focusing on this nomination for 3 straight weeks, we have ignored so many other issues that should be brought to the Senate. We could resolve this issue tomorrow morning easily.

Senator BENNETT, a Republican, of Utah has come to the floor and made a suggestion that I think is eminently reasonable. Let Miguel Estrada turn over his legal writings so they can be reviewed by Senator HATCH and Senator LEAHY. And if they find anything in there of moment, of consequence, or of controversy, let them follow through with the questions or, if necessary, a hearing, and let's be done with it, a vote up or down.

Senator DASCHLE came to the floor today, the Democratic leader, and said that would be perfectly acceptable. We would have the information, and then we could reach our conclusion. And in the process we could be protecting our responsibility as Members of the Senate.

It has nothing to do with Miguel Estrada personally, but it does have something to do with our constitutional authority and responsibility to review each nominee.

EPHEDRA

Mr. President, I would also like to address another issue that is totally unrelated.

On February 14, a Friday, I stood in this spot and spoke about an issue, one that has been on my mind for almost 6 months, an issue which worries me, concerns me, because it relates to the health and safety of American families.

On that day, I challenged the Secretary of Health and Human Services, Tommy Thompson, under his authority to protect American families, to protect them against a nutritional supplement known as ephedra. You will find this supplement in a lot of diet pills, pills that are being sold over the counter as a supplement or vitamin or food product. They are sold as a way to lose weight or increase your energy or performance.

People come in and buy them, with no restriction on how old you have to be or what your health is or what might interact with these supplements. And people buy those and find out, in many instances, that not only don't they work, they are dangerous.

I have challenged Secretary Thompson for 6 months—6 months—to take these dangerous products off the market, and he has not done so. That was February 14.

On February 16, a pitcher from the Baltimore Orioles dropped dead during training. He had cardiac arrest, and the coroner who examined his body afterwards—those who did the autopsy—disclosed the fact that he had used these supplements with ephedra. That was 2 days after I had given that speech.

Time has run out for Steve Bechler and for many like him when it comes to protection from the harm of dangerous dietary supplements containing ephedra. We cannot bring Steve Bechler or my own constituent in Lincoln, IL, Sean Riggins, back. But we can fight to make sure this dangerous product is taken off the market immediately.

Sean Riggins was a 16-year-old boy. And about 4 weeks after I held a hearing in Washington, he went into a convenience store in Lincoln, IL, a small town, and bought—off the counter, with no identification, no check—a pill that was supposed to help him to perform better as a football player. The pill had ephedra in it. As best we can determine, Sean Riggins—this healthy football player, 16 years old—washed down that pill with Mountain Dew or some other product with caffeine in it and went into cardiac arrest and died. This healthy young man died, after taking a pill sold over the counter that contained ephedra.

I cannot think of another product that has generated so many adverse events, so many bad results—some extremely serious, even fatal—and yet has failed to generate any response from this Government to protect families and individuals buying these products.

The Food and Drug Administration has received over 18,000 reports of adverse events, serious health consequences, from those using ephedra and within those 18,000 over 100 deaths. Yet the Food and Drug Administration and Secretary Thompson refuse to act. They want to study the issue. And as they study, innocent people die.

Last August, I wrote to Secretary Thompson and urged him to ban these products. At that time, Lee Smith, an airline pilot from Nevada, had not yet suffered the debilitating stroke that cost him his health and his job due to ephedra.

I again wrote to Secretary Thompson on August 22. At that time, when I sent him a letter begging him to do something about these products, my constituent, Sean Riggins—that healthy 16-year-old boy in Lincoln, IL, who played football and wrestled for his high school team—was still alive. He died September 3, after consuming an ephedra product called yellow jacket. You will find those by cash registers at gas stations and convenience stores across America—kids popping them because they think they make them better performers when it comes to sports or, even worse, taking these pills and drinking beer, craziness that leads to terrible health consequences. And those pills are sold over the counter, with no Government control.

I wrote again, and I spoke directly to Secretary Tommy Thompson in September and October. My Governmental Affairs Subcommittee had hearings on the dangers of ephedra in July and October.

I again urged the Secretary, in a letter sent to him less than 1 month before Steve Bechler of the Baltimore Orioles died. Incidentally, did you see the followup articles in the sports pages, as other athletes, professional baseball players such as David Wells came forward and told his story about how he wanted to lose some weight, and he took an ephedra product and his heart was racing at 200 beats a minute. He flat-lined. He was almost in cardiac arrest before they finally brought him back.

These are not sickly individuals. These are healthy athletes who are taking these products sold over the counter and risking their lives in the process.

Yet the most we can get from Secretary Thompson in response is a suggestion that maybe we need a warning label. When the reporters asked him this past weekend about Steve Bechler of the Baltimore Orioles, his death because of ephedra, the Secretary was quoted as saying: ''I wouldn't use it, would you?''

Well, I must say to the Secretary, this is not a matter of his personal preference. It is not a matter of whether as a consumer he would buy the product. It is a matter of his personal responsibility, his responsibility as Secretary of Health and Human Services to get this dangerous product off the shelves of American stores today and to protect families.

I am not the only person calling for this ban on ephedra products. The American Medical Association, representing over 200,000 doctors, called on Secretary Thompson to ban ephedra products. They didn't do it last week after Steve Bechler died. No. They did it over a year ago after Canada had banned this product for sale in their country. They went to Secretary Thompson and said it is dangerous to sell in the United States. He has done nothing.

Let me tell you another thing you might not know. The U.S. Army has banned the sale of ephedra in their commissaries worldwide after 33

ephedra-related deaths occurred among American servicemen. Does this make any sense? We believe as a government that we need to protect the men and women in uniform and so we ban the sale of these products at commissaries across the world, and yet the Secretary of Health and Human Services and the Commissioner of the Food and Drug Administration will not ban the sale of these products in convenience stores and drugstores and gas stations across America.

When you ask him about it, the Secretary says: I am studying it. I have a group called the RAND Commission that is going to study it.

With all due respect, we don't need another study. The Food and Drug Administration has received over 18,000 adverse reports about ephedra. The FDA could do followup on the most serious ones. In fact, the FDA did commission a review of adverse reports several years ago. That review by Drs. Haller and Benowitz established that 31 percent of the reports were definitely or probably related to ephedra and an additional 31 were deemed to be possibly related.

We understand what we are up against. Ephedra is a danger. It is so dangerous that when it was used in its synthetic form with caffeine, that was banned over 15 years ago. They said you couldn't sell a drug in America, nor could you sell an over-the-counter drug product in America that contained ephedra and caffeine because, put together, it is a dangerous and sometimes lethal combination. But yet if you step back from the over-the-counter drugs and call it a nutrition supplement, a vitamin, a food, you are totally exempt from that prohibition. You can combine those two lethal substances, ephedra and caffeine, and sell them with impunity. Does that make any sense? Is that protecting consumers across America? Is that what you expect from your government?

Certainly it is not what I expect. Many of these companies say it is a natural product. Ephedra is naturally occurring. That is no defense. Arsenic is a natural product. Hemlock is a natural product. That doesn't mean that they are safe. In fact, they are dangerous.

We have seen a lot of studies that have come out about ephedra. We know what needs to be done. Many States have already taken action. Because the Federal Government has failed to act, over 20 States have enacted restrictions on the sale of ephedra-containing products.

Incidentally, if you think these products are something you have never heard of, the leading sales of ephedra products are under the brand name Metabolife 365. You have seen them advertised on television and in magazines. Every time you walk into a drugstore and convenience store, you find: Metabolife tablets help you lose weight. Look carefully. Many of them contain ephedra, this lethal drug which has killed so many people.

Suffolk County, a week or so ago in New York, decided to ban this product as well after a 20-year-old named Peter Schlendorf died in 1996, and others suffered serious consequences. They understood, as the U.S. Army, Canada, Britain, Australia, and Germany, that action had to be taken to protect the residents. The National Football League, the NCAA, and the International Olympic Commission have reached the same conclusion, banning the use of this product by athletes.

I wrote to the Baseball Commissioner, Bud Selig, last week and to the Baseball Players' Association urging them to follow suit. The question isn't whether these individual organizations will show responsibility. The question is whether this Government will accept its responsibility.

I don't know Secretary Thompson that well. I have met him a few times. He is a very likable person. He certainly has had a distinguished public career in the State of Wisconsin, serving as a legislator and Governor of the State for many years, one of the most popular elected officials in its history. Everyone tells me this man really understands public service. I believe it.

This really seems to be a blind spot. When I talked to Secretary Thompson on the phone about these products, he said: How are we going to stop these fellows from selling these products and endangering people? I said: Mr. Secretary, you can stop them. You have the authority to stop them.

Time passes and nothing happens. I understand this industry is powerful. I have heard from them. I have heard from my colleagues in the Senate and House who have said: Don't take on these folks in the vitamin and nutritional supplement industry. They really have a lot of political clout. They do. But for goodness' sakes, if you can't stand up to an industry that is selling a lethal product to protect American families, why in the world would you take the oath of office to serve in the Senate? I think every Member understands that responsibility. It goes beyond political fear. It goes right to the heart of your political responsibility, the oath of office we all take and one we all value so much.

In closing, I say to Secretary Thompson, you have another chance now. It is a chance which I pray you will take. The last time I made a speech on the floor of the Senate about this issue, Steve Bechler of the Baltimore Orioles, a man in his early twenties, a promising athlete with a great future ahead of him, was still alive. Sadly, he is not alive today. He took this product and he died as a result. Others will, too.

That story, that tragic story of Steve Bechler, Sean Riggins, and so many others will be repeated over and over again. This industry may have political clout, but it does not have a conscience. It is up to the Secretary, as head of the Health and Human Services Department, to accept his responsibility to protect American families. A warning label is not enough. You cannot get by with putting a label on this product, saying: Caution, use of this product may cause stroke, a coronary event, or death. Why in the world would you allow such a product to be sold over the counter, unregulated in terms of the age of the buyer, unregulated in terms of the dosage? How in the world can you justify that kind of a thing?

The Secretary needs to accept his responsibility, and if he does, I will be the first to applaud him. But until he does, stay tuned. You will continue to hear these speeches on the floor from me and others while helpless victims across America fall because of their consumption of this deadly product.

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

Mr. DURBIN. I am happy to yield.

Mr. REID. As the Senator knows, the Senate has been tied up in the matter of Miguel Estrada for 9 or 10 days. From what the Senator said, I don't know much about the product, but he has made a very persuasive argument. It seems to me if the administration and the Secretary, as part of the administration, refuses to do anything administratively, maybe we could well use some Senate time debating this issue. Maybe there should be a moratorium put on the sale of this until further information is obtained on it. I make that suggestion.

My direct question, if the Secretary refuses to do something forthwith, wouldn't we well use the time that is now being spent on this nomination talking about this product that has killed people as the Senator has related?

Mr. DURBIN. The Senator is absolutely right. In fact, we not only could, we should. We should accept that responsibility. We do have this Government which has three coequal branches. If the executive branch and Secretary Thompson refuses to use the authority he has under the law, frankly, I think we should ban the sale of this product in the U.S.

As the Senator knows, we have been tied up for 3 weeks because Miguel Estrada refuses to disclose legal writings he has made. Even Republican Senators have suggested that he should.

We have waited for Republicans to understand that with more information, we can put this behind us and move on to other important business—not just questions about health and safety, but questions about the economy of this Nation, issues on which we ought to be debating and acting.

In closing, I am just going to ask Secretary Thompson again to take this very seriously. I hope we don't have to read about more athletes and other unsuspecting individuals and children who lose their lives as a result of these dangerous products. I say to any citizens following this debate, please think twice before you use a product containing ephedra. There are too many

cases of death and serious health consequences for people who thought they were taking an innocent little pill that can be sold over the counter at a convenience store. In fact, many have turned out to be lethal doses that have killed or caused a great deal of harm.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. NELSON of Florida. Mr. President, the courts provide the foundation upon which the institutions of government in our free society are built. Their strength and legitimacy are derived from a long tradition of Federal judges whose knowledge, integrity and impartiality are beyond reproach.

The Senate is obligated by the Constitution—and the public interest—to protect this legacy and to ensure that the public's confidence in the court system is justified and continues for many years to come.

As guardians of this trust we must carefully scrutinize the credentials and qualifications of every man and woman nominated by the President to serve on the Federal bench.

The men and women we approve for these lifetime appointments make important decisions each and every day, which impact the American people. Once on the bench they may be called upon to consider the extent of our right to personal privacy, our right to free speech, or even a criminal defendant's right to counsel. The importance of these positions and their influence must not be dismissed.

We all have benefitted from listening to the debate about Miguel Estrada's qualifications to serve on the D.C. Circuit.

I very much respect those Senators who desire to have additional information about Mr. Estrada's personal beliefs. Their efforts reflect a sound commitment to the Senate's constitutional obligation to advise and consent.

At the same time, I am troubled by those who have suggested that some Senators are anti-Hispanic because they seek additional information about this nominee. Poisoning the debate with baseless accusations demeans the nomination process.

After reviewing Mr. Estrada's personal and professional credentials—including personally interviewing the nominee—I believe he is qualified to serve on the D.C. Circuit Court—and, I will vote in favor of his nomination.

A Federal appellate judge's power to decide and pronounce judgment and carry it into effect is immense and comes with a moral and legal obligation to conform to the highest standards of conduct.

Federal judges must possess a high degree of knowledge of established legal principles and procedures and must also be impartial, even tempered and have a well-defined sense of justice, compassion and fair play.

In addition, a judge must have the integrity to leave legislating to lawmakers. Judges must have the self-restraint to avoid injecting their own personal views or ideas that may be inconsistent with existing decisional or statutory law.

I believe Mr. Estrada possesses the knowledge and skills needed to be a successful court of appeals judge. Few would argue with his academic credentials, litigation experience or intelligence.

And based on my conversation with him, and those who know him well, I believe he respects—and will honor—his moral and legal obligation to uphold the law impartially.

However, should Mr. Estrada someday be considered for a position on the Supreme Court—as some have suggested he could be—I believe further inquiry not only will be justified, but necessary.

While appellate judges are constrained to a great degree by precedent, and by a check on their power by the Supreme Court, justices on the High Court have greater latitude to insert their own ideological viewpoints.

Mr. Estrada agreed wholeheartedly with this point when we discussed his nomination.

Make no mistake; I believe all judicial nominees should be completely forthcoming during the confirmation process.

Mr. Estrada has argued that he's satisfied a minimum threshold of disclosure, and that revealing additional information about his personal ideological beliefs may compromise his image of impartiality—if he eventually is seated on the federal bench.

I disagree with his approach, because it leads to the suspicion and mistrust—like that which now engulfs us.

Furthermore, I do not believe a similar argument reasonably can be made by a nominee to the Supreme Court. Ideology can be central to the High Court's decisions. As a result, absolute disclosure by Supreme Court nominees is necessary to protect the public interest.

In sum, while I believe Mr. Estrada could have been more forthcoming in order to avoid this controversy, my conclusion is that he is qualified to serve on the D.C. Circuit.

Should he come before the Senate as a nominee to the Supreme Court, he must be willing to provide additional information about his personal beliefs.

LEGISLATIVE SESSION

Mr. TALENT. Mr. President, I ask unanimous consent that the Senate return to legislative session.

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

MORNING BUSINESS

Mr. TALENT. Mr. President, I ask unanimous consent that the Senate proceed to a period for morning business.

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

HONORING MAJOR GENERAL PHILIP G. KILLEY FOR 40 YEARS OF SERVICE

Mr. DASCHLE. Mr. President, today I salute a great American and South Dakotan, Major General Philip G. Killey.

General Killey, currently the Adjutant General of the South Dakota National Guard, retires at the end of this week, after 40 years of service. His service includes nearly a quarter-century with the South Dakota National Guard, including two separate appointments as Adjutant General covering more than 6 years.

Since September 11, 2001, General Killey's job has become more demanding and complex, but, as ever through his career, he has proven worthy of the challenge. Since September 11, his troops have been performing a broad variety of missions, from bolstering security at our State's airports to enforcing the no-fly zone over Iraq, from fighting forest fires to keeping the peace in Bosnia. All this, while also staying trained and ready for their next assignment.

Now, that next assignment is here. About 1,200 South Dakota Guard personnel have been called to active duty as part of our Nation's buildup on the borders of Iraq. Given the small population of our State, this is a major contribution. In fact, on a per capita basis, South Dakota is contributing more Guard personnel than all but five other States. This is a much larger commitment than the South Dakota Guard was asked to provide during Desert Storm, its other major call-up of the post-Cold War period, and it has come at a time when General Killey is already managing other high-priority commitments.

Managing these tasks and the Iraq call-up turns out to be the capstone event of General Killey's long military career, and it stands as a real testament to his skill and leadership. It is at critical moments like this, when your resources are stretched thin and you are asked to do even more, that gaps in training, leadership or equipment will reveal themselves. But in South Dakota, General Killey's troops have met the test. They are ready, and it shows.

Over the years, General Killey and I have worked together on many fronts to improve the equipment and facilities of the Guard. In the past 2 years, we have been able to secure nearly $35 million in construction funds to improve 7 Guard facilities at Camp Rapid, Fort Meade, Pierre, Watertown, Mitchell, and Sioux Falls. We were able to

John Warner, Chuck Grassley, Lincoln Chafee, and Olmypia Snowe.

Mr. FRIST. I will be very brief, but I will quote four paragraphs from this letter which does demonstrate the majority support of Senators for this nominee. The letter itself is dated February 25, 2003. The letter is to the President of the United States.

First paragraph:

Dear Mr. President, we write to express the strong, majority support in the United States Senate for Miguel Estrada, your nominee to the United States Court of Appeals to the District of Columbia Circuit.

The second paragraph reads:

Mr. Estrada's professional accomplishments and personal achievement are truly impressive. He graduated magna cum laude from both Columbia College, where he was elected to Phi Beta Kappa, and Harvard Law School, where he served as an editor of the Harvard Law Review. He clerked on the Second Circuit Court of Appeals and the Supreme Court of the United States. Miguel Estrada served with distinction as an assistant U.S. attorney in the prestigious Southern District of New York, rising to Deputy Chief of the Appellate section, and in the Solicitor General's Office during both Republican and Democrat Administrations, where he argued fifteen cases before the Supreme Court.

It is no wonder Mr. Estrada received a rare, unanimous rating of ''well qualified'' from the American Bar Association, what many of our colleagues called the coveted ''Gold Standard.''

Mr. Estrada's professional successes are even more remarkable in light of his compelling personal story. After emigrating from Honduras at the age of seventeen, he reached the pinnacle of his profession by overcoming a speech impediment and mastering a second language. These are daunting challenges for anyone; they are particularly impressive when one's profession is the practice of oral advocacy before the nation's highest Court.

Mr. President, the last paragraph before the pages of the signators of a majority of people in this body, 52 Senators, reads:

Despite his obvious qualifications and remarkable personal story, we have been unable to obtain fair consideration on the Senate floor for Mr. Estrada's nomination. Nevertheless, we, the undersigned majority in the United States Senate, commend you for your outstanding choice, and will continue to work diligently to ensure Mr. Estrada receives a simple up or down vote on the Senate floor.

Again, there are 4 pages of signatures. The first page is signed by Senators MITCH MCCONNELL and ZELL MILLER, followed by 50 signatures, which is now in the RECORD.

We will have a full day today. I look forward to continuing the discussions as we go forward.

RESERVATION OF LEADER TIME

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

EXECUTIVE SESSION

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

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

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

The PRESIDING OFFICER. The Senator from Nevada.

ORDER FOR RECESS

Mr. REID. Before the majority leader leaves the floor on a matter regarding what we are going to do this afternoon, at 2:30 today it is my understanding the Secretary of Defense will be here to brief Senators. I think it would be in everyone's interest if we had at least an hour recess during the time the Secretary is here.

Mr. FRIST. Mr. President, given the circumstances surrounding and leading to the discussion today at 2:30, that would be satisfactory on our part.

We will likely be in session late this afternoon, into the evening, because there are a number of issues we do want to address. It is appropriate to be in recess from 2:30 to 3:30 today.

Mr. REID. I ask unanimous consent that that be in order.

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

The Senator from Nevada.

Mr. REID. Mr. President, Senator HATCH is in the Chamber, as well as Senator DORGAN, who has been trying to speak for 2 days now. It is obvious there are not enough votes, as indicated by the letter sent to the President. The fact is that there are three ways to dispose of Estrada: No. 1, pull the nomination so we can go to other issues that affect this country, such as the economy, such as have a discussion relating to the global warming document that came out today indicating there certainly needs to be a lot more done regarding global warming. It certainly is time we should be talking about the education of our children. Yesterday, the Democratic leader offered an economic stimulus plan. We wanted to bring that to the floor. So the nomination should be pulled for those other reasons.

If that is not the case, then there is another way of disposing of this matter perhaps—by having the majority file a cloture motion. That failing, it seems to me they should meet our request to have him honestly—I should not say honestly—thoroughly answer questions that have been propounded to him; and, secondly, submit the memos to this body, at least to the Judiciary Committee, so they can review the memos he wrote while he was Solicitor General.

That failing, we can stay in tonight and tomorrow night, whatever the leader decides to do, but as I have indicated before, now that the majority has changed, the majority has to preside and we will have people to protect our interests on the floor, so that is certainly no punishment to us.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have been interested in the approach by the other side. Yesterday, they came on the floor and said, oh, my goodness, we should get rid of this because we have so many important issues to take care of. There is one way to get it rid of it, and that is to let the people's representatives in the Senate vote. That is what the Washington Post said: Just vote. Vote up or down.

The real reason they are not allowing a vote—because, as we can see from the letter, we have at least 52 votes and there have been at least 3 other Senators on the minority side who have said they are going to vote for Mr. Estrada. So there are at least 55 votes for Mr. Estrada, and I believe there will be others votes as well.

It is one thing to support your party and to stand in an intractable way against the first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia. It is another thing to come on the floor and say we are not going about the people's business because we are dealing with this incidental judicial nomination. Well, it is not incidental. It is one of the most important nominations in the country.

This is a man who really deserves to be on the Circuit Court of Appeals for the District of Columbia. This is a man who has every credential and has not had a glove laid on him. That is why the fishing expedition request into privileged matters. They want to get his recommendations, or I suppose in the future anybody's recommendations, especially Republicans who might have worked in the Solicitor General's Office, on appeals, on certiorari petitions, and on amicus curiae matters. Those have never been given to anybody. Those are the crucial documents upon which the Solicitor General, the people's attorney, makes decisions as to where to go and what to do. There is only one reason they would like to get these privileged documents, and that is they are on a fishing expedition because they have not been able to find anything to hang on Miguel Estrada yet, other than these phony accusations that he has not answered the questions.

My gosh, the hearing transcript is that thick; the briefs he has filed and the answers in the testimony before the Supreme Court, two volumes, that thick. They have more materials on Mr. Estrada to know what he is and what he is about than almost any judicial nominee, other than the Supreme Court, who has been nominated in the whole 27 years I have been in the Senate. I think my colleagues can take it

from me because I have been involved in every one of these nominations. As chairman, now twice, I can say there has very seldom been anybody as scrutinized as Mr. Estrada. And since there is still nothing they can point to that is a good reason for keeping him out of this position, what one has to conclude is the reason they are doing this—well, I will leave that up to the American people, and I will leave it up to the people in the Hispanic community. My personal conclusion is that they do not like having a Republican, Hispanic, conservative who thinks for himself as an independent thinker.

Mr. DURBIN. Will the Senator yield?

Mr. HATCH. Not yet. I will make a statement first before I yield for a question. I will do that later, however. I have been very good about yielding, so I hope my colleague does not feel badly about my decision to make my statement first.

I cannot believe the arguments that have been used in this matter, and I cannot believe my colleagues on the other side, with their feet in concrete, cannot understand why this is such an important nomination.

The fact is this fellow is immensely qualified. I have had countless people tell me that, in addition to my own studies, and I have had a lot of Democrats say he is really qualified—but.

''But'' what? These phony accusations that he has not answered questions? Come on. The Democrats conducted the hearings. They controlled the process. They could have kept the hearings going for days. It would have been very unusual for them to do that, but they could have. The hearings were conducted by Senator SCHUMER. Every Democrat had a chance to come and ask questions. After the hearings were over, they had an opportunity to present written questions to him. Guess how many of those nine Democrats offered written questions. Only two of them.

I will say, the distinguished Senator from Illinois has tried to get to the bottom of what he is concerned about in Federal judgeships. I commend him for it. He wrote questions, and he got answers. Senator KENNEDY, who takes a very active role on the committee, wrote questions, and he got answers. Where were the rest of them? Why all the complaining now, 2 years later? Are we going to make every circuit court of appeals judge wait 2 years?

Actually, we are finding a slowdown in the Federal judiciary like I have never seen before, except for district court nominees about whom they do not seem to worry too much. If they are qualified, district court nominees are the trial court nominees. Circuit court nominees should be qualified, too, and this one—I would not say overly qualified, but not many people can match his qualifications in this whole society today—here, in the 10th or 11th day of debate, he is being treated very shabbily.

We are in the middle of a filibuster, no matter what anyone says. That is exactly what it is. I noted my friend from New York, Senator SCHUMER, said on Sunday this is not a filibuster. If it is not, I don't know what it is. And, frankly, I know a lot about filibusters, having led one of the most important filibusters in history on labor law reform in 1978 that lasted at least a month. It was very tough, mean, miserable, and in some ways tremendously difficult.

My colleague, the distinguished ranking member on the committee, on June 18, 1998, said: ''I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported.''

So I suppose the distinguished Senator from Vermont will be another vote for Mr. Estrada, if he really meant what he said. Knowing him, I am sure he did mean what he said. So that would get us up to 56 votes right there. He also said: ''I do not want to get to having to invoke cloture on judicial nominations. I think it is a bad precedent.''

Boy, I sure agree with that. I spent 6 years during the Clinton years when a lot of liberal judges were put up, who were qualified, arguing with some on our side, a relative few, but some who believed we should filibuster those judges. I said: No way. We can't get into filibustering of judges. It diminishes the power of the administration, the executive office, the executive branch of Government, which is supposed to be coequal with the legislative branch. But in addition to diminishing the power of the executive branch, it diminishes the power of the judiciary with regard to its coequality with the executive branch, so both would be diminished while the executive branch was augmented and made superior over both of those branches.

Why? Because a filibuster means that from here on in, with every nominee who may be ''controversial,'' you are going to have to have a supermajority of 60 votes. Or will you? If the Democrats have their way, that is how it will be. And it will be both ways. There will not be any more well-known liberals or well-known conservatives, as great as many in the past have been, on the courts of this country; there will be people who do not have a paper trail, do not have any opinions, on whom you do not know what is going on in their minds. They will be the only ones who can get through for the circuit court of appeals positions or the Supreme Court. That would be indeed a tragedy for this country.

What we get when we elect a President is a person who picks the judges in this country. The Senate's obligation is to vote on those judges. If you do not like what you see, you vote no. If you like what you see, you vote aye. But they get a vote on the Senate floor. That is not what is happening here.

If press reports are to be believed, some Senators are contemplating a dramatic change to the Senate's treatment of the President's judicial nominees. A new requirement: The nominees to the Nation's courts must receive at least 60 votes in order to be confirmed. Since our friends on the other side are filibustering Mr. Estrada's nomination to the Circuit Court of Appeals for the District of Columbia, and if the filibuster results in the nomination being rejected, Democrats will have forced a permanent change in the political and constitutional landscape, a very dangerous and bad change.

Mr. DURBIN. Will the Senator yield?

Mr. HATCH. I am happy to.

Mr. DURBIN. I will only ask one question and would like the Senator's response.

I think there has been a very constructive and valuable suggestion by one of your colleagues, Senator BENNETT of Utah, who came to the floor last week and suggested, to end this impasse, that we can finally bring this matter to a vote on Mr. Estrada simply by producing the controversial documents to be reviewed by you and Senator LEAHY, and if a decision is made by either of you that there is something worth pursuing by way of written questions or further hearing, then we can bring this to closure.

I asked Senator DASCHLE on the floor yesterday, would this be a good end game for the Estrada issue? He said it was acceptable to him. So I ask the Senator from Utah if he would entertain the suggestion of his colleague, Senator BENNETT, to produce these work documents that reflect on Mr. Estrada's philosophy, for you, personally, for Senator LEAHY personally, and followup, if necessary, so that we can finally move on to important issues that we should be considering on the Senate floor?

Mr. HATCH. That is a good question. I have to say, no administration worth their salt, no executive branch of government worth any constitutional knowledge, would give up those papers, even to people they trust, such as Senator LEAHY and myself. The reason is they have to maintain the dignity of that Solicitor General's Office. They have to maintain the discipline of that office. They have to maintain the privileged nature of those documents. If those documents are disclosed, that means they will have to be disclosed henceforth forever in every case where a person has worked in the Solicitor General's office. It would demean the office and diminish the ability to get forthright and accurate information, and it would impinge upon the work of the Solicitor General.

The only reason those letters were written requesting those documents is that they knew this would constitute a red herring. The only thing they have to argue against Miguel Estrada is a red herring, so they can say: We cannot vote for him because we cannot get these documents. Which is right, they cannot get them. No self-respecting administration would give them.

Mr. DURBIN. One last question. The chairman suggested it would be unprecedented to produce these documents. But is the chairman not aware of the fact that similar documents were produced when William Rehnquist was being nominated to the Chief Justice of the Supreme Court, when Robert Bork's nomination came before the Senate, Benjamin Civiletti, and several other cases?

This is not unprecedented and has happened before. To suggest this administration would be breaking new ground—would the Senator from Utah concede that other administrations, Republican administrations, and Democrat, have disclosed this kind of information? We are suggesting, through Senator BENNETT, a limited disclosure to you and Senator LEAHY—

Mr. HATCH. The Senator is again mistaken. He is absolutely wrong, totally inaccurate.

The fact is the request was for his recommendation on his appeal recommendations, his certiorari recommendations, his amicus curiae recommendations. Those have never ever been given to anybody up here on Capitol Hill. And they shouldn't be given to anybody. Those are the most crucial recommendations the Solicitor General gets and relies upon.

There are some cases where documents for appeal, certiorari, amicus curiae documents, were leaked to Democrat Senators in the past, and there were one or two cases where there were allegations of criminal behavior, or potential criminal behavior, where very selected documents were produced. But there has never, ever been a production of internal, privileged recommendations for appeals, certiorari, and amicus curiae. Again, the Senator is mistaken. I hesitate to point that out, but it is something that has to be pointed out.

I believe with all my heart that my friends on the other side know that. So this is a phony issue they have raised. Here is a man who has the highest rating of the American Bar Association, given by a majority of Democrats who have supported financially other Democrats, and yet they found him worthy of the highest rating of the American Bar Association. I know my colleagues do not like that, even though many of them said he deserves it, he is that good, but we are going to vote against cloture anyway—because we are Democrats, I guess.

Is that really the reason? What is the reason there is a double standard with regard to Miguel Estrada? Is it because we are Democrats? I hope not. Is it because we are liberals? You got that one right. Is it because he is an independent thinker? You have that one right. Is it because he just does not toe the line of the Democratic Party? You got that right. Is it because he is a Republican Hispanic? You got that right. Is it because he is a Republican Hispanic who may be conservative? You bet. Is it because he is a Republican Hispanic who may be conservative who might even be pro-life? I don't know what he is that way, but that is surely part of it.

In other words, it is a double standard, even though we did not take that standard on our side. There were some who wanted to, I admit that. But I didn't take that standard in approving 377 Clinton judges, the second all-time record of judicial confirmations in the history of the Presidency, second only to Ronald Reagan, who had 6 years of a Republican Senate to help him, where President Clinton had only 2 years of a Democrat Senate to help him.

Think about it. What do you conclude is the reason they are fighting this? Because they found something wrong with Miguel Estrada? Show me what it is. Because of this red herring issue—and they know it is a red herring issue—that they know is improper to even ask for?

But counting on their friends in the media to ignore the seven former Solicitors General, four of whom are Democrat, leading liberal Democrat Solicitors General who say those papers should never be given to the legislative branch—it would upset and ruin the work of the Solicitor General of the United States; he is the people's attorney. That is the only thing they have. Yet they are filibustering this man, this Hispanic, this first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia, and one of the few ever nominated to the circuit courts of appeals in this country. It is amazing to me.

What really louses this up for them, as far as I am concerned, is their claim that he does not have any judicial experience; therefore, he should not have this position. That is condemning every Hispanic lawyer to never be a Federal court judge, by and large, because hardly any of them have judicial experience. The only way they get it is by rising in the profession, like Miguel Estrada, reaching the top of the profession, and getting nominated by a President of the United States.

It is a tough road for Hispanics. Here is one who has made it, and my colleagues on the other side are standing in his way, blocking his path, taking away his future. He is the embodiment of the American dream, and they are taking away his future as a judge. I suppose part of it also is to discourage conservative Hispanics, conservatives of other minorities, from wanting to be judges if they are Republicans because it is not worth going through this kind of a battle.

I chatted with Miguel Estrada yesterday. Miguel Estrada said it is worth going through this battle. He will do a great job on that court. He will do it in the best interests of the American people, regardless of ideology. That is basically what he said in answers to these questions that were raised by Democrats. He basically said he would follow the law as he always has as a top-flight attorney.

Now, are we going to have to have 60 votes to confirm ''controversial'' nominees? If his nomination is rejected by a filibuster, then Democrats will have forced a permanent change in the political and constitutional landscape.

Never again could any future President—or even this President—fairly expect a judicial nominee, whose nomination reaches the Senate floor, to receive an up-or-down vote. And never again would the Senate minority party fear that blocking of a judicial nominee by partisan filibuster, or 41 votes, was unprecedented.

If the Estrada nomination is permanently blocked by filibuster, the political baseline shifts forever. What is sauce for the goose is going to be sauce for the gander. And I think it is terrible. I am doing everything in my power to fight against that. It is even bigger than this nomination, as important as this nomination is, because it could taint the Federal judiciary henceforth and forever because of partisan politics on the Democrat side.

To understand just how stunningly extraordinary this state of affairs is, one needs to examine the Senate's record of confirming judicial nominations.

The first filibuster of a judicial nominee that resulted in a cloture vote was in 1968. In other words, in all the history of this country, that was the first filibuster, in 1968. Since then, the Senate has confirmed approximately 1,600 judicial nominations—since 1968. That filibuster was on the Fortas nomination. Since then, they have confirmed approximately 1,600 judicial nominations, and the vast majority—nearly 1,500—of them without even a rollcall vote, as most are confirmed by unanimous consent.

Indeed, of those some 1,600 judicial nominations confirmed by the Senate since 1968, only 14 even underwent a cloture vote. And with the exception of the bipartisan 1968 filibuster of Abe Fortas's nomination to be Chief Justice of the United States, the Senate has never—let me repeat that—has never blocked by filibuster a judicial nominee to any court in this land—never; never—until this, I think, ill-fated, hopefully, attempt on the part of some of our colleagues on the other side.

I am just wondering why some of my strong colleagues are being led like lambs to the slaughter in this matter without standing up and saying: Hey, enough is enough. We have made our point. We have roughed this guy up. We made it clear to him that, ''you had better behave yourself on the court or you will never be on the Supreme Court.'' That is part of this, I know. That may be a legitimate part as far as I am concerned. They have a right to rough anybody up, I suppose, although I question the propriety of it from time to time.

What follows is an account of all past debates over judicial nominees which

required cloture votes. The history establishes a consistent, bipartisan resistance to taking the step that some Democrats are really doing right now.

Let me talk about the bipartisan Fortas filibuster because, indeed, that was a bipartisan filibuster. It was not just one side, as it is here. But I decry that. That filibuster should not have occurred either.

Judicial nominations have been especially contentious since the days of the Warren Court. That was from 1954 to 1969. Nowhere has that controversy been more pronounced than for nominees to the Nation's highest court. In particular, Supreme Court nominees such as Abe Fortas, William Rehnquist, and Clarence Thomas all faced considerable opposition in the Senate during their confirmations. Yet despite this controversy, only one nomination, Justice Fortas's nomination to be Chief Justice in the tumultuous summer of 1668, caused the Senate to filibuster and block confirmation.

President Lyndon Johnson nominated Associate Justice Abe Fortas to be Chief Justice in June of 1968. A bipartisan coalition of Senators soon formed to oppose Justice Fortas's elevation. The reasons were varied. Some opposed the nomination because Justice Fortas often joined the ''progressive'' Earl Warren wing of the activist Supreme Court. Other Senators opposed Fortas because of his admissions before the Judiciary Committee that he remained involved in White House political affairs even while serving on the Supreme Court, including advising the President during the Vietnam war and the then-recent race riots in Detroit. When it was discovered that Justice Fortas accepted $15,000—more than $75,000 in 2001 dollars—from controversial sources to teach a 9-week academic course, his support further deteriorated. Yet as the heated 1968 election season continued, some Democrats were wary of defeating Fortas if that meant leaving the nomination to soon-to-be-President-elect Richard Nixon.

Nevertheless, bipartisan opposition to Fortas's elevation was substantial and the filibuster did ensue. The filibuster itself was controversial, as some Republicans, such as Nixon himself, believed that Fortas should receive an up-or-down vote as a matter of principle. That would have been my position at the time. And it is my position now. Senators persisted, and on October 1, a cloture vote failed by a margin of 45 to 43. Twenty-four Republicans and nineteen Democrats voted against the cloture motion, with 10 Republicans and 35 Democrats in favor of cutting off debate. President Johnson then withdrew the nomination.

Now let me chat a little bit about the effect of the Fortas filibuster on future Supreme Court battles.

After the Fortas filibuster, the Senate rejected outright two of President Nixon's nominees to the Supreme Court, Clement Haynsworth—that was on a vote of 45 to 55—and G. Harold Carswell—on a vote of 48 to 51. But neither nominee faced a filibuster attempt despite the close votes. The Fortas affair is, therefore, especially important for what it did not lead to: a pattern of blocking by filibuster controversial judicial nominees.

That refusal to block nominees by filibuster is most dramatic and important in the context of the Supreme Court. The Supreme Court nominations that most divided the Senate since the Haynsworth and Carswell defeats were those of William Rehnquist—in 1972 to the Court, and in 1986 to be Chief Justice—and Clarence Thomas in 1991.

Rehnquist's nomination to be Associate Justice provoked considerable controversy and division within the Senate, but he nonetheless received a full Senate vote after but a few days' debate. The same was true in 1986, when he was nominated to become Chief Justice.

During Clarence Thomas's hard-fought nomination battle of 1991, outside activist groups urged Justice Thomas's Senate opponents to filibuster his nomination, but Senate Democrats, such as then-Judiciary Chairman JOSEPH BIDEN, and leading Thomas opponent Senator Howard Metzenbaum, balked. Former Judiciary Committee Chairman PATRICK LEAHY publicly declared himself ''totally opposed to a filibuster,'' adding, ''We should vote for or against [Thomas].'' I commend my colleague for that. He was right then, and he would be right today to do the same. No filibuster was attempted, and Justice Thomas was confirmed 52 to 48.

As is well known, President Clinton's nominations of both Ruth Bader Ginsburg and Stephen Breyer sailed through the Senate with minimal debate and no filibusters. Justice Ginsburg was confirmed 96 to 3, and Justice Breyer was confirmed 87 to 9.

Now I want to make the point that lower court nominees have never been blocked by filibusters.

Given the Senate's general unwillingness to filibuster nominees—even Supreme Court nominees—it is surprising that the Senate has never blocked by filibuster a nominee to any lower court. Furthermore, the Senate has never blocked—by a partisan filibuster—any judicial nominee, including Justice Fortas. The only successful rejection by filibuster was the aforementioned case of Justice Fortas, which was clearly bipartisan. Thus, there is no historical example of a filibuster conducted solely by one party that denied the President his judicial nominee—until now. This is the first time in the history of this country. It is amazing to me that my colleagues on the other side are so blatant about it.

Now, there have been recent, what some people have called, quasi-filibusters of President Bush's judicial nominees.

During the Democratic control of the Senate during 2001 to 2002, only 17 Bush circuit court nominees reached the floor for votes. In three of the cases where they did—the nominations of Julia Smith Gibbons, Richard B. Clifton, and Lavenski R. Smith—cloture motions were filed, and the motions easily carried. However, none of those cloture votes was responding to a genuine effort to filibuster a nominee. Rather, cloture motions were filed as a Senate time-management device—certainly in the Clifton and Gibbons matters—or in response to a small number of Senators who wished to force the cloture vote to draw attention to another issue unrelated to the nominee—such as in the case of nominee Smith.

Now, despite a Republican majority during 6 years of President Clinton's term, no judicial nominee was ever deprived of a vote on the Senate floor because of a floor filibuster of the nomination.

Many Senators may recall the controversy over President Clinton's nominations of Marsha Berzon and Richard Paez to the U.S. Court of Appeals for the Ninth Circuit. Although most Republican Senators opposed their confirmations, the majority of Republican Senators also opposed any effort to prevent the full Senate from voting on their nominations. Debate on each nomination lasted only 1 day. These were very liberal, some thought activist, nominees, and yet the debate lasted 1 day. We are now on our 11th, I think—10th or 11th—day on this debate.

So debate on each nomination lasted only 1 day, and a majority of Republicans joined all Democrats in supporting cloture motions for debate on each nomination, including over 20 Republicans who would eventually vote against confirmation and a majority of the Republican members of the Judiciary Committee.

In neither case did Republicans mount a party-line filibuster effort to prevent voting on any nominee. Indeed, Majority Leader LOTT filed the cloture motions for the above debates.

The situation was similar in 1994, when some Republicans voiced objections to President Clinton's nomination of H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit. A majority of Republicans supported a cloture motion after a relatively brief period of debate, and cloture was invoked by a vote of 85 to 12. It was clear it was a time-management device. It was not a filibuster. Judge Sarokin was then confirmed by a vote of only 63 to 35.

The only judge nominated by President Clinton who faced a partisan filibuster was Brian Theadore Stewart, a nominee to the Federal District Court in Utah. However, it was the Senate Democrats—not Republicans—who filibustered this Clinton nominee in protest over purported delays in bringing other judicial nominees to the floor. A cloture motion was voted upon on September 21, 1999, and it failed—by falling short of 60 votes—by a vote of 55 to 44,

with all Democrats except Senator Moynihan opposing cloture. But once again, the Democrats' objection was not to Judge Stewart himself, who has since proven to be an excellent judge on the bench, and on October 5, 1999, the Senate confirmed him by a vote of 93 to 5. So it clearly was not a serious filibuster, even though the Democrats used that for various reasons, none of which related to Judge Stewart.

For all the hand wringing about the ''treatment'' of President Clinton's nominees, one thing is clear: Every nomination taken up for debate on the floor received an up-or-down vote.

Even when Democrats attempted to filibuster Republican Presidents' judicial nominees, those efforts were still unsuccessful, as a substantial majority of Senators resisted using the partisan filibuster as a means to block judicial nominations.

When President Bush nominated Edward Carnes to be a judge on the U.S. Court of Appeals for the Eleventh Circuit, in 1992, many Democrats opposed the nomination on the merits, in particular because of his past prosecution of death penalty cases.

Aware of this opposition, the Senate agreed by unanimous consent to 2 days of debate, with a cloture vote to follow. The debate proceeded, and the cloture motion carried by a vote of 66 to 30, with 24 Democrats joining 42 Republicans to close the debate. The Senate proceeded immediately to confirm Judge Carnes by a vote of 62 to 36.

I hope my friends on the other side will realize that they have raised a big fuss here. They certainly got their points across—whatever those points are—whether valid or invalid. It is time to vote on the nomination.

A similarly close cloture vote occurred in March 1986 when the Senate considered President Reagan's nomination of Sidney Fitzwater to be a Federal district court judge in Texas. Many Democrats opposed Judge Fitzwater on the merits and after a few days' debate, Majority Leader Dole filed a cloture motion which, by unanimous consent, was to be voted on the next day the Senate was in session. That cloture motion prevailed, 64–33, with the support of 12 Democrats. The Senate proceeded immediately to confirm Judge Fitzwater by a vote of 52–42.

The only other judicial nominee of President Reagan's to face a cloture vote was J. Harvie Wilkinson to the U.S. Court of Appeals for the Fourth Circuit. Many Democrats opposed the nominee and filibustered the nomination. An initial cloture motion failed on July 31, 1984, 57–39, because some Senators argued that additional information had arisen since Judge Wilkinson's original Judiciary Committee hearings and that further investigation was necessary. Judge Wilkinson returned to the Judiciary Committee on August 7, his nomination was returned to the floor of the Senate, and a second cloture motion prevailed on August 9 by a vote of 65–32. The Senate then proceeded immediately to confirm Judge Wilkinson by a vote of 58–39.

It is apparent that Democrats historically have been more willing than Republicans to vote against cloture motions and to attempt to prevent votes on Republican judicial nominees. In other words, they have been more than willing on occasion to filibuster Republican nominees. Apparently not in true filibusters, however. However, it is important to note that even in the cases above, many Democrats found the filibuster process inappropriate in the judicial nominee context and insisted upon full Senate votes.

Senators, Led by Republican Gordon Humphrey and Democrat Robert Morgan of North Carolina, Filibustered the nomination of Justice Stephen Breyer to be a judge on the U.S. Court of Appeals for the First Circuit in late 1980. Their objection was not to Mr. Breyer's qualifications—indeed, this is the same Stephen Breyer currently serving as a Supreme Court Justice—but to the process by which he was nominated and reported to the full Senate. The Senators argued that the Judiciary Committee had improperly reported out Mr. Breyer's nomination without proper committee approval and without regard to many other earlier-nominated persons waiting for hearings. After forcing the Judiciary Committee to reconvene and approve the nominee through proper procedures, the Senate invoked cloture, 68–28, and confirmed Mr. Breyer, 80–10.

So it clearly was not a filibuster, a real filibuster.

This history demonstrates that while some nominees have been filibustered and cloture petitions filed in those and other situations, the only nominee ever to have been defeated or withdrawn after a filibuster was Abe Fortas in 1968. Even key Democrats who opposed Republican nominees voted for cloture. So, if a partisan filibuster of Miguel Estrada resulted in his nomination being defeated, it would be unprecedented.

A partisan attempt to block Mr. Estrada's nomination by filibuster would contradict the repeated and emphatic statements of Democrats who have served for a long time in positions of special responsibility in these matters. I am calling on those Democrats to continue to be responsible, not irresponsible. To vote against cloture in this case I think would be irresponsible because they know how serious this is. Consider the past comments by Senators regarding judicial and executive nominees:

Senator LEAHY, past Judiciary Chairman and current Ranking Member said:

> If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

That was on June 18, 1998, right in the CONGRESSIONAL RECORD.

The distinguished Senator from Vermont again:

> I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a [floor] vote, up or down, within 60 days.

That was on October 11, 2000.

The distinguished minority leader, Senator DASCHLE, had this to say:

> 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 [Clinton judicial nominees] Berzon and Paez.

That was on October 5, 1999.

The distinguished Senator from Delaware, a past Judiciary Committee Chairman said:

> But I also respectfully suggest that everyone who is nominated ought to have a shot, to have a hearing and to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor. . . . It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam president, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote. . . .

That was on March 19, 1997.

The distinguished Senator from Massachusetts, also a past Judiciary Committee Chairman:

> The Chief Justice of the United States Supreme Court said: ''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.'' Which is exactly what I would like.

That was on March 7, 2000.

Again, Senator KENNEDY, the distinguished Senator from Massachusetts said on February 3, 1998:

> 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.

That is exactly what I would like.

The Senator from California, Ms. FEINSTEIN, a distinguished member of our Judiciary Committee on September 16, 1999, said:

> A nominee is entitled to a vote. Vote them up; vote them down.

There are others but I will leave it at that. Absent from any of the current debate over Miguel Estrada is any explanation as to why he should be denied the floor vote that every one of President Clinton's judicial nominees who reached the floor received.

The rejection of Abe Fortas to serve as chief Justice of the United States marked the first and only time the Senate has rejected a President's judicial nominee by way of a filibuster. Yet, Miguel Estrada presents none of the concerns that caused a bipartisan coalition of Senators to block Justice Fortas's elevation to Chief Justice. Mr. Estrada is an outstanding nominee, fully qualified for this judgeship, who

has committed to enforce the Constitution as interpreted by the Supreme Court, not to interpose his personal political views into his jurisprudence. The American Bar Association unanimously gave him its highest rating of ''well-qualified''; and Democrats such as President Clinton's Solicitor General, Seth Waxman, and Vice President Gore's attorney, Ron Klain, have praised his intellect, judgment, and integrity.

But the stakes here are much greater than the fate of a single judicial nominee. At issue is whether the Senate should reinterpret its constitutional advise and consent obligation to require 60 rather than 51 votes to confirm a judicial nominee. This is a position that the Senate has never taken in the context of lower court nominees, and Republicans especially have eschewed. To adopt this new standard would fundamentally alter the balance of power between the Executive and the Senate in the judicial confirmation process and would seriously erode the comity that generally has existed between the two branches in the past.

For the life of me, I don't understand why my colleagues on the other side are delaying this explosive issue like they are. They are just asking for it. I think our side is far more capable of conducting filibusters than they are. I think the past proves it. And we have won on them. I think they are totally capable of conducting this filibuster if they ignore all the precedents, if they ignore all the history, if they ignore the Constitution, and the unconstitutionality of what they are doing, they ignore the future and what is going to happen when Democrat nominees become President. I think they are making a tremendous mistake to even go this far. I call upon my colleagues, at least I call upon the reasonable people on the other side, I call upon the people who have good faith in the Senate, who believe in the process, who really want to have a fair deal in judicial nominations, who really don't want to have this whole system break down, although it has been called broken by no less than a former Solicitor General, Walter Dellinger, one of the four who basically have said Miguel Estrada is a good man, and who basically has said these documents should never be given to the legislative branch because they are privileged executive documents—Democrats said that. I think it is very important my colleagues, the ones who are clear thinkers on the other side, the ones who really believe in this institution, the ones who really believe in the judicial nominations process, the ones who really can see the future and not just the instant, that they stop this filibuster and give an up-or-down vote, voting whichever way they want, on Miguel Estrada.

Mr. President, I ask unanimous consent that the distinguished Senator from North Dakota, Mr. DORGAN, be permitted to speak, and then immediately following Senator DORGAN, Senator SPECTER from Pennsylvania be recognized to speak.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). Is there objection?

Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I hope I perhaps am one of those clear thinkers and ''reasonable'' people the Senator from Utah was referring to. I suspect there are a good many in this Chamber who are self-proclaimed clear thinkers and reasonable people.

I am not out here as a member of the Judiciary Committee. I do not spend a lot of time on judicial issues, on a point of nomination. And on judicial nominations, I want to work with President Bush.

We have had two Republican nominees for judges in the east and west districts of North Dakota in the last year and a half. I have been pleased to work with President Bush on their nominations. We now have investiture of a Republican judge in the western district of North Dakota, someone I supported—a Republican but someone I strongly supported. He will be a fine Federal judge. I know I am going to be proud of him.

There is a nominee before the Judiciary Committee for the east district in Fargo. I likewise have strong support for that nominee of President Bush. I think he will be a fine Federal judge. He is a Republican. But the fact is he will, I think, make us proud of the Federal bench. I am very pleased to say that the President chose well. He consulted with us. And I was very supportive of the two judges who will now assume the bench in the Federal districts of North Dakota.

So I am not someone who comes to this saying I am a Democrat with respect to this process and the process should be political. That is not the way I come to this.

But I do believe this Congress has a responsibility to advise and consent, and it is not a responsibility to have a huge rubberstamp, where the President sends us a nomination and we say, yes, sir; yes, sir, count us in. That is not the responsibility of advise and consent.

The constitutional responsibility for Congress is equal to the President's. He proposes and we make a judgment on his proposal. He sends us a nomination. We make a judgment.

Now this is not some ordinary decision on the floor of the Senate. This is a lifetime appointment. When we decide to confirm a nominee sent to us by the White House, this is not for 2 years or 5 years or 15 years or 25 years; it is for a lifetime. And we ought to take that seriously. I know most Members of the Senate do. So if we are going to be passing judgment on a nominee who is going to be there for a lifetime, let's know a little about the nominee.

I was proud to support Dan Hovland, who is now the confirmed Federal judge in the west district of North Dakota. President Bush nominated him, and I was proud to support him. But unlike Miguel Estrada, Mr. Hovland cooperated with the Judiciary Committee. He was asked during his confirmation process, ''Can you list three Supreme Court cases that you disagree with?'' And unlike Mr. Estrada, Mr. Hovland had no difficulty answering that simple question.

Why would one ask a nominee that question? To get a sense of how they think and reason. Mr. Hovland didn't object to that. Judge Hovland readily identified a couple of recent cases—Thompson v. Western States Medical Center, Behrens v. Peltier. He cited a case that most would cite, Korematsu v. the United States, the case in which the Supreme Court affirmed the conviction of a person of Japanese ancestry for the violation of a curfew order solely because of the individual's ancestry. So Mr. Hovelnd was asked a simple question and was happy to give us a glimpse of how he was thinking about things, and how he viewed some of these decisions. He didn't object to answering that question. He was asked a simple question, and he gave a straightforward answer that was helpful to my colleagues and me.

Other nominees have been asked the same kinds of questions. Mr. Estrada, however, has not been willing to answer those questions. He apparently thinks there is some inherent right to be confirmed by the Senate.

There is no inherent right for a confirmation. We have a responsibility to understand who these nominees are and then to pass judgment on them as to whether or not we think they deserve a lifetime appointment to the bench. As I have indicated, on at least two Federal judgeships in North Dakota, I was proud to support Republicans. I think President Bush chose well.

I don't have the information about Mr. Estrada with which to make that judgment. Some say, well, look, you don't need the information, you don't deserve the information, and we don't want you to get the information. So belly up here and vote. If you don't like it, it doesn't matter, just vote.

Really, how would you vote if you don't have basic information? We have sent Mr. Estrada a letter saying you have not answered basic questions; you have not allowed to have released the basic information. Provide all of that and let's have a vote.

I am for that. For me, this isn't about a filibuster. It is about saying we ought to have nominees provide the basic information to Members of the Senate before there is a vote. Mr. Estrada has not done that. It is simple. He hasn't done that. Perhaps when he does it, he will get a big vote in the Senate. I don't know. But I think it is a terrible precedent for the Senate to allow a nominee to say, I am not going to answer your questions; I will show up and give you my name and tell you

where I went to school, but I don't intend to talk about much else at all.

Mr. Estrada has never been a judge. We don't have judicial record to examine. We don't have any information about that. That is the reason we have asked him the same kinds of questions we have asked others. The difference is he has not responded. I don't understand that.

Let me also say something else. I have listened to my colleague from Utah, and he is one of the more capable Members of the Senate. He talked about delay and how terrible it was to delay this, that, and the other thing. Let me tell you something. We understand what it feels like to be faced with delay on judicial nominations. We have been on the receiving end of it for a long time. Notwithstanding that fact, I don't believe we ought to delay anybody just for the sake of delay. I think we get the information and we move forward. If we don't get the information requested of a nominee, there is no inherent right for a nominee to go to a vote, to receive a lifetime appointment.

We know a little about facing delay. I find it interesting that those who were the architects of delay for so long now come to the floor—many of them—and say it is terrible what has happened here.

I will give you examples of what has happened. James Beatty was nominated by President Clinton to the Fourth Circuit, rated well qualified by the ABA. He had no hearing and no vote. Do you know how long his nomination languished up here? Three years. Do you suppose he knows a little something about delay?

Robert Cindrich, nominated to the Third Circuit, found well qualified by the ABA; he didn't get a hearing and certainly no vote. Not a hearing and not a vote. He would know something about delay, I guess.

H. Alston Johnson, nominated to the Fifth Circuit by the previous administration, was rated well qualified by the ABA. He never got a hearing or a vote. His nomination was up here 696 days. He never got a hearing, never got a vote.

The question is, Why? It was the previous administration that sent them up, and those who controlled the Judiciary Committee at that point didn't want to provide a hearing or a vote. I suppose that is a filibuster in its effect, isn't it?

James Duffy, a Ninth Circuit Court nominee, was up here for 640 days. Well qualified by the ABA, no hearing, no vote.

The list is fairly lengthy. I shall not go through it all. Kathleen Lewis, nominated by the Sixth Circuit, found well qualified by the ABA; no hearing, no vote.

These are just a few nominations that came from the President, the previous administration. Those on the other side who want to push Mr. Estrada through without our getting the information we have asked of him, those are the same Senators who blocked all of these other nominees. They didn't get to the floor or get a hearing, let alone a vote in the committee. Not even a hearing, for gosh sakes. So we understand a little about facing delay.

Some of these delays, as you know, stretched to 4 full years, with not even a hearing. I find it interesting that people here who talk about delay are those who took nominations from the previous administration and said: They are irrelevant as far as we are concerned. We don't even intend to hold a hearing.

Well, Mr. Estrada got a hearing. I think Mr. Estrada would get a vote on the floor of the Senate, as soon as he provided the information he has been requested to provide. The ranking member of the Judiciary Committee and the minority leader have sent a letter and said here is what he has not provided. It is a lifetime appointment. Provide the information and let us move forward. I think that is what we ought to do.

I am not part of a filibuster. I have only spoken one time previously on the floor about Mr. Estrada. It is not a filibuster, as far as I am concerned.

I just don't think the Senate ought to vote on a nominee for a lifetime appointment to the Federal bench—whether it is a circuit court or any court—if the nominee says: I am sorry, I don't intend to answer your questions.

Here is a question posed to Miguel Estrada: What are several Supreme Court rulings over a good many years with which you disagree, and why?

Is that a reasonable thing to ask somebody who aspires to serve on the Federal bench? I think so, and most other nominees have answered that question. The nominee I was proud to support for the western district judgeship in North Dakota didn't object to that. I thought he answered that question easily and with good judgment, which gave me some comfort about that nominee.

Mr. Estrada won't answer that question. I just don't think there is an inherent right—certainly there is no inherent requirement in the Constitution—that we move forward and cast a vote on a nominee that has not yet provided the information that has been requested of him.

This nomination should not yet be on the floor of the Senate. It ought to be in the Judiciary Committee, and the nominee ought to not have his name brought to the floor until he has satisfied the members of the Judiciary Committee with respect to the information they are requesting. The information they are requesting is not unusual, not extraordinary. It is information that has been requested of others and provided by others. And with respect to this lifetime appointment, my feeling is the country will be best served if we decide as a Senate not to treat lifetime appointments to the Federal bench in a trifling way.

It is a trifling way if we say to people, by the way, if your nomination comes before this Senate, you can just get by with saying: I don't intend to answer your questions. I don't have answers to your questions. We don't need to have that dialogue. You have a responsibility to vote because the President sent the nomination down to the Senate.

Well, as I have described, those who ran the Judiciary Committee during the last administration felt no such obligation. They created a special ''jail'' for nominees, and nominations went into that jail and the door was locked forever. A good many of them were very well-qualified men and women, and they didn't even get a hearing, let alone a vote. So I don't think we ought to be lectured by anybody about delays and about tactics that somehow injure a nominee.

Plenty of nominees have been derailed unjustifiably, in my judgment. It is not my intention in any way to derail the nomination of Mr. Estrada. It is my intention as one Member of the Senate to insist—yes, to demand—that a nominee who expects a Senate to consider his or her nomination provide the information requested by the Senate.

The minute this nominee complies with the request of the ranking member of the Judiciary Committee, the former chairman of the committee, for information that was requested on behalf of the members of the minority on the committee and on behalf of dozens of Members in the Senate, I think that nomination should be on the floor of the Senate, and we should have a vote. Until then, I do not think we ought to.

I have voted now for, I believe, well over 100 Federal judges submitted to this Senate by President Bush. I believe I have voted against only one. With respect to the two Republicans nominated in North Dakota, I have been a strong supporter. I have spoken in the committee and on the floor in support of their nominations.

I do not think anyone can take a look at me and say I am trying to obstruct anything. I am not. I think I am pretty clear-headed on these matters. But I do not feel an obligation to vote on anybody until we get the information requested of them, especially for a lifetime appointment. That is clear-headed. That is common sense. And the Senate will rue the day it decides it is all right for nominees to come to the Senate and simply say: I am going to stonewall; I do not provide information; I do not answer questions. That will not, and should not, be the rule of the day with respect to considering lifetime appointments.

HYDROGEN ECONOMY AND FUEL CELLS

Mr. President, one of the problems with having the Estrada nomination on the floor for a great length of time is that there are so many other matters we ought to be working on.

President Bush, in his State of the Union speech and his subsequent appearance a week later in Washington, DC, talked about the need to move to a hydrogen economy and fuel cells as a way of extending America's energy independence, making us less dependent on foreign energy. I support this idea, and I would much rather we all discuss that issue on the floor of the Senate, rather than being at parade rest on the Estrada nomination.

We import over one-half of the oil that we use—20 million barrels a day. Here are our top sources of imported oil: No. 1 is Saudi Arabia; Venezuela is No. 4; Iraq is No. 6. These and other of our top suppliers are beset by turmoil.

The fact is, it makes no sense for our economy to be this dependent on foreign sources of energy, and yet we will always be that dependent unless we do something about transportation. Let me describe why, using this chart.

In this country today, the transportation sector is the sector for the great majority of our imported oil. And as one can see, the total demand for oil is increasing. This line is moving steadily upward. As one can see, the transportation demand is what is driving it; that is, putting gasoline through our carburetors. And we have done that for a century. Nothing has changed. With the Model T Ford, they pulled up to a pump and pumped gas. With a 2003 Ford, you pull up to a pump and pump gas. Nothing has changed in almost a century.

If we do not do something about this demand, this line will continue to go up. We will dramatically increase our dependence on foreign oil, and our economy will be held hostage to things we cannot control.

As you can see from this press release that the White House issued, we import 55 percent of our oil, and that is expected to grow to 68 percent by 2025. Nearly all of our cars and trucks run on gasoline. Two-thirds of the 20 million barrels of oil we use each day is used for transportation, and one-third of it comes from a troubled part of the world. Does this make any sense to anybody?

What the President said—and I fully agree—is we ought to move to a hydrogen economy and fuel cells. He proposed a $1.2 billion program, though only $700 million of that is new money. I think that is too timid, not bold enough, but it is definitely a step in the right direction.

What is that right path? The right path, it seems to me, is to see if we can find a way to power America's transportation fleet in a different manner.

There is a new book written by Jeremy Rifkin called ''The Hydrogen Economy,'' that discusses the possibility of using hydrogen as a fuel, to radically transform our economy. The fact is, hydrogen is ubiquitous. Hydrogen is everywhere. It is in water. Electrolysis can separate hydrogen and oxygen from water, and you can use that hydrogen in a fuel cell to power an electric engine, an electric motor, power a vehicle.

When we use hydrogen fuel cells to power a vehicle, we put only water vapor out the tailpipe. What a wonderful thing.

Now the hydrogen has to be obtained using other energy sources, but we can use every source available to us. We can use fossil fuels, coal, natural gas, but also renewable sources, like wind and solar. By using hydrogen as a fuel, we make the most efficient use of every domestically available fuel source, and what comes out of the tailpipe of a fuel cell vehicle is water vapor. Boy, that makes a lot of sense. The quicker we get to that point, the better.

That does not mean abandoning oil, natural gas, and coal for some long while. But if digging and drilling is our only strategy with respect to our future energy supply, then our energy program is something I call yesterday forever, and it is not an energy program that makes this country secure, that does what we need to do to be reasonably independent with respect to energy sources.

When President Bush moves us in this direction, I say absolutely: I am with you; let's do this. I say let's be bolder than he suggests. Let's be less timid. Let's develop an Apollo-type project, a real project, a big project. With the Apollo project, we said we were going to put a man on the Moon at the end of a decade. Let's do an Apollo-type project where we agree that in the next 5, 10, 15 years we are going to convert America's vehicle fleet to hydrogen economy and fuel cells. We can do that. We cannot do that if we are timid, but we can set goals, and commit the necessary resources.

The goal we ought to set for this country is to have a period, whether it is 10, 15, or 20 years out, in which we have a large number of vehicles that are hydrogen vehicles and fuel cell vehicles.

I am going to introduce a piece of legislation that is a robust Apollo-type project, with $6.5 billion invested over 10 years, and with specific goals. I would like 2.5 million vehicles on the roads by the year 2020 that use fuel cells and hydrogen.

Last year when we wrote the energy bill in the Senate, we passed a provision that I authored, which said that we should have 2.5 million fuel-cell vehicles on the road in this country by the year 2020.

The fact is we already have some cars running on fuel cells. We had a demonstration car go from Los Angeles to New York. I have driven demonstration fuel-cell cars.

Mr. SCHUMER. Mr. President, will my colleague yield for a unanimous consent request?

Mr. DORGAN. Certainly, I will yield for a question.

Mr. SCHUMER. I understand, Mr. President, that there has already been a request that Senator SPECTER immediately follow Senator DORGAN. I haven't had a chance to speak in the last few days. I ask unanimous consent that I be allowed to follow Senator SPECTER when he finishes his remarks.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SCHUMER. I thank the Chair.

I thank my colleague. I think what he is doing on these fuel-cell cars is great and the way to the future. I commend him for his bill.

Mr. DORGAN. Mr. President, I began talking about the Estrada nomination, about how we wish we could resolve that, and turn to other important issues.

I think this issue of fuel-cell vehicles and a hydrogen economy is something we will deal with in an energy bill. I visited with Senator DOMENICI, who is now chairman of the Energy Committee, and my colleague Senator BINGAMAN as well, the ranking member, about this issue.

Now, I want to show my colleagues that this fuel cell technology is not pie in the sky. Here is a fuel-cell vehicle—a Ford Focus production-ready prototype introduced in the autumn of 2002. And this is a fuel-cell vehicle at the hydrogen fueling station. PowerTech Laboratories created this infrastructure for fueling, which, of course, you have to have if you are going to have these kinds of vehicles.

This next chart shows a Nissan X-Terra fueled by compressed hydrogen and tested on public roads in California in the year 2001.

Finally, this is the General Motors Hy-Wire Fuel Concept Car unveiled in August 2002.

The fact is we can do this and should do this as a country, but it won't happen unless we make it happen. That is the point of my legislation.

The Director of Environmental Affairs at Daimler Chrysler has said that political support is vital for the car industry to make inroads in fuel cell technology. They can do a lot themselves, but at a certain point they need legislative and financial support to stimulate this important sector. For that, they need the Government. The European Union has already earmarked 2 billion euros for research over the next 5 years. The central focus will be hydrogen fuel cells.

This is a big idea. This is something our country needs to do. It is the equivalent of going to the Moon by the end of the decade, as John F. Kennedy proposed.

President Bush is right to propose an initiative in this area. I was pleased to support him. I was working with him a year ago. We had in the energy bill goals that I had set. I am convinced we will make much more progress this year.

At a recent hearing, I asked officials from the Department of Energy what kind of vision we have for the year 2025 or 2050 about the type of fuel we are

going to use in American vehicles. The answer was they didn't have a guess. I said: That is interesting. We project out 25 to 50 years and talk about what kind of financial circumstances will exist for Social Security or Medicare. But we have no such goals with respect to the energy? The answer was: No, we don't really have that kind of planning.

It is long past time to start that kind of planning. This country needs a big idea. The President has proposed an approach that I support. It is something I have worked on for the last couple of years. I think by working together—Republicans and Democrats—we can embrace a big idea and move in a very significant way to improve America's energy future to make our country less dependent—less dangerously dependent—on foreign sources of energy. That is my goal.

It is not my goal to turn my back on coal, oil, and natural gas. The fact is the leaders in this effort in this hydrogen economy and in the move to this hydrogen economy will be many of the utility companies and the energy companies of today.

They are the ones in the forefront—United Technologies, Shell, BP. I could go on and name at great length the companies that are involved in this right now at the front end. They are going to be the leaders.

I just think this is the right thing to do. It is important for our country to establish goals. If ever we needed to think about the fragile nature of this American economy, it is now. With the threat of terrorism, with the problems in the Middle East, and with the potential war against Iraq, we ought to be thinking: do we want to depend for over half of our oil from areas of the world that are troubled areas? If not, let us do something about it, and do it now, and let us do it together.

That is why I am introducing my bill, setting forth $6.5 billion over a 10-year period, so that we will establish and reach ambitious goals, in partnership with the private sector, and with the support, I hope, of the President of the United States. I think we can do this, and I think if we do it, it will be extraordinarily helpful to this country.

THE TRADE DEFICIT

Mr. President, one of the other issues I wanted to come to the floor and talk about is the issue of the trade deficit. I think this is a vitally important issue, and I wish my colleagues and I were debating this at length, rather than continuing to dwell on the Estrada matter.

On Thursday last, the Commerce Department announced that our trade deficit was at a record for the year 2002. Our country's deficit in goods last year was $470 billion. That means we sold $470 billion less to other countries than we purchased from other countries. What does all that mean?

This chart shows that our trade deficit has exploded since 1991, a little over a decade ago—and our merchandise trade deficit is now $470 billion. When the Washington Post reported that on the day it was announced, they finally said, it will put a significant damper on U.S. economic growth. Now, the Washington Post is not in the habit of sounding the alarm about the trade deficit. You cannot get them to print an op-ed on that subject. They have a rosy view of trade, and view everyone who raises these questions as some sort of isolationist xenophobes. But here is the Washington Post, in its report last week, saying that the record deficit will put a significant damper on economic growth. They noted that a combination of increasing imports and falling exports clipped a half of a percentage point off the increase in GDP last year.

The Post further reported that nearly one-fourth of the year's trade deficit was with China, which sold $103 billion more in goods to the United States than we were able to sell there. I will speak about China in a couple of moments, but China is by no means the only country with which we have a trade deficit.

This chart shows we have a trade deficit with nearly every country with whom we do business. One notable exception is Australia, but I think that is going to get remedied because our trade negotiators are now negotiating a free trade agreement with Australia, and our trade negotiators are able to lose almost immediately when they negotiate trade agreements.

Will Rogers once said the United States of America has never lost a war and has never won a conference. He surely must have been talking about our trade negotiators.

So every time we have a new trade agreement, it ends up hurting us and helping those with whom we reach the agreement. I guess we are fixing to do an agreement with Australia so perhaps our positive trade balance with Australia will be gone soon.

This chart, sourced from the Department of Commerce, shows that with virtually every major trading partner we have a very large trade deficit. Our deficit with Canada now is $50 billion; deficits with Mexico, $37 billion. Before our negotiators went to negotiate with Canada and Mexico and created this trade agreement, which I thought was a terrible agreement and sold out certain American interests in exchange for other benefits, we had a reasonably modest trade deficit with Canada and a small trade surplus with Mexico. We have managed to turn that into a huge deficit with Canada and a very large deficit with Mexico.

We have deficits with every major Asian country except Singapore. We have deficits with the major economies of Latin America.

Not only do we have deficits with virtually all of our major trading partners, we also have deficits in about every major sector of goods trade. A $110 billion deficit in vehicle trade—vehicles, mind you—a $47 billion deficit in consumer electronics; a $58 billion deficit in clothing, for example.

Some might say agriculture is a bright spot, isn't it, because we are a net exporter of agricultural goods? But even our modest surplus on agricultural products has now been reduced by 30 percent, just over the last year, from $14.2 billion to $10.9 billion in 2002. Our surplus in meats declined by $1 billion. Our deficit in livestock trade reached $1.5 billion. Our deficit in vegetables and fruits reached $2.5 billion.

I mentioned trade with China. We have a deficit with China of $103 billion.

One innocent sounding sector in which we have a trade deficit with China is toys. We have a trade deficit of $14 billion with China in the area of toys. Now, let me describe a news report that I read last year, about conditions in a Chinese toy factory.

The story is entitled ''Worked Till They Drop. Few Protections For China's New Laborers.''

On the night she died, Li Chunmei must have been exhausted. Co-workers said she had been on her feet for nearly 16 hours, running back and forth inside the toy factory, carrying toy parts from machine to machine.

This was the busy season before Christmas.

The factory food was so bad, she said, she felt as if she had not eaten at all. Long hours were mandatory, and at least 2 months had passed since Li and other workers had enjoyed even a Sunday off. ''I want to quit,'' one of her roommates remembered her saying. ''I want to go home.'' Her roommates had fallen asleep when Li started coughing up blood. They found her in the bathroom a few hours later, curled up on the floor, moaning softly in the dark, bleeding from her nose and mouth.

She died before she could arrive at a hospital. The exact cause of her death remains unknown, they say.

What happened to her last November is described by family and friends and coworkers as an example of what China's more daring newspapers have actually given a name. They call it ''guolaosi.'' The phrase means ''overwork death.'' They actually have a name for it in China. It usually applies to young workers who suddenly collapse and die after working exceedingly long hours day after day.

Think of it. Think of working 16-hour days with no day off, inadequate food, in unsafe factories, working children to death in a country where they do it often enough so there is actually a name for it.

Is this the sort of playing field that our manufacturers should be competing in? With children working long hours, for months on end, for virtually no money?

There is another reason, of course, for our trade deficit with China, and that is our markets are open to virtually all of their products, and their markets are not open to ours. The Washington Times ran an article documenting many of the trade barriers that China puts up to our products, particularly the agricultural products. It quotes the American Farm Bureau, which says the Chinese market is no

more open today than it was when China entered the WTO.

At the end of the WTO negotiations, China was a $2 billion market. We expected substantial growth, the Farm Bureau says, but we have not seen that growth because China has not done what it was supposed to do.

Trade barriers are as numerous as they are creative. Import regulations are nearly impossible to figure out. Health inspection standards have changed one month to the next, and it goes on and on.

The bottom line is our agricultural products are not getting into China. China is a country of 1.3 billion people, and they have a $103 billion trade surplus with us, or we a deficit with them. That story in the Washington Times tells us another reason why.

One does not have to travel as far as China to find closed markets for U.S. products. We have a $50 billion trade deficit with Canada. In 2002, for example, our deficit with Canada was $90 million in durum wheat, $160 million in spring wheat. It is pretty easy to calculate that. Do you want to know why? Because our exports to Canada in these areas in wheat are zero. You cannot get it in. I know that personally because I have been on a truck trying to get through the border into Canada with 200 bushels of durum wheat, watching all the Canadian durum ship south on the trip north, and we were stopped at the border.

On February 15 of last year, the USTR found that Canada was guilty of unfair trade, but they said: We will not impose tariff rate quotas. In the absence of tariff rate quotas, one recent study says, U.S. wheat producers lost $124 million in sales in the last crop year.

On April 19, I held a hearing in the Commerce subcommittee I then chaired and talked to agriculture negotiator Ambassador Allen Johnson and said: We need to take action now. I showed him an article in the Bismarck Tribune where the Canadian Wheat Board president was gloating saying USTR had not imposed tariff rate quotas on Canadian wheat. Therefore, they have won. Since the USTR's decision on February 15, last year, enough wheat has come in from Canada to fill 50,000 18-wheel trucks, and the Canadians have not changed their practices at all.

Are farmers upset about that? You are darn right they are. They do not think anybody stands up for them or speaks out for them, and they are sick and tired of it.

We also have a trade deficit with the European Union of $82 billion. One area that is a chronic problem is beef. They will not allow American beef into the European Union. They claim that our beef is made with dangerous growth hormones, even though there is no evidence that such beef is bad for people.

So they have decided that this is what livestock in America looks like: a two-headed cow. Therefore, $100 million in U.S. beef is banned from the EU each year.

Now, we go to the WTO and we get a ruling against the Europeans. What does that mean? Nothing. It does not mean a thing. So then our country takes action against the Europeans. Do you know what we do to the Europeans? We take action against European truffles, goose liver, and Roquefort cheese. Now, my God, that is enough to scare the devil out of any country. Truffles, goose liver, and Roquefort cheese.

Let's talk about Korea. The year 2001, the last year for which I have figures, Korea sent 618,000 automobiles into our country; we were able to get 2,800 cars into Korea. I repeat that because people think that cannot be right. Korea shipped us 618,000 automobiles made in Korea and we were able to get 2,800 U.S. vehicles into the Korean marketplace. Why? Because Korea does not want American vehicles in their marketplace. End of story. We have a $13 billion trade deficit with Korea. If you do not like to talk automobiles, let's talk about potato flakes, the ingredient they use for snack food, and on which they impose a 300-percent tariff.

The list goes on and on. I have not even talked about Japan. We have had a deficit with them forever. It has gone on and on and on. We had a deficit with them when the dollar was strong, when the dollar was weak, when we were growing, when we were in recession, it does not matter.

All of these countries have decided they will use the American marketplace for their benefit and keep American goods out of their marketplace for their benefit. The result is the American consumers pay the price. Some say it is good for consumers that we have all of this trade deficit because this means cheap foreign goods coming in. But our consumers are also people who work. And when you lose your job, which is the result of a trade deficit that is $470 billion, when you lose your job, your time as a consumer is just about over.

One can make a case, I suppose, that the Federal budget deficit is money we owe to ourselves. Some economists make that case. You cannot make that case with respect to the trade deficit. That is money we owe to others outside of this country and will be repaid, inevitably will be repaid, with a lower standard of living someday in this country.

Just once I want our trade negotiators and want this administration and future administrations to stand up for this country's interests. No, not to put a wall around this country. But I would like for this country to believe that its trade policies are in this country's best interests. And they have not been. NAFTA has not been. The United States-Canada FTA was not. The WTO is not.

Just look at the bilateral we did with China—do you know what our negotiators did with China 2 years ago? They sat down, always in secret, and then the door opened, and they trumpeted this new agreement. Do you know what they agreed to with the Chinese? After a phase-in period, we will agree that we will have a tariff on Chinese automobiles that come to the United States that is only one-tenth of the tariff we allow the Chinese to allow on U.S. vehicles that go to China. Our negotiators agreed that we would allow the Chinese to have ten times larger tariffs against U.S. automobiles going to China.

I don't know who agreed to that. I would love to get a name. But these are amorphous groups of people who go over and meet in secret and they lose a trade agreement the minute they sit down with another country.

Harry Truman used to say, I want a one-armed economist because they always say on the one hand this, on the other hand that. I want one economist who supported all the trade agreements we have had to come forward and make a case that this has worked.

It is not working. It is hurting this country. No country will long remain a world power without a strong manufacturing sector. And our manufacturing sector is being sucked out of the middle of this country.

When they talked about NAFTA, with U.S. and Mexican trade, they said U.S.-Mexican trade will all be the product of low-skilled labor coming from Mexico to the United States. That is what we will get from Mexico. Not true. Not true at all. The three largest imports from Mexico, including the maquiladora area, are automobiles, automobile parts, and electronics, the product of high-skilled labor. You can see what is happening in this country as a result of these trade agreements.

Just once I would like to see somebody stand up for this country's producers and its interests. I know a lot of companies that you think of as American companies like these trade agreements. And the chambers of commerce and others that support them support these agreements. Why? Because they are really multinational, international companies. They think this is just fine. Take a jet, fly around the world, look down on the ground and see where you can produce for 14 cents, hire 14-year-olds and work them 14 hours a day. Where can you do that? And then ship the product back to Toledo, Bismarck, Los Angeles, or Denver? Where can you do that? It is about profit, not about strengthening our country. It is about international profit.

I care about this country's long-term economic interests. A $470 billion trade deficit, especially given the circumstances that exist with those with whom we have that deficit—Japan, Europe, Korea, China, Canada, Mexico—shame on us for deciding this is acceptable. It is not acceptable. In the long term it will hurt every child in this country who grows up and experiences a lower standard of living because we

did not have the guts to decide we would demand fair trade with other countries.

Fair trade means if we cannot compete, that is our fault. But fair trade insists that the rules be fair. And no American worker and no American company ought to have to compete against someone that wants to hire 14-year-olds and work them 14 hours a day.

You say it does not happen? I will give you names. Of course it happens. It happens all the time, all over the world. No American should have to compete against a company that decided to renounce its citizenship, moved its headquarters on paper to Bermuda to avoid paying U.S. corporate income tax, and then moved its production to yet a third country, somewhere where they can dump chemicals into the water and chemicals into the area and run a factory that is unsafe, where they hire kids. No American should have to compete against that. It is not fair competition, and at some point, in some way, some day, someone will say this is not in our interest.

It is in our interest to encourage expanded trade; that clearly is in our interest. On behalf of those who produce in this country and who work in production in this country, it is in our interest to demand fair trade rules. Globalization has galloped far ahead of the rules of trade and no one is willing to admit it or do anything about it. And it is injuring this country, inevitably injuring this country.

The question is, When will we have a real debate about it? You can put on a blindfold and listen. You can listen to Democratic Presidents and Republican Presidents and you will not hear a bit of difference on international trade. For 20 years, we have had the same mindless mantra about this trade. And when I finish this speech, some will say that I am a protectionist, a xenophobic isolationist protectionist, someone who just does not get it.

Well, I get it. What I get is I have seen the unfairness that is undermining American farmers, American manufacturers, American businesses, and it ought to stop. The only way it will stop is if we have someone, someplace, somewhere who has the guts to stand up and stop it.

We had a vote in this Chamber recently on something called fast track. They called it trade promotion authority, which is just a goofy way of putting some new clothing on a old, bad deal—fast track. I voted against it. I would not give it to President Clinton. I would not give it to President George H.W. Bush. I did not think either of them should have it.

President George W. Bush now has fast-track authority. What does that mean? That trade agreements are being negotiated in secret somewhere around the world, and when they are done negotiating, they will be brought back to this Chamber for a straight up-or-down vote. Fast track means that no one in this Chamber, under any circumstances, at any time, will ever be able to offer an amendment to strike out an offending provision, to strike out something we think inherently injures this country. Nobody will be able to offer the amendment. Why? Because we decided to handcuff ourselves. I have no idea why Members of the Senate think we ought to be doing that. And it is exactly what we have done.

So this, unfortunately, is not going to get better. It is going to get worse, unless enough of us decide in this country that American jobs are important, that yes, globalism is here, but the rules of globalism must keep pace, and we must insist and demand fair trade. We must demand that other countries open their markets in exchange for an admission to the American marketplace. All of these things are conditions that are inherent to the well-being and stability of this country's future.

I am obviously frustrated, from time to time, about trade issues because no one seems to care. There is a sense that there are only two sides: There are the expansionists and the protectionists. That is fundamentally wrong. There are people like me who believe in expanded trade, but believe, on behalf of the things we fought for for a century in this country, that such expanded trade needs to be done with fair rules.

We fought for a century, I would say, for people to have the right to go into a factory that is safe, to have a safe workplace. We fought for a long while about preventing people from dumping chemicals into streams and the air. People lost their lives demonstrating on the streets for the right to be able to collectively bargain.

And now we decide that did not matter much, just skip all that, and pole-vault over it all and move your plant, in fact, renounce your citizenship while you are at it, become a Bermuda paper company so you do not even pay your taxes.

Bermuda has a navy that has 26 people. Maybe the next time a U.S. company that decides to become a Bermuda paper company, and they are in trouble, and someone wants to expropriate their assets, maybe they ought to call on the Bermudan Navy. Maybe that is where they ought to get their protection.

I am going to come back and speak at some greater length on trade. This is such an important issue.

I represent a State that produces agricultural products, for which we must find a foreign home for a sizable portion of it. I am not anti-trade. I very strongly support expanded trade. But I am sick and tired of this country being taken advantage of. I am sick and tired of seeing wheat farmers being injured by bad agreements and by bad practices that you can't stop. And the same is true with the textile workers. And the same is true for those who manufacture aircraft. It just goes on and on. We have a responsibility to stop it.

We should be a world leader and say we support globalization and world trade, providing the rules are fair. The rules are not fair. We ought to say, we, by God, are going to change them. We have to be the leader that changes those rules to make sure we have a fair chance at a world trade regime that is beneficial not just to those with whom we trade, but beneficial to this country as well.

So I will continue this at a later time. I did tell my colleague that I would be finished at about this time. I thank him for his patience.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I have sought recognition to support the confirmation of Miguel Estrada to be a judge for the Court of Appeals for the District of Columbia Circuit.

We are seeing a Democratic filibuster, which essentially constitutes a revolution on the advice and consent process. It is unprecedented. What we are seeing is the culmination of 41 opposition Senators holding the judicial confirmation process hostage.

The advice and consent function has traditionally been structured where the President makes the nomination and, unless there is some reason to oppose, some objection, some basis for opposition, the confirmation follows.

In this situation there is no reason not to confirm Mr. Estrada. He has an extraordinary academic background. Phi Beta Kappa, magna cum laude from Columbia; magna cum laude from Harvard Law School. He was on the Harvard Law Review. He argued 15 cases before the Supreme Court of the United States. He is the member of a distinguished law practice. He has had service as an Assistant Solicitor General. This is a great American success story of a man coming from a very humble background and achieving real success, with real credentials for the court of appeals.

The opponents to Mr. Estrada have contended that he has not answered questions to their satisfaction in the Judiciary Committee hearing. I suggest that a fair reading of the record shows the contrary.

Nominees are not supposed to give their opinions or judgments on hypothetical cases or in matters which may come before the court. The judicial process works so that cases in controversy depend upon the specific facts. Then briefs are submitted to the court. Then there is oral argument before the court. Then the judges deliberate, talk among themselves, reflect on the case, ultimately come to a judgment, write an opinion, and express themselves as to their conclusions.

That is a very different matter from someone being asked: What is your judgment on issue A? What is your judgment on issue B? How would you find on issue C? The judicial process does not function that way.

Traditionally, nominees have been accorded an understanding that they do not have to answer such questions.

It is commonplace for questions to be asked. And I refer now to the confirmation hearings of Merrick Garland, where I asked now-Judge Garland:

Do you favor, as a personal matter, capital punishment?

Mr. Garland:

That is really a matter of settled law now. The Court has held that capital punishment is constitutional, and lower courts are required to follow that rule.

There was an extended discussion which followed, but the upshot of the matter was that Mr. Garland—now Judge Garland—did not give his views. And I accepted that. He said that it was a matter of established law, and as a lower court judge he would be obliged to follow the law.

There was a very controversial nominee, now Judge Marsha Berzon. She was asked about her view on Roe v. Wade and her thoughts about the abortion issue. And Marsha Berzon responded:

I'm bound by Casey in that regard.

That is referring to the case of Casey v. Planned Parenthood. And Marsha Berzon was a nominee by President Clinton, as was Judge Garland a nominee by President Clinton.

When the shoe was on the other foot, these nominees did not give answers to these questions, but responded in the traditional way. And they were confirmed.

Judge Rogers was questioned by Senator Cohen and asked about constitutional interpretation, where Senator Bill Cohen said:

This is an evolutionary interpretation of what was originally defined at least in the Constitution. Would you agree with that general statement?

Judge Rogers responded, ''My job as an appellate judge is to apply precedent.''

And so it goes with the tradition being established that nominees do not answer specific questions.

Mr. Estrada has agreed to make himself available to talk to any Senator who wishes to talk to him and to respond to inquiries and to have a discussion as to his judicial qualifications and answer questions consistent with appropriate practice. I think that is sufficient, certainly in the context where Mr. Estrada has already had his hearing by the Judiciary Committee and has been reported out.

There has been an effort to obtain the legal papers of Miguel Estrada when he worked as an Assistant Solicitor General. I say with all due respect that that kind of contention is a red herring. Seven former Solicitors General wrote to the then chairman of the Judiciary Committee, Senator LEAHY, outlining this issue in a succinct way. Reading the letter would express it as briefly as it can be expressed. Solicitors General Seth Waxman, a Democrat, Walter Dellinger, a Democrat, Drew Days, a Democrat, Kenneth Starr, a Republican, Charles Fried, a Republican, Robert H. Bork, a Republican, Archibald Cox, a Democrat—a four to three balance for Democrats—wrote as follows:

We write to express our concern about your recent request that the Department of Justice turn over ''appeal recommendations, certiorari recommendations and amicus recommendations'' that Miguel Estrada worked on while in the Office of Solicitor General. As former heads of the Office of Solicitor General, we can attest to the vital importance of candor and confidentiality in the Solicitor General's decision-making process. The Solicitor General is charged with weighing responsibility, of deciding whether to appeal adverse decisions in cases where the United States is a party, whether to seek Supreme Court review of adverse appellate decisions, and whether to participate as amicus curiae and other high-profile cases that implicate an important Federal interest. The Solicitor General has the responsibility of representing the interests not just of the Justice Department nor just of the executive branch but of the entire Federal Government, including Congress. It goes without saying that when we make these and other critical decisions we rely on frank, honest, and thorough advice from our staff attorneys, such as Mr. Estrada. Our decision-making process requires the unbridled, open exchange of ideas, and exchange simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all but vulnerable to public disclosures. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosures. High-level decision-making requires candor, and candor in turn requires confidentiality. Any attempt to intrude into the office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the U.S. litigation interests, a cost that would also be borne by Congress itself. Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the Federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process.

It is signed by four former Democratic Solicitors General for Democratic Presidents who were Democrats, and three former Solicitors General who served in that capacity for Republican Presidents.

What is really happening here is that the advise and consent function is being turned into an advise and dissent function. Beyond the qualifications of Mr. Estrada to be on the Court of Appeals for the District of Columbia Circuit, this is obviously a preliminary battle for the next nominee to the Supreme Court of the United States.

I emphasize the issue of the unprecedented nature of this challenge and this procedure where 41 Senators can hold the confirmation process hostage. In order to cut off debate—to get what we call cloture—60 votes are required. So as long as 41 Senators of the opposition party vote against cloture, the nomination process cannot go forward and there cannot be an up-or-down vote on a nominee.

It has been said many times that if the opponents of Mr. Estrada seek to vote him down, let them do so. But it is plain that there are more than 51 Senators who are ready to vote to confirm Miguel Estrada. It is reported that some 55 Senators are prepared to vote for cloture. If this process goes on long enough, I think it is true that 60 votes would be obtained, cloture would be invoked, debate would be cut off, and there would be a vote on Miguel Estrada and he would be confirmed.

But this lengthy process comes at the expense of very important other business of the Senate. The minority leader appeared in the Chamber earlier this week and asked to proceed to a discussion of the economy, which is a very important subject. That was obviously a tactic to make a point of trying to get off of Estrada and going to something else. But we should conclude Estrada not by way of removing the nomination from the floor but by way of voting on Miguel Estrada and then moving on to other very important items.

There are very important issues which this Senate has to consider—an economic stimulus package, the prospects of a war in Iraq, and the issue of terrorism, which I am going to speak about in a few minutes. But right now, there is a stranglehold on the Senate with both sides having dug in.

I will concede that when President Clinton was in the White House and we Republicans controlled the Senate that we did not give due deference to Presidential nominees. The record is also plain that I was willing to and did support Democratic nominees who were qualified. Other Republicans did as well. When we had a majority in the Judiciary Committee, we voted out nominees who were Democrats.

It is my hope that one day we will find a resolution to this issue by establishing a protocol where the practice is established that so many days after a nomination is submitted there is a hearing in the Judiciary Committee; some days later, there is a vote by the committee; so many days after that, there is a floor debate and a vote by the Senate could be extended.

On the most controversial nomination we have had during my tenure, the nomination of Justice Clarence Thomas, which was decided on the 52-to-48 vote with a lot of acrimonious debate remembered well in this Chamber although it was back in October of 1991, the opposition party did not resort to a filibuster. In 1991, the Senate was controlled by the Democrats. They had a majority of the Senators. Justice Thomas was confirmed 52 to 48 in a very hotly contested, very partisan, very controversial nomination.

Now to move to Miguel Estrada to be on the lower court, the District of Columbia Circuit Court, and with a matter of his qualifications, is sending the confirmation process into turmoil from which it may never recover, or if it does recover it is going to be a very long time. The fallout on this issue goes beyond the nomination process but to the essence of collegiality and the workings of the Senate, which is very much to the detriment of this

body and very much to the detriment of the American people whom we are supposed to serve.

It is my hope that we yet might be able to come to some accommodation—not on Miguel Estrada but on the broader issues where we can have a protocol and establish a procedure that is not partisan, not political.

We ought to take the judicial nominating process out of politics so that when you have a Republican President and a Senate controlled by the Democrats, or a President who is a Democrat with a Senate controlled by the Republicans, we do not get into a logjam. And now we have a President who is a Republican and a Senate controlled by the Republicans, but as long as there are 41 who will stand up and oppose and filibuster, then the entire process breaks down.

TERRORISM

Mr. President, I intend to talk on another subject. I have gotten the acquiescence of the chairman of the committee, Senator HATCH. This is not about the Estrada nomination that we are generally talking about, although Senators have talked about other subjects. The subject I am now going to discuss is a matter of great national importance. It relates to a report that was issued yesterday by Senator LEAHY, Senator GRASSLEY, and myself. It is in reference to the issue of terrorism.

The Judiciary Committee is scheduled to have a hearing next Tuesday, and there are matters that require discussion so that we are in a position to get responses from the Director of the FBI and move ahead with the Judiciary Committee hearings scheduled, as I said, for next Tuesday.

Yesterday, as a matter of senatorial oversight, Senator LEAHY, Senator GRASSLEY, and I released a 37-page report that deals with the issue of the FBI's activities under the Foreign Intelligence Surveillance Act (''FISA'') and the ability of the Federal Bureau of Investigation and the Department of Justice to handle counterterrorism. The report can be found on my office's internet website at specter.senate.gov.

It is my view that there is a critical issue of the FBI's competence to handle terrorism, in light of the clear-cut failures of the FBI prior to 9/11, and the FBI's failure to answer important questions about what the FBI has done to correct the current failures.

The report we released yesterday refers to the FBI's handling of the famous Phoenix memorandum, where there was a suspicious person who was taking flight training in the Phoenix area, and he had a big picture of Osama bin Laden on his wall. A detailed FBI report was submitted to Washington and was lost in the shuffle at FBI headquarters.

At pages 31–32 of the report that we filed yesterday, there is a reference to the Phoenix memo. Had it been forwarded to the right personnel and understood at FBI headquarters, the Foreign Intelligence Surveillance Act request in the Moussaoui case from the Justice Department's Office of Intelligence Policy and Review would have been handled in a different manner. With that Phoenix report, coupled with the information from Zacarias Moussaoui's computer, and coupled with other information, 9/11 might well have been prevented.

There was information in the hands of the Central Intelligence Agency about individuals in Kuala Lampur, Malaysia, who later turned out to be among the hijackers on 9/11—information that was not turned over to the Immigration and Naturalization Service. Had it been turned over, those individuals would have been kept out of the United States and would not have been hijackers on 9/11.

There had been information as early as 1996 from a Pakistani named Abdul Hakim Murad, an al-Qaida member, who had plans to fly an airplane into the White House or CIA headquarters.

Had the information on Zacarias Moussaoui been properly handled, it could have led to a FISA search authorization for Moussaoui's computer and the information contained on that computer, and might well have prevented 9/11.

The Zacarias Moussaoui case received national prominence when a conscientious FBI agent named Coleen Rowley wrote a 13-page, single-spaced letter to the FBI Director, which the Judiciary Committee ultimately saw and was the subject of a very important Judiciary Committee hearing last June 6. FBI Agent Rowley was honored on the cover of Time Magazine as one of the persons of the year—three so-called whistleblowers, which is a categorization that doesn't sound too complimentary on its face, but it is very important when somebody knows what is going on within the Government that is wrong and has the courage to stand up and expose it and subject himself or herself to retaliation.

But in the course of what Agent Rowley wrote to FBI Director Mueller, it was apparent the FBI was applying the wrong standard for a warrant under the Foreign Intelligence Surveillance Act.

The letter from Agent Rowley pointed out that they were being held to a standard of preponderance of the evidence—meaning more likely or more probable than not—meaning 51 percent or more. In the course of that hearing, I raised with Director Mueller and with Agent Rowley the case of Illinois v. Gates, 462 U.S. 213, 1983, which appears at pages 23–24 of the report that Senators LEAHY, GRASSLEY, and I released yesterday, which defined probable cause as ''circumstances which warrant suspicion'' under the ''totality of the circumstances analysis.''

This case was decided in 1983 and it referred back to an opinion of Chief Justice Marshall in 1813. So this had been the law for a long time. But at the hearing, Agent Rowley testified that was not the standard that was used, and there is a real question which has yet to be answered as to whether FBI Director Mueller knew what the right standard was.

In light of the fact that a warrant was not obtained under the Foreign Intelligence Surveillance Act, Moussaoui, a key participant in the 9/11 planning, developed into a burgeoning, very major case in the United States in the intervening months. We then proceeded to have a closed-door session, where we brought in attorneys and personnel from the FBI who were in charge of handling warrants under the Foreign Intelligence Surveillance Act. This appears at page 27.

My questioning:

What is the legal standard for probable cause for a warrant?

FBI attorney:

A reasonable belief that the facts you are trying to prove are accurate.

Question by me:

Reason to believe?

Answer by the attorney:

Reasonable belief.

Question by me:

Reasonable belief?

Answer by the attorney:

More probable than not.

My question:

More probable than not?

Mr. President, that is not the standard. The standard is suspicion under the totality of the circumstances. Here is the key attorney who is supposed to pass on applications for warrants under the Foreign Intelligence Surveillance Act, and he doesn't know the standard.

My question was:

Are you familiar with Gates v. Illinois?

Answer:

No, sir.

He doesn't know the baseline case for deciding what the standard is for probable cause, and he is the man who is supposed to approve warrants under the Foreign Intelligence Surveillance Act so that we can find out what men like Zacarias Moussaoui are doing and protect the American people.

I was absolutely astounded at what I heard. I was astounded because the June 6 hearings, more than a month before we had this closed-door session on July 9, were widely publicized. They were on C–SPAN. Maybe nobody watches C–SPAN. Maybe nobody is watching C–SPAN now. Maybe nobody ever watches C–SPAN. But beyond being publicized on C–SPAN, there was extensive newspaper coverage about it. One would have expected that the agents who deal with the Foreign Intelligence Surveillance Act would be looking at a hearing which was squarely on their subject. Or one would also expect that the Director of the FBI, who was at the hearing, and found that key FBI personnel had applied the wrong standard in the Zacarias Moussaoui case—causing them not to apply for a search warrant—that the

FBI Director would take specific steps to see to it that the people in charge of handling those warrant applications would have known what was going on.

From June 6 to July 9 is 33 days. The world could turn in 33 days. People could be doing highly suspicious things, people could be planning terrorist attacks, and no action was taken by the Director of the FBI to see to it that the people who were charged with the responsibility of applying for these warrants did so.

The very next day, I wrote to the Director of the FBI:

Dear Bob, In a hearing before the Judiciary Committee on June 6 . . . I called your attention to the standard on probable cause in the opinion of then-Associate Justice Rehnquist in Illinois v. Gates. . . .

I go through the business about suspicion and totality of the circumstances. My letter continues:

In a closed door hearing yesterday, seven FBI personnel handling FISA warrant applications were questioned, including four attorneys.

A fair summary of their testimony demonstrated that no one was familiar with Justice Rehnquist's definition from Gates and no one articulated an accurate standard for probable cause.

I would have thought that the FBI personnel handling FISA applications would have noted this issue from the June 6th hearing; or, in the alternative, that you or other supervisory personnel would have called it to their attention.

It is obvious that these applications, which are frequently made, are of the utmost importance to our national security and your personnel should not be applying such a high standard that precludes submission of FISA applications to the Foreign Intelligence Surveillance Court.

I believe the Judiciary Committee will have more to say on this subject but I wanted to call this to your attention immediately so that you could personally take appropriate corrective action.

Days followed, weeks followed, and no response from Director Mueller.

Then on September 10, I again raised these issues with a representative of the Department of Justice who appeared before the Judiciary Committee. On September 12, I received an undated letter signed by the Assistant Director for the Office of Public and Congressional Affairs. It is very unusual to get undated letters. The representation has been made that the letter was sent on July 25, but it was received in my office on September 12.

Mr. President, I ask unanimous consent that my letter to Director Mueller dated July 10 and the undated response from John E. Collingwood be printed in the CONGRESSIONAL RECORD at the conclusion of my remarks.

Mr. SCHUMER. Reserving the right to object—and I am not going to object—I want to get a time line. My friend has important things to say. How much longer does my colleague from Pennsylvania—if he will yield for a question—expect to hold the floor?

Mr. SPECTER. I will not say regular order, but there is no basis for the inquiry, but I will respond. I expect to be about 15 minutes more.

Mr. SCHUMER. I thank my colleague. I am trying to work out our schedule. I have no objection, of course. I am very interested in what my colleague has to say.

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

(See exhibit 1.)

Mr. SPECTER. Mr. President, the FBI then put out a memorandum dated September 16. That was in response to my questioning the Department of Justice representative at the Judiciary Committee hearings on September 10. Again, Mr. President, I ask unanimous consent that this memorandum be printed in the CONGRESSIONAL RECORD following my statement.

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

(See exhibit 2.)

Mr. SPECTER. Mr. President, I will not read the memo or analyze it in detail, but I invite readers of the CONGRESSIONAL RECORD to do so. This is a virtually unintelligible memorandum, if agents are supposed to read this and know what to do about applications for warrants under the Foreign Intelligence Surveillance Act.

In paragraph 3, it talks about ''which deal with probabilities.'' It makes a reference to ''it requires more than unfounded suspicion,'' but it is not probabilities that involve the standards, it is suspicion. Obviously, not unfounded suspicion, but suspicion based on a totality of the circumstances.

At that stage, I again wrote to Director Mueller noting the questions which I had propounded to him and Special Agent Coleen Rowley on June 6 and the July 10 letter which I wrote to him which had still not been answered. This undated letter from John E. Collingwood provides no answer at all. I will not read it in detail, but it will be in the RECORD.

The closest the letter from John E. Collingwood, the Assistant Director for the Office of Public and Congressional Affairs, comes is:

This guidance will also address the concerns raised in your letter in your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation.

That is as close as they come to an answer which, obviously, on its face is no answer at all.

So I again wrote Director Mueller on September 24, 2002. I referenced the July 10 letter, and I referenced the fact that on September 12, my office received an undated letter from Assistant Director Collingwood which was totally unresponsive. I referenced the September 16 FBI memo, and concluded by saying I would like an explanation from him as to why it took the FBI so long to disseminate information on the standard for probable cause under Illinois v. Gates for a Foreign Intelligence Surveillance Act warrant. As yet, I have not received an answer from FBI Director Mueller to that important question as to why it took so long.

Then I supplemented that letter on October 1, inquiring what were the specifics on the standard of probable cause used by the FBI for warrants under the Foreign Intelligence Surveillance Act from June 6, the date of our Judiciary Committee hearing, until September 16, when the memorandum went out. As yet, I have not gotten an answer to that letter.

I ask unanimous consent that both of those letters be printed at the conclusion of my remarks.

In the sequence of events, we next sent over to the FBI the report which we issued yesterday to give them an opportunity to review it and an opportunity to make comments. Finally, last Friday, February 21, 2003, we received another letter dated February 20 from the Department of Justice which referenced the outstanding questions—not sent to me, the person who had raised the questions, but sent to Senator HATCH, with a copy to me—and ending with the statement of what standard had been applied. The letter is signed by Acting Assistant Attorney General Jamie E. Brown:

The standard they employed was consistent with ''Illinois v. Gates'' both before and after they received the memorandum.

That is patently false. The standard which had been employed before the memorandum was more probable than not, 51 percent, as testified by Special Agent Coleen Rowley, and it is undetermined as to what standard was used thereafter.

The issues under the Foreign Intelligence Surveillance Act have been raised in other oversight hearings relating to Wen Ho Lee, when the Department of Justice, on a matter handled by Attorney General Janet Reno personally, declined to request a warrant under the Foreign Intelligence Surveillance Act where there was ample probable cause, a matter which was reviewed in depth by the subcommittee which I chaired on Department of Justice oversight.

The Attorney General designated Assistant U.S. Attorney Randy Bellows to review the Wen Ho Lee case. Mister Bellows filed an extensive report on May 12, 2000, saying that Attorney General Reno was wrong and the subcommittee of the Judiciary Committee was correct that a warrant should have been issued.

Just in the last few weeks, an indictment has been returned, charging Mr. Sami Al-Arian for gathering funds for terrorist organizations since the early 1990s, an indictment based on extensive evidence collected pursuant to the Foreign Intelligence Surveillance Act, raising a real question as to the interpretation by the FBI and the Department of Justice of the Foreign Intelligence Surveillance Act, going back to Wen Ho Lee, going back to the 1990s, and surviving up until very recently, when they failed to utilize the provisions of the Foreign Intelligence Surveillance Act for criminal prosecutions.

Prior to the enactment of the PATRIOT Act in the fall of 2001, the standard for Foreign Intelligence Surveillance Act surveillance had been interpreted by the courts to be that the primary purpose for the surveillance had to be for intelligence gathering, but saying ''primary purpose'' left latitude for some law enforcement purpose.

Then the PATRIOT Act amended the Foreign Intelligence Surveillance Act standards to say ''significant purpose,'' broadening to some extent the issue of using Foreign Intelligence Surveillance Act warrants for law enforcement purposes. So in that substance, there is a persistent question as to the activities of the Department of Justice in implementing the Foreign Intelligence Surveillance Act, passed in 1978, at a time when gathering information and evidence against terrorists is of the utmost importance for the security of the American people.

In our oversight hearing which we conducted last July 9, and in subsequent hearings and correspondence, we asked the Department of Justice for an opinion written by the Foreign Intelligence Surveillance Court, which the Department of Justice declined to give us. We finally had to get it from the court itself. In that matter, the Foreign Intelligence Surveillance Court criticized the Department of Justice and the FBI for some 75 cases where, as the court put it, the applications for search warrants had contained substantial inaccuracies. Then there was an appeal taken, the first such appeal, where the Court of Appeals for the Foreign Intelligence Surveillance Act found that there was broader discretion for law enforcement, which was very important in the war against terrorism.

All of this is very complicated, and I have gone to some length to put this into the RECORD.

I ask unanimous consent, on behalf of Senator LEAHY, Senator GRASSLEY, and myself, that the full text of the report issued yesterday be printed in the RECORD. As I noted earlier, the report can also be found on my office's website at specter.senate.gov.

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

INTERIM REPORT ON FBI OVERSIGHT: FISA IMPLEMENTATION FAILURES

I. EXECUTIVE SUMMARY AND CONCLUSIONS

Working in a bipartisan manner in the 107th Congress, the Senate Judiciary Committee conducted the first comprehensive oversight of the FBI in nearly two decades. That oversight was aimed not at tearing down the FBI but at identifying any problem areas as a necessary first step to finding constructive solutions and marshaling the attention and resources to implement improvements. The overarching goal of this oversight was to restore confidence in the FBI and make the FBI as strong and as great as it must be to fulfill this agency's multiple and critical missions of protecting the United States against crime, international terrorism, and foreign clandestine intelligence activity, within constitutional and statutory boundaries.

Shortly after the Committee initiated oversight hearings and had confirmed the new Director of the FBI, the Nation suffered the terrorist attacks of September 11, 2001, the most serious attacks on these shores since Pearl Harbor. While it is impossible to say what could have been done to stop these attacks from occurring, it is certainly possible in hindsight to say that the FBI, and therefore the Nation, would have benefitted from earlier close scrutiny by this Committee of the problems the agency faced, particularly as those problems affected the Foreign Intelligence Surveillance Act (''FISA'') process. Such oversight might have led to corrective actions, as that is an important purpose of oversight.

In the immediate aftermath of the attacks, the Congress and, in particular, the Senate Judiciary Committee responded to demands by the Department of Justice (DOJ) and the FBI for greater powers to meet the security challenges posed by international terrorism. We worked together to craft the USA PATRIOT Act to provide such powers. With those enhanced powers comes an increased potential for abuse and the necessity of enhanced congressional oversight.

Our oversight has been multi-faceted. We have held public hearings, conducted informal briefings, convened closed hearings on matters of a classified nature, and posed written questions in letters in connection with hearings to the DOJ and FBI. Although our oversight has focused primarily on the FBI, the Attorney General and the DOJ have ultimate responsibility for the performance of the FBI. Without both accountability and support on the part of the Attorney General and senior officials of the DOJ, the FBI cannot make necessary improvements or garner the resources to implement reforms.

At times, the DOJ and FBI have been cooperative in our oversight efforts. Unfortunately, however, at times the DOJ and FBI have either delayed answering or refused to answer fully legitimate oversight questions. Such reticence only further underscores the need for continued aggressive congressional oversight. Our constitutional system of checks and balances and our vital national security concerns demand no less. In the future, we urge the DOJ and FBI to embrace, rather than resist, the healthy scrutiny that legitimate congressional oversight brings.

One particular focus of our oversight efforts has been the Foreign Intelligence Surveillance Act (FISA). This report is focused on our FISA oversight for three reasons. First, the FISA is the law governing the exercise of the DOJ's and FBI's surveillance powers inside the United States to collect foreign intelligence information in the fight against terrorism and, as such, is vitally important to our national security. Second, the concerns revealed by our FISA oversight highlight the more systemic problems facing the FBI and the importance of close congressional oversight and scrutiny in helping to provide the resources and attention to correct such problems before they worsen. Third, members of this Committee led the effort to amend key provisions of the FISA in the USA PATRIOT Act, and the sunset or termination of those amendments in four years makes it imperative that the Committee carefully monitor how the FISA changes are being implemented.

This report is in no way intended to be a comprehensive study of what did, or did not, ''go wrong'' before the 9/11 attacks. That important work was commenced by the Joint Intelligence Committee in the 107th Congress and will be continued by the National Commission on Terrorist Attacks (the ''9/11 Commission'') established by an act of Congress at the end of the last session. The focus of this report is different than these other important inquiries. We have not attempted to analyze each and every piece of intelligence or the performance of each and every member of the Intelligence Community prior to the 9/11 attacks. Nor have we limited our inquiry to matters relating only to the 9/11 attacks. Rather, we have attempted, based upon an array of oversight activities related to the performance of the FBI over an extended period of time, to highlight broader and more systemic problems within the DOJ and FBI and to ascertain whether these systemic shortcomings played a role in the implementation of the FISA prior to the 9/11 attacks.

The FISA provides a statutory framework for electronic and other forms of surveillance in the context of foreign intelligence gathering. These types of investigations give rise to a tension between the government's legitimate national security interests, on the one hand, and, on the other hand, constitutional safeguards against unreasonable government searches and seizures and excessive government intrusion into the exercise of free speech, associational, and privacy rights. Congress, through legislation, has sought to strike a delicate balance between national security and constitutionally protected interests in this sensitive arena.

The oversight review this Committee has conducted during the 107th Congress has uncovered a number of problems in the FISA process: a misunderstanding of the rules governing the application procedure, varying interpretations of the law among key participants, and a break-down of communication among all those involved in the FISA application process. Most disturbing is the lack of accountability that has permeated the entire application procedure.

Our FISA oversight—especially oversight dealing with the time leading up to the 9/11 attacks—has reinforced the conclusion that the FBI must improve in the most basic aspects of its operations. Following is a list of our most important conclusions:

FBI Headquarters did not properly support the efforts of its field offices in foreign intelligence matters. The role of FBI Headquarters in national security investigations is to ''add value'' in two ways: by applying legal and practical expertise in the processing of FISA surveillance applications and by integrating relevant information from all available intelligence sources to evaluate the significance of particular information and to supplement information from the field. In short, Headquarters' role is to know the law and ''connect the dots'' from multiple sources both inside and outside the FBI. The FBI failed in this role before the 9/11 attacks. In fact, the bureaucratic hurdles erected by Headquarters (and DOJ) not only hindered investigations but contributed to inaccurate information being presented to the FISA Court, eroding the trust in the FBI of the special court that is key to the government's enforcement efforts in national security investigations.

Key FBI agents and officials were inadequately trained in important aspects of not only FISA, but also fundamental aspects of criminal law.

In the time leading up to the 9/11 attacks, the FBI and DOJ had not devoted sufficient resources to implementing the FISA, so that long delays both crippled enforcement efforts and demoralized line agents.

The secrecy of individual FISA cases is certainly necessary, but this secrecy has been extended to the most basic legal and procedural aspects of the FISA, which should not be secret. This unnecessary secrecy contributed to the deficiencies that have hamstrung the implementation of the FISA.

Much more information, including all unclassified opinions and operating rules of the FISA Court and Court of Review, should be made public and/or provided to the Congress.

The FBI's failure to analyze and disseminate properly the intelligence data in the agency's possession rendered useless important work of some of its best field agents. In short, the FBI did not know what it knew. While we are encouraged by the steps commenced by Director Mueller to address this problem, there is more work to be done.

The FBI's information technology was, and remains, inadequate to meet the challenges facing the FBI, and FBI personnel are not adequately trained to use the technology that they do possess. We appreciate that Director Mueller is trying to address this endemic problem, but past performance indicates that close congressional scrutiny is necessary to ensure that improvements continue to be made swiftly and effectively.

A deep-rooted culture of ignoring problems and discouraging employees from criticizing the FBI contributes to the FBI's repetition of its past mistakes in the foreign intelligence field. There has been little or no progress at the FBI in addressing this culture.

It is important to note that our oversight and conclusions in no way reflect on the fine and important work being done by the vast majority of line agents in the FBI. We want to commend the hard-working special agents and supervisory agents in the Phoenix and Minneapolis field offices for their dedication, professionalism, and initiative in serving the American people in the finest traditions of the FBI and law enforcement. Indeed, one of our most basic conclusions, both with respect to FISA and the FBI generally, is that institutional and management flaws prevent the FBI's field agents from operating to their full potential.

Although the DOJ and FBI have acknowledged shortcomings in some of these areas and begun efforts to reform, we cannot stress strongly enough the urgency of this situation. The pace of improvement and reform must quicken.

We are issuing this interim public report now so that this information is available to the American people and Members of Congress as we evaluate the implementation of the USA PATRIOT Act amendments to the FISA and additional pending legislation, including the FBI Reform Act. We also note that many of the same concerns set forth in this report have already led to legislative reforms. Included in these was the bipartisan proposal, first made in the Senate, to establish a cabinet level Department of Homeland Security, a proposal that is already a legislative reality. Our oversight also helped us to craft and pass, for the first time in 20 years, the 21st Century Department of Justice Appropriations Authorization Act, P.L. 107–296, designed to support important reforms at the Department of Justice and the FBI. In addition, concerns raised by this Committee about the need for training on basic legal concepts, such as probable cause, spurred the FBI to issue an electronic communication on September 16, 2002, from the FBI's Office of the General Counsel to all field offices explaining this critical legal standard.

Additionally, this report may assist the senior leadership of the DOJ and FBI, and other persons responsible for ensuring that FISA is used properly in defending against international terrorists.

II. OVERVIEW OF FBI OVERSIGHT IN THE 107TH CONGRESS

A. The Purposes of FBI Oversight: Enhancing Both Security and Liberty

Beginning in the summer of 2001 and continuing through the remainder of the 107th Congress, the Senate Judiciary Committee conducted intensive, bipartisan oversight of the FBI. The purpose of this comprehensive oversight effort was to reverse the trend of the prior decades, during which the FBI operated with only sporadic congressional oversight focused on its handling of specific incidents, such as the standoffs at Ruby Ridge, Idaho, or Waco, Texas, and the handling of the Peter Lee and Wen Ho Lee espionage cases. It was the view of both Democrats and Republicans on the Judiciary Committee that the FBI would benefit from a more hands-on approach and that congressional oversight would help identify problems within the FBI as a first step to ensuring that appropriate resources and attention were focused on constructive solutions. In short, the goal of this oversight was to ensure that the FBI would perform at its full potential. Strong and bipartisan oversight, while at times potentially embarrassing to any law enforcement agency, strengthens an agency in the long run. It helps inform the crafting of legislation to improve an agency's performance, and it casts light on both successes and problems in order to spur agencies to institute administrative reforms of their own accord. In short, the primary goal of FBI oversight is to help the FBI be as great and effective as it can be.

So, too, is oversight important in order to protect the basic liberties upon which our country is founded. Past oversight efforts, such as the Church Committee in the 1970s, have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence that these abuses have come after extended periods when the public and the Congress did not diligently monitor the FBI's activities. Even when agencies such as the FBI operate with the best of intentions (such as protecting our nation from foreign threats such as Communism in the 1950s and 1960s and fighting terrorism now), if left unchecked, the immense power wielded by such government agencies can lead them astray. Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and the FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable. In this way, congressional oversight plays a critical role in our democracy.

The importance of the dual goals of congressional oversight—improving FBI performance and protecting liberty—have been driven home since the 9/11 attacks. Even prior to the terrorist attacks, the Judiciary Committee had begun oversight and held hearings that had exposed several longstanding problems at the FBI, such as the double standard in discipline between line agents and senior executive officials. The 9/11 attacks on our country have forever redefined the stakes riding upon the FBI's success in fulfilling its mission to fight terrorism. It is no luxury that the FBI perform at its peak level—it is now a necessity.

At the same time, the increased powers granted to the FBI and other law enforcement agencies after the 9/11 attacks, in the USA PATRIOT Act, which Members of this Committee helped to craft, and through the actions of the Attorney General and the President, have made it more important than ever that Congress fulfills its role in protecting the liberty of our nation. Everyone would agree that winning the war on terrorism would be a hollow victory indeed if it came only at the cost of the very liberties we are fighting to preserve. By carefully overseeing the DOJ's and FBI's use of its broad powers, Congress can help to ensure that the false choice between fundamental liberty and basic security is one that our government never takes upon itself to make. For these reasons, in the post-9/11 world, FBI oversight has been, and will continue to be, more important than ever.

B. Judiciary Committee FBI Oversight Activities in the 107th Congress

1. Full Committee FBI Oversight Hearings

Beginning in July 2001, after Senator Leahy became chairman, the Senate Judiciary Committee held hearings that focused on certain longstanding and systemic problems at the FBI. These included hearings concerning: (1) the FBI's antiquated computer systems and its belated upgrade program; (2) the FBI's ''circle the wagons'' mentality, wherein those who report flaws in the FBI are punished for their frankness; and (3) the FBI's flawed internal disciplinary procedures and ''double standard'' in discipline, in which line FBI agents can be seriously punished for the same misconduct that only earns senior FBI executives a slap on the wrist. Such flaws were exemplified by the disciplinary actions taken (and not taken) by the FBI and DOJ after the incidents at Waco, Texas, and Ruby Ridge, Idaho, and the apparent adverse career effects experienced by FBI agents participating in those investigations who answered the duty call to police their own.

The Committee's pre-9/11 FBI oversight efforts culminated with the confirmation hearings of the new FBI Director, Robert S. Mueller, III. Beginning on July 30, 2001, the Committee held two days of extensive hearings on Director Mueller's confirmation and closely questioned Director Mueller about the need to correct the information technology and other problems within the FBI. In conducting these hearings, Committee Members understood the critical role of the FBI Director in protecting our country from criminal, terrorist, and clandestine intelligence activities and recognized the many challenges facing the new Director.

Director Mueller was questioned very closely on the issue of congressional oversight, engaging in four rounds of questioning over two days. In response to one of Senator Specter's early questions, Director Mueller stated ''I understand, firmly believe in the right and the power of Congress to engage in its oversight function. It is not only a right, but it is a duty.''

In response to a later question, Director Mueller stated:

''I absolutely agree that Congress is entitled to oversight of the ongoing responsibilities of the FBI and the Department of Justice. You mentioned at the outset the problems that you have had over a period of getting documents in ongoing investigations. And as I stated before and I'll state again, I think it is incumbent upon the FBI and the Department of Justice to attempt to accommodate every request from Congress swiftly and, where it cannot accommodate or believes that there are confidential issues that have to be raised, to bring to your attention and articulate with some specificity, not just the fact that there's ongoing investigation, not just the fact that there is an ongoing or an upcoming trial, but with specificity why producing the documents would interfere with either that trial or for some other reason or we believed covered by some issue of confidentiality.''

Incoming Director Mueller, at that time, frankly acknowledged that there was room for improvement in these areas at the FBI and vowed to cooperate with efforts to conduct congressional oversight of the FBI in the future.

Director Mueller assumed his duties on September 4, 2001, just one week before the terrorist attacks. After the terrorist attacks, there was a brief break from FBI oversight, as the Members of the Judiciary Committee worked with the White House to craft

and pass the USA PATRIOT Act. In that new law, the Congress responded to the DOJ's and FBI's demands for increased powers but granted many of those powers only on a temporary basis, making them subject to termination at the end of 2005. The ''sunset'' of the increased FISA surveillance powers reflected the promise that the Congress would conduct vigilant oversight to evaluate the FBI's performance both before and after 9/11. Only in that way could Congress and the public be assured that the DOJ and FBI needed the increased powers in the first place, and were effectively and properly using these new powers to warrant extension of the sunset.

Passage of the USA PATRIOT Act did not solve the longstanding and acknowledged problems at the FBI. Rather, the 9/11 attacks created a new imperative to remedy systemic shortcomings at the FBI. Review of the FBI's pre-9/11 performance is not conducted to assess blame. The blame lies with the terrorists. Rather, such review is conducted to help the FBI prevent future attacks by not repeating the mistakes of the past. Thus, the enactment of the USA PATRIOT Act did not obviate the need to oversee the FBI; it augmented that need.

Within weeks of passage of the USA PATRIOT Act, the Senate Judiciary Committee held hearings with senior DOJ officials on implementation of the new law and other steps that were being taken by the Administration to combat terrorism. The Committee heard testimony on November 28, 2001, from Assistant Attorney General Michael Chertoff and, on December 6, 2001, from Attorney General Ashcroft. In response to written questions submitted in connection with the latter hearing, DOJ confirmed that shortly after the USA PATRIOT Act had been signed by the President on October 26, 2001, DOJ began to press the Congress for additional changes to relax FISA requirements, including expansion of the definition of ''foreign power'' to include individual, non-U.S. persons engaged in international terrorism. DOJ explained that this proposal was to address the threat posed by a single foreign terrorist without an obvious tie to another person, group, or state overseas. Yet, when asked to ''provide this Committee with information about specific cases that support your claim to need such broad new powers,'' DOJ was silent in its response and named no specific cases showing such a need, nor did it say that it could provide such specificity even in a classified setting. In short, DOJ sought more power but was either unwilling or unable to provide an example as to why.

Beginning in March 2002, the Committee convened another series of hearings monitoring the FBI's performance and its efforts to reform itself. On March 21, 2002, the Judiciary Committee held a hearing on the DOJ Inspector General's report on the belated production of documents in the Oklahoma City bombing case. That hearing highlighted longstanding problems in the FBI's information technology and training regarding the use of, and access to, records. It also highlighted the persistence of a ''head-in-the-sand'' approach to problems, where shortcomings are ignored rather than addressed and the reporting of problems is discouraged rather than encouraged.

On April 9, 2002, the Committee held a hearing on the Webster Commission's report regarding former FBI Agent and Russian spy Robert Hanssen's activities. That hearing exposed a deep-seated cultural bias against the importance of security at the FBI. One important finding brought to light at that hearing was the highly inappropriate handling of sensitive FISA materials in the time after the 9/11 attacks. In short, massive amounts of the most sensitive and highly classified materials in the FBI's possession were made available on an unrestricted basis to nearly all FBI employees. Even more disturbing, this action was taken without proper consultation with the FBI's own security officials.

On May 8, 2002, the Judiciary Committee held an oversight hearing at which FBI Director Mueller and Deputy Attorney General Thompson testified regarding their efforts to reshape the FBI and the DOJ to address the threat of terrorism. It was at this hearing that the so-called ''Phoenix Memorandum'' was publicly discussed for the first time. Director Mueller explained in response to one question:

''[T]he Phoenix electronic communication contains suggestions from the agent as to steps that should be taken, or he suggested taking to look at other flight schools . . . . He made a recommendation that we initiate a program to look at flight schools. That was received at Headquarters. It was not acted on by September 11. I should say in passing that even if we had followed those suggestions at that time, it would not, given what we know since September 11, have enabled us to prevent the attacks of September 11. But in the same breath I should say that what we learned from instances such as that is much about the weaknesses of our approach to counterterrorism prior to September 11.''

In addition, Director Mueller first discussed at this hearing that FBI agents in Minnesota had been frustrated by Headquarters officials in obtaining a FISA warrant in the Zacharias Moussaoui investigation before the 9/11 attacks, and that one agent seeking the warrant had said that he was worried that Moussaoui would hijack an airplane and fly it into the World Trade Center.

On June 6, 2002, the Committee held another hearing at which Director Mueller testified further regarding the restructuring underway at the FBI. Significantly, that hearing also provided the first public forum for FBI Chief Division Counsel Coleen Rowley of the Minneapolis Division to voice constructive criticism about the FBI. Her criticisms, the subject of a lengthy letter sent to Director Mueller on May 21, 2002, which was also sent to Members of Congress, echoed many of the issues raised in this Committee's oversight hearings. Special Agent Rowley testified about ''careerism'' at the FBI and a mentality at FBI Headquarters that led Headquarters agents to more often stand in the way of field agents than to support them. She cited the Moussaoui case as only the most high profile instance of such an attitude. Special Agent Rowley also described a FBI computer system that prevented agents from accessing their own records and conducting even the most basic types of searches. In short, Special Agent Rowley's testimony reemphasized the importance of addressing the FBI's longstanding problems, not hiding from them, in the post-9/11 era.

As the head of the Department of Justice as a whole, the Attorney General has ultimate responsibility for the performance of the FBI. On July 25, 2002, the Judiciary Committee held an oversight hearing at which Attorney General Ashcroft testified. The Committee and the Attorney General engaged in a dialogue regarding the performance of the DOJ on many areas of interest, including the fight against terrorism. Among other things discussed at this hearing were the Attorney General's plans to implement the Terrorism Information and Prevention System (TIPS), which would have enlisted private citizens to monitor ''suspicious'' activities of other Americans. After questioning on the subject, Attorney General Ashcroft testified that he would seek restrictions on whether and how information generated through TIPS would be retained. Later, as part of the Homeland Security legislation, TIPS was prohibited altogether.

On September 10, 2002, the Committee held an oversight hearing specifically focusing on issues related to the FISA. Leading experts from the DOJ, from academia, and from the civil liberties and national security legal communities participated in a rare public debate on the FISA. That hearing brought before the public an important discussion about the reaches of domestic surveillance using FISA and the meaning of the USA PATRIOT Act. In addition, through the efforts of the Judiciary Committee, the public learned that this same debate was already raging in private. The FISA Court (FISC) had rejected the DOJ's proposed procedure for implementing the USA PATRIOT Act, and the FISA Court of Review was hearing its first appeal in its 20-year-plus existence to address important issues regarding these USA PATRIOT Act amendments to the FISA. The Committee requested that the FISA Court of Review publicly release an unclassified version of the transcript of the oral argument and its opinion, which the Court agreed to do and furnished to the Committee. Thus, only through the bipartisan oversight work of the Judiciary Committee was the public first informed of the landmark legal opinion interpreting the FISA and the USA PATRIOT Act amendments overruling the FISC's position, accepting some of the DOJ's legal arguments, but rejecting others.

These are only the full Judiciary Committee hearings related to FBI oversight issues in the 107th Congress. The Judiciary Committee's subcommittees also convened numerous, bipartisan oversight hearings relating to the FBI's performance both before and after 9/11.

2. Other oversight activities: classified hearings, written requests, and informal briefings

The Judiciary Committee and its Members have fulfilled their oversight responsibilities through methods other than public hearings as well. Particularly with respect to FISA oversight, Members of the Judiciary Committee and its staff conducted a series of closed hearings and briefings, and made numerous written inquiries on the issues surrounding both the application for a FISA search warrant of accused international terrorist Zacharias Moussaoui's personal property before the 9/11 attacks and the post–9/11 implementation of the USA PATRIOT Act. As with all of our FBI oversight, these inquiries were intended to review the performance of the FBI and DOJ in order to improve that performance in the future.

The Judiciary Committee and its Members also exercised their oversight responsibilities over the DOJ and the FBI implementation of the FISA through written inquiries, written hearing questions, and other informal requests. These efforts included letters to the Attorney General and the FBI Director from Senator Leahy on November 1, 2001, and May 23, 2002, and from Senators Leahy, Specter, and Grassley on June 4, June 13, July 3, and July 31, 2002. In addition, these Members sent letters requesting information from the FISA Court and FISA Court of Review on July 16, July 31, and September 9, 2002. Such oversight efforts are important on a day-to-day basis because they are often the most efficient means of monitoring the activities of the FBI and DOJ.

3. DOJ and FBI non-responsiveness

Particularly with respect to our FISA oversight efforts, we are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered

or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Specter to ask the Attorney General directly, ''how do we communicate with you and are you really too busy to respond?''

Two clear examples of such reticence on the part of the DOJ and the FBI relate directly to our FISA oversight efforts. First, Chairman Sensenbrenner and Ranking Member Conyers of the House Judiciary Committee issued a set of 50 questions on June 13, 2002, in order to fulfill the House Judiciary Committee's oversight responsibilities to monitor the implementation of the USA PATRIOT Act, including its amendments to FISA. In connection with the July 25, 2002, oversight hearing with the Attorney General, Chairman Leahy posed the same questions to the Department on behalf of the Senate Judiciary Committee. Unfortunately, the Department refused to respond to the Judiciary Committee with answers to many of these legitimate questions. Indeed, it was only after Chairman Sensenbrenner publicly stated that he would subpoena the material that the Department provided any response at all to many of the questions posed, and to date some questions remain unanswered. Senator Leahy posed a total of 93 questions, including the 50 questions posed by the leadership of the House Judiciary Committee. While the DOJ responded to 56 of those questions in a series of letters on July 29, August 26, and December 23, 2002, thirty-seven questions remain unanswered. In addition, the DOJ attempted to respond to some of these requests by providing information not to the Judiciary Committees, which had made the request, but to the Intelligence Committees. Such attempts at forum shopping by the Executive Branch are not a productive means of facilitating legitimate oversight.

Second, the FBI and DOJ repeatedly refused to provide Members of the Judiciary Committee with a copy of the FISA Court's May 17, 2002, opinion rejecting the DOJ's proposed implementation of the USA PATRIOT Act's FISA amendments. This refusal was made despite the fact that the opinion, which was highly critical of aspects of the FBI's past performance on FISA warrants, was not classified and bore directly upon the meaning of provisions in the USA PATRIOT Act authored by Members of the Judiciary Committee. Indeed, the Committee eventually had to obtain the opinion not from the DOJ but directly from the FISA Court, and it was only through these efforts that the public was first made aware of the important appeal being pursued by the DOJ and the legal positions being taken by the Department on the FISA Amendments.

In both of these instances, and in others, the DOJ and FBI have made exercise of our oversight responsibilities difficult.

It is our sincere hope that the FBI and DOJ will reconsider their approach to congressional oversight in the future. The Congress and the American people deserve to know what their government is doing. Certainly, the Department should not expect Congress to be a ''rubber stamp'' on its requests for new or expanded powers if requests for information about how the Department has handled its existing powers have been either ignored or summarily paid lip service.

III. FISA OVERSIGHT: A CASE STUDY OF THE SYSTEMIC PROBLEMS PLAGUING THE FBI

A. Overview and Conclusions

The Judiciary Committee held a series of classified briefings for the purpose of reviewing the processing of FISA applications before the terrorist attacks on September 11, 2001. The Judiciary Committee sought to determine whether any problems at the FBI in the processing of FISA applications contributed to intelligence failures before September 11th; to evaluate the implementation of the changes to FISA enacted pursuant to the USA PATRIOT Act; and to determine whether additional legislation is necessary to improve this process and facilitate congressional oversight and public confidence in the FISA and the FBI.

We specifically sought to determine whether the systemic problems uncovered in our FBI oversight hearings commenced in the summer of 2001 contributed to any shortcomings that may have affected the FBI counterterrorism efforts prior to the 9/11 attacks. Not surprisingly, we conclude that they did. Indeed, in many ways the DOJ and FBI's shortcomings in implementing the FISA—including but not limited to the time period before the 9/11 attacks—present a compelling case for both comprehensive FBI reform and close congressional oversight and scrutiny of the justification for any further relaxation of FISA requirements. FISA applications are of the utmost importance to our national security. Our review suggests that the same fundamental problems within the FBI that have plagued the agency in other contexts also prevented both the FBI and DOJ from aggressively pursuing FISA applications in the period before the 9/11 attacks. Such problems caused the submission of key FISA applications to the FISA Court to have been significantly delayed or not made. More specifically, our concerns that the FBI and DOJ did not make effective use of FISA before making demands on the Congress for expanded FISA powers in the USA PATRIOT Act are bolstered by the following findings:

(1) The FBI and Justice Department were setting too high a standard to establish that there is ''probable cause'' that a person may be an ''agent of a foreign power'' and, therefore, may be subject to surveillance pursuant to FISA;

(2) FBI agents and key Headquarters officials were not sufficiently trained to understand the meanings of crucial legal terms and standards in the FISA process;

(3) Prior problems between the FBI and the FISA Court that resulted in the Court barring one FBI agent from appearing before it for allegedly filing inaccurate affidavits may have ''chilled'' the FBI and DOJ from aggressively seeking FISA warrants (although there is some contradictory information on this matter, we will seek to do additional oversight on this question);

(4) FBI Headquarters fostered a culture that stifled rather than supported aggressive and creative investigative initiatives from agents in the field; and

(5) The FBI's difficulties in properly analyzing and disseminating information in its possession caused it not to seek FISA warrants that it should have sought. These difficulties are due to:

(a) a lack of proper resources dedicated to intelligence analysis;

(b) a ''stove pipe'' mentality where crucial intelligence is pigeonholed into a particular unit and may not be shared with other units;

(c) High turnover of senior agents at FBI Headquarters within critical counterterrorism and foreign intelligence units;

(d) Outmoded information technology that hinders access to, and dissemination of, important intelligence; and

(e) A lack of training for FBI agents to know how to use, and a lack of requirements that they do use, the technology available to search for and access relevant information.

We have found that, in combination, all of these factors contributed to the intelligence failures at the FBI prior to the 9/11 attacks.

We are also conscious of the extraordinary power FISA confers on the Executive branch. FISA contains safeguards, including judicial review by the FISA Court and certain limited reporting requirements to congressional intelligence committees, to ensure that this power is not abused. Such safeguards are no substitute, however, for the watchful eye of the public and the Judiciary Committees, which have broader oversight responsibilities for DOJ and the FBI. In addition to reviewing the effectiveness of the FBI's use of its FISA power, this Committee carries the important responsibility of checking that the FBI does not abuse its power to conduct surveillance within our borders. Increased congressional oversight is important in achieving that goal.

From the outset, we note that our discussion will not address any of the specific facts of the case against Zacharias Moussaoui that we have reviewed in our closed inquiries. That case is still pending trial, and, no matter how it is resolved, this Committee is not the appropriate forum for adjudicating the allegations in that case. Any of the facts recited in this report that bear on the substance of the Moussaoui case are already in the public record. To the extent that this report contains information we received in closed sessions, that information bears on abstract, procedural issues, and not any substantive issues relating to any criminal or national security investigation or proceeding. This is an interim report of what we have discovered to date. We hope to and should continue this important oversight in the 108th Congress.

B. Allegations Raised by Special Agent Rowley's Letter

The Judiciary Committee had initiated its FISA oversight inquiry several months before the revelations in the dramatic letter sent on May 21, 2002, to FBI Director Mueller by Special Agent Coleen Rowley. Indeed, it was this Committee's oversight about the FBI's counterintelligence operations before the 9/11 attacks that in part helped motivate SA Rowley to write this letter to the Director.

The observations and critiques of the FBI's FISA process in this letter only corroborated problems that the Judiciary Committee was uncovering. In her letter, SA Rowley detailed the problems the Minneapolis agents had in dealing with FBI Headquarters in their unsuccessful attempts to seek a FISA warrant for the search of Moussaoui's lap top computer and other personal belongings. These attempts proved fruitless, and Moussaoui's computer and personal belongings were not searched until September 11th, 2001, when the Minneapolis agents were able to obtain a criminal search warrant after the attacks of that date. According to SA Rowley, with the exception of the fact of those attacks, the information presented in the warrant application establishing probable cause for the criminal search warrant was exactly the same as the facts that FBI Headquarters earlier had deemed inadequate to obtain a FISA search warrant.

In her letter, SA Rowley raised many issues concerning the efforts by the agents assigned to the Minneapolis Field Office to obtain a FISA search warrant for Moussaoui's personal belongings. Two of the issues she raised were notable. First, SA Rowley corroborated that many of the cultural and management problems within the FBI (including what she referred to as ''careerism'') have significant effects on the FBI's law enforcement and intelligence gathering activities. This led to a perception among the Minneapolis agents that FBI Headquarters personnel had frustrated their efforts to obtain a FISA warrant by raising

unnecessary objections to the information submitted by Minneapolis, modifying and removing that information, and limiting the efforts by the Minneapolis Field Office to contact other agencies for relevant information to bolster the probable cause for the warrant. These concerns echoed criticisms that this Committee has heard in other contexts about the culture of FBI management and the effect of the bureaucracy in stifling initiative by FBI agents in the field.

In making this point, SA Rowley provided specific examples of the frustrating delays and roadblocks erected by Headquarters agents in the Moussaoui investigation:

''For example at one point, the Supervisory Special Agent at FBIHQ posited that the French information could be worthless because it only identified Zacharias Moussaoui by name and he, the SSA, didn't know how many people by that name existed in France. A Minneapolis agent attempted to surmount that problem by quickly phoning the FBI's Legal Attache (Legat) in Paris, France, so that a check could be made of the French telephone directories. Although the Legat in France did not have access to all of the French telephone directories, he was able to quickly ascertain that there was only one listed in the Paris directory. It is not known if this sufficiently answered the question, for the SSA continued to find new reasons to stall.

''Eventually, on August 28, 2001, after a series of e-mails between Minneapolis and FBIHQ, which suggest that the FBIHQ SSA deliberately further undercut the FISA effort by not adding the further intelligence information which he had promised to add that supported Moussaoui's foreign power connection and making several changes in the wording of the information that had been provided by the Minneapolis agent, the Minneapolis agents were notified that the NSLU Unit Chief did not think there was sufficient evidence of Moussaoui's connection to a foreign power. Minneapolis personnel are, to this date, unaware of the specifics of the verbal presentations by the FBIHQ SSA to NSLU or whether anyone in NSLU ever was afforded the opportunity to actually read for him/herself all of the information on Moussaoui that had been gathered by the Minneapolis Division and [redacted; classified]. Obviously[,] verbal presentations are far more susceptible to mis-characterization and error.''

Even after the attacks had commenced, FBI Headquarters discouraged Minneapolis from securing a criminal search warrant to examine Moussaoui's belongings, dismissing the coordinated attack on the World Trade Center and Pentagon as a coincidence.

Second, SA Rowley's letter highlighted the issue of the apparent lack of understanding of the applicable legal standards for establishing ''probable cause'' and the requisite statutory FISA requirements by FBI personnel in the Minneapolis Division and at FBI Headquarters. This issue will be discussed in more detail below.

C. Results of Investigation

1. The Mishandling of the Moussaoui FISA Application

Apart from SA Rowley's letter and her public testimony, the Judiciary Committee and its staff found additional corroboration that many of her concerns about the handling of the Moussaoui FISA application for a search warrant were justified.

At the outset, it is helpful to review how Headquarters ''adds value'' to field offices in national security investigations using FISA surveillance tools. Headquarters has three functions in such investigations. The first function is the ministerial function of actually assembling the FISA application in the proper format for review by the DOJ's Office of Intelligence Policy and Review OIPR and the FISA Court. The other two functions are more substantive and add ''value'' to the FISA application. The first substantive function is to assist the field by being experts on the legal aspects of FISA, and to provide guidance to the field as to the information needed to meet the statutory requirements of FISA. The second function is to supplement the information from the field in order to establish or strengthen the showing that there is ''probable cause'' that the FISA target was an ''agent of a foreign power,'' by integrating additional relevant intelligence information both from within the FBI and from other intelligence or law enforcement organizations outside the FBI. It is with respect to the latter, substantive functions that Headquarters fell short in the Moussaoui FISA application and, as a consequence, never got to the first, more ministerial, function.

Our investigation revealed that the following events occurred in connection with this FISA application. We discovered that the Supervisory Special Agent (SSA) involved in reviewing the Moussaoui FISA request was assigned to the Radical Fundamentalist Unit (RFU) of the International Terrorism Operations Section of the FBI's Counterterrorism Division. The Unit Chief of the RFU was the SSA's immediate supervisor. When the Minneapolis Division submitted its application for the FISA search warrant for Moussaoui's laptop computer and other property, the SSA was assigned the responsibility of processing the application for approval. Minneapolis submitted its application for the FISA warrant in the form of a 26-page Electronic Communication (EC), which contained all of the information that the Minneapolis agents had collected to establish that Moussaoui was an agent of a foreign power at the time. The SSA's responsibilities included integrating this information submitted by the Minneapolis division with information from other sources that the Minneapolis agents were not privy to, in order to establish there was probable cause that Moussaoui was an agent of a foreign power. In performing this fairly straightforward task, FBI Headquarters personnel failed miserably in at least two ways.

First, most surprisingly, the SSA never presented the information submitted by Minneapolis and from other sources in its written, original format to any of the FBI's attorneys in the National Security Law Unit (NSLU). The Minneapolis agents had submitted their information in the 26-page EC and a subsequent letterhead memorandum (LHM), but neither was shown to the attorneys. Instead, the SSA relied on short, verbal briefings to the attorneys, who opined that based on the information provided verbally by the SSA they could not establish that there was probable cause that Moussaoui was an agent of a foreign power. Each of the attorneys in the NSLU stated they did not receive documents on the Moussaoui FISA, but instead only received a short, verbal briefing from the SSA. As SA Rowley noted, however, ''verbal presentations are far more susceptible to mis-characterization and error.''

The failure of the SSA to provide the 26-page Minneapolis EC and the LHM to the attorneys, and the failure of the attorneys to review those documents, meant that the consideration by Headquarters officials of the evidence developed by the Minneapolis agents was truncated. The Committee has requested, but not yet received, the full 26–page Minneapolis EC (even, inexplicably, in a classified setting).

Second, the SSA's task was to help bolster the work of the Minneapolis agents and collect information that would establish probable cause that a ''foreign power'' existed, and that Moussaoui was its ''agent.'' Indeed, sitting in the FBI computer system was the Phoenix memorandum, which senior FBI officials have conceded would have provided sufficient additional context to Moussaoui's conduct to have established probable cause. (Joint Inquiry Hearing, Testimony of Eleanor Hill, Staff Director, September 24, 2002, p. 19: ''The [FBI] attorneys also told the Staff that, if they had been aware of the Phoenix memo, they would have forwarded the FISA request to the Justice Department's Office of Intelligence Policy Review (OIPR). They reasoned that the particulars of the Phoenix memo changed the context of the Moussaoui investigation and made a stronger case for the FISA warrant. None of them saw the Phoenix memo before September 11.'') Yet, neither the SSA nor anyone else at Headquarters consulted about the Moussaoui application ever conducted any computer searches for electronic or other information relevant to the application. Even the much touted ''Woods Procedures'' governing the procedures to be followed by FBI personnel in preparing FISA applications do not require Headquarters personnel to conduct even the most basic subject matter computer searches or checks as part of the preparation and review of FISA applications.

2. General Findings.

We found that key FBI personnel involved in the FISA process were not properly trained to carry out their important duties. In addition, we found that the structural, management, and resource problems plaguing the FBI in general contributed to the intelligence failures prior to the 9/11 attacks. (The Joint Inquiry by the Senate and House Select Committee on Intelligence similarly concluded that the FBI needs to ''establish and sustain independent career tracks within the FBI that recognize and provide incentives for demonstrated skills and performance of counterterrorism agents and analysts; . . . implement training for agents in the effective use of analysts and analysis in their work;?improve national security law training of FBI personnel;?and finally solve the FBI's persistent and incapacitating information technology problems.'' (Final Report, Recommendations, p. 6).) Following are some of the most salient facts supporting these conclusions.

First, key FBI personnel responsible for protecting our country against terrorism did not understand the law. The SSA at FBI Headquarters responsible for assembling the facts in support of the Moussaoui FISA application testified before the Committee in a closed hearing that he did not know that ''probable cause'' was the applicable legal standard for obtaining a FISA warrant. In addition, he did not have a clear understanding of what the probable cause standard meant. The SSA was not a lawyer, and he was relying on FBI lawyers for their expertise on what constituted probable cause. In addition to not understanding the probable cause standard, the SSA's supervisor (the Unit Chief) responsible for reviewing FISA applications did not have a proper understanding of the legal definition of the ''agent of a foreign power'' requirement. Specifically, he was under the incorrect impression that the statute required a link to an already identified or ''recognized'' terrorist organization, an interpretation that the FBI and the supervisor himself admitted was incorrect. Thus, key FBI officials did not have a proper understanding of either the relevant burden of proof (probable cause) or the substantive element of proof (agent of a foreign power). This fundamental breakdown in training on an important intelligence matter is of serious concern to this Committee.

Second, the complaints contained in the Rowley letter about problems in the working relationship between field offices and FBI Headquarters are more widespread. There must be a dynamic relationship between Headquarters and field offices with Headquarters providing direction to the efforts of agents in the field when required. At the same time, Headquarters personnel should serve to support field agents, not to stifle initiative by field agents and hinder the progress of significant cases. The FBI's Minneapolis office was not alone in this complaint. Our oversight also confirmed that agents from the FBI's Phoenix office, whose investigation and initiative resulted in the so-called ''Phoenix Memorandum,'' warning about suspicious activity in U.S. aviation schools, also found their initiative dampened by a non-responsive FBI Headquarters.

So deficient was the FISA process that, according to at least one FBI supervisor, not only were new applications not acted upon in a timely manner, but the surveillance of existing targets of interest was often terminated, not because the facts no longer warranted surveillance, but because the application for extending FISA surveillance could not be completed in a timely manner. Thus, targets that represented a sufficient threat to national security that the Department had sought, and a FISA Court judge had approved, a FISA warrant were allowed to break free of surveillance for no reason other than the FBI and DOJ's failure to complete and submit the proper paper work. This failure is inexcusable.

Third, systemic management problems at FBI Headquarters led to a lack of accountability among senior FBI officials. A revolving door at FBI Headquarters resulted in agents who held key supervisory positions not having the required specialized knowledge to perform their jobs competently. A lack of proper communication produced a system where no single person was held accountable for mistakes. Therefore, there was little or no incentive to improve performance. Fourth, the layers of FBI and DOJ bureaucracy also helped lead to breakdowns in communication and serious errors in the materials presented to the FISA Court. The Committee learned that in the year before the Moussaoui case, one FBI supervisor was barred from appearing before the FISC due to inaccurate information presented in sworn affidavits to the Court. DOJ explained in a December 23, 2002, response to written questions from the July 25, 2002, oversight hearing that:

''One FBI supervisory special agent has been barred from appearing before the Court. In March of 2001, the government informed the Court of an error contained in a series of FISA applications. This error arose in the description of a ''wall'' procedure. The Presiding Judge of the Court at the time, Royce Lamberth, wrote to the Attorney General expressing concern over this error and barred one specifically-named FBI agent from appearing before the Court as a FISA affiant. . . . FBI Director Freeh personally met twice with then-Presiding Judge Lamberth to discuss the accuracy problems and necessary solutions.''

As the Committee later learned from review of the FISA Court's May 17, 2002, opinion, that Court had complained of 75 inaccuracies in FISA affidavits submitted by the FBI, and the DOJ and FBI had to develop new procedures to ensure accuracy in presentations to that Court. These so-called ''Woods Procedures'' were declassified at the request of the authors and were made publicly available at the Committee's hearing on June 6, 2002. As DOJ further explained in its December 23, 2002, answers to written questions submitted on July 25, 2002:

''On April 6, 2001, the FBI disseminated to all field divisions and relevant Headquarters divisions a set of new mandatory procedures to be applied to all FISAs within the FBI. These procedures known as the ''Woods procedures,'' are designed to help minimize errors in and ensure that the information provided to the Court is accurate. . . They have been declassified at the request of your Committee.''

DOJ describes the inaccuracies cited in the FISA Court opinion as related to ''errors in the 'wall' procedure'' to keep separate information used for criminal prosecution and information collected under FISA and used for foreign intelligence. However, this does not appear to be the only problem the FBI and DOJ were having in the use of FISA.

An FBI document obtained under the Freedom of Information Act, which is attached to this report as Exhibit D, suggests that the errors committed were far broader. The document is a memorandum dated April 21, 2000, from the FBI's Counterterrorism Division, that details a series of inaccuracies and errors in handling FISA applications and wiretaps that have nothing whatsoever to do with the ''wall.'' Such mistakes included videotaping a meeting when videotaping was not allowed under the relevant FISA Court order, continuing to intercept a person's email after there was no authorization to do so, and continuing a wiretap on a cell phone even after the phone number had changed to a new subscriber who spoke a different language from the target.

This document highlights the fact apart from the problems with applications made to the FISC, that the FBI was experiencing more systemic problems related to the implementation of FISA orders. These issues were unrelated to the legal questions surrounding the ''wall,'' which was in effect long before 1999. The document notes that the number of inaccuracies grew by three-and-one-half times from 1999 to 2000. We recommend that additional efforts to correct the procedural, structural, and training problems in the FISA process would go further toward ensuring accuracy in the FISA process than simply criticizing the state of the law.

One legitimate question is whether the problems inside the FBI and between the FBI and the FISA Court either caused FBI Headquarters to be unduly cautious in proposing FISA warrants or eroded the FISA Court's confidence in the DOJ and the FBI to the point that it affected the FBI's ability to conduct terrorism and intelligence investigations effectively. SA Rowley opines in her letter that in the year before ''the September 11th acts of terrorism, numerous alleged IOB [Intelligence Oversight Board] violations on the part of FBI personnel had to be submitted to the FBI's Office of Professional Responsibility (OPR) as well as the IOB. I believe the chilling effect upon all levels of FBI agents assigned to intelligence matters and their managers hampered us from aggressive investigation of terrorists.'' (Rowley letter, pp. 7–8, fn. 7). Although the belated release of the FISA Court's opinion of May 17, 2002, provided additional insight into this issue, further inquiry is needed.

Fifth, the FBI's inability to properly analyze and disseminate information (even from and between its own agents) rendered key information that it collected relatively useless. Had the FBI put together the disparate strands of information that agents from around the country had furnished to Headquarters before September 11, 2001, additional steps could certainly have been taken to prevent the 9/11 attacks. So, while no one can say with certainty that the 9/11 attacks could have been prevented, in our view, it is also beyond reasonable dispute that more could have been done in the weeks before the attacks to try to prevent them.

Certain of our findings merit additional discussion, and such discussion follows.

3. FBI's Misunderstanding of Legal Standards Applicable to the FISA

a. The FISA Statutory Standard: ''Agent of a Foreign Power''

In order to obtain either a search warrant or an authorization to conduct electronic surveillance pursuant to FISA, the FBI and Justice Department must establish before the FISA Court probable cause that the targeted person is an ''agent of a foreign power.'' An agent of a foreign power is defined as ''any person who . . . knowingly aids or abets any person in the conduct of [certain] activities.'' Those certain activities include ''international terrorism,'' and one definition of ''foreign power'' includes groups that engage in international terrorism. Accordingly, in the Moussaoui case, to obtain a FISA warrant the FBI had to collect only enough evidence to establish that there was ''probable cause'' to believe that Moussaoui was the ''agent'' of an ''international terrorist group'' as defined by FISA.

However, even the FBI agents who dealt most with FISA did not correctly understand this requirement. During a briefing with Judiciary Committee staff in February 2002, the Headquarters counterterrorism Unit Chief of the unit responsible for handling the Moussaoui FISA application stated that with respect to international terrorism cases, FISA warrants could only be obtained for ''recognized'' terrorist groups (presumably those identified by the Department of State or by the FBI itself or some other government agency). The Unit Chief later admitted that he knew that this was an incorrect understanding of the law, but it was his understanding at the time the application was pending. Additionally, during a closed hearing on July 9, 2002, the Supervisory Special Agent (''SSA'') who actually handled the Moussaoui FISA application at Headquarters also mentioned that he was trying to establish whether Moussaoui was an ''agent of a recognized foreign power''.

Nowhere, however, does the statutory definition require that the terrorist group be an identified organization that is already recognized (such as by the United States Department of State) as engaging in terrorist activities. Indeed, even the FBI concedes this point. Thus, there was no support whatsoever for key FBI officials' incorrect understanding that the target of FISA surveillance must be linked to such an identified group in the time before 9/11. This misunderstanding colored the handling of requests from the field to conduct FISA surveillance in the crucial weeks before the 9/11 attacks. Instead of supporting such an application, key Headquarters personnel asked the field agents working on this investigation to develop additional evidence to prove a fact that was unnecessary to gain judicial approval under FISA. It is difficult to understand how the agents whose job included such a heavy FISA component could not have understood that statute. It is difficult to understand how the FBI could have so failed its own agents in such a crucial aspect of their training.

The Headquarters personnel misapplied the FISA requirements. In the context of this case, the foreign power would be an international terrorist group, that is, ''a group engaged in international terrorism or activities in preparation therefore.'' A ''group'' is not defined in the FISA, but in common parlance, and using other legal principles, including criminal conspiracy, a group consists of two or more persons whether identified or not. It is our opinion that such a ''group''

may exist, even if not a group ''recognized'' by the Department of State.

The SSA's other task would be to help marshal evidence showing probable cause that Moussaoui was an agent of that group. In applying the ''totality of the circumstances,'' as defined in the case of Illinois v. Gates, 462 U.S. 213 (1983), any information available about Moussaoui's ''actual contacts'' with the group should have been considered in light of other information the FBI had in order to understand and establish the true probable nature of those contacts. (The Supreme Court's leading case on probable cause; it is discussed in more detail in the next section of this report.) It is only with consideration of all the information known to the FBI that Moussaoui's contacts with any group could be properly characterized in determining whether he was an agent of such a group.

In making this evaluation, the fact, as recited in the public indictment, that Moussaoui ''paid $6,800 in cash'' to the Minneapolis flight school, without adequate explanation for the source of this funding, would have been a highly probative fact bearing on his connections to foreign groups. Yet, it does not appear that this was a fact that the FBI Headquarters agents considered in analyzing the totality of the circumstances. The probable source of that cash should have been a factor that was considered in analyzing the totality of the circumstances. So too would the information in the Phoenix memorandum have been helpful. It also was not considered, as discussed further below. In our view, the FBI applied too cramped an interpretation of probable cause and ''agent of a foreign power'' in making the determination of whether Moussaoui was an agent of a foreign power. FBI Headquarters personnel in charge of reviewing this application focused too much on establishing a nexus between Moussaoui and a ''recognized'' group, which is not legally required. Without going into the actual evidence in the Moussaoui case, there appears to have been sufficient evidence in the possession of the FBI which satisfied the FISA requirements for the Moussaoui application. Given this conclusion, our primary task is not to assess blame on particular agents, the overwhelming majority of whom are to be commended for devoting their lives to protecting the public, but to discuss the systemic problems at the FBI that contributed to their inability to succeed in that endeavor.

b. The Probable Cause Standard

i. Supreme Court's Definition of ''Probable Cause''.—During the course of our investigation, the evidence we have evaluated thus far indicates that both FBI agents and FBI attorneys do not have a clear understanding of the legal standard for probable cause, as defined by the Supreme Court in the case of Illinois v. Gates, 462 U.S. 213 (1983). This is such a basic legal principle that, again, it is impossible to justify the FBI's lack of complete and proper training on it. In Gates, then-Associate Justice Rehnquist wrote for the Court:

''Standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to ''probable cause'' may not be helpful, it is clear that ''only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'' (462 U.S. at 236 (citations omitted.)

The Court further stated:

For all these reasons, we conclude that it is wiser to abandon the ''twopronged test'' established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ''veracity'' and ''basis of knowledge'' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a ''substantial basis for . . . conclud[ing]'' that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli.''

Accordingly, it is clear that the Court rejected ''preponderance of the evidence'' as the standard for probable cause and established a standard of ''probability'' based on the ''totality of the circumstances.''

ii. The FBI's Unnecessarily High Standard for Probable Cause.—Unfortunately, our review has revealed that many agents and lawyers at the FBI did not properly understand the definition of probable cause and that they also possessed inconsistent understandings of that term. In the portion of her letter to Director Mueller discussing the quantum of evidence needed to reach the standard of probable cause, SA Rowley wrote that ''although I thought probable cause existed ('probable cause' meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney's Office, (for a lot of reasons including just to play it safe), in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%–80% probability and sometimes even higher), and depending upon the actual AUSA who would be assigned, might turn us down.'' The Gates case and its progeny do not require an exacting standard of proof. Probable cause does not mean more likely than not, but only a probability or substantial chance of the prohibited conduct taking place. Moreover, ''[t]he fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause.''

On June 6, 2002, the Judiciary Committee held an open hearing on the FBI's conduct of counterterrorism investigations. The Committee heard from Director Mueller and DOJ Inspector General Glenn Fine on the first panel and from SA Rowley on the second panel. The issue of the probable cause standard was specifically raised with Director Mueller, citing the case of Illinois v. Gates, and Director Mueller was asked to comment in writing on the proper standard was asked for establishing probable cause. The FBI responded in an undated letter to Senator Specter and with the subsequent transmission of an electronic communication (E.C.) dated September 16, 2002. In the E.C., the FBI's General Counsel reviewed the case law defining ''probable cause,'' in order to clarify the definition of probable cause for FBI personnel handling both criminal investigations and FISA applications.

At the June 6th hearing, SA Rowley reviewed her discussion of the probable cause standard in her letter. During that testimony three issues arose. First, by focusing on the prosecution of a potential case, versus investigating a case, law enforcement personnel, both investigators and prosecutors, may impose on themselves a higher standard than necessary to secure a warrant. This prosecution focus is one of the largest hurdles that the FBI is facing as it tries to change its focus from crime fighting to the prevention of terrorist attacks. It is symptomatic of a challenge facing the FBI and DOJ in nearly every aspect of their new mission in preventing terrorism. Secondly, prosecutors, in gauging what amount of evidence reaches the probable cause standard, may calibrate their decision to meet the de facto standard imposed by the judges, who may be imposing a higher standard than is required by law. Finally, SA Rowley opined that some prosecutors and senior FBI officials may set a higher standard due to risk-averseness, which is caused by ''careerism.''

SA Rowley's testimony was corroborated in our other hearings. During a closed hearing, in response to the following questions, a key Headquarters SSA assigned to terrorism matters stated that he did not know the legal standard for obtaining a warrant under FISA.

''Sen. Specter: . . . [SSA], what is your understanding of the legal standard for a FISA warrant?

[SSA]: I am not an attorney, so I would turn all of those types of questions over to one of the attorneys that I work with in the National Security Law Unit.

Question: Well, did you make the preliminary determination that there was not sufficient facts to get a FISA warrant issued?

[SSA]: That is the way I saw it.

Question: Well, assuming you would have to prove there was an agent and there was a foreign power, do you have to prove it beyond a reasonable doubt? Do you have to have a suspicion? Where in between?

[SSA]: I would ask my attorney in the National Security Law Unit that question.

Question: Did anybody give you any instruction as to what the legal standard for probable cause was?

[SSA]: In this particular instance, no.''

The SSA explained that he had instruction on probable cause in the past, but could not recall that training. It became clear to us that the SSA was collecting information without knowing when he had enough and, more importantly, making ''preliminary'' decisions and directing field agents to take investigating steps without knowing the applicable legal standards. While we agree that FBI agents and supervisory personnel should consult regularly with legal experts at the National Security Law Unit, and with the DOJ and U.S. Attorneys Offices, supervisory agents must also have sufficient facility for evaluating probable cause in order to provide support and guidance to the field.

Unfortunately, our oversight revealed a similar confusion as to the proper standard among other FBI officials. On July 9, 2002, the Committee held a closed session on this issue, and heard from the following FBI personnel: Special Agent ''G,'' who had been a counterterrorism supervisor in the Minneapolis Division of the FBI and worked with SA Rowley; the Supervisory Special Agent (''the SSA'') from FBI Headquarters referred to in SA Rowley's letter (and referred to the discussion above); the SSA's Unit Chief (''the Unit Chief''); a very senior attorney from the FBI's Office of General Counsel with national security responsibilities (''Attorney #1''); and three attorneys assigned to the FBI's Office of General Counsel's National Security Law Unit (''Attorney #2,'' ''Attorney #3,'' and ''Attorney #4''). The purpose of the session was to determine how the Moussaoui FISA application had been processed by FBI Headquarters personnel. None of the personnel present, including the attorneys, appeared to be familiar with the standard for probable cause articulated in Illinois v. Gates, and none had reviewed the case prior to the hearing, despite its importance having been highlighted at the June 6th hearing with the FBI Director. To wit:

Sen. Specter: . . . [Attorney #1] what is the legal standard for probable cause for a warrant?

[Attorney #1]: A reasonable belief that the facts you are trying to prove are accurate.

Question: Reason to believe?

[Attorney #1]: Reasonable belief.

Question: Reasonable belief?

[Attorney #1]: More probable than not.

Question: More probable than not?

[Attorney #1]: Yes, sir. Not a preponderance of the evidence.

Question: Are you familiar with ''Gates v. Illinois''?

[Attorney #1]: No, sir.

However, ''more probable than not'' is not the standard; rather, ''only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'' (Gates, 462 U.S. at 36 (citations omitted).)

Similarly, Attorneys #2, #3, and #4 were also not familiar with Gates. Under further questioning, Attorney #1 conceded that the FBI, at that time, did not have written procedures concerning the definition of ''probable cause'' in FISA cases: ''On the FISA side of the house I don't think we have any written guidelines on that.'' Additionally, Attorney #1 stated that ''[w]e need to have some kinds of facts that an agent can swear to a reasonable belief that they are true,'' to establish that a person is an agent of a foreign power. Giving a precise definition of probable cause is not an easy task, as whether probable cause exists rests on factual and practical considerations in a particular context. Yet, even with the inherent difficulty in this standard we are concerned that senior FBI officials offered definitions that imposed heightened proof requirements. The issue of what is required for ''probable cause'' is especially troubling because it is not the first time that the issue had arisen specifically in the FISA context. Indeed, the Judiciary Committee confronted the issue of ''probable cause'' in the FISA context in 1999, when the Committee initiated oversight hearings of the espionage investigation of Dr. Wen Ho Lee. Among the many issues examined was whether there was probable cause to obtain FISA surveillance of Dr. Lee. In that case, there was a disagreement as to whether probable cause existed between the FBI and the DOJ, within the DOJ, and among ourselves.

In 1999, Attorney General Janet Reno commissioned an internal DOJ review of the Wen Ho Lee investigation. The Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation was headed by Assistant United States Attorney Randy I. Bellows, a Senior Litigation Counsel in the Office of the United States Attorney for the Eastern District of Virginia. Mr. Bellows submitted his exhaustive report on May 12, 2000 (the ''Bellows Report''), and made numerous findings of fact and recommendations. With respect to the issue of probable cause, Mr. Bellows concluded that:

''The final draft FISA application (Draft #3), on its face, established probable cause to believe that Wen Ho Lee was an agent of a foreign power, that is to say, a United States person currently engaged in clandestine intelligence gathering activities for or on behalf of the PRC which activities involved or might involve violations of the criminal laws of the United States . . . . Given what the FBI and OIPR knew at the time, it should have resulted in the submission of a FISA application, and the issuance of a FISA order.''

The Bellows team concluded that OIPR had been too conservative with the Wen Ho Lee FISA application, a conservatism that may continue to affect the FBI's and DOJ's handling of FISA applications. The team found that with respect to OIPR's near-''perfect record'' before the FISA Court (only one FISA rejection), ''[w]hile there is something almost unseemly in the use of such a remarkable track record as proof of error, rather than proof of excellence, it is nevertheless true that this record suggests the use of 'PC+,' an insistence on a bit more than the law requires.''

The Bellows team made another finding of particular pertinence to the instant issue. It found that ''[t]he Attorney General should have been apprised of any rejection of a FISA request . . . .'' In effect, FBI Headquarters rejected the Minneapolis Division's request for a FISA application, a decision that was not reported to then Acting Director Thomas Pickard. Director Mueller has adopted a new policy, not formally recorded in writing, that he be informed of the denial within the FBI of any request for a FISA application. However, in an informal briefing the weekend after this new policy was publicly announced, the FBI lawyer whom it most directly affected claimed to know nothing of the new ''policy'' beyond what he had read in the newspaper. From an oversight perspective, it is striking that the FBI and DOJ were effectively on notice regarding precisely this issue: that the probable cause test being applied in FISA investigations was more stringent than legally required. We appreciate the carefulness and diligence with which the professionals at OIPR and the FBI exercise their duties in processing FISA applications, which normally remain secret and immune from the adversarial scrutiny to which criminal warrants are subject. Yet, this persistent problem has two serious repercussions. First, the FBI and DOJ appear to be failing to take decisive action to provide in-depth training to agents and lawyers on an issue of the utmost national importance. We simply cannot continue to deny or ignore such training flaws only to see them repeated in the future.

Second, when the DOJ and FBI do not apply or use the FISA as fully or comprehensively as the law allows, pressure is brought on the Congress to change the statute in ways that may not be at all necessary. From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law. The reaction on the part of the DOJ and FBI has been to call upon the Congress to relax FISA standards rather than engage in the more time-consuming remedial task of reforming the management and process to make it work better. Many times such ''quick legislative fixes'' are attractive on the surface, but only operate as an excuse to avoid correcting more fundamental problems.

4. The Working Relationship Between FBI Headquarters and Field Offices

Our oversight revealed that on more than one occasion FBI Headquarters was not sufficiently supportive of agents in the field who were exercising their initiative in an attempt to carry out the FBI's mission. While at least some of this is due to resource and staffing shortages, which the current Director is taking action to address, there are broader issues involved as well. Included in these is a deep-rooted culture at the FBI that makes an assignment to Headquarters unattractive to aggressive field agents and results in an attitude among many who do work at Headquarters that is not supportive of the field.

In addition to these cultural problems at the FBI, we conclude that there are also structural and management problems that contribute to the FBI's shortcomings as exemplified in the implementation of the FISA. Personnel are transferred in and out of key Headquarters jobs too quickly, so that they do not possess the expertise necessary to carry out their vital functions. In addition, the multiple layers of supervision at Headquarters have created a bureaucratic FBI that either will not or cannot respond quickly enough to time-sensitive initiatives from the field. We appreciate that the FBI has taken steps to cut through some of this bureaucracy by requiring OIPR attorneys to have direct contact with field agents working on particular cases.

In addition to hampering the implementation of FISA, these are problems that the Judiciary Committee has witnessed replayed in other contexts within the FBI. These root causes must be addressed head on, so that Headquarters personnel at the FBI view their jobs as supporting talented and aggressive field agents.

The FBI has a key role in the FISA process. Under the system designed by the FBI, a field agent and his field supervisors must negotiate a series of bureaucratic levels in order to even ask for a FISA warrant. The initial consideration of a FISA application and evaluation of whether statutory requirements are met is made by Supervisory Special Agents who staff the numerous Headquarters investigative units. These positions are critical and sensitive by their very nature. No application can move forward to the attorneys in the FBI's National Security Law Unit (NSLU) for further consideration unless the unit SSA says so. In addition, no matter may be forwarded to the DOJ lawyers at the OIPR without the approval of the NSLU. These multiple layers of review are necessary and prudent but take time.

The purpose of having SSAs in the various counterterrorism units is so that those personnel may bring their experience and skill to bear to bolster and enhance the substance of applications sent by field offices. A responsible SSA will provide strategic guidance to the requesting field division and coordinate the investigative activities and efforts between FBI Headquarters and that office, in addition to the other field divisions and outside agencies involved in the investigation. This process did not work well in the Moussaoui case.

Under the FBI's system, an effective SSA should thoroughly brief the NSLU and solicit its determination on the adequacy of any application within a reasonable time after receipt. In ''close call'' investigations, we would expect the NSLU attorneys to seek to review all written information forwarded by the field office rather than rely on brief oral briefings. In the case of the Moussaoui application forwarded from Minneapolis, the RFU SSA merely provided brief, oral briefings to NSLU attorneys and did not once provide that office with a copy of the extensive written application for their review. An SSA should also facilitate communication between the OIPR, the NSLU, and those in the field doing the investigation and constructing the application. That also did not occur in this case.

By its very nature, having so many players involved in the process allows internal FBI finger-pointing with little or no accountability for mistakes. The NSLU can claim, as it does here, to have acquiesced to the factual judgment of the SSAs in the investigative unit. The SSAs, in turn, claim that they have received no legal training or guidance and rely on the lawyers at the NSLU to make what they term as legal decisions. The judgment of the agents in the field, who are closest to the facts of the case, is almost completely disregarded.

Stuck in this confusing, bureaucratic maze, the seemingly simple and routine business practices within key Headquarters units

were flawed. As we note above, even routine renewals on already existing FISA warrants were delayed or not obtained due to the lengthy delays in processing FISA applications.

5. The Mishandling of the Phoenix Electronic Communication

The handling of the Phoenix EC represents another prime example of the problems with the FBI's FISA system as well as its faulty use of information technology. The EC contained information that was material to the decision whether or not to seek a FISA warrant in the Moussaoui case, but it was never considered by the proper people. Even though the RFU Unit Chief himself was listed as a direct addressee on the Phoenix EC (in addition to others within the RFU and other counterterrorism Units at FBI Headquarters), he claims that he never even knew of the existence of such an EC until the FBI's Office of Professional Responsibility (OPR) contacted him months after the 9/11 attacks. Even after this revelation, the Unit Chief never made any attempt to notify the Phoenix Division (or any other field Division) that he had not read the EC addressed to him. He issued no clarifying instructions from his Unit to the field, which very naturally must believe to this day that this Unit Chief is actually reading and assessing the reports that are submitted to his attention and for his consideration. The Unit Chief in question here has claimed to be ''at a loss'' as to why he did not receive a copy of the Phoenix EC at the time it was assigned, as was the practice in the Unit at that time.

Apparently, it was routine in the Unit for analytic support personnel to assess and close leads assigned to them without any supervisory agent personnel reviewing their activities. In the RFU, the two individuals in the support capacity entered into service at the FBI in 1996 and 1998. The Phoenix memo was assigned to one of these analysts as a ''lead'' by the Unit's Investigative Assistant (IA) on or about July 30th, 2001. The IA would then accordingly give the Unit Chief a copy of each EC assigned to personnel in the Unit for investigation. The RFU Unit Chief claims to have never seen this one. In short, the crucial information being collected by FBI agents in the field was disappearing into a black hole at Headquarters. To the extent the information was reviewed, it was not reviewed by the appropriate people.

More disturbingly, this is a recurrent problem at the FBI. The handling of the Minneapolis LHM and the Phoenix memo, neither of which were reviewed by the correct people in the FBI, are not the first times that the FBI has experienced such a problem in a major case. The delayed production of documents in the Oklahoma City bombing trial, for example, resulted in significant embarrassment for the FBI in a case of national importance. The Judiciary Committee held a hearing during which the DOJ's own Inspector General testified that the inability of the FBI to access its own information base did and will have serious negative consequences. Although the FBI is undertaking to update its information technology to assist in addressing this problem, the Oklahoma City case demonstrates that the issue is broader than antiquated computer systems. As the report concluded, ''human error, not the inadequate computer system, was the chief cause of the failure. . . .'' The report concluded that problems of training and FBI culture were the primary causes of the embarrassing mishaps in that case. Once again, the FBI's and DOJ's failures to address such broad based problems seem to have caused their recurrence in another context.

6. The FBI's Poor Information Technology Capabilities

On June 6, 2002, Director Mueller and SA Rowley testified before the Senate Judiciary Committee on the search capabilities of the FBI's Automated Case Support (ACS) system. ACS is the FBI's centralized case management system, and serves as the central electronic repository for the FBI's official investigative textual documents. Director Mueller, who was presumably briefed by senior FBI officials regarding the abilities of the FBI's computers, testified that, although the Phoenix memorandum had been uploaded to the ACS, it was not used by agents who were investigating the Moussaoui case in Minnesota or at Headquarters. According to Director Mueller, the Phoenix memorandum was not accessible to the Minneapolis field office or any other offices around the country; it was only accessible to the places where it had been sent: Headquarters and perhaps two other offices. Director Mueller also testified that no one in the FBI had searched the ACS for relevant terms such as ''aviation schools'' or ''pilot training.'' According to Director Mueller, he hoped to have in the future the technology in the computer system to do that type of search (e.g., to pull out any electronic communication relating to aviation), as it was very cumbersome to do that type of search as of June 6, 2002. SA Rowley testified that FBI personnel could only perform one-word searches in the ACS system, which results in too many results to review.

Within two weeks of the hearing, on June 14, 2002, both Director Mueller (through John E. Collingwood, AD Office of Public and Congressional Affairs) and SA Rowley submitted to the Committee written corrections of their June 6, 2002, testimony. The FBI corrected the record by stating that ACS was implemented in all FBI field offices, resident agencies, legal attache offices, and Headquarters on October 16, 1995. In addition, it was, in fact, possible to search for multiple terms in the ACS system, using Boolean connectors (e.g., hijacker or terrorist and flight adj school), and to refine searches with other fields (e.g., document type). Rowley confirmed the multiple search-term capabilities of ACS and added that the specifics of ACS's search capabilities are not widely known within the FBI.

We commend Director Mueller and SA Rowley for promptly correcting their testimony as they became aware of the incorrect description of the FBI's ACS system during the hearing. Nevertheless, their corrections and statements regarding FBI personnel's lack of knowledge of the ACS system highlights a longstanding problem within the Bureau. An OIG report, issued in July 1999, states that FBI personnel were not well-versed in the ACS system or other FBI databases. An OIG report of March 2002, which analyzed the causes for the belated production of many documents in the Oklahoma City bombing case, also concluded that the inefficient and complex ACS system was a contributing factor in the FBI's failure to provide hundreds of investigative documents to the defendants in the Oklahoma City Bombing Case. In short, this Committee's oversight has confirmed, yet again, that not only are the FBI's computer systems inadequate but that the FBI does not adequately train its own personnel in how to use their technology.

7. The ''Revolving Door'' at FBI Headquarters

Compounding information technology problems at the FBI are both the inexperience and attitude of ''careerist'' senior FBI agents who rapidly move through sensitive supervisory positions at FBI Headquarters. This ''ticket punching'' is routinely allowed to take place with the acquiescence of senior FBI management at the expense of maintaining critical institutional knowledge in key investigative and analytical units. FBI agents occupying key Headquarters positions have complained to members of the Senate Judiciary Committee that relocating to Washington, DC, is akin to a ''hardship'' transfer in the minds of many field agents. More often than not, however, the move is a career enhancement, as the agent is almost always promoted to a higher pay grade during or upon the completion of the assignment. The tour at Headquarters is usually relatively short in duration and the agent is allowed to leave and return to the field.

To his credit, Director Mueller tasked the Executive Board of the Special Agents Advisory Committee (SAAC) to report to him on disincentives for Special Agents seeking administrative advancement. They reported on July 1, 2002, with the following results of an earlier survey:

''Less than 5% of the Agents surveyed indicated an interest in promotion if relocation to FBIHQ was required. Of 35 field supervisors queried, 31 said they would 'step down' rather than accept an assignment in Washington, D.C. All groups of Agents (those with and without FBIHQ experience) viewed as assignment at FBIHQ as very negative. Only 6% of those who had previously been assigned there believed that the experience was positive—the work was clerical, void of supervisory responsibility critical to future field or other assignments. Additionally, the FBIHQ supervisors were generally powerless to make decisions while working in an environment which was full of negativity, intimidation, fear and anxiousness to leave.''

The SAAC report also contained serious criticism of FBI management, stating:

''Agents across the board expressed reluctance to become involved in a management system which they believe to [be] hypocritical, lacking ethics, and one in which we lead by what we say and not by example. Most subordinates believe and most managers agreed that the FBI is too often concerned with appearance over substance. Agents believed that management decisions are often based on promoting one's self interest versus the best interests of the FBI.''

There is a dire need for the FBI to reconsider and reform a personnel system and a management structure that do not create the proper incentives for its most capable and talented agents to occupy its most important posts. The SAAC recommended a number of steps to reduce or eliminate ''disincentives for attaining leadership within the Bureau.'' Congress must also step up to the plate and assess the location pay differential for Headquarters transfers compared to other transfers and other financial rewards for administrative advancement to ensure that those agents with relevant field experience and accomplishment are in critical Headquarters positions.

Indeed, in the time period both before and after the Moussaoui application was processed at Headquarters (and continuing for months after the 9/11 attacks), most of the agents in the pertinent Headquarters terrorism unit had less than two years of experience working on such cases. In the spring and summer of 2001, when Administration officials have publicly acknowledged increased ''chatter'' internationally about potential terrorist attacks, the Radical Fundamentalist Unit at FBI Headquarters experienced the routinely high rate of turnover in agent personnel as other units regularly did. Not only was the Unit Chief replaced, but also one or more of the four SSAs who reported to the Unit Chief was a recent transfer into the Unit. These key personnel were to have immediate and direct control over the fate of

the ''Phoenix memo'' and the Minneapolis Division's submission of a FISA application for the personal belongings of Moussaoui. While these supervisory agents certainly had distinguished and even outstanding professional experience within the FBI before being assigned to Headquarters, their short tours in the specialized counterterrorism units raises questions about the depth and scope of their training and experience to handle these requests properly and, more importantly, about the FBI's decision to allow such a key unit to be staffed in such a manner.

Rather than staffing counterterrorism units with Supervisory Special Agents on a revolving door basis, these positions should be filled with a cadre of senior agents who can provide continuity in investigations and guidance to the field.

A related deficiency in FBI management practices was that those SSAs making the decisions on whether any FISA application moved out of an operational unit were not given adequate training, guidance, or instruction on the practical application of key elements of the FISA statute. As we stated earlier, it seems incomprehensible that those very individuals responsible for taking a FISA application past the first step were allowed to apply their own individual interpretations of critical elements of the law relating to what constitutes a ''foreign power,'' ''acting as an agent of a foreign power,'' ''probable cause,'' and the meaning of ''totality of the circumstances,'' before presenting an application to the attorneys in the NSLU. We learned at the Committee's hearing this past September 10th, a full year after the terrorist attacks, that the FBI drafted administrative guidelines that will provide for Unit Chiefs and SSAs at Headquarters a uniform interpretation of how—and just as importantly—when to apply probable cause or other standards in FISA warrant applications.

All of these problems demonstrate that there is a dire need for a thorough review of procedural and substantive practices regarding FISA at the FBI and the DOJ. The Senate Judiciary Committee needs to be even more vigilant in its oversight responsibilities regarding the entire FISA process and the FISA Court itself. The FISA process is not fatally flawed, but rather its administration and coordination needs swift review and improvement if it is to continue to be an effective tool in America's war on terrorism.

IV. THE IMPORTANCE OF ENHANCED CONGRESSIONAL OVERSIGHT

An undeniable and distinguishing feature of the flawed FISA implementation system that has developed at the DOJ and FBI over the last 23 years is its secrecy. Both at the legal and operational level, the most generalized aspects of the DOJ's FISA activities have not only been kept secret from the general public but from the Congress as well. As we stated above, much of this secrecy has been due to a lack of diligence on the part of Congress exercising its oversight responsibility. Equally disturbing, however, is the difficulty that a properly constituted Senate Committee, including a bipartisan group of senior senators, had in conducting effective oversight of the FISA process when we did attempt to perform our constitutional duties.

The Judiciary Committee's ability to conduct its inquiry was seriously hampered by the initial failure of the DOJ and the Administrative Office of the United States Courts to provide to the Committee an unclassified opinion of the FISA Court relevant to these matters. As noted above, we only received this opinion on August 22, 2002, in the middle of the August recess.

Under current law there is no requirement that FISA Court opinions be made available to Congressional committees or the public. The only statutory FISA reporting requirement is for an unclassified annual report of the Attorney General to the Administrative Office of the United States Courts and to Congress setting forth with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance under Title I, and (b) the total number of such orders and extensions either granted, modified, or denied. These reports do not disclose or identify unclassified FISA Court opinions or disclose the number of individuals or entities targeted for surveillance, nor do they cover FISA Court orders for physical searches, pen registers, or records access.

Current law also requires various reports from the Attorney General to the Intelligence and Judiciary Committees that are not made public. These reports are used for Congressional oversight purposes, but do not include FISA Court opinions. When the Act was passed in 1978, it required the Intelligence Committees for the first five years after enactment to report respectively to the House of Representatives and the Senate concerning the implementation of the Act and whether the Act should be amended, repealed, or permitted to continue in effect without amendment. Those public reports were issued in 1979–1984 and discussed one FISA Court opinion issued in 1981, which related to the Court's authority to issue search warrants without express statutory jurisdiction.

The USA PATRIOT Act of 2001 made substantial amendments to FISA, and those changes are subject to a sunset clause under which they shall generally cease to have effect on December 31, 2005. That Act did not provide for any additional reporting to the Congress or the public regarding implementation of these amendments or FISA Court opinions interpreting them.

Oversight of the entire FISA process is hampered not just because the Committee was initially denied access to a single unclassified opinion but because the Congress and the public get no access to any work of the FISA Court, even work that is unclassified. This secrecy is unnecessary, and allows problems in applying the law to fester. There needs to be a healthy dialogue on unclassified FISA issues within Congress and the Executive branch and among informed professionals and interested groups. Even classified legal memoranda submitted by the DOJ to, and classified opinions by, the FISA Court can reasonably be redacted to allow some scrutiny of the issues that are being considered. This highly important body of FISA law is being developed in secret, and, because they are ex parte proceedings, without the benefit of opposing sides fleshing out the arguments as in other judicial contexts, and without even the scrutiny of the public or the Congress. Resolution of this problem requires considering legislation that would mandate that the Attorney General submit annual public reports on the number of targets of FISA surveillance, search, and investigative measures who are United States persons, the number of criminal prosecutions where FISA information is used and approved for use, and the unclassified opinions and legal reasoning adopted by the FISA Court and submitted by the DOJ.

As the recent litigation before the FISA Court of Review demonstrated, oversight also bears directly on the protection of important civil liberties. Due process means that the justice system has to be fair and accountable when the system breaks down.

Many things are different now since the tragic events of last September, but one thing that has not changed is the United States Constitution. Congress must work to guarantee the civil liberties of our people while at the same time meet our obligations to America's national security. Excessive secrecy and unilateral decision making by a single branch of government is not the proper method of striking that all important balance. We hope that, joining together, the Congress and the Executive Branch can work in a bipartisan manner to best serve the American people on these important issues. The stakes are too high for any other approach.

PATRICK LEAHY,
U.S. Senator.
ARLEN SPECTER,
U.S. Senator.
CHARLES E. GRASSLEY,
U.S. Senator.

Mr. SPECTER. I ask unanimous consent that the response of the Department of Justice dated February 20, 2003 be printed in the RECORD.

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

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 20, 2003.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is to follow up on outstanding questions from the Committee's hearings on June 6, 2002, at which FBI Director Mueller testified, a closed hearing on July 9, 2002, at which seven FBI personnel testified, and a September 10, 2002, hearing at which an Associate Deputy Attorney General testified on the FISA process. During this latter hearing, and in follow-up letters, dated September 24, 2002 and October 1, 2002, Senator Specter asked for additional information about the circumstances leading up to the FBI's issuance of guidance on the probable cause standard and the number of FBI requests for FISA warrants between June 6, 2002 and September 16, 2002.

In July 2002, the General Counsel's Office undertook to draft a comprehensive memorandum to provide FBI field and headquarters personnel with a practitioner's guide to the FISA process and the changes resulting from the USA PATRIOT Act. A section of that guidance was to be devoted to a refresher discussion of the probable cause standard. Near the end of that month, however, a new General Counsel reported to the FBI and reviewed the initial draft. After discussions with attorneys in the FBI's National Security Law Unit and the Justice Department, it was determined that the guidance would be issued in three separate memoranda. One would provide a broad overview of the FISA process; one would cover recent revisions to the limitations on the sharing of FISA-derived information; and one would clarify the probable cause standard.

These three memoranda were issued in September 2002 and copies are enclosed for your convenience. The 15-page overview of the FISA process was finalized and posted on the FBI intranet on September 12, 2002. The 11-page guidance on the new information sharing procedures was issued on September 18, 2002, and later superceded by the November 18, 2002 decision of the Foreign Intelligence Surveillance Court of Review which approved the Attorney General's March 6, 2002 Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI. The clarification memorandum on the probable cause standard was released on September 16, 2002 and I am advised that, as a

matter of courtesy, a copy was delivered to Senator Specter's office on that date.

In light of the November 18, 2002, decision of the Foreign Intelligence Surveillance Court of Review, the Department issued ''field guidance'' on intelligence sharing and FISA issues on December 24, 2002, which was sent to all United States Attorneys, all Anti-Terrorism Task Force coordinators and all Special Agents of the FBI. It consisted of three documents: (1) a memorandum jointly issued by the Deputy Attorney General and the Director of the FBI discussing the intelligence sharing procedures for foreign intelligence and foreign counterintelligence investigations, including a chart summarizing the March 6, 2002 Intelligence Sharing Procedures; (2) the Attorney General's March 6, 2002 memorandum on Intelligence Sharing Procedures for Foreign Intelligence and Counterintelligence Investigations conducted by the FBI; and (3) a memorandum from the Deputy Attorney General summarizing the November 18, 2002, decision of Foreign Intelligence Surveillance Court of Review. An electronic copy of the field guidance was provided to the Judiciary Committee on January 17, 2003 (an additional courtesy copy is enclosed).

Also on December 24, 2002, the Deputy Attorney General issued a memorandum instructing the Counsel for Intelligence Policy, the Assistant Attorney General for the Criminal Division, and the Director of the FBI to ''jointly establish and implement a training curriculum for all Department lawyers and FBI agents who work on foreign intelligence or counterintelligence investigations, both in Washington, DC and in the field, including Assistant United States Attorneys designated under the Department's March 6, 2002 Intelligence Sharing Procedures. At a minimum, the training shall address the FISA process, the importance of accuracy in FISA applications, the legal standards (including probable cause) set by FISA, coordination with law enforcement and with the Intelligence Community, and the proper storing and handling of classified information.'' A copy of the December 24, 2002, training memorandum is enclosed.

Senator Specter's letter of October 1, 2002, asked as an additional follow-up question about the number of FBI requests for FISA warrants between Colleen Rowley's June 6, 2002, appearance before the Judiciary Committee and the September 16, 2002, issuance of the probable cause memorandum. The number of FBI applications to the Foreign Intelligence Surveillance Court (FISC) for FISA searches and surveillances during this time period is classified at the SECRET level and is being delivered to the Committee through the Office of Senate Security under separate cover and in accordance with the longstanding Executive branch practices on the sharing of classified intelligence information with Congress. Please note that the total annual number of FISA applications for orders authorizing electronic surveillance filed by the government and the total annual number of such applications either granted, modified, or denied by the FISC are not classified and are provided annually to the Administrative Office of the United States Court and to Congress under section 1807 of FISA.

The question of what probable cause standard was used on FISA applications for warrants during that time was posed to supervisors in the National Security Law Unit and in the Office of Intelligence Policy and Review. They responded that the applications—and their discussions about those applications—reflect that the agents and attorneys involved in the FISA process understood and applied the correct probable cause standard in their analyses of the relevant evidence. Based on their observations, the staff's understanding of probable cause—whether based on a reading of *Illinois* v. *Gates*, 462 U.S. 213 (1983), or of any of the other numerous authoritative judicial statements of the probable cause standard—did not change with the issuance of the probable cause memorandum. The standard they employed was consistent with *Illinois* v. *Gates* both before and after they received the memorandum.

I hope that this information is helpful. If you would like further assistance on this or on any other matter, please do not hesitate to contact me.

Sincerely,

JAMIE E. BROWN,
Acting Assistant Attorney General.

Mr. SPECTER. The oversight is going to continue on this matter. We are dealing with a constitutional responsibility of the Congress, that is the Senate and the Judiciary Committee, to conduct oversight on the Department of Justice and on the Federal Bureau of Investigation. This inquiry has demonstrated to this Senator that such oversight is sorely needed.

When I was District Attorney of Philadelphia and an assistant district attorney before that time, I had occasion to deal with a great many applications for search warrants. To find now that the key FBI personnel entrusted with the responsibility to apply for warrants under the Foreign Intelligence Surveillance Act, to get information on agents of foreign powers, at a time when the United States is threatened by terrorism, and they do not know what the right standard is, is just scandalous.

It has already been detailed on the public record that had they followed the right standard, and had the FBI gotten the computer of Zacarias Moussaoui, that 9/11 might have been prevented.

Then when the Judiciary Committee pursues the issue more than a month later at a subsequent hearing, and finds that the key FBI personnel, including their attorneys, do not know the right standard, it is just incredible. Then when the FBI Director does not respond to inquiries as to what the standards are, and days, weeks, and months follow, I wonder what has happened with many matters where terrorists may be plotting other attacks and our law enforcement officials are not doing the job.

This does raise the very fundamental question of whether the FBI is capable of handling counterterrorism in the United States, and what standards are being applied. Senator LEAHY, Senator GRASSLEY, and I have introduced further legislation requiring more reporting. There is a very important issue about civil liberties, but it all turns on appropriate application of the law, and that certainly has not been followed.

I will be sending a copy of this statement to FBI Director Mueller tomorrow when it is in print, and these issues will be raised at the hearing which is scheduled for next Tuesday. We have a hearing scheduled which will include Attorney General Ashcroft, FBI Director Robert Mueller, CIA Director George Tenet, and Secretary of Homeland Defense Tom Ridge. I am urging Chairman HATCH to break it up and to have only one of those individuals appear. If we have all four of them at one time, we will only be hearing opening statements from the Senators and opening statements from the individuals, and along about 1:15, when nobody has gone to lunch, is when we will really get to serious questioning, and the hearing will not exactly be fruitful. So we really need to take these very important individuals one at a time. So stay tuned on some questions for FBI Director Mueller.

I ask unanimous consent to print the letter in the RECORD.

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

U.S. SENATE,
Washington, DC, September 24, 2002.

Hon. ROBERT MUELLER,
Director, Federal Bureau of Investigation, Washington, DC.

DEAR DIRECTOR MUELLER: In a hearing before the Judiciary Committee on June 6, 2002, I questioned you and Special Agent Colleen Rowley about the erroneous standards being applied by the FBI on applications for warrants under the Foreign Intelligence Surveillance Act. I specifically called your attention to the appropriate standards in *Illinois* v. *Gates*.

On July 10, 2002, I wrote to you concerning a closed door hearing on July 9, 2002 where seven FBI personnel including four attorneys were still unfamiliar with the appropriate standard for probable cause of a FISA warrant under Gates.

At a Judiciary Committee hearing on September 10, 2002, I again raised these issues with a representative of the Department of Justice asking why I had not heard about any action taken by the FBI on these issues.

On September 12, 2002, my office received an undated letter from Assistant Director John E. Collingwood (copy enclosed) which was a totally inadequate response. My office has since been furnished with a copy of a memorandum from the Federal Bureau of Investigation dated September 16, 2002, entitled ''Probable Cause'' which references the Gates case.

I would like an explanation from you as to why it took the FBI so long to disseminate information on the standard for probable cause under Gates for a FISA warrant.

Sincerely,

ARLEN SPECTER.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, September 12, 2002.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: I am writing in response to your letter to Director Mueller dated July 10, 2002 regarding the standards applied to applications under the Foreign Intelligence Surveillance Act (FISA).

As you know, the events of September 11, 2001 caused the entire Government to review all of its programs to identify any revisions which may help to prevent another terrorist attack. The FISA review process is critical to our counterterrorism mission and, even before September 11th, we were working with the Department of Justice (DOJ), as well as the FISA Court, to simplify and expedite the FISA procedures. We have made significant progress including implementation of the

FISA procedures to ensure accuracy (known as the ''Woods Procedures''), a copy of which has been provided to the Committee.

In addition, we have been crafting new guidance, in consultation with DOJ, to address the FISA process as modified by the USA PATRIOT Act. This guidance will also address the concerns raised in your letter and your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation. A copy will be provided to the Committee as well.

I appreciate your concerns and your support in these critical matters. Please contact me if you have any questions.

Sincerely,

JOHN E. COLLINGWOOD,
Assistant Director, Office of Public and Congressional Affairs.

U.S. SENATE,
Washington, DC, October 1, 2002.

Hon. ROBERT MUELLER,
Director, Federal Bureau of Investigation, Washington, DC.

DEAR DIRECTOR MUELLER: Supplementing my letter of September 24, 2002, I would like to know how many requests the FBI made for warrants under the Foreign Intelligence Surveillance Act from June 10, 2002, the date of the Judiciary Committee hearing with you and Special Agent Colleen Rowley, and September 16, 2002, the date on the FBI memorandum citing the Gates case.

I would also like to know the specifics on what standard of probable cause was used on the applications for warrants under FISA during that period.

Sincerely,

ARLEN SPECTER.

EXHIBIT 1

U.S. SENATE,
Washington, DC, July 10, 2002.

Hon. ROBERT MUELLER,
Director, Federal Bureau of Investigation, Washington, DC.

DEAR DIRECTOR: In a hearing before the Judiciary Committee on June 6, 2002, I called your attention to the standard on probable cause in the opinion of then-Associate Justice Rehnquist in *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (citations omitted) as follows:

As early as *Locke* v. *United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that ''the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion.'' More recently, we said that ''the quanta . . . of proof'' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to ''probable cause'' may not be helpful, it is clear that ''only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.''

In a closed door hearing yesterday, seven FBI personnel handling FISA warrant applications were questioned, including four attorneys.

A fair summary of their testimony demonstrated that no one was familiar with Justice Rehnquist's definition from Gates and no one articulated an accurate standard for probable cause.

I would have thought that the FBI personnel handling FISA applications would have noted that issue from the June 6th hearing; or, in the alternative, that you are other supervisory personnel would have called it to their attention.

It is obvious that these applications, which are frequently made, are of the utmost importance to our national security and your personnel should not be applying such a high standard that precludes submission of FISA applications to the Foreign Intelligence Surveillance Court.

I believe the Judiciary Committee will have more to say on this subject but I wanted to call this to your attention immediately so that you could personally take appropriate corrective action.

Sincerely,

ARLEN SPECTER.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: I am writing in response to your letter to Director Mueller dated July 10, 2002 regarding the standards applied to applications under the Foreign Intelligence Surveillance Act (FISA).

As you know, the events of September 11, 2001 caused the entire Government to review all of its programs to identify any revisions which may help to prevent another terrorist attack. The FISA review process is critical to our counterterrorism mission and, even before September 11th, we were working with the Department of Justice (DOJ), as well as the FISA Court, to simplify and expedite the FISA procedures. We have made significant progress including implementation of the FISA procedures to ensure accuracy (known as the ''Woods Procedures''), a copy of which has been provided to the Committee.

In addition, we have been crafting new guidance, in consultation with DOJ, to address the FISA process as modified by the USA PATRIOT Act. This guidance will also address the concerns raised in your letter and your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation. A copy will be provided to the Committee as well.

I appreciate your concerns and your support in these critical matters. Please contact me if you have any questions.

Sincerely,

JOHN E. COLLINGWOOD,
Assistant Director, Office of Public and Congressional Affairs.

EXHIBIT 2

FEDERAL BUREAU OF INVESTIGATION

To: All Divisions.
From: Office of the General Counsel.

PROBABLE CAUSE

Synopsis: The purpose of this Electronic Communication is to clarify the meaning of probable cause.

Details: In recent legislative hearings, questions have been raised about the concept of probable cause as it applies to the Foreign Intelligence Surveillance Act (FISA). While FBI Agents receive substantial legal training and have ample experience applying the concept in their daily work, it is nonetheless helpful to review the case law defining probable cause. Accordingly, the Office of the General Counsel prepared the following summary for the benefit of all FBI Agents.

In *Illinois* versus *Gates*, 462 U.S. 213 (1983, the Supreme Court explained that the probable cause standard is a practical, nontechnical concept which deals with probabilities—not hard certainties—derived from the totality of the circumstances in a factual situation. Probable cause to believe a particular contention is determined by evaluating ''the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act;'' it is a ''fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules.'' 462 U.S. at 231–32.

The courts have broadly defined the parameters of probable cause. While it requires more than an unfounded suspicion, courts have repeatedly explained that probable cause requires a lesser showing than the rigorous evidentiary standards employed in trial proceedings. In Gates, 462 U.S. at 235, the Supreme Court explained that probable cause is less demanding than the evidentiary standards of beyond a reasonable doubt, preponderance of the evidence or even a prima facie case—all that is required to establish probable cause is a ''fair probability'' that the asserted contention is true. It is particularly important to note that probable cause is a lower standard than ''preponderance of the evidence,'' which is defined as the amount of evidence that makes a contention more likely true than not true. See, e.g., *United States* versus *Bapack*, 129 F.3d 1320, 1324 (D.C. Cir. 1997) (preponderance standards means ''more likley than not''); *United States* versus *Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994) (''more probable than not''), BLACK'S LAW DICTIONARY 1064 (5th ed. 1979) (''[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it''). Since probable cause is a lower standard than preponderance of the evidence, an Agent can demonstrate probable cause to believe a factual contention without proving that contention even to a 51 percent certainty, as required under the preponderance of the evidence standard. See, e.g., *United States* versus *Cruz*, 834 F.2d 47, 50 (2d Cir. 1987) (probable cause does not require a showing that it is more probable than not that a crime has been committed); *Paff* versus *Kaltenbach*, 204 F.3d 425, 436 (3d Cir. 2000) (probable cause is a lesser showing than preponderance of the evidence); *United States* versus *Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (same); *United States* versus *Mounts*, 248 F.3d 712, 715 (7th Cir. 2001) (probable cause does not require a showing that it is more likely than not that the suspected committed a crime).

Courts have instructed judges to apply no higher standard when they review warrants for probable cause. The magistrate reviewing an application for a criminal search warrant ''is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'' *Gates*, 462 U.S. at 238. As to arrest warrants, the question for the magistrate is whether the totality of the facts and circumstances set forth in the affidavit are ''sufficient to warrant a prudent man in believing that the [suspect] had committed'' the alleged offense—an evaluation that ''does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands.'' *Gerstin* versus *Pugh*, 420 U.S. 103, 111–12, 121 (1975).

Similarly, a judge of the Foreign Intelligence Surveillance Court reviewing an application for a FISA electronic surveillance order or search warrant must make a probable cause determination based on a practical, common-sense assessment of the circumstances set forth in the declaration. The judge must first find probable cause that the target of the surveillance or search is a foreign power or an agent of a foreign power. While certain non-U.S. persons can qualify

as agents of a foreign power merely by acting in the United States as an officer or employee of a foreign power, a U.S. person can be found to be an agent of a foreign power only if the judge finds probable cause to believe that he or she is engaged in activities that involve (or in the case of clandestine intelligence gathering activities ''may involve'') certain criminal conduct. 50 U.S.C. 1801(b). For an electronic surveillance order to issue under FISA, the judge must additionally find that there is probable cause to believe that each of the facilities or places to be electronically surveilled is being used, or is about to be used, by a foreign power or an agent of a foreign power. 50 U.S.C. 1805(a)(3). For a FISA search warrant, the judge must find probable cause to believe that the premises or property to be searched is owned, used, possessed by or in transit to or from a foreign power or an agent of a foreign power. 50 U.S.C. 1824(a)(3).

We hope this summary clarifies the meaning of probable cause. Agents with questions about probable cause in a case should consult with their Chief Division Counsel, the Office of the General Counsel, or the Assistant United States Attorney or Justice Department attorney assigned to the case.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I think Members on both sides of the aisle greatly respect the work of our colleague on the FBI and we appreciate his work.

Mr. SPECTER. I thank my colleague from New York for the generous comments.

Mr. SCHUMER. Well deserved, not just in my opinion but in the opinion of many Members.

Mr. SPECTER. I thank the Senator.

Mr. SCHUMER. Mr. President, I will continue our discussion on so many issues facing the Nation. Obviously, in the Senate the business is the business of Miguel Estrada. I will comment on that in a few minutes.

I do want to say, however, that some on the other side are attempting to convey the impression that it is we, the Democrats, who continue the debate on Miguel Estrada. We do not. We have, indeed, asked Mr. Estrada to answer the most rudimentary questions that every person who seeks to achieve a lifetime appointment of the high office of judge of the DC Circuit Court of Appeals is asked to answer. There are a large number of Members who will not move to vote until those questions are answered. That seems to be entirely logical.

Let me make clear the reason we continue to debate Mr. Estrada—not the economy, not homeland security, not the many issues that our constituents are asking about—is the choice not of the Democratic minority but of the Republican majority that controls the floor.

In fact, 2 weeks ago, when the Republican majority thought they ought to get other things done, they have. We actually approved three other judges at the majority leader's request. We left the subject of Mr. Estrada and debated those judges. We approved the omnibus budget—late, of course—but we approved that budget, the largest amount of Federal spending we have ever voted on, debated it, amended it, while the Estrada nomination was still pending.

I ask my colleagues on the other side of the aisle, until we resolve this impasse about who Mr. Estrada is and what he actually believes, what his judicial philosophy is, and get the best evidence—not hearsay evidence because there is hearsay evidence on both sides—that we do move to other issues.

When I go to New York, virtually none of my constituents ask me about Miguel Estrada. Yes, you will get some editorials and you get some talk shows talking about him one way or the other. But not average voters. Not even any voter except those in the political class.

My constituents are asking me about the war, when we might go to war and what is happening. I get a lot of negative comments about France, which I am sympathetic toward—not France but the negative comments. And more than that I get questions about the economy. I get question after question after question: What are you guys in Washington doing about the economy?

This morning I flew back from New York and the man at the gate of the airport, obviously somebody who makes an average salary working for Delta Airlines, asked me: Senator, when are you guys going to get the economy going?

We on this side would love to start debating on the economy. We would love to start talking about how we will get people to work. As our minority leader, TOM DASCHLE, put it so well yesterday, the Republicans on the other side of the aisle are concerned about one job, that of Mr. Estrada. And by the way, he already has a job. My guess is he is being paid well into the six figures. He can live quite a nice life, as he deserves, on that ample salary.

But what about the 2.8 million Americans who have lost jobs? What about the tens of millions of other Americans who have jobs, but they are not getting the salaries they used to get in terms of buying power? What about all the companies, the small businesses, that say the business climate is not good enough so they can expand? What about the large businesses? I was reading my clips here and some of the largest companies in upstate New York have stopped putting dollars into research or decreased the amount of money they are putting into research, which is the lifeblood of our future, our information-based economy, because very simply, the economy is so squishy soft.

We have plans to deal with the economy. We would like to debate them. I was told this morning that many think the majority leader will not even bring up a stimulus package until late spring. We cannot afford to wait. We can sit here and make the speeches.

Do you know how many times I have heard that Mr. Estrada graduated from Harvard Law School? It is not new news. We are not making any new points in this debate. I guess every one of the Senators could answer this question: How many former Solicitors General have said that the records should not be revealed? We have heard that probably 100 times on the floor. No new ground is being broken in this debate.

Yet for some strange reason the majority leader seeks to keep us on this issue. We all know what the issue is. It is a simple issue. That is, many Members believe Mr. Estrada has to tell not only the Senate but the American people—because the Founding Fathers regarded us as a mechanism by which the American people could learn—his views on fundamental issues. What is his view of the first amendment and whether it is an expansive view or narrowing view?

Right now we are faced with the age-old conflict between security and liberty as we debate the PATRIOT Act. It is all challenged in court. What are Mr. Estrada's views? How does he see it? Is he hard on the security side? Is he hard on the liberty side? What are his views on the commerce clause?

We all know that there is a move among many Justices in the Supreme Court and judges in the courts of appeals to narrow that commerce clause. Some want to narrow it, in my opinion, so severely we could go back not to the 1930s but the 1890s.

The American people are entitled to know his views. They are not simply entitled to know that Mr. Seth Waxman says he is a good fellow. That is not an answer.

I am sure my colleague from Pennsylvania would admit if he were here, direct evidence is a lot better than hearsay evidence. There are various ways you get direct evidence. One is by asking a witness questions. As anyone who has read the transcript of the hearing that I chaired for Mr. Estrada, he went to every length to avoid any answers that were substantive on any direct questions. I have never seen anything like it.

Of course, subsequent to Mr. Estrada answering that way, I believe there are new nominees saying the same thing. But none of the nominees before were ever so restrictive. And I believe the only reason the others have not answered questions, they were afraid they would embarrass Mr. Estrada, acting at the request of the White House. It is a good guess he has been instructed not to answer these.

Another way is to look at somebody's past history. There is only one place where we can find Mr. Estrada's own views in his past history because he has written very little.

He clearly was not previously a judge; he was a lawyer. He was obviously representing clients; that is, by his writings and by his views when he was in the Solicitor General's office. There are some who say those should not be revealed. There are arguments on that side. But there are no legal arguments and there is plenty of precedent on the other side.

Should everybody who worked in the Solicitor General's Office have to reveal such information? Probably it would be better. I believe in openness. But it wouldn't be essential because just about every nominee who has come before us for this kind of high court has had some kind of record.

There are some who say Mr. Estrada is way to the right of Justice Scalia. If that is true, he should not be approved. If, on the other hand, he is a mainstream conservative, he should be approved.

Of the 106 people the President nominated for judge for whom we voted, on whom we have had votes here in the Senate, I have supported 98, 99, or 100 of them. I am sure the vast majority of those were mainstream conservatives—people I might disagree with on this issue or that. But the real issue here is, Is Mr. Estrada so far out of the mainstream on the second highest court in the land that if the American people knew his views they would be aghast?

Do you know what many people say when they hear this argument? When I went back home and anyone asked me—as I said, almost no one did—but when I was asked or when I entered an opinion, there was not a soul who would disagree that he should reveal what he thinks. There is too much power in this awesome lifetime appointment not to do so.

So the issue is drawn. We know the issue. No one has budged over the last 2 to 3 weeks.

Why are we still debating Estrada? Because the Republican majority insists on doing it. Maybe they think they can win political points. I doubt it. I think most people do not care. Maybe they feel so strongly that they want to keep the Senate tied up. I will tell you, if they do, they are not representing what the American people want, which is debate on other issues.

The two issues I think we should be debating now are the economy and what we are doing about homeland security. Those two issues, in my judgment, are the two that have a real impact. We have disagreements on the war. We know that. That is now pretty much in executive branch hands. But what to do about homeland security and what to do about the economy or what the American people are asking us to do—and I will say to you, ladies and gentlemen of America—the reason we are not debating those extremely serious issues is because the Republican majority insists that we stay on the Estrada issue.

If I heard from the other side new arguments that might convince people, I would say, well, maybe they have a point. But a new argument has not been made on this issue for a week or two. Do you know what. If someone comes up with an ingenious argument that might convince a number of Members on this side, we can go back and debate Mr. Estrada. But right now, I will challenge my good friends, my Republican colleagues on the other side of the aisle, to start doing something about the economy. Let us debate that issue.

Again, I say this to the American people. We do not control the floor.

When they say Democrats are filibustering on Mr. Estrada, that is not true. It is the Republican side that is keeping us debating the issue of Mr. Estrada. They say until you see it our way, we are going to stay with Mr. Estrada. If this were the No. 1 issue most Americans think should be tackled, they might have a point. But it isn't, although I am afraid some of my colleagues are sort of out of touch.

I want to quote my good friend, the junior Senator from Pennsylvania, Mr. SANTORUM. He came out of a White House meeting, according to the National Journal, and said that getting Estrada to the Senate was first and foremost on President Bush's mind.

More important than the war in Iraq? More important than protecting our homeland? More important than starting the economy going and getting the jobs we need? I don't think more than 1 percent of the American people would agree with that analysis. If so, the President ought to rethink. If Mr. SANTORUM is properly reporting on President Bush's views that Estrada is first and foremost, then the President ought to get out on the hustings and start talking to the American people and finding out what is on their minds because it isn't Mr. Estrada.

I would like to talk about one thing about the economy which I think is important. Today, along with my colleague from New Jersey, Senator CORZINE, and my colleague from Michigan, Ms. STABENOW, and my colleague from Delaware, Senator CARPER, all members of the Banking Committee, we put in a sense-of-the-Congress resolution that says the independence of the Federal Reserve Board should be preserved; that praises Chairman Greenspan as an independent voice and that asks this Senate to go on record in support of Mr. Greenspan.

Why have we done that? Very simply, 2 weeks ago Mr. Greenspan, before our Banking Committee, was his usual independent self. He said that while he likes the dividend tax cut, that he was so worried about plunging this Nation into fiscal chaos with huge deficits that we only ought to do it if it could be revenue-neutral—in other words, if we could find other cuts in spending or other increases in taxes that would equal the dividend tax cut—a view, by the way, that I find is corroborated by most of the business leaders I talk to.

Right after that happened, there were reports in all the newspapers that the White House was furious at Alan Greenspan. Bob Novak said in his column—which I believe was entitled, ''Goodbye Greenspan?''—the White House was so angry at Alan Greenspan's show of display of independence that they might not reappoint him.

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

Mr. SCHUMER. I will be happy to yield in a few minutes. I want to finish my point.

When the Federal Reserve Board was set up, it was supposed to be independent. That is why it was a board. That is why the appointments are for such lengths of time. If you go back and read the history, it was set up to be as far removed from the political forces within the White House and elsewhere as it could be. Sometimes the independence of Chairman Greenspan benefits the White House.

Two years ago, many of us on this side of the aisle were quite upset with him when he encouraged a tax cut that many economists thought seemed too high—not that there shouldn't have been a tax cut, but that it was too large. At that point, the White House was very happy with the independence of the chairman. Now he said something else. Our economy is weaker. We have a large deficit. It is getting worse. The White House, which says we have no money for homeland security and no money to help the States out of their problems, has $670 billion for a tax cut.

I tend to like tax cuts. I tend to support them. But they ought to be stimulative to the economy. They ought to be fair. In other words, the middle-class people ought to get a good, decent share of the benefit. And they ought to be responsible. They ought not throw us into such large deficits that our economy has a burden on its shoulders for a decade. Chairman Greenspan was saying on the last point that we need to correct it.

When I mentioned this resolution in the Banking Committee a few hours ago, I was glad to hear that three or four of my Republican colleagues, including Chairman SHELBY, said that Alan Greenspan was a fine man, that the Federal Reserve Board ought to be independent, and that he ought to be reappointed.

I ask unanimous consent right now to bring up that amendment, to bring up that sense-of-the-Senate resolution because that would help calm the markets that are jittery enough as they are right now.

The PRESIDING OFFICER. Is there objection?

Mr. BURNS. I object.

Mr. SCHUMER. I understand that my colleague objected. It didn't surprise me.

But, again, on the issue of great importance to Americans, the state of this economy, and the independence of the Federal Reserve Board and the need that we don't just become profligate with the tax cut or the spending side, the other side wants not to debate that subject and continue debating Mr. Estrada.

I am happy to debate it. I have been on this floor for many hours. But, again, there are no new arguments that come out. I think every one of us could take a quiz on the three major points the Republican side makes and the Democrat side makes. So I say to my

colleagues, it is time to move on. There is another issue I think we should move on to.

I am going to yield just for the purposes of a question to my colleague because I am going on to another little area.

Mr. BURNS. I thank the Senator from New York.

The reason I objected is, that is not the issue at hand on the floor now, and the proper people are not on the floor to strengthen or weaken his argument on Mr. Greenspan.

But I have been watching the debate on Miguel Estrada with a great deal of interest. I would agree with my friend from New York in that I have traveled through my whole State—not the whole State, but a goodly part of it—and it is not the first question we are asked in townhall meetings or in an occasional meeting on the street.

I understand, though, that the Senator from New York questioned Mr. Estrada for about 90 minutes or so in committee. And I think it is general practice here that if you have more questions, even after the committee hearing is over, you submit written questions. I would inquire of my friend from New York: Did you send Mr. Estrada any written questions after the hearing, after he was voted out of committee and his nomination was brought to the floor?

Mr. SCHUMER. Let me respond to my colleague, I did not. I usually do send written questions. I had ample time to question Mr. Estrada. I got to ask a lot of the questions I wanted to ask. There was one problem: I got no answers. When I asked Mr. Estrada his views on, say, the 1st amendment, or on the commerce clause, or on the 11th amendment, I got back an answer that I found extremely unsatisfying. Some might call it disingenuous. I am not going to go that far. He said: Senator, I will follow the law.

Of course, every judge believes they are following the law. But if following the law was all one needed to say, we would not need a confirmation process. How Justice Scalia thinks we ought to follow the law is quite different than how Justice Breyer or Justice Thomas thinks we ought to follow the law.

If simply following the law told us how a judge would vote on the most important issues, then why is it that judges who tend to be appointed by Republican Presidents—not always, but usually—vote quite differently than judges who get appointed by Democratic Presidents? It is because even as you follow the law, your own views always influence you as a judge. And the higher the court is, and the more important the court is, the more that is the case, because there are fewer precedents.

In fact, I commend to my good friend from Montana a study done by Professor Sunstein of the University of Chicago. He looked at this very DC Court of Appeals, and he said there were huge differences on just about every issue between the judges appointed by Democratic Presidents and judges appointed by Republican Presidents.

So the bottom line is, I asked Mr. Estrada, and first he said: I can't answer these questions because it might influence me when I have to make a future decision. And he cited the canons of ethics. We all know that the canons of ethics means you cannot say: Well, there is a case over there about the logging standards in the Sawtooth Mountains. I think those are in Montana.

Mr. BURNS. You got the right mountains, but you have got the wrong State.

Mr. SCHUMER. Idaho. My family and I have traveled through there, and it is a beautiful part of America. We go hiking out there every summer, although I am sure my friend from Montana would think not enough of the West has rubbed off on me yet, but we are trying.

But in any case, that prospective nominee should not answer. But if you ask a prospective nominee his views or her views on: What are your general views on how much leeway the Federal Government has versus the State governments on how logging should be done or how the environment should be regulated? I would argue to my colleague from Montana that is exactly what we should be asking the nominee, and that is exactly what they should be answering.

Let me read you a quote from your leader on the Judiciary Committee. He said, on February 18, 1997, before the University of Utah Federalist Society:

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

That is exactly what we are saying. He was asked by Senator FEINSTEIN his views on Roe v. Wade. Now, I do not believe in a litmus test, and I would say, of the 99 or so judges I voted for, who were nominated by President Bush, most of them disagree with my view on choice, but I voted for them because they were mainstream conservatives. They were mainstream.

Mr. BURNS. Will the Senator further yield?

Mr. SCHUMER. I will yield when I finish my point.

But when Miguel Estrada was asked if he had any personal views on Roe v. Wade, he said, no—something to that effect. I said to him: Name three Supreme Court cases already decided that you do not like. There would be no worry about the canons of ethics. And guess what he said. ''I won't answer.''

So after 90 minutes of basically being stonewalled, there was no further point in asking written questions and getting the same answers. It is not that we did not ask the questions. We asked him a ton of questions, my colleague from Illinois and all the members of the Judiciary Committee. He just simply dead flat refused to answer them. And that when you are being nominated for the second most important court in the land, a court that is going to have huge power over every one of our lives.

That is not what the Founding Fathers intended. You read The Federalist Papers. It is not fair to this Senate. It makes a mockery of the process. And most of all, I say to my good friend from Montana, it is not fair to the American people. Because the judiciary is the one unelected branch of Government. It is where the people have the least say. That is why sometimes it garners such fervent opinions, pro and con. But the only chance you have—before this lifetime appointment passes—is at this point. And, in all fairness, I cannot think of anybody who has shown less of what he thinks about the major issues of the day before nomination than Mr. Estrada. I am sure my colleague would agree with me, if you asked 100 Americans: Should nominees for such awesome positions be—not required—but should they reveal their views? I bet 99 or 98 would say: Yes.

So I just want to make one other point. I see my other colleagues are in the Chamber. There is another issue—I am going to yield.

I ask the Senator, do you have another question?

Mr. BURNS. Being that the Senate is made up of about 65 to 70 percent attorneys—and I not being one of those—that was the longest ''yes, I did not ask him any further questions in written form'' I have ever heard. But we have to contend with that in this body.

I watched those hearings with a great deal of interest because I believe, as does the Senator from New York, this is a very sensitive and important part of our role in the Senate. However, I think we have injected a double standard here in this case. And I think that case has been made here. But I would say after——

Mr. SCHUMER. Mr. President, just reclaiming my time, I would say it has been made about 50 times—not very well, in my judgment but 50 times.

Mr. BURNS. If I may finish my question. Didn't he answer that question just about the same as the nominees sent up by the previous President of the United States? That is what I am going back to.

Like the Senator from New York, I think we should be moving on. I contend that we have talked about this, we have discussed it and debated it. The only thing I am saying is let's just vote on him.

I plan to come back to the Chamber later today to make a statement. I was interested in the Senator's discussion and his statement. I thank my good friend from New York for responding to the question.

Mr. SCHUMER. I appreciate that.

Mr. President, let me say this. I don't have all of the nominees here. I have been on the Judiciary Committee for 4 years. I have not come across a nominee to the court of appeals, when given

so many extensive questions, who had so few answers as Miguel Estrada.

I don't think there is a double standard. I will quote one. Probably, the nominee of President Clinton that garnered the most controversy—because my colleagues on the other side thought he was too far out of the mainstream from the left side—happened to be a Hispanic nominee named Richard Paez. As the Senator knows, he was held up for over 1,500 days. Let me read the same question that was asked of Mr. Paez—by the way, these were asked by your colleague, my colleague, our friend, Senator SESSIONS. Senator SESSIONS asked him:

In your opinion, what is the greatest Supreme Court decision in American history?

Did Judge Paez refuse to answer that question, say he could not, as Mr. Estrada did? No. He right away named Brown v. Board of Education.

Senator SESSIONS then asked the same question I asked of Mr. Estrada. He said:

What is the worst Supreme Court decision?

Again, Paez answered without hesitation, without ducking, without hiding behind some legal subterfuge—which I know my colleague from Montana doesn't like—that it was Dred Scott.

So if these questions were fair to ask Judge Paez, why are they not fair to ask Miguel Estrada?

One other point I will make rhetorically is, we have heard some charges here—not directed at any one of us specifically—that asking Mr. Estrada all these questions means we are against Hispanics. Why wasn't asking these questions of Judge Paez anti-Hispanic? If you want to talk about a double standard, the double standard, I am afraid, has been brought up by many of my colleagues on the other side of the aisle who seem to think it was perfectly OK then.

This is what Senator HATCH said about another Hispanic nominee. Her name was Rosemary Barkett—a Hispanic nominee, by the way, with the same kind of rags-to-riches story—well, Miguel Estrada didn't come from poverty, but it was the same quick advancement story. She tried to become a nun. She worked in schools and made herself a lawyer—very admirable, with high ratings from the American Bar Association. Same thing. This is what our good friend, ORRIN HATCH, said:

I led the fight to oppose Judge Barkett's confirmation . . . because her judicial records indicated that she would be an activist who would legislate from the bench.

Why isn't what's good for the goose good for the gander? Senator HATCH believed—and nobody on this side stopped him—that he had to ask this nominee, who also happens to be Hispanic—a Mexican American, not from Central America—a whole lot of questions. He had to go through her records and now all of a sudden when Miguel Estrada comes up, not only are we being told we should not ask questions, but it is a ''double standard'' because he is Hispanic. I think the double standard comes from the people who are making that charge on the other side. They ought to look in the mirror.

I yield to my colleague from Nevada for a question.

Mr. REID. The Senator from New York is a member of the Judiciary Committee, true?

Mr. SCHUMER. I am indeed.

Mr. REID. The Senator is familiar with the record of the Judiciary Committee during the time Democrats were in control of the Senate, true?

Mr. SCHUMER. I am.

Mr. REID. Is it true that a hundred judges were approved during that short period of time when we were in control of the Senate?

Mr. SCHUMER. Exactly true.

Mr. REID. Breaking all records.

Mr. SCHUMER. Yes. Senator LEAHY, our chairman, made every effort to bring nominees through. When I tell my constituents—the few who care about this, frankly, because most of them want us to talk about the economy or homeland security—that we have approved something like 99 out of 106 nominees, a lot of them said we approved too many. Everyone should not be rubberstamped.

Mr. REID. If I may ask another question. It is also true, is it not, that during this session of the legislature, the three judges brought before us other than Estrada have been approved unanimously?

Mr. SCHUMER. My colleague is exactly correct. I brought this up before while we were debating Miguel Estrada, so we could go off the Estrada issue to debate the economy and homeland security, which my good friend from Montana had the good grace to say is also far more on the minds of his constituents.

Mr. REID. If the Senator will yield for another question, is the Senator aware that a poll was conducted by the Pew Research Center. You are familiar with polls, as I am.

Mr. SCHUMER. I am not familiar with that particular one, but Pew Research has a good reputation.

Mr. REID. They did a poll of 1,254 people that was completed on February 18. Is the Senator aware that in that poll, the people were asked how President Bush was handling the economy? Is the Senator aware that 43 percent of the people approved of the way President Bush was handling the economy and 48 percent disapproved?

Mr. SCHUMER. I was not aware of that poll.

Mr. REID. Is the Senator aware of the fact that Senator DASCHLE, the Democratic leader, came to the floor yesterday and asked that a bill that had been moved by the majority leader the day before, a rule 14, S. 414, is the Senator aware that Senator DASCHLE asked unanimous consent to bring that bill to the floor so we could start talking about a way to maybe improve President Bush's numbers as it relates to the economy and talk about stimulating the economy? S. 414, is the Senator aware that it was objected to?

Mr. SCHUMER. I am aware of that. I was sitting on the floor when Senator DASCHLE brought it up. He made an excellent point, I thought. He said the other side seemed to be concerned about one man's job, Miguel Estrada.

By the way—and Senator DASCHLE didn't say this—Mr. Estrada already has a job. My guess is that he is probably making in the high six figures, so he can do pretty well feeding his family.

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

Mr. SCHUMER. In a minute, I will be delighted to yield.

We have 2.8 million fewer Americans in jobs than we had when President Bush took office. We have tens of millions of Americans who have jobs, but their jobs are not as good as the jobs they used to have. We should be debating that issue.

I say to my colleague from Nevada and my colleague from Montana that we should be debating homeland security, which is vital to our future. Those of us who follow football, or basketball, or baseball know that a good team needs both a good offense and a good defense. There are many opinions on the offense, but clearly President Bush has a plan and has implemented it. I have been sometimes critical, but usually supportive, of the President's plan in that regard. But a good team needs defense.

On homeland security, this country is not doing close to what we need to do. Even if, God willing, tomorrow we were to get rid of Saddam Hussein, Osama bin Laden, and al-Qaida, other groups would come forward. Are we protected from shoulder-held missile launchers? Are our planes protected? No. Are we protected from somebody smuggling a nuclear weapon into this country? Are we doing much about it? No.

Is our northern border, which my State shares with Canada for hundreds of miles, at all adequately guarded so bad people cannot come in? No.

Is there money in the President's budget to do these activities? No.

I do not know if this is true of my colleague from Montana, but when I go back and talk to my police chiefs and fire chiefs of big towns, little towns, urban areas, rural areas, and suburban areas, does my colleague know what they tell me? They have huge new responsibilities post 9/11, and they are not getting one thin dime from Washington. In my opinion, most Americans would rather we debate that than debating Miguel Estrada.

So we are at an impasse with Estrada. We believe records should be revealed. The other side says: No, let's vote on him without the records. Nothing has changed in the last week or two. Why don't we just put the issue of Mr. Estrada aside until someone a lot smarter than the Senator from New

York and the Senator from Montana thinks of some kind of compromise, because right now we are at loggerheads and nothing has budged, and why don't we start talking about the economy, which my colleague from Nevada brought up; why don't we start talking about homeland security as we are on the edge of war with Iraq, which is what, again, my good friend from Montana has admitted his constituents would prefer. I can certainly tell the Senator that my constituents in New York would much prefer that.

I yield for another question.

Mr. BURNS. Mr. President, I say to my friend from New York, I did not get questions on homeland security or the economy while I was up there. We will go over those questions later.

I understand what the Senator from New York said about Judge Paez, but in the end, did he get a vote?

Mr. SCHUMER. I say to my colleague——

Mr. BURNS. Yes or no, and I have a followup question.

Mr. SCHUMER. Wait, in the Senate—I have only been here 4 years, and my colleague has been here longer, but we do not do that yes or no, cross-examination stuff. In fact, when I came here, I only spoke for 5 or 10 minutes on subjects, and people thought I was crazy, but I am not going to take that long. I am not going to take more than 5 minutes.

At first, Judge Paez, as my friend knows, was held up for 4 years. If my colleague wants to make it equal, start complaining in 2 more years about Judge Estrada. Second, and far more important than the amount of time, Judge Paez had an ample record in the courts. By the way, so ample that I believe it was 39 Members from the other side—perhaps my friend from Montana; I do not know how he voted—voted against Judge Paez, and when Judge Paez came before us and was subjected to extensive questioning by Senator SESSIONS, by Senator Ashcroft, who was then a Senator, by many of my colleagues on the Judiciary Committee, did he duck? Did he hide behind the legal shibboleth of: I have to see all the briefs before I answer, or it is a case that might come before me? He did not. He had the courage, he had the decency, and, most of all, he had the respect for the advise and consent process to answer those questions. So he deserved a vote.

I say to my colleague, if in 2005 we have a Democratic President—God willing—and if that Democratic President should nominate somebody who many on the other side fear would be so far over to the left that he would do real damage on the bench, I would support my colleagues, if he did not answer questions and had as skimpy a record and did as much of a job of stonewalling, in not bringing that nominee to a vote as I would today.

This is not an issue of left or right, in my judgment. It should not be. This is not an issue even of my view, which is: Should ideology matter when you vote for judges? I believe it should, but some do not. This is a matter, in my judgment—and I mean this sincerely to my colleague—that goes to the sacredness of the Constitution of the United States.

When the Founding Fathers, in their wisdom, set up the advice and consent clause, they did not intend it to be degraded by having a sham hearing where the witness answers no questions.

Mr. BURNS. Mr. President, if my friend from New York will allow a comment, and maybe a followup question.

Mr. SCHUMER. Well——

Mr. BURNS. No, a followup question. That is a long way to say, yes, he got a vote. Is it snowing outside today, right now?

Mr. SCHUMER. Let me say to my colleague that snow comes from the clouds, and it happens when the temperature is below 32 degrees up in the clouds.

Mr. BURNS. I submit it is snowing inside today also.

I thank the Presiding Officer. I thank my good friend from New York.

Mr. SCHUMER. Mr. President, it is always a pleasure to debate with my colleague from Montana. I say to my colleague, this, plain and simple, he knows in his heart—I hope he knows; I think he knows—that what Miguel Estrada did in terms of how he treated this body—all of us—was wrong, and if it is allowed to continue, we will have dramatic changes in the way this country is governed, and that is why so many of us feel so strongly about this issue.

I reiterate to my colleague once more, he is not going to change our views, at least not with the same old arguments. I have been asked about four or five times did Judge Paez get a vote. Let's put this aside and talk about the issues the American people want us to talk about: the economy and homeland security. If my colleague can get the record of Mr. Estrada, we will be happy then to bring him to a vote.

I thank my colleague. I yield the floor.

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Illinois.

Mr. DURBIN. I thank the Chair.

Mr. President, I thank my colleague from New York and my seatmate on the Senate Judiciary Committee for the statement he made on this important nomination. I think he has made this point. I listened earlier today when President Bush spoke to the Latino Coalition at the White House, in the Executive Office Building. I listened to what he said about Miguel Estrada. I find it difficult to quarrel with any of the statements he said about the man's quality.

I met him personally. There is no doubt he has an inspiring life story, having come to the United States from Honduras with limited knowledge of English and, in a matter of a few years, reaching the heights of a legal education at Harvard Law School. Then, of course, there are his opportunities to serve our Government in a legal capacity, and now in private practice. All of these attest to his legal acumen, his legal skills, and the fact he has overcome adversity. Those are qualities we want to respect and reward when it comes to those seeking public service.

The issue before us is one that is narrow in one respect but much broader in another. It is narrow in that we are not questioning his academic or legal credentials or even his experience. I quarrel with those who say he has never been on the bench, in the judiciary. That is not good enough from my point of view. I have seen first timers on the bench in Federal and State courts who have done very well.

What we are questioning—the narrow aspect—is whether he has been forthcoming, honest, and candid in revealing his views on issues, not going so far as to be intrusive in terms of pending cases before the court, or not suggesting he answer a question that is a conflict of interest, but rather that he comes to the heart of the question: What is in his mind? Is he truly a conservative—and we expect those nominees from this President—or is he something more? And if he is something more, should we pause, should we reflect on this fact? Should we ask the hard question of whether this man is entitled to a lifetime appointment to the bench which the President characterized today as the second highest court in the land, the DC Circuit Court of Appeals?

Sadly, when one looks at the record of responses from Miguel Estrada, it is unfortunate. It is truly unfortunate because I believe he has views that he can share with us. I believe he certainly has the knowledge to answer the questions. But he was coached and trained and cautioned not to come to Capitol Hill and be honest and open in his answers.

I am sure the people at the Department of Justice said: Miguel, you may want to answer these questions, but do not do it. Trust us, do not answer them. Give them an evasive answer for anything. Try to move on, get it behind you, get this to the floor. You have enough votes, and you never have to answer those questions.

He probably said at some point: Wait a minute; I do not mind answering a question such as which Supreme Court case do I disagree with. And they said: Be careful. If you start answering those questions, we do not know where this could lead.

He followed that advice, or followed someone's advice. He came before the Judiciary Committee and refused to answer the questions.

So now we have a broader issue. The broader issue is this: If the Senate, and particularly the Judiciary Committee, is to accept this approach from nominees, why in the world are we here? Why do we swear to uphold this Constitution when it comes to advice and

consent? Why is it we go through any process whatsoever with nominees? Because we know if Miguel Estrada comes through under these circumstances, the order of the day will be for future nominees: Evasion, concealment, refusal to answer the most basic questions. If that is the case, then, frankly, I think we are not meeting our responsibility.

The broader issue is a constitutional responsibility of this Senate. It has been raised before and should be raised again. There is an easy way to end this impasse and end it within a matter of days. We have asked Miguel Estrada to produce the documents which he generated in the Solicitor General's Office, documents which we can review—in fact, we could review them on a restricted basis.

One of the Republican Senators I admire very much, Mr. BENNETT of Utah, suggested these documents be produced and given to Senator HATCH, a Republican, and Senator LEAHY, a Democrat. They can review them. I do not have to see them as a member of the Judiciary Committee. They can decide whether they merit further inquiry, either with written questions or another hearing. If they decide, on the basis of that in camera and private review, that they do not merit that kind of followup, I will accept Senator LEAHY's judgment on that.

I do not speak for myself only. Yesterday, Senator DASCHLE came to the floor and I asked him point blank if Miguel Estrada will produce this documentation, which he says he wants to voluntarily turn over, to be reviewed by Senators HATCH and LEAHY, and if there is anything controversial we have a chance to follow up or not, can this bring the matter to a close, to a vote?

I think Senator DASCHLE spoke for virtually all of us on the Democrat side and said: Yes, it can. I think that is a fair way to bring this to a conclusion.

This morning I said to Senator HATCH: Isn't that a way to bring this to an end? Isn't that a reasonable way, a dignified way, that does not turn loose all these documents for the world to see and for the press to pore over but gives it to Senator HATCH and Senator LEAHY to review them and see if there is anything that merits a followup?

Senator HATCH said: That is absolutely unacceptable. These are privileged documents and never have they been released and we are not going to start now. Start releasing internal memos and documents like this, and there is no end to it and the White House is right. Despite Miguel Estrada's objections, the White House is right to refuse to release those documents.

I call the attention of my colleagues and those following this debate to the fact that Senator HATCH perhaps did not tell the whole story because when we look at requests for writings such as Miguel Estrada's writings, in the past the Department of Justice has provided memos by attorneys during the following nominations: William Bradford Reynolds, nominated to be Associate Attorney General, the Republican Department of Justice provided the documents then. Robert Bork, the controversial—celebrated in some quarters—nominee to the Supreme Court, he, too, was asked to provide the documents. The Department of Justice did. Benjamin Civiletti, nominated to be Attorney General, provided similar documents to this Congress for review by the Senate Judiciary Committee; Stephen Trott, nominated to the Court of Appeals for the Ninth Circuit, same standard applied, documents provided from the Department of Justice.

Finally, I know it is at the bottom of the list and it maybe should have been at the top, Justice William Rehnquist, when he was nominated to be Chief Justice of the Supreme Court, was asked by those before me who were members of the Judiciary Committee for memoranda that he had prepared. They were provided by the Department of Justice.

For Senators' staff and others to argue that this request is patently unreasonable, unacceptable, and unprecedented, I suggest that in five specific instances, Democratic and Republican Departments of Justice, with Democratic and Republican Attorneys General, these documents have been provided.

Let me go further. I am going to ask in a moment for these letters to be printed in the RECORD, but we have letters to the then-chairman of the Senate Judiciary Committee, JOE BIDEN, from the State of Delaware, relative to the nominations of two individuals, Judge Robert Bork to the Supreme Court—I am sorry. Both of these related to Judge Robert Bork's nomination to the Supreme Court.

It is interesting that the Ronald Reagan Department of Justice, with a Republican Attorney General, produced the very documents that we are discussing today, which Senator HATCH and others have said are unprecedented, that there has never been a request of this nature.

Frankly, in reading the letter of transmittal of presentation from the Department of Justice, we see they decided that in the interest of disclosure, in the interest of openness and candor, that they would cooperate, as they say, to the fullest extent possible with the committee to expedite Judge Bork's confirmation process.

And I quote further from this letter signed by John Bolton, Assistant Attorney General:

> Accordingly, we have decided to take the exceptional step of providing the committee with access to responsive materials we currently possess, except those privileged documents specifically described above. Of course, our decision to produce these documents does not constitute a waiver of any future claim of privilege.

And it should not. But in this instance, the Department of Justice, with the Robert Bork nomination to the Supreme Court before them, made a decision to cooperate with the committee.

In this case, Miguel Estrada, realizing he has never sat on the bench before, and he does not have a body of opinion to which we can turn to understand his judicial philosophy and thinking, has said he is prepared to turn over these memos so we can review them. He believes they are not controversial. He believes they will shed light, perhaps, on his point of view. I think he is probably right, but we will not know.

Mr. CRAPO. Will the Senator yield for and respond to a question?

Mr. DURBIN. I am happy to respond to a question.

Mr. CRAPO. I have been listening to the arguments the Senator has made. I have been listening very carefully to the examples the Senator is pointing out about other nominations in which documents were provided. It is my understanding, however, that the Department of Justice has never disclosed confidential deliberative documents on career lawyers in the Solicitor General's Office. These are documents dealing with recommendations on internal deliberations regarding appeals and certiorari or amicus recommendations in pending cases.

From the information I am aware of that the White House has provided in each of the cases that the Senator has listed, there is a very clear difference in each of those cases. Take the situation of Judge Bork to which the Senator was referring. The materials involving Judge Bork were very carefully limited to those that focused on his observations on political questions, such as President Nixon's assertion of the executive privilege or the pocket veto. Never has the Department of Justice allowed access to internal career lawyers' working documents on appeals or on certiorari or amicus recommendations, and that is what I understand the Senator to be requesting.

First, does the Senator understand the distinction that is made between these document explanations that have been made? And does the Senator believe the Senate should start the precedent, which has never been done in this Senate, of asking for access to these career lawyers' deliberations on confidential matters in the Solicitor's Office?

Mr. DURBIN. In response to my colleague, I believe this is a good-faith question and it is one that deserves an honest reply. Do I believe there are some internal memoranda and writings generated within the Department of Justice that should not be subject to public disclosure? I certainly do. I think lines should be drawn.

In the Bork case, the lines were drawn. They said some of the documents you have requested we will produce in the spirit of cooperation; some we cannot and should not produce. And if that is the response

from the Department of Justice when it comes to Miguel Estrada, we may quarrel with their dividing line, but at least it would demonstrate a cooperative effort to work with the Senate Judiciary Committee.

So if they say to us they can give certain memoranda, but they draw the line on others, at least we are moving forward in the process. But at this moment in time, I say to my colleague and friend, the Department of Justice has said flat out: No, not ever; we will not produce anything.

Mr. CRAPO. Will the Senator yield further?

Mr. DURBIN. If I can finish, and then I will be glad to yield for another question.

In the Bork situation, they said: We wish to cooperate to the fullest extent possible. We have decided to take the exceptional step of providing the committee with access to responsive materials we currently possess, except those privileged documents specifically described above.

The Department of Justice, in the Bork situation, said we are drawing a line but we are providing you with these internal memos and information. Now, if the same thing is to apply to Miguel Estrada, as I said, we can debate where the lines can be drawn, but Mr. Gonzales in the White House said, no, we will not consider producing anything.

It leads Members to conclude on this side of the aisle that there is something very damaging in these materials that they do not want disclosed. It is the only conclusion you can draw. The fact that Miguel Estrada volunteered the information, the fact that he is prepared to waive the privilege if it exists, is an indication he does not think the controversy is there, but this White House, tentative and concerned about whether or not Miguel Estrada has said some things that could jeopardize his nomination, refuses to disclose.

I yield to the Senator.

Mr. CRAPO. If I understand correctly, you are reading that the internal work documents of a career attorney of the Solicitor General's Office in making recommendations on how to handle cases would not be something this Senate should try to investigate or to cause to be disclosed?

In each of the cases you have discussed, either it was specific charges of misconduct about which very narrow documents were disclosed or general comments on politics such as the case of Justice Bork. And if you are agreeing with that, perhaps there is some progress we can make. It is my understanding the demand for disclosure is far broader than what you have just described.

Mr. DURBIN. Let me say in response to my colleague, in the case involving Robert Bork, I am reading from a letter from Thomas Boyd, the Acting Assistant Attorney General—and I ask unanimous consent these letters be printed in the RECORD.

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

DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,

Washington, DC, August 24, 1987.

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

DEAR CHAIRMAN BIDEN: This responds further to your August 10th letter requesting certain documents relating to the nomination of Judge Robert Bork to the Supreme Court. Specifically, this sets forth the status of our search for responsive documents and the method and scope of review by the Committee.

As we have previously informed you in our letter of August 18, the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below, completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents. The results of this effort are as follows:

In response to your requests numbered 1–3, we have conducted an extensive search for documents generated during the period 1972–1974 and relating to the so-called Watergate affair. We have followed the same procedure, in response to request number 4, for all documents relating to consideration of Robert Bork for the Supreme Court by President Nixon or his subordinates. We have completed our search and relevant Department of Justice and White House files for documents responsive to these requests. The Federal Bureau of Investigation also has completed its search for responsive documents, focusing on the period October-December 1973 and on references to Robert Bork generally.

Most of the documents responsive to requests numbered 1–4 are in the possession of the National Archives and Records Administration, which has custody of the Nixon Presidential materials and the files of the Watergate Special Prosecution Force. The Archives staff supervised and participated in the search of the opened files of the Nixon Presidential materials and the files of the Watergate Special Prosecution Force, which was directed to those files which the Archives staff deemed reasonably likely to contain potentially responsive documents.

Pursuant to a request by this Department under 36 C F.R. 1275, the Archives staff also examined relevant unopened files of the Nixon Presidential materials, and, as required under the pertinent regulations, submitted the responsive documents thus located for review by counsel for former President Nixon. Mr. Nixon's counsel, R. Stan Mortenson, interposed no objection to release of those submitted documents that (a) reference, directly or indirectly, Robert Bork, or (b) were received by or disseminated to persons outside the Nixon White House. Mr. Mortenson on behalf of Mr. Nixon objected to production of the documents which are described in the attached appendix. Mr. Mortenson represents that these documents constitute purely internal communications within the White House and contain no direct or indirect reference to Robert Bork.

Mr. Mortenson also objected on the same grounds to production of unopened portions of two documents produced in incomplete form from the opened files of the Nixon Presidential materials:

1. First page and redacted portion of fifth page of handwritten note of John D. Ehrlichman dated December 11, 1972.

2. All pages other than the first page of memorandum from Geoff Shepard to Ken Cole dated June 19, 1973.

Mr. James J. Hastings, Acting Director of the Nixon Presidential Materials Project, has reviewed these two documents and has advised us that the unopened portions of neither document contain any direct or indirect reference to Judge Bork.

Our search has not yielded a copy of the document referenced in paragraph ''a'' of your request numbered 3, which, as you correctly note, is printed at pages 287–288 of the Judiciary Committee's 1973 ''Special Prosecutor'' hearings.

Among the documents collected by the Department are certain documents generated in the defense of *Halperin*. v. *Kissinger*, Civil Action No. 73–1187 (D. D.C.), a suit filed against several federal officials in their individual capacity, which remains pending. The Department has an ongoing attorney-client relationship with the defendants in Halperin, which precludes us from releasing certain documents containing client confidences and litigation strategy, without their consent. 28 C F.R. 50.156(a)(3).

All documents responsive to request number 5, concerning the pocket veto, have been assembled.

All documents responsive to request number 6 have been assembled. The exhibits filed by counsel for Edward S. Miller on July 12, 1978 and referred to in your August 10 letter, remain under seal by order of the United States District Court for the District of Columbia. However, a list of the thirteen documents has been unsealed. We have supplied copies of eleven of these documents, including redacted versions of two of the documents (a few sentences of classified material have been deleted). We have supplied unclassified versions of two of these eleven documents, as small portions of them remain classified. We are precluded by Rule 6(e) of the Rules of Criminal Procedure from giving you access to two other exhibits—classified excerpts of grand jury transcripts—filed on July 12, 1978. We also searched the files of several civil cases related to the Felt and Miller criminal prosecution, as well as the documents generated during the consideration of the pardon for Felt and Miller.

With respect to request number 7, Judge Bork has previously provided to the Committee a number of his speeches, which we have not sought to duplicate. We have sought and supplied any additional speeches, press conferences or interviews by Mr. Bork, as well as any contemporaneous documents which tend to identify a date or event where he gave a speech or press interview during his tenure at the Department.

On request number 8, there are no documents in which President Reagan has set forth the criteria he used to select Supreme Court nominees, or their application to Judge Bork, other than the public pronouncements and speeches we have assembled.

Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files in every case handled by the Civil Rights Division or Civil Division, between 1969–77, which concerned desegregation of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled some responsive documents obtained from other Department files. The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW.

We have assembled case files for the cases referred to in question 10, with the exception of *Hill* v. *Stone*, for which there is no file. We have no record of the participation of the United States in *Hill* v. *Stone*, or consideration by the Solicitor General's office of whether to participate in that case.

A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession.

As you know, the vast majority of the documents you have requested reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities. For these reasons, the Justice Department and other executive agencies have consistently taken the position, in response to the Freedom of Information Act and other requests, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications.

On the other hand, we also wish to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process. Accordingly, we have decided to take the exceptional step of providing the Committee with access to responsive materials we currently possess, except those privileged documents specifically described above and in the attached appendix. Of course, our decision to produce these documents does not constitute a waiver of any future claims of privilege concerning other documents that the Committee requests or a waiver of any claim over these documents with respect to entities or persons other than the Judiciary Committee.

As I have previously discussed with Diana Huffman, the other documents will be made available in a room at the Justice Department. Particularly in light of the voluminous and privileged nature of these documents, copies of identified documents will be produced, upon request, only to members of the Judiciary Committee and their staff and only on the understanding that they will not be shown or disclosed to any other persons. Please have your staff contact me to arrange a mutually convenient time for inspection of the documents.

As I stressed in my previous letter, if the Committee is or becomes aware of any documents it believes are potentially responsive but have not been produced, please alert us as soon as possible and we will attempt to locate them.

Should you have any questions or comments, please contact me as soon as possible. Thank you for your cooperation.

Sincerely,

LAURA NELSON
(For John R. Bolton,
Assistant Attorney General).

APPENDIX

DOCUMENTS SUBJECT TO OBJECTION

(By Mr. Nixon's Counsel)

1. Memorandum to Buzhardt and Garment from Charles Alan Wright, January 7, 1973. Subject: June 6th meeting with the Special Prosecutor (document No. 8).

2. Memorandum to Buzhardt and Garment from Charles Alan Wright, January 7, 1973. Subject: June 6th meeting with the Special Prosecutor (document No. 9).

3. Memorandum to Garment from Ray Price, July 25, 1973. Subject: Procedures re: Subpoena (document No. 13).

4. Memorandum to General Haig from Charles A. Wright, July 25, 1973. Subject: Proposed redrafts of letters (document No. 14).

5. Draft letter to Senator Ervin dated July 26, 1973. Subject: two subpoenas from Senator Ervin (document No. 15).

6. Draft letter to Judge Sirica dated July 26, 1973. Subject: subpoena duces tecum (document No. 16).

7. Memorandum to the Lawyers from Charles A. Wright, July 25, 1973. Subject: Thoughts while shaving (document No. 17).

8. Memorandum to the President from J. Fred Buzhardt, Leonard Garment, Charles A. Wright, dated July 24, 1973. Subject: Response to Subpoenas (document No. 18).

9. Memorandum to Ray Price from Tex Lezar, dated October 17, 1973. Subject: WG Tapes (document No. 20).

10. Memorandum to Leonard Garment and J. Fred Buzhardt from Charles A. Wright, dated August 3, 1973. Subject: Discussions with Philip Lacovara (document No. 25).

11. Memorandum to the President from Leonard Garment, J. Fred Buzhardt, Charles A. Wright, dated August 2, 1973. Subject: Brief for Judge Sirica (document No. 26).

12. Memorandum to Len Garment, Fred Buzhardt, Doug Parker and Tom Marinis from Charlie Wright, dated August 1, 1973. Subject: note regarding brief (document No. 27).

13. Memorandum to the President from J. Fred Buzhardt, Leonard Garment, Charles A. Wright, dated July 24, 1973. Subject: Response to Subpoenas (document No. 28).

14. Draft letter to Senator Ervin dated July 26, 1973. Subject: two subpoenas issued July 23rd (document No. 29).

15. Draft letter to Judge Sirica dated July 26, 1973. Subject: subpoena duces tecum (document No. 30).

16. Memorandum to J. Fred Buzhardt, Leonard Garment, Charles A. Wright, from Thomas P. Marinis, Jr. (Undated). Subject: Appealability of Cox Suit (document No. 31).

17. Notes (handwritten) (Undated). Subject: [appears to be notes of oral argument] (document No. 32).

18. Memorandum to the President from Charles Alan Wright, dated September 14, 1973. Subject: Response to Court's memorandum (document No. 34).

19. Handwritten notes (document no. 36).

20. Memorandum to J. Frederick Buzhardt from Charles Alan Wright, dated June 2, 1973. Subject: Executive privilege (document no. 41).

21. Memorandum to J. Frederick Buzhardt and Leonard Garment from Charles Alan Wright, dated June 7, 1973. Subject: June 6th meeting with Special Prosecutor (document no. 42).

22. Memorandum to J. Fred Buzhardt from Robert R. Andrews, dated June 21, 1973. Subject: Executive Privilege (document no. 43).

23. Memorandum to J. Fred Buzhardt and Leonard Garment from Thomas P. Marinis, Jr., dated June 20, 1973. Subject: Prosecutor Wright's attempt to obtain document (document no. 44).

24. Memorandum to J. Frederick Buzhardt and Leonard Garment from Charles Alan Garment (sic), dated June 7, 1973. Subject: June 6th meeting with Special Prosecutor (document no. 46).

25. Draft letter to Senator from Alexander Haig, dated December 12, 1973. Subject: Response to letter of the 5th (document no. 60).

26. Draft letter to Senator from Alexander Haig, dated December 12, 1973. Subject: Response to letter of the 5th (document no. 61).

27. Proposal re: transcription of tapes dated October 17, 1973. (document no. 63).

28. Typed note with handwritten notation: Sent to Buzhardt 12/11/73. Undated. Subject: papers Buzhardt sent to Jaworski (document no. 66).

29. Chronology—Presidential Statements, Letters, Subpoenas dated March 12, 1973. Subject: chronology of same (document no. 71).

30. Handwritten note dated 1/31/74 (January 31, 1974). Subject: Duties and responsibilities of Special Prosecutor (document no. 82).

31. Memorandum to Fred Buzhardt from William Timmons, dated 7/30/73 (July 30, 1973). Subject: refusal to release taped conversations (document no. 91).

32. Memorandum to J. Fred Buzhardt from Paul Troible, dated October 30, 1973. Subject: Cox's disclosure of Kleindienst's confidential communication (document no. 92).

33. Proposal regarding transcription of tape conversations dated 10/17/73 (October 17, 1973). (document no. 94).

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

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

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

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

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

Sincerely,

THOMAS M. BOYD,
Acting Assistant Attorney General.

Mr. DURBIN. In this May 10, 1988, letter from Thomas Boyd to JOE BIDEN, then-chairman of the Senate Judiciary Committee:

As Assistant Attorney General John Bolton noted in an August 24, 1987, letter to you, many of the documents provided the Committee, ''reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.'' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

In response to my friend, the point I am making is they did not draw the same absolute line being drawn by the

Bush White House for Miguel Estrada. They disclosed information which reflected purely internal deliberations and the work product of attorneys and confidential legal advice and did it in the spirit of cooperation. They drew a line, but the line was on the side of disclosure. The line drawn by the Bush White House for Estrada is on the side of concealment, the refusal to disclose this information.

Mr. CRAPO. Will the Senator yield further?

Mr. DURBIN. I am happy to yield.

Mr. CRAPO. If I understand correctly, you are saying, based on the letter, that you indeed are seeking the disclosure of these confidential internal work documents and you believe that letter shows the precedent for disclosure exists, is that correct?

Mr. DURBIN. Certainly the precedent exists. The statement made on the floor by Senator HATCH and others that this has never been done or only been leaked—he used that term this morning—is not a fact.

I concede the point made by my colleague that they do draw a line. The Department of Justice said no to everything, but they did disclose the information I just described when it came to Robert Bork. At this moment in time I don't think this Department of Justice has even entered into an honest conversation with the Senate Judiciary Committee members about whether that line can be drawn. They have said categorically that they are not going to allow anything to be produced.

That is why we are at this impasse. It is troublesome to have a nominee with great credentials, a great resume, a good paying job as an attorney in the District of Columbia. He has not served as a judge so he does not have written opinions. We are trying to get to the heart of the matter. What are his values? Is he conservative or something else?

Mr. CRAPO. Will the Senator yield?

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

Mr. CRAPO. I understand your position now, which is that you are asking for the disclosure of this broad array of confidential documents.

I assume you are aware that every living former Solicitor General has rejected this request. This letter was signed by Democrats Seth Waxman, Walter Dellinger, and by Republicans, Ken Starr, Charles Fried, Robert Bork, and Archibald Cox for the very reasons we have been talking about.

I want to get at this principle. Is it the correct policy, is it the right thing for us to do in the Senate, to change the practice? I understand you can list a few cases where there were exceptions in the history of handling judicial nominations in this country, but if you look at the thousands, indeed tens of thousands of judicial nominations, the policy and practice of the Senate has been not to delve into the confidential documents for the very reason every former living Solicitor General has said it would compromise the ability of its office to do its work effectively.

Do you believe it is the right policy for the Senate to begin putting some standard on those who would become nominees of any President, Republican or Democrat, to a position in the U.S. Judiciary? Should we open this door and start demanding that the Solicitor General's Office, the Justice Department, and other contacts, or in any other situation, start revealing these confidential internal work documents by career lawyers?

(Mrs. DOLE assumed the Chair.)

Mr. DURBIN. In response, Miguel Estrada does not see a problem with this at all.

Mr. CRAPO. Miguel Estrada believes his papers will show support for him. But the principle here is the principle—

Mr. DURBIN. I would like to respond, if I could. In fact, because Miguel Estrada does not see a problem with this is an indication to me that perhaps some in the White House are being overly cautious again. They coached Miguel Estrada to come before us and not answer questions and now when he says, disclose the memoranda, they are saying, no, no, we did not want the Senate raising that.

Going to the point raised by the Senator as to in the history of this Senate how often this has occurred, let me reflect on this for a moment. In most instances, this will never happen. There are only a few nominees who will come before the Senate who actually have generated this kind of documentation in the Solicitor General's Office or the Department. And many of those nominees will have an open record as judges with their writings to indicate what they believe. And most, if not all, of them will have been responsive to the questions that we have asked of the nominees.

We find ourselves backed into this corner with Miguel Estrada because he does not have a body of established opinions as a judge. He does not have an abundance of writings reflecting on his philosophy. He has not answered the questions which we have asked of him. And we are straining to find some information on which to base a reasoned judgment about his nomination to the second highest court of the land for a lifetime appointment.

We find ourselves in the difficult, and I think somewhat rare, situation that has been created by Miguel Estrada and the strategy of the White House in sending this nominee to Capitol Hill. I think that is rare. I hope it does not happen again.

I yield for a question.

Mr. CRAPO. It is not just the White House. As I indicated, this is every living former Solicitor General in the United States who is saying this issue goes far beyond the Miguel Estrada nomination. It goes to the core of what the Senate should be dealing with in terms of its investigation of judicial nominees and what they can do to our judicial system and to the Justice Department in that context.

But you indicated also in your answer that Miguel Estrada did not answer the questions asked of him by the Judiciary Committee. I wish to clarify this because I understand he would not reveal the documents that we are discussing.

Were there any other questions which you asked him or which you are aware of that he has not answered?

Mr. DURBIN. Let me suggest you look at the questions asked of him by Senator KENNEDY, written questions after the nominee appeared, that went to specific decided cases and asked for his response or reasoning. Time after time he came back and said: Well, I have to read all of the pleadings that were filed and all the briefs that were filed before I would hazard an opinion upon this.

Similarly, when Senator SCHUMER asked him what I thought to be a perfectly reasonable question, one that had been asked by Republican Senators of Clinton nominees, repeatedly he refused to answer. The question was one that you would dream of in a constitutional law course in law school. The question was: Name a Supreme Court decision in the last 40 years—or a followup question, at any time in its history—that you would find objectionable.

If that were the question on the final at law school, you would breathe a sigh of relief. You can think of one case with which you disagree. But this man, seeking a lifetime appointment to the second highest court in the land, would not answer that question.

I asked: Which Federal court judge, living or dead, would you emulate or admire on the bench? He went on to say, first, that he could not name a single Federal court judge, living or dead, he would try to emulate on the bench.

He then, in later response to the same question, said: I admire some of the Federal Court Justices I have worked with. I can understand that. That is a reasonable response.

But do you understand how we, sitting on this side of the table, are saying how can this man, who is clearly a gifted individual with extraordinary legal talent, be so afraid to share with us one Supreme Court case that he disagrees with?

That was a question Senator SESSIONS asked of Richard Paez, and I don't believe a Democrat stood up and said: That is not fair. You have gone too far.

It is a reasonable question. It gives you insight. Is he going to mention Brown v. Board of Education? Is he going to mention Roe v. Wade? What case is he going to mention? He wouldn't mention one. Doesn't that trouble you? I ask my colleague and friend, doesn't that trouble you, that someone who is seeking that kind of legal appointment wouldn't be honest and candid with you? For the sake of yielding to my colleague for a question

and for him to answer my question, I will yield.

Mr. CRAPO. I will respond and ask a question, how is that?

Mr. DURBIN. Sure.

Mr. CRAPO. Not having sat in the hearing, I don't know how much it would trouble me. I can't tell you if a witness would not answer my questions I wouldn't be troubled by it. I don't think that would cause me to try to filibuster the nomination, which is really one of the core issues we are dealing with here. I might vote no because of it. And you are perfectly entitled to vote no if you don't like the answers to your questions. But we are way beyond not liking the answers to questions here. We are seeing a filibuster of a nomination to the Circuit Court of Appeals for the District of Columbia. It is based, as I understand it, in large part on the fact that confidential documents are not disclosed.

What I am trying to get at is: What else? What I have heard at this point is the nominee did not identify which was his favorite and least favorite Supreme Court case, and that he would not say how he would have judged a particular case until he had read the briefs and studied the matter more carefully. Frankly, I think that makes him a better candidate.

Mr. DURBIN. I am sorry, I am going to have to interject at that point. We didn't ask him how he would rule on a particular case. We asked him, on deciding cases, to explain his position on an accepted standard of law. We could not and should not and I don't think any Member would ask him how he would rule on a specific case pending before the Court. That is way beyond the bounds.

Let me just say, though, this is an interesting thing on which I think my colleague might reflect. This comes from the Legal Times of April 2002. It's a quote:

President George W. Bush's judicial nominees received some very specific confirmation advice last week: Keep your mouth shut. Justice Scalia called DC Circuit Judge Silberman at one point, the latter recalled, and told him he was about to be questioned about his views about Marbury v. Madison, the nearly 200-year-old case that established the principle of judicial review.

That's almost the first case—McCulloch v. Maryland and Marbury v. Madison—the first two cases you'll ever read in constitutional law. Listen to what Silberman told him.

''I told him as a matter of principle he should not answer that question either,'' Silberman said.

So you understand we are not just dealing with my interpretation as to whether or not Miguel Estrada is cooperative; we are dealing with a strategy: Keep your mouth shut. Don't tell the Senate, don't tell the American people, don't put on the record who you are and what you believe. Zip your mouth, hold tight, wait for the vote, and we will give you a lifetime appointment to the second highest court of the land. I don't think that is a fair way to approach this process.

Mr. CRAPO. Will the Senator yield?

Mr. DURBIN. After I finish. When the Clinton nominees came before the Judiciary Committee under the control of the Republicans, they were peppered with questions. Some of those questions I think went way beyond the realm of reasonable inquiry.

I can recall one woman from California who was asked to explain how she had voted on every proposition before the California voters over the previous 10 years; in other words, to disclose the secrecy of the ballot place, how she had voted and why on every proposition. That was a question propounded by a Republican Senator from the Judiciary Committee, still serving there, to this Clinton nominee. She said that is unfair, and we agreed with her. Because of that stance she took, she waited forever and ever to be confirmed.

In this situation I think what we are dealing with is a reasonable inquiry—positions on Supreme Court Justices, Supreme Court cases. We are not asking for Miguel Estrada to disclose his personal conscience and feelings on issues that may be of some personal note to him, but, rather, to focus on his view of the law. I think that is reasonable. I hope we will continue in our efforts to do that.

I might say to the Senator, I am going to move to another topic. If he is interested in staying, of course, he might.

Mr. CRAPO. Will the Senator entertain one more question before he moves on? I do appreciate him allowing me to engage in this discussion with him.

Again, I am trying to make it clear so we understand just exactly what it is that is being said Miguel Estrada has not disclosed. We talked about the documents in the Solicitor General's Office that he prepared as a career attorney. We talked about his failure to identify which was his favorite and least favorite Supreme Court case. And apparently—I was not at the hearing because I don't sit on the Judiciary Committee—he did not answer Senator KENNEDY's questions about some current cases to the satisfaction of the Senators.

Is there anything else that is holding him back? Again, the reason I am getting at this is because we are facing a remarkably unique circumstance here, the filibuster of a circuit court nomination on the basis of nondisclosure. I want to get out exactly what that nondisclosure is so we and the American public can understand that. Then we can deal with it on a very focused basis, on a point-by-point basis and, where there is merit on either side, deal with it.

But the general charges, it seems to me, of nondisclosure and not answering questions to the satisfaction of a Senator usually result in a Senator saying I don't like the way the answers were given so I am going to vote no on the nomination. Instead, at this point we are facing a filibuster, which I believe is a serious threat to the manner and the protocol with which the Senate has approached Presidential nominations to the judiciary and is much broader than just the nomination of this individual judge.

So we have two issues which to me are much broader than this specific nomination. The first is whether we should have the Senate start inquiries into confidential Solicitor General documents, and the second is whether the Senate should be stopped from voting on a Presidential nomination by a filibuster when we are dealing with nominations to the judiciary. That will change the way this Senate has operated historically.

Mr. DURBIN. Let me just say to my colleague, I have given him great leeway in his questioning.

Mr. CRAPO. You have.

Mr. DURBIN. And for specific reason. I thank him for coming to the floor, even though we disagree on this issue. This deliberative body doesn't deliberate much. There is not much debate on the floor of the Senate and that is sad. I thank him for coming to the floor and for engaging me in questions. I think he will find, almost without exception, I always yield for questions because I happen to believe that is what this is about. It is a deliberative body. We should express our points of view. Let our colleagues and those following debate decide who is right and who is wrong. I thank him for asking those questions.

I think what he has said is he has a difference of opinion from my point of view on the disclosure of documents. That is an honest difference. I think what I have said is in the past there has been disclosure, lines have been drawn, but in this case the White House said no disclosure when it comes to Miguel Estrada's documents, and that is an important issue before us.

Second, he has asked for a bill of particulars: Give us the specific questions that you didn't like when it came to Miguel Estrada's responses. I have given him several. That is not an exclusive or exhaustive list. I think other members of the Judiciary Committee could come up with more.

If the Senator is suggesting we should resubmit the questions and see if he takes the test a second time whether he can pass it, maybe that would move us down the road a little closer to a final vote on this individual.

I want to add here it is unusual for there to be a filibuster on a nominee to such an important bench, but it is not unprecedented. I don't know if my colleague was in the Senate when the Richard Paez nomination came before us. But the fact is, he would not have been confirmed had it not been for a cloture vote that had to be filed. Paez, who waited patiently for over 4 years before the Senate Judiciary Committee, finally had to have a cloture vote in which he prevailed to become a Federal judge.

The Republicans, then in a position to launch a filibuster, did it on a Hispanic nominee not that long ago, in March of 2000. We know when it came to Richard Paez, the standard used by many Republican Senators was we will filibuster him. It took a cloture vote to stop the filibuster. I don't know if the Senator was in the Senate at that time. I think he was. I do not know how he voted. But the fact is some Members felt strongly enough about the Paez nomination that they went ahead and initiated this kind of filibuster.

THE ECONOMY

Mr. President, I would like to move on to another issue if I can. It is one I think bears some attention by the Senate and those following the deliberation. We are now in the third week of debating Miguel Estrada. It is an important issue.

Today, I noticed when President Bush spoke to the Latino Coalition in the Executive Office Building, the first issue he raised was not Miguel Estrada but it was an important issue—and I am sure he did that for emphasis—but when it came to the issues raised by the President of the United States to the Latino Coalition in the Executive Office Building, the first issue he raised was the state of the economy. It is interesting to me that though the President raised this issue, we can't raise this issue on the floor of the Senate.

Yesterday, the minority leader, TOM DASCHLE, made a unanimous consent request which I am going to repeat in a few moments that we move from this debate to a debate on the state of the economy—and I think for good reason.

As you look across America, you think people will realize our economy is in a sad state. This is a recession which has gone on entirely too long. My friends on the Republican side say this is a Clinton recession. I am afraid the statute of limitations has run on that particular complaint.

At this point in time, 2.5 million jobs have been lost since President Bush took office. He is going to have to take ownership for this recession.

There are many factors which led to this recession. There is no doubt the economy heated up prior to his coming into office, and there was going to be a correction. There is no doubt as well that terrorism and 9/11 took its toll on the economy, and continue to, I might add.

There is also no doubt that the economic policy pursued by the Bush tax cut 2 years ago failed. It didn't work. We continue to lose jobs by the cut in interest rates to try to get the economy moving forward again. Frankly, we are in a terrible situation. We understand our economy needs a boost. Consumer confidence in America is at a 10-year low. It was reported yesterday that the Consumer Confidence Index plummeted from 4.6 to the revised 7.8, this the lowest reading since October of 1993.

Unemployment is on the rise. Since January 2000, the number of unemployed increased by nearly 40 percent with nearly 8.3 million Americans out of work, and 2.3 million private sector jobs lost.

Contrast that with the Clinton administration where 22 million jobs were created. In the Bush administration of 2 years and a few months, 10 percent of those jobs have been lost—a 2.3 million increase in the creation of jobs. What we have in the Bush administration is the elimination of jobs which were previously created by the Clinton administration.

Unemployment spells are lengthening because companies are not hiring. It isn't a problem of losing a job today and finding another one next month. The average number of weeks individuals spend unsuccessfully seeking work increased by a month over the past year. Approximately 20 percent of all the unemployed have been looking for work for more than 6 months. Wage growth is now stagnant. The shortage of jobs has slowed—I might add, as has the increase in the cost of health insurance, another issue which this administration summarily ignores.

Today, President Bush spoke to the Latino Coalition about small businesses and what we need to do to help small businesses. Instead of a tax plan that will help small businesses, let me suggest as follows. What the Bush tax plan offers to the wealthiest individuals in America is a three-layered cake. What the Bush tax plan offers to small business is crumbs; things that, frankly, are not controversial in terms of expensing. But the vast majority of the tax cut the President is pushing will not stimulate today's economy, but it will burrow us deep into a deficit which, frankly, is not fair. The fact is they are giving tax breaks to the wealthy people.

The President failed to mention what I would suggest would be the top one or two complaints of small businesses in America today. You pick them. Open the phone books and call a small business person and ask, What is your problem today? They will say the economy is not strong. People aren't buying. What about your expenses in business? What kind of problems do you face? I guarantee you the answer will be the cost of health insurance. And not a word, not one word from the Bush administration about how to deal with that.

I introduced a bill to give a tax credit to small businesses which would allow them to provide health insurance for their employees. It doesn't answer the problem. But at least it is sensitive to trying to help small employers employ their people as well as the owners of the business dealing with health insurance protection. That, to me, is a reasonable approach, and something that would help small businesses, which is summarily ignored by the Bush administration.

The track record we have now for job creation is the worst in 58 years. In order for the Bush administration to tie the Eisenhower administration for the worst job creation record ever, President Bush would have to create 96,000 jobs a month starting today to the end of his term. He is not going to get that done, I am afraid. I hope I am wrong. I hope the economy turns around.

But isn't it interesting, with the economy in a basket struggling to survive, that we can't even engage in a debate on the floor of the Senate about what steps we can take to get this economy back on track. I don't have to tell you about the crisis most States are facing when it comes to their budgets. Illinois will have about a $5 billion deficit which the Governor is going to have to wrestle with under extraordinary circumstances. He will have to cut spending, I am sure. There are some who will say he should raise taxes. Whatever he does will not help us move out after a recession. In fact, it puts a damper on economic growth at a time when we should be putting stimulus. So that situation is out there as well.

I might also add that the situation when it comes to homeland security is also a damper on the economy. So many business people across America are worried about their vulnerabilities when it comes to the economy. They hope this government, starting in Washington, will provide a helping hand. But it hasn't happened, because this administration has been strong on rhetoric and press conferences, but weak when it comes to providing the money so that State and local resources can be increased and enhanced.

Who are you going to call if there is a threat of terrorism in the community? Are you going to ask for a telephone number for 1600 Pennsylvania Avenue to try to get through to President Bush or Vice President Chaney? Not likely. You are likely to call 9–1–1 and a local policeman or firefighter is going to be the voice at the other end of the call. If they are not trained, if they are not equipped, frankly, homeland security is a farce.

We know what is going on in the Middle East today. Troops numbering 180,000 have been sent by our government—military personnel and support personnel—in preparation for the invasion of Iraq. It is clear that America is preparing to attack. But we know from the homeland security side that America is not prepared to defend. We are not prepared to defend the hometown families and neighborhoods and communities across America. This administration has not come up with the resources we need to make that happen.

At this point, I would like to introduce into the RECORD—it probably has been done before, but it certainly bears repeating—a letter sent to President Bush by my friend and colleague, and ranking Member of the Senate Committee on Appropriations, Senator

ROBERT C. BYRD of West Virginia. The letter is dated February 23, 2003. The reason I want to enter it at this point is that Senator BYRD goes through chapter and verse of the take by Democrats in Congress and Congress in general to persuade the Bush administration to put more money into homeland security. He spells out in graphic detail how this White House has stopped our efforts every step of the way. It is a sad reality that as we face terrorists at home we are not providing the resources that are necessary to the local first responders.

I ask unanimous consent that the letter be printed in the RECORD.

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

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, DC, February 25, 2003.

Hon. GEORGE W. BUSH,
Office of the President, The White House, Washington, DC.

DEAR MR. PRESIDENT: In your remarks to the National Governors Association on February 24, 2003, you claimed that Congress was to blame for a reduction in homeland security funding in Fiscal Year 2003. Such a claim is wrong, and I urge you to correct it.

If enacted, the Administration's Fiscal Year 2003 request for first responders, for instance, would have eliminated funding for the Justice Department's Office of Domestic Preparedness; it would have eliminated funding for the Community Oriented Policing Services (COPS) hiring initiative; it would have discarded the Edward Byrne Memorial and the Local Law Enforcement Assistance Block grant programs; and it would have provided absolutely no support for the Assistance to Firefighters grant program.

A lack of Administration commitment to first responders is just the beginning of the empty rhetoric coming from the White House on homeland security funding.

Since September 11, 2001, you have signed, with great fanfare, legislation to authorize improvements in airport, seaport, and border security. Yet, your Administration has opposed efforts to fund those bills. On December 10, 2002, you announced a plan for state and local governments to vaccinate 10 million first responders for a potential smallpox attack. But your Administration has passed the responsibility of paying for these vaccines to the state and local governments.

Last August, you rejected $2.5 billion that Congress, in an overwhelming bipartisan fashion, approved for homeland security efforts. Congress had designated those funds as emergency priorities in the Fiscal Year 2002 Supplemental Appropriations bill. This package include funds to begin to meet the billions of dollars of outstanding applications from 18,000 fire departments for equipment and training. The legislation also included grant funding to make police and fire equipment interoperable—a critical weakness in response efforts on September 11, 2001. The homeland security package contained critical funding for port security, for security enhancements at small and medium airports, and for federal law enforcement counterterrorism efforts. The legislation included funding to strengthen security at nuclear plants and laboratories and to protect the nation's food and water supply.

Instead of embracing this package and agreeing with Congress on its urgency, you called it wasteful. It only took your signature to address these vulnerabilities, but you refused and called the funding wasteful.

I must note that the Senate Appropriations Committee approved that funding unanimously. In fact, the Committee last July approved each of the 13 appropriations bills on a unanimous, bipartisan basis. But your Administration objected again and again to these bills despite the overwhelming needs facing the nation.

This past January, during Senate consideration of the Fiscal Year 2003 Omnibus Appropriations bill, I offered two amendments, both aimed at increasing investments in homeland security initiatives from coast to coast. The amendments focused on funding authorization bills that you signed with great fanfare. But again the Administration said the funds were unnecessary and urged the Senate to reject these amendments. The political strong-arm tactics worked, and the amendments were rejected to partisan votes (roll call votes #002 and #003).

Last spring, the Senate Appropriations Committee held five days of hearings to examine homeland security priorities. The Administration was represented by six Cabinet secretaries, the Attorney General, and the Director of the Federal Emergency Management Agency. They argued the case for homeland security funding plan. However, every local government representative and every representative of fire, police, and emergency response agencies testified that the Administration's funding plan was seriously flawed. They testified that doing away with the funding programs which have proved so valuable was shortsighted and irresponsible.

In your remarks to the governors, you characterized the Congress's decision to use existing and effective programs to deliver funding to our first responders as micromanagement. Congress chose to fully fund your $3.5 billion first responder request through existing, effective channels rather than launch a new, untested program. This was a responsible decision.

In the Fiscal Year 2003 appropriations legislation, Congress chose to be responsible by listening to the men and women on the front lines of homeland security. We heard their needs and answered their calls for help. But, time and time again, the Administration has turned its back to the nation's first responders. Enough is enough.

I appreciate your desire to protect the nation from terrorist attack, but the job cannot be accomplished with continued political grandstanding. The country needs an Administration that takes an honest approach to homeland security instead of continually making empty promises to the nation's police, fire, and emergency medical teams. The American people want to know that if there is an attack close to their homes, their local doctors and nurses have the training to treat the injured. They want to know that their local firemen have the ability and equipment to handle a chemical or biological attack. They want to know that their local police officers are trained in identifying and responding to the variety of terrorist attacks that we now could face.

The enemy is not Congress, Mr. President. The enemy is the terrorist who stands ready to exploit the nation's many security gaps. Especially now, when the terror alert is high and war is looming at our doorstep, we must be acutely aware of the sharply increased threat of attack here at home. Instead of pointing fingers and assigning blame, I implore you to expedite the release of the homeland security funds in the Fiscal Year 2003 appropriations legislation and the funds that still are unobligated from the Fiscal Year 2002 appropriations bills. The fact that these dollars, approved by Congress in December 2001, sit idle is beyond comprehension. I also hope that you consider expanding the investment in homeland security in the upcoming supplemental bill. As a nation, we know where our vulnerabilities lie, and we can be sure that the terrorists do, as well. We should take every step possible to protect the American people and to provide critical funding for homeland security initiatives.

As we move forward, I urge you to work with Congress in a bipartisan fashion to provide homeland security funding will make a significant investment in the protection of the American people.

Sincerely yours,

ROBERT C. BYRD.

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

Mr. DURBIN. I would be happy to yield.

Mr. REID. I appreciate very much the Senator entering that letter from Senator BYRD.

I ask the Senator from Illinois: Is he aware that the reason Senator BYRD wrote that letter is because President Bush, at the signing of the omnibus bill when we lumped 11 appropriations bills—is the Senator aware that he had the audacity to say at the signing of that bill that it was OK, but he was upset with Congress for not providing more money for homeland security? Is the Senator aware that is why Senator BYRD wrote that letter, because it is just not true?

Mr. DURBIN. Yes. I am aware of it. It is sadly troubling, because what the President did in making that statement is to mischaracterize what happened.

The Senator may recall, as I do, that Senator BYRD came before this body early on and said to us we have a problem in America. If we are going to protect America, we need to make a substantial investment in changes such as a statewide communications system for Nevada and Illinois so the police, fire, and medical responders can all be on the same network if there is terrorist activity or a disaster. These investments are basic. And also in the area of bioterrorism, to make sure that doctors, nurses, and health care personnel are adequately trained and that hospitals are ready if there is anthrax, God forbid, as we faced on Capitol Hill.

Senator BYRD came time and time again to this floor and begged us, as a nation, to be responsive. Unfortunately, time and time again, he was rejected.

When we finally sent a $2.5 billion amount to the White House, asking them to put that into homeland security, it was effectively vetoed—$2.5 billion stopped. So the President cannot point the finger at Congress.

I say to my friend from Nevada, I am anxious to follow the debate we are going to face in a few weeks when we have this administration come before us and tell us they need $26 billion for Turkey—$6 billion in grants and $20 billion in loan guarantees for Turkey—which has been their demand if we are going to be using Turkey as a base of operations for an invasion of Iraq.

I want the administration to explain to the American people how we can afford $26 billion for the defense and security of Turkey and cannot afford $2 billion for the defense and security of the United States of America when it comes to homeland security. That is going to be an interesting debate.

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

Mr. DURBIN. I am happy to yield for another question.

Mr. REID. Is the Senator aware that one of the reasons Senator BYRD was so upset—and that is probably too calm a term for how he reacted to this statement of the President. Senator BYRD, you will recall, when he was chairman of the Appropriations Committee, last year, held a series of hearings that went over 2 weeks, where we called in various administration officials, people from communities in States around the country, to find out what their needs were for homeland security. That is why he brought the money number before the Congress. And he was rejected by the President.

Is the Senator aware of that?

Mr. DURBIN. I am not only aware of it, I attended many of those hearings, as I believe the Senator from Nevada did as well. And Senator BYRD took it very seriously. He brought in the experts when it came to law enforcement, fire protection, and medical personnel, and asked them what they needed. It was not this porkbarrel that we are often accused of here and of dreaming up ideas on how to spend money.

He asked the people on the ground: What do you need? What will help? When they identified those needs, he put that into legislation, which was rejected by this administration.

So we have a situation, if you would step back for a second, where we have an economy on the ropes. We have a President with a failed economic policy. We have a war on terrorism, which continues to pursue Osama bin Laden, with very little success. We have a homeland security program headed up by a man we both respect, Tom Ridge, which, unfortunately, is not sending the resources necessary to State and local governments so they can protect America.

Instead, we are preparing to launch an invasion of Iraq. We are putting the billions of dollars necessary into that effort and, unfortunately, short-changing homeland security in the process. That, to me, shows misguided priorities.

The President cannot get away with blaming Congress for this. It really is a creation of his own administration and their own priorities in spending.

Mr. REID. I have three questions I wish to ask the Senator. Will the Senator yield for the first question?

Mr. DURBIN. I am happy to yield.

Mr. REID. I had in my office yesterday—and I am wondering if the Senator had people from Illinois in his office recently—people who came from Nevada and represented 911 centers, especially the Las Vegas Metropolitan Police Department, which is a very large police department. I spoke to a woman who has worked there for 20 years. She proceeded to tell me that she is frightened for the people of Clark County. That is in the Las Vegas metropolitan area. If someone calls on a regular telephone from their home, they know where that call is coming from.

But a lot of people—because computer use has become so prevalent, and they are using computers for telephones, and because of the use of cell phones—if someone calls from a computer or cell phone to 911, they have no idea where, or who, or anything about that. It is a terrible tragedy for the American people.

Is the Senator aware that is something that money for homeland security would identify because the technology is there, they just need money to be able to do it?

Mr. DURBIN. The Senator's point is well taken because I visited the 911 center in Chicago. It is really state of the art. But there are gaps that they face as well. They need the funding for training, for improving the communications network, money that is not forthcoming from this administration, from this White House.

I pray to God we never face another terrorist event in America. But if we do, this administration will be held accountable as to whether it spent the money, when it should have, to prepare America to defend itself. And when it comes to this kind of communication effort, I am afraid we have not done that.

Mr. REID. I listened to the Senator outline, as he is so adept at doing, the situation we have in the American economy today, with 2 million people unemployed. The Senator has laid out a very good picture of what we have going on in America today.

Is the Senator aware of the nonpartisan organization called the Pew Research Center? Is the Senator aware of that organization?

Mr. DURBIN. Yes, I am.

Mr. REID. I ask, is the Senator aware they conducted a poll, which was completed on February 18, of 1,254 adults? Is the Senator aware that when asked the question on how President Bush is handling the economy, 43 percent of the people said yes, he is doing fine, but that 48 percent of the people asked that question disapproved? Is the Senator aware of those numbers?

Mr. DURBIN. I heard those numbers when the Senator from Nevada mentioned them earlier. But I think reality has caught up with the administration. Generally, Americans give the President high marks as a President. And the numbers have come down, but only slightly. His general overall rating is positive. I think a lot of that reflects on his leadership since 911 and perhaps in the Middle East. But when asked specifically about the state of the economy, that is when the chickens come home to roost.

I think that is the point where the President and the White House is failing. They have failed because their economic policy—giving tax cuts to the wealthiest people in America, generating the biggest deficits in our history—really has us headed down the road which we all understand would be a road of economic ruin.

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

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

Mr. REID. Is the Senator aware that this same poll asked how President Bush is handling tax policy? The Senator has made a number of statements on this floor, and he personally disagrees with the tax policy enunciated by this President. I am happy to report, from this poll, people in America agree with the Senator and not the President.

Is the Senator aware that 42 percent of the people approve of the way George W. Bush is handling tax policy, and 44 percent disapprove? Is the Senator aware of that?

Mr. DURBIN. I had not heard those numbers before, but I think I can understand why the American people reached that conclusion. Because the President promised the age-old Republican response: If you just cut taxes on the wealthiest people in America, it is bound to enliven and energize the economy. Well, he did it. I voted no when it came to that issue. But it passed. It did not work. What happened was we wound up with a deficit and a weaker economy.

So the Bush tax plan failed in the first instance. Now the President has said: I have a new economic policy, and it is called: More of the same; let's try to do this, and do it at even greater levels, which will drag us more deeply into deficit.

I would like to illustrate this point to the Senator from Nevada by showing him a couple charts, if I can find them.

President Bush, on January 29, 2002, in his State of the Union Address, was quoted as saying:

> Our budget will run a deficit that will be [a] small and short term [deficit.]

Then, take a look at what this means. We are going to have record deficits in terms of the Bush administration, the legacy that is going to be left from the President. The actual deficits, which our children will have to pay, are going to break records.

Isn't it interesting that the Republicans, who have fashioned themselves as fiscal conservatives, now find themselves, once again, in a posture of creating the biggest deficits in the history of the United States—harkening back to President Ronald Reagan's administration?

But if you take a look at the surpluses, which we thought we would enjoy for a long time to come, they started with $236 billion to $127 billion. We are paying down the debt in the Social Security trust fund. And then it falls off the table.

In comes the George Bush tax plan, and the state of the economy, and the recession, and look at these deficits start to grow—in the range of $300 billion plus. The administration just gives the back of the hand to those deficits and says they are not really long-term problems.

They are long-term problems because they have to be repaid. And it does not show the kind of discipline, in which we should be engaged. The tax plan proposed by the President is a plan which, sadly, is going to plunge the United States more deeply into deficit and is not going to revive the economy.

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

Mr. DURBIN. I will yield for one last question. I see another colleague is in the Chamber.

Mr. REID. I actually have two questions. I know the Senator is anxious to leave.

I will first lay the basis for my question. The numbers the Senator has on that chart are basically inaccurate to the effect that it does not include the disguise that is taking place down at Pennsylvania Avenue, because Social Security surpluses are there to dampen the amount of the deficit. Actually, the deficit is about $485 billion, not $304 billion, because the Social Security surpluses are being used to disguise the budget.

Is the Senator aware of that?

Mr. DURBIN. I am aware of that. I think it is a good point to be made. These true deficits are at the expense of the Social Security trust fund. In the closing years of the Clinton administration, surpluses that we generated were paying off the debt of the Social Security trust fund, making it a stronger program for years to come, as baby boomers will arrive and ask for benefits.

Now, in the Bush administration, with tax cuts for the wealthiest people in America, we are raiding the Social Security trust fund and weakening it at a time when we know we need it the most.

Mr. REID. Last question. The Senator has spoken about the need for us to be doing something other than just talking about a man who is fully employed, in contrast to the 2.8 million people who have lost jobs under this administration. The man we are debating now has a job downtown where he makes lots of money. We should be doing something else. The Senator, I am sure, is not aware of this statement because it was made during the noon hour and he has been on the floor. I would like the Senator to tell me if he is familiar with Robert Novak.

Mr. DURBIN. Yes. He is an Illinois resident, who grew up in Joliet. I have been on ''Crossfire'' with him many times.

Mr. REID. Bob Novak said today:

Well, the Republicans figured that they would be home at their recess last week and find out what the people wanted. Apparently, the people weren't interested in Estrada, because the Republicans have no idea what to do in the Senate. They had a leadership meeting yesterday afternoon [that was Tuesday] couldn't figure anything out, had a luncheon of all the Republican senators, didn't figure it out. All that's decided is, they're not going to ask for a cloture vote to force an end to the filibuster, because they'd lose that. But they have no strategy for around-the-clock sessions. They don't know what to do. The Democrats are winning.

So that former resident of the State of Illinois said this, and would the Senator agree with him?

Mr. DURBIN. The Senator is putting me on the spot to agree with Bob Novak. I will not question his conclusion, unless the Senator on that side would like to correct the record. That is the problem faced by the Republican caucus.

I say to the Senator from Nevada that I am prepared to deliver them from their plight. I am prepared to give them hope and direction. I am going to make a unanimous consent request that we stop this debate right now and move immediately to the consideration of an economic stimulus package and that we engage all of the Senators, Democrats and Republicans, to come to the floor and talk about what we can do to turn the economy around, create jobs, create consumer confidence, give businesses some hope, try to find some way to put Americans back to work.

Let's stop talking about Miguel Estrada, who has a good job downtown for a law firm, and start talking about the millions of Americans who are worried about their jobs and whether they will have them in the future.

When I make the unanimous consent request, if there is no objection, I say to those following the debate, we will move directly to the economic stimulus package. In that debate, perhaps by the end of the week, we can come up with something that shows that the Senate cares, that this Congress cares about the state of the economy.

Now, if by chance a Republican Senator stands up and objects to my unanimous consent request, that Senator is saying that he does not want us to talk about the economy, doesn't want us to talk about economic stimulus; he wants us to stay mired down in one judicial nomination for the remainder of this week. I cannot believe any Republican Senator would object to this unanimous consent request, which I will make now. I believe it is going to finally move us away from this judicial nomination to the issue people care about across America, getting this economy moving.

Madam President, I ask unanimous consent that the Senate proceed to legislative session and begin the consideration of Calendar No. 21, S. 414, a bill to provide an economic stimulus package for America.

The PRESIDING OFFICER. Is there objection?

Mr. CRAPO. Madam President, reserving the right to object. I will not object if the request for unanimous consent is amended to provide that prior to moving to the legislative calendar, the Senate move no later than 6 p.m. today to a vote on the Estrada nomination, up or down, and then proceed to the legislative calendar under the consideration of both the Republican and Democratic plans.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Madam President, I ask unanimous consent to modify the request of the distinguished junior Senator from Idaho, that his request be changed to that the vote on Estrada would occur only after the memos from the Solicitor General's Office are provided to us, and that following that, he submits himself to questioning.

Mr. CRAPO. Madam President, I will not accept that modification to my request.

Mr. REID. I object to his request.

Mr. CRAPO. I object to the previous request.

The PRESIDING OFFICER. Objection is heard.

Mr. DURBIN. Madam President, there you have it. I tried my best to move this debate away from one man, one nomination, to the state of the economy.

Basically, what the Senator has said is that unless we can have this one nominee, we don't care about the economy; let it languish, falter, and let the American people lose hope. We are going to stick with this one political issue.

I think there is a way out of this morass with Miguel Estrada. I think we can do it cooperatively, with the production of documents and the honest answering of questions. I don't think we should delay the business of the Senate indefinitely and ignore the serious problems facing our Nation in the process. I hope there will be some reconsideration of the issue.

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

Mr. DURBIN. I will.

Mr. CRAPO. Madam President, it seems to me that we can easily move to any of these other issues that the Senator and his colleagues have been discussing, which we all agree need to be addressed. We can easily move there if your side will agree to give up trying to stop the nomination of this one single judge.

So one could say that those who want to hold the floor and focus on this nomination are willing to delay debate of other issues until we vote on this particular nomination, or that those who are filibustering—which is generally understood by the public as an act of stopping a procedure and moving to a vote—this particular nomination are unwilling to move to these other economic issues.

Would you not agree that it really comes down to the question of whether we want to agree to change the precedent of the Senate and open up investigation into these confidential documents of the Solicitor General's Office?

Mr. DURBIN. I will say to my friend, we have talked about this at length. I

believe it is unprecedented. We are asking for the writings of Mr. Estrada so we may know who he is. I don't think that is unreasonable.

There are three conceivable outcomes of the nomination. One is that there be a cloture vote called for by Senator FRIST to try to bring an end to this debate on the floor. That is his right.

As I noted, there was a cloture vote called on Richard Paez, a Hispanic nominee of the Clinton administration. So it has happened before.

There could be a decision by Senator FRIST to move this nomination back to the calendar. I think the best outcome would be that, finally, Miguel Estrada would be open, candid, honest, and not conceal what he truly believes about the state of law in America. If he is seeking a lifetime appointment to the second highest court of the land, that is the least we can ask of him.

Those are the potential outcomes. What I tried to do was circumvent even those three and say let's move to the economy, and maybe at some later time move back to Miguel Estrada. But the Senator said, no, we don't want to talk about the economic situation in America, about unemployment, about job loss and loss of consumer confidence, the biggest deficits in the history of the United States. We just want to talk about one judicial nomination. That is unfortunate.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

A SAFER WORLD

Mr. LEAHY. Madam President, regarding this debate on Miguel Estrada, we do have a lot of other issues that seem to be ignored. I am back home almost every week in Vermont and I don't find anybody talking to me about Miguel Estrada. Even when the White House has sent people up and various special interest groups to attack me, nobody seems to care—''either the press, the people in my State,'' or anybody else. But what they do care very much about is the economy and Iraq.

More than a half century ago in the aftermath of two catastrophic world wars, the United Nations Charter was signed in San Francisco. It was dedicated to the prevention and peaceful resolution of conflict. The U.N. was largely a creation of the United States, with the support of the other great world powers.

The U.N. has had a difficult history. With the notable exception of the Korean war, the Soviet Union and the United States each worked throughout the Cold War to ensure that the U.N. Security Council remained little more than a toothless forum for debating and passing resolutions of little or no effect.

Even in recent years, the United Nations has had a string of failures. It was unable to prevent the slaughter of half a million people in Rwanda. It failed to prevent the destruction of the former Yugoslavia, which was ultimately stopped only by NATO's intervention. United Nations resolutions seeking to resolve the Israeli—Palestinian conflict have been routinely ignored.

The United Nations has also passed resolutions aimed at eliminating Iraq's nuclear, chemical, and biological weapons programs, but the Iraqi Government has flagrantly tried to subvert those resolutions.

The United Nations is frequently blamed for these failures. It is convenient to ridicule a multilateral organization that often seems to be its own worst enemy. But there are also many examples of U.N. successes, like peacekeeping missions that are strongly supported by the United States but rarely involve any commitment of U.S. troops.

The U.N.'s effectiveness depends on the political—will or lack of will—of its 191 member states. No country—no country—bears more responsibility than the United States for the success or failure of the United Nations. This has never been more true than today when solving so many of the world's problems—especially combating terrorism—depend on U.S. leadership and the cooperation of other nations.

Not surprisingly, when it has served its interests, this administration has praised the United Nations and has urged the Congress to provide the funds to support it. In fact, a Bush administration publication states:

> Acting through the United Nations allows the United States to share the risks and costs of responding to international crises.

I applauded President Bush when he went to the United Nations last September to seek a resolution calling for the return of U.N. weapons inspectors to Iraq. I and others here had urged him to take that step, at a time when many of the President's advisers were insisting that a resolution was both unnecessary and unwise.

And I commended Secretary Powell for recognizing the importance of securing United Nations support for disarming Iraq, and for his work in obtaining a unanimous vote of the U.N. Security Council for that resolution.

Since then, the inspectors have reported mixed cooperation from the Government of Iraq. They have visited hundreds of sites but have not found significant evidence of Saddam Hussein's weapons of mass destruction, despite Saddam Hussein's failure to explain what happened to the thousands of tons of chemical and biological weapons material that was known to exist when the inspectors left Iraq 5 years ago.

The administration's response, with justification, is that Saddam Hussein is once again playing a cat-and-mouse game of deceiving the inspectors, and that time has finally run out. But the solution is not to direct threats and name-calling at some of our oldest allies, or to dismiss the U.N. as irrelevant just because some of its members disagree with us. It is counterproductive and beneath a great nation.

It is no less harmful to mislead the American people. Yesterday's Washington Post reported that the President and other administration officials continue to say publicly that the President has not made a final decision about whether to invade Iraq. These statements lack credibility, especially when the Pentagon continues to amass tens of thousands of U.S. troops on Iraq's borders.

Yet the White House is telling our potential coalition partners that the decision to invade Iraq has been made. The President has made it, they say, and nothing the U.N. Security Council says or does will change that. They warn that unless the U.N. Security Council abandons the inspections process and supports a U.S.-led military invasion, the United Nations will become irrelevant.

At the same time that White House officials dismiss any meaningful role for the Security Council in the decision to go to war, they are calling on the U.N. to prepare to help take care of as many as 2 million Iraqi refugees once the war begins. And they make no secret of the fact that they expect the U.N. to play a central role in the reconstruction of a post-Saddam Iraq.

One of the lessons of the gulf war was that it was far safer for our troops, and of critical importance to our continued relations with the Arab world, to build a broad international coalition in support of the use of force. The importance of that coalition has been lauded by administration officials and Members of Congress, time and again, in public statements and in testimony.

Nothing that has happened since, and nothing that we have heard from this President or his advisers leads one to believe that we should go to war without such a coalition. To the contrary, with the threat of international terrorism fueled by Islamic extremists who fan the flames of hatred of Americans, the arguments for building a strong coalition with the backing of the United Nations are even more compelling.

It has been 28 years since I was first elected to represent my State of Vermont in the Senate. I have served during the administrations of five Presidents Democrat and Republican. I have had my share of agreements and disagreements with each of these Presidents on issues of great importance—from the Vietnam war to the dilemma we face today with Iraq.

But never, in all those years, have I seen such an opportunity to use the tremendous influence of the United States to unite the world behind the common goal of disarmament and in doing so to strengthen the United Nations, mishandled with such arrogance.

Today, apparently only weeks away from a war with Iraq, the United States is telling the rest of the world, ''We don't need you.'' Even though we will be risking the lives of American men and women in uniform to enforce a United Nations resolution, we are

going to war in spite of our U.N. allies who urge caution and patience.

The administration's ultimatum on Iraq is but the latest example of its disdain for working with other nations to solve global problems from arms control to the environment.

They thumbed their noses at the Kyoto Treaty, even though the United States uses wastefully a quarter of the world's resources and is by far the largest contributor to global warming.

They sabotaged the International Criminal Court, despite the fact that the United States was instrumental in its conception.

They have walked away from the Anti-Ballistic Missile Treaty and from an agreement to strengthen the biological weapons convention.

Reasonable people may disagree about the merits of these treaties, but the administration has simply walked away. They have offered no constructive alternatives, they have unnecessarily poisoned relations with allies, and they have undermined our Nation's interests.

This pattern has not only alienated and angered those whose support we need, it has made it easier for others to ignore their own international obligations. It has needlessly and recklessly squandered the good will we felt after September 11, when the Star-Spangled Banner played outside Buckingham Palace and France's Le Monde declared, ''We are all Americans''. This attitude has made us less secure, not more. The administration squandered that worldwide support.

I have no doubt, nor does anyone in this Chamber, that our armed forces can defeat Saddam Hussein's army, which according to all reports is far weaker than it was a decade ago. Nor do any of us differ about the desire to see an end to Saddam Hussein's despicable regime. But the risk that he will use chemical or biological weapons, and of the horror that could result for our own troops, as well as the civilian casualties, are hardly mentioned by the White House.

In the meantime, the situation in Afghanistan so recently the focus of attention remains extremely unstable.

In fact, I read today that Afghanistan has become the largest opium exporter in the world.

The survival of the Karzai government is far from certain, as Pakistan, Russia, and Iran continue to provide support and sanctuary to Afghan warlords and to the Taliban who fled.

Osama bin Laden continues to broadcast threats against Americans, and al-Qaida remains active in dozens of countries.

A nuclear crisis on the Korean peninsula threatens to spiral out of control.

In the Middle East, hardly a day passes without shootings or bombings by both Israelis and Palestinians. The administration appears to have abandoned that crisis.

Our allies are divided about the need to abort the U.N. inspections process and launch a preemptive military invasion of Iraq, and a majority of the American people oppose the use of unilateral U.S. military force.

I am not among those who believe that under no circumstances would force ever be justified to disarm Saddam Hussein. But why now, when there is such discord even among those who agree about the need for Iraq to disarm? Why now, when there is no realistic chance that Saddam Hussein will seek to carry out an act of aggression as long as the U.N. inspectors are there? Why now, when the United Nations is seized with this issue? Why now, when giving the inspectors more time could bring more key nations on board with us if the use of force becomes necessary? Why rush to act in a way that will weaken the United Nations, that will further isolate us from many of our closest allies and create more anti-Americanism and quite possibly more terrorists?

This country is not close to being united in favor of a preemptive, unilateral war with Iraq. It is not a question of whether we can defeat Saddam Hussein. It is a question of the long-term risks to our own security.

The President should listen to the American people. Hundreds of thousands of Americans have braved the freezing cold in recent weeks, as have millions of people in Europe and elsewhere, to demonstrate their opposition to the President's policy. They are protesting not in sympathy with the Iraqi government but in opposition to a war that might yet be prevented.

So today, as our Government moves inexorably towards war, we must continue to question, we must continue to debate, we must continue to do everything we can to support a policy that makes our country and the world safer, not only for tomorrow but for next year and beyond.

If war comes, let us be able to say that it was only because we and our allies exhausted every other option, that we acted with the support of the Security Council, and in doing so we made the United Nations stronger.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

FOSTER CARE REFORM

Mrs. CLINTON. Madam President, I thank my friend and colleague from Vermont for his thoughtful comments. He always brings a really good analysis of any situation to the floor and shares it with us, and I am very grateful to him for that.

Occasionally a movie comes to the screen that brings to life the stories that have become routine in our newspapers and on our television stations, and because of that constant repetition we sometimes become numb to the news. That happens across the board on many issues, but there is one in particular I wish to address that I do not think we can ever afford to be numb to or indifferent toward, and that is the abuse and neglect so many children in our country live with every day, the children who are shuffled in and out of our foster care systems, often with little guidance from or connection to any adult. Too often these stories end in the most tragic way possible.

Seven-year-old Faheem Williams in Newark, NJ, was recently found dead in a basement, with his two brothers in a deplorable condition, having been chained in that basement for weeks at a time. Six-year-old Alma Manjarrez in Chicago was beaten by her mother's boyfriend and left to die outside in the snow and cold of the winter. And despite 27 visits by law enforcement officials to investigate violence, 7-year-old Ray Ferguson from Los Angeles was recently killed in the crossfire of a gun battle in his neighborhood.

Unfortunately, I could take up quite a few minutes of my allotted time telling even more tragic stories such as these, but today I want to focus on a different kind of story, a story of hope and possibility, the story of Antwone Fisher.

Mr. Fisher overcame tremendous odds. He was born in prison, handed over to the State, and lived to tell his story of heartbreaking abuse. At the age of 18, he left foster care for the streets, with nowhere to turn. He found the support, education, and structure he desperately needed in the United States Navy. In the Navy, Mr. Fisher received a mentor and professional counselor who helped him turn his life around.

Mr. Fisher survived that childhood of neglect, abuse, and violence, and has lived to inspire us all and send a stern reminder that it is our duty to reform the foster care system. I believe we have a moral obligation to make sure that no child languishes in this system, left to develop his or her own survival skills, without the attention, guidance, discipline, and love every child is entitled to from at least one caring, responsible adult.

I believe Antwone Fisher's success story should be the rule, not the exception. Tonight, House Majority Leader TOM DELAY and I will be cohosting a screening of the movie ''Antwone Fisher''—Mr. Fisher's life story. This is a screening for Members of Congress, but I urge anyone listening or watching today to seek this movie out in their movie theater, because it is an inspirational story. It makes you cry, it makes you laugh, but it leaves you with the very strong fundamental faith that every one of us can do something to help a child like Antwone have a better life.

TOM DELAY and I decided to host this together because we both feel it is imperative to raise national awareness about foster care. Because Antwone Fisher's story is inspirational, we hope his movie will give all of us in this Chamber and in the House the inspiration to tackle this tough issue.

In the year 2000, Congressman DELAY and I received an award together from the Orphan Foundation of America for

the work we have both done over many years in the area of foster care and adoption. My staff and Congressman DELAY's staff have been working together to try to figure out how we could, across party lines, from both Houses of Congress, help to create the kind of attention that is needed in the lives of our foster care children.

I commend the commitment Congressman DELAY and his wife Christine have. This is not just an issue for them. They are certainly strong advocates for foster children, but they are also foster parents.

I hope my colleagues in the Senate will join us tonight at the Motion Picture Association for this viewing. For those who cannot join and for those who are watching at home, I want to share a little bit about Antwone Fisher's story. People should know that his book, called ''Finding Fish,'' is just as good as the movie. So go out and buy that. Pass it around. Make sure everybody you go to school with, you work with, you go to church with sees this book and sees this movie.

I would like to read a section from the book. Here is how Mr. Antwone Fisher describes his life story:

The first recorded mention of me and my life was from the Ohio State child welfare records: Ward No. 13544. Acceptance: Acceptance for the temporary care of Baby Boy Fisher was signed by Mr. Nesi of the Ohio Revised Code. Cause: Referred by division of Child Welfare on 8–3–59. Child is illegitimate; paternity not established. The mother, a minor is unable to plan for the child.' The report when on to detail the otherwise uneventful matter of my birth in a prison hospital facility and my first week of life in a Cleveland orphanage before my placement in the foster care home of Mrs. Nellie Strange. According to the careful notes made by the second of what would be a total of thirteen caseworkers to document my childhood, the board rate for my feeding and care costs the state $2.20 per day.

Fisher continues to describe the document and writes that the child welfare caseworker felt that his first foster mother had become ''too attached'' to him and insisted that he be given up to another foster home.

The caseworker documents this change,

Foster mother's friend brought Antwone in from their car. Also her little adopted son came into the agency lobby with Antwone . . . They arrived at the door to the lobby and the friend and the older child quickly slipped back out the door. When Antwone realized that he was alone with the caseworker, he let out a lusty yell and attempted to follow them.

Caseworker picked him up and brought him in. Child cried until completely exhausted and finally leaned back against caseworker, because he was completely unable to cry anymore.

I know a little bit about this because when I was a law student in the late 1960s and very early 1970s, I worked for the Legal Services Organization. The first case I was assigned to was representing a foster mother who had signed up with the State of Connecticut to care for foster children, and in the contract she signed, it said she would never try to adopt any of her foster children. She was just a weigh station. The children were supposed to be just passing by and through. This little girl who came to live with my client was a child of mixed race, a beautiful little girl. She was left with her foster mother for a couple of years. And, boy, did that foster mother get attached. Wouldn't you want a person taking care of a child to become attached? And just as with Antwone Fisher's case, when the State found out that the foster mother had gotten attached to this little girl, they decided they needed to move her on, put her up for adoption, take her to another foster home, but to break the attachment.

I was part of trying to reverse that rule that governed in all the States in the 1960s and early 1970s. I was unsuccessful, although later in Arkansas I tried a case where I was able to reverse that rule, making the argument that is not the best interests of the child supposed to be the guiding standard? Why would we let a bureaucracy and the rules of a bureaucracy determine what is in the best interests of a child, as long as that child was well cared for and that child had a home that was loving and supportive? Why would we break it up?

That is what happened to Antwone Fisher. All through his case files, everyone always seemed to be slipping away in one sense or another. When he arrived at his next foster home and as he grew, he was first not told about the circumstances of his birth. All he knew was that he felt unwanted, that he did not belong anywhere to anyone. It was not long before he came to the conclusion that he was an uninvited guest. It was his hardest earliest truth that he wanted to belong somewhere. He wanted a mother and a father. He never knew that. He never knew a mother, a father, or a permanent home. Instead, he was left to fend for himself until he was expelled from foster care at the age of 18.

That is what we used to do everywhere. It is what we still do in lots of places. When you finish high school, you turn 18, whichever happens first, you are out on the street. I have literally known children whose foster parents and case workers came into the little bedroom, maybe, that they shared with somebody else, took all their belongings, put it in a black garbage bag, handed the garbage bag to the child and said: We are finished with you.

I cannot even imagine that, but that is what happens. That is what happened to Antwone Fisher when he found himself, at the age of 18, on the streets and homeless.

Luckily, somewhere deep inside him, in some sacred place, he found the courage and resilience to keep going with his life, and he found his way to a recruiting station where he volunteered for the U.S. Navy. He needed a place to sleep; he needed food to eat; he needed to be safe on the streets, and thank goodness he did. Thank goodness the U.S. Navy took a chance on Antwone Fisher.

There are lots and lots of children just like him in our foster care system. There are approximately 542,000 children in our Nation's foster care system; 16,000 of these young people leave foster care every year just like Antwone Fisher had to. We worked during the last several years to try to improve conditions.

In 1999, when I was First Lady, I advocated for and Congress passed the Chafee Foster Care Independence Act which provides States with funds to give young people assistance with housing and health care and education. It is funded at $140 million annually. That is not nearly enough for the needs of these children, but I am very grateful that we are doing something to recognize what it means to be the age of 18 and have nowhere to go. I have even met foster children who got admitted into college and during the holidays when most of us who went to college look forward to going home and seeing our friends and seeing our family, they begged to be able to stay in the dorm, even if the heat was turned off, because they had no home to go to.

This bill came after the very important bipartisan Adoption and Safe Families Act of 1997 where we made the most sweeping changes in the Federal child welfare law since 1980 that once and for all said a child's safety is the paramount issue in any placement. If you cannot return a child to his or her home with their biological parents, with their natural family, then let's move to relieve that child of the past and put that child in a position to be adopted and placed in a permanent home.

The next major hurdle we need to tackle is the financing system. Currently, we spend approximately $7 billion annually to protect children from abuse and neglect, to place children in foster care, and to provide adoption assistance. The bulk of this funding falls to States as reimbursements for low-income children taken into foster care when there is a judicial finding that continuation in their home is not safe. This funding provides payments for foster families to care for foster children, as well as training and administrative costs which gives children a safety net. But it is not enough because the financing is focused on the time when the child is in foster care. The longer the child stays in foster care, the more money the States get, which makes no sense to me. We ought to have the incentives in the other direction.

Try to provide the services so you can reunite a child with their family or make the decision to terminate parental rights and put a permanency plan into effect so the child can have a better shot at the future.

I appreciate that President Bush has put a proposal on the table to change the way foster care is financed. I look forward to working with him and my

colleagues to try to deal with some of these legitimate issues around financing. But I cannot support block-granting our child welfare system because it is imperative we have standards. If the States could have done this on their own, without Federal oversight funding and standards, they would have done so.

Therefore, we have to ask ourselves, How do we maintain child safety protections that we passed in the Adoption and Safe Families Act? How do we require the targeting of funds to prevention and postfoster care services? What happens if there is a crisis and more foster care children enter the system? These are all important questions. They deserve answers. But it is critical we begin the process to look at how we change the incentives.

In the past, my colleagues, Senators LANDRIEU, DEWINE, and GRASSLEY, put forth a proposal to restructure the priorities in our child welfare system. I think their proposal was headed in the right direction. It ensured that incentives were in place so that foster care stays would be shorter. I applaud my colleague Senator ROCKEFELLER, who has been a long-time champion on these issues, for his welfare reform bill which offers an alternative to financing child welfare by aligning foster care and adoption assistance with TANF eligibility.

I look forward to tackling this hard issue in the months ahead. I look forward to seeing the number of children in foster care decrease. I look forward to seeing more children in foster care being reunited with their birth families or being placed into permanent, loving homes.

For those of you who want more insight into what this issue is truly all about, I urge you to see the movie ''Antwone Fisher,'' to read Mr. Fisher's book ''Finding Fish,'' to understand that may be just one story but it stands for countless others, innocent children to whom we owe a chance for a better life.

I ask unanimous consent that an article appearing in USA Today be printed in the RECORD.

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

[From USA Today]

EASING FOSTER CARE'S PAIN UNITES DISPARATE POLITICIANS

(By Hillary Rodham Clinton and Tom DeLay)

Occasionally, a movie shines the spotlight of public recognition onto a problem that lingers deep in the nation's shadow. It forces the country either to confront the issue or look away. Today, the movie is Antwone Fisher, and the 542,000 children languishing in our broken foster care system are the issue.

Antwone Fisher tells the true story of a boy born in prison and abandoned by his mother to years of abuse, both emotional and sexual, in foster care. The compelling story of his life, written by Fisher, is about a child's hope and resilience despite an uncaring system. While we cheer Fisher's success against such abysmal odds, the movie also reminds us that too many still suffer needlessly in a foster care system that is inherently flawed.

When Fisher turned 18, the system dropped him onto the streets. Fisher turned to the Navy, where he discovered structure, discipline, the power of education and strong guidance from an adult mentor. This powerful catalyst turned Fisher's life around. But what about all of the others in our foster care system whose longing for meaning and direction goes unrequited?

Every year 16,000 young adults age out of this system. Many grew up without guidance and faced enormous hardships. The foster care system simply did not teach them the basic skills to live independently in the world. They never learned how to cook, balance a checkbook or apply for a job. Without this critical guidance, they emerge from a system unwanted and uncertain about navigating life's turns. In short, they enter adulthood the way they spend their childhood: alone.

RESET PRIORITIES

Fisher's story should spark broad reforms of the foster care system, which needs to be changed, one community at a time, so that no more children fall through the cracks. Despite our political differences, we are committed to working together so that children like Fisher do not languish in foster care until at 18, then get expelled with little guidance and support.

The federal government now gives states almost $7 billion annually to protect children from abuse and neglect, place children in foster care and provide adoption assistance. But the timing is off: Most of the money goes to states for use after a child is removed from a troubled home. Instead, it should be used to provide more preventive resources—to keep children out of foster care to begin with—and to assist children after they leave the system.

Senators and representatives from both parties acknowledge that we have to change the way we finance our foster care system. Greater emphasis needs to be put on reducing both the number of children in the system and the length of time they stay in foster care. American's children need safe, permanent homes—something Fisher never knew as a child.

BUSH OFFERS ONE PLAN

We can find a bipartisan solution to reform the way we finance our child welfare system, but both the House and Senate must make reforms a priority. President Bush has offered one proposal that deserves careful consideration. He wants to give states an option to change the way foster care is financed so they can do more to prevent children from entering foster care, shorten the time spend in such care and provide more assistance to children and their families after they leave the system.

Although reform is never easy, there are proven legislative successes in this area. During the past five years, Congress has passed two major bipartisan child-welfare bills, which we both strongly supported. One helped to nearly double the number of children being adopted from foster care, and the second has helped to provide better transition services for older children who, like Fisher, never are adopted and age out of the foster care system at 18.

We are no doubt surprising many of our friends by writing this piece together, but that just underscores our point. If a public-policy dilemma can bring the two of us together, it clearly deserves a hard look from everyone. Fisher's success should be the norm for all children who travel through the foster care system, not be one exceptional spark in the darkness of countless children's lives.

RECESS

The PRESIDING OFFICER. The hour of 2:30 having arrived, under the previous order the Senate stands in recess until 3:30.

Thereupon, the Senate, at 2:30 p.m., recessed until 3:30 p.m. and reassembled when called to order by the Presiding Officer (Mrs. DOLE).

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. President, the Miguel Estrada nomination was submitted by President Bush in May 2001—almost 2 years ago. We know that he has not only the support of the majority party, but he has support from a majority of the Members—more than 51 Senators—in this body. And that was demonstrated in a letter that was sent by Senator MCCONNELL and 51 other colleagues to the President, dated February 25, 2003.

Yet my colleagues on the other side of the aisle continue to practice justice delayed, which, incidentally, is increasingly being called, by the American people, justice denied, because that delay is denying the majority will of this body.

My objective, since February 5—since this nomination came to the floor of the Senate—has been to provide all of our Senators with a forum for informed deliberation, for tempered deliberation, for thorough consideration. I have been very clear from the beginning that my intention was to have a vote—an up-or-down vote—and to move this nomination to the constitutionally mandated question: Will the Senate advise and consent to this nomination—yes or no, yea or nay, up or down? That is all that we ask.

It is the majority leader's job, after consultation with the minority leader, to schedule this yea or nay vote. I have asked, on numerous occasions, for a time certain for this vote. Again and again, each of my requests has been rejected.

The nomination has been pending now for 3 weeks—or more than 3 weeks—and I do believe there has been ample time for Members to deliberate on this nominee. There is no doubt about the outcome if we are allowed to vote on it. The sheer number of signatures on that February 25 letter reflects that the confirmation would occur. Yet Democrats continue to refuse to set a time for this dispositive vote.

So, once again, I say: Let's vote. I hope that Members do come to the floor during today's proceedings to discuss this important nomination.

With respect to rollcall votes—because I know a number of our colleagues are very interested in what the plans will be for both today, tomorrow, and on Monday—I will be discussing the schedule with the Democratic assistant leader or the Democratic leader today in relation to the schedule so that very shortly we can determine when these votes will be scheduled.

The Judiciary Committee is still meeting as we speak. But I hope to have some information here within the next hour or hour and a half so we can set up votes over the next couple days.

The ACTING PRESIDENT pro tempore. The Democratic whip.

Mr. REID. Mr. President, the two leaders have met several times in the last 12 hours. That is fair. And there is progress being made as to what the majority leader is going to do next week. We will be happy to cooperate in any way we can. We have this little dust-up here. We have to work around that.

As I indicated—the leader was not on the floor at the time yesterday—we know we have a problem with the Estrada nomination.

But we are not trying to delay. We have allowed the committees to go forward. We have tried to cooperate with the majority leader anytime he has had other legislation to bring forward. We will continue to do that. We just need to figure out some way to get through the parliamentary problem we have now with the Estrada nomination. We will continue to be advocates for our position in that regard, but we stand ready, as the majority leader has been told by Senator DASCHLE, to work with him in any way we can to help move legislation.

Mr. FRIST. Mr. President, we will continue to work aggressively. I think everybody in this body understands our goal. I appreciate the good nature. We will continue to push forward for a vote. I did have the opportunity to talk to the leader on the other side of the aisle. The Democratic leader and I discussed plans over the next several weeks. That discussion is very important. I believe we are making progress there. Again, in terms of votes, either later today or tomorrow morning, hopefully within an hour or hour and a half, we can make decisions. In all likelihood, we will be voting Monday afternoon and throughout Tuesday.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

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

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now go into executive session and resume consideration of Executive Calendar No. 21, which the clerk will report.

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

The ACTING PRESIDENT pro tempore. The Senator from New Jersey.

Mr. CORZINE. Mr. President, for the past several weeks, as we have heard this morning, this body has done very little beyond the debate on the nomination of Miguel Estrada. Hour upon hour, day upon day, week upon week, the debate has continued. We have heard every argument there is to make on both sides of the issue. We have heard them from just about every Senator, and we have heard them over and over. It has been pretty repetitious.

I don't mean to diminish the importance of this debate about a single, very important job. After all, it goes to the heart of the Senate's role under the constitutional system of government. The question is whether this constitutionally responsible body will be diminished to such an extent that we just become a rubberstamp for White House judicial nominations; that is, whether we will agree to automatically confirm nominees even if they refuse to answer publicly the most basic of our questions on their jurisprudential perspectives. It is hard to understand how we can give a lifetime appointment to a job without having a job interview.

This is an important debate. All of us believe that. That is why we have had 3 weeks of consideration. It is one that reaches well beyond the specifics of the individual candidate. It deserves our careful consideration. The Constitution charges the Senate with the responsibility to provide advice and consent on judicial nominations. Those of us on this side will attend to that responsibility.

Of all the issues facing our Nation at this most challenging time in our history, there are other—certainly in my view and I suspect the view of most of my colleagues—issues that are of a higher priority. It is a profound mistake on the part of the majority to insist on staying on this nomination indefinitely while Mr. Estrada and the administration, with all due respect, continue what some would term ''stonewalling'' while there are so many vital issues our Congress should be addressing.

THE ECONOMY

Today, I will focus in particular on the problem, along with the drastic, dramatic threat of terrorism we face daily and the prospect of war with Iraq, which we heard the President talked about last evening, that is probably uppermost in the minds of my constituents in New Jersey and, I suspect, across the country, and that is the state of our economy. It is in serious need of attention.

I have been listening to New Jerseyans from around the State, from all walks of life, all ethnic, religious, racial backgrounds, the long-term unemployed, to manual laborers, to mid-level managers, to CEOs, to retirees and soccer moms. For just about all of them, there is a tremendous sense of anxiety with respect to the state of our economy and their families' economic security. People are concerned about whether they will have a job, whether their savings will be there when they retire, whether they will be able to pay for their college educations, whether they will be able to have health care. There are serious concerns, flat-out kitchen table concerns for all Americans. I know that is the case in my home State.

An anecdotal perspective on this country's anxiousness has now been backed up by hard statistics from the conference board released this week.

Sometimes we divorce these statistics from the reality. I certainly see it in people's faces and the words, but we saw it actually monitored in a statistic released by the conference board this week. We saw consumer confidence drop from 78, almost 79 percent, of the population last month to 64 percent. That is the lowest level since October of 1993. That is probably one of the sharpest drops in history; I did not check the actual number, but far greater than post-September 11, and it is reflective of a dramatic undermining of the strength of well-being felt by most Americans.

Americans around the country are deeply concerned about our Nation's economy. They have a good reason to be. After all, since January 2001, the number of unemployed has increased by nearly 40 percent—almost 8.5 million people. About 2.5 million private sector jobs have been lost in that period, and there are now about 2.5 job seekers for every job opening in America. Think about that, 2.5 people applying for every job now available.

Not only have the number of unemployed Americans increased, those out of work are now jobless for longer periods of time. Over the past year, the average number of weeks individuals have spent unsuccessfully seeking work has increased by about a month, and 20 percent of the unemployed have been looking for work more than 6 months. There are 1 million of these long-term unemployed workers in America and almost 100,000 falling off the rolls for unemployment insurance benefits each month. Just slightly fewer than 100,000 each month are dropping off the benefits because they can't find jobs.

While there are no great and solid statistics on it, there are a lot of people dropping out of the job market. The job market is not growing, and it is one of the reasons—the statistics show the unemployment rate certainly up dramatically and skyrocketing—a lot of people have just stopped looking. The lack of jobs has also slowed wage growth. Recently, only those workers with the very highest of incomes have experienced any wage increases in the economy, any wage increases at least that have outpaced inflation. For lower wage earners, that growth has absolutely stalled to zero. That is not, obviously, helping create the demand that will drive our economy and make a real difference in people's lives.

The Bush administration's record on job creation is on track to be the worst in 58 years. In fact, to just equal what transpired during the Eisenhower administration, which currently has the worst record, you would have to create 96,000 new jobs each month starting today and continuing each month for the remainder of this President's term; 96,000 is a lot of jobs to create, particularly when we have been losing jobs at a rate almost that fast each month.

It is extraordinary what we have to do to turn the economy around. Without a significant increase in job creation, we will have the worst 4-year record in the history of any President.

Unfortunately, there is little evidence to suggest that it will turn around. For instance, according to the employment outlook survey conducted by Manpower, Inc., which came out this week, which is the private sector's best gauge of what is going on in the employment market, only 22 percent of America's employers are going to increase the number of jobs in the upcoming two quarters. The rest of them are either going to reduce jobs or stay the same.

Mr. President, 22 percent is a very low number by any historical measure. I don't understand why we are debating one job on the floor of the Senate when we are failing to address the fundamental needs and requirements for all American families, their jobs, and their well-being.

Of course, the problems with the economy are much deeper than just reflected in what is probably the most important place—the job market. But there is a lack of confidence in a whole host of sectors in the American economy. Our businesses are now operating at only about 75 percent of capacity. That is well below any of the averages we have had historically, which is about 81 percent. Our States are suffering with some of the most severe fiscal crises they faced in decades, forcing Governors and State legislators to approve steep tax increases. In my State, the average increase in property taxes was 7.1 percent. New York City increased property taxes 18.5 percent, and they are trying to put a commuter tax on so everybody who surrounds the city is helping to bail it out with lots of legitimate needs on homeland defense and first responders. We are putting unbelievable pressure on those individuals who are responsible for State and local governments.

In the upcoming fiscal year, estimates of the total State deficits are roughly $90 billion cumulatively. And we are talking about a $36 billion tax cut to be administered this year. That is way overblown by what is happening at our State and local levels.

Briefly, I will mention that investors are in a state of shock. The stock market has declined dramatically in the last 2 years and couple of months, losing almost $5 trillion in value in that period of time. Those are unbelievable numbers, but when you translate that into 401(k)s and IRAs of individuals—at least in my State—I think that is about a 40 percent decline in value, on average. It is a huge loss of the retirement security that many families have seen happen in their financial well-being. When the President's program was announced in early January, actually the Dow Jones Industrial Average was supposed to be benefited by that program, but it dropped by over 10 percent.

Our Federal budget, which 2 years ago was projected to enjoy a 10-year surplus at $5.6 trillion, now looks at record deficits for absolutely years to come—as far as the eye can see, some would say—and will be increasing the public debt over the same horizon as we projected that $5.6 billion surplus to $2 trillion worth of public debt. That is a fiscal reversal in this country of $8 trillion. It is an $8 trillion negative cash swing in the country's cashflow.

I don't want to tell you what I would do if I were back running a company and we had an $8 trillion negative cashflow, but it would probably be grounds for change in policies and programs—maybe even a change in CEOs.

When you add all these concerns together, it is clear that the economic record of the Bush administration is bordering on abject failure. Now the administration's response to the problem is, let's do more of the same. Having based its economic policy on large tax breaks for the most fortunate among us, the President's response to that failed policy is let's stay the course, let's have more tax breaks targeted for those with the highest income, and let's run larger budget deficits and increase our national debt even more, and let's reduce national savings—which is the way we create growth in this country—even more.

Whatever happened to the simple view that I think there has been a bipartisan sense of, which is that rising tides lift all boats? Are we not thinking about the economy in its totality? Why don't we have everybody participating? I don't understand why we are sticking with policies that look to be not serving the country well.

As I have suggested, there used to be a business leader who said, ''If it's broke, fix it.'' It is really nothing more than common sense. If things are not working, I think you have to adjust policies; you have to think about doing something differently if you are stuck in a rut. This administration is doing just the reverse. It has dug itself into a hole, and its response is to dig deeper. If we don't challenge these policies, the long-term implications could reduce our Nation's standard of living not just in the near term but for decades to come.

At a time when we are challenged with domestic security and international security, when we are asking for sacrifice from our men and women in uniform, for all of the country to understand we have serious challenges to our national security, why we are not understanding that this is a time for us to pull together and have shared sacrifice is hard for me to understand.

Frankly, if one projects the cost of the President's tax cut package beyond 10 years—if you put that structure in place while the demographic bubble of the baby boomers comes into play, frankly—I don't care about dynamic scoring—we will end up running, by almost all objective analyses, catastrophic deficits, as Chairman Alan Greenspan testified just this morning at a House hearing on aging. It will be

a real challenge to be able to maintain Social Security and Medicare at anything similar to today's programs for the future seniors of America.

We are putting those programs at risk, we are putting our fiscal position at risk, if we stay the course with the policies we have today. Considering all these facts, unfortunately, it is difficult for the administration to provide effective leadership, in my view, on the economy because its credibility has been badly eroded. There is a tremendous credibility gap, and it results from the repeated use of figures and claims that are just badly misleading in many ways. As a matter of fact, starting to come out are regular analyses by economists, people in the press, and I think one needs to honestly look at and challenge what some of these predictions and analyses point to and compare them with the facts.

Let me provide a few examples. The President's rhetoric would lead one to believe that his tax plan will provide a meaningful economic stimulus, get jobs growing, and it is all about jobs. When you dig into the numbers, it turns out that the reality is very different. In fact, only $36 billion of the President's planned $675 billion on the table would kick in this year—$36 billion in a $10 trillion economy. It is just an absolute drop in the bucket relative to what would be needed to actually drive this economy forward, by anybody's measure, any objective measure of what it takes to get an economy moving.

There is virtually no one in Congress I have been able to find who would argue that this is a program that will stimulate or revitalize this economy, nor does it make sense to argue that the President's dividend exclusion somehow is going to stimulate the economy, when its real effect will be to shift cash off the corporate balance sheet. If corporations are going to invest in jobs and research and development, and if they are going to put money to work in building, plant, and equipment, they need cash. You cannot go to a bank unless you have margin to put down. You need to invest in those things to drive our economy.

By definition, dividend exclusion is going to take money off the balance sheets of companies, and the capacity to invest and retain and create jobs is going to be diminished. That is why there is this argument about whether, if you are going to have a dividend exclusion, you ought to at least do it at the corporate side of the income statement as opposed to through an exclusion.

We have heard that from Chairman Greenspan. We see that from almost any reasonable economic analysis. Cash on the balance sheets is how you get business done, as far as investment and creating jobs. It is almost a truism. Instead of driving economic growth, it is actually antigrowth, and I think we will end up with less economic stimulus by the nature of the structure, even if we thought it was an appropriate time for that reform on something other than a revenue-neutral basis. In other words, the President's claims about the stimulative impact of his proposal, in my view, and I think a vast majority of independent analysts, is little more than rhetoric. The reality is quite different.

There are other elements with which people can deal with regard to the credibility of the proposals of the administration claiming benefits of this tax cut are going to go—I think this is the quote—''92 million Americans receive an average tax cut of $1,083.'' That is the claim.

As we are hearing over and over, that is pretty misleading because the average tax cut is inflated by the huge breaks going to a very narrow set of folks, while a lot of other people are getting very small tax cuts. In fact, a half of all taxpayers would get a tax cut not of $1,083, but less than $100. This is a difference between mean and average, and 78 percent of Americans would get reductions of less than $1,000.

When I went to business school, our required reading included the book ''How to Lie with Statistics.'' There are some spinmeisters who must have reviewed this work and learned it well, as far as I can tell. I am sure Americans understand how averages are put together, and they can cover great sins.

Similarly, the White House likes to claim the amount of income tax paid by high-income Americans would actually rise under this proposal. We hear this under the arguments of class warfare. When you consider the real measure of who benefits in terms of increases in something that is simple for people to understand, aftertax take-home pay—the stuff people can actually buy groceries with or pay the bills with—it turns out that—no surprise—it is the most fortunate who do best under the Bush plan.

The tax reduction for those making $45,000 would amount to less than 1 percent of their aftertax take-home pay. Those making more than $525,000 would see an increase of more than three times that rate, and in real dollars those are substantial numbers. But with the aftertax, what people can actually use in their everyday lives, the opposite is being promoted from what the reality is. Again, there is a credibility gap.

I also argue the credibility gap applies to the administration's claims that their plan will help seniors. In fact, over half of all dividends paid to the elderly go to seniors with incomes over $100,000. I think it is great they planned and saved, but the number of seniors out of the roughly 40 million seniors who have incomes over $100,000 is about 3.5 million. That is where over half of this dividend exclusion benefit would go. By the way, only about a quarter of all seniors would receive any benefit.

To say this is going to somehow vastly improve the position of seniors in America is just a gross overstatement. I wish to revert back to comments I made earlier. The vast majority of seniors depend on Social Security and Medicare as the basis for protecting their economic security and their well-being over a period of time, and we are doing just the opposite of what is necessary to protect Social Security and Medicare in the future years. It is depressing. That is what Chairman Greenspan talked about an hour ago in a hearing of the House Committee on Aging: the risks to Social Security and Medicare if we do not change our economic policies and do something to straighten out our fiscal policies in this country.

Let's consider the administration's claims about how cutting taxes on dividends will benefit millions of Americans. The truth is, only 22 percent of those with incomes under $100,000—this is the vast majority of income-tax-paying Americans—reported any dividends in the year 2000, and the average tax cut from the dividend exclusion for those with modest incomes of between $30,000 and $40,000—by the way, the average income for individuals in America is something close to $40,000—those people are going to get a $29 tax cut associated with this dividend exclusion.

There is a real credibility gap. We are exaggerating and distorting the claims about the power of this tax cut. We are talking in terms that really do not relate to the vast majority of Americans. I think the word is starting to get out. There are serious questions in the minds of Americans that at a time when we have the potential for war offshore, and we certainly have threats of terrorism at home, why are we focusing so much of our benefits of what we are doing with regard to tax proposals on such a narrow segment when the broad economy, that rising tide that would help everyone, is suffering and there is no stimulus going to it?

This is not the only area, by the way, where some of these claims, relative to reality, are setting up a real pattern of a credibility gap for the administration. The Secretary of Defense, on a number of occasions, argued the cost of war in Iraq might be $50 billion to $60 billion, something in that neighborhood. But when the President's top economic adviser last December—maybe it was in November—to his credit suggested this figure was far too low and the actual cost could be as high as $200 billion, what happened? He got fired.

The dissidence between what is talked about in the public relative to what the analysis is by a lot of people who are trying to look at this in a serious-minded way so we understand what our needs are as a nation is troubling to a lot of folks and accentuates this credibility gap.

It is time for the administration to be more forthcoming about the real costs of the impending war. The American people have a right to know. I am glad this week we started to see a little

of that discussion, but even in that context, we need to consider the ongoing costs of rebuilding Iraq in the aftermath of a war, presuming that war goes the way we expect, presuming that it is relatively short in nature.

Even yesterday's estimate of $60 billion to $95 billion that we read about in the papers included only 1 year of reconstruction costs—1 year—when almost every expert I have heard come before the Foreign Relations Committee has talked about a decade, maybe a little bit more, but a very long-term program. By the way, all we have to do is think about Korea. We are still in Korea 53 years after a war on that peninsula.

The administration should play it straight with everyone about the costs we are going to face, just as we ought to play it straight with regard to our budget, with regard to tax cuts. In my view, we need to talk straight so we can build up the trust of the American people and those who watch us around the world. Trust does matter. It is important. That is what we are asking corporate America to do, to clean up its act. That is why we want accounting statements that are true. I think people expect to truly understand what the nature of the current situation is as we go forward.

Actually there is a serious credibility problem that is causing us problems abroad as well. I think whether or not we are believed by some of the populations abroad is reflected in how much opposition we have seen from a lot of countries, not just in their political establishment but by literally millions of people who have shown up, probably most clearly in Great Britain, which has been our strongest supporter with regard to the Iraqi situation. The population is someplace else. Why is it we are not able to make our case clear?

I think part of this comes from credibility in how we frame these issues, how the information has been brought forward. All one has to do is look at what is going on in the economy to bring about some credibility questions, when we get on to some of these issues of national security.

In this context, let me return to the issue of the nomination of Miguel Estrada. As with many of the claims about the Bush budget, too many of the claims from the other side on this issue simply lack credibility. One of those—probably the most irritating—is the claim that somehow those who oppose the Estrada nomination, or at least would like to have information to prepare ourselves for a vote, are somehow anti-Hispanic.

Does that suggest that groups such as the Congressional Hispanic Caucus, the National Association of Latino Elected and Appointed Officials, the Mexican American Legal Defense and Education Fund, the National Puerto Rican Coalition are anti-Hispanic? I do not get it.

We are making a judgment about how the constitutional process is supposed to work, not talking about whether or not someone is qualified or disqualified because of ethnic background. As far as I am concerned, these kinds of demagogic attacks on Hispanic groups and those who show common cause with them lack credibility. The facts do not meet the circumstance, and they are part of an attempt to intimidate opponents of Mr. Estrada's nomination to stay silent in fulfilling our rightful and responsible position of advice and consent in selecting judges for lifetime appointments to the courts of our country.

It is not going to work, and one reason it is not going to work is the American people expect us to do our job—it is very simple—just as they expect us to pay attention to the economy and do those things that will get us flat off our back and get the economy moving. These things really are common sense, in my view. We are spending weeks upon weeks debating whether one individual is appropriate for a job because many of us do not understand what his views are, and he is unwilling to answer questions, unwilling to have a job interview, and we are forgetting about the 2½ million private sector jobs that we have lost and the 8 million-plus people who are searching for a job. One job versus 8 million.

I have a very hard time understanding where those priorities come out. What is more important to the American people?

A couple of days ago, I asked the distinguished Democratic leader about some conversations he had with the Governors who have been around town from both sides of the aisle. We have all met with them. We have sympathized with some of their needs. I asked if one single Governor lobbied the leader about the Estrada nomination, either to move it on or take it off, or what is happening. Not a single one spoke to the distinguished leader about that nomination.

It should not surprise anyone that our Nation's Governors are more concerned about the economy and the terrible fiscal crisis they face, and here we are talking about this one individual who has been nominated for this one seat on the Court of Appeals for the District of Columbia.

I know from my conversations with people in New Jersey that they feel the same way, and I am sure Americans across America agree. Why is the Senate spending all this time worrying about this one job—I do not get it—while we ignore the millions of Americans who have lost their jobs? We see the consumer confidence falling off the charts. We see our stock market reeling. We see the dollar declining. We are not paying attention to the real things that people are concerned about that make a difference to their lives, their kids' lives, their families' lives. This Estrada nomination is not the priority of the American people, and I do not think it is the priority of my Democratic colleagues.

In a moment, I am going to make a unanimous consent request that we at long last make the economy our top priority. I am going to ask that at least for now we move off the Estrada nomination, as we have done for other concerns—we have passed the omnibus appropriations bill. We were able to take up the child pornography issue this week. We ought to focus on our economy.

The bill for which I will ask unanimous consent was proposed by the distinguished Democratic leader. It includes, among other things, middle-class tax cuts, aid to the States, an expansion of benefits for unemployed Americans, those 100,000 people a week who are dropping off the unemployment rolls right now, and establish rules to restore long-term fiscal discipline and health in our economy.

I recognize my colleagues on the other side of the aisle are not likely to agree to this proposal, but as Democrats continue to emphasize the importance of dealing with our economy, I hope someone on the other side will begin to question the decision to spend days upon days and weeks upon weeks on the nomination of this one individual. I hope they will come to appreciate that there is little time to waste when it comes to boosting our economy and taking care of America's families and getting on to the priority of creating jobs for Americans. I hope they will adapt their priorities, the priorities of the Senate, to those of the American people, which is jobs and economic security.

UNANIMOUS CONSENT REQUEST

I ask unanimous consent that the pending nomination be set aside and that the Senate take up and begin debate on Calendar No. 21, S. 414, a bill to provide an immediate stimulus to our Nation's economy.

The ACTING PRESIDENT pro tempore. Is there objection?

The Senator from Nevada.

Mr. ENSIGN. Reserving the right to object, the way to resolve the nomination is to schedule an up-or-down vote.

I object.

The ACTING PRESIDENT pro tempore. The objection is heard.

The Senator from New Jersey has the floor.

Mr. CORZINE. With full expectation and understanding of the position, I am disappointed with the objection that has been raised, but I am not surprised. We have a critical need to get focused on our economy in this country. The needs of the American people are not being addressed. It is not because we are having this debate. We could move off this debate and move to the economy today, then come back to it like we did with regard to the omnibus appropriations.

The American people should know there are proposals on the table that would stimulate this economy and get it moving, instead of seeing unemployment rates skyrocket, instead of seeing deficits as far as the eye can see being

put in place, with no attention being drawn to them, without dealing with the core things that matter in families' lives, in real people's lives. We could do that and still come back to this and have a full constitutional and responsible debate about what is needed to review a candidate and get on with the real needs facing our country.

I find it very difficult to understand where we are with regard to a lot of these priorities at this point in time, and I hope we will see the light before we have to go further with more of these serious problems that our American families face with their economic security.

I yield the floor, and I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. ENSIGN. Mr. President, it is my pleasure today to come before the Senate to lend my support to a man of tremendous character and extraordinary legal credentials, Mr. Miguel Estrada. We have heard a lot about this nominee. We have heard a lot about why we should be focusing, why we shouldn't. As I discussed before, I would like to see us get on to things like the economy, like the budget. The simplest way to do that is to have an up-or-down vote on Miguel Estrada.

I will share a few facts about Mr. Estrada and the importance of the nomination to our legal system. Mr. Estrada is an American success story. He came to this country at the age of 17 as an immigrant from Honduras, speaking very little English. He overcame amazing obstacles to rise to the top of the legal profession. After graduating magna cum laude from Harvard Law School, Miguel became a law clerk to the Supreme Court Justice Anthony Kennedy. Since that time, he served as a Federal prosecutor in New York and Assistant Solicitor General of the United States for 1 year in the Bush Administration and 4 years in the Clinton administration. He was handed nothing, and his achievements are the product of hard work, perseverance, and a commitment to education. He is actually living the American dream.

Among other accomplishments, Mr. Estrada has argued 15 cases before the Supreme Court of the United States, including one case in which he represented a death row inmate pro bono. The American Bar Association unanimously rated Mr. Estrada as well qualified for the DC Circuit. This is the ABA's highest possible rating, and the rating typically used as the gold standard for judicial nominees in the Senate Judiciary Committee, especially on the Democrat side.

Mr. Estrada served as a member of the Solicitor General's Office in both the Bush and Clinton administrations. He is enthusiastically supported by both President Bush and President Clinton. The long list of Hispanic groups backing Miguel Estrada's nomination includes the League of United Latin American Citizens, the U.S. Hispanic Chamber of Commerce, the Latino Coalition, the Hispanic Bar Association, and the National Association of Small Disadvantaged Businesses.

Sadly, Mr. Estrada's extraordinary accomplishments and his desire to serve our country have not been enough to protect him from the baseless, vicious, and partisan attacks he has endured through this process. Now is not the time to play partisan games with the United States judicial system. America is facing a judicial vacancy crisis in our Federal courts. The U.S. Courts of Appeals are currently 15 percent vacant, with 25 vacancies out of 167 authorized seats. The DC court, which is the court we are trying to get Miguel Estrada onto, has four vacancies on a 12-judge court.

Adding to this crisis, caseloads in the Federal courts continue to grow dramatically. Filings in the Federal appeals court reached an all-time high last year. The Chief Justice recently warned that the current number of vacancies, combined with the rising caseloads, threatens the proper functioning of the Federal courts. He has asked the Senate to provide every nominee with a prompt up-or-down vote.

Chief Rehnquist is right. Every judicial nominee deserves a prompt hearing and a chance at an up-or-down vote on the Senate floor. This nominee is not being assessed by the traditional standards of quality or by his ability to follow the law as a judge. There is no question that this nomination is being delayed and possibly blocked because of a distorted analysis of his qualifications, policies, and personal views. My colleagues on the other side of the aisle are blocking this nomination simply because he is President Bush's nominee. This is a detriment to the integrity of this body. It is unfair to the nominee. And it is unfair to the American people.

I am asking my colleagues in the Senate today to do what we were elected to do, to allow this body to work its will, and to give Mr. Estrada the up-or-down vote he deserves. I add that the precedent we are setting, this 60-vote threshold for circuit court nominees, is a dangerous precedent. Right now the Republicans are in the majority and we have the Presidency. At some point the Democrats are going to be back in the majority. At some point the Democrats are going to hold the Presidency again. Paybacks are very ugly. But make no mistake about it, with the precedent being set here, unless this can be worked out, those paybacks will come back to haunt the other side of the aisle.

It is vitally important we work this out for the health of the judiciary in this country. It should not become a political tool to be bandied about just because somebody thinks that somebody may have a particular ideology.

We realize that having a Republican Hispanic on the DC Circuit Court of Appeals is something the other side does not like.

But just because they don't like the politics of that does not mean that they should object to him getting on the court. He deserves this. He is qualified for it. He has the integrity to carry it out. And we, as a body, should give this man an up-or-down vote. If we give him an up-or-down vote he will be confirmed by the Senate.

I believe it is our constitutional duty to give him an up-or-down vote. He has had all the hearings he needs to have. We have been doing this for almost 2 years now. We need to give this well-qualified candidate the vote he deserves.

I want to raise a couple of points. The Senator from New Jersey was talking about the economy. He says we have to get on the economy. I agree, we need to take care of the economy. I have some proposals. The President has some proposals. There are going to be other Senators who will have proposals to try to stimulate the economy. The Senator from New Jersey indicated he doesn't think what the President is doing is going to have enough of an impact. I have a proposal that actually, the first year alone, according to the Joint Tax Committee, will bring $135 billion worth of investment into this country. I hope the other side of the aisle is going to join us in that. That is significant even in the size economy that we have.

What the President has laid out as part of his plan—I don't agree with all of it, but there are some good things in it. He has laid out a plan, not only for this year but for solid growth and, in future years, to have good, solid, long-term fiscal policy and long-term growth.

I agree with some of the things the other side of the aisle is talking about with respect to budget deficits. We do have a problem in the outyears with budget deficits. But if we do not fix the economy, we know we will never fix the deficits. We will continue to go further and further into debt. That is why it is critical for us to fix the economy, so we produce more tax revenues so we don't have these huge deficits and threats to Medicare and threats to Social Security and threats to our defense spending in the future.

We have proven here in Washington, DC, we can't cut spending. We can maybe slow down the rate of growth sometimes, but we can't cut spending. As Ronald Reagan talked about—I don't remember the exact quote, but as he said in the early 1980s: The best way to eternal life is to become a Federal agency or department in Washington. He said that because he realized once a program starts, it develops a constituency and it is impossible to cut it. So I believe if the other side is concerned

about the deficit, they should join some of us on this side of the aisle and start cutting out some of the waste and overspending in certain parts of our Government.

Having said that, let me conclude by saying let's have an up-or-down vote on Miguel Estrada so we can get on to some of the other important issues. Make no mistake about it, though; the judiciary and this part of what we do is a very important part of our role as Senators in fulfilling our obligation, our oath of obligation to defend and support the Constitution. We can get on to other things. The budget was not enacted last year. For the first time since 1974 we did not have a budget. Because of that, we ended up with some serious problems last year. The appropriations bills didn't get finished until just a couple of weeks ago.

We are asking the other side to not continue to obstruct the will and the work of this body, to join us, have an up-or-down vote, let the Senate work its will on this nomination so we can get on to other important business of the country. We have a lot of things to do. Let's join together. Let's work across the aisle. Let's join hands. There are a lot of good things we can do for the American people.

I yield the floor.

The PRESIDING OFFICER (Mr. BUNNING). The Senator from South Dakota.

Mr. JOHNSON. Mr. President, I rise to express my great dismay at the policy of the President of the United States that he seems to be attempting to impose on the Senate, which would require each and every one of us in this body to betray the Constitution, to betray our oath of office, and to ignore the constitutional mandate that we give meaningful advice and consent on judicial nominees coming before this body.

I will never betray the Constitution and my oath. I don't care whether we have to be here night after night. I am not going to go down that road. I speak as a Senator who has voted in favor of somewhere in the range of 100 judicial nominees that President Bush has sent to this body, virtually all conservative Republicans. I wish it were different. I wish there were more progressive judges before us. But I understand the President's prerogative, and I respect his right to nominate whomever he may wish.

But this nomination before us is unprecedented. It is not only a matter of Mr. Estrada, it is a matter of the sanctity of our Constitution. It goes to the very oath of office we have taken. It would make a travesty of this body and of the Constitution for us to do otherwise than to object to the manner in which this particular nominee has been presented to the Senate.

The other nominees who have come before this body—for whom I have voted over and over again, somewhere in the range of 100 already—we at least knew what was their legal philosophy. They tended to be conservative Republicans and that is the President's prerogative and I voted for them, but they had either been Federal judges or State judges, allowing us to look at their rulings in the past, or they had been legal scholars with a significant body of work that allowed us to view what the inner workings of their minds were and allowed us to determine whether they were, in fact, within the mainstream of American jurisprudential thought. This nominee stands unique. The precedent would be catastrophic to our Republic if we start, for the first time ever, to approve secret judges, stealth judges, judges who have no record and who will disclose no record to the Senate.

We have no way of knowing what this individual's legal philosophy might be. We have reason to believe he is undoubtedly a capable lawyer, in terms of his technical skills as a Solicitor, but we have no idea where he stands otherwise. The question is not whether we will have Hispanic Republican judges on the District of Columbia Court of Appeals. That is irrelevant. I voted repeatedly, as have my colleagues on my side of the aisle, for Hispanic judges and other high officials in our Government. I am proud to have played a role in supporting our Hispanic colleagues in issue after issue, and position after position. But this, this is a sham. This is a travesty. I believe any Senator who thinks seriously about his oath and reads the Constitution, the obligation—not the right but the obligation of the Senate to provide advice and consent on these offices is a profoundly important role.

It is one thing to approve or not approve Cabinet appointees and other advisers to the President; they come and they go. It is a serious matter, but at least there is not a lifelong appointment involved. In this case, we have a lifetime appointment to the second highest court in the land. What is worse, if we submit to this failure to abide by our constitutional obligations to make a meaningful decision about advice and consent, we will have opened the floodgate because it will become apparent to this President that the strategy to use from here on out is to continue to find individuals who have no track record, who may have a secret ideological agenda, and to send them one after another through the Senate to be rubberstamped by this institution. That is not acceptable. This is a matter of enormous importance.

These individuals, and this particular individual about whom we are debating today, if confirmed, will likely serve on this bench for the rest of our lifetimes, for many of us in this body. President Bush may come and he may go, but these appointments will last a lifetime.

So it is with enormous concern that I rise to express my opposition to this strategy because that is what this is about. It is about a strategy. It is not about whether a Hispanic Republican should be on the bench. It is not about whether a conservative should be on the bench, so long as they fall within the mainstream of American juris prudential thought. The question is, Should this Senate be allowed any idea about this individual's ideology, about his legal philosophy? There we know nothing. We would be surrendering our constitutional prerogatives and our constitutional obligations were we to respond any other way than we have attempted to do on this side. Obviously, we can move on to other agenda items, whether it be stimulating the economy, education, health care, or what have you. All that is required is for leadership of our colleagues on the other side of the aisle in support of the President to either withdraw this nominee or to have him respond to reasonable questions about his philosophy. There is no effort here to require this individual to answer questions that have not been put to other judges. The question is not his response to specific items before the Court. It would be inappropriate to ask those kinds of questions. But this is astonishing. This is stonewalling. That is what this is. It is unacceptable.

Again, over 100 judges that President Bush has nominated have been confirmed by this body, and most have gone through with my support. Most of them were conservative Republican judges. That is fine. But this is different. I hope the American public understands the profound consequences that would flow from our surrendering of our constitutional obligation to at least make meaningful decisions about whether to confirm a particular nominee.

THE BUDGET

Mr. President, I also want to express my great frustration and my great sadness in many ways over priorities that President Bush has recently exhibited relative to our young men and women in uniform and the likely war we are about to embark upon.

Americans all across this country, including my wife and myself, are about to send our finest young men and young women into harm's way in the Iraq region. We can debate the wisdom of that. But that is the reality. I think we all see this coming. We can take great pride in these men and women in uniform, the courage they show, and their commitment to America. They are asking for so little and, yet, they are willing to do whatever is required of our American military. They are the greatest military ever fielded in terms of the sophistication of technology they deal with and the requirements they meet.

But while we put this military together and send them on their way with flags flying and salutes and the prayers of all of us, the President simultaneously has recommended now in his 2004 budget recommendation that we cut impact aid education funding for the children of these very troops who we are sending into war. Is it because we can't afford to finance quality

education of the children of our military? No. President Bush also, as we recall, has called for over $100 billion of tax cuts for primarily the very wealthiest of Americans—primarily on Wall Street. So rather than asking America's wealthiest families to sacrifice at a time of war, the request seems to be of the middle class and the working family, send your sons and daughters into combat, and we will ask America's wealthiest no sacrifice whatever. In fact, we will cut their taxes and we will come back to these families who are sending their sons and daughters into combat and tell them we can't afford to educate your kids while you are gone. And these spouses remain. The Guard and Reserve and active-duty spouses in South Dakota and across every State in our land are worried to death about the prospects of their loved ones, but proud, and upholding America's ideals as they go into heaven knows what kind of combat circumstance they will face with weapons of mass destruction arrayed against them. We hope whatever combat occurs will be swift and decisive and conclude positively for us. But obviously we all know there is great risk for everyone's sons and daughters who go into circumstances such as this.

Is it asking too much of President Bush to at least not cut the education funding for the children who are left behind? Is that asking too much? It says a lot about the priorities of this administration, that we would array the world's finest military on the one hand, provide tax relief for the world's wealthiest people on the other hand, and simultaneously beg poverty when it comes to the schools for the children of our military personnel. Shame on the President. Shame on the President for these kinds of priorities. America deserves better. Our fighting men and women deserve better than this. Fiscal responsibility is not the issue. Priority is the issue.

Then when our military personnel come home again, what do they find but the Veterans Administration underfunded yet again. The administration is asking for higher copayments, higher deductibles, and denies hundreds of thousands of our veterans access to VA health care they were promised. What kind of signal does that send? How are you going to continue to attract the very best of America's young men and women to wear our Nation's uniform when they find that while we do that and pat them on their back and salute them and send them onto combat—4 years, 5 years—at the same time we are not going to take care of their kids. When they come home, we are not going to take care of their health care obligations as we promised we would.

It is long overdue that some of these priorities be met off the top of the barrel, rather than the bottom of the barrel and the crumbs that are left over half doing other things.

I don't know how we can expect in the day and age of a voluntary military to continue to attract the best and the brightest of our young people who deal with the sophisticated kinds of technology they are requested to do now, if they know simultaneously—and they increasingly do—that once they leave home and once they come back, they will in too many cases be treated shabbily by our government, which is too busy stuffing its pockets with cash rather than meeting its obligations to those who are laying their lives literally on the line for America's freedom and American values.

As a member of the Senate Budget Committee, today I also expressed alarm at recent news reports of still larger than expected Federal budget deficits, after an unprecedented 4 years in a row of budget surpluses during the final 4 years of the past Clinton administration—the years in which we were in the black. We were paying down on the accumulated national debt. We were not borrowing from the Social Security trust fund. We now find the bipartisan Congressional Budget Office telling us this red ink will be an astonishing $199 billion. As recently as 2001, we had a surplus of $127 billion.

Mr. President, in 2001—2 years ago—we had a surplus of $127 billion, which followed 3 preceding surplus years in the black. That was responsible budgeting. Some experts now are saying that the 2004 deficit is going to break all records, at over $350 billion, if war expenses and the cost of the Bush tax policies are assumed.

The budget surplus, the paying down of the national debt, and the preservation of the Social Security trust funds—which was what we all had when this administration commenced—have all gone away. The days of not borrowing from the Social Security trust fund are over. We are back. And we are told by the White House budget people at OMB that we will continue to borrow under the President's budget and tax plans out of the Social Security trust fund for the remainder of the decade.

The paying down of the national debt has gone away. The ability to avoid continued high debt service so we can redirect those dollars, instead, to education, to health care, to our veterans, to our military, whatever it might be, has all gone away, because we are going to increasingly pay debt service under the President's budget plan.

The CBO indicates that our Nation will not see a budget surplus again until 2007, and then only if there are no war expenses, no additional tax cuts, and no Medicare prescription drug legislation. We all know that is not going to happen. We are going to have war expenses. We do not know what they will be. We will pay whatever it takes to make sure our men and women in uniform are supported. Whatever the cost is, we will pay it. But the war and the follow-on occupation is likely to cost at least $100 billion.

We know the President has tax cut after tax cut lined up primarily for his wealthiest contributors. And then we know, as well, that we need to move on to prescription drug legislation that is long overdue. We are the only major democratic society in the world that does not have some kind of prescription drug or national health care strategy.

So what we find here is President Bush's proposal to borrow yet another $1 trillion. Now we are not even talking ''B,'' we are talking the ''T'' word. Mr. President, $1 trillion over the coming decade in order to finance Wall Street tax breaks has to be approached with great caution. This seems, to me, to be part of an agenda designed to make it impossible to have strong Federal funding for education, veterans, agriculture, and seniors for generations to come.

This overall strategy strikes me as one that we saw a glimmer of in the 1980s; and that is, a strategy designed to primarily break the Federal Government, to deny all resources. Because when our friends in the far political right try to advance the cause of eliminating Medicare, downsizing Social Security, downsizing or eliminating veterans health care, withdrawing from supporting our schools, getting out of the afterschool and daycare programs, getting away from rural electricity and rural development programs—when they try to do that, they are always met with resistance from the American people, Democrats and Republicans alike.

They have never been able to win that war because Americans want that kind of partnership—that constructive partnership—between Washington and our communities and our States. So in a very cynical tactic, what has been discovered here is that while they cannot win the war on the merits of eliminating that partnership, they can try to break the Government, to deny it the revenue it needs, so that they can come to the American public and say: Well, we would love to support those afterschool programs, we would love to have more police on the beat, we would love to help our fire departments, and we would love to make sure all our young people could afford to go to college or technical programs, but, oh, we are broke; we don't have the money.

That is apparently how some people hope this debate will conclude. They cannot win on the merits of the policy, but what they can try to do is come up with a tax policy that enriches the wealthiest contributors while simultaneously making it increasingly impossible for this Federal Government to live up to its obligations to its people and to build a stronger society, offering more opportunity for every young American—Black, Hispanic, Native American, Caucasian, whoever they might be.

I feel great frustration. I hope the American public understands what really is going on here relative to the President's budget-and-tax agenda. It is a radical agenda. If you don't believe

it is a radical agenda, look at what this President is willing to do, even to the children of our men and women in uniform. It is appalling.

Look at what the President is willing to do to try to stack the court, possibly with ideologues, far outside the mainstream of American jurisprudential thought, to bend the Constitution, to break the Constitution, by bringing nominees to this body who will not share with us their judicial thoughts, who have no scholarly writings, who have no past judicial decisions to look to. They are stealth judges, secret judges.

We cannot allow that to stand. We cannot allow that to happen in our Nation. Our country has been a beacon of democracy, a beacon of openness, a beacon of opportunity. We cannot walk away from that. The Constitution has been the bulwark of making sure that those remain our ideals. For this body to walk away, and to allow for a rubberstamp process to go on, that any individual can come before the Senate Judiciary Committee and the full Senate without the Senate or the committee having any idea who he is or what his agenda really is would be a travesty. It is completely unacceptable.

So, again, I have been proud to work in a bipartisan manner on the confirmation of roughly 100 judges—virtually all conservative Republican judges. But I draw the line here. This is unprecedented, and the constitutional ramifications of what would occur and what precedent would be set would be devastating to this Nation. It would make a mockery of our oath, a mockery of the Constitution, for this body to do anything other than to insist that this nominee share with the body his philosophy relative to legal issues, his jurisprudence.

So I hope we can soon either get to the bottom of who this individual is or move on to other issues that are pressing before our Republic—ranging from health care, education, support of our men and women in uniform. There is much we need to be doing.

Frankly, there is very little pending on the floor at this time, but there is much that ultimately we need to be doing. I hope, in the context of taking on these additional issues, we will do it with fiscal responsibility, which not only involves not succumbing to the temptation to sink our country deeper and deeper and deeper into red ink as far as the eye can see, but also involves correcting President Bush's budget priorities to the degree that we take care of these kids of our military men and women, that we resist the President's temptation to take money away from these schoolhouses in order to give it to Wall Street and to wealthy contributors for political campaigns.

That isn't what we are here for. Those aren't the people we represent. Those aren't the ideals we represent. And this Nation deserves better.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from New Mexico.

MEDICAID

Mr. BINGAMAN. Mr. President, I rise to address two or three issues this afternoon. I very much appreciate the chance to do so. First, let me begin with a subject that is extremely important to my State and to many of our States. That is Medicaid. I want to address two different proposals there. First, there is a proposal the administration has made related to Medicaid.

We don't have a written proposal as yet, but we do have various statements from Secretary Thompson. We had a hearing this morning in the Finance Committee that the Presiding Officer attended, as did I. We have had testimony and oral statements and very brief descriptions, but we do not have a written proposal or even a detailed outline of what might be proposed by the administration. But in what they are proposing, I find some real serious concerns.

The other proposal I want to discuss is one I am working on with Congressman DINGELL—we hope to introduce it probably early next week—entitled ''Saving Our States.'' I will try to describe a little bit each of these.

The Nation's Governors have been here this week. I had the good fortune to speak to them last Sunday at one of their subcommittee meetings on human resources about Medicaid. It is clear that they are under severe stress at this point fiscally. It is estimated the States are facing nearly a $30 billion shortfall this year and an $80 billion shortfall in fiscal year 2004. In my view, it is important that the Federal Government respond to that. We cannot just ignore the fact that a growing number of our citizens are uninsured and that more and more people are being dropped from the Medicaid Program and the SCHIP program.

The Federal Government needs to fundamentally reassess its own role in providing health care and reassess its relationship to the States in this regard. As I indicated, I am working with Congressman DINGELL to prepare legislation to do just that.

Let me talk first about the administration's proposal in very broad terms, as I understand it. It contains two parts. One is a set of reforms where, as the Secretary very eloquently described, it would allow States to adopt the best practices. It would allow States to put more emphasis on preventive care for seniors. It would allow States to have the flexibility they need to meet their particular needs. All of that is, of course, very good public policy, at least as stated in its most general form.

As a general matter, I certainly believe the President and the Secretary will find strong support in Congress for that effort. But the second part of their proposal is the one that gives me concern. That is the restructuring of the financing. This part is much more difficult. What this does is basically say that for optional groups and for optional services—and that is an interesting definition as to what is optional; you will find that most of the services and groups currently covered by Medicaid turn out to be optional, and most of the funding that is currently spent on Medicaid turns out to be funding for optional groups and optional services—States would have the ability to get extra money for the first 7 years if they agreed that they would essentially live by a capped amount of Federal funding from now on. It would be about what they were getting in the year 2000 plus a 9-percent increase per year. That is the basic proposal.

In addition to that, they are saying not only are we going to give the States a little extra money, we will reduce the amount of growth in that portion that the State in fact provides. So this is going to save money for the Federal Government. It will save money for the States.

The one thing that is not discussed and that I have great concern about is the effect on the people who are supposed to be getting the health care services under this program; that is, the low-income children and the seniors.

When you look at these definitions, optional groups, which seniors would you think might be in an optional group? Well, under the definition I have been given, if your income is over 74 percent of the Federal poverty rate, you are in an optional group. That means if your income gets anywhere up over about $7,500 or $8,000 per year, somewhere in that range—and I can get the exact figure—you are in an optional group. That means the total resources going to assist in your health care are being capped and are not going to grow as the population needing those services grows, are not going to grow as the usage of those services grows, are not going to grow as the health care cost of those services grows. We all know that there is growth in all three of those areas. That concerns me greatly.

The other part of this which I can understand and makes it somewhat attractive to Governors, some of the Governors who were here this week, is that the Federal proposal says, if you agree to this, not only do you get a little extra Federal money but the amount of State money that you are going to have to put in is also going to be capped. The growth in that is also going to be capped. In other words, we will be able to save you money in your State budget.

This is great for the States; it is great for the Federal Government. The problem is that the health care services available to low-income children and to seniors in our society are going to be reduced and reduced very substantially over the next 10 years under this proposal. So that has been my concern.

Allow me to cite a couple of quotations from people who have spent

a lot of time studying this. The AARP executive director and CEO, Bill Novelli, has said, in relation to the administration's proposal:

> This proposal handcuffs states because it leaves people more vulnerable in future years as states struggle to meet increased needs with decreased dollars.

Another quote, from the Consortium for Citizens with Disabilities:

> The Bush Administration proposal fails people with disabilities and dishonors the nation's commitment to its residents—it is not in the national interest. . . .What the Medicaid program calls ''optional'' services are, in reality, mandatory disability services for the children and adults who need them. These services often are not only life-saving, but also the key to a positive quality of life—something everyone in our nation deserves.

I believe strongly that the Federal Government at this particular time in our Nation's history should not be stepping away from its commitment to seniors, to people with disabilities, and to low-income children. It should not be leaving the States with the primary responsibility for dealing with growth in the cost of the services to these groups in the future.

The administration will point out that the proposal does provide more funding up front to the States. The proposal is to give $12.7 billion more over the first 7 years to help the States. But there is something of an element of bait and switch in that after the first 7 years, that additional funding goes away.

Secretary Thompson noted in his press conference that is after he has left his position, and I am sure it is after most of the Governors will have left their positions and probably after many of us will have left the Senate. That does not give us an adequate justification for putting in place a system that cuts funding for these vitally needed services in future years.

The administration points out that they are promising the block grant for optional populations in a way that will increase at the same percentages that are projected in its budget. This is difficult to respond to, frankly, until we see a written proposal. We need a written proposal from the administration. We do not have that as yet. We do not have that on the Medicaid subject. We do not have that on Medicare either. And I hope those will be forthcoming soon because they are extremely vital programs for all of our States.

Let me also talk a little about the proposal that I have, along with Congressman DINGELL, that we are going to introduce next week. And I will go into more detail about it next week.

Our idea is that there are certain groups that receive health care services under Medicaid, where the Federal Government needs to step up and pay the full cost of those services—or something very close to the full cost. One such group is so-called dual eligibles. These are people who are eligible for Medicare benefits, but are also low income enough that they are eligible for Medicaid at the same time.

Current law says for those who are covered under the Medicaid law the States pay the lion's share of that cost. We are saying the States should not have to pay the lion's share of that cost. This is something where these folks have become eligible for Medicare. We should be paying 100 percent of that cost at the Federal level.

Another group the Federal Government should be underwriting the cost of providing services for are illegal immigrants who come to our health care providers needing emergency attention. Here you can get into quite a philosophical argument as to whether or not these services should be provided. The reality is, if you are a doctor, if you are working in an emergency room and someone shows up who needs emergency care, you are obligated under your Hippocratic oath and the laws of decency, basically, to provide that care, if you are able to do so. To turn a person away because they do not have the right health insurance coverage, or they cannot demonstrate to you their financial solvency, when their circumstance is critical, is just not the way we should do business.

The question is, Once that person has come into that emergency room and asked for that emergency care, who should reimburse the hospital for it? Who should pay the cost of that physician? At the current time, the States are picking that up, or the counties are picking that up, or the health care providers themselves are doing this on a pro bono basis. The reality is the Federal Government should be responsible for that, and we are proposing that in our legislation.

Another group, of course, is Native American citizens. We have a great many Native Americans in my home State. The Federal Government should be stepping up to its responsibility to ensure that health care for these individuals is provided. We propose that as part of our proposal for saving our States as well.

I will have another chance to talk this ''saving our States'' proposal when we introduce it early next week. I very much wanted to make reference to it today and indicate my great concern about the proposal I understand the administration is about to present to us. The truth is, the cost of providing health care is very high, and it is not getting any cheaper. We need to budget that in and we need to acknowledge that and we need to recognize that as a matter of public policy in this country, we should provide that basic care to seniors, to low-income children, to those who are disabled. The Medicaid Program does that. We need to keep the Medicaid Program sound and not undermine it by rationing back on the dollars we are willing to spend on those basic services.

SOUTHWEST REGIONAL BORDER AUTHORITY ACT

Mr. President, let me also talk about a bill I introduced yesterday. This is a bill entitled Southwest Regional Border Authority Act. We offered this same bill last May. I am very pleased this year I am joined by Senator KAY BAILEY HUTCHISON, and also Senator BARBARA BOXER. This legislation would create an economic development authority for the Southwest border region that would be charged with awarding grants to border communities in support of local economic development projects. The need for a regional border authority is acute. The poverty rate in the Southwest border region is over 20 percent, nearly double the national average of 11.7 percent. The unemployment rate in Southwest border counties can reach as high as six times the national unemployment rate. The per capita personal income in the region is greatly below the national average. In many border counties, the per capita personal income is less than 50 percent of the national average. There is a lack of adequate access to capital that has made it difficult for businesses to get started in this region.

In addition, the development of key infrastructures, such as water, waste water, transportation, public health, and telecommunications—all of these areas of infrastructure need have failed to keep pace with the population explosion and the increase in commerce across our border with Mexico.

Mr. President, the counties in the Southwest border region are among the most economically distressed in the Nation. It should be noted that there are only a few such regions of economic distress throughout the country. Virtually all of the other regions that face this same economic distress are, in fact, served by regional economic development commissions today. These commissions include the Appalachian Regional Commission, the Delta Regional Authority, the Denali Commission in Alaska, and the Northern Great Plains Regional Authority.

In order to address the needs of the border region in a similar fashion, we are proposing this Regional Economic Commission for the Southwest border. The bill is based on four guiding principles.

First, it starts from the premise that people who live on the Southwest border know best when it comes to making decisions as to how to improve their own communities.

Second, it employs a regional approach to economic development and encourages communities to work across county and State lines where appropriate. All too often in the past, the efforts to improve our region have hit roadblocks as a result of poor coordination and communication between communities.

Third, it creates an independent agency, meaning it will be able to make decisions that are in the best interest of the border communities, without being subject to the politics of Federal agencies.

Finally, it brings together representatives of the four Southwest border States and the Federal Government as partners to work on improving the

standard of living for people living on the border.

This is not just another commission, and it is certainly not just another grant program. I believe this Southwest regional border authority not only will help leverage new private sector funding, it will also help to better target the Federal funds that are available to those projects that are most likely to produce results.

The legislation accomplishes this through a sensible mechanism of development planning. The purpose of the planning process is to ensure that priorities are reflected in the projects funded by the authority. It also is to provide flexibility to the authority to fund projects that are regional in nature.

I think the process has various advantages, and there are great benefits that can be derived from setting up this border authority. I believe very strongly this legislation is overdue. It is something that should have happened several years ago. For too long, the needs of the Southwest border have been ignored, overlooked, and underfunded.

I am confident the creation of a Southwest regional border authority not only will call attention to the great needs that exist on the border, but will help us to meet those needs. I urge my colleagues to give attention to this legislation that we have introduced. I hope other colleagues will choose to support it. I hope we can have a hearing on it in the near future and move the legislation through the Senate and through the House to the President for signature.

Mr. President, let me say a few words about the Estrada nomination as well. I know that is a subject of great concern to many on both sides of the aisle. I have taken some time in the last couple of days to review the transcript of the testimony that Mr. Estrada gave in the Judiciary Committee.

I have been struck by his position, as stated numerous times in that testimony, that he was not willing to share his views on any issue related to judicial philosophy or court decisions with the committee.

I was particularly struck by the discussion he had with our colleague, Senator SCHUMER. Senator SCHUMER was asking about Mr. Estrada's earlier statement that he saw as part of his job working for Justice Kennedy recommending law clerks and asking them questions, of course, interviewing them before he made the recommendation.

Senator SCHUMER said:

> Isn't it appropriate that you would ask those questions? Isn't it also appropriate that we would be asking you some questions to try to determine your views?

Mr. Estrada said in response to that question:

> Questions that I asked in doing my job for Justice Kennedy were intended to ascertain whether there were any strongly felt views that would keep that person from being a good law clerk to the Justice.

That is entirely appropriate, in my view, and a very well-stated position. That, in my view, is the exact job we have to perform as we screen and consider the various nominees for Federal court positions that the President sends us. We need to determine whether they have any strongly felt views that would keep them from being good members of the Court of Appeals for the District of Columbia, good members of the district court, or good members of the Supreme Court.

My own position is that I am willing, and have demonstrated many times on the Senate floor my willingness, to support conservative nominees to the court. I believe many of those people are making excellent judges in our Federal court system. But I also want to be sure their views on issues that relate to their duties are mainstream, that they are not extreme. The only way I know to carry out that responsibility is to ask some questions to determine whether they have strongly felt views, as Mr. Estrada said, that would keep them from being, as he said in the case he was referring to, a good law clerk to the Justice.

In the Senate, when we are considering people for lifetime appointments to the Federal judiciary, we have a heavier responsibility to be sure there are no strongly held views that would keep these individuals from being good judges in our Federal court system for the remainder of their lives. That is what I believe we should be trying to do. I think that is what many members of the Judiciary Committee were trying to do in the hearing that took place on Mr. Estrada.

His view was that he would not respond to questions that were put to him about any such views, and he repeatedly said he did not think it was appropriate for him to comment on any personal views he might have. Since, of course, he would not comment on his personal views, there is no way to determine whether any of them are extreme.

I do not think that is an adequate carrying out of responsibilities by the Judiciary Committee. I do not think it is an adequate carrying out of responsibilities by the Senate. And I think we do need more information. That has been my position. Before we move ahead with this nomination, we should get more information.

I hope the Judiciary Committee will consider reconvening a hearing, once again providing the nominee with an opportunity to respond, as other nominees have traditionally responded. That is all we are asking, not that he give us information others were not asked to give or others did not give, but that he essentially provide basic information.

He may express some views with which I do not agree. That is fine. Many judges for whom I have voted also, I believe, expressed views with which I did not agree. At least I was confident their views were not extreme. At least I was confident their views were mainstream and that they were within the mainstream as far as their conception of where the law is and where the law ought to go.

I hope very much we can get the additional information we have been asking for and can proceed to dispose of this nomination. That would be my great hope. I do not know what the intent of the majority leader is at this point or the intent of the Judiciary Committee. I hope we can proceed in that manner.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. REID. Mr. President, last evening, there was a lot of talk about whether memos at the Solicitor General's Office had ever been made public. I am going to talk about that, but I think we should put this whole debate involving Miguel Estrada in a framework that people who are watching the debate who are not familiar with Senate procedure can better understand what is going on.

In effect, Miguel Estrada has asked his employer, the Federal Government, to give him a job to last for life. As with any job, one usually has to have an interview. In this instance, in addition to an interview, you bring whatever papers you have, whether it is a resume or other documents that your employer may want to find out if you should be hired. In the instance of Miguel Estrada, he simply has not filled out the requisite papers, he has not answered the questions or supplied the necessary information.

An employer in Nevada, whether a company that sold tires or a company that sold food—it would not matter what it is—if somebody applied for a job, they would have to answer the questions that employer asked and give the requisite papers. In this instance, Democratic members of the Judiciary Committee believe he has not answered the questions. By reading the transcript, it is quite clear that is true.

But yesterday, the distinguished Senator from Utah, Mr. HATCH, engaged in extensive discussion regarding the release of Solicitor General memoranda. As everyone by this time knows, we have asked that Miguel Estrada release memos he wrote while he was an attorney in the Solicitor General's Office. The administration has refused to provide these documents.

There are two basic charges raised by my distinguished colleagues on the other side of the aisle about these memoranda: First, the distinguished chairman of the committee, Senator HATCH, has argued that when such

memos were provided in the past, they were leaked.

My colleague argued that they have never, ever been given to anyone on Capitol Hill.

Second, he qualified his remarks by saying to the extent memos had been provided, they were provided because there was some allegation of improper behavior by the nominee in connection with the memo.

I will place in the RECORD a series of correspondence between the Judiciary Committee and the Justice Department from 1987 that demonstrates in fact such documents were provided. This is only one instance. These letters show that these memoranda were not leaked. They show that they were in fact provided freely by the Justice Department.

In a letter dated August 10, 1987, then Judiciary Committee Chairman BIDEN set forth a request for several types of documents relating to the nomination of Judge Bork to the Supreme Court. In the letter, Senator BIDEN requested four classes of Bork-related memos: He requested those that related to the Watergate controversy; second, all documents generated or involving Solicitor General Bork relating to the constitutionality, appropriateness, or use of the pocket veto; third, all documents generated to or involving then Solicitor General Bork regarding school desegregation; fourth, all documents generated to or involving then Solicitor General Bork in forming the U.S. position in a series of specific cases.

These requests involved memoranda provided by attorneys in the Solicitor General's Office to the Solicitor General recommending such things as whether to file amicus briefs in particular cases.

In this instance, what happened to Senator BIDEN's request? Well, in fact a letter came to him dated August 24 from then Republican Assistant Attorney General Bolton to Democratic Senator JOE BIDEN. In that letter, the Justice Department declined to provide documents relating to the Watergate controversy. This denial of documents was based on executive privilege. The documents involved did not include Bork but, rather, related to communications between and among close advisers to the President and the President.

Yesterday, Senator CRAPO made reference to the fact that some documents were not turned over to the committee during this time. While it is true that the Watergate documents were not turned over, and this is based on executive privilege, that does not affect our debate. Solicitor General memoranda from Estrada to his supervisors are not covered by executive privilege. No one has ever claimed they are.

In 1987, however, the Justice Department did provide the other documents I described above which were requested in the Biden letter. In these materials, the Justice Department noted in the letter: The vast majority of the documents that have been requested reflect or disclose internal deliberations within the executive branch. We wish to cooperate to the fullest extent with the committee and to expedite Judge Bork's confirmation process. The letter concludes that the documents referred to above would be provided. The letter confirms the nature and circumstances under which the Solicitor General memoranda were provided to the Judiciary Committee during Bork's hearings.

So what about the argument that to the extent memoranda have been provided, they were only provided when the request alleged misconduct or malfeasance on the part of the nominee or other attorneys involved in the matter? This simply is not true.

I have a list of internal attorney memoranda provided during the Bork, Reynolds, and Rehnquist nominations. These documents, some of which are from the Solicitor's Office, others from other parts of the Justice Department, were made public and given to Senator BIDEN, and in other instances given to others. For example, all documents related to school desegregation between 1969 and 1977 relating to Bork in any way, there was no allegation of misconduct; documents related to Halpren v. Kissinger, no allegation of misconduct.

I have about 14 of these that were made a part of proceedings before the Senate.

I ask unanimous consent that this list be printed in the RECORD.

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

All documents related to school desegregation between 1969 and 1977 relating to Bork in any way (disclosure included, among others, the SG Office memos about *Vorcheimer* v. *Philadelphia*, known as ''the Easterbrook memo''; *United States* v. *Omaha; United States* v. *Demopolis City* (school desegregation in Alabama)): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Documents related to *Halperin* v. *Kissinger* (civil suit for 4th Amendment violations for wiretapping): No allegation of misconduct or malfeasance by the nominee.

Memos about whether to file an amicus brief in *Hishon* v. *King & Spaulding* (gender discrimination at a law firm): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos regarding *Wallace* v. *Jaffree* (school prayer in Alabama): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about Congressional reapportionment in Louisiana and one-person, one-vote standard: No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos regarding possible constitutional amendment in 1970 to overturn *Green* v. *New Kent County*, and preserve racial discrimination in Southern schools: No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memo of November 16, 1970 from John Dean: No allegation of misconduct or malfeasance by the nominee.

Memos of William Ruckelshaus of December 19, 1969 and February 6, 1970: No allegation of misconduct or malfeasance by the nominee.

Memos of Robert Mardian of January 18 1971: No allegation of misconduct or malfeasance by the nominee.

Memos of law clerk to Justice Jackson: No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about whether or not to seek Supreme Court review in *Kennedy* v. *Sampson* (pocket veto): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about *Hills* v. *Gautreaux* (racial discrimination in housing in Chicago): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about *DeFunis* v. *Odegaard* (affirmative action program at the University of Washington law school): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about *Morgan* v. *McDonough* (public school desegregation in Boston): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about *Pasadena* v. *Spengler* (public school desegregation): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about *Barnes* v. *Kline* (military assistance in El Salvador): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Memos about *Kennedy* v. *Jones* (pocket veto and the mass transit bill and bill to assist the disabled): No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Documents related to Supreme Court selection process of Nixon and Reagan: No allegation of misconduct or malfeasance by the nominee or anyone else at the Justice Department.

Mr. REID. I say respectfully that the statements made by the distinguished Senator from Utah were without basis of fact. Here we have records that were not leaked, they are directly as we said they were last night. We were unable to get the floor, but in fact that is what the story was.

So now that we do have the floor, I ask unanimous consent that the letter dated August 10, 1987, to Attorney General Ed Meese from JOSEPH BIDEN be printed in the RECORD.

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

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

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

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

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

Thank you for your cooperation.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Chairman.

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

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

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

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

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

b. the dismissal of Archibald Cox as Special Prosecutor;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GUIDELINES

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

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

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

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

Mr. REID. Mr. President, this outlines seven pages of documents he wants and certain guidelines that would be followed so that the Attorney General's Office would be protected.

In addition, I ask unanimous consent that a letter dated August 24 of that same year to JOSEPH R. BIDEN from Mr. Bolton, the Assistant Attorney General, be printed in the RECORD.

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

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

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

DEAR CHAIRMAN BIDEN: This responds further to your August 10th letter requesting certain documents relating to the nomination of Judge Robert Bork to the Supreme Court. Specifically, this sets forth the status of our search for responsive documents and the methods and scope of review by the Committee.

As we have previously informed you in our letter of August 18, the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below, completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents. The results of this effort are as follows:

In response to your requests numbered 1–3, we have conducted an extensive search for documents generated during the period 1972–1974 and relating to the so-called Watergate affair. We have followed the same procedure, in response to request number 4, for all documents relating to consideration of Robert Bork for the Supreme Court by President Nixon or his subordinates. We have completed our search of relevant Department of Justice and White House files for documents responsive to these requests. The Federal Bureau of Investigation also has completed its search for responsive documents, focusing on the period October–December 1973 and on references to Robert Bork generally.

Most of the documents responsive to requests numbered 1–4 are in the possession of the National Archives and Records Administration, which has custody of the Nixon Presidential materials and the files of the Watergate Special Prosecution Force. The Archives staff supervised and participated in the search of the opened files of the Nixon Presidential materials and the files of the Watergate Special Prosecution Force, which was directed to those files which the Archives staff deemed reasonably likely to contain potentially responsive documents.

Pursuant to a request by this Department under 36 C F.R. 1275, the Archives staff also examined relevant unopened files of the Nixon Presidential materials, and, as required under the pertinent regulations, submitted the responsive documents thus located for review by counsel for former President Nixon. Mr. Nixon's counsel, R. Stan Mortenson, interposed no objection to release of those submitted documents that (a) reference, directly or indirectly, Robert Bork, or (b) were received by or disseminated to persons outside the Nixon White House. Mr. Mortenson on behalf of Mr. Nixon objected to production of the documents which are described in the attached appendix. Mr. Mortenson represents that these documents constitute purely internal communications within the White House and contain no direct or indirect reference to Robert Bork.

Mr. Mortenson also objected on the same grounds to production of unopened portions of two documents produced in incomplete form from the opened files of the Nixon Presidential materials:

1. First page and redacted portion of fifth page of handwritten note of John D. Ehrlichman dated December 11, 1972.

2. All pages other than the first page of memorandum from Geoff Shepard to Ken Cole dated June 19, 1973.

Mr. James J. Hastings, Acting Director of the Nixon Presidential Materials Project, has reviewed these two documents and has advised us that the unopened portions of neither document contain any direct or indirect reference to Judge Bork.

Our search has not yielded a copy of the document referenced in paragraph ''a'' of your request numbered 3, which, as you correctly note, is printed at pages 287–288 of the Judiciary Committee's 1973 ''Special Prosecutor'' hearings.

Among the documents collected by the Department are certain documents generated in the defense of *Halperin* v. *Kissinger*, Civil Action No. 73–1187 (D. D.C.), a suit filed against several federal officials in their individual capacity, which remains pending. The Department has an ongoing attorney-client relationship with the defendants in *Halperin*, which precludes us from releasing certain documents containing client confidences and litigation strategy, without their consent. 28 C F.R. 50.156(a)(3).

All documents responsive to request number 5, concerning the pocket veto, have been assembled.

All documents responsive to request number 6 have been assembled. The exhibits filed by counsel for Edward S. Miller on July 12, 1978 and referred to in your August 10 letter, remain under seal by order of the United States District Court for the District of Columbia. However, a list of the thirteen documents has been unsealed. We have supplied copies of eleven of these documents, including redacted versions of two of the documents (a few sentences of classified material have been deleted). We have supplied unclassified versions of two of these eleven documents, as small portions of them remain classified. We are precluded by Rule 6(e) of the Rules of Criminal Procedure from giving you access to two other exhibits—classified excerpts of grand jury transcripts—filed on July 12, 1978. We also searched the files of several civil cases related to the Felt and Miller criminal prosecution, as well as the documents generated during the consideration of the pardon for Felt and Miller.

With respect to request number seven, Judge Bork has previously provided to the Committee a number of his speeches, which we have not sought to duplicate. We have sought and supplied any additional speeches, press conferences or interviews by Mr. Bork, as well as any contemporaneous documents which tend to identify a date or event where he gave a speech or press interview during his tenure at the Department.

On request number eight, there are no documents in which President Reagan has set forth the criteria he used to select Supreme Court nominees, or their application to Judge Bork, other than the public pronouncements and speeches we have assembled.

Our search for documents responsive to request number nine has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files in every case handled by the Civil Rights Division or Civil Division, between 1969–77, which concerned desegregation of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled some responsive documents obtained from other Department files. The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW.

We have assembled case files for the cases referred to in question ten, with the exception of *Hill* v. STONE, for which there is no file. We have no record of the participation of the United States in *Hill* v. *Stone*, or consideration by the Solicitor General's office of whether to participate in that case.

A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession.

As you know, the vast majority of the documents you have requested reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities. For these reasons, the Justice Department and other executive agencies have consistently taken the position, in response to the Freedom of Information Act and other requests, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications.

On the other hand, we also wish to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process. Accordingly, we have decided to take the exceptional step of providing the Committee with access to responsive materials we currently possess, except those privileged documents specifically described above and in the attached appendix. Of course, our decision to produce these documents does not constitute a waiver of any future claims of privilege concerning other documents that the Committee request or a waiver of any claim over these documents with respect to entities or persons other than the Judiciary Committee.

As I have previously discussed with Diana Huffman, the other documents will be made available in a room at the Justice Department. Particularly in light of the voluminous and privileged nature of these documents, copies of identified documents will be produced, upon request, only to members of the Judiciary Committee and their staff and only on the understanding that they will not be shown or disclosed to any other persons. Please have you staff contact me to arrange a mutually convenient time for inspection of the documents.

As I stressed in my previous letter, if the Committee is or becomes aware of any documents it believes are potentially responsive but have not been produced, please alert us as soon as possible and we will attempt to locate them.

Should you have any questions or comments, please contact me as soon possible. Thank you for your cooperation.

Sincerely,

LAURA WILSON
(for John R. Bolton, Assistant Attorney General)

APPENDIX

DOCUMENTS SUBJECT TO OBJECTION BY MR. NIXON'S COUNSEL

1. Memorandum to Buzhardt and Garment, from Charles Alan Wright, January 7, 1973. Subject: June 6th meeting with the Special Prosecutor. (Document No. 8)

2. Memorandum to Buzhardt and Garment, from Charles Alan Wright, January 7, 1973. Subject: June 6th meeting with the Special Prosecutor. (Document No. 9)

3. Memorandum to Garment, from Ray Price, July 25, 1973. Subject: Procedures re: Subpoena. (Document No. 13)

4. Memorandum to General Haig, from Charles A. Wright, July 25, 1973. Subject: Proposed redrafts of letters. (Document No. 14)

5. Draft letter to Senator Ervin, dated July 26, 1973. Subject: two subpoenas from Senator Ervin. (Document No. 15)

6. Draft letter to Judge Sirica, dated July 26, 1973. Subject: subpoena duces tecum. (Document No. 16)

7. Memorandum to The Lawyers, from Charlie Wright, dated July 25, 1973. Subject: Thoughts while shaving. (Document No. 17)

8. Memorandum to The President, from J. Fred Buzhardt, Leonard Garment, Charles A. Wright, dated July 24, 1973. Subject: Response to Subpoenas. (Document No. 18)

9. Memorandum to Ray Price, from Tex Lezar, dated October 17, 1973. Subject: WG Tapes. (Document No. 20)

10. Memorandum to Leonard Garment and J. Fred Buzhardt, from Charles A. Wright, dated August 3, 1973. Subject: Discussions with Philip Lacovara. (Document No. 25)

11. Memorandum to the President, from Leonard Garment, J. Fred Buzhardt, Charles A. Wright, dated August 2, 1973. Subject: Brief for Judge Sirica. (Document No. 26)

12. Memorandum to Len Garment, Fred Buzhardt, Doug Parker and Tom Marinis, From Charlie Wright, dated August 1, 1973. Subject: note regarding brief. (Document No. 27)

13. Memorandum to The President, from J. Fred Buzhardt, Leonard Garment and Charles A. Wright, dated July 24, 1973. Subject: Response to Subpoenas. (Document No. 28)

14. Draft letter to Senator Ervin, dated July 26, 1973. Subject: two subpoenas issued July 23rd. (Document No. 29)

15. Draft letter to Judge Sirica, dated July 26, 1973. Subject: subpoena duces tecum. (Document No. 30)

16. Memorandum to J. Fred Buzhardt, Leonard Garment and Charles Alan Wright, from Thomas P. Marinis, Jr. (undated). Subject: Appealability of Cox Suit. (Document No. 31)

17. Notes (handwritten) (undated). Subject: [appears to be notes of oral argument]. (Document No. 32)

18. Memorandum to The President, from Charles Alan Wright, dated September 14, 1973. Subject: Response to Court's memorandum. (Document No. 34)

19. Handwritten notes. (Document No. 36)

20. Memorandum to J. Frederick Buzhardt, from Charles Alan Wright, dated June 2, 1973. Subject: Executive privilege. (Document No. 41)

21. Memorandum to J. Frederick Buzhardt and Leonard Garment, from Charles Alan Wright, dated June 7, 1973. Subject: June 6th meeting with Special Prosecutor. (Document No. 42)

22. Memorandum to J. Fred Buzhardt from Robert R. Andrews, dated June 21, 1973. Subject: Executive Privilege. (Document No. 43)

23. Memorandum to J. Fred Buzhardt and Leonard Garment, from Thomas P. Marinis, Jr., dated June 20, 1973. Subject: Professor Wright's attempt to obtain document. (Document No. 44)

24. Memorandum to J. Fred Buzhardt and Leonard Garment, from Charles Alan Garment (sic), dated June 7, 1973. Subject: June 6th meeting with the Special Prosecutor. (Document No. 46)

25. Draft letter to Senator, from Alexander Haig, dated December 12, 1973. Subject: Response to letter of the 5th. (Document No. 60)

26. Draft Letter to Senator, from Alexander Haig, dated December 12, 1973. Subject: Response to letter of the 5th. (Document No. 61)

27. Proposal re: transcription of tapes, dated October 17, 1973. (Document No. 63)

28. Typed note with handwritten notation: Sent to Buzhardt 12/11/73, undated. Subject: papers Buzhardt sent to Jaworski. (Document No. 66)

29. Chronology—Presidential Statements, Letters, Subpoenas, dated March 12, 1973. Subject: chronology of same. (Document No. 71)

30. Handwritten note, dated 1/31/74 (January 31, 1974). Subject: Duties and responsibilities of Special Prosecutor. (Document No. 82)

31. Memorandum to Fred Buzhardt, from William Timmons, dated 7/30/73 (July 30, 1973). Subject: refusal to release taped conversations. (Document No. 91)

32. Memorandum to Fred Buzhardt, from Paul Trible, dated October 30, 1973. Subject: Cox's diclosure of Kleindienst's confidential communication. (Document No. 92)

33. Proposal regarding transcription of tape conversations, dated 10/17/73 (October 17, 1973). (Document No. 94)

Mr. REID. These clearly indicate that Bolton acknowledged materials would be forthcoming.

The reason these are important is that we have said this man who has no judicial record whatsoever—and I heard the distinguished Presiding Officer give a statement yesterday about the many judges who have been distinguished who have not had judicial experience. We have never debated that. We agree, one does not have to have judicial experience to be a good judge. If that were the case, there would never be any good judges, quite frankly. Somebody has to start someplace. In fact, we would never have judges. That is what is referred to as a red herring.

We have never alleged that Miguel Estrada is disqualified from being a judge because he has not been a judge. That is something that the majority has talked about a lot, but we have never raised that as an issue.

What we have said is that those instances where we can learn something about his political philosophy and his philosophy as it relates to jurisprudence, we need to know something about that. The only place we can go to look is in relation to when he worked at the Solicitor's Office because he has not answered the questions we have asked him about the cases he prepared and took to trial when he was an Assistant Attorney General or when he argued cases before appellate courts.

As I have said on a number of different occasions, I have been to court lots of times. I have represented all kinds of different people. In all the cases I took, when I argued a case before a jury and before a court, one could not find out what my political or judicial philosophy was. The reason was I was being paid to represent somebody and carrying out my responsibilities as a lawyer.

So the fact that he has been before the Supreme Court and other appellate courts and has tried cases adds to someone's capabilities, but it does not allow us to find out about a person who is going to the second highest court in the land, if he passes this test. That is not enough. We need to know something about him. That is the reason we have raised these issues.

One thing my friend from Vermont raised, and I thought it was so good last evening: One does not have to graduate first in their class at Harvard to be a judge, but we heard assertions that Miguel Estrada has graduated first in his class. He has not. But he could graduate last in his class. He went to Harvard, which is one of the top two or three law schools in the entire country. The mere fact he went to Harvard means he is really smart.

He did not graduate first in his class. He was not editor of the Law Review. He was, with 71 other men and women at Harvard, part of the Law Review. He was 1 of 71. That is a pretty large group. As I have indicated, they are all smart.

The fact that he was an editor adds to his qualifications, but do not try to puff him up to make him something that he is not. He was not editor of the Law Review.

I think we are off on a lot of tangents. As Senator HATCH laid out so clearly last night, I think it is tremendous that a man came from Central America when he was 17 years old, went to Columbia University, also a school that is hard to get in, so he must have done well on his tests. I think it is tremendous that he was able then to go to Harvard. But let's not try to make this a rags-to-riches story because it was not. He did well, and that is tremendous. He is an immigrant to this country who has done well academically, but let's not build this up to some kind of a Horatio Alger story as some have said. I think the guy has done very well, and that is commendable. But we have heard all of these assertions that he graduated first in his class and he was editor of the Law Review, which is not true. It does not take away from what a smart man he must be.

We heard a lot last night, with Senators asking questions of Senator HATCH about all the editorials from around the country. Of course, there are lots of editorials that oppose Miguel Estrada. There is no need to read all of them, but I would like to read one from the New York Times. It may only be one newspaper, but the circulation makes up for a lot of smaller newspapers.

This editorial is 411 words long and is entitled ''Full Disclosure for Judicial Candidates.''

The Constitution requires the Senate to give its advise and consent on nominees for federal judgeships. But in the case of Miguel Estrada, the Bush administration's choice for a vacancy on the powerful United States Court of Appeals for the District of Columbia Circuit, the Senate is not being given the records it needs to perform its constitutional role. The Senate should not be bullied into making this important decision in the dark.

Mr. Estrada, who has a hearing before the Senate Judiciary Committee tomorrow, has made few public statements about controversial legal issues. But some former colleagues report that his views are far outside the legal mainstream.

The best evidence of Mr. Estrada's views is almost certainly the memorandums he wrote while working for the solicitor general's office, where he argued 15 cases before the Supreme Court on behalf of the federal government. In these documents, he no doubt gave his views on what position the government should take on cases before the Supreme Court and lower federal courts. Reading them would give the Senate insight into how Mr. Estrada interprets the Constitution, and in what direction he believes the law should head.

There are precedents for this. When Robert Bork was nominated to the Supreme Court in 1987, the Senate was given access to memos prepared while he was solicitor general. The administration has no legal basis for its refusal to supply these documents. Congress has oversight authority over the solicitor general's office, which is part of the Justice Department, and therefore has a right to review its records. Attorney-client privilege and executive privilege are inapplicable for many reasons, including their inability to override the Senate's constitutional duty to investigate fully this judicial nomination.

This is an administration that loves secrecy, on issues ranging from the war in Iraq to Vice President Dick Cheney's energy task force. And it seems to think that if Congress is ignored, it will simply go away. Congress must insist on getting the documents it needs to evaluate Mr. Estrada, and it should not confirm him until it does.

There are three things that can be done and we have been saying this for the 3 weeks we have been on this matter. No. 1, pull the nomination. What does that mean? That means go to something else. No. 2, try to invoke cloture. File a motion to invoke cloture and to do that you need 60 votes. That certainly is within the framework of the Senate for these many years. I also recognize the other way to do this is for Mr. Estrada to come before the Senate and answer the questions that we ask and also supply the memoranda that the New York Times says he should supply. That would be the way to get over this.

We have had now for several days statements made that we should not be on this, that Miguel Estrada is making hundreds of thousands of dollars a year as a lawyer, fully employed at a large law firm here in Washington, DC. We believe that for the many people who are unemployed, the many people who have lost their jobs, 2.8 million during the 2 years of this administration, we should be dealing with those people who are not employed and underemployed people with no health insurance or who are underinsured, people who are trying to make it educationally and otherwise in this society. That is what we should be dealing with. Rather than spending 3 weeks on a man who is fully employed, making hundreds of thousands of dollars a year, we think we should get off this and go to something else.

We are, as has been indicated, here for the duration. If the majority decides they would rather spend the Senate's valuable time on Miguel Estrada, they can do that. But I say that idle time is time we cannot make up later. There is a limited amount of time and a limited amount of legislative days that we have. We could be going to something else.

These filibusters occur very infrequently. I have been here more than two decades now and filibusters are very rare. Once in a while you have to stand for what you believe is right. As the New York Times indicated, we believe we are right.

Now, there was a lot of name calling last night. Both my friend from Colorado and my friend from Tennessee have the absolute right to voice their opinion. I don't think any less of Members for voicing opinions because they disagree with me. I don't think this is the time to name call. We have an actual factual dispute in the Senate. It is now in a procedural bog. We have to figure a way out of this. It should be a debate that is worthy of the traditions of the Senate. That is what this is all about. The Senate traditionally has had debate we read about in our history books. That is what I want the people who read about this debate to see in years to come—not calling each other names, negative in nature but, rather, referring to a person's position as one of conviction.

I listened to the speech of the Presiding Officer who indicated he would wait until next Tuesday to give his maiden speech, but he felt so passionate—that is my word, not his—about this issue that he wanted to give it a few days early. More power to the Senator from Tennessee. That is certainly fine. That is tremendous that the Senator from Tennessee made his speech and he feels strongly about the issue. It does not mean I have to agree with him. But I admire and respect his position.

Everyone on the other side should understand we also have conviction and feel passionately about this issue, and sometimes there are stalemates. This may be one of those. There may be a very tough decision that the majority leader has to make to pull this nomination. If he wants to go through a cloture vote, second cloture vote, a third cloture vote, eat up more time of the Senate, we are here. We are here for the duration. I don't think because we are involved in this debate that people suddenly need to say the Senate will never be the same. Of course it will be the same. We survived the filibuster with the Abe Fortas nomination. We survived that. It was very tough at the time. I watched that from the sidelines. We survived the filibusters conducted against President Clinton's nominees. The problem the Republicans had at that time, they did not have enough votes to stop cloture from being invoked because there were Republicans of good will who decided it was the wrong thing to do. That is good.

The fact there were filibusters and some people felt so strongly is hard to comprehend, but even after the filibuster was ended with the cloture vote then people still moved to postpone that nomination. It went that far.

The Senate survived that. And the Senate will survive this little dustup that is going on here.

The point I am trying to make, let's feel good about other people's positions. You do not have to be mean spirited about someone disagreeing with you. I hope, however long this debate takes, whether it is ended today, Friday, next week, or a month from now, that people will speak well about each other in the Senate and not resort to name calling. That is not good at all.

I hope we can move on to some of the other important issues now facing this country.

The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Colorado.

Mr. ALLARD. Mr. President, I stand in support of Miguel Estrada, and the need for a vote on his nomination. I listened to the comments of my colleague from Nevada, and I ask myself, what is this debate really about? The debate is about whether a majority of Senators should have the opportunity to voice their opinion through a vote on Miguel Estrada. I, for one, feel like I have adequate information. There is more than a majority of Senators in this body who obviously feel they have adequate information to take a vote on Miguel Estrada.

This filibuster is unprecedented. We have never had a filibuster of this nature before on a circuit court judge up for consideration before this body. I think it is time we recognize that in the Constitution there is an advise and consent provision. Many of us feel the debate has reached the point where enough questions have been asked and now the full body of the Senate is ready to proceed to a vote.

When a judge starts through the nomination process, he is introduced to the Senate through resolution. The nomination goes to the committee. There is also a process where individual Senators can express their concerns through a blue slip process. Then there are hearings and votes in committee, and then the nomination comes to the floor for a vote.

Miguel Estrada has gone through this process. He has even received the highest recommendation from the American Bar Association. That is a body of peers, peers he has done business with on a regular basis, who understand his

record, who know him personally, and who appreciate and respect his professional competence to the point they are willing to give him the highest rating the American Bar Association will give to any nominee.

I think he has a great story. He came to this country with a limited English language ability at the age of 17. He could speak Spanish hardly any English at all. If you come here at 17 and don't know the language and you graduate from a university magna cum laude and then go and serve on the Harvard Law Review—it is simply an outstanding academic accomplishment.

This individual's accomplishments did not stop with graduation; they continued through his professional life. Not just anybody gets to argue before the Supreme Court of the United States. That is a select group of people. So as far as I am concerned, let's simplify this debate, as my colleague suggested. Let's have a vote. That is what we are talking about. Let's just bring up Miguel Estrada for a vote in the Senate. I think it is time. I think a lot of debate has been going on. There are some differences of opinion about things that can be argued about. But if we have a vote, each individual Senator has an opportunity to make up his or her mind as to how they feel, as to whether or not there is enough information, to make up their minds as to whether they think this is the quality of person they would like to have on the DC Court of Appeals.

The assistant Democratic leader suggested there are three ways to resolve this problem. He said we can pull the nomination, file cloture, or submit the nominee to additional questioning. I suggest another: To do what we do for most nominees; that is, have the debate, which we are having and have done, set a time certain for a vote, which the other side simply has refused to do, and then vote up or down. Unfortunately, they are not going to permit that to happen.

Last night I joined a majority of my colleagues to display our unity in support for Miguel Estrada, a display of support that is particularly important in the midst of this Democrat-led filibuster. But last night was more than just a display. It was an attempt to break the logjam, a good will invitation to carry out the Senate's duties as commanded by the advice and consent clause of the Constitution. My colleagues and I gathered here on the floor last night, ready to act. A majority of this body is willing to move forward on the nomination of Miguel Estrada by taking a simple up-or-down vote. That is all we are asking for, a simple up-or-down vote on a nominee who is more than qualified to assume the judgeship of the DC Circuit Court, the second most important court in the United States.

Hoping to proceed, my colleagues and I participated in a dialog with Chairman HATCH, a back-and-forth exchange of questions and answers. I admire, I have to say, the ability and knowledge of Chairman HATCH and his dedication to this cause, especially as it became apparent that we, once again, would be denied the opportunity to vote, held hostage by a game of entrenchment politics.

Every time I hear one of my colleagues address the nomination of Mr. Estrada, I cannot help but to be both impressed and shocked, impressed with the character and integrity, the intellect and principles of Mr. Estrada; and shocked that such a capable man, who has the opportunity to become the first Hispanic judge on the DC Circuit Court, cannot even receive a vote, a simple up-or-down vote.

The majority of my colleagues are ready to move forward on the nomination. We are ready to vote. I cannot cast judgment on those who oppose Mr. Estrada. If they want to vote no, that is their choice. I respect that. It is their right. I understand that. I voted against judges whom I believed were not fit to serve. But it is implausible to think he should be denied a vote entirely.

Newspapers, radio stations, television programs across the country are demanding that the stalemate end, and that the minority party allow the Senate to proceed and to break off a filibuster that could amount to a major shift in constitutional authority.

Last week I spent the Presidents Day recess traveling across the State of Colorado. In every community, big or small, concerned citizens shared their beliefs on the importance of this nomination and the need to provide a vote for Miguel Estrada. They were appalled that we were not moving forward, that their representative in the Senate would not have an opportunity to vote on a very important consideration for the judiciary. Perhaps some disagree on whether he should be confirmed, but they all agree there should be at least a vote, and they agree it should be done without shifting constitutional authority in a manner that imposes a supermajority requirement on all judicial nominations. I am afraid that is where we are headed.

Let me share with you a couple of editorials that ran in Colorado's two major newspapers, one published in the Denver Post, the other appearing in the Rocky Mountain News.

The Denver Post, a paper that endorsed Al Gore in 2000, and by no means an arm of the Republican party, demands that Estrada be given his day in court, that the Senate be provided a vote. The paper confirms the outstanding quality of the nominee, noting that he is a picture book example of an immigrant pursuing the American dream.

The Denver Post also recognizes his outstanding credentials, stating that while he may lack judicial experience, so, too, do a majority of those now sitting on the DC Circuit Court, some of whom were nominated by Presidents Carter and Clinton.

I have a statement here from the editorial in the Denver Post on the posterboard beside me.

The key point is that there should be a vote . . . a filibuster should play no part in the process.

The Rocky Mountain News simply described the Democrats tactics as ''ugly,'' commenting on their attempt to thwart the Senate's majoritarian decisionmaking.

The editorial calls the filibuster:

. . . irresponsible, a hysteria being acted out to keep Estrada from serving on the US Court of Appeals for the District of Columbia.

On the chart I have a quote from both papers highlighting the need to end the filibuster and to proceed to a vote.

The Denver Post:

The key point is that there should be a vote . . . a filibuster should play no part in the process.

The Rocky Mountain News concludes that:

The Democrats have no excuse. Keeping others from voting their consciences on this particular matter is simply out of line.

Editorial boards across the country echo this very same sentiment. More than 60 major newspapers are calling for an end to the filibuster.

I would like to share with my colleagues here this afternoon a few of those. Let me name a few:

The Arkansas Democrat-Gazette; in California, Redding, and The Press Enterprise; The Hartford Courant; The Washington Post; in Florida, The Tampa Tribune and The Florida Times-Union; The Atlanta Journal Constitution and the Augusta Chronicle; the Chicago Tribune in Illinois, along with the Chicago Sun-Times, and Freeport Journal Standard; The Advocate in Baton Rouge, Louisiana; The Boston Herald; The Detroit News and Grand Rapids Press; in New Mexico the Albuquerque Journal; in Nevada, the Las Vegas Review Journal; the Winston-Salem Journal in North Carolina; in North Dakota, the Grand Forks Herald; the Providence Journal in Rhode Island; in West Virginia, the Wheeling News Register/Intelligencer; and nationally, the Investor's Business Daily and the Wall Street Journal.

I would also like to refute one of the arguments being put forward by the Democrats against Mr. Estrada.

For 11 days we have heard statements that the nominee is not qualified to serve because he lacks judicial experience. This standard is simply ridiculous.

Had it applied to their own Democratic nominees, it would have prevented some of the most capable attorney's from being seated on the federal bench.

Under the experience litmus test, the late Justice Byron ''Whizzer'' White, a great Coloradan, who was nominated to the Supreme Court by President John F. Kennedy, would never have been confirmed.

Nor would another great Coloradan, Judge Carlos Lucero, who was nominated by President Bill Clinton to the

Tenth Circuit Court of Appeals, have been confirmed.

To consider a lack of judicial experience as the poison pill of the Estrada nomination while ignoring the confirmation of Democratic nominees Justice White and Judge Lucero, is a double standard of the highest order.

The majority of this body, a majority elected by the American people, is ready to proceed with the nomination of Miguel Estrada.

I have no doubt that the obstructionists have their own reason to vote against the nominee. But they have no reason to prevent a vote entirely.

I hope that my colleagues will realize the danger of the path they have chosen, and will end this course of obstruction.

While I believe a full and fair debate of Presidential nominees is of paramount importance, obstructing an up-or-down vote fails the public trust and is a disservice to our system of justice.

I know how I am going to vote. I am voting for a highly qualified individual. A nominee who the American Bar Association has stated is ''highly-qualified.'' That individual is Miguel Estrada, and he deserves a vote by the United States Senate.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

TITLE IX

Mrs. CLINTON. Mr. President, yesterday, the President's Commission on Opportunity in Athletics released its recommendations for Title IX and some of the findings are a haunting reminder of the way things used to be.

It seems that many of the Commissioners believe that men's sports have suffered because of women's programs. They believe that it is okay to count ''slots'' instead of actual women players. And some believe that since men are better ''naturally'' at sports compared to women—that is their word and not mine. That is a true statement if it comes from me, but it is not a true statement when it comes from other women who are more athletically different—and, therefore, men deserve more funding and support. I don't think we should forget that was the excuse used for decades and for generations to keep women out of college, out of math and science classes, and out of the workplace.

I remember as a young girl reading stories of the first women back in the 19th century who wanted to go to medical school to become a doctor or to a law school to become lawyers and who wanted to go to college to further their education. There were court decisions which said women naturally were not suited for higher education. It will wear out their brain. It will undermine their health, and they certainly are not fit to go into the courtroom or into the operating room. Thank goodness we have come a long way from those days.

But I think about it frequently because my mother was born before women could vote. Lest we forget that many of the changes which we now take for granted did not come about just because somebody changed their mind. It is because we had to fight for work and for the kind of progress which we can see all around us.

For 30 years, title IX has encouraged millions of girls and women to participate in sports. In 1972, only 1 out of every 27 women participated in sports. Today, that number is 1 in 2. The program works. I think we should recognize the extraordinary progress we have made.

I remember very well that although I loved playing sports and athletics as a young girl, I was never very good at it. But I played hard, and it was a major influence on my understanding of my abilities, my limits, teamwork, and sportsmanship. It was hard for me to accept the fact that many of my friends and colleagues who were more talented really hit a wall. There were not the kind of interscholastic teams available at the high school level which we now take for granted. There were not scholarships available in most sports for most girls who had the capacity to compete and be good. The colleges were in no way fulfilling the need and desire that young women had to further their athletic pursuits. There really wasn't anything that you could point to as being professional athletic options for extremely well-qualified and motivated women.

I believe passionately that title IX changed the rules on the playing field and opened up the opportunities so more girls and women could see themselves on that field—and create conditions that would encourage our institutions actually to respond to those needs and desires.

I was very pleased to hear last night that Secretary Paige announced he would only consider the recommendations of the Commission that the Commission unanimously agreed upon. And I applaud that announcement.

But I believe that the minority report, which was written by Julie Foudy, the captain and 9-year veteran of the U.S. Women's National Soccer Team, and Donna de Varona, an Olympic swimmer with two gold metals, raises questions about whether any of these recommendations can actually be described as unanimous.

The introduction of the report reads as follows:

> After . . . unsuccessful efforts to include . . . our minority views within the majority report, we have reached the conclusion that we cannot join the report of the Commission.

And Julie Foudy and Donna de Varona go on to say:

> Our decision is based on our fundamental disagreement with the tenor, structure and significant portions of the content of the Commission's report, which fails to present a full and fair consideration of the issues or a clear statement of the discrimination women and girls still face in obtaining equal opportunity in athletics—

They go on to say:

> [secondly,] our belief that many of the recommendations made by the majority would seriously weaken Title IX's protections and substantially reduce the opportunities to which women and girls are entitled under current law; and, [third,] our belief that only one of the proposals would address the budgetary causes underlying the discontinuation of some men's teams, and that others would not restore opportunities that have been lost.

Their goal in issuing this minority report was to make sure it was included in the official record of the Commission. Unfortunately, it is my understanding that the Secretary of Education today has refused to include the minority report. I think that is fundamentally unfair. To me, that report should belong with the majority report, especially since those two women, probably between them, have more direct personal experience in what athletics can mean to a woman's life and what it was like before IX, when Donna was competing, and what it was like after IX was enacted, when Julie helped to lead our women's soccer team to the World Cup Championship.

Therefore, Mr. President, I am going to ask unanimous consent to have printed in the RECORD this minority report. I am doing so because I believe it is important that on this issue we hear from the people who have the most to lose: women athletes, women students. Julie and Donna were invited to join the Commission to represent that point of view, and their voices should be heard. For the information of my colleagues, the minority report can be found at http://www.womensportsfoundation.org/binary-data/WSF—Article/pdf—file/944.pdf.

Now, along with my colleagues, Senator DASCHLE, Senator KENNEDY, Senator MURRAY, Senator SNOWE, and Senator STEVENS, who care so deeply about this issue, we will continue to keep a watchful eye on the Department of Education because the truth is, they do not need permission from the Commission or anyone else to adopt the changes the Commission has proposed; they can propose to change the regulations or offer guidance at any time.

So I am here today in the Chamber to say that I, and many of my colleagues on both sides of the aisle—men and women alike; athletes and nonathletes alike—will fight to protect title IX for our daughters and our granddaughters and generations of girls and women to come.

But let me also add, my support of title IX and my support of the right of the minority to be heard with respect to the Commission's recommendations does not, in any way, suggest that I do not believe in the importance of sports for young men, because I do. I strongly support sports for all young people.

In fact, I think it is very unfortunate that physical education has been dropped from so many of our schools, that so many of our youngsters not only do not have the opportunity to discharge energy and engage in physical activities, but to learn about sports, to find out that maybe something would inspire their passion and their commitment.

There are other ways to ensure that all boys and girls, all men and women have the opportunity for athletic experiences, to participate on teams.

I was somewhat distressed, when the Commission was appointed, with the number of Commissioners who represented an experience that is not the common experience; namely, the experience of very high stakes, big college and university football, which of course is important; I very much believe that. But that is only one sport, and it is a very expensive sport.

I think there are ways, without taking anything away from anyone—boys, girls, men, women—that we can listen to the voices of experience, such as Julie's and Donna's, and come to recognize that there may be other reasons, besides the law, that some men's teams have been discontinued, which I am very sorry about and wish did not have to happen and believe should not have happened if there had been a fairer allocation of athletic resources across all sports.

So I think we can come to some agreements that would serve perhaps to create additional opportunities, but we should not do it to the detriment of girls and women.

I appreciate the opportunity to come to the floor to recognize this very important piece of legislation which has literally changed the lives of girls and women and should continue to do so. What we ought to be doing is looking for ways we can enhance the physical activity, the athletic, competitive opportunities of boys and girls.

One of the biggest problems we have confronting us now is obesity among young people. We need to get kids moving again. We need to get them in organized physical education classes, intramural sports, interscholastic sports, afterschool sports, and summer sports, so they can have an opportunity to develop their bodies and their athletic interests, as well as their minds and their academic pursuits.

Mr. KYL. Mr. President, also, for the information of my colleagues, ''Open to All,'' the report of the Secretary of Education's Commission on Opportunity in Athletics can be found at http://ed.gov/pubs/titleixat30/index.html.

HOMELAND SECURITY

Mrs. CLINTON. Now, Mr. President, on another issue that is of deep concern to me, I come also to raise questions about our commitment to homeland security. This is something I have come to this Chamber to address on numerous occasions, starting in those terrible days after September 11, 2001. And it is an issue I will continue to address in every forum and venue that I possibly can find because, unfortunately, I do not believe we have done enough to protect ourselves here at home.

On February 3, Mitch Daniels, the Director of the Office of Management and Budget, said:

> There is not enough money in the galaxy to protect every square inch of America and every American against every conceived threat.

This statement bothered me at the time. It has continued to bother me. I suppose, on the face of it, it is an accurate statement. Not only isn't there enough money in the United States, the world, or the galaxy to protect every square inch, but what kind of country would we have if we were trying to protect every square inch? That would raise all sorts of issues that might possibly change the character and quality of life here in America.

But I do not think that is what really motivated the statement. The statement was a kind of excuse, if you will, as to why this administration has consistently failed to provide even the rudimentary funding that we have needed for our first responders and to deal with national security vulnerabilities.

We have learned, in the last few months, that threats do exist all over our country. It is not just New York City or Washington, DC, that suffered on September 11. We know that in the months since then, we have seen many other parts of our country respond to alerts—our latest orange alert—which have required huge expenditures of resources in order to protect local water supplies, bridges, chemical plants, nuclear powerplants, to do all that is necessary to know that we have done the best we can.

Life is not certain. There is no way any of us knows where we will be in an hour or in a day or in a year. But what we try to do is to plan for the worst, against contingencies that might undermine our safety. And then we have to just hope and trust and have faith that we have done enough. But if we do not try, if we do not make the commitment, if we do not provide the resources, then we have essentially just put up our hands and surrendered to what did not have to be the inevitable.

When I heard Mr. Daniels make that comment, I thought to myself, if you had made a list of every community in America that might possibly be a site for an al-Qaida terrorist cell, I am not sure that Lackawanna, NY, would have made that list. It is a small community outside of Buffalo where the FBI, in cooperation with local law enforcement, uncovered such a cell of people who had gone to Bin Laden's training camps in Afghanistan and then come back home, most likely what is called a sleeper cell. Their leader was in Yemen where one of our predator aircraft found him and took action against him and his compatriots who are part of the al-Qaida terrorist campaign against us. If we were just thinking, where should we put money to protect ourselves, I am not sure Lackawanna, NY, would have been on that list. Yet we have reason to believe it should be on any list anywhere. Just yesterday four men in Syracuse, NY, were accused of sending millions of dollars to Saddam Hussein.

I don't know that we can sit here in Washington and say: Well, we can't possibly protect everybody so we shouldn't protect anybody. But that seems to be the attitude of this administration. That is what concerns me most. We should be doing everything we possibly can to make our country safer. We should be thinking 24 hours a day, 7 days a week about new steps, smart steps that we should be taking. Why? Because that is what our enemies do when they think about how to attack us. If somebody is on CNN or the Internet, it doesn't stop at our borders. That is viewed and analyzed in places all over the world. We know that they are working as hard as they possibly can to do as much harm to us and our way of life as they possibly can.

Since September 11, our first responders, our mayors, police and fire chiefs have said over and over again they need Federal support so they can do their jobs to protect the American people. During this recent code orange alert, they have done a remarkable job. They have responded to their new responsibility as this country's frontline soldiers in the war against terrorism with grace, honor, and a dedication that Washington should emulate.

We have had the opportunity to do so. We could have already had in the pipeline and delivered more dollars to pay for needed training, personnel, overtime costs, equipment, whatever it took as determined by local communities that they require to do the job we expect them to do. But every time the Senate has tried to do more for our first responders, the administration and some in Congress have said we should do less.

Senator BYRD stood right over there last summer and offered an amendment, which the Senate supported, that would have provided more than $5.1 billion in homeland security funding. It included $585 million for port security; $150 million to purchase interoperable radio so that police, firefighters and emergency service workers can communicate effectively, a problem we found out tragically interfered with communication on September 11 in New York City; another $83 million to protect our borders. But in each case, despite having passed it in the Senate, the administration and Republican leaders settled for far less. They called such spending ''unnecessary.'' In some cases, such as the funding for interoperable radios, not only did we not get the increase to buy this critical equipment, the funding was cut by $66 million.

It was during that debate that we needed the administration's support. But instead, they opposed such efforts,

and the President himself refused to designate $5.1 billion last August as an emergency to do the kinds of things that mayors and police chiefs and fire chiefs and others have been telling me and my colleagues they desperately need help doing.

The paper today says the President acknowledges we need to do more. I welcome that acknowledgment. But I have learned that we have to wait to see whether the actions match the words. We have to make sure this new awareness about having shortchanged homeland security doesn't translate into taking money away from the functions that firefighters and police officers are called upon to do every day, transferring it across the government ledger, relabeling it counterterrorism, and wiping our hands of it and saying: We did it.

That just doesn't add up. That is what they tried to do for the last year, take money away from the so-called COPS program, which put police on the beat onto our streets, which helped to lower the crime rate during the 1990s, taking money away from the grants that go to fire departments to be well prepared to get those hazardous materials, equipment, and suits that will protect them and claiming that we take that money away, we put it over here, and we say we have done our job. That is just not an appropriate, fair-minded response.

We cannot undo the past, but every day we don't plan for the future is a lost day. I don't ever want to have a debate in the Senate about what we should have done or we could have done or we would have done to protect ourselves, if only we had taken as seriously our commitment to homeland security as the administration takes our commitment to national security.

Last month I issued a report about how 70 percent of the cities and counties in New York are not receiving any Federal homeland security funding. I commissioned this study because I wanted to know for myself whether maybe some money had trickled down into their coffers that I was not aware of. Well, 70 percent say they had gotten nothing; 30 percent say they had gotten a little bit of the bioterrorism money that we had appropriated. But then I also asked them, how much did they need and what did they need it for and how did they justify their needs. And I must say, most of the requests were very well thought out, prudent requests for help that in this time of falling revenues and budget crunches, city and county governments just cannot do themselves.

When that orange alert went out a week or so ago, what happened? I know in New York City, if you were there, you would have seen an intense police presence because our commissioner of police, our mayor, knew they had to respond. They had to get out there and keep a watchful eye. But there was no help coming from Washington for them to do that. It may be a national alert, but it is a local response. And we are not taking care of the people we expect to make that response for us.

Then I was concerned to see that in so many of the discussions of potential weapons of mass destruction, doctors and nurses and hospital administrators are saying: We are not ready. We do not have the funding. We don't even have the funding to do the preventive work, the smallpox vaccination. We don't have the means to be ready for some kind of chemical or biological or radiological attack.

When we had the incident a few months ago of the shoulder-fired missile that was aimed at the Israeli airline in Kenya—thankfully it missed—I called the people in the new Department of Homeland Security. I said: What are our plans? How do we respond to the threat posed by shoulder-fired missiles?

The response I got back was: Well, that is a local law enforcement responsibility.

Are we going to provide more funding so we can have more police patrols on the outskirts of large airports similar to the ones we have in New York and other States have?

Well, no, that is not in the cards. You just go out there and keep an eye out for those shoulder-fired missiles.

Time and time again we hear about a threat. We hear the conversations from our government officials. We listen to the experts tell us what we have to be afraid of. And if you are a police chief or a fire chief sitting in any city in our country, you are sitting there in front of the television set saying to yourself: My goodness, how am I going to protect my people? How am I possibly going to do the work I need to do when my State budget is being cut, when my local budget is being cut, when the Federal budget is not providing me any resources? How am I going to do that?

It is a fair question. Yet when we dial 911, we expect that phone to be answered, not in this Chamber, not down at the other end of Pennsylvania Avenue in the White House, but right in our local precinct and our local firehouse. Yet in place after place around America, we read stories about police being laid off or being enticed into early retirement to save money, firehouses being closed or firefighters being encouraged to take early retirement, not filling classes in the police and fire academy.

There is something wrong with this picture. Now, we have done all we know to do to give our men and women who wear military uniforms every bit of support we believe they need. If we are going to put them in harm's way, then we owe it to them, to their families, to equip them and train them, and give them the best possible protection so they can fulfill their mission without harm to themselves.

But this is a two-front war. We hear that all the time. My gosh, there is nothing else coming across the airwaves except about what is happening in the Persian Gulf and on the Korean peninsula and what is happening with al-Qaida. We know we are in a global war against terror and against weapons of mass destruction. That is good offense. We need to be out there trying to rid the world of weapons of mass destruction, rid the world of tyrants and dictators who would use such weapons.

But what about defense? What about what happens here at home? We have not done what we need to do to protect our homeland or our hometowns. That is absolutely unacceptable. The one thing we have learned from the horrors of September 11 is that in this new globalization of transportation and information we now live in, boundaries mean very little. Part of the reason we were immune from attack through many decades—with the exception of Pearl Harbor and the attack on this city and on Baltimore in the War of 1812—is we were protected by those big oceans, and with friendly neighbors to the north and south. But those days are gone. You can get on a jet plane from anywhere. You can be in a cave in Afghanistan and use your computer. You can transfer information about attacks and about weapons of mass destruction with the flick of a mouse.

So we have to upgrade and transform our homeland defense, just as we have to think differently about our military readiness and capacity. This does not come cheaply. This is not easy to do. I spend a lot of time talking with police, firefighters, hospital administrators, and front line doctors and nurses; they are ready to make the sacrifice to perform in whatever way they are expected to do so to protect us. But we are not giving them the help they need.

Now, we can remedy this. It was a good sign when the President admitted today that he and his administration have not funded homeland security, and I am glad to hear they have finally admitted that. But now we have to do something about that admission. It cannot be just a one-day headline. We have to figure out, OK, now that you are seeing what we see, what we have been worried about, let's do something. Let's make sure that whatever budget is sent up here has money in it for these important functions, so we can look in the eyes of our police officers, firefighters, and emergency providers, and say we have done the best we know how to do.

That doesn't mean we are 100 percent safe. There is no such thing. That is impossible. That is not something we can possibly achieve. But we have to do the best we can. I believe it is probably a good old adage to ''hope for the best, but prepare for the worst.'' When you have done all you knew how to do, when something does happen, hopefully, you are prepared to deal with it.

From my perspective, Mr. President, this is a national priority that cannot wait. Many of the commentators and pundits of the current theme talk about the likely military action necessitated by Saddam Hussein's refusal to

disarm, and point to the possibility that such action will trigger an upsurge in potential attack not only here at home but on American assets and individuals around the world. It would be impossible to write any scenario about the next 10 years without taking into account the potential of future terrorism.

But what is not impossible—in fact, what is absolutely necessary—is for us to be able to say to our children and the children of firefighters and police officers and emergency responders that we did all we knew to do; we were as prepared as we possibly could be. That is what I want to be able to say, and I know we cannot do that without the resources that will make it a real promise of security, instead of an empty promise.

So, Mr. President, it is my very strong hope that in the wake of the administration's recognition of the failure thus far to fund homeland security, now we can get down to business; that we not only can fund it, but do it quickly, get the money flowing, and get local communities ready to implement it, and we can get about the business of making America safer here at home. I will do everything I can to realize that goal. I look forward to working with my colleagues on both sides of the aisle as we provide the kind of homeland security Americans deserve.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. PRYOR. Mr. President, I ask unanimous consent that I be permitted to speak in morning business for up to 25 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered. The Senator from Arkansas is recognized.

(The remarks of Mr. PRYOR are printed in today's RECORD under ''Morning Business.'')

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. GRASSLEY. Mr. President, I rise once again to speak in support of the confirmation of Miguel Estrada, an exceptionally well qualified nominee who does not deserve to have his nomination obstructed by this filibuster. I have been a strong supporter of Mr. Estrada's since he came before the Judiciary Committee last year. At that time, I argued that his nomination should come up for a floor vote, but we were not allowed to vote on his nomination then. Here we are a year later, and I am still strongly supporting Mr. Estrada, and I am still arguing for a floor vote, and that vote is still being refused. I think it is shameful to continue holding up the vote on this very qualified judicial nominee, who, by the way, will make an excellent member of the US Court of Appeals for the DC Circuit.

I know my colleagues heard Mr. Estrada's credentials many times last week. In fact, I am pretty sure that some of my colleagues could quote his credentials in their sleep. However, I think it is important that the Senate is reminded of how qualified this nominee is who is being filibustered. Not only is he regarded as one of the Nation's top appellate lawyers, having argued 15 cases before the Supreme Court of the United States, but the American Bar Association, which I think Democrats consider the gold standard of determination of the person's qualifications to be a judicial nominee, has given him a unanimous rating of, in their words, ''well qualified.'' This happens to be the highest American Bar Association rating. It is a rating they would not give to just any lawyer who comes up the pike. According to the American Bar Association, quoting from their standard:

> To merit a rating of well qualified, the nominee must be at the top of the legal profession in his or her legal community, having outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated or exhibited the capacity for judicial temperament.

We ought to demand that more qualified people like Miguel Estrada be appointed to the bench rather than fighting his nomination.

As my colleagues know, I am not a lawyer. There is nothing wrong with going to law school, but I did not. I have been on the Judiciary Committee my entire time in the Senate. I know some of the qualifications that are needed to be a Federal judge, particularly a Federal judge on this DC Circuit that handles so many appeals from administrative agencies and is often considered, by legal experts, to be the second highest court of our land.

Mr. Estrada's academic credentials are stellar. He graduated from Columbia University with his bachelor's degree magna cum laude and was also a member of Phi Beta Kappa. Then he earned his juris doctorate from Harvard University, also magna cum laude, where he was editor of the Harvard Law Review. Mr. Estrada did not just attend Harvard Law School; he graduated with honors. He also served as the editor of the Harvard Law Review. To be selected as the editor of a law review is a feat that only the most exceptional of law students attain.

While Mr. Estrada certainly has the intellect required to be a Federal judge, his professional background also gives testament to his being qualified for a Federal Court of Appeals judgeship as opposed to just any judgeship.

After law school, Mr. Estrada served as a law clerk to the Second Circuit Court of Appeals and as a law clerk to Justice Kennedy, on the United States Supreme Court. Subsequently, he served as an Assistant US Attorney and deputy chief of the appellate section of the US Attorney's Office of the Southern District of New York, and then as assistant to the Solicitor General of the United States of America.

Mr. Estrada has been in the private sector as well. He is a partner with the Washington, DC, office of the law firm of Gibson, Dunn & Crutcher. In this exceptional career, Mr. Estrada has argued 15 cases before the United States Supreme Court. He won nine of those cases. Mr. Estrada is not just an appellate lawyer; he is one of the top appellate lawyers in the country. So for a young lawyer, I think I can give my colleagues a person who can truly be labeled an American success story. In fact, instead of degrading his ability to serve as a circuit court judge, we should all be proud of Mr. Estrada's many accomplishments.

This is the nominee that the Democrats are filibustering. I fail to understand why a nominee of these outstanding qualifications, and who has been honored by the ABA with its highest rating, would be the object of such obstruction. In all my years on the Judiciary Committee—and that has been my entire tenure in the Senate—Republicans never once filibustered a Democratic President's nominee to the Federal bench. There are many I may have wanted to filibuster, but I did not do it—we did not do it—because it is not right.

In fact, as I understand it, in the entire history of the Senate neither party has ever filibustered a judicial nominee. Going back over 200 years, Republicans and Democrats have resisted the urge to obstruct a nominee by filibustering. Good men of sound judgment have come to the conclusion that to use this tool of last resorts to obstruct a nomination is, at best, inappropriate, and, at worst, just down right wrong.

This nominee, like all nominees, deserves an up-or-down vote. Anything less is absolutely unfair. I hope my colleagues on the other side of the aisle will reconsider this filibuster. The Senate should not cross this Rubicon and establish new precedent for the confirmation process.

Over 40 newspapers from across the country have published editorials advocating that the Senate give Mr. Estrada a vote. Even the Washington Post, which is not exactly a bastion of conservatism, published an editorial last week entitled, ''Just Vote.'' In that editorial, the Post correctly characterized the Democrats obstructionist efforts. With regard to the Democrat request for the internal memos Mr. Estrada drafted while he was in the Solicitor General's Office, the Post said

that this filibuster of Mr. Estrada goes beyond the normal political confirmation games, because,

Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address.

I agree with the Post:

It's long past time to stop these games and vote.

I make a unanimous consent request that this Washington Post editorial, ''Just Vote'' be printed in the RECORD after my statement.

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

[See exhibit 1.]

Mr. GRASSLEY. Those denying the Senate an up-or-down vote on Mr. Estrada's nomination claim that he has not answered questions or produced documentation, and so he should not be confirmed to the Federal bench. I can think of a number of Democratic nominees who did not sufficiently answer question that I submitted to them, but that did not lead me to filibuster. As far as I know, Mr. Estrada has answered all questions posed to him by the Judiciary Committee members.

His opponents claim that he has refused to hand over certain in-house Justice Department memoranda. What actually is happening is that the Democrats on the Judiciary Committee have requested that the Department of Justice submit to the Committee, internal memoranda written by Miguel Estrada when he was an attorney in the Solicitor General's Office. These internal memos are attorney work product, specifically appeal, certiorari, and amicus memoranda, and the Justice Department has rightly refused to produce them.

The Department of Justice has never disclosed such sensitive information in the context of a Court of Appeals nomination. These memoranda should not be released, because they detail the appeal, certiorari and amicus recommendations and legal opinions of an assistant to the Solicitor General. This is not just the policy of this administration, the Bush administration, a Republican administration. This has also been the policy under Democratic Presidents.

The inappropriateness of this request prompted all seven living former Solicitors General to write a bipartisan letter to the Committee to express their concern regarding the Committee's request and to defend the need to keep such documents confidential. The letter was signed by Democrats Seth Waxman, Walter Dellinger, Drew Days III and Republicans Ken Starr, Charles Fried, Robert Bork and Archibald Cox. The letter notes that when each of the Solicitors General made 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:

relied on frank, honest and thorough advice from [their] staff attorneys like Mr. Estrada . . .

and that the open exchange of ideas which must occur in such a context

Simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure.

The letter concludes that

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.

The Democratic committee member's request has even drawn criticism from the editorial boards of the Washington Post and Wall Street Journal. On May 28, 2002, in an editorial entitled ''Not Fair Game'' the Washington Post editorialized that the request

For an attorney's work product would be unthinkable if the work had been done for a private client. . . . [and] legal advice by a line attorney for the federal government is not fair game either.

According to the Post editorial

. . . 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.

On May 24, 2002, the Wall Street Journal in an editorial entitled ''The Estrada Gambit'' also criticized the request, calling it ''one more attempt to delay giving Mr. Estrada a hearing and a vote.'' The Journal further criticized the Committee's request in a later editorial, entitled ''No Judicial Fishing'', calling the request ''outrageous'' and noting that the goal of the request ''is to delay, trying to put off the day when Mr. Estrada takes a seat on the D.C. Circuit Court of Appeals.''

Mr. President, I ask unanimous consent that these two editorials also be printed in the RECORD after my statement.

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

[See exhibit 2.]

Mr. GRASSLEY. Mr. Estrada is not the only former deputy or assistant to the Solicitor General nominated to the Federal bench. In fact, there are seven others now serving on the Federal Courts of Appeals. None had any prior judicial experience, and the committee did not ask the Justice Department to turn over any confidential internal memoranda those nominees prepared while serving in the Solicitor General's Office. The seven nominees were: Samuel Alito on the 3rd Circuit, Danny Boggs on the 6th Circuit, William Bryson and Daniel Friedman on the Federal Circuit, Frank Easterbrook and Richard Posner on the 7th Circuit, and A. Raymond Randolph on the D.C. Circuit. Why should Mr. Estrada be treated any differently?

During Mr. Estrada's hearing, Judiciary Committee Democrats alleged that the committee has reviewed the work product of other nominees, including memos written by Frank Easterbrook, by Chief Justice Rehnquist when he served as a clerk to Justice Jackson, and by Robert Bork when he was an official at the Justice Department.

For the record, there is no evidence that the Department of Justice ever turned over confidential memoranda prepared by Frank Easterbrook when he served in the Solicitor General's Office. There also is no evidence that the committee even requested such information.

During Robert Bork's hearings, the Department did turn over memos Judge Bork wrote while serving as Solicitor General, but none of these memos contained the sort of deliberative materials requested of Mr. Estrada and the Justice Department. The Bork materials include 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 contain 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, namely the Solicitor General, and political advisors to the President, rather than the advice of a career Department of Justice attorney to his superiors, as is the case with Mr. Estrada.

You see, the Judiciary Committee has never requested and the Department of Justice has never agreed to release the internal memos of a career line attorney. To ask that Mr. Estrada turn over his memos is unprecedented, and frankly unfair. No Member of this body would ever condone a request to turn over staff memos. What my staff communicates to me in writing is internal and private. I am sure every other Senator feels the same way as I do. This Democrat fishing expedition needs to stop. Miguel Estrada is a more than well qualified nominee and he deserves a vote on his nomination, today.

In conclusion, we are again seeing an attack on another very talented, very principled, highly qualified legal mind. It all boils down to this, Mr. Estrada's opponents refuse to give him a vote because they say they do not know enough about him. They further contend that the Justice Department memos, which they know will never be released, are the only way they can find out what they need to know about Mr. Estrada. It is a terrible Catch–22.

These obstructionist efforts are a disgrace and an outrage. We must put a stop to these inappropriate political attacks and get on with the business of confirming to the Federal bench good men and women who are committed to doing what judges should do, interpret law as opposed to making law from the bench, because it is our responsibility to make law as members of the legislative branch.

I yield the floor.

EXHIBIT 1

[From the Washington Post, Feb. 18, 2003]

JUST VOTE

The Senate has recessed without voting on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit. Because of a Democratic filibuster, it spent much of the week debating Mr. Estrada, and, at least for now, enough Democrats are holding together to prevent the full Senate from acting. The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such material, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only because he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised a substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway—just for good measure. It's long past time to stop these games and vote.

EXHIBIT 2

[From the Wall Street Journal, May 24, 2002]

THE ESTRADA GAMBIT

Senate Judiciary Chairman Patrick Leahy keeps saying he's assessing judicial nominees on the merits, without political influence. So why does he keep getting caught with someone else's fingerprints on his press releases?

The latest episode involves Miguel Estrada, nominated more than a year ago by President Bush for the prestigious D.C. Circuit Court of Appeals. Mr. Estrada scares the legal briefs off liberal lobbies because he's young, smart and accomplished, having served in the Clinton Solicitor General's office, and especially because he's a conservative Hispanic. All of these things make him a potential candidate to be elevated to the U.S. Supreme Court down the road.

Sooner or later even Mr. Leahy has to grant the nominee a hearing, one would think. But maybe not, if he keeps taking orders from Ralph Neas at People for the American Way. On April 15, 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 SG's office, hoping they will shed light on the nominee's personal views.''

Hmmm. Who could that leader be? Mr. Neas, perhaps? Whoever it is, Mr. Leahy seems to be following orders, because a month later, on May 15, Mr. Leahy sent a letter to Mr. Estrada requesting the ''appeal recommendations, certiorari recommendations, and amicus recommendations you worked on while at the United States Department of Justice.''

It's important to understand how outrageous this request is. Mr. Leahy is demanding pre-decision memorandums, the kind of internal deliberations that are almost by definition protected by executive privilege. No White House would disclose them, and the Bush Administration has already turned down a similar Senate request of memorandums in the case of EPA nominee Jeffrey Holmstead, who once worked in the White House counsel's office.

No legal fool, Mr. Leahy must understand this. So the question is what is he really up to? The answer is almost certainly one more attempt to delay giving Mr. Estrada a hearing and vote. A simple exchange of letters from lawyers can take weeks. And then if the White House turns Mr. Leahy down, he can claim lack of cooperation and use that as an excuse to delay still further.

Mr. Leahy is also playing star marionette to liberal Hispanic groups, which on May 1 wrote to Mr. Leahy urging that he delay the Estrada hearing until at least August in order to ''allow sufficient time . . . to complete a thorough and comprehensive review of the nominee's record.'' We guess a year isn't adequate time and can only assume they need the labor-intensive summer months to complete their investigation. (Now there's a job for an intern.) On May 9, the one-year anniversary of Mr. Estrada's nomination. Mr. Leahy issued a statement justifying the delay in granting him a hearing by pointing to the Hispanic group's letter.

These groups, by the way, deserve some greater exposure. They include the Mexican American Legal Defense and Educational Fund as well as La Raza, two lobbies that claim to represent the interests of Hispanics. Apparently they now believe their job is to help white liberals dig up dirt on a distinguished jurist who could be the first Hispanic on the U.S. Supreme Court.

The frustration among liberals in not being able to dig up anything on Mr. Estrada is obvious. Nam Aron, president of the Alliance for Justice, told Legal Times that ''There is a dearth of information about Estrada's record, which places a responsibility on the part of Senators to develop a record at his hearing. There is much that he has done that is not apparent.'' Translation: We can't beat him yet.

Anywhere but Washington, Mr. Estrada would be considered a splendid nominee. The American Bar Association, whose recommendation Mr. LEAHY one called the ''gold standard by which judicial candidates have been judged,'' awarded Mr. Estrada its highest rating of unanimously well-qualified. There are even Democrats, such as Gore advisor Ron Klaim, who are as effusive as Republicans singing the candidate's praises.

When Mr. Estrada worked in the Clinton-era Solicitor General's office, he wrote a friend-of-the-court brief in support of the National Organization of Women's position that anti-abortion protestors violated RICO. It's hard to paint a lawyer who's worked for Bill Clinton and supported NOW as a right-wing fanatic.

We report all of this because it reveals just how poison judicial politics have become, and how the Senate is perverting its advise and consent power. Yesterday the Judiciary Committee finally to help fellow Pennsylvania Brooks Smith.

Mr. Estrada doesn't have such a patron, so he's fated to endure the delay and document-fishing of liberal interests and the Senate Chairman who takes their dictation.

Ms. MIKULSKI. Mr. President, I rise in opposition to the nomination of Miguel Estrada to the United States Circuit Court of Appeals for the District of Columbia.

The President has the right to make judicial nominations. The Senate has the Constitutional responsibility to advise and consent. I take this responsibility very seriously. This is a lifetime appointment for our nation's second most important court. Only the Supreme Court has a greater impact on the lives and rights of every American.

The District of Columbia Circuit is the final arbiter on many cases that the Supreme Court refuses to consider. That means it's responsible for decisions on fundamental constitutional issues involving freedom of speech, the right to privacy and equal protection.

In addition, the D.C. Circuit has special jurisdiction over Federal agency actions. That means the D.C. Circuit is responsible for cases on issues of great national significance involving labor rights, affirmative action, clean air and clear water standards, health and safety regulations, consumer privacy and campaign finance. The importance of this court highlights the importance of placing skilled, experienced and moderate jurists on the court.

I base my consideration of each judicial nominee on three criteria: competence, integrity and commitment to core Constitutional principles.

I don't question Mr. Estrada's character or competence. He is clearly a skilled lawyer. Yet the Senate does not have enough information to judge Mr. Estrada's commitment to core Constitutional principles.

He has refused to answer even the most basic questions during his hearing in Senate Judiciary Committee. For example, he was asked to give examples of Supreme Court decisions with which he disagreed. He refused to answer. He was asked basic questions on his judicial philosophy. He refused to answer.

The Constitution gives the Senate the responsibility to advise and consent on judicial nominations. This consent should be based on rigorous analysis. The nominee doesn't have to be an academic with a paper trail. Yet the nominee must be open and forthcoming. He or she must answer questions that seek to determine their commitment to core Constitutional principles.

This is a divisive nomination—at a time when our Nation should be united. Our Nation is preparing for a possible war in Iraq. We are already engaged in a war against terrorism. We are also facing a weak economy. Americans are stressed and anxious. The Senate should be working to reduce this stress—to make America more secure; to strengthen our economy and to deal with the ballooning cost of health care.

I urge the administration to nominate judicial candidates who are moderate and mainstream—and to instruct those nominees to be forthright and forthcoming with the Senate so the Senate can address the significant issues that face our Nation today.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Oklahoma.

Mr. NICKLES. Madam President, I ask unanimous consent to proceed as if in morning business.

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

(The remarks of Mr. NICKLES pertaining to the introduction of S. 2 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Madam President, one of our most important responsibilities as Senators is the confirmation of Federal judges. Federal judges are appointed for life, and they will be interpreting laws affecting the lives of all our citizens for many years to come. Yet my colleagues across the aisle suggest that something far less than a full review of a nominee's record is warranted. Republican Senators pretend that by seeking additional information to help us understand Mr. Estrada's views and judicial philosophy, we are upsetting the proper constitutional balance between the Senate and the executive branch. They claim the Senate has to consent to the President's judicial nominees, as long as they have appropriate professional qualifications.

In fact, the Constitution gives a strong role to the Senate in evaluating nominees. The role of the Senate is fundamental to the basic constitutional concept of checks and balances at the heart of the Federal Government. And when we say ''check'' we don't mean blank check.

The debates over the drafting of the Constitution tell a great deal about the proper role of the Senate in the judicial selection process. Both the text of the Appointments Clause of the Constitution and the debates over its adoption make clear that the Senate should play an active and independent role in selecting judges.

Given recent statements by Republican Senators, it is important to lay out the historical record in detail. The Constitutional Convention met in Philadelphia from late May until mid-September of 1787. On May 29, 1787, the Convention began its work on the Constitution with the Virginia Plan introduced by Governor Randolph, which provided ''that a National Judiciary be established, to be chosen by the National Legislature.'' Under this plan, the President had no role at all in the selection of judges.

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

That idea had almost no support. Rutledge of South Carolina said that he ''was by no means disposed to grant so great a power to any single person.'' James Madison agreed that the legislature was too large a body, and stated that he was ''rather inclined to give [the appointment power] to the Senatorial branch'' of the legislature, a group ''sufficiently stable and independent'' to provide ''deliberate judgements.''

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

July of 1787 was spent reviewing the draft Constitution. On July 18, the Convention reaffirmed its decision to grant the Senate the exclusive power. James Wilson again proposed ''that the Judges be appointed by the Executive'' and again his motion was defeated.

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

In a debate concerning the provision, George Mason called the idea of executive appointment of Federal judges a ''dangerous precedent.'' The Constitution was drafted to read: ''The Senate of the United States shall have power to appoint Judges of the Supreme Court.''

Not until the final days of the Convention was the President given power to nominate Judges. On September 4, 2 weeks before the Convention's work was completed, the Committee proposed that the President should have a role in selecting judges. It stated: ''The President shall nominate and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court.'' The debates, make clear, however, that while the President had the power to nominate judges, the Senate still had a central role.

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

The debates and the series of events proceeding adoption of the ''advise and consent'' language make clear, that the Senate should play an active role. The Convention having repeatedly rejected proposals that would lodge exclusive power to select judges with the executive branch, could not possibly have intended to reduce the Senate to a rubber stamp role.

The reasons given by delegates to the Convention for making the selection of judges a joint decision by the President and the Senate are as relevant today as they were in 1787. The framers refused to give the power of appointment to a ''single individual.'' They understood that a more representative judiciary would be attained by giving members of the Senate a major role.

From the start, the Senate has not hesitated to fully exercise this power. During the first 100 years after ratification of the Constitution, 21 or 81 Supreme Court nominations—one out of four—were rejected, withdrawn, or not acted on. During these confirmation debates, ideology often mattered. John Rutledge, nominated by George Washington, failed to win confirmation as Chief Justice in 1795.

Alexander Hamilton and other Federalists opposed him, because of his position on the controversial Jay Treaty. A nominee of President James Polk was rejected because of his anti-immigration position. A nominee of President Hoover was rejected because of his anti labor view. Our Republican colleagues are obviously aware of this. Their recent statements attempting to downplay the Senate's role stand in stark contrast to the statements when they controlled the Senate during the Clinton administration. At that time, they vigorously asserted their right of ''advice and consent.''

Indeed, while public debate and a demand to fully review a nominee's record is consistent with our duty of ''advice and consent,'' many of the actions by Republicans were damaging to the nominations process. Democrats have made clear our concerns about whether Mr. Estrada has met the burden of showing that he should be appointed to the DC Circuit, but Republicans resorted to tactics such as secret holds to block President Clinton's nominees. For instance, it took four years to act on the nomination of Richard Paez, a Mexican-American, to the Ninth Circuit. Senate Republicans repeatedly delayed floor action on Judge Paez through use of anonymous holds.

Republicans voted to indefinitely postpone action on Judge Paez's nomination. Finally, in March 2000, 4 years after his nomination and with the Presidential election on the horizon, Judge Paez was confirmed, after cloture was invoked.

Reviewing Mr. Estrada's nomination is our constitutional duty. We take his nomination particularly seriously because of the importance of the DC Circuit, the Court to which he has been nominated. The important work we do in Congress to improve health care, protect workers rights, and protect civil rights mean far less if we fail to fulfill our responsibility to provide the

best possible advice and consent on judicial nominations. Tough environmental laws mean little to a community that can't enforce them in our federal courts. Civil rights laws are undercut if there are no remedies for disabled men and women. Fair labor laws are only words on paper if we confirm judges who ignore them.

What we know about Mr. Estrada leads us to question whether he will deal fairly with the range of important issues affecting everyday Americans that came before him.

Mr. Estrada has been actively involved in supporting broad anti-loitering ordinances that restrict the rights of minority residents to conduct lawful activities in their neighborhoods. Mr. Estrada has sought to undermine the ability of civil rights groups like the NAACP to challenge these broad ordinances which affect the ability of minority citizens to conduct activities such as drug counseling and voter outreach in their communities.

Information we need to know about Mr. Estrada's record has been hidden from us by the Department of Justice. Democratic Senators have asked for Mr. Estrada's Solicitor General Memoranda. We have moved for unanimous consent to proceed to a vote on his nomination, after those memoranda are provided. Yet, the White House refuses to provide any of Mr. Estrada's memos, even though there is ample precedent for allowing the Senate to review these documents.

Even as Republicans refuse to allow us to see Mr. Estrada's memos from his time in public office—and even as Mr. Estrada declined to answer many basic questions about his judicial philosophy and approach—Republicans repeatedly make clear that they are familiar with Mr. Estrada's views and judicial philosophy.

Since his nomination, Republican Senators have repeatedly praised Mr. Estrada as a ''conservative.'' A recent article from Roll Call states that the Republican Party is confident that Mr. Estrada will rule in support of big business. The article also states that the Republican Party has asked lobbyists to get involved in the battle over Mr. Estrada's nomination.

I have spoken in recent days about the importance of the DC Circuit and it's shift to the right in the 1980s and 1990s. In the 1960s and 1970s, the DC Circuit had a significant role in protecting public access to agency and judicial proceedings, protecting civil rights guarantees, overseeing administrative agencies, protecting the public interest in communications regulation, and enforcing environmental protections. In the 1980s, however, the DC Circuit changed dramatically because of the appointment of conservative judges. As its composition changed, it became a conservative and activist court—striking down civil rights and constitutional protections, encouraging deregulation, closing the doors of the courts to many citizens, favoring employers over workers, and undermining federal protection of the environment.

It seems clear that Mr. Estrada has been nominated to the DC Circuit in the hope that this court will continue to be more interested in favoring big business than in protecting the rights of workers, consumers, women, minorities, and other Americans.

Mr. Estrada's nomination is strongly opposed by those concerned about these rights. Republicans repeatedly praise Mr. Estrada as a Hispanic—but many Hispanic groups oppose his nomination. The Congressional Hispanic Caucus, the Mexican American Legal Defense Fund, the Southwest Voter Registration Project, 52 Latino Labor Leaders representing working families across the country, the California League of United Lationo Citizens, the California La Raza, the Puerto Rican Legal Defense Fund and fifteen past presidents of the Hispanic National Bar Association, whose terms span from 1972 until 1998 have stated their opposition to Mr. Estrada. As these Presidents write:

Based upon our review and understanding of the totality of Mr. Estrada's record and life's experiences, we believe that there are more than enought reasons to conclude that Mr. Estrada's candidacy falls short. [These] reasons include: his virtually non-existent written record, his verbally expressed and un-rebutted extreme views, his lack of judicial or academic teaching experience (against which his fairness, reasoning skills and judicial philosophy could be properly tested), his poor judicial temperament, his total lack of connection whatsoever to, or lack of demonstrated interest in the Hispanic community, his refusals to answer even the most basic questions about civil rights and constitutional law, his less than candid responses to other straightforward questions of Senate Judiciary Committee Members.

I would like to include in the RECORD statements at the end of my remarks of two of the past National Presidents of the League of United Latin American Citizens opposing Mr. Estrada's nomination. The first statement is from Belen Robles, a native Texas who has a long and active involvement in the Latino civil rights community. He writes that he is ''deeply troubled with the nomination of Miguel Estrada.'' He is troubled by the positions that Mr. Estrada has taken on racial profiling, and on whether the NAACP had standing to put forward the claims of African-Americans arrested under an anti-loitering ordinance.

Mr. Robles writes:

As a former National President of LULAC, I know very well that on many occasions LULAC has been a champion of the rights of its membership in civil rights cases. We asserted those rights on behalf of voters in voting cases in Texas, and in many other civil rights cases. Under his view, Mr. Estrada could decide that a civil rights organization such as LULAC would not be able to sue on behalf of its members. NO supporter of civil rights could agree with Mr. Estrada's confirmation.

Ruben Bonilla, an attorney in Texas who is also a past National president of LULAC, opposes the confirmation of Mr. Estrada.

Mr. Bonilla writes:

I am deeply troubled with the double standard that surrounds the nomination of Mr. Estrada. It is particularly troubling that some of the Senators have accused Democrats or other Latinos of being anti-Hispanic, or holding the American dream hostage. Yet, these same Senators in fact prevented Latinos appointed by the Clinton Administration from ever being given a hearing. Notably, Corpus Christi lawyer Jorge Rangel, and El Paso attorney Enrique Moreno, and Denver attorney Christine Arguello never received hearings before the judiciary committee. Yet, these individuals who came from the top of their profession were schooled in the Ivy League, were raised from modest means in the Southwest, and in fact truly embodied the American Dream. These highly qualified Mexican-Americans never had the opportunity to introduce themselves and their views to the Senate, as Mr. Estrada did.

Mr. President, the Senate is entitled to see Mr. Estrada's full record. Both the Constitution and historical practices require us to ignore the Administration's obvious ideological nominations. Judicial nominees who come before the Senate should have professional qualifications and the right temperament to be a judge. They should be committed to basic constitutional principles. Many of us have no confidence that Mr. Estrada has met this burden. I urge the Senate to reject this nomination.

I ask unanimous consent that supporting material be printed in the RECORD.

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

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

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

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

In addition to evaluating a candidate's professional experience and judicial temperament, the HNBA's policies and procedures governing judicial endorsements have required that the following additional criteria be considered: The extent to which a candidate has been involved in, supportive of, and responsive to the issues, needs and concerns or Hispanic Americans, and the candidate's demonstrated commitment to the concept of equal opportunity and equal justice under the law.

Based upon our review and understanding of the totality of Mr. Estrada's record and life's experiences, we believe that there are more than enough reasons to conclude that Mr. Estrada's candidacy falls short in these respects. We believe that for many reasons including: his virtually non-existent written record, his verbally expressed and un-rebutted extreme views, his lack of judicial or academic teaching experience, (against which his fairness, reasoning skills and judicial philosophy could be properly tested), his

poor judicial temperament, his total lack of any connection whatsoever to, or lack of demonstrated interest in the Hispanic community, his refusals to answer even the most basic questions about civil rights and constitutional law, his less than candid responses to the other straightforward questions of Senate Judiciary Committee members, and because of the Administration's refusal to provide the Judiciary Committee the additional information and cooperation it needs to address these concerns, the United States Senate cannot and must not conclude that Mr. Estrada can be a fair and impartial appellate court judge.

Respectfully submitted,

JOHN ROY CASTILLO, ET AL.

[From The Oregonian, Feb. 24, 2003]

ESTRADA WOULD DESTROY HARD-FOUGHT VICTORIES

(By Dolores C. Huerta)

As a co-founder of the United Farm Workers with Cesar Chavez, I know what progress looks like. Injustice and the fight against it take many forms-from boycotts and marches to contract negotiations and legislation. Over the years, we had to fight against brutal opponents, but the courts were often there to back us up. Where we moved forward, America's courts helped to establish important legal protections for all farm workers, all women, all Americans. Now, though, a dangerous shift in the courts could destroy the worker's rights, women's rights, and civil rights that our collective actions secured.

It is especially bitter for me that one of the most visible agents of the strategy to erase our legal victories is being called a great role model for Latinos. It is true that for Latinos to realize America's promise of equality and justice for all, we need to be represented in every sector of business and every branch of government. But it is also true that judges who would wipe out our hard-fought legal victories—no matter where they were born or what color their skin—are not role models for our children. And they are not the kind of judges we want on the federal courts.

Miguel Estrada is a successful lawyer, and he has powerful friends who are trying to get him a lifetime job as a federal judge. Many of them talk about him being a future Supreme Court justice. Shouldn't we be proud of him?

I for one am not too proud of a man who is unconcerned about the discrimination that many Latinos live with every day. I am not especially proud of a man whose political friends—the ones fighting hardest to put him on the court—are also fighting to abolish affirmative action and to make it harder if not impossible for federal courts to protect the rights and safety of workers and women and anyone with little power and only the hope of the courts to protect their legal rights.

Just as we resist the injustice of racial profiling and the assumption that we are lesser individuals because of where we were born or the color of our skin, so too must we resist the urge to endorse a man on the basis of his ethnic background. Members of the Congressional Hispanic Caucus met with Miguel Estrada and came away convinced that he would harm our community as a federal judge. The Mexican American Legal Defense and Educational Fund and the Puerto Rican Defense and Education Fund reviewed his record and came to the same conclusion.

Are these groups fighting Miguel Estrada because they are somehow anti-Hispanic? Are they saying that only people with certain political views are ''true'' Latinos? Of course not. They are saying that as a judge this man would do damage to the rights we have fought so hard to obtain, and that we cannot ignore that fact just because he is Latino. I think Cesar Chavez would be turning over in his grave if he knew that a candidate like this would be celebrated for supposedly representing the Hispanic community. He would also be dismayed that any civil rights organization would stay silent or back such a candidate.

To my friends who think this is all about politicians fighting among themselves, I ask you to think what would have happened over the last 40 years if the federal courts were fighting against worker's rights and women's rights and civil rights. And then think about how quickly that could become the world we are living in.

As MALDEF wrote in a detailed analysis, Estrada's record suggests that ''he would not recognize the due process rights of Latinos,'' that he ''would not fairly review Latino allegations of racial profiling by law enforcement,'' that he ''would most likely always find that government affirmative action programs fail to meet'' legal standards, and that he ''could very well compromise the rights of Latino voters under the Voting Rights Act.''

Miguel Estrada is only one of the people nominated by President Bush who could destroy much of what we have built if they become judges. The far right is fighting for them just as it is fighting for Estrada. We must fight back against Estrada and against all of them. If the only way to stop this is a filibuster in the Senate, I say, Que viva la filibuster!

STATEMENT OF RUBEN BONILLA, IN OPPOSITION TO THE CONFIRMATION OF MIGUEL ESTRADA

I write to join other Latinos in opposing the confirmation of Miguel Estrada to the DC Circuit Court of Appeals. I have a long history of involvement in the Latino civil rights community. I am an attorney in Corpus Christi, Texas, and am a past National President of LULAC. I am deeply concerned with the betterment of my community.

I am deeply troubled with the double standard that surrounds the nomination of Miguel Estrada. It is particularly troubling that some of the senators have accused Democrats or other Latinos of being anti-Hispanic, or holding the American dream hostage. Yet, these same senators in fact prevented Latinos appointed by the Clinton Administration from ever being given a hearing. Notably, Corpus Christi lawyer Jorge Rangel, and El Paso attorney Enrique Moreno, and Denver attorney Christine Arguello never received hearings before the judiciary committee. Yet, these individuals who came from the top of their profession were schooled in the Ivy League, were raised from modest means in the Southwest, and in fact truly embodied the American Dream. These highly qualified Mexican Americans never had the opportunity to introduce themselves and their views to the Senate, as Mr. Estrada did.

In addition to my concerns regarding this double standard. I am also concerned that Mr. Estrada showed himself unwilling to allow the Senate to fully evaluate his record. He was not candid in his responses. Yet, Mr. Estrada, as every other nominee who is a candidate for a lifelong appointment, must be prepared to fully answer basic questions, particularly where there is no prior judicial record or scholarly work to scrutinize. By declining to give full and candid responses, he frustrated the process. Individuals with values should be called to explain those values honestly and forthrightly. We can demand no less from those who would hold a lifelong appointment in our system of justice.

Finally, I am also concerned with some of the answers that Mr. Estrada did give when he was pressed. For example, I understand that as an attorney he argued that the NAACP did not have legal standing to press the claims of African Americans who had been arrested under a particular ordinance. As a former National President of LULAC, I know that on many occasions LULAC has represented the rights of its membership in voting cases, and in other civil rights matters. I would be troubled that if he were confirmed, Mr. Estrada would not find a civil rights organization to be an appropriate plaintiff, and would uphold closing the courthouse door on them.

Given these concerns, I oppose the confirmation of Mr. Miguel Estrada.

STATEMENT OF BELEN ROBLES IN OPPOSITION TO THE CONFIRMATION OF MIGUEL ESTRADA

I write to join other Latino leaders and organizations in opposing the confirmation of Miguel Estrada to the DC Circuit Court of Appeals. As a native Texan, I have a very long and active involvement in the Latino civil rights community and have worked hard to ensure that Latinos have real choices about their lives. I am a past National President of the League of United Latin American Citizens (LULAC).

I am deeply troubled with the nomination of Miguel Estrada. I am very troubled with the positions he seems to have taken about our youth being subjected to racial profiling. As I understand his position, he does not believe that racial profiling exists, and has many times argued that the Constitution gives police officers unbridled authority and power. In our communities, racial profiling does exist and our children have been subjected to it. This is an issue that Latino organizations, including LULAC have long cared about. In all of the years that I was involved with civil rights, LULAC always stood to protect our community, including our youth when law enforcement exceeds their authority.

I am also concerned that Mr. Estrada did not allow the Senate to fully evaluate his record. He was not open in his responses, but instead was evasive. Yet, anyone appointed to a lifelong position has to be willing to answer questions fully. The American people have a right to know who sits in our seats of justice. And to demand that the person be fair.

Mr. Estrada has also taken actions against organizations that make me believe that he would not be fair. For example, as an attorney he argued that the NAACP did not have legal standing to put forward the claims of African Americans who have been arrested under a particular ordinance. As a former National President of LULAC, I know very well that on many occasions LULAC has been a champion of the rights of its membership in civil rights cases. We asserted those rights on behalf of voters in voting cases in Texas, and in many other civil rights cases. Under his view, Mr. Estrada could decide that a civil rights organization such as LULAC would not be able to sue on behalf of its members. No supporter of civil rights could agree with Mr. Estrada's confirmation.

I oppose the confirmation of Mr. Miguel Estrada.

HISPANIC BAR ASSOCIATION OF PENNSYLVANIA,
Philadelphia, PA, January 28, 2003.

Hon. Senator EDWARD M. KENNEDY,
Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR HONORABLE SIR: I am writing on behalf of the Hispanic Bar Association of Pennsylvania (HBA) to inform you that we oppose the appointment of Miguel Angel Estrada to the United States Court of Appeals for the District of Columbia Circuit. For the reasons

that follow, we urge you to vote against Mr. Estrada's confirmation.

The HBA recognizes that Mr. Estrada's nomination was pending for some time prior to his hearing before the Senate Judiciary Committee on September 26, 2002. Nevertheless, it was the Hispanic National Bar Association's public endorsement of this candidate that prompted our organization to initiate its own evaluation of Mr. Estrada.

To that end, the HBA created a Special Committee on Judicial Nominations to develop a process for reviewing and potentially endorsing not only Mr. Estrada, but also all future candidates for the Judiciary. As part of the process, we contacted Mr. Estrada, asked to interview him, and invited him as a guest of the HBA to meet the members of our organization. Mr. Estrada, for stated good cause, declined our invitations. Notwithstanding Mr. Estrada's non-participation, the Committee completed its work and reported its findings to the HBA membership on November 14, 2002. Following the Committee's recommendation, the membership voted not to support Mr. Estrada's nomination.

The HBA recognizes and applauds Mr. Estrada for his outstanding professional and personal achievements. Indeed, the HBA adopts the American Bar Association's rating of ''well-qualified'' with regard to Mr. Estrada's professional competence and integrity. However, employing the ABA's seven established criteria for evaluating judicial temperament, the HBA finds Mr. Estrada to be lacking. Our organization could find no evidence that Mr. Estrada has demonstrated the judicial position. In addition, the HBA seeks to endorse individuals who have ''demonstrated awareness and sensitivity to minority, particularly Hispanic concerns.'' Sadly, we also could find no evidence of this quality in Mr. Estrada.

The HBA shares the concern of the president of the Judiciary Committee that only the best-qualified and most suitable individuals be appointed to the federal bench. Furthermore, the HBA appreciates the efforts, as evidenced by Mr. Estrada's nomination, to consider and promote members of the rapidly growing Latino population to positions of high visibility and importance. However, we believe that there are a myriad of other well-qualified Latinos whose integrity, professional competence, and judicial temperament would be beyond reproach and who would therefore be better suited for this position.

The Hispanic Bar Association of Pennsylvania regrets that it cannot support the nomination of Mr. Estrada to the United States Court of Appeals for the District of Columbia Circuit. We respectfully request that you oppose the confirmation of his nomination.

Respectfully submitted,

ARLENE RIVERA FINKELSTEIN,

President, and the Special Committee on Judicial Nominations on behalf of the Hispanic Bar Association of Pennsylvania.

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

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

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. LAUTENBERG. Mr. President, today is the 12th day, as remarkable as that seems, that the Senate is debating this nomination instead of doing what it has to for the important business of the American people, as I see it. It is quite clear the other side is just not going to get cloture on this nomination. So the choice is either bring forward a cloture motion or move on to other business.

The Nation's Governors are in Washington meeting with President Bush and Members of Congress to discuss critically important issues, such as homeland security, rising unemployment, and increasing State deficits. These are serious issues that need attention, but we are delaying tending to the needs of the American people with endless debate on a judicial nominee who is refusing to tell the Senate almost anything about his judicial philosophy or decisionmaking process.

This hide-the-ball strategy being used by Mr. Estrada, frankly, I think is an affront to the Senate and the American people. We have the right to get complete and thoughtful answers to legitimate concerns about his approach to his interpretation of the U.S. Constitution and the laws of the country.

I was formerly a businessman. Sometimes there are processes that are not dissimilar to our functions here. One of them is to be able to understand what a nominee or an appointment of a high-ranking executive might include and a review of that person's potential, that person's experience, that person's attitude before you put him to work.

My fellow Senators on the other side of the aisle would have the Senate, considered the most deliberative body in world history—and, I assume, also considered one of the most thoughtful places in the world in terms of Government and deliberative bodies—vote to confirm a nominee to a lifetime—lifetime, and it is important people realize that means you cannot be fired from the job; this means you can go as long as you want to, and when you are finished with your service, your salary continues at exactly the same level it did when you went to work every day—a lifetime appointment without disclosure of what I and my colleagues consider required information.

In the business world, this practice would have been unheard of, and the American people deserve better. If someone were seeking a post and they appeared before a congressional committee or a department head and said, I would like the job, but I am not willing to answer that questionnaire, that would make that aspirant unacceptable under any condition. It should be a requirement when a lifetime-tenured job is under discussion, something so important as the circuit court of appeals where people, after getting a decision from district court, go to get the judgment of wise and experienced people. His unwillingness to answer questions, to talk about what he stands for, and what he believes is a shocking disregard for appropriate behavior.

Responsible business owners do not hire senior managers without first conducting a complete and thorough review of that candidate's job application. The candidate would answer questions that give interviewers an opportunity to measure the candidate's decisionmaking process and views on work-related issues. A candidate cannot simply refuse to answer important questions of fitness, philosophy, or temperament. No business executive would hire a candidate who refused to answer basic inquiries. These are not private matters. They become the matters of the employer, be it government or business. Those in business would put their businesses at risk and leave themselves susceptible to future lawsuits based on negligent hiring practices.

No one is doubting the fact Mr. Estrada is bright and intelligent, but his repeated refusal to provide the Senate with any insight into his views on the law and the U.S. Constitution is incomprehensible. I just cannot understand it. How can we make an informed decision about a judicial nominee if the nominee refuses to provide the Senate with sufficient information about his judicial philosophy and, therefore, his temperament?

The questions being asked are not prohibited by law or judicial or professional ethics codes. Instead of entertaining continuing with these dilatory tactics, the Senate should simply move on to the important business of the American people concerned about the protection of their homeland; move on to repair a hemorrhaging Federal budget that under this administration has been converted from a $5.6 trillion surplus into a 2.$1 trillion deficit; move on to provide States that are experiencing dire economic conditions with more Federal assistance that would help them weather the storms during these times of increasing unemployment, threatening war with Iraq, and a sustained fear of potential terrorist acts.

In the most recent CNN Gallup poll, 50 percent of Americans believe the economy is the most pressing issue confronting the Nation. Thirty percent of Americans believe the war with Iraq is the most important issue, second to jobs and the economy.

The nomination of Mr. Estrada did not make the list of important concerns facing the Nation. Since January 2001, the number of unemployed Americans has increased by nearly 40 percent, with nearly 8.3 million Americans out of work.

Since President Bush took office, 2.3 million private sector jobs have been lost and the unemployment rate for Latinos by way of example has increased 33 percent. According to the Department of Labor, there are now 2.4 jobseekers for every job opening. So rather than focusing on creating jobs for 8.3 million Americans, the Senate is targeted on the job of one attorney, a very successful attorney who made a lot of money. But how does that influence what the American people see as their need?

This is the same thinking that has produced an economic stimulus package that overwhelmingly favors the top 1 percent of American taxpayers while giving very little to those who really need some economic help.

The Senate needs to move on to the important work of protecting the homeland. CIA Director Tenet and FBI Director Mueller have both testified that America is still vulnerable to terrorist attack, and we keep on hearing alarms described in different colors. The American public does not understand what the difference between red and yellow is. They just know it scares them. It panics them. They do not know what to do. I get phone calls from people in New Jersey asking, Should we stay out of New York City? Should we not take our children on a trip? Should we stay home? The answer to all of those is that we do not really know, but we ought to get on with finding out.

The omnibus appropriations bill provides less than half of the $3.5 billion in funding promised to law enforcement people, firefighters, and emergency medical personnel. Meanwhile, America's ports, borders, and critical infrastructure remain dangerously unprotected.

Once again, instead of focusing on protecting the homeland and funding our first responders, the work of the Senate is being delayed in order to secure the appointment of a judicial nominee who refuses to share his views with the American people.

I do not intend to demean or diminish the importance of this nomination. It is very important. To the contrary, the nomination at issue is to the U.S. Court of Appeals for the DC Circuit, which is the most powerful intermediate Federal appellate court, second only to the U.S. Supreme Court. The DC Circuit is more powerful, it is observed, than other Federal courts because it has exclusive jurisdiction over a broad array of far-reaching Federal regulations that enforce critical environment, consumer, and worker protection laws.

As history has shown, DC Circuit Court judges are often tapped to serve on the Supreme Court. Presently, three of the nine Supreme Court Justices—Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg—previously served on the DC Circuit.

The Senate has a constitutional responsibility. The constitutional judicial confirmation process grants authority to the President of the United States to make the nominations and gives the Senate an equally significant role to agree by advising and consenting with the President's recommendation before a nominee can sit on the Federal bench. These important, mutually coexisting roles of the President and the Senate are central to the democratic system of separation of powers and checks and balances.

Mr. Estrada must provide the Senate with a full and complete understanding of his views of the law and the Constitution, including important civil rights laws that protect all Americans, especially minorities, women, the elderly, and the disabled. However, if he is unwilling or the White House is unwilling to nominate judicial nominees who are willing to answer reasonable, nonintrusive, and legitimate inquiries of the Senate, then these nominees should not be confirmed.

The role of the Senate in the confirmation process is advise and consent. It does not say anyplace to rubberstamp all Presidential nominations. The Senate should not abdicate its responsibility to thoroughly review judicial nominations. It is a responsibility, it is an obligation, for each one of us. Rather, the Senate is dutybound to ensure that each nominee maintains the utmost commitment to upholding the Constitution of our country—following precedent, listening to arguments without fear or favor, and rendering judgment without personal bias. Miguel Estrada has failed to respond to legitimate inquiries to the Senate and the American people.

As I said before, it is time to move on to the important work of the American people, and let this appointment fall as it should unless Mr. Estrada has a reckoning with himself and his obligation and comes to the Senate to discuss his views in response to questions posed by the Senate.

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

Mr. LAUTENBERG. Yes.

Mr. REID. The Senator is from the State of New Jersey. Of course, the State of New Jersey is very aware of the news that is put out in the New York Times and the editorials put out in the New York Times. Is that a fair statement?

Mr. LAUTENBERG. It is a very important paper, yes.

Mr. REID. I do not know if the Senator is aware that I read into the RECORD this morning a New York Times editorial from last fall dealing with Estrada. I ask the Senator if he is aware of the first paragraph of an editorial written February 13, 2003, in the New York Times?

Is the Senator also aware that last night the majority read into the RECORD a number of editorials from around the country?

Mr. LAUTENBERG. I am aware of that.

Mr. REID. Does the Senator from New Jersey know the circulation of the New York Times?

Mr. LAUTENBERG. I do not know precisely, but it is in the——

Mr. REID. It is in the millions.

Mr. LAUTENBERG. I am sorry?

Mr. REID. It is over a million.

Mr. LAUTENBERG. Over a million certainly on the weekends.

Mr. REID. Yes, I am sure it is.

Is the Senator aware of this editorial that says, paragraph No. 1, ''The Bush administration is missing the point in the Senate battle over Miguel Estrada, its controversial nominee to the powerful DC Circuit Court of Appeals. Democrats who have vowed to filibuster the nomination are not engaging in 'shameful politics,' as the President has put it, nor are they anti-Latino, as Republicans have cynically charged. They are insisting that the White House respect the Senate's role in confirming judicial nominees''?

Mr. LAUTENBERG. I am. I am also aware of the fact that there are Latino organizations that are unalterably opposed to this nomination.

Mr. REID. If the Senator will yield for a question, is he aware that it is led by the Congressional Hispanic Caucus?

Mr. LAUTENBERG. I am aware of all that.

Mr. REID. If the Senator will yield for a further question, it would be difficult, would it not, to say that the Congressional Hispanic Caucus was anti-Hispanic?

Mr. LAUTENBERG. I absolutely agree that there would typically be a determination by them to support the nomination, but they are not. If the Senator will help sharpen my memory, I think they said keep on talking in the close of that editorial piece.

Mr. REID. We are going to find out. If the Senator would yield for another question?

Mr. LAUTENBERG. I would be happy to.

Mr. REID. I ask if the Senator from New Jersey agrees with that first paragraph of the editorial that I just wrote—read. I wish I had written it, but I read it.

Mr. LAUTENBERG. I agree with the Senator and wish I had written it as well.

Mr. REID. It is a short editorial. It is only three paragraphs. I will ask the Senator a question if he would yield.

Mr. LAUTENBERG. Yes.

Mr. REID. ''The Bush administration has shown no interest in working with Senate Democrats to select nominees who could be approved by consensus, and has dug in its heels on its most controversial choices. At their confirmation hearings, judicial nominees have refused to answer questions about their views on legal issues. And Senate Republicans have rushed through the procedures on controversial nominees. Mr. Estrada embodies the White House's scorn for the Senate's role. Dubbed the 'stealth candidate,' he arrived with an extremely conservative reputation but almost no paper trail. He refused to answer questions, and although he had written many memorandums as a lawyer in the Justice Department, the White House refused to release them.''

Does the Senator from New Jersey agree with the statement made in this editorial, second paragraph, by the New York Times?

Mr. LAUTENBERG. I agree with it fully. I read that editorial. I was in total agreement with their logic, coming from New Jersey where we had candidates who were recommended for the

appeals court languish—nothing happening for months and months and months. The protests we hear now from our friends on the other side about the process are a bit shameless because we had a nominee from California, Mr. Paez, who waited, I believe, 1,500 days.

Mr. REID. One thousand five hundred four days.

Mr. LAUTENBERG. Waiting for a review by the committee, and could not get that.

If we talk about obstinate approaches to the process about deliberate obstruction, the record is very clear.

When we presented candidates, when the Democrats were a majority, they could not move them because the Republican side of the Senate would not permit any action at all.

Mr. REID. Will the Senator yield for an additional question?

Mr. LAUTENBERG. I am happy to yield to my friend from Nevada.

Mr. REID. The final paragraph of this short but powerful editorial, does the Senator from New Jersey agree with this:

> The Senate Democratic leader, Tom Daschle, insists that the Senate be given the information it needs to evaluate Mr. Estrada. He says there cannot be a vote until senators are given access to Mr. Estrada's memorandums and until they get answers to their questions. The White House can call this politics or obstruction. But in fact it is Senators doing their jobs.

Would the Senator agree with this statement?

Mr. LAUTENBERG. I agree 100 percent with that statement, and I think we ought to get on with the business of the American people.

Mr. REID. If the Senator will yield for another question before he leaves the floor. The Senator mentioned there were aspirants to be appellate judges, and is the Senator aware that a number of these people were from New York? Is that true?

Mr. LAUTENBERG. Indeed, that is true.

I just got a letter from a district court judge in New Jersey, considered one of the most brilliant and able district court judges, who was recommended for the circuit court of appeals in our district and decided after a long wait that he was not going to get a chance to be heard for a circuit court job. He informs me in his letter that he is going back to the law firm after 10 years on the Federal bench—a distinguished jurist, a great loss. He could not get a hearing, so he decided to withdraw rather than sit there and be dangled like a kite in the wind.

Mr. REID. Is the Senator aware of the names of 79 Clinton judicial nominees who were not confirmed by the Republicans?

Mr. LAUTENBERG. I am fully aware of that. I listened when the distinguished Democratic whip read that list the first time, and I took the liberty of reading the list a second time to make sure it was clearly understood.

Mr. LAUTENBERG. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. THOMAS. Mr. President, it is very interesting to hear the discussions. It is very similar to what we have heard now for a couple of weeks. I could not agree more with the Senator from New Jersey who says let's get on with it. I have a suggestion as to how we can do that. There are more than a majority in this Senate who are satisfied with this candidate and ready to vote. All we need to do is have an up-or-down vote. Those who are opposing that are in the minority. They can study as many things as they choose. The fact is, the majority of the people on this floor are satisfied this candidate is the right candidate and it is time to go. I could not agree more.

We have a lot of things to do. We have gone through the hearings, we have gone through all the background, and certainly most of us would like to get away from this delay tactic and get on with our work. I have to say that when the majority is ready to go, that is what we ought to do. I suggest that.

I will discuss another subject for a moment.

THE PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. THOMAS. I thank the Chair.

(The remarks of Mr. THOMAS pertaining to the introduction of S. 475 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. THOMAS. Mr. President, again I hope we find ourselves in a position to move forward. I don't think there is a soul here who would not admit we have talked enough about this judicial nomination. I don't think there is a soul here who would deny we have all made up our minds, we all know exactly what we are going to do. It is very clear that the majority on this floor is prepared to vote for this nominee and we are being held up over here by a minority that simply continues to ask for something that is not necessary because the majority has already been determined. So I hope we can move on and do the business of this country for these people.

I yield the floor.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAPO. Mr. President, I rise today to submit a resolution.

(The remarks of Mr. CRAPO pertaining to the submission of S. Con. Res. 11 are printed in today's RECORD under ''Submission on Concurrent and Senate Resolutions.'')

JUDICIARY COMMITTEE ACTION

Mr. DASCHLE. Mr. President, I wanted to come to the floor this afternoon to discuss a matter that occurred in the Judiciary Committee today that is deeply troubling.

During a mark-up of 3 controversial circuit court nominees, the Chairman of the Judiciary Committee refused to observe the long-standing rules of the committee and brought two circuit court nominations to a vote despite the fact that there was a desire by several members of the minority to continue debate.

This situation is very specifically addressed by Committee Rule No. 4, which reads as follows:

> The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a rollcall vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the Minority.

At the time that the chairman attempted to bring the nominations of John Roberts and Deborah Cook to a vote, objections were lodged by at least 2 members of the committee.

In fact, I believe that this rule was read into the RECORD in an effort to make clear to the chairman that it was not appropriate under the committee rules to bring these matters to a vote.

Despite the fact that this action represented a clear violation of the committee rules, the chairman ended debate on these nominations and conducted a roll call vote.

This reckless exercise of raw power by a chairman without regard to the agreed-upon standards of conduct that members of the committee have agreed to is ominous.

Senate committees either have rules or they do not. It cannot be the case that the rules of a committee will apply unless the chairman deems them inconvenient or an obstacle to a goal he seeks at any given moment.

This body has, for over 200 years, operated on the principle that civil debate and resolution of competing philosophies require rules. If the actions taken today indicate the new standard to which the majority plans to hold itself, then I propose that we simply repeal committee rules altogether and acknowledge that ''might makes right'' and there is no respect for minority interests.

How can we expect the Judiciary Committee to place on the bench individuals who respect the rule of law if the very process that the committee uses to confirm those individuals violates the Senate rules themselves?

I hope that upon reflection the chairman of the Judiciary Committee will reconvene the committee and allow for the committee to report out these nominations in a manner that is consistent with the committee rules.

If not, he must recognize that he is setting a terrible precedent regarding the operation of Senate committees in the future, regardless of which party may be in control.

Mr. President, I am very deeply troubled. This is a body of rules. This is a

country of laws. I cannot imagine that there is ever a time that any one of us—any one of us—ought to be in a position to say: The rules in this case are not going to apply, the law in this case will not apply.

And how ironic—how ironic—that in the Judiciary Committee, the committee which passes judgment on those who will interpret the rule of law, that very committee violated the rule today.

So, Mr. President, we call attention to this extraordinary development with grave concern about its implications, about its precedent, about the message it sends. And I must say, it will not be tolerated.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

HOMELAND SECURITY

Mr. REID. Mr. President, there have been a number of statements over the past many months about the fact that we should have been spending more money on homeland security.

For example, this week, I had a woman come to me from Las Vegas, who is in charge of the 9–1–1 center at the Metropolitan Police Department, a very large police department, with hundreds and hundreds of police officers representing that urban area of some 1.5 to 1.7 million people.

She indicated to me there is a real problem. If you have a telephone call coming from a standard telephone, that person can be identified. They know the location of that telephone. Or if it is a pay phone, they know the location of that pay phone. But today a lot of people are getting rid of their standard telephones, as we know them, and are using computers, and millions and millions of people are using cell phones.

She said that for virtually every place in the United States, including the Las Vegas area, if you call 9–1–1 from a cell phone, they have no idea who is making the phone call or where it is coming from. And, of course, with the computer, that is absolutely the case also.

She was lamenting the fact that the technology is there. It is easy to do what needs to be done to make sure that 9–1–1 calls that come from cell phones can be located.

People have lost their lives and have been injured and harm caused to them as a result of 9–1–1 not being able to identify when the emergency call comes in. This is only one example of how technology could handle the problem.

Why isn't it being done in Las Vegas and other places? There isn't enough money. With what happened on September 11, there is tremendous need for more money to be spent for homeland security. This was certainly the opinion of the Governors who were in town this week. They are having all kinds of problems.

So, Mr. President, I would like to refer again to the New York Times. I have talked about an editorial, as did my friend from Idaho, in the New York Times. I want to refer to a news story from the New York Times, dated today, February 27, 2003, written by one Philip Shenon, entitled ''White House Concedes That Counterterror Budget Is Meager.'' In effect, what this news article says is the White House now recognizes that there isn't enough money to take care of the problems of homeland security.

In this article, among other things, the President blames the leadership of the House and the Senate. And, of course, that does not include the Democratic leadership, because everyone knows, including the President, that we have been crying for more money for more than a year.

There are just a couple things from this news article I would like to point out to the Senate:

. . . the long delayed Government spending plan for the year does not provide enough money to protect against terrorist attacks on American soil.

Mr. President, this is a statement from this administration. This is not a statement from the Senator from West Virginia, the senior member of the Appropriations Committee, who has spoken for hours and hours on the need for more money. This is not a statement from Senator DASCHLE, the Democratic leader. This is coming from the administration: White House concedes that counterterror budget is meager.

The article goes on to say:

. . . because it had failed to provide adequate money for local counterterrorism programs.

Mr. President, throughout America today you can't have police agencies talking with each other. In Las Vegas, as an example, you have the Las Vegas Metropolitan Police Department, the city of Henderson, and Boulder City, and they can't talk to each other in an emergency. The technology is there. They can do that. But these governments simply don't have the money to do that. Fire departments can't talk to police departments all over America. It is not only a problem in Nevada.

We have been asking that the President help with these moneys, and he has been unwilling to do so. He, in effect, vetoed a multibillion dollar proposal we had in a bill just a short time ago. In the bill we had, the big omnibus bill, we asked for a small amount of money for all the demands in here. We asked for $3.5 billion, but it contains only, as this article indicates, about $1.3 billion in counterterrorism money for local governments.

Now, these remarks struck some of the audiences unusually sharp, given that ''both Houses of Congress are controlled by the President's party,'' as the article indicates.

Now, there is more in this article, and the day is late, and the snow is falling, but I do want to read this to make sure the picture is plain.

This is a quote from Governor Gary Locke of Washington, which is in the article:

We have a lot of police agencies in the state that were assured by the administration, repeatedly, that this money was on the way.

Still quoting from the article:

He said that many police and fire departments had bought [for example] hazardous-materials protective suits and other counterterrorism equipment in the expectation that they would be reimbursed by the federal government.

''And now,'' Governor Locke said, ''they're going to have to scramble to terminate other programs in order to cover those costs.''

It is not only Democratic Governors complaining. Republican Governors are complaining. Governor Bob Taft, a Republican, said lawmakers did not appropriate the amount that was recommended and earmarked for what they appropriated. So it is very clear there are things we need to do on this Senate floor that deal with more than the employment of one man, Miguel Estrada, a man who today, I am sure, is billing big hours down at his plush office here in Washington, a man who makes hundreds of thousands of dollars a year.

There have been statements made on this floor that it is extremely important that we shift from this man's employment, one man's employment, to the millions of people who are unemployed, and millions who are underemployed, people who have no health insurance and are underinsured and the many other problems we face.

UNANIMOUS CONSENT REQUEST—S. 466

Based upon the New York Times article and the fact that the President of the United States has now acknowledged that the counterterror budget is meager, I ask unanimous consent that the Senate return to legislative session and then proceed to the immediate consideration of S. 466, a bill to provide $5 billion for first responders, introduced today by Senator DASCHLE.

The PRESIDING OFFICER. Is there objection?

Mr. CRAPO. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. REID. Mr. President, this is no surprise. I hope that people will understand the need to go to other legislation. When we have our own President who, for more than a year, has said we have enough money, there is money in the pipeline, now agreeing that we have a problem, that we don't have enough money. The State of Nevada, I spoke to the State legislature there a week ago last Tuesday, 10 days ago, 9 days ago. I told the legislature there, which is like 45 other State legislatures around America today, they have a State that is in red ink. I told them there are a number of reasons they are

in red ink. One is we have passed a bill called Leave No Child Behind, and we are leaving lots of children behind because we passed on to the State of Nevada and other States unfunded mandates that create financial problems for the States.

I also told the State legislature that what we have done in passing different measures dealing with terrorism, we have passed on to the State and local governments unfunded mandates, costing the State of Nevada and local governments millions of dollars, causing their budgets to be in the red significantly.

The President is wrong. He must help us address the problem. Senator DASCHLE's bill for $5 billion for first responders is not enough, but it is a step in the right direction.

We are fighting. We have now here the former chairman of the Armed Services Committee, now ranking member. As we speak, American forces are in a war in Afghanistan. People every day are being wounded and killed in Afghanistan. But that has been overwhelmed by what is going on in Iraq, or what soon will go on in Iraq.

We have lots of problems. We have problems in North Korea, which is a real serious one. They have started their second reactor there in the last few days. I was present at a briefing the other day with somebody from the administration who should know about how much the war is going to cost, and they don't know. The war in Iraq, they don't know. But we know we have a war going on here at home to fight terrorism, and we are not spending enough money to protect American people.

We have interests in the Middle East. We have interests in Afghanistan. We have interests on the Korean peninsula. We have interests here, and they are being neglected. The President acknowledges that. What are we doing here, spending 3 weeks dealing with Miguel Estrada. It is wrong. I am not surprised this unanimous consent request was objected to, but even though I am not surprised, it doesn't take away from the significance and really how depressed I am as a result of not having the adequate resources we need to take care of the problems dealing with homeland security.

Mr. LEVIN. I wonder if the Senator will yield for one question?

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

Mr. LEVIN. We have heard now with some regularity from the administration that they have no idea, no estimate as to what the cost of the war with Iraq will be, nor what the aftermath would cost; in other words, assuming there is a war, assuming that we occupy Iraq with or without others. According to General Shinseki, that could actually involve up to 100,000 troops there for some unlimited period of time. But even if they disagree with that, which apparently some members of the Pentagon do, we have not been able to obtain—and they claim there is none—an estimate of the cost of the aftermath of a war with Iraq at the same time that they are asking us to put in place an additional tax cut.

Does it not strike my good friend from Nevada as being irresponsible to put into place tax cuts with huge costs to the Treasury when we are likely on the verge of a war which has no particular estimated cost, and then the aftermath of that war, which could last years, in turn also has no estimated cost? Does it not strike the Senator from Nevada as simply not being the responsible thing to do to be imposing or putting into place tax reductions which means losses to the Treasury, when we are right on the verge of potential expenditures which could be literally hundreds of billions of dollars over a reasonably short period of time?

Mr. REID. Even though I would disagree with what the administration would do if they had the information and wouldn't give it to us, I wouldn't like that, but I would at least feel more comfortable that they were on top of their game. But for them to come to us and say, we don't know, that says it all. If they don't know and have no estimates as to the cost of what post-Iraq is going to be, we should all be concerned. If the general is 50 percent wrong, and it is only 100,000 troops, that is a lot of troops to keep there for a period of time. They don't know whether it is 2 days, 2 years or 2 decades.

Mr. LEVIN. And the answer we get is there is no way to know with certainty. These specifics are simply not available. There are too many imponderables. That is true, there are clearly some uncertainties. But it seems obvious to me the planners at the Pentagon must have some range of time or else there is no exit strategy, or else it is forever.

Previous administrations have been criticized for not having exit strategies, not having estimates in time, for making their estimate too short: They will be home by Christmas. But that is no excuse for not having some range—that we will be there from 1 to 3 years according to the best estimate. The worst case scenario is X number of years, best case scenario is such and such. The best case scenario is we won't have problems with the Kurds or the Shia will not be attacking the Sunni. The worst case scenario is we will have those kinds of civil wars. There are best case and worst case scenarios which allow planners who are working actually on estimated costs and exit strategies to come up with some kind of an estimate upon which we can base future resources and expenditures of this Nation.

Mr. REID. People in the administration who try to be candid with Congress get in trouble. Larry Lindsey, the chief economic adviser to the President, told us the war would cost $100 billion. He lost his job. I don't know if that is the only reason, but the general, a couple days ago, said: We will have to have 200,000 troops. There was a mad rush to that poor man to get him to change his opinion, and he changed his opinion and said: Maybe I was wrong, maybe it will be—and he mumbled around a little bit, but he gave an honest answer.

Mr. LEVIN. He did.

Mr. REID. Let's hope he doesn't lose his job. Let me also say this. We have all been impressed with this movie ''A Beautiful Mind,'' which a year ago won the Academy Award. The principle of that movie and the book that I read, written by a woman named Nasar, was that this brilliant man, Nash, figured out what was called the game theory. This doesn't necessarily mean playing checkers.

He was able to determine through this brilliant mind that he had what would happen if more than two people were engaged in an activity and, as a result of the work he did, that is what much of the cold war planning was based upon—his theory, his game theory.

Now, for me to be told that this mighty Nation, the United States of America, with 260 million people, with the finest educational institutions in the world—there are about 121 great universities in the world, and we have about 112 of them; basically they are all in America. So for someone to tell me that we don't know what it is going to cost postwar, that simply is not being candid. They know. There are different scenarios and they have them all in those computers, and they know what the different costs are going to be.

I say to my friend from Michigan that, through mathematics, through computer modeling, you can figure about anything out. As most everybody knows, my last election was real close. I won election night by 401 votes. By the time it was over, I picked up 27 more votes. But on election night, I had a computer man who worked with me for many years. He was a fine man. He had run a number of different models for the 17 counties in Nevada and he told me after the vote was out of Clark County: You cannot lose. I have run every model there is and you cannot lose. It will be close, but you cannot lose. He figured out with mathematical certainty that I could not lose. Now, I didn't believe him, but he knew because he believes math doesn't lie.

So without belaboring the point to the Senator from Michigan, somebody knows in this administration, but they are not going to tell us because they are afraid the American people are going to lose more confidence. As reported yesterday, the Wall Street Journal reports that soaring energy costs, the threat of terrorism, and a stagnant job market has sent consumer spirits plunging to levels only seen in recessions. That was from yesterday. That is why they are not telling us.

I have given the Senator a very long answer to a short question, but I believe the administration knows and

they are afraid to fess up to the Congress and to the American people what this war is going to cost.

Mr. LEVIN. Just to add one further thought, it seems to me it would be absolutely irresponsible not to have a range or an estimate of what the cost of a war would be in the best and worst case scenarios.

Mr. REID. Or middle case.

Mr. LEVIN. Yes, or at least a range on what is the worst case scenario and what is the best case scenario. I cannot believe the planners at the Pentagon and the OMB do not have a range. If they don't have a range, it would be irresponsible because how in heaven's name can the administration then say that we can afford a tax cut of the size they are proposing, when we have an impending demand for resources in a war that could be lengthy, costly, and then the aftermath could be lengthy and costly? It borders on the reckless, in terms of an economy, to say we don't have an estimate, we don't know whether or not it is going to be $20 billion, $40 billion, $100 billion—we don't have a range; yet they are trying to persuade a majority of the Congress that we ought to shrink the resources coming into the Government at the same time we are on the verge of war and the aftermath of a war, which doesn't have any estimated length, any estimated cost, and no troop estimate. We were given about a 200,000 estimate. Well, that is too high. OK, what is the ceiling that is more realistic to the people who say 200,000 is too high? We are completely devoid of that.

What we are not devoid of, though, is the effort to shrink resources to this Government through a tax cut, which has a number of problems to it. One of them is that when we are facing what we are in terms of expenditures, it is not the responsible thing to do.

Mr. REID. I would like to respond, not in a very direct way, but to point out problems the Senator has outlined in his statement to me. Is the Senator aware that yesterday I talked about a Pew Research Center poll? It is a nonpartisan organization. They are not for Democrats or Republicans. This was a real big poll, where 1,254 adults were contacted between February 12 and 18. For the first time in this administration, the American people do not approve of the way George W. Bush is handling the economy; 48 percent of the people disapprove. Is the Senator aware of that?

Mr. LEVIN. I wasn't aware of the Senator's remarks, but I was aware of the poll.

Mr. REID. And the Senator talked about tax policy. This same poll says that 44 percent of the American people disagree of George W. Bush's handling of tax policy. So the Senator said it all. I appreciate his asking me a question.

Mr. LEVIN. Mr. President, I am going to speak about the very budget document that the Senator from Nevada and I have been discussing, perhaps in an indirect way. I wish to share some thoughts with the Senate about the proposed budget for 2004, which the President has now sent to Congress.

As always, I wanted to see where the President's priorities were—not in sound bites, but the actual nitty-gritty numbers in the budget document. While every budget request is important, with the economy sputtering the way it is and with huge Federal deficits looming and critical domestic and international issues unresolved, particularly when we are facing the potential of a war and a very lengthy and complicated, expensive aftermath to that war, this budget requires special attention.

I have been keenly disappointed by what this attention revealed. The President's budget would do exactly what he recently said he did not want to do, which was to pass our problems along to the next generation. The President made a very eloquent statement in the State of the Union Address, saying that we are not going to pass our problems along to the next generation. But when you look at the details of the budget, that is precisely what this budget request does.

By the administration's own calculations, this budget would have us run a deficit of over a trillion dollars for the next 5 years, including record-setting deficits of over $300 billion for this year and next.

Now, the contrast here between this projection of deficit and the $5.5 trillion 10-year surplus that was projected in January of 2001 is simply stunning. That contrast between just what 2 years ago was projected for our economy—a $5.5 trillion surplus—now there are projections of deficits upon deficits upon deficits—a projected deficit of over a trillion dollars over the next 5 years.

The administration's plan estimates a non-Social Security deficit totaling over $2.5 trillion to the year 2008, which would leave us with an additional debt of $5 trillion in 2008, which is 150 times greater than what was projected just in the year 2001.

Why such dire fiscal predictions? First, while the tax cut in the year 2001 played a huge part in putting us into the current deficit ditch, the President's call for an additional $1.5 trillion in new tax cuts—most of which disproportionately benefits upper income folks—will help ensure that we not only stay in the deficit ditch, which we are back into, but that it will be a deep deficit ditch.

Even Federal Reserve Chairman Alan Greenspan recognized the danger of such cuts when he spoke of the importance of curbing the deficit, not increasing it.

That perhaps came as a surprise to some people in the administration who were looking to Alan Greenspan to give support to the tax cut proposal and minimize, they hoped, the impact of deficits on future economies. That is not what Chairman Greenspan did. He straightforwardly recognized the danger of the tax cuts when he spoke of the importance of reducing deficits and not increasing deficits.

Mr. President, I see the Democratic leader is in the Chamber. I withhold the remainder of my comments at this time because he has a very important message relative to North Korea, and I wish to participate with him in a colloquy and presentation. So I withhold the remainder of my comments relative to the President's budget at this time.

I yield the floor.

The PRESIDING OFFICER. The Democratic leader.

NORTH KOREA

Mr. DASCHLE. Mr. President, I thank the distinguished Senator from Michigan for his courtesy and appreciate very much his comments with regard to the budget and his extraordinary leadership with regard to many issues involving our military challenges and priorities abroad.

Three weeks ago, I came to the Senate floor to address the intensifying crisis in North Korea, a country and a situation that I believe poses a risk to our Nation every bit as serious as that posed by Saddam Hussein. At the time, I urged President Bush immediately and directly to engage the North Korean Government in discussions to bring about a verifiable end to that country's nuclear weapons program.

Unfortunately, the administration so far has failed to act, and, in the meantime, the crisis in North Korea continues to escalate. In recent days, we have seen reports that North Korea test-fired a new missile, evidently that regime's idea of an inauguration present for South Korea's incoming President. Just today, the newspapers contain reports that North Korea has restarted one of the reactors at its primary nuclear complex, a reactor that produces spent plutonium which can then be converted into weapons grade material.

Let's be clear about what this latest provocation means. It means North Korea could have a nuclear production line up and running and producing weapons grade nuclear material in a matter of months. It means the world's worst proliferator could have enough nuclear material to produce six to eight nuclear weapons by summer.

According to Brent Scowcroft, President George Bush's National Security Adviser, if we fail to act, it means ''We will soon face a rampant plutonium production program that could spark a nuclear arms race in Asia and provide deadly exports to America's most implacable enemies.''

Unfortunately, the administration continues to insist on downplaying this threat. These latest developments should confirm for anyone watching that this is a crisis that only grows with each day the administration fails to act. I come to the floor today to join with my colleague, the ranking member of the Armed Services Committee, to urge the administration to act now.

The first step toward action is to acknowledge there is a problem. Based on a series of administration statements that play down the threat posed by North Korea's actions, it appears many in the administration are not even willing to take this step. For example, for quite some time now, the administration refused to call this situation even a crisis.

Last month, North Korea announced its intention to withdraw from the Nuclear Non-Proliferation Treaty, the cornerstone of the world's nonproliferation efforts, and the response from Under Secretary of State John Bolton, ''Not at all expected,'' and on Monday after the missile test, the administration is quoted as saying that this was ''just a periodic event.'' Secretary Powell called the test ''not surprising and fairly innocuous.''

So what do we do? I believe we must begin by making certain we are on the same page as our allies. Failure to do so will only produce a failed policy. Unfortunately, while the administration says the right things about the importance of coalitions, it is unwilling or unable to do the right things to build a coalition.

The administration continues to insist on multilateral discussions with the North Koreans while our friends and others have consistently and repeatedly urged President Bush to engage in bilateral talks. Therefore, the administration must redouble its efforts with our allies in South Korea, Japan, with the Chinese, and the Russians.

Second, we must make it clear to the North Koreans that separating plutonium from the spent fuel rods at Yongbyon represents an unacceptable threat to our collective security. We should tell North Korea what we expect of them directly: That if it verifiably freezes all nuclear activities, we and our allies are prepared to discuss the full range of security issues affecting the peninsula, as well as other steps North Korea can take to reenter the international community.

This is not news to the administration. In fact, the President himself has suggested he is prepared to have just these kinds of talks.

Yet, I must say, regrettably, the administration still delays. It allows the crisis to deepen and relations with our friends who are most directly threatened by North Korea to suffer. In fact, what would reward North Korea is to continue to stand by while it builds a nuclear arsenal. The danger within North Korea is too urgent for the President to delay this any further.

Finally, let me also take advantage of having my colleague, Senator LEVIN, in the Chamber to discuss a recent exchange of letters with the administration on this issue. Senators LEVIN, BIDEN, and I laid out our concerns to the administration about its North Korean policies and provided recommendations in a series of letters. I recently received a response from Dr. Rice, and I ask unanimous consent to print our January 31 letter and Dr. Rice's February 10 response in the RECORD.

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

U.S. SENATE,
Washington, DC, January 31, 2003.

Dr. CONDOLEEZZA RICE,
National Security Adviser, The White House, Washington, DC.

DEAR DR. RICE: We wrote to you earlier this month about our increased concern regarding the crises on the Korean peninsula. Our concern has deepended significantly as a result of a report in today's New York Times, which was confirmed by the Administration, that the U.S. government has evidence that North Korea is removing spent nuclear fuel rods from storage. These rods, which had been securely stored under IAEA monitoring from 1994 until recently, reportedly contain enough plutonium to produce roughtly a half dozen nuclear weapons.

As alarming as this report is, we are just as troubled by the Administration's reported reaction to these developments. Prior to this disclosure, the Administration said nothing publicly or privately to Congress about these activities. According to comments attributed to senior Administration officials, the Administration has consciously decided to hold this information in an effort to avoid creating a crisis atmosphere and distracting international attention from Iraq.

This muted response to the world's worst proliferator taking concrete steps that could permit it to build a nuclear arsenal stands in stark contrast to the President's statement on Tuesday evening that ''the gravest danger in the war on terror . . . is outlaw regimes that seek and possess nuclear, chemical, and biological weapons.'' It is also increasingly difficult to square the Administration's rehtroic on Iraq and decades of U.S. policy aimed at discouraging the emergence of declared nuclear powers with its continued downplaying of the threat posed by North Korea's blatant disregard for international rules on proliferation.

As the crisis with North Korea continues to escalate, the Administration's policy has not gotten any clearer. The Administration's lack of a clear, consistent policy and our failure to take concrete steps to address this growing crisis has produced consternation and confusion. One result is that our allies in the region appear to be taking a course directly at odds with the Administration's latest pronouncements.

Given the stakes of the situation and the ongoing confusion about the Administration's policy, we request that you come brief the Senate as early as is practical to discuss that we know about North Korea['s latest actions and what the United States is doing in response.

We look forward to hearing from you as soon as possible

Sincerely,

TOM DASCHLE.
JOSEPH R. BIDEN, Jr.
CARL LEVIN.

THE WHITE HOUSE,
Washington, DC, February 10, 2003.

Hon. THOMAS A. DASCHLE,
Democratic Leader, U.S. Senate, Washington, DC.

DEAR MR. LEADER: Thank you for your letter regarding U.S. policy on North Korea.

I agree with you about the need to take effective action in light of North Korea's recent actions to restart its nuclear facilities at Yongbyon. The United States is working closely with friends and allies toward our objective of the elimination of North Korea's nuclear weapons program in a verifiable and irreversible manner.

However, I disagree with the assertion contained in your letter that, prior to the New York Times article on January 31 on recent North Korean activities, ''the Administration said nothing publicly or privately to Congress about these activities.'' I also reject any suggestion that the Administration consciously withheld information from Congress to avoid distracting attention from Iraq.

The Administration has regularly briefed and consulted Members of Congress regarding policy toward North Korea and Iraq. For example, Deputy Secretary Armitage briefed Senators on January 16 on recent intelligence on activities at North Korean nuclear facilities and steps taken by the Administration in response to these actions. He also testified before the Senate Foreign Relations Committee on February 4.

In addition, the CIA has routinely provided briefings and written reports to Members and its oversight Committees. CIA briefed Senate Foreign Relations staff on three occasions in December on North Korea WMD issues, and on January 29, published an article on North Korean nuclear-related activities in the Senior Executive Intelligence Brief (SEIB) that addressed the issues discussed in the New York Times on January 31. The January 29 article was one of nine such articles published in the SEIB on North Korea in January alone. The SEIB is delivered daily to the CIA's oversight Committees and to the Office of Senate Security where it is available to Senators and appropriately-cleared staff.

In the days and weeks ahead, it is my hope that we can work together to address the challenges we face on a range of critical national security issues, including North Korea and Iraq.

Sincerely,

CONDOLEEZZA RICE,
Assistant to the President for National Security Affairs.

Mr. DASCHLE. Unfortunately, little in Dr. Rice's letter addresses our policy concerns. Rather, the bulk of her comments are dedicated to rebutting a claim in our letter that Congress has not been adequately consulted about some explosive findings revealed in a January 31 New York Times article.

The article stated that the U.S. Government has evidence North Korea had begun moving spent fuel rods out of a secure storage area, a development that was subsequently confirmed by the administration. Movement of spent fuel rods would either suggest that North Korea was getting ready to reprocess that fuel to build new weapons or was trying to hide the spent fuel from the international community. In either case, this is a very significant finding that we believed then and still believe deserves to be brought to the Congress's attention.

While Dr. Rice rightly points out that Congress has been briefed on North Korea issues generally, including a briefing by Deputy Secretary Armitage on January 16, we are not aware of any administration briefing that provided us with information on this specific development prior to the New York Times story. And in recent testimony before the Senate Foreign Relations Committee, Deputy Secretary Armitage implicitly acknowledged that fact.

The reason to bring this up is because we are facing a crisis on the Korean peninsula, a crisis with extremely high stakes, a crisis that demands robust American response, a crisis that demands we be clear with each other and with the American people. Given the stakes of the situation and the ongoing confusion about the administration's policy, we should expect no less.

I yield the floor.

Mr. LEVIN. Mr. President, will the Democratic leader yield just for some questions?

Mr. DASCHLE. Before I yield the floor, I am happy to yield to the distinguished Senator from Michigan.

Mr. LEVIN. Is the Senator aware of a statement which was made before us—I do not know how he would be, but let me brief him on it. We had the head of the Defense Intelligence Agency in front of the Armed Services Committee a couple of days ago, and we asked him whether or not in his judgment there was a crisis on the Korean peninsula because of the actions of North Korea in removing these seals from the spent fuel, eliminating the cameras and kicking out the inspectors. Even though the administration is unwilling to put the label ''crisis'' on what is going on on the Korean peninsula, Admiral Jacoby was more than willing to say, yes, this is a crisis.

I am wondering if the Democratic leader would agree that part of the problem that we have in dealing with the North Korean situation is the unwillingness to see it for what it is, which is a major proliferation threat when there is a country that has been the world's greatest proliferator, including Libya and Iran, missiles and missile technology, when there is a country with a nuclear program that they acknowledge removes the inspectors from its country, whether or not that would represent progress if we could just at least get the administration to acknowledge what the head of the Defense Intelligence Agency says, which is that we have a crisis on the Korean peninsula?

Mr. DASCHLE. I think the Senator asks a very good question. This is more than just a semantical issue. Whether one calls it a crisis, an emergency, whatever volatile term one wishes to apply, clearly this deserves more of a response than this administration has provided.

I wonder what would have happened if Iraq had been the country with the evidence now to suggest that weapons of mass destruction, nuclear weapons, would be produced with the degree of certainty that we now see them in North Korea, what would the administration have said to that? If Iraq had fired a test missile within the last 2 weeks, what would the administration have said of that? My hunch, is that they would have used the word ''crisis'' and then some.

They have already claimed, of course, that North Korea is a member of the so-called axis of evil, an unfortunate term in my opinion. But to avoid using the word ''crisis,'' I believe, lends a real serious credibility question to the administration's foreign policy with regard to the region. This is a crisis. Every expert has acknowledged that it is a crisis. Unless we are willing to recognize the reality of the implications of this crisis, I believe the crisis will only worsen.

The Senator from Michigan has made a very important point with his question.

Mr. LEVIN. In addition to looking a problem square in the eye and not sugarcoating it, if we are going to solve it, another part of the administration's platform relative to Korea, or approach to the Korean problem, is to say that the multilateral approach is the right approach. I am always glad to hear when the administration is willing to work multilaterally. I have been a critic of the administration because their unilateral rhetoric activities, it seems to me, have been counterproductive in many parts of the world. So whenever the administration talks about a multilateral approach or consulting with allies and friends, that is good news. But when they do the consultation, when they talk to South Korea, both its former President and its new President, as well as when they talk to China, as well as when they talk to Japan, as well as when they talk to other allies in the area, they are told the same thing. When they do use the multilateral approach, they are told: Engage in direct discussions with North Korea. As a matter of fact, the representative of the new President of South Korea, the special envoy of new President Roh, visited us. His name is Dr. Chyung, and he visited with us on February 3.

That was, again, the open advice, he said, of the South Korean Government, is to have the United States talk directly with North Korea so that they can hear from us what our concerns are; so that both sides can avoid any kind of miscalculations; so that we do not fuel the paranoia this isolated regime has. They are paranoid. They are isolated. They actually believe we might strike them with one of our preemptive strikes. They actually believe it.

So the advice we are getting when we talk to our allies and follow this multilateral approach is engage with North Korea, and yet we refuse to do so.

I am wondering whether the Senator would agree that it is not only important that we consult with allies, not necessarily follow the advice but at least give serious consideration to the advice they give us when they talk to us about a direct engagement with North Korea to avoid miscalculation, so that the North can hear directly from us what our major concerns are?

Mr. DASCHLE. I appreciate the question posed by the Senator from Michigan. This whole experience has turned logic on its head. We have 220,000 troops in the gulf. We are told that there is almost an inevitability of war. We are told that the reason for this near inevitability is because of weapons of mass destruction that we have yet to find in Iraq and because of an unstable leader in Iraq.

These assertions have required the administration to go to great lengths to try to prove that their findings are ones that could be recognized by the world community. With all of their best effort, they have yet to demonstrate to the satisfaction of some of our allies that the threat exists to the extent the administration perceives it, and yet there is a clear set of circumstances that are undeniable in North Korea. There is a very questionable leader spurring development of nuclear weapons in the most rapid way, which we know could be sold quickly to terrorist organizations and used against us and the world community. Yet this administration chooses to ignore it.

The Senator asks the question, why would we not engage the community and recognize the importance of confronting North Korea? The administration says the answer to that is they do not want to reward bad behavior.

I argue that we are rewarding bad behavior by ignoring the circumstances as this administration has chosen to do. What could be worse behavior than what is going on right now?

As I understand it, we began to reship food assistance to the North Korean people within the last few days. We have no real guarantee that aid is going to get to the people, but it is a very unusual message they are sending to both Iraq and North Korea. Of all those who would be most confused it would be our allies. How do they explain all of this? What credibility do we have with them as we attempt to rationalize this odd position we find ourselves in today?

I appreciate the question, and I would simply say to my colleague that it begs further explanation by the administration which, again, because they refuse to call this a crisis, they have yet to provide.

Mr. LEVIN. This administration has blown hot and cold when it comes to policy relative to North Korea.

I just have one final question.

The Democratic leader points out just how confusing a policy it is, not just for North Korea but for our own allies. Our ally with the most at stake on the Korean peninsula is South Korea. They could be destroyed if there is a miscalculation. Their capital is within range of tens of thousands of artillery of North Korea.

On March 6, 2001, on the eve of a summit between then South Korean President Kim Jong-Il and President Bush, Secretary of State Powell said we plan to engage with North Korea and to pick up where President Clinton and his administration left off.

Within 24 hours was the Secretary of State's statement that we were going to engage with North Korea and pick

up where the Clinton administration left off because the Clinton administration obtained the framework agreement that resulted in the canning of that very material which is so dangerous which contains plutonium. Within 24 hours, at the summit the next day, President Bush basically said: We are not going to have any discussions with North Korea. We are not picking up where the Clinton administration left off. We do not trust North Korea.

No kidding. That is a mild statement, that we do not trust North Korea. If we did not talk to people we did not trust, we would not be talking to half of the world, including some of the most dangerous people in the world.

Talking to people does not mean we are going to reward anything. It simply means they will hear directly, eyeball to eyeball, from us as to what our concerns are, and also why we do not threaten them, and why, if they will terminate their nuclear program, they can rest assured they will get an agreement from us that there is not going to be any active aggression against them.

The blowing hot and cold, the erratic policy, the undermining not just of our own Secretary of State 24 hours after he said we would continue a policy, but undermining our South Korean allies with so much at stake, it seems to me has contributed to a very uncertain policy on the Korean peninsula, has sowed the seeds of confusion, and fueled and contributed to the paranoia that already existed in spades in North Korea.

I have been to Yongbyon, the place in North Korea where they were canning those fuel rods, where they had sealed them. I don't know that any other Member of the Congress got there, but I got there a couple years ago. I watched the International Atomic Energy Agency as they were sealing those fuel rods. That was a very positive thing to watch, to actually see, under IAEA inspection and supervision, those incredibly dangerous nuclear materials being canned instead of threatening to the rest of the world as potential proliferated material, to actually see it put under the supervision of the IAEA.

That is now out the window. We are starting from scratch. I understate my feelings on the matter when I say the Senator, the Democratic leader here, has so accurately stated the fact that we have a problem. Step 1 is to recognize we indeed have a crisis. Step 2 is not just to consult with allies but to seriously consider what they recommend when they talk about having direct engagement with the North Koreans.

I thank the Democratic leader for his constant determination to keep this Korean peninsula crisis in front of us. We cannot lose sight of it. It is a greater threat than Iraq because in North Korea you have a known proliferator who has removed the inspectors and who has nuclear material which could be so easily distributed, shipped, or sold to people who could do great harm with it.

I thank my friend from South Dakota.

Mr. DASCHLE. I thank the distinguished Senator from Michigan.

We can learn a lot from history. History, for most of my lifetime, involved a cold war, a cold war with an archenemy—the Soviet Union—which had thousands of nuclear warheads pointed toward the United States. They posed an imminent threat that could at any moment destroy all of civilization.

We made the choice, for good reason, Republican and Democratic administrations made the choice, that rather than engage in conflict, we would contain, negotiate, disarm, and ultimately wear down those leaders of the Soviet Union. That is ultimately what happened. The Soviet Union collapsed, negotiations for disarmament continued, and I recognize the contribution of many Presidents, from Harry Truman on.

But it was Ronald Reagan who said: Trust but verify. He did not say: I don't trust the Soviet Union, so I'm not going to enter into dialog with them. He was criticized at times, but he said: I'm going to engage in dialog. I'm going to continue the effort of my predecessors. I'm going to trust. But then I'm going to verify.

What the Senator from Michigan noted is that a couple of years ago that verification process was underway. We trusted. And we verified. His site visit was an indication of that verification.

I can only hope that those responsible for the day-to-day decisions made with regard to U.S. foreign policy will recognize the importance of past precedent, that we engage our enemies, we engage those whom there is ample reason to distrust, but we recognize that without some communication, without some engagement, the only other option is conflict.

The only other option is to see what is happening today. Nuclear weapons are being constructed. Nuclear weapons are being stockpiled. Nuclear weapons could be shipped. Nuclear weapons could be used not only in the region but against this country, as well. Every day we delay, every day we lack the will to confront and communicate, every day we lack the desire to verify, every day we create a problem more complex for future leaders and for future American policy.

I hope this administration will very carefully reconsider their position. I hope they will listen to our allies. I hope they will engage the North Koreans. I hope they can give us greater appreciation with greater clarity of their intentions with regard to that part of the world.

I yield the floor.

LEGISLATIVE SESSION

MORNING BUSINESS

Mr. BENNETT. Mr. President, I ask unanimous consent that the Senate now return to legislative session and go into a period of morning business.

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

IRAQ

Mr. BENNETT. Mr. President, this morning's Washington Post has an especially long editorial. Indeed, it takes up the entire length of the editorial page. It is entitled ''Drumbeat on Iraq, a Response to Readers.''

I have a dear friend in Utah who wrote me. She was distraught—is distraught, I am sure—about the prospect of going to war and expressed a great many concerns. I have been in the process of constructing what I hope is a responsible and thoughtful response to her concerns. As I read the editorial in this morning's Washington Post, I found that it does a better job than I could do of summarizing many, if not most, of the issues about which she is concerned. I want to read from sections of the editorial and then ask unanimous consent that it be printed in the RECORD at the end of my remarks.

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

(See exhibit 1.)

Mr. BENNETT. In the editorial they say:

> The right question, though, is not, ''Is war risky?'' but ''Is inaction less so?'' No one can provide more than a judgment in reply. But the world is already a dangerous place. Anthrax has been wielded in Florida, New York and Washington. Terrorists have struck repeatedly and with increased strength over the past decade. Are the United States and its allies ultimately safer if they back down again and leave Saddam Hussein secure? Or does safety lie in making clear that his kind of outlaw behavior will not be tolerated and in helping Iraq become a peaceable nation that offers no haven to terrorists? We would say the latter. . . .

As I say, I could not have put it better, which is why I have quoted it. I have raised the question on the floor before: What are the consequences if we do not follow through in Iraq? Some have said let's just leave the troops in place. And that means Iraq remains contained.

Leaving the troops in place is not an option. We must understand that the troops are where they are, poised to move into Iraq, because of the agreement of the governments in Qatar, Turkey, and Saudi Arabia, among others. Those governments will not allow our troops to remain on their soil indefinitely. They will not allow those troops to remain there while we contain Saddam Hussein for 6 months or 12 months or 12 years, which has been the period of ''containment'' that we have seen up until now. We must either withdraw those troops and say we are

From: Miranda, Manuel (Frist) <Manuel_Miranda@frist.senate.gov>
BCC: Brett M. Kavanaugh (Brett M. Kavanaugh/WHO/EOP [WHO])
Sent: 3/18/2003 10:53:29 AM
Subject: : For use and not distribution.
Attachments: P_2CBSE003_WHO.TXT_1.html

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:"Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov> ("Miranda, Manuel (Frist)" <Manuel_Miranda@frist.senate.gov> [UNKNOWN])
CREATION DATE/TIME:18-MAR-2003 15:53:29.00
SUBJECT:: For use and not distribution.
BCC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

Please see information below. Also, Kennedy speech about the precedent for legal memos from the Kleindeinst nomination. Also, precedent based on a Robert Jackson quote from 1941 and Kuhl's memos regarding Bob Jones University which were disclosed by the Justice Department to the Finance Committee in the 1980s.

In response to this morning's letter, Dem staffers say that they have confidential information that you all have reviewed the files.

Points they make:

- Rather than face the facts of past precedent and begin a process of negotiating the terms of the release to the Senate of the memos written by Miguel Estrada, Republicans insist on asserting, without any factual basis, that the appeal memos written by attorneys to the Solicitor General were stolen or leaked. This claim defies the facts and is very, very misleading. They alternatively claim that only a few memos have been disclosed but only in narrow circumstances related to claims of criminal misconduct or malfeasance. Again, that is false. Now the Justice Department claims that not even it has reviewed Estrada's memos, implying that this is how sensitive such documents are. Past Justice Department acted much more responsibly and responsively. Here are just a few examples.

- Here are just five examples that clearly refute the Republicans' incorrect claims. Correspondence from the Senate Judiciary Committee clearly shows that memos by attorneys have been requested and provided by prior Administrations that were far more cooperative with the Senate in nominations.

- Past examples include the nominations of Robert Bork to the Supreme Court, William Rehnquist to the Supreme Court, Bradford Reynolds to a term-appointment as Associate Attorney General, Stephen Trott to the Ninth Circuit, and Ben Civiletti to be Attorney General.

First, it is clear that the Reagan Justice Department provided numerous memos to the Senate in the Bork nomination regarding school desegregation cases.

In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos. Included in this request was what was identified as request number 9. That request asked for the Justice Department to provide to the Senate, and I will quote that paragraph in its entirety:

"All documents constituting, describing, referring or relating in whole

or in part to Robert H. Bork ans any study or consideration during the period 1969-1977 by the Executive Branch of the United States Government or any agency or component thereof of school desegregation remedies. (In addition to responsive documents from the entities described at the beginning of this request, please provide any responsive documents in the possession, custody or control of the U.S. Department of Education or its predecessor agency, or any agency, component of document depository thereof.)"

- I think we can all agree that this was a very exhaustive request for all documents on school desegregation cases and deliberations for an 8-year period from 1969 to 1977. It is also apparent that there was no allegation of wrongdoing or malfeasance as the predicate of this request.

? The request for these memos was merely an effort to understand the Department's position on these important issues and Bork's involvement in suggesting or taking litigation positions on this issue in response to recommendations by Department attorneys as well as information from the client agency in school desegregation cases, what was then known as the Health, Education, and Welfare Department (known as HEW).

? What was the Reagan Administration's response?

? Did they say -like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? Did they assert that this would chill Justice Department and HEW attorneys from candidly discussing cases? No.

? Did they assert that the request was too broad or some sort of fishing expedition that it wanted to ignore? No.

? Did they claim that they could not even look at those sensitive legal memos? No!

? Well, what did they say then? They said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? That is already far more cooperation than this Senate has received from this Administration.

? Here is what the Justice Department said specifically about the request for information about school desegregation cases, and I will quote it in its entirety so that there can be no mistake:

"Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files of every case handled by the Civil Rights Division or Civil Division, between 1969 and 1977, which concerned desegregation of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled responsive documents obtained from other Department files.

The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW."

? So, the Reagan Justice Department conducted an exhaustive review of its litigation files and assembled the documents responsive to the Senate's request. This stands in marked contrast to the stonewalling of the current Justice Department.

? What happened next to the boxes of school desegregation memos assembled by the Reagan Justice Department?

? On September 2, 1987, nine days after reporting to the Senate on its efforts to locate and assemble documents responsive to the Senate's request, the Department of Justice sent Chairman Biden a letter, stating:
"Attached is one set of copies of documents assembled by the Department in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork. . . ."

? So, it is clear that the Justice Department transmitted all of the documents not objected to (specifically, not a handful of Watergate documents objected to be Nixon's lawyer).

? What were those school desegregation documents? I have in my hand a sample of the documents provided by the Justice Department to the Senate during the Bork nomination regarding school desegregation.

? For example, there is a memo from Assistant Solicitor General Frank Easterbrook (then acting in the same capacity as Mr. Estrada, now a judge on the Seventh Circuit). In this memo, Easterbrook analyzes school desegregation efforts in Philadelphia. In this memo to the Solicitor General, Robert Bork, Easterbrook states: "The Civil Rights Division and I recommend AMICUS PARTICIPATION in support of petitioner."

? Easterbrook suggested that the Third Circuit's decision in Vorcheimer v. School District of Philadephia, that the local schools were "separate but equal" in this case involving a female student seeking entry could adversely affect the enforcement of Title IX and amendments prohibiting sex discrimination in education. In the memo, one can see Easterbrook's analysis of whether discrimination based on sex should be reviewed under a strict scrutiny standard or the lowest level of review, which is known as rational basis review.

? Attached to that memo is the memoranda of the Acting Assistant Attorney General for the Civil Rights Division, Stanley Pottinger.

? Another example of a school desegregation memo to the Solicitor General disclosed in the Bork nomination involves the desegregation of Nebraska schools in the case of United States v. School District of Omaha. In that case, the memo to Solicitor General Bork argued that the Civil Rights Division should be permitted to appeal an adverse decision by the district court in Nebraska that found erroneously that the school district's segregation was not based on intent to segregate. That memos analyzes why the decision below was wrong and why the law should be corrected to reflect a better understanding of the standards for finding unlawful segregation based on race.

? Specifically, the author of that memo argues that "We believe that an appeal of the district court's decision in this case is essential in order to develop the law on the issue of proof necessary to establish a showing of intent to segregate in a northern school system."

? We believe Mr. Estrada's memos contain similar suggestions about how the law should be developed, which reflect his unscripted views of the state of the law and its direction.

? Yet another memo disclosed in the Bork nomination involves the case of Lee and United States v. Demopolis City School System, relating to desegregation in Alabama. That memo to Solicitor General Robert Bork requests authority to appeal a lower court decision refusing to desegregate elementary schools, one white and one African American, as well as dismantling of the segregation state-wide.

? These are just a few of the memos provided to the Senate by the Justice Department during the Bork nomination relating to school desegregation (with all of those busing cases between 1969 and 1977 enforcing Brown v. Board). They were clearly provided as part of the Justice Department's submission of memos requested by the Senate in document request number 9, which I read in full earlier.

? One would think this would be enough evidence to refute the groundless claims of Republicans that memos from lower level attorneys written to the Solicitor General have never been provided in past nominations or that the above memos were stolen(!), but there is even more evidence.

? A second example also comes from the Bork nomination.

? In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos.

? Included in this request was what was identified as request number 10. That request asked for the Justice Department to provide to the Senate, numerous "documents constituting, describing, referring in whole or in part to the participation of Solicitor General Robert H. Bork in the formulation of the position of the United States . . . ."
? In the Solicitor General's office, line attorneys (Assistant Solicitors General, in the same role as Estrada) write the recommendations to the Solicitor General analyzing what the law is or should be and whether the case would help move the law in one direction or another.

? In those appeals, a lower level attorney would write a memo making the recommendation, that memo would be reviewed by a direct supervisor and then submitted to the Solicitor General who would then make an oral decision whether to accept the recommendation to appeal (or intervene as amicus) or not. Upon reviewing those attorney memos, a Senate staffer would then examine whether the Solicitor General accepted the recommendation and, if so, whether they took the same position in the publicly filed briefs on appeal as amicus.

? If the recommendation were accepted and appeal or amicus were authorized, then the lower attorney would be asked to write briefs (or even lower, like the Civil Division) consistent with the decision of the SG. Those briefs would be edited by direct supervisors (not the SG) and then would be reviewed by a head of the office (for example, the SG if the brief were going to the Supreme Court, or a Deputy in the Civil Division if the case were going to a circuit court, such as the 9th Circuit).

? Many of the memos relating to appeal requested and provided in Bork's nomination were written to Bork, not by Bork.

? What was the Reagan Administration's response to the request of memos by line attorneys to Solicitor General Bork?

? Did they say -like this Administration does-- we have never given you such documents in the past? No, because that was not true.

? Did they claim that past document disclosures were based on a claim of wrongdoing? No, because that was not true.

? Did they assert that the request was some sort of fishing expedition that it wanted to ignore? No.

? Did they assert that they could not even look at the attorney memos to the Solicitor General? Of course not.

? Well, what did they say then?

? On August 20, 1987, Chairman Biden's staff noted that the Justice Department had created three categories of documents. First, those which they would not release due to executive privilege claims [by Nixon's counsel related to some Watergate documents]. Second, those they would release with limited access by staff, and, third, those to which the Senate would have unlimited access. The current administration has made no such overture to this Senate.

? The Reagan Justice Department also said in a letter of August 24, 1987, "the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below [related to the objections of President Nixon's lawyer to some Watergate documents], completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents."

? Again, that is already far more cooperation than this Senate has received from this Administration.

? Here is what the Justice Department said specifically about request number 10: "We have assembled case files for the cases referred to in question 10, with the exception of Hill v. Stone, for which there is no file." The also said "A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession."

? Again, this is far more cooperation than this Justice Department has provided.

? The Justice Department did, however, express some concerns about internal deliberations, but it still provided the informationrequested.

? Here is the complete statement of the Reagan Justice Department on the issue of providing memos involving internal deliberations:
"As you know, the vast majority of the documents you have requested reflect of disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities."

? According to that letter, "For these reasons, the Justice Department and other executive agencies have consistently taken the position, in Freedom of Information Act [which, as an aside-from Lisa, expressly does not apply to Congress nor limit Congress' authority to seek information from the Executive Branch in any way whatsoever. 5 U.S.C. 552(d) (stating expressly that FOIA "is not authority to withhold information from Congress")] and other request, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications."

? Immediately after stating this, the Reagan Justice Department stated:
"On the other hand, we also wish to cooperate to the fullest

extent possible with the Committee and to expedite Judge Bork's confirmation process."

? The Justice Department then indicated that it was providing the documents requested except those specifically objected to (relating to documents regarding Watergate objected to by Nixon's lawyer).
? Then on September 2, 1987, the Justice Department sent the Senate a letter stating here "is one set of copies of documents assembled in response to your August 10, 1987 request for documents relating to the nomination of Robert Bork."

? Then, the next year, the Justice Department asked for the Senate to return the documents requested. Specifically, the Justice Department in a letter by Thomas Boyd on May 10, 1988, reiterated that the documents it provided "reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." The Justice Department indicated that it provided those memos "to respond fully to the Committee's request and to expedite the confirmation process." The Department then asked for the return of all documents that except those "that are clearly part of the public record (e.g., briefs and judicial opinions) or that were specifically made part of the record of the hearing."

? Let's contrast that with the position of this Justice Department. In a letter dated June 5, 2002, the Bush Justice Department stated that "the Department has a longstanding policy-which has endured across Administrations of both parties-of declining to release publicly or make available to Congress the kinds of documents you have requested."

? In fact, the opposite is true. The long-standing practice of the Justice Department has been to follow a "policy of accommodation." Senator Schumer put a statement of that policy from the Clinton Administration into the hearing record. That policy provides that it is well established that the Department and the Senate typically work together to find an accommodation to avoid an impasse.

? In fact, the D.C. Circuit has noted that: "The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute . . . . The Constitution contemplates such accommodation." United States v. AT&T, 576 U.S. 121, 127, 130 (D.C. Cir. 1977).
? In fact, in 1982, President Reagan issued a memo to Department heads explaining the policy of accomodation:
"The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with constitutional and statutory obligations of the Executive Branch . .. . . Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving the conflicts between the Branches."

? This is what the current administration is denying and ignoring. This was the policy and practice dating from the Carter Administration (which disclosed the legal memos to and from Benjamin Civiletti to the Senate in the course of his nomination to be Attorney General) through the Reagan Administration (which disclosed the legal memos to the Solicitor General and others in the nomination of Brad Reynolds to be Associate AG, the appeal memos to Bork and other memos by Bork in his nomination).

? The Reagan Administration also provided numerous legal memos to and by William Rehnquist about the broad issues "civil rights and civil liberties," and the first Bush Administration also disclosed internal legal memos related to the special prosecutor decisions in

connection with Stephen Trott's nomination to the Ninth Circuit. The Clinton Administration disclosed a broad range on memos in the oversight process. [In addition, the Justice Department encouraged its nominees to be responsive to every request no matter how intrusive, such as the request for how Margaret Morrow voted in the ballot box on California Referenda and how Marsha Berzon voted on ACLU board meeting issues, among others.]

? A third example, also stems from the Bork nomination.

? In a letter dated August 10, 1987, then-Chairman Biden wrote to the Justice Department and requested numerous memos, including all memos from 1973 to 1977 relating to Bork's analysis of the President's pocket veto power, in addition to the memos relating to appealing or petitioning for certiorari in pocket veto cases.

? On August 24, 1987, the Justice Department responded that "[a]ll documents responsive to request number 5, concerning pocket veto, have been assembled."

? On September 1, 1987, Senator Kennedy's counsel wrote that the materials produced had not included one of the memos to the Solicitor General in a pocket veto case. The Justice Department responded by conducting further searches and then producing that memo to the Committee.

? A fourth example comes from the Rehnquist nomination. On July 23, 1986 (before the Department shared the memos requested in the Bork nomination), then-Ranking Member Biden asked Chairman Strom Thurmond to provide copies of "all memoranda, correspondence, and other materials prepared by Mr. Rehnquist or by his staff, for his approval, or on which his name or initials appear" from 1969 to 1971 related to "civil rights," "civil liberties," "national security," "domestic surveillance," "wiretapping," "anti-war demonstrators," "executive privilege," and other issues.

? What was the Reagan Administration's response?

? Did they claim that sharing those documents with the Senate would chill deliberations by attorneys about legal policy in these areas? No.

? Did they claim the request was a fishing expedition? No.

? Did they claim that disclosure of documents was only predicated on wrongdoing? No.

? Did these Justice Department officials claim that they did not and could not look at those sensitive legal memos of the Department? Of course not.

? Instead, they accommodated the Senate's request. In a letter dated August 6, 1986, Senator Biden said:
"I wish to express my appreciation for the manner in which we were able to resolve the issue of access to documents which we requested in connection with Justice Rehnquist's confirmation proceedings. I am delighted that we were able to work out a mutually acceptable accommodation of our respective responsibilities."

? Biden then noted that in reviewing the memos provided, "several of the items refer to other materials, most of which appear to be incoming communications" to Rehnquist. Biden then attaches a list of the 14 additional memos.

? That attachment makes clear that voluminous materials were already provided, and it seeks memos from a number of people like Alexander Haig, John Dean, and William Rucklshaus.

? The very next day, the Justice Department responded to Biden's request noting that it had gone "far beyond its routine process to ensure the comprehensiveness of its response." Based on that review, the Justice Department found three other memos related to May Day arrests prepared by Justice Department attorneys as well as another memo. As noted in that letter, "the staff of the Office of Legal Counsel went to extraordinary lengths to ensure that all responsive materials were located, putting literally hundreds of hours into this request."

? The current administration has made no such efforts.

? Yet a fifth example stems from the Reynolds nomination to a short-term appointment to be Associate Attorney General. In that nomination, the Senate requested a wide range of memos, including appeal memos to the Solicitor General (Rex Lee) relating to civil rights. In fact, some of these memos appear in the hearing record.

? For example, Senators placed a memo to the Solicitor General relating to seeking to intervene as amicus in an employment discrimination case called Hishon v. King & Spaulding (involving a gender discrimination claim) as well as memos relating to redistricting cases. None of the Senators present or Mr. Reynolds claimed that such memos were protected or were stolen or leaked as the current administration has claimed about our document request memos.

? In addition, some memos written by Bork himself to President Nixon about broader legal issues were provided, for example, legal memos assessing the pocket veto power, the scope of executive privilege, and how to structure a special prosecutor or independent prosecutor process.

? As noted earlier, in the case of the pocket veto, the Senate received and reviewed both Bork's memo describing his views on the pocket veto power, as well as memos from Assistant SGs or lower level attorneys recommending for or against appeal in litigation challenging the President Nixon's use of pocket veto.

? As you can see, none of these memos related to allegations of malfeasance or criminal misconduct by Bork or others. They simply reflect a desire of Senators to know how Bork approached those (controversial) issues and whether his views influenced litigation moving the law in one direction or another. (SG memos were also provided in Reynolds nomination (to a short-term appointment as Associate AG-not even a lifetime appointment) about the impact of his views on appealing civil rights cases (discrimination cases and school prayers cases for example). A sample of such memos written to the SG was actually published in the hearing transcript. In addition, legal memos written to or from Rehnquist in the Office of Legal Counsel were also provided in his nomination. These are just a few examples.)

- att1.htm
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_2CBSE003_WHO.TXT_1>

From:	CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To:	Manuel Miranda) (Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN] <Manuel_Miranda@judiciary.senate.gov>
CC:	sales; nathan <nathan.sales@usdoj.gov>;koebele; steve <steve.koebele@usdoj.gov>;willett; don <don.willett@usdoj.gov>
Sent:	7/28/2002 3:03:12 PM
Subject:	: Re: Help requested

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:28-JUL-2002 19:03:12.00
SUBJECT:: Re: Help requested
TO:Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) (
Manuel_Miranda@judiciary.senate.gov (Manuel Miranda) [UNKNOWN])
READ:UNKNOWN
CC:"sales; nathan" <nathan.sales@usdoj.gov> ("sales; nathan" <nathan.sales@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
CC:"koebele; steve" <steve.koebele@usdoj.gov> ("koebele; steve" <steve.koebele@usdoj.gov>
[UNKNOWN])
READ:UNKNOWN
CC:"willett; don" <don.willett@usdoj.gov> ("willett; don" <don.willett@usdoj.gov> [
UNKNOWN])
READ:UNKNOWN
End Original ARMS Header

Nathan and Steve should elaborate, but my preliminary take:

1. First, the name Jane Doe is used precisely to protect privacy of the individuals. Second, all Justices in these cases discussed and quoted from the record extensively. See the majority opinion in Doe 2, the Gonzales opinion in Doe 3, the Enoch opinion in Doe 3, the majority opinion in Doe 4, etc. This is simply a bogus charge to direct at Owen.

2. Justice Owen believed that opinions could be written in a few days as courts often do in emergency cases of this nature. She specifically stated that the judgment with opinions should have been issued on March 13 instead of a summary order without opinions on March 10. She did not suggest delaying decision "for months."

3. In this case, the court unanimously agreed that the record did not meet the standard for a bypass. Six Justices concluded that a remand was appropriate. Justice Owen and two others argued, however, that Doe simply failed to make the required showing and that a remand was inappropriate. Justice Owen argued, moreover, that the potentially negative reaction of the parents of a pregnant minor when the minor becomes an adult does not meet the statutory "best interest" standard for a bypass.

Manuel_Miranda@judiciary.senate.gov (Manuel Miranda)
07/28/2002 06:33:10 PM
Record Type: Record

To: "Willett; Don" <Don.Willett@usdoj.gov>, "Sales; Nathan"
<Nathan.Sales@usdoj.gov>, "Koebele; Steve" <Steve.Koebele@usdoj.gov>,

Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: Help requested

I would ask that no action be taken by any of your offices on this for now except as I request. It is important that it be confidential to the recipients of this email and up your chains of authority only.
As I mentioned on Friday, Senator Leahy?s staff has distributed a ?confidential? letter to Dem Counsel on Thursday from Collyn Peddie, who served as the attorney for ?Jane Doe? in some or several of the Texas bypass cases. According to either the letter or the Leahy staff Ms. Peddie sent this letter in the strictest confidence because she is up for partner, and believes she will be fired if it is publicized. Several members of her firm are lead supporters of the Owen nomination. Leahy?s staff is only sharing with Democratic counsels. However, we might expect this letter to be used like the Brenda Polkey in Pickering at a moment when we are unable to respond.
Ms. Peddie is being portrayed as a small oppressed lawyer fearing repercussions if her name gets out and the brave attorney who represented the ?girl in trouble? in Jane Doe 1. In fact, she is the attorney for Planned Parenthood who argued JD cases and the Buffer Zone case and on the board of Planned Parenthood of Texas, among other things. I will copy you on our research on her.
For now I need priority help early Monday from the A team in briefly commenting on these items (two or three sentences). I have not seen the letter but it strongly criticizes Owen?s actions on the Doe cases, especially for her ?appalling insensitivity? to the pregnant minors before her court.
Owen violated the confidentiality of the Jane Does in her written opinions Specifically, Peddie accuses Owen of publishing ?dissents and concurrences in which paragraph after paragraph of confidential testimony was quoted in great detail.?
Owen sought delay of order granting bypass
Owen sought to stop the entry of Jane Doe l?s bypass until the court had published all its opinions. The court issued the order over Owen?s objection, but if the Court had adopted Owen?s position, the pregnant minor would have had to wait three more months to get the abortion.
3. Owen?s Dissent in Jane Doe 4
Peddie criticized Owen?s dissent in Jane Doe 4 which argued that parental rights should trump the risk that ?parents would throw a minor girl out on the street upon finding out she was pregnant.?

From: "Wong, Candice (OLP)" (b)(6)
To: "Lichter, Jennifer (OLP)" (b)(6), "Bumatay, Patrick (OAG)" (b)(6), "Murray, Claire M. EOP/WHO" (b)(6)
Cc: Chris Michel (b)(6), "Talley, Brett (OLP)" (b)(6), "Shah, Raj S. EOP/WHO" (b)(6), "LaCour, Alice (OLP)" (b)(6), "Champoux, Mark (OLP)" (b)(6), "Michel, Christopher G. EOP/WHO" (b)(6), "Lacy, Megan M. EOP/WHO" (b)(6)
Subject: RE: [EXTERNAL] Manny Miranda documents
Date: Wed, 19 Sep 2018 16:48:25 +0000
Importance: Normal
Attachments: (b)(5) .docx

And attaching our compendium topline doc. I like all Claire's points. Would just add, (b)(5)

From: Lichter, Jennifer (OLP)
Sent: Wednesday, September 19, 2018 12:20 PM
To: Bumatay, Patrick (OAG) (b)(6); Murray, Claire M. EOP/WHO (b)(6)
Cc: Chris Michel (b)(6); Talley, Brett (OLP) (b)(6); Wong, Candice (OLP) (b)(6); Shah, Raj S. EOP/WHO (b)(6); LaCour, Alice (OLP) (b)(6); Champoux, Mark (OLP) (b)(6); Michel, Christopher G. EOP/WHO (b)(6); Lacy, Megan M. EOP/WHO (b)(6)
Subject: RE: [EXTERNAL] Manny Miranda documents

Sure – see attached. I believe Raj has this already (?) but FYI for everyone.

From: Bumatay, Patrick (OAG)
Sent: Wednesday, September 19, 2018 12:16 PM
To: Murray, Claire M. EOP/WHO (b)(6)
Cc: Chris Michel (b)(6); Talley, Brett (OLP) (b)(6); Wong, Candice (OLP) (b)(6); Shah, Raj S. EOP/WHO (b)(6); LaCour, Alice (OLP) (b)(6); Champoux, Mark (OLP) (b)(6); Lichter, Jennifer (OLP) (b)(6); Michel, Christopher G. EOP/WHO (b)(6); Lacy, Megan M. EOP/WHO (b)(6)
Subject: Re: [EXTERNAL] Manny Miranda documents

We developed a TP on this. I don't have access on the road. But Jennie can you send it around ?

On Sep 19, 2018, at 12:06 PM, Murray, Claire M. EOP/WHO (b)(6) wrote:

Duplicative Material

From: "Champoux, Mark (OLP)" (b)(6)
To: "Wong, Candice (OLP)" (b)(6), "Talley, Brett (OLP)" (b)(6), "Shah, Raj S. EOP/WHO" (b)(6), (b)(6) Chris Michel, "LaCour, Alice (OLP)" (b)(6), "Bumatay, Patrick (OAG)" (b)(6), "Lichter, Jennifer (OLP)" (b)(6)
Subject: RE: [EXTERNAL] Manny Miranda documents
Date: Wed, 19 Sep 2018 15:52:56 +0000
Importance: Normal

I'll try to track them down and circulate, along with some thoughts on this.

MC

(b)(6)

From: Wong, Candice (OLP)
Sent: Wednesday, September 19, 2018 11:50 AM
To: Talley, Brett (OLP) (b)(6); Shah, Raj S. EOP/WHO (b)(6); (b)(6) Chris Michel; LaCour, Alice (OLP) (b)(6); Champoux, Mark (OLP) (b)(6); Bumatay, Patrick (OAG) (b)(6); Lichter, Jennifer (OLP) (b)(6)
Subject: RE: [EXTERNAL] Manny Miranda documents

Duplicative Material

From: "Talley, Brett (OLP)" (b)(6)
To: "Sandoloski, Sean M. EOP/WHO" (b)(6)
Subject: FW: SCOTUS -- non-BI, un-redacted version of Ford letter
Date: Fri, 21 Sep 2018 13:50:37 -0000
Importance: Normal
Attachments: 09202018_Feinstein_Letter_to_Grassley_re_07302018_Ford_Letter.pdf

---

From: Davis, Mike (Judiciary-Rep) (b)(6)
Sent: Friday, September 21, 2018 9:48 AM
To: Megan Lacy (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Talley, Brett (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6)
Subject: FW: SCOTUS -- non-BI, un-redacted version of Ford letter

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Davis, Mike (Judiciary-Rep)
Sent: Friday, September 21, 2018 9:42 AM
To: Judiciary Chief Counsels Republican <ChiefCounselsRepublican@routing.senate.gov>
Cc: Davis, Kolan (Judiciary-Rep) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; Kenny, Steve (Judiciary-Rep) (b)(6)
Subject: SCOTUS -- non-BI, un-redacted version of Ford letter

Yesterday, Feinstein's staff hand-delivered an envelope, marked CONFIDENTIAL, containing the attached cover letter, along with a non-BI, un-redacted version of Dr. Ford's 7/30/2018 letter.

Note that Feinstein did not show Grassley this letter for nearly 2 months.

Any Senate member or any SJC chief counsel can come read this letter in Hart 308. Please coordinate with Lauren Mehler or Steve Kenny.

We should continue to call on Feinstein to publicly release the letter.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON THE JUDICIARY - RANKING MEMBER
SELECT COMMITTEE ON INTELLIGENCE
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate

September 20, 2018

Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley:

I am writing in response to your request for an unredacted copy of Dr. Christine Blasey Ford's letter containing allegations of sexual assault by Supreme Court nominee Brett Kavanaugh. As you know, I referred the unredacted letter to the FBI on September 12. The FBI redacted portions and sent it to the White House as part of the nominee's background investigation file.

The decision on redactions was made by the FBI and the resulting letter is now part of the background investigation file that has been shared with the Senate under a memorandum agreement with the White House. This means that all Senators and a limited number of staff have access to the letter as produced in the file.

As you know, the letter was given to me in confidence and I am giving it to you with the expectation that you will maintain its confidentiality and that it will not be released publicly or disseminated further, as requested by Dr. Blasey Ford's counsel Debra Katz.

Sincerely,

Dianne Feinstein

WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Subject: SCOTUS -- Dr. Ford's 7/30/2018 Letter to Feinstein
Date: Sun, 23 Sep 2018 23:38:53 +0000
Importance: Normal
Attachments: 09202018_Feintein_Letter_to_Grassley_with_Ford_Letter_Redacted.pdf

---

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

July 30, 2018

CONFIDENTIAL

Senator Dianne Feinstein

Dear Senator Feinstein:

I am writing with information relevant in evaluating the current nominee to the Supreme Court. As a constituent, I expect that you will maintain this as confidential until we have further opportunity to speak.

Brett Kavanaugh physically and sexually assaulted me during High School in the early 1980's. He conducted these acts with the assistance of his close friend, Mark G. Judge. Both were 1-2 years older than me and students at a local private school. The assault occurred in a suburban Maryland area home at a gathering that included me and 4 others. Kavanaugh physically pushed me into a bedroom as I was headed for a bathroom up a short stairwell from the living room. They locked the door and played loud music, precluding any successful attempts to yell for help. Kavanaugh was on top of me while laughing with Judge, who periodically jumped onto Kavanaugh. They both laughed as Kavanaugh tried to disrobe me in their highly inebriated state. With Kavanaugh's hand over my mouth, I feared he may inadvertently kill me. From across the room, a very drunken Judge said mixed words to Kavanaugh ranging from "go for it" to "stop". At one point when Judge jumped onto the bed, the weight on me was substantial. The pile toppled, and the two scrapped with each other. After a few attempts to get away, I was able to take this opportune moment to get up and run across to a hallway bathroom. I locked the bathroom door behind me. Both loudly stumbled down the stairwell, at which point other persons at the house were talking with them. I exited the bathroom, ran outside of the house and went home.

I have not knowingly seen Kavanaugh since the assault. I did see Mark Judge once at the Potomac Village Safeway, where he was extremely uncomfortable seeing me.

I have received medical treatment regarding the assault. On July 6, I notified my local government representative to ask them how to proceed with sharing this information. It is upsetting to discuss sexual assault and its repercussions, yet I felt guilty and compelled as a citizen about the idea of not saying anything.

I am available to speak further should you wish to discuss. I am currently vacationing in the mid-Atlantic until August 7th and will be in California after August 10th.

In Confidence,

Christine Blasey

Palo Alto, California

[redacted]

From: "Hudson, Andrew (OLP)" (b)(6)

To: "Tucker, Rachael (OAG)" (b)(6), "Beelaert, Jeffrey (ENRD)" (b)(6), "Bernie, Andrew (OLP)" (b)(6), "Brinton, Jedediah (OLP)" (b)(6), "Bull, Brittany (OLP)" (b)(6), "(b)(6) (NSD)" (b)(6), "Day, Sean (OLP)" (b)(6), "Fragoso, Michael (OLP)" (b)(6), "Freeman, Lindsey (OLP)" (b)(6), "Ganjei, Nicholas (OLP)" (b)(6), "Glover, Matthew J. (CIV)" (b)(6), "Hall, Jeffrey (OASG)" (b)(6), "Helfman, Tara (CRT)" (b)(6), "Higginbotham, Ryan K (OLP)" (b)(6), "King, Kara (ATR)" (b)(6), "LaCour, Alice (OLP)" (b)(6), "Lichter, Jennifer (OLP)" (b)(6), "McCotter, Trent (USAVAE)" (b)(6), "Minerva, Craig (ATR)" (b)(6), "O'Connor, Kasey (OLP)" (b)(6), "Owings, Taylor (ATR)" (b)(6), "Park, Janet (OLP)" (b)(6), "Pickett, Bethany (OLP)" (b)(6), "Rathbun, Douglas (OLP)" (b)(6), "Robbins, Alexander P. (TAX)" (b)(6), "Rothenberg, Laurence E (OLP)" (b)(6), "(b)(6) (NSD)" (b)(6), "Soskin, Eric (CIV)" (b)(6), "Talley, Brett (OLP)" (b)(6), "Von Bokern, Jordan L. (OLP)" (b)(6), "Wasserman, Carl (OLP)" (b)(6), "Wu, Connie V. (ODAG)" (b)(6), "Wong, Candice (OLP)" (b)(6), "Cervi, Kristina (OLP)" (b)(6), "Chiang, Annie (OLP)" (b)(6), "Green, Emily A. (OLP)" (b)(6), "Swenson, Ian (OLP)" (b)(6), "Thompson, William (OLP)" (b)(6), "Beck, Dorothy K. (OLP)" (b)(6), "Brittany.Bull@ed.gov" <Brittany.Bull@ed.gov>, "Loveland, Daniel (USAMD)" (b)(6), (b)(6) US Tax Court Email Domain

Cc: "Williams, Beth A (OLP)" (b)(6), "Champoux, Mark (OLP)" (b)(6), "Crytzer, Katherine (OLP)" (b)(6), "Bumatay, Patrick (OAG)" (b)(6)

Subject: RE: Team Kavanaugh Thank-You and AG Meeting

Date: Thu, 4 Oct 2018 14:04:22 +0000

Importance: Normal

Hey, everyone,

Just a reminder about the AG photo in the Great Hall in about **30 minutes**. Please be a couple of minutes early—we'll need to take a group photo with the AG quickly once he gets there so we also have time for individual photos. **The AG has another meeting immediately afterwards, so we'll need to stay on track**.

Thanks, and I look forward to seeing everyone in a few minutes.

-Drew

From: Tucker, Rachael (OAG)
Sent: Wednesday, October 3, 2018 2:40 PM
To: Hudson, Andrew (OLP) (b)(6); Beelaert, Jeffrey (ENRD) (b)(6);

Bernie, Andrew (OLP) (b)(6) ; Brinton, Jedediah (OLP) (b)(6) ; Bull, Brittany (OLP) (b)(6) ; (b)(6) (NSD) (b)(6) ; Day, Sean (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6) ; Freeman, Lindsey (OLP) (b)(6) ; Ganjei, Nicholas (OLP) (b)(6) ; Glover, Matthew J. (CIV) (b)(6) ; Hall, Jeffrey (OASG) (b)(6) ; Helfman, Tara (CRT) (b)(6) ; Higginbotham, Ryan K (OLP) (b)(6) ; King, Kara (ATR) (b)(6) ; LaCour, Alice (OLP) (b)(6) ; Lichter, Jennifer (OLP) (b)(6) ; McCotter, Trent (USAVAE) (b)(6) ; Minerva, Craig (ATR) (b)(6) ; O'Connor, Kasey (OLP) (b)(6) ; Owings, Taylor (ATR) (b)(6) ; Park, Janet (OLP) (b)(6) ; Pickett, Bethany (OLP) (b)(6) ; Rathbun, Douglas (OLP) (b)(6) ; Robbins, Alexander P. (TAX) (b)(6) ; Rothenberg, Laurence E (OLP) (b)(6) ; (b)(6) (NSD) (b)(6) ; Soskin, Eric (CIV) (b)(6) ; Talley, Brett (OLP) (b)(6) ; Von Bokern, Jordan L. (OLP) (b)(6) Wasserman, Carl (OLP) (b)(6) ; Wu, Connie V. (ODAG) (b)(6) ; Wong, Candice (OLP) (b)(6) ; Cervi, Kristina (OLP) (b)(6) ; Chiang, Annie (OLP) (b)(6) ; Green, Emily A. (OLP) (b)(6) ; Swenson, Ian (OLP) (b)(6) ; Thompson, William (OLP) (b)(6) ; Beck, Dorothy K. (OLP) (b)(6) ; Brittany.Bull@ed.gov; Loveland, Daniel (USAMD) (b)(6) ; (b)(6) US Tax Court Email Domain

Cc: Williams, Beth A (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Crytzer, Katherine (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6)

Subject: RE: Team Kavanaugh Thank-You and AG Meeting

Great Hall has been confirmed as the location. See you all tomorrow.

From: Hudson, Andrew (OLP)

Sent: Wednesday, October 3, 2018 2:36 PM

To: Beelaert, Jeffrey (ENRD) (b)(6) ; Bernie, Andrew (OLP) (b)(6) ; Brinton, Jedediah (OLP) (b)(6) ; Bull, Brittany (OLP) (b)(6) ; (b)(6) (NSD) (b)(6) ; Day, Sean (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6) ; Freeman, Lindsey (OLP) (b)(6) ; Ganjei, Nicholas (OLP) (b)(6) ; Glover, Matthew J. (CIV) (b)(6) ; Hall, Jeffrey (OASG) (b)(6) ; Helfman, Tara (CRT) (b)(6) ; Higginbotham, Ryan K (OLP) (b)(6) ; King, Kara (ATR) (b)(6) ; LaCour, Alice (OLP) (b)(6) ; Lichter, Jennifer (OLP) (b)(6) ; McCotter, Trent (USAVAE) (b)(6) ; Minerva, Craig (ATR) (b)(6) ; O'Connor, Kasey (OLP) (b)(6) ; Owings, Taylor (ATR) (b)(6) ; Park, Janet (OLP) (b)(6) ; Pickett, Bethany (OLP) (b)(6) ; Rathbun, Douglas (OLP) (b)(6) ; Robbins, Alexander P. (TAX) (b)(6) ; Rothenberg, Laurence E (OLP) (b)(6) ; (b)(6) (NSD) (b)(6) ; Soskin, Eric (CIV) (b)(6) ; Talley, Brett (OLP) (b)(6) ; Von Bokern, Jordan L. (OLP) (b)(6) ; Wasserman, Carl (OLP) (b)(6) ; Wu, Connie V. (ODAG) (b)(6) ; Wong, Candice (OLP) (b)(6) ; Cervi, Kristina (OLP) (b)(6) ; Chiang, Annie (OLP) (b)(6) ; Green, Emily A. (OLP) (b)(6) ; Swenson, Ian (OLP) (b)(6) ; Thompson, William (OLP) (b)(6) ; Beck, Dorothy K. (OLP) (b)(6) ; Brittany.Bull@ed.gov; Loveland, Daniel (USAMD) (b)(6) ; (b)(6) US Tax Court Email Domain

Cc: Williams, Beth A (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Crytzer, Katherine (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6) ; Tucker, Rachael (OAG) (b)(6)

Subject: RE: Team Kavanaugh Thank-You and AG Meeting

Hey, Team Kavanaugh,

You may have seen the calendar invitation update a few times today for the AG photos. I wanted to follow up with you to let you know we are currently planning for this to take place tomorrow, as the calendar invitation indicates. The location may shift before tomorrow morning, so keep an eye on it. Right now, we're **scheduled to meet with the AG from 10:30-10:45am tomorrow (Thursday, Oct. 4) in the Great Hall** so each of you can get a photo with him.

If you still have not received the calendar invitation, please email me directly so I can make sure you're notified of any updates or changes. Additionally, **if you are planning to be here but do not currently have access to Main Justice/RFK, please email me no later than COB today (Wednesday, Oct. 3)** so I can make sure you're on the access list.

Thanks,

Drew Hudson
(b)(6)

From: Hudson, Andrew (OLP)
Sent: Monday, September 17, 2018 12:37 PM
To: Beelaert, Jeffrey (ENRD) (b)(6); Bernie, Andrew (OLP) (b)(6); Brinton, Jedediah (OLP) (b)(6); Bull, Brittany (OLP) (b)(6); (b)(6) (NSD) (b)(6); Day, Sean (OLP) (b)(6); Fragoso, Michael (OLP) (b)(6); Freeman, Lindsey (OLP) (b)(6); Ganjei, Nicholas (OLP) (b)(6); Glover, Matthew J. (CIV) (b)(6); Hall, Jeffrey (OASG) (b)(6); Helfman, Tara (CRT) (b)(6); Higginbotham, Ryan K (OLP) (b)(6); King, Kara (ATR) (b)(6); LaCour, Alice (OLP) (b)(6); Lichter, Jennifer (OLP) (b)(6); Loveland, Daniel (ODAG) (b)(6); 'McCotter, Trent (USAVAE)' (b)(6); Minerva, Craig (ATR) (b)(6); O'Connor, Kasey (OLP) (b)(6); Owings, Taylor (ATR) (b)(6); Park, Janet (OLP) (b)(6); Pickett, Bethany (OLP) (b)(6); Rathbun, Douglas (OLP) (b)(6); Robbins, Alexander P. (TAX) (b)(6); Rothenberg, Laurence E (OLP) (b)(6); (b)(6) (NSD) (b)(6); Soskin, Eric (CIV) (b)(6); Talley, Brett (OLP) (b)(6); Urda, Patrick (TAX) (b)(6); Von Bokern, Jordan L. (OLP) (b)(6); Wasserman, Carl (OLP) (b)(6); Wu, Connie V. (ODAG) (b)(6); Wong, Candice (OLP) (b)(6); Cervi, Kristina (OLP) (b)(6); Chiang, Annie (OLP) (b)(6); Green, Emily A. (OLP) (b)(6); Swenson, Ian (OLP) (b)(6); Thompson, William (OLP) (b)(6); Beck, Dorothy K. (OLP) (b)(6); 'Brittany.Bull@ed.gov' <Brittany.Bull@ed.gov>
Cc: Williams, Beth A (OLP) (b)(6); Champoux, Mark (OLP) (b)(6); Crytzer, Katherine (OLP) (b)(6); Bumatay, Patrick (OAG) (b)(6)
Subject: RE: Team Kavanaugh Thank-You and AG Meeting

Hey, folks,

I hope everyone had a good weekend! As you might have noticed, we've had to bump the calendar invitation back a couple of times already today. Given some fluctuations in the AG's schedule this afternoon, **we're going to postpone today's photo**. Another email will follow in the coming days with more details.

Thanks again to everyone for your hard work on this so far!

-Drew

From: Hudson, Andrew (OLP)
Sent: Friday, September 14, 2018 2:46 PM
To: Beelaert, Jeffrey (ENRD) (b)(6); Bernie, Andrew (OLP) (b)(6); Brinton, Jedediah (OLP) (b)(6); Bull, Brittany (OLP) (b)(6); (b)(6) (NSD) (b)(6); Day, Sean (OLP) (b)(6); Fragoso, Michael (OLP) (b)(6); Freeman, Lindsey (OLP) (b)(6); Ganjei, Nicholas (OLP) (b)(6); Glover, Matthew J. (CIV) (b)(6); Hall, Jeffrey (OASG) (b)(6); Helfman, Tara (CRT) (b)(6); Higginbotham, Ryan K (OLP) (b)(6); King, Kara (ATR) (b)(6); LaCour, Alice (OLP) (b)(6); Lichter, Jennifer (OLP) (b)(6); Loveland, Daniel (ODAG) (b)(6); 'McCotter, Trent (USAVAE)' (b)(6); Minerva, Craig (ATR) (b)(6); O'Connor, Kasey (OLP) (b)(6); Owings, Taylor (ATR) (b)(6); Park, Janet (OLP) (b)(6); Pickett, Bethany (OLP) (b)(6); Rathbun, Douglas (OLP) (b)(6); Robbins, Alexander P. (TAX) (b)(6); Rothenberg, Laurence E (OLP) (b)(6); (b)(6) (NSD) (b)(6); Soskin, Eric (CIV) (b)(6); Talley, Brett (OLP) (b)(6); Urda, Patrick (TAX) (b)(6); Von Bokern, Jordan L. (OLP) (b)(6); Wasserman, Carl (OLP) (b)(6); Wu, Connie V. (ODAG) (b)(6); Wong, Candice (OLP) (b)(6); Cervi, Kristina (OLP) (b)(6); Chiang, Annie (OLP) (b)(6); Green, Emily A. (OLP) (b)(6); Swenson, Ian (OLP) (b)(6); Thompson, William (OLP) (b)(6); Beck, Dorothy K. (OLP) (b)(6)
Cc: Williams, Beth A (OLP) (b)(6); Champoux, Mark (OLP) (b)(6); Crytzer, Katherine (OLP) (b)(6); Bumatay, Patrick (OAG) (b)(6)
Subject: RE: Team Kavanaugh Thank-You and AG Meeting

As a quick reminder, **please do not forward the calendar invitation** to the AG meeting. If there's someone from this list who did not receive it, or if there's anyone else who you believe should be added, please let me know directly.

Thanks, and have a great weekend!

-Drew

From: Hudson, Andrew (OLP)
Sent: Thursday, September 13, 2018 4:51 PM
To: Beelaert, Jeffrey (ENRD) (b)(6); Bernie, Andrew (OLP) (b)(6); Brinton, Jedediah (OLP) (b)(6); Bull, Brittany (OLP) (b)(6); (b)(6) (NSD) (b)(6); Day, Sean (OLP) (b)(6); Fragoso, Michael (OLP) (b)(6); Freeman, Lindsey (OLP) (b)(6); Ganjei, Nicholas (OLP) (b)(6); Glover, Matthew J. (CIV) (b)(6); Hall, Jeffrey (OASG) (b)(6); Helfman, Tara (CRT) (b)(6); Higginbotham, Ryan K (OLP) (b)(6); King, Kara (ATR) (b)(6); LaCour, Alice (OLP) (b)(6); Lichter, Jennifer (OLP) (b)(6); Loveland, Daniel (ODAG) (b)(6); 'McCotter, Trent (USAVAE)' (b)(6); Minerva, Craig (ATR) (b)(6); O'Connor, Kasey (OLP) (b)(6); Owings, Taylor (ATR) (b)(6); Park, Janet (OLP) (b)(6); Pickett, Bethany (OLP) (b)(6); Rathbun, Douglas (OLP) (b)(6); Robbins, Alexander P. (TAX) (b)(6); Rothenberg, Laurence E (OLP) (b)(6); (b)(6) (NSD) (b)(6); Soskin, Eric (CIV) (b)(6); Talley, Brett (OLP) (b)(6); Urda, Patrick (TAX) (b)(6); Von Bokern, Jordan L. (OLP) (b)(6); Wasserman, Carl (OLP) (b)(6); Wu, Connie V. (ODAG) (b)(6); Wong, Candice (OLP) (b)(6); Cervi, Kristina (OLP) (b)(6); Chiang, Annie (OLP) (b)(6); Green, Emily A. (OLP)

(b)(6) ; Swenson, Ian (OLP) (b)(6) ; Thompson, William (OLP) (b)(6) ; Beck, Dorothy K. (OLP) (b)(6)
Cc: Williams, Beth A (OLP) (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Crytzer, Katherine (OLP) (b)(6) ; Bumatay, Patrick (OAG) (b)(6)
Subject: Team Kavanaugh Thank-You and AG Meeting
Importance: High

Hey, Team Kavanaugh!

Thanks again to everyone for your incredible, tireless work over the past two months. Even people who are vehemently opposed to the nomination have noted the thoroughness and efficiency of the well-oiled machine that is the Department of Justice's nominations team. Others have noted the unprecedented numbers of documents and QFR responses (among other things) that went into this nomination process. The numbers are insane and you should all be proud of the great work you've done.

The Attorney General would like to thank you all for your work. On **Monday, September 17, at 4:45pm**, we will have a short meeting with the Attorney General, along with an opportunity for you to each get a photo with him. The details are forthcoming in a calendar invitation from OAG in the next day or two, but for now just be sure to hold that time slot open—you won't want to miss it!

Also, there are literally hundreds of folks who have assisted with the Kavanaugh nomination process in some form or another. With that in mind, **please do not forward this invitation** to others—time and space restrictions necessitate that we limit this meeting only to the invitees on this email. If you have any questions, please let me know.

Thank you again for everything you've done and continue to do in service of your country—I hope everyone gets an opportunity for some rest this weekend!

Drew Hudson
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave N.W.
Washington, D.C. 20530
(b)(6)

From: "Murray, Claire M. EOP/WHO" (b)(6)
To: "Fragoso, Michael (OLP)" (b)(6)
Cc: "Talley, Brett (OLP)" (b)(6), "King, Kara (OLP)" (b)(6), "Michel, Christopher G. EOP/WHO" (b)(6), "Lacy, Megan M. EOP/WHO" (b)(6)
Subject: Re: Timeline
Date: Wed, 19 Sep 2018 13:20:10 +0000
Importance: Normal

Same day is also my recollection.

Sent from my iPhone

> On Sep 19, 2018, at 9:12 AM, Fragoso, Michael (OLP) (b)(6) wrote:
>
> You're right. My emails say "Tuesday morning" which would have been the 28th. Follow-up call that same day.
>
> -----Original Message-----
> From: Talley, Brett (OLP)
> Sent: Wednesday, September 19, 2018 9:01 AM
> To: Fragoso, Michael (OLP) (b)(6); Murray, Claire M. EOP/WHO (b)(6)
> Cc: King, Kara (OLP) (b)(6); Michel, Christopher G. EOP/WHO (b)(6); Lacy, Megan M. EOP/WHO (b)(6)
> Subject: RE: Timeline
>
> You sure? He was in the moot all day the 27th. Could it have been pushed to Tuesday the 28 with a follow up on Wednesday?
>
> -----Original Message-----
> From: Fragoso, Michael (OLP)
> Sent: Wednesday, September 19, 2018 8:54 AM
> To: Murray, Claire M. EOP/WHO (b)(6)
> Cc: Talley, Brett (OLP) (b)(6); King, Kara (OLP) (b)(6); Michel, Christopher G. EOP/WHO (b)(6); Lacy, Megan M. EOP/WHO (b)(6)
> Subject: Re: Timeline
>
> Main was on 8/27 with a follow up on 8/28
>
> Sent from my iPhone
>
>> On Sep 19, 2018, at 8:51 AM, Murray, Claire M. EOP/WHO (b)(6) wrote:
>>
>> There were at least 2 BI calls.
>>
>> Sent from my iPhone
>>
>>> On Sep 19, 2018, at 8:46 AM, Talley, Brett (OLP) (b)(6) wrote:
>>>
>>> Frags may know more, too.
>>>
>>> -----Original Message-----

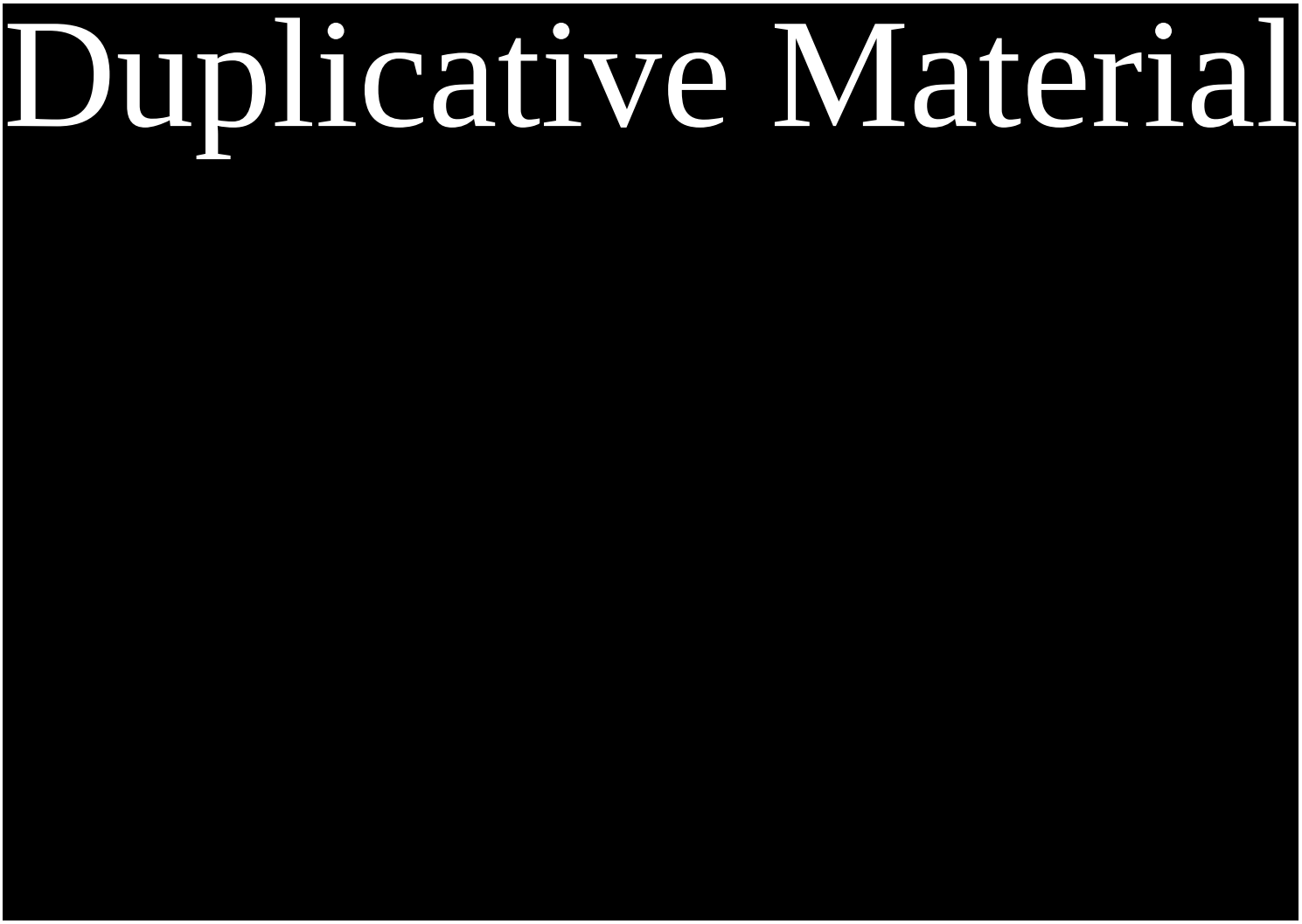
>>> From: King, Kara (OLP)
>>> Sent: Wednesday, September 19, 2018 8:44 AM
>>> To: Talley, Brett (OLP) (b)(6)
>>> Cc: Michel, Christopher G. EOP/WHO (b)(6) ; Lacy, Megan M. EOP/WHO (b)(6) ; Murray, Claire M. EOP/WHO (b)(6)
>>> Subject: Re: Timeline
>>>
>>> Only BI call I'm aware the Senate asked for was on August 27th. The BI went over to the Senate the Monday after the SJQ was submitted, so July 23rd. Happy to forward the records if you need them.
>>>
>>> Sent from my iPhone
>>>
>>>> On Sep 19, 2018, at 8:24 AM, Talley, Brett (OLP) (b)(6) wrote:
>>>>
>>>> Looping in Kara.
>>>>
>>>> -----Original Message-----
>>>> From: Michel, Christopher G. EOP/WHO (b)(6)
>>>> Sent: Wednesday, September 19, 2018 8:23 AM
>>>> To: Lacy, Megan M. EOP/WHO (b)(6) ; Talley, Brett (OLP) (b)(6) ; Murray, Claire M. EOP/WHO (b)(6)
>>>> Subject: Timeline
>>>>
>>>> Do we know the dates of all BI calls with BK? Relatedly, do we know when the BI report was delivered to the Committee (presumably sometime relatively soon after July 9)?
>>>>
>>>> Sent from my iPhone

From: "King, Kara (OLP)" (b)(6)
To: "Talley, Brett (OLP)" (b)(6)
Cc: "Fragoso, Michael (OLP)" (b)(6), "Michel, Christopher G. EOP/WHO" (b)(6), "Lacy, Megan M. EOP/WHO" (b)(6), "Murray, Claire M. EOP/WHO" (b)(6)
Subject: Re: Timeline
Date: Wed, 19 Sep 2018 12:50:26 +0000
Importance: Normal

Sorry - I was looking at the date of the email for the BI call. The actual call was on 8/28 at 10:00am. I'm not aware of any other call pre-hearing, but again Frags probably knows more.

Sent from my iPhone

> On Sep 19, 2018, at 8:46 AM, Talley, Brett (OLP) (b)(6) wrote:



From: "Talley, Brett (OLP)" (b)(6)

To: "Shah, Raj S. EOP/WHO" (b)(6)

Cc: "Lacy, Megan M. EOP/WHO" (b)(6) "Donaldson, Annie M. EOP/WHO" (b)(6)

Subject: Re: Senate Judiciary Committee contacts Christine Blasey Ford's friend about party - CNNPolitics

Date: Sun, 23 Sep 2018 01:45:11 -0000

Importance: Normal

That was all Davis.

Sent from my iPhone

> On Sep 22, 2018, at 9:38 PM, Shah, Raj S. EOP/WHO (b)(6) wrote:
>
> CRC HAS TO STOP
> UGH
> FIXING
>
> Sent from my iPhone
>
>> On Sep 22, 2018, at 9:31 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:
>>
>> Their headline is that SJC contacted her friend, not that the fourth and final eyewitness identified denies even knowing him?
>>
>>
>> https://www.cnn.com/2018/09/22/politics/kavanaugh-ford-accuser-nomination/index.html
>>
>>
>> Sent from my iPhone

From: "Donaldson, Annie M. EOP/WHO" (b)(6)

To: "Lacy, Megan M. EOP/WHO" (b)(6)

Cc: "Shah, Raj S. EOP/WHO" (b)(6), "Brett.Talley@usdoj.gov" (b)(6)

Subject: Re: Senate Judiciary Committee contacts Christine Blasey Ford's friend about party - CNNPolitics

Date: Sun, 23 Sep 2018 01:36:56 +0000

Importance: Normal

Why they let CNN be lead on this will forever be a mystery for me. But it's out.

Raj, we're on the clock.

> On Sep 22, 2018, at 9:31 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:
>

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Subject: SCOTUS: Senate update // cloture filed on Judge Kavanaugh to SCOTUS
Date: Thu, 4 Oct 2018 01:56:49 +0000
Importance: Normal

From: Suares, Erica (McConnell)
Sent: Wednesday, October 03, 2018 9:55 PM
To: Suares, Erica (McConnell) (b)(6)
Subject: Senate update // cloture filed on Judge Kavanaugh to SCOTUS

Hello everyone – if you're still up, Leader McConnell just **filed cloture on the nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States**.

As a reminder, after filing cloture on a nomination the nomination lays over one (1) day (the "intervening day"), and then a vote to invoke cloture occurs (at either a time set by consent, or one hour after the Senate convenes – e.g. if the Senate convenes at noon the vote is at 1 pm; this vote is at a simple majority, post rules change).

After cloture is invoked, there's up to 30 hours of post cloture debate, and then a vote on confirmation (also at a simple majority).

Reminder: Last week, Friday, Sept. 28, the Senate proceeded to the nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States by voice vote (the MTP was voice voted). Earlier this week we had been dual tracking the executive and legislative calendars this week (by consent) in order to process FAA and opioids legislation, while not displacing Judge Kavanaugh's nomination as the pending business before the Senate.

Thanks,
Erica

Erica Suares
Policy Advisor
Office of the Majority Leader
U.S. Senator Mitch McConnell
S-230, The Capitol
(b)(6)
http://www.republicanleader.senate.gov/

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: "Clark, Justin R. EOP/WHO" (b)(6)
To: "Donaldson, Annie M. EOP/WHO" (b)(6)
Cc: "Talley, Brett (OLP)" (b)(6)
Subject: RE: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations
Date: Mon, 1 Oct 2018 13:37:07 +0000
Importance: Normal

Already sent the memo as it is public, but is the timeline shareable with the outside?

From: Clark, Justin R. EOP/WHO
Sent: Monday, October 1, 2018 9:21 AM
To: Donaldson, Annie M. EOP/WHO (b)(6)
Subject: RE: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations

And can I send the timeline and the prosecutors stuff around to groups?

From: Clark, Justin R. EOP/WHO
Sent: Monday, October 1, 2018 8:56 AM
To: Donaldson, Annie M. EOP/WHO (b)(6)
Subject: RE: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations

This is great! Sorry I missed the call this morning. Trade news dominated this AM. Did I miss anything?

From: Donaldson, Annie M. EOP/WHO
Sent: Monday, October 1, 2018 8:26 AM
To: Clark, Justin R. EOP/WHO (b)(6)
Subject: FW: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations

---

From: Talley, Brett (OLP) (b)(6)
Sent: Monday, October 1, 2018 7:57 AM
To: Shah, Raj S. EOP/WHO (b)(6); Donaldson, Annie M. EOP/WHO (b)(6); Horning, Liz A. EOP/WHO (b)(6)
Subject: FW: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations

This memo is extremely powerful and compelling. We should get it to everyone we can.

From: Davis, Mike (Judiciary-Rep) (b)(6)
Sent: Sunday, September 30, 2018 10:35 PM
To: Davis, Mike (Judiciary-Rep) (b)(6)
Subject: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

Memorandum

TO: **All Republican Senators**
FROM: **Rachel Mitchell, Nominations Investigative Counsel**
United States Senate Committee on the Judiciary
DATE: **September 30, 2018**
RE: **Analysis of Dr. Christine Blasey Ford's Allegations**

Please permit me this opportunity to present my independent assessment of Dr. Christine Blasey Ford's allegations against Judge Brett Kavanaugh. Before I do this, I want to emphasize two important points:

1. This memorandum contains my own independent assessment of Dr. Ford's allegations, based upon my independent review of the evidence and my nearly 25 years of experience as a career prosecutor of sex-related and other crimes in Arizona. This memorandum does not necessarily reflect the views of the Chairman, any committee member, or any other senator. No senator reviewed or approved this memorandum before its release, and I was not pressured in any way to write this memorandum or to write any words in this memorandum with which I do not fully agree. The words written in this memorandum are mine, and I fully stand by all of them. While I am a registered Republican, I am not a political or partisan person.

2. A Senate confirmation hearing is not a trial, especially not a prosecution. The Chairman made the following statement on September 25, 2018, after he hired me:

   As I have said, I'm committed to providing a forum to both Dr. Ford and Judge Kavanaugh on Thursday that is safe, comfortable and dignified. The majority members have followed the bipartisan recommendation to hire as staff counsel for the committee an experienced career sex-crimes prosecutor to question the witnesses at Thursday's hearing. The goal is to de-politicize the process and get to the truth, instead of grandstanding and giving senators an opportunity to launch their presidential campaigns. I'm very appreciative that Rachel Mitchell has stepped forward to serve in this important and serious role. Ms. Mitchell has been recognized in the legal community for her experience and objectivity. I've worked to give Dr. Ford an opportunity to share serious allegations with committee members in any format she'd like after learning of the allegations. I promised Dr. Ford that I would do everything in my power to avoid a repeat of the 'circus' atmosphere in the hearing room that we saw the week of September 4. I've taken this additional step to have questions asked by expert staff counsel to establish the most fair and respectful treatment of the witnesses possible.

   That is how I approached my job. There is no clear standard of proof for allegations made during the Senate's confirmation process. But the world in which I work is the legal world, not the political world. Thus, I can only provide my assessment of Dr. Ford's allegations in that legal context.

<u>In the legal context, here is my bottom line:</u> A "he said, she said" case is incredibly difficult to prove. But this case is even weaker than that. Dr. Ford identified other witnesses to the event, and those witnesses either refuted her allegations or failed to corroborate them. For the reasons discussed below, I do not think that a reasonable prosecutor would bring this case based on the evidence before the Committee. Nor do I believe that this evidence is sufficient to satisfy the preponderance-of-the-evidence standard.

<u>Dr. Ford has not offered a consistent account of when the alleged assault happened.</u>

- In a July 6 text to the *Washington Post*, she said it happened in the "mid 1980s."
- In her July 30 letter to Senator Feinstein, she said it happened in the "early 80s."
- Her August 7 statement to the polygrapher said that it happened one "high school summer in early 80's," but she crossed out the word "early" for reasons she did not explain.
- A September 16 *Washington Post* article reported that Dr. Ford said it happened in the "summer of 1982."
- Similarly, the September 16 article reported that notes from an individual therapy session in 2013 show her describing the assault as occurring in her "late teens." But she told the *Post* and the Committee that she was 15 when the assault allegedly occurred. She has not turned over her therapy records for the Committee to review.
- While it is common for victims to be uncertain about dates, Dr. Ford failed to explain how she was suddenly able to narrow the timeframe to a particular season and particular year.

<u>Dr. Ford has struggled to identify Judge Kavanaugh as the assailant by name.</u>

- No name was given in her 2012 marriage therapy notes.
- No name was given in her 2013 individual therapy notes.
- Dr. Ford's husband claims to recall that she identified Judge Kavanaugh by name in 2012. At that point, Judge Kavanaugh's name was widely reported in the press as a potential Supreme Court nominee if Governor Romney won the presidential election.
- In any event, it took Dr. Ford over thirty years to name her assailant. Delayed disclosure of abuse is common so this is not dispositive.

<u>When speaking with her husband, Dr. Ford changed her description of the incident to become less specific.</u>

- Dr. Ford testified that she told her husband about a *"sexual assault"* before they were married.
- But she told the *Washington Post* that she informed her husband that she was the victim of "*physical abuse*" at the beginning of their marriage.
- She testified that, both times, she was referring to the same incident.

<u>Dr. Ford has no memory of key details of the night in question—details that could help corroborate her account</u>.

- She does not remember who invited her to the party or how she heard about it.
- She does not remember how she got to the party.

- She does not remember in what house the assault allegedly took place or where that house was located with any specificity.
- Perhaps most importantly, she does not remember how she got from the party back to her house.
    - Her inability to remember this detail raises significant questions.
    - She told the *Washington Post* that the party took place near the Columbia Country Club. The Club is more than 7 miles from her childhood home as the crow flies, and she testified that it was a roughly 20-minute drive from her childhood home.
    - She also agreed for the first time in her testimony that she was driven somewhere that night, either to the party or from the party or both.
    - Dr. Ford was able to describe hiding in the bathroom, locking the door, and subsequently exiting the house. She also described wanting to make sure that she did not look like she had been attacked.
    - But she has no memory of who drove her or when. Nor has anyone come forward to identify him or herself as the driver.
    - Given that this all took place before cell phones, arranging a ride home would not have been easy. Indeed, she stated that she ran out of the house after coming downstairs and did not state that she made a phone call from the house before she did, or that she called anyone else thereafter.
- She does, however, remember small, distinct details from the party unrelated to the assault. For example, she testified that she had exactly one beer at the party and was taking no medication at the time of the alleged assault.

<u>Dr. Ford's account of the alleged assault has not been corroborated by anyone she identified as having attended—including her lifelong friend</u>.

- Dr. Ford has named three people other than Judge Kavanaugh who attended the party—Mark Judge, Patrick "PJ" Smyth, and her lifelong friend Leland Keyser (née Ingham). Dr. Ford testified to the Committee that another boy attended the party, but that she could not remember his name. No others have come forward.
- All three named eyewitnesses have submitted statements to the Committee denying any memory of the party whatsoever. Most relevantly, in her first statement to the Committee, Ms. Keyser stated through counsel that, "[s]imply put, Ms. Keyser does not know Mr. Kavanaugh and she has no recollection of ever being at a party or gathering where he was present, with, or without, Dr. Ford." In a subsequent statement to the Committee through counsel, Ms. Keyser said that "the simple and unchangeable truth is that she is unable to corroborate [Dr. Ford's allegations] because she has no recollection of the incident in question."
    - Moreover, Dr. Ford testified that her friend Leland, apparently the only other girl at the party, did not follow up with Dr. Ford after the party to ask why she had suddenly disappeared.

<u>Dr. Ford has not offered a consistent account of the alleged assault.</u>

- According to her letter to Senator Feinstein, Dr. Ford heard Judge Kavanaugh and Mark Judge talking to other partygoers downstairs while she was hiding in the bathroom after the alleged assault. But according to her testimony, she could not hear them talking to anyone.

- In her letter, she stated, "I locked the door behind me. Both loudly stumbled down the stairwell, at which point other persons at the house were talking with them."
- She testified that Judge Kavanaugh or Mark Judge turned up the music in the bedroom so that the people downstairs could not hear her scream. She testified that, after the incident, she ran into the bathroom, locked the door, and heard them going downstairs. But she maintained that she could not hear their conversation with others when they got downstairs. Instead, she testified that she "assum[ed]" a conversation took place.

- Her account of who was at the party has been inconsistent.
  - According to the *Washington Post*'s account of her therapy notes, there were four boys in the bedroom in which she was assaulted.
  - She told the *Washington Post* that the notes were erroneous because there were four boys at the party, but only two in the bedroom.
  - In her letter to Senator Feinstein, she said "me and 4 others" were present at the party.
  - In her testimony, she said there were four boys in addition to Leland Keyser and herself. She could not remember the name of the fourth boy, and no one has come forward.
  - Dr. Ford listed Patrick "PJ" Smyth as a "bystander" in her statement to the polygrapher and in her July 6 text to the *Washington Post*, although she testified that it was inaccurate to call him a bystander. She did not list Leland Keyser even though they are good friends. Leland Keyser's presence should have been more memorable than PJ Smyth's.

<u>Dr. Ford has struggled to recall important recent events relating to her allegations, and her testimony regarding recent events raises further questions about her memory.</u>

- Dr. Ford struggled to remember her interactions with the *Washington Post*.
  - Dr. Ford could not remember if she showed a full or partial set of therapy notes to the *Washington Post* reporter.
    - She does not remember whether she showed the *Post* reporter the therapist's notes or her own summary of those notes. The *Washington Post* article said that "portions" of her "therapist's notes" were "provided by Ford and reviewed by" the *Post*. But in her testimony, Dr. Ford could not recall whether she summarized the notes for the reporter or showed her the actual records.
  - She does not remember if she actually had a copy of the notes when she texted the *Washington Post* WhatsApp account on July 6.
    - Dr. Ford said in her first WhatsApp message to the *Post* that she "ha[d] therapy notes talking about" the incident when she contacted the *Post*'s tipline. She testified that she had reviewed her therapy notes before contacting the *Post* to determine whether the mentioned anything about the alleged incident, but could not remember if she had a copy of those notes, as she said in her WhatsApp message, or merely reviewed them in her therapist's office.
- Dr. Ford refused to provide *any* of her therapy notes to the Committee.

- Dr. Ford's explanation of why she disclosed her allegations the way she did raises questions.
    - She claimed originally that she wished for her story to remain confidential, but the person operating the tipline at the *Washington Post* was the first person other than her therapist or husband to whom she disclosed the identity of her alleged attacker. She testified that she had a "sense of urgency to relay the information to the Senate and the president." She did not contact the Senate, however, because she claims she "did not know how to do that." She does not explain why she knew how to contact her Congresswoman but not her Senator.
- Dr. Ford could not remember if she was being audio- or video-recorded when she took the polygraph. And she could not remember whether the polygraph occurred the same day as her grandmother's funeral or the day after her grandmother's funeral.
    - It would also have been inappropriate to administer a polygraph to someone who was grieving.

<u>Dr. Ford's description of the psychological impact of the event raises questions.</u>

- She maintains that she suffers from anxiety, claustrophobia, and post-traumatic stress disorder (PTSD).
    - The date of the hearing was delayed because the Committee was informed that her symptoms prevent her from flying. But she agreed during her testimony that she flies "fairly frequently for [her] hobbies and … work." She flies to the mid-Atlantic at least once a year to visit her family. She has flown to Hawaii, French Polynesia, and Costa Rica. She also flew to Washington, D.C. for the hearing.
    - Note too that her attorneys refused a private hearing or interview. Dr. Ford testified that she was not "clear" on whether investigators were willing to travel to California to interview her. It therefore is not clear that her attorneys ever communicated Chairman Grassley's offer to send investigators to meet her in California or wherever she wanted to meet to conduct the interview.
- She alleges that she struggled academically in college, but she has never made any similar claim about her last two years of high school.
- It is significant that she used the word "contributed" when she described the psychological impact of the incident to the *Washington Post*. Use of the word "contributed" rather than "caused" suggests that other life events may have contributed to her symptoms. And when questioned on that point, said that she could think of "nothing as striking as" the alleged assault.

<u>The activities of congressional Democrats and Dr. Ford's attorneys likely affected Dr. Ford's account.</u>

- See the included timeline for details.

Timeline

Date	Event	Description/Notes	Citation
July 6	Ford speaks with Rep. Eshoo's staff.	Ford called Eshoo's office and requested a meeting. A staffer spoke with Ford in advance of the meeting. In her letter to Senator Feinstein, Ford wrote, "On July 6 I notified my local government representative to ask them how to proceed . . . ."	Hearing testimony; Casey Tolan, *Congresswoman Anna Eshoo First To Hear Blasey Ford's Story: 'I Told Her I Believed Her,'* Mercury News (Sep. 18, 2018), https://www.mercurynews.com/2018/09/18/christine-blasey-ford-first-meeting-anna-eshoo-brett-kavanaugh/; *Read the Letter Christine Blasey Ford Sent Accusing Brett Kavanaugh of Sexual Misconduct*, CNN (Sep. 17, 2018), https://www.cnn.com/2018/09/16/politics/blasey-ford-kavanaugh-letter-feinstein/index.html.
	Ford texts the *Washington Post* tipline using WhatsApp.	Identifies "Brett Kavanaugh with Mark Judge" as her attacker and says that "PJ" was a "bystander." She says she "shouldn't be quiet" about her allegations.	Hearing Testimony; Produced documents
July 9	Ford speaks with Eshoo's staff on the phone.		Hearing testimony
July 10	Ford contacts the *Washington Post* again.	"Been advised to contact senators or NYT. Haven't heard back from WaPo."	Produced documents
At some point between July 10 and September 16	Ford speaks with Emma Brown, a *Washington Post* reporter.	Brown was the reporter who ultimately responded to the WhatsApp entries.	Hearing testimony
July 18	Ford meets with Eshoo's staff.		Hearing testimony
July 20	Ford speaks with Eshoo.	Ford and Eshoo met for "more than an hour and half" in a "conference room." Eshoo suggested that she write a letter detailing her claims to Senator Feinstein.	Hearing testimony; Casey Tolan, *Congresswoman Anna Eshoo First To Hear Blasey Ford's Story: 'I Told Her I Believed Her,'* Mercury News (Sep. 18, 2018), https://www.mercurynews.com/2018/09/18/christine-blasey-ford-first-meeting-anna-eshoo-brett-kavanaugh/.
July 30	The letter, dated July 30, is delivered to Senator Feinstein's D.C. office.	"Eshoo said she hasn't met with the professor since that July afternoon, although her staff has been in contact with her since she came forward."	Hearing testimony; Casey Tolan, *Congresswoman Anna Eshoo First To Hear Blasey Ford's Story: 'I Told Her I Believed Her,'* Mercury News (Sep. 18, 2018), https://www.mercurynews.com/2018/09/18/christine-blasey-ford-first-meeting-anna-eshoo-brett-kavanaugh/.

July 31	Senator Feinstein writes a return letter to Ford.	The letter promises not to share Ford's letter without her explicit consent. Ford did not provide this letter to the Committee.	Hearing testimony
Between July 30 and August 7	Ford speaks by phone with Senator Feinstein.		Hearing testimony
Between July 30 and August 7	Ford speaks with Senator Feinstein's staff, who recommends that she engage Debra Katz.		Hearing testimony
Between July 30 and August 7	Ford engages Debra Katz to represent her with regard to her allegations.		Hearing testimony
August 7	Ford takes a polygraph test after she engages Katz.	Ford took a polygraph test administered by a former FBI agent. Katz provided the results to the *Washington Post*. They showed that she "was being truthful when she said a statement summarizing her allegations was accurate."	Hearing Testimony; Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, Washington Post (Sep. 16, 2018), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.
August 20	Senator Feinstein meets one-on-one with Kavanaugh.		Hearing Testimony; Michael Macagnone & Jimmy Hoover, *Kavanaugh Meets Top Senate Dem Opposing His Confirmation*, Law360 (Aug. 20, 2018), https://www.law360.com/articles/1075169/kavanaugh-meets-top-senate-dem-opposing-his-confirmation.
August 28	Senator Feinstein's staff participates in the first Background Investigation (BI) call.	Senator Feinstein's staff asked Judge Kavanaugh numerous questions about confidential background information.	Committee records
August 31	Senator Feinstein writes Dr. Ford a letter	Senator Feinstein promises that "she would not share [Dr. Ford's July 30] letter without [Dr. Ford's] explicit consent."	Hearing testimony

September 4-7	SJC holds a public hearing on Kavanaugh's nomination.		Committee records
September 6	SJC gives Senators an opportunity to question Kavanaugh about sensitive issues at a closed session.	Senator Feinstein does not attend closed session.	Committee records
September 12	The *Intercept* reports that SJC Democrats have requested to view a "Kavanaugh-related document" in the possession of Senator Feinstein.	The article reported that a letter in the possession of Senator Feinstein "purportedly describe[d] an incident that was relayed to someone affiliated with Stanford University, who authored the letter and sent it to Rep. Anna Eshoo, a Democrat who represents the area."	Ryan Grim, *Dianne Feinstein Withholding Brett Kavanaugh Document From Fellow Judiciary Committee Democrats*, Intercept (Sep. 12, 2018), https://theintercept.com/2018/09/12/brett-kavanaugh-confirmation-dianne-feinstein/.
September 12	Ford's attorney Debra Katz is seen leaving Capitol Hill shortly after the *Intercept* story was published.		Lissandra Villa and Paul McLeod, *Senate Democrats Have Referred a Secret Letter about Brett Kavanaugh to the FBI*, BuzzFeed News (Sep. 13, 2018), https://www.buzzfeednews.com/article/lissandravilla/senate-democrats-have-sent-a-secret-letter-about-brett.
September 13	Senator Feinstein refers the letter to the FBI.		Burgess Everett & Edward-Isaac Dovere, *Feinstein Asks Feds To Investigate Kavanaugh Claims in Letter*, Politico (Sep. 30, 2018), https://www.politico.com/story/2018/09/13/feinstein-kavanaugh-investigation-letter-822902.
September 14	The *New Yorker* reports on an interview with Ford but does not identify her by name.	The article described the incident in detail.	Ronan Farrow & Jane Mayer, *A Sexual-Misconduct Allegation Against the Supreme Court Nominee Brett Kavanaugh Stirs Tension Among Democrats in Congress*, New Yorker (Sep. 14, 2018), https://www.newyorker.com/news/news-desk/a-sexual-misconduct-allegation-against-the-supreme-court-nominee-brett-kavanaugh-stirs-tension-among-democrats-in-congress.
September 16	The *Washington Post* reports on an interview with Ford.	The article described the incident in detail.	Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, Washington Post (Sep. 16, 2018), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-

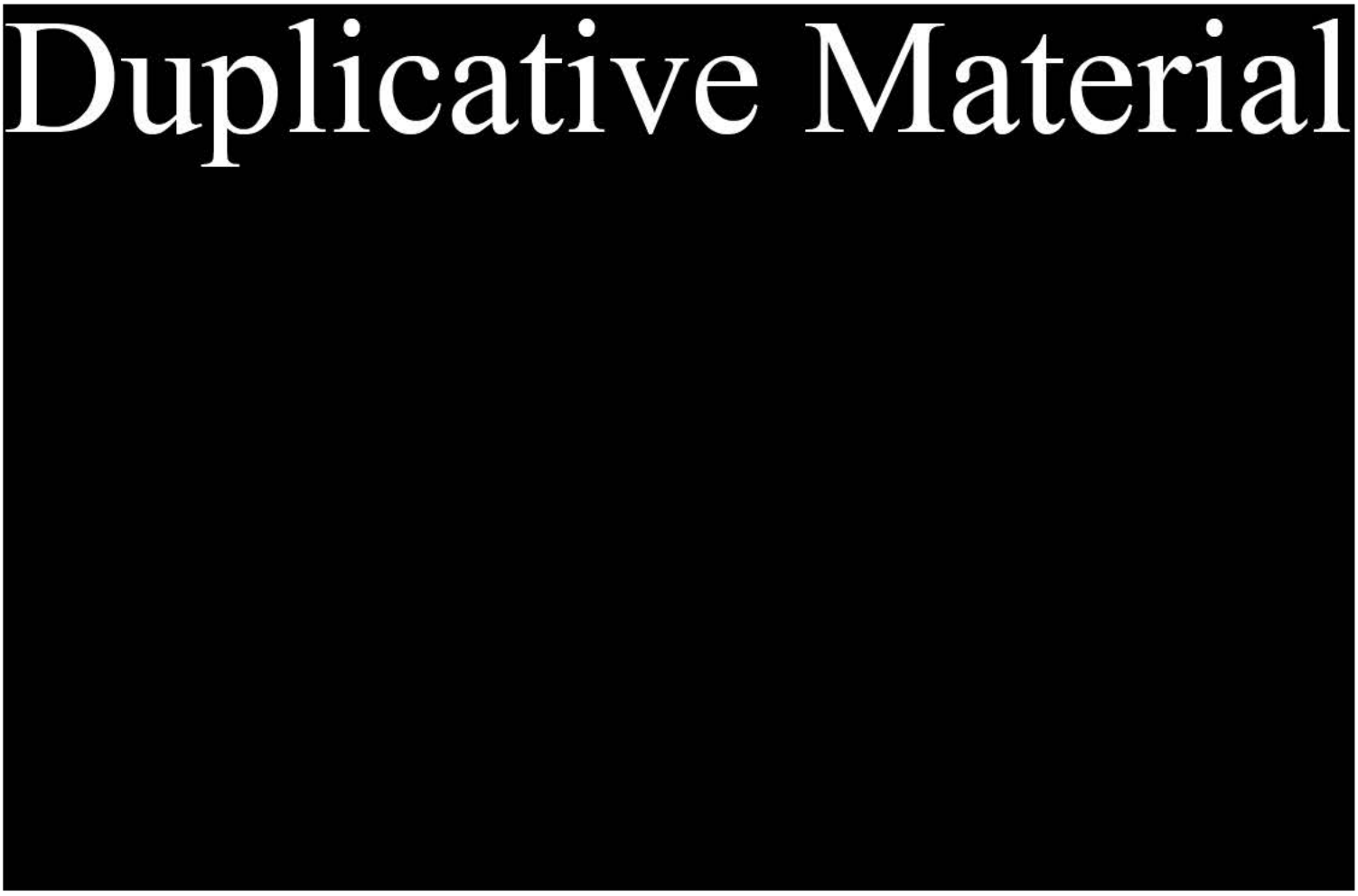
			speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.
September 17	SJC has a follow-up BI call with Kavanaugh on the Ford letter. Senator Feinstein does not participate.	Senator Feinstein's staff did not show up.	Committee records
September 25	SJC speaks with Kavanaugh about the allegations against him.	Senator Feinstein's staff declared that they were present "under protest" and did not participate.	Committee records
September 26	SJC speaks with Judge Kavanaugh about the allegations against him.	Senator Feinstein's staff declared that they were present "under protest" and did not participate.	Committee records

From: "Shah, Raj S. EOP/WHO" (b)(6)
To: "Talley, Brett (OLP)" (b)(6)
Cc: "Donaldson, Annie M. EOP/WHO" (b)(6), "Horning, Liz A. EOP/WHO" (b)(6)
Subject: Re: SCOTUS -- Memo to GOP Senators from Rachel Mitchell Re Analysis of Dr. Christine Blasey Ford's Allegations
Date: Mon, 1 Oct 2018 11:59:37 +0000
Importance: Normal

Yeah all networks and prints have
Will have Kerri blast it too

Sent from my iPhone

On Oct 1, 2018, at 7:57 AM, Talley, Brett (OLP) (b)(6) wrote:



From: "Michel, Christopher G. EOP/WHO" (b)(6)
To: "Talley, Brett (OLP)" (b)(6)
Subject: RE: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Kavanugh)
Date: Thu, 20 Sep 2018 19:34:38 +0000
Importance: Normal

Thanks. Travis is sending back slightly edited version momentarily.

From: Talley, Brett (OLP) (b)(6)
Sent: Thursday, September 20, 2018 3:33 PM
To: Michel, Christopher G. EOP/WHO (b)(6)
Subject: FW: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Kavanugh)

From: Davis, Mike (Judiciary-Rep) (b)(6)
Sent: Tuesday, September 18, 2018 11 11 PM
To: Megan Lacy (b)(6) ; Champoux, Mark (OLP) (b)(6) ; Talley, Brett (OLP) (b)(6) ; Fragoso, Michael (OLP) (b)(6)
Subject: FW: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Kavanugh)

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Covey, Jason (Judiciary-Rep)
Sent: Tuesday, September 18, 2018 4:32 PM
To: 'bwilkinson@wilkinsonwalsh.com' <bwilkinson@wilkinsonwalsh.com>
Cc: Davis, Mike (Judiciary-Rep) (b)(6) ; Mehler, Lauren (Judiciary-Rep) (b)(6) ; Willey, Katharine (Judiciary-Rep) (b)(6)
Subject: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Kavanugh)

Ms. Wilkinson,

Attached please find a letter from Chairman Grassley inviting the Honorable Brett Kavanaugh to appear and testify at the hearing on the nomination of the Honorable Brett M. Kavanaugh.

Should you have any questions please feel free to contact me at (202) 224-5225 or via email.

Thank you.

Jason A. Covey
Hearing Clerk | Senate Judiciary Committee
>http://judiciary.senate.gov<

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 18, 2018

The Honorable Brett M. Kavanaugh
Circuit Judge
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Avenue NE
Washington, DC 20002

Dear Judge Kavanaugh:

I invite you to testify at the Senate Committee on the Judiciary hearing on the nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the United States Supreme Court on Monday, September 24, 2018, in room 216 of the Hart Senate Office Building.

Committee rules require that you provide your testimony and a short biography for distribution to members of the Committee and the press by 10:00 a.m. on Friday, September 21. Please send an electronic copy of your testimony and biography to (b)(6) Jason Covey

Please contact Jason Covey at (202) 224-5225 with any questions. We look forward to your testimony.

Sincerely,

Chuck Grassley

Charles E. Grassley
Chairman

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Donaldson, Annie M. EOP/WHO" (b)(6), "Burnham, James M. EOP/WHO" (b)(6), (b)(6) Brett Talley (OLP)
Subject: Fwd: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Kavanugh)
Date: Wed, 19 Sep 2018 03:13:13 +0000
Importance: Normal
Attachments: Kavanaugh_Invitation.pdf; ATT00001.htm

Official invitation to the Judge for Monday

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 18, 2018 at 11:10:54 PM EDT
To: "Megan Lacy (b)(6), "Mark Champoux (b)(6), (b)(6) Brett Talley (OLP), (b)(6) Michael Fragoso (OLP)
Subject: FW: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Kavanugh)

Duplicative Material

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Donaldson, Annie M. EOP/WHO" (b)(6), "Burnham, James M. EOP/WHO" (b)(6), (b)(6) Brett Talley (OLP), "Murray, Claire M. EOP/WHO" (b)(6), "Michel, Christopher G. EOP/WHO" (b)(6)
Subject: FW: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Ford)
Date: Tue, 18 Sep 2018 21:54:48 +0000
Importance: Normal
Attachments: Ford_Invitation.pdf

FYI, formal invitation from Committee clerk went out (a follow-on to the emailed invitations from yesterday).

From: Davis, Mike (Judiciary-Rep) (b)(6)
Sent: Tuesday, September 18, 2018 5:53 PM
To: Lacy, Megan M. EOP/WHO (b)(6); Mark Champoux (b)(6); (b)(6) Brett Talley (OLP); (b)(6) Michael Fragoso (OLP)
Subject: FW: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Ford)

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Covey, Jason (Judiciary-Rep)
Sent: Tuesday, September 18, 2018 4:32 PM
To: 'katz@kmblegal.com' <katz@kmblegal.com>
Cc: Davis, Mike (Judiciary-Rep) (b)(6); Mehler, Lauren (Judiciary-Rep) (b)(6); Willey, Katharine (Judiciary-Rep) (b)(6)
Subject: Nomination of Brett M. Kavanaugh Hearing - Invitation to Testify (Ford)

Ms. Katz,

Attached please find a letter from Chairman Grassley inviting Professor Ford to appear and testify at the hearing on the nomination of the Honorable Brett M. Kavanaugh.

Should you have any questions please feel free to contact me at (202) 224-5225 or via email.

Thank you.

Jason A. Covey
Hearing Clerk | Senate Judiciary Committee
>http://judiciary.senate.gov<

From: "Lacy, Megan M. EOP/WHO" (b)(6)

To: "Donaldson, Annie M. EOP/WHO" (b)(6), "Michel, Christopher G. EOP/WHO" (b)(6), "Murray, Claire M. EOP/WHO" (b)(6), (b)(6) Brett Talley (OLP)

Subject: Fwd: SCOTUS -- (1) Senate Judiciary Committee Invitation to Dr. Ford; and (2) Grassley Letter to Attorneys for Dr. Ford

Date: Wed, 19 Sep 2018 20:08:47 +0000

Importance: Normal

Attachments: Ford_Invitation.pdf; ATT00001.htm; 09.19.18_CEG_to_Debra_Katz.pdf; ATT00002.htm

---

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 19, 2018 at 4:05:56 PM EDT
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Subject: SCOTUS -- (1) Senate Judiciary Committee Invitation to Dr. Ford; and (2) Grassley Letter to Attorneys for Dr. Ford

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

CHUCK GRASSLEY, IOWA
CHAIRMAN

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

September 19, 2018

Ms. Debra S. Katz
Ms. Lisa J. Banks
Katz, Marshall & Banks, LLP
1718 Connecticut Avenue NW
Washington, D.C. 20009

Dear Mses. Katz and Banks,

Thank you for your letter dated September 18, 2018. I was disturbed to read that your client and her family have received threats of intimidation. That's never appropriate and no one should be subject to that behavior.

The Federal Bureau of Investigation has supplemented Judge Kavanaugh's background investigation file in light of the allegations raised by your client, Dr. Christine Blasey Ford. The Committee's standard procedure for supplemented background investigations is to conduct phone or in-person interviews with the relevant parties to discuss the underlying issues. To that end, Committee staff has attempted to contact you directly by phone and e-mail several times to schedule a call at a time convenient for you and your client. We thus far have not heard back from you with regard to that request. Please contact Committee staff at your earliest convenience to schedule that call at a time convenient for you and your client.

As you know, I have reopened the hearing on Judge Kavanaugh's nomination in light of Dr. Ford's allegations. That hearing will begin again on Monday, September 24, at 10:00 a.m. I have invited Dr. Ford to testify regarding her allegations against Judge Kavanaugh. And in recognition of how difficult it can be to discuss allegations of this kind in public, I have also offered her the choice of testifying in either a public or closed session of the hearing. In response to my invitation, however, you wrote yesterday that "an FBI investigation of the incident should be the first step in addressing her allegations."

I certainly understand and respect Dr. Ford's desire for an investigation of her allegations. That is precisely what the Senate is doing. That is why our investigators have asked to speak with your client. That is why I have invited Dr. Ford to tell her story to the Senate and, if she so chooses, to the American people. It is not the FBI's role to investigate a matter such as this. Before nominating an individual to a judicial or executive office, the White House directs the FBI to conduct a background investigation. The FBI compiles information about a prospective nominee and sends it to the White House. The White House then provides FBI background investigation files to the

Senate as a courtesy to help us determine whether to confirm a nominee. The FBI does not make a credibility assessment of any information it receives with respect to a nominee. Nor is it tasked with investigating a matter simply because the Committee deems it important. The Constitution assigns the Senate, and only the Senate, with the task of advising the President on his nominee and consenting to the nomination if the circumstances merit. We have no power to commandeer an Executive Branch agency into conducting our due diligence. The job of assessing and investigating a nominee's qualifications in order to decide whether to consent to the nomination is ours, and ours alone.

I have reopened the hearing because I believe that anyone who comes forward with allegations of sexual assault has a right to be heard, and because it is the Committee's responsibility to fully evaluate the fitness of a nominee to the Supreme Court. I therefore want to give Dr. Ford an opportunity to tell her story to the Senate and, if she chooses, to the American people. I also want to give Judge Kavanaugh an opportunity to respond to the allegations. By hearing out both Dr. Ford and Judge Kavanaugh, the Committee will endeavor to discover the truth of the matter, and will be better able to make an informed judgment about Judge Kavanaugh's nomination.

You have stated repeatedly that Dr. Ford wants to tell her story. I sincerely hope that Dr. Ford will accept my invitation to do so, either privately or publicly, on Monday. In the meantime, my staff would still welcome the opportunity to speak with Dr. Ford at a time and place convenient to her. And I remind you that, consistent with Committee rules, Dr. Ford's prepared testimony and biography are due to the Committee by 10:00 a.m. on Friday, September 21, if she intends to testify on Monday.

Sincerely,

Chuck Grassley
Chairman

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Shah, Raj S. EOP/WHO" (b)(6) , "Donaldson, Annie M. EOP/WHO" (b)(6) (b)(6) Brett Talley (OLP)
Subject: Fwd: Dr. Christine Blasey Ford
Date: Wed, 19 Sep 2018 22:26:23 +0000
Importance: Normal
Attachments: ATT00001.htm; ATT00002.htm; ATT00003.htm; ATT00004.htm; 09.19.18_CEG_to_Debra_Katz.pdf; ATT00005.htm
Inline-Images: image001.gif; image001(1).gif; image002.png; image001(2).gif

---

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 19, 2018 at 6:25:18 PM EDT
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Subject: FW: Dr. Christine Blasey Ford

FYI below. Dr. Ford's attorneys blame faulty email and Yom Kippur for their inability to respond to the Chairman's numerous invitations for Dr. Ford to testify, including in the attached letter.

Yet, Dr. Ford's attorneys have found plenty of time today to find TV cameras and talk to reporters.

Here is just one of many examples:

Lawyer for Kavanaugh accuser says GOP plan to move ahead with hearing is 'not a fair or good faith investigation'
>https://www.washingtonpost.com/politics/trump-says-alleged-assault-by-kavanaugh-is-very-hard-for-me-to-imagine/2018/09/19/07a71002-bbf3-11e8-bdc0-90f81cc58c5d_story.html?utm_term=.ff1e0b7fe50c&wpisrc=al_news__alert-politics--alert-national&wpmk=1<

BREAKING: In a statement, the lawyer for Christine Blasey Ford said there are multiple witnesses who should be included in the Senate Judiciary Committee hearing, scheduled for Monday. The panel's Republicans have invited Supreme Court nominee Brett M. Kavanaugh and Ford to testify. "The rush to a hearing is unnecessary, and contrary to the Committee discovering the truth," said Lisa Banks, the lawyer for Ford. The statement made no mention of whether Ford would testify.
This story will be updated

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Willey, Katharine (Judiciary-Rep)
Sent: Wednesday, September 19, 2018 5:30 PM
To: 'Lisa Banks' <banks@kmblegal.com>
Cc: (b)(6)
Subject: RE: Dr. Christine Blasey Ford

I just received the email forwarded at 4:22 pm but I did not receive the first email. Thanks for following up.

From: Lisa Banks [mailto:banks@kmblegal.com]
Sent: Wednesday, September 19, 2018 4:22 PM
To: Willey, Katharine (Judiciary-Rep) (b)(6)
Cc: Lisa Banks <banks@kmblegal.com>; (b)(6)
Subject: FW: Dr. Christine Blasey Ford

Ms. Willey,

Lisa asked me to forward the email below to you as we were having an issue with our emails today. Please confirm receipt. Thank you.

Best,
(b)(6)
Office Manager

KATZ, MARSHALL & BANKS, LLP
KATZ, MARSHALL & BANKS, LLP
KATZ, MARSHALL & BANKS, LLP

1718 Connecticut Ave., N.W.
Sixth Floor
Washington, D.C. 20009
Tel: 202-299-1140
Fax: 202-299-1148
Email: (b)(6)

Website: >www.kmblegal.com<

From: Lisa Banks
Sent: Wednesday, September 19, 2018 1:19 PM
To: 'Willey, Katharine (Judiciary-Rep)' (b)(6); Debra Katz <katz@kmblegal.com>
Cc: Mehler, Lauren (Judiciary-Rep) (b)(6); Davis, Mike (Judiciary-Rep) (b)(6)
Subject: RE: Dr. Christine Blasey Ford

Ms. Willey,

Thank you for forwarding this letter. Today is Yom Kippur, but I expect we will be able to respond tomorrow.

Best regards,

Lisa Banks

Lisa J. Banks

Partner
1718 Connecticut Ave., N.W.
Sixth Floor
Washington, D.C. 20009
Tel: 202-299-1140
Fax: 202-299-1148
Email: Banks@kmblegal.com

Website: >www.kmblegal.com<

From: Willey, Katharine (Judiciary-Rep) (b)(6)
Sent: Wednesday, September 19, 2018 11:52 AM
To: Lisa Banks <banks@kmblegal.com>; Debra Katz <katz@kmblegal.com>
Cc: Mehler, Lauren (Judiciary-Rep) (b)(6) ; Davis, Mike (Judiciary-Rep) (b)(6)
Subject: RE: Dr. Christine Blasey Ford

Ms. Banks,

Please see the enclosed letter from the Chairman in response to your September 18th letter. As always, please feel free to contact me if you have any questions.

Katharine L. Willey
Counsel, Office of the Chairman

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
224 Dirksen Senate Office Building | Washington, DC 20510
phone: 202.224.5225

From: Lisa Banks [mailto:banks@kmblegal.com]
Sent: Tuesday, September 18, 2018 7:57 PM
To: Willey, Katharine (Judiciary-Rep) (b)(6)
Subject: Dr. Christine Blasey Ford

Ms. Willey,

Please see the enclosed.

Sincerely,

Lisa J. Banks

Partner
1718 Connecticut Ave., N.W.
Sixth Floor
Washington, D.C. 20009
Tel: 202-299-1140
Fax: 202-299-1148
Email: Banks@kmblegal.com

Website: >www kmblegal.com<

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Donaldson, Annie M. EOP/WHO" (b)(6) , (b)(6) Brett Talley (OLP)
Subject: Fwd: Dr. Christine Blasey Ford
Date: Wed, 19 Sep 2018 21:36:07 +0000
Importance: Normal
Inline-Images: image001.gif; image001(1).gif; image002.png; image001(2).gif

---

Her lawyers say they'll write back tomorrow

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 19, 2018 at 5:32:40 PM EDT
To: "Megan Lacy (b)(6) , "Mark Champoux (b)(6) ,(b)(6) Brett Talley (OLP) ,(b)(6) Michael Fragoso (OLP)
Subject: FW: Dr. Christine Blasey Ford

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Willey, Katharine (Judiciary-Rep)
Sent: Wednesday, September 19, 2018 5:30 PM
To: 'Lisa Banks' <banks@kmblegal.com>
Cc: (b)(6)
Subject: RE: Dr. Christine Blasey Ford

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Burnham, James M. EOP/WHO" (b)(6), "Donaldson, Annie M. EOP/WHO" (b)(6), (b)(6) Brett Talley (OLP)
Subject: Fwd: Dr. Christine Blasey Ford
Date: Wed, 19 Sep 2018 00:38:52 +0000
Importance: Normal

Sent from my iPhone

Begin forwarded message:

From: "Lacy, Megan M. EOP/WHO" (b)(6)
Date: September 18, 2018 at 8:38:24 PM EDT
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Cc: "Mark Champoux (b)(6), (b)(6) Brett Talley (OLP), (b)(6) Michael Fragoso (OLP)
Subject: Re: Dr. Christine Blasey Ford

Also, "at the same table" is nonsense.

Sent from my iPhone

On Sep 18, 2018, at 8:07 PM, Lacy, Megan M. EOP/WHO (b)(6) wrote:

Excellent. Thanks Mike.

Sent from my iPhone

On Sep 18, 2018, at 8:06 PM, Davis, Mike (Judiciary-Rep) (b)(6) wrote:

See attached letter from Dr. Ford's attorneys.

They will not commit to Dr. Ford testifying on Monday. They indicate that they will not commit to Dr. Ford testifying until after a "full investigation" by the FBI.

But the attorney is on CNN right now. This is clearly a political charade.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Lisa Banks [mailto:banks@kmblegal.com]
Sent: Tuesday, September 18, 2018 7:57 PM
To: Willey, Katharine (Judiciary-Rep) (b)(6)
Subject: Dr. Christine Blasey Ford

Duplicative Material

<180918 - Ltr to Grassley.pdf>

KATZ, MARSHALL & BANKS, LLP

By Electronic Mail
September 18, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for reaching out yesterday afternoon. Dr. Christine Blasey Ford looks forward to working with you and the Committee.

As you know, earlier this summer, Dr. Ford sought to tell her story, in confidence, so that lawmakers would have a fuller understanding of Brett Kavanaugh's character and history. Only after the details of her experience were leaked did Dr. Ford make the reluctant decision to come forward publicly.

In the 36 hours since her name became public, Dr. Ford has received a stunning amount of support from her community and from fellow citizens across our country. At the same time, however, her worst fears have materialized. She has been the target of vicious harassment and even death threats. As a result of these kind of threats, her family was forced to relocate out of their home. Her email has been hacked, and she has been impersonated online.

While Dr. Ford's life was being turned upside down, you and your staff scheduled a public hearing for her to testify at the same table as Judge Kavanaugh in front of two dozen U.S. Senators on national television to relive this traumatic and harrowing incident. The hearing was scheduled for six short days from today and would include interrogation by Senators who appear to have made up their minds that she is "mistaken" and "mixed up." While no sexual assault survivor should be subjected to such an ordeal, Dr. Ford wants to cooperate with the Committee and with law enforcement officials.

As the Judiciary Committee has recognized and done before, an FBI investigation of the incident should be the first step in addressing her allegations. A full investigation by law enforcement officials will ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions.

We would welcome the opportunity to talk with you and Ranking Member Feinstein to discuss reasonable steps as to how Dr. Ford can cooperate while also taking care of her own health and security.

Sincerely,

Debra S. Katz

Lisa J. Banks
Attorneys for Dr. Christine Blasey Ford

cc: The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary

From: "Lacy, Megan M. EOP/WHO" (b)(6)
To: "Donaldson, Annie M. EOP/WHO" (b)(6) , (b)(6) Brett Talley (OLP) , "Burnham, James M. EOP/WHO" (b)(6)
Subject: Fwd: Dr. Christine Blasey Ford
Date: Wed, 19 Sep 2018 00:07:02 +0000
Importance: Normal
Attachments: ATT00001.htm; 180918_-_Ltr_to_Grassley.pdf; ATT00002.htm
Inline-Images: image001.gif

Sent from my iPhone

Begin forwarded message:

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
Date: September 18, 2018 at 8:06:26 PM EDT
To: "Megan Lacy (b)(6) , "Mark Champoux (b)(6) ,(b)(6) Brett Talley (OLP) ,(b)(6) Michael Fragoso (OLP)
Subject: FW: Dr. Christine Blasey Ford

Duplicative Material

From: "Davis, Mike (Judiciary-Rep)" (b)(6)
To: "Davis, Mike (Judiciary-Rep)" (b)(6)
Subject: FW: SCOTUS -- request for evidence
Date: Wed, 26 Sep 2018 03:37:07 +0000
Importance: Normal
Attachments: 180925_-_Ltr_to_Davis.pdf; 09.23.18_CEG_to_BMK_Attorneys.pdf
Inline-Images: image001.jpg

From: Davis, Mike (Judiciary-Rep)
Sent: Tuesday, September 25, 2018 11:05 PM
To: 'BWilkinson@wilkinsonwalsh.com' <BWilkinson@wilkinsonwalsh.com>; 'awalsh@wilkinsonwalsh.com' <awalsh@wilkinsonwalsh.com>
Cc: 'Michael R. Bromwich' (b)(6); 'Lisa Banks' <banks@kmblegal.com>; 'katz@kmblegal.com' <katz@kmblegal.com>; Duck, Jennifer (Judiciary-Dem) (b)(6); Sawyer, Heather (Judiciary-Dem) (b)(6); Covey, Jason (Judiciary-Rep) (b)(6); Mehler, Lauren (Judiciary-Rep) (b)(6); Kenny, Steve (Judiciary-Rep) (b)(6); Ferguson, Andrew (Judiciary-Rep) (b)(6)
Subject: FW: SCOTUS -- request for evidence

Ms. Wilkinson and Ms. Walsh,

Attached are the materials submitted by Dr. Ford to the Senate Judiciary Committee, for purposes of Day 5 (Thursday, 9/27/2018) of the public nomination hearing for Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.

Per the attached 9/23/2018 document request sent by the Chairman, please provide Judge Kavanaugh's responsive evidence on or before tomorrow.

I have copied Dr. Ford's legal team, along with the Chairman and Ranking Member's staff. Please copy all of these individuals on your email submission.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

From: Joseph Abboud [mailto:Abboud@kmblegal.com]
Sent: Tuesday, September 25, 2018 9:18 PM
To: Davis, Mike (Judiciary-Rep) (b)(6); 'Michael R. Bromwich' (b)(6); Lisa Banks <banks@kmblegal.com>; Debra Katz <katz@kmblegal.com>

Cc: Sawyer, Heather (Judiciary-Dem) (b)(6)
Subject: RE: SCOTUS -- request for evidence

Mr. Davis,

Please see attached.

Thanks,

KATZ, MARSHALL & BANKS, LLP
Joseph E. Abboud
Associate
1718 Connecticut Ave., N.W.
Sixth Floor
Washington, D.C. 20009
Tel: 202-299-1140
Fax: 202-299-1148
Email: Abboud@kmblegal.com
Website: www.kmblegal.com

From: Davis, Mike (Judiciary-Rep) (b)(6)
Sent: Sunday, September 23, 2018 4:26 PM
To: 'Michael R. Bromwich' (b)(6); Lisa Banks <banks@kmblegal.com>; Debra Katz <katz@kmblegal.com>; Joseph Abboud <Abboud@kmblegal.com>
Cc: Duck, Jennifer (Judiciary-Dem) (b)(6); Sawyer, Heather (Judiciary-Dem) (b)(6)
Subject: SCOTUS -- request for evidence

Counsel:

Please find the attached letter from the Chairman.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
(b)(6) (direct)
(b)(6) (cell)
202-224-9102 (fax)
(b)(6)

KATZ, MARSHALL & BANKS, LLP

Joseph E. Abboud, Associate

By Electronic Mail
September 25, 2018

Mike Davis, Esquire
Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Davis:

Attached please find materials responsive to the requests for documents contained in Senator Grassley's letter dated September 23, 2018. We reserve the right to provide supplemental documents as necessary.

Sincerely,

Joseph E. Abboud
Attorney for Dr. Christine Blasey Ford

Encl.

cc: Heather Sawyer, Esquire

Christine Blasey MA, PhD, MS

Palo Alto, CA

Education

Master of Science, Epidemiology, 2009
Stanford University School of Medicine
Department of Health Research and Policy
Specialization: Biostatistics
GPA 4.0

Doctor of Philosophy, Psychology, 1996
University of Southern California, Rossier School of Education (APA-accredited)
Specialization: Marriage and Family Therapy, Research Design and Statistics
Dissertation: Psychometric Development of a Measure of Children's Coping Strategies
GPA 3.9

Predoctoral Clinical Psychology Internship, 1994
University of Hawai'i at Manoa (APA-accredited)

Master of Arts, Clinical Psychology, 1991
Pepperdine University, 1991
Dean's Letter of Commendation
GPA 4.0

Bachelor of Arts, Experimental Psychology, 1988
University of North Carolina at Chapel Hill

High School, 1984
Holton-Arms School
Bethesda, Maryland

Current Employment

Current **Professor, PGSP-Stanford University Consortium for Clinical Psychology**
Stanford University School of Medicine Department of Psychiatry and Palo Alto University

Director of Student Research Competence.
Teach Statistics, Research Methods, Psychometrics, Dissertation Preparation Seminar, Advanced Statistics and Scientific Writing.
Mentor students and serve on 10-15 Dissertation Committees per year. Common student-led research areas include Evidence-based treatments for Depression, Anxiety, ADHD, Autism Spectrum and other Developmental Disorders, Trauma and other illnesses in Veteran populations
Golden Apple Award, Winner 2012 and 2018

Research Psychologist and Biostatistician, **Stanford University School of Medicine Department of Psychiatry**

Design studies and conduct statistical analyses supporting faculty research across child and adult psychiatry. Statistical expertise in centering, interaction effects, mediation and moderation. Studies focus on child and adulthood psychiatric conditions, their etiologies and effective treatments. Provide statistical expertise to faculty in other departments within the School of Medicine (e.g., cardiology)

Prior Employment

2012-4, 2017 **Consulting Biostatistician**, Titan Pharmaceuticals, San Francisco, CA
Conduct statistical analyses regarding the efficacy of novel treatments for opioid abuse disorders.

2012-4, 2017 **Consulting Biostatistician**, Brain Resource, Sydney, Australia
Conduct statistical analyses regarding the putative psychological and biological markers of treatment response to ADD and Antidepressant medications.

2010-2012 **Director, Corcept Therapeutics**

2005-2012 **Associate Director, Statistician, Corcept Therapeutics**

Led statistical activities of Phase 3 program for development of new medicines. Designed and constructed databases, chose analytic models, wrote statistical programs, co-authored Statistical Analysis Plans, co-authored Clinical Study reports (CSR), and co-wrote manuscripts for scientific publications. Presented at professional meetings including NCDEU and APA.

1999-current **Research Psychologist, Stanford University**

Provided data analytic and research design support for faculty and trainees in the Department of Psychiatry & Behavioral Sciences. Received formal mentoring from Helena C. Kraemer. Co-authored manuscripts, presented at professional conferences, taught statistics courses for MD and PhD postdocs and research fellows, provided training courses in SPSS. Taught statistics courses for 3 years in Child Psychiatry postdoctoral fellowship program and in the Stanford-PGSP Consortium.

1999-2001 **Biostatistician, The Children's Health Council**

Designed and conducted program evaluations. Provided project management and supervised Research Assistants in their research projects.

1995-98 **Visiting Professor, Pepperdine University**

Taught full time (10 classes per year) in the undergraduate and graduate psychology programs. Courses Taught: Psych 101 (small class and large lecture hall), Introductory Statistics, Intermediate Statistics, Computer Applications in Statistics, Psychological Testing and Assessment, Developmental Psychology, Personality Theory, Family Therapy. Nominee, Tyler Teacher of the Year Award, 1996.

Computer Skills
SPSS
QROC (signal detection)
SAS – Level 4

Statistical Reviewer
Multiple psychiatry and statistics journals

Sample of Awards and Invited Talks

2018 Invited Statistics Mentor, NIH-American Psychiatric Association Annual Meeting, New York

2017 Invited Statistics Mentor, NIH-American Psychiatric Association Annual Meeting, San Diego

2018 Golden Apple Teaching Award in Statistics, PGSP-Stanford Psy.D Consortium

2012 Golden Apple Teaching Award in Statistics, PGSP-Stanford Psy.D Consortium

2014-5 Roundtable Lead Discussant, Statistical Analysis in Industry-FDA Interactions. American Statistical Association Annual FDA meeting with Industry and Academic Statisticians. Washington, DC

1997 Ron Tyler Teaching Award Finalist, Pepperdine University

Book and Book Chapters

Kraemer HC and **Blasey C**. (2015) *How Many Subjects*? Los Angeles: Sage Publications.

Blasey C, DeBattista C, Belanoff J, Schatzberg A (2010). Psychopharmacology. In Koocher G (Editor), Psychologists Desk Reference.

****Sample Peer Reviewed Publications**

Williams N, Heiferts B, **Blasey C**, Sudheimer K, Schatzberg A. (August, 2018). Opioid Receptor Antagonism Attenuates the Antidepressant Effects of Ketamine. *American Journal of Psychiatry*.

Arnow BA, **Blasey CB** , Rush AJ. Beyond symptom reduction: Poor Quality of Life, Daily Functioning, and Life Satisfaction issues persist (*In preparation*).

Avery T, **Blasey C**, Rosen C, Bayley P. Psychological Flexibility and Set-Shifting Among Veterans Participating in a Yoga Program: A Pilot Study. Mil Med. 2018 Mar 26.

Elliott GR, **Blasey C**, Rekshan W, Rush AJ, Palmer DM, Clarke S, Kohn M, Kaplan C, Gordon E. Cognitive Testing to Identify Children With ADHD Who Do and Do Not Respond to Methylphenidate. J Atten Disord. 2017 Dec;21(14):1151-1160.

Cohen JM, **Blasey C**, Barr Taylor C, Weiss BJ, Newman MG Anxiety and Related Disorders and Concealment in Sexual Minority Young Adults. Behav Ther. 2016 Jan;47(1):91-101.

Korgaonkar MS, Rekshan W, Gordon E, Rush AJ, Williams LM, **Blasey C**, Grieve SM. Magnetic Resonance Imaging Measures of Brain Structure to Predict Antidepressant Treatment Outcome in Major Depressive Disorder. 2015 Dec3; 2 (1):37-45.

Arnow BA, **Blasey C**, Williams LM, Palmer DM, Rekshan W, Schatzberg AF, Etkin A,Kulkarni J, Luther JF, Rush AJ. Depression Subtypes in Predicting Antidepressant Response: A Report From the iSPOT-D Trial. Am J Psychiatry. 2015 Aug 1; 172 (8):743-50.

Abbasi F, **Blasey C**, Feldman D, Caulfield MP, Hantash FM, Reaven GM. Low circulating 25-hydroxyvitamin D concentrations are associated with defects in insulin action and insulin secretion in persons with prediabetes. J Nutr. 2015 Apr; 145 (4):714-9.

Rosenthal RN, Ling W, Casadonte P, Vocci F, Bailey GL, Kampman K, Patkar A, Chavoustie S, **Blasey C**, Sigmon S, Beebe KL. Buprenorphine implants for treatment of opioid dependence: randomized comparison to placebo and sublingual buprenorphine/naloxone. Addiction. 2013 Dec; 108 (12):2141-9.

Blasey C, McLain C, Belanoff J. (2013). Trough Plasma Concentrations of Mifepristone Correlate with Psychotic Symptom Reductions: A Review of Three Randomized Clinical Trials. *Current Psychiatry Reviews*.

Blasey C, Belanoff J, DeBattista C, Schatzberg A (2013). Adult Psychopharmacology. In Koocher, Norcross, Hill (Eds). Psychologist's Desk Reference. Oxford University Press.

Steidtmann D, Manber R, **Blasey C**, Markowitz JC, Klein DN, Rothbaum BO, Thase ME, Kocsis JH, Arnow BA. Detecting Critical Decision Points in Psychotherapy and Psychotherapy + Medication for Chronic Depression. *J Consult Clin Psychol*. 2013 Jun 10.

Arnow BA, Steidtmann D, **Blasey C**, Manber R, Constantino MJ, Klein DN,Markowitz JC, Rothbaum BO, Thase ME, Fisher AJ, Kocsis JH. The relationship between the therapeutic alliance and treatment outcome in two distinct psychotherapies for chronic depression. *J Consult Clin Psychol*. 2013 Aug; 81 (4):627-38.

Abbasi F, **Blasey C**, Reaven GM. Cardiometabolic risk factors and obesity: does it matter whether BMI or waist circumference is the index of obesity? *Am J Clin Nutr*. 2013 Sep; 98(3):637-40.

Bhat SL, Abbasi FA, **Blasey C**, Reaven GM, Kim SH. Beyond fasting plasma glucose: The association between coronary heart disease risk and postprandial glucose, postprandial insulin and insulin resistance in healthy, nondiabeticadults. *Metabolism*. 2013 Sep;62(9):1223-6.

Bhat S, Abbasi F, **Blasey C**, Reaven G, Kim Sh. Plasma glucose and insulin responses to mixed meals: impaired fasting glucose re-visited. *Diab Vasc Dis Res*.2011 Oct;8(4):271-5.

Andrade C, Shaikh SA, Narayan L, **Blasey C**, Belanoff J. Administration of a selective glucocorticoid antagonist attenuates electroconvulsive shock-induced retrograde amnesia. *J Neural Transm*. 2012 Mar;119(3):337-44.

Blasey C, Block T, Belanoff JK, Roe RL. Efficacy and Safety of Mifepristone for the treatment of Psychotic Depression. *Journal of Clinical Psychopharmacology*, 2011 Aug; 31(4): 436-440.

Asagami T, Belanoff JK, Azuma J, **Blasey C**, Tsao P. Selective glucocorticoid receptor (GR-II) antagonist reduces body weight gain in mice. *Journal of Nutrition and Metabolism*, 2011.

Arnow BA, **Blasey CM**, Hunkeler EM, Lee J, Hayward C. Does Gender Moderate the Relationship Between Childhood Maltreatment and Adult Depression? *Child Maltreat*. 2011 Jul 4.

Arnow BA, **Blasey CM**, Constantino MJ, Robinson R, Hunkeler E, Lee J, Fireman B,Khaylis A, Feiner L, Hayward C. Catastrophizing, depression and pain-related disability. *Gen Hosp Psychiatry*. 2011 Mar-Apr; 33 (2):150-6.

Belanoff JK, **Blasey CM**, Clark RD, Roe RL. Selective glucocorticoid receptor(type II) antagonists prevent weight gain caused by olanzapine in rats. *Eur J Pharmacol*. 2011 Mar 25;655(1-3):117-20.

Belanoff JK, **Blasey CM**, Clark RD, Roe RL. Selective glucocorticoid receptor (type II) antagonist prevents and reverses olanzapine-induced weight gain. *Diabetes Obes Metab*. 2010 Jun; 12 (6):545-7.

Parker KJ, Kenna HA, Zeitzer JM, Keller J, **Blasey CM**, Amico JA, Schatzberg AF. Preliminary evidence that plasma oxytocin levels are elevated in majordepression. *Psychiatry Res*. 2010 Jul 30;178 (2):359-62.

Blasey CM, Debattista C, Roe R, Block T, Belanoff JK. A multisite trial of mifepristone for the treatment of psychotic depression: a site-by-treatment interaction. *Contemporary Clinical Trials*. 2009, 30(4):284-8.

Gross C, **Blasey CM**, Roe RL, Belanoff JK. Mifepristone reduces weight gain and improves metabolic abnormalities associated with risperidone treatment in normal men. *Obesity* (Silver Spring). 2010 Dec; 18(12):2295-300.

Gross C, **Blasey C**, Allen K, Block T, Belanoff J. Mifepristone treatment of olanzapine-induced weight gain in healthy men. *Advances in Therapy*, 2009 (20)576-586.

Reaven GM, Lieberman JA, Sethuraman G, Kraemer H, Davis JM, **Blasey C**, Tsuang MT, Schatzberg AF. (2009) In search of moderators and mediators of hyperglycemia with atypical antipsychotic treatment.*J Psychiatr Res*. 2009 Mar 6.

Arnow BA, **Blasey CM**, Lee J, Fireman B, Hunkeler EM, Dea R, Robinson R, Hayward C. Relationships among depression, chronic pain, chronic disabling pain, and medical costs. *Psychiatric Services*. 2009 Mar; 60(3):344-50.

Butler LD, Koopman C, Azarow J, **Blasey CM**, Magdalene JC, DiMiceli S, Seagraves DA, Hastings TA, Chen XH, Garlan RW, Kraemer HC, Spiegel D Psychosocial predictors of resilience after the September 11, 2001 terrorist attacks. *J Nerv Ment Dis*. 2009 Apr; 197(4):266-73.

Manber R, **Blasey C**, Allen JJ Depression symptoms during pregnancy. *Archives of Womens Mental Health*. 2008; 11(1):43-8.

Butler LD, Waelde LC, Hastings TA, Chen XH, Symons B, Marshall J, Kaufman A, Nagy TF, **Blasey CM**, Seibert EO, Spiegel D. Meditation with yoga, group therapy with hypnosis, and psychoeducation for long-term depressed mood: a randomized pilot trial. *Journal of Clinical Psychology*, 2008 Jul; 64(7):806-20.

Arnow BA, **Blasey C**, Manber R, Constantino MJ, Markowitz JC, Klein DN, Thase ME, Kocsis JH, Rush AJ. Dropouts versus completers among chronically depressed outpatients. *Journal of Affective Disorders*. 2007 Jan;97(1-3):197-202.

Classen CC, Kraemer HC, **Blasey C**, Giese-Davis J, Koopman C, Palesh OG, Atkinson A, Dimiceli S, Stonisch-Riggs G, Westendorp J, Morrow GR, Spiegel D. Supportive-expressive group therapy for primary breast cancer patients: a randomized prospective multicenter trial. *Psychooncology*. 2008 May;17(5):438-47.

Arnow B, **Blasey C**, Manber R, Constantino M, Hayward C. Dropouts Versus Completers Among Chronically Depressed Outpatients. *Journal of Affective Disorders*. 2006.

Arnow B, Hunkeler, E. **Blasey C**, Hayward C. Comorbid Depression, Chronic Pain, and Disability in Primary Care. *Psychosomatic Medicine*, 2006, 68:262-268.

Doumas D, **Blasey C**, Thacker C. Attrition from Alcohol and Drug Outpatient Treatment: Psychological Distress and Interpersonal Problems as Indicators. *Alcoholism Treatment Quarterly*, 2006 23 (4), 55-67.

DeBattista C, Belanoff J, Glass S, Khan A, Horne R, **Blasey C**, Carpenter L, Alva G. Mifepristone versus Placebo in the Treatment of Psychosis in Patients with Psychotic Major Depression. *Biological Psychiatry*, 2006.

Beebe K, Block T, DeBattista C, **Blasey C**, Belanoff J. The efficacy of mifepristone in the reduction and prevention of olanzapine-induced weight gain in rats. *Behavioural Brain Research*, 2006, 171 (2), 225-9.

Constantino M, Arnow B, **Blasey C**, Agras S. The association between patient characteristics and the therapeutic alliance in cognitive-behavioral and interpersonal therapy in bulimia. *Journal of Consulting and Clinical Psychology*, 2005; 73(2): 203-211

Manber R, **Blasey C**. Arnow B, Markowitz J, Thase M, Rush A, Dowling F, Koscis J, Trivedi M, Keller, M. Assessing insomnia severity in depression: comparison of depression rating scales and sleep diaries, *Journal of Psychiatric Research*, 2005, 39(5), 481-8.

Belanoff J, Sund B, Koopman C, **Blasey C**, Flamm J, Schatzberg A, Spiegel D. A randomized trial of the efficacy of group psychotherapy in changing viral load and CD4 counts in individuals living with HIV infection. *International Journal of Psychiatry in Medicine*, 2005, 35(4), 349-362.

Lee T, **Blasey C**, Dyer-Friedman J, Glaser B, Reiss AL, Eliez S. From Research to Practice: Teacher and Pediatrician Awareness of Phenotypic Traits in Neurogenetic Syndromes. *American Journal of Mental Retardation*. 2005, 110(2), 100-106.

Kraemer HC, **Blasey CM**. Centring in regression analyses: a strategy to prevent errors in statistical inference. *International Journal Methods Psychiatric Research*. 2004, 13(3):141-51.

Saxena K, **Blasey C**. Research Methodology in Clinical Trials. In Steiner, H (Ed.) Handbook of mental health interventions in children and adolescents: An integrated developmental approach. San Francisco: Jossey Bass.

Fleming S, **Blasey C**, Schatzberg A. Neuropsychological correlates of psychotic features in major depressive disorders: A review and meta-analysis. *Journal of Psychiatric Research*, 2004, 38(1), 27-35.

Manber R, Schnyer RN, Allen JJ, Rush AJ, **Blasey CM**. Acupuncture: A promising treatment for depression during pregnancy. *Journal of Affectives Disorders*. 2004 Nov 15, 83(1):89-95.

Arnow BA, Manber R, **Blasey C**, Klein DN, Blalock JA, Markowitz JC, Rothbaum BO, Rush AJ, Thase ME, Riso LP, Vivian D, McCullough JP Jr, Keller MB. Therapeutic reactance as a predictor of outcome in the treatment of chronic depression. *Journal of Consulting and Clinical Psychology*. 2003 Dec;71(6):1025-35.

Jutte D, Burgos A, Mendoza M, **Blasey** Ford C, Huffman LC. Use of the Pediatric Symptom Checklist in a Low-Income, Mexican American Population *Archives Pediatric and Adolescent Medicine*. 2003;157:1169-1176.

Piggot J, Kwon H, Mobbs D, **Blasey C**, Lotspeich L, Menon V, Bookheimer S, Reiss AL. Emotional attribution in high-functioning individuals with autistic spectrum disorder: a functional imaging study. *Journal of American Academy of Child and Adolescent Psychiatry*. 2004 Apr;43(4):473-80.

Manber R, Arnow B, **Blasey C**, and others. Patient's therapeutic skill acquisition and response to psychotherapy, alone or in combination with medication. *Psychological Medicine*. 2003 May;33 (4):693-702.

Kesler SR, Adams HF, **Blasey CM**, Bigler ED. Premorbid intellectual functioning, education, and brain size in traumatic brain injury: an investigation of the cognitive reserve hypothesis. *Applied Neuropsychology*. 2003;10(3):153-62

Shaw RJ, Palmer L, **Blasey C**, Sarwal M. A typology of non-adherence in pediatric renal transplant recipients. *Pediatric Transplant*. 2003 Dec;7(6):489-93.

Chang KD, **Blasey CM**, Ketter TA, Steiner H. Temperament characteristics of child and adolescent bipolar offspring. *Journal of Affective Disorders*. 2003 Oct; 77(1):11-9.

Kesler SR, **Blasey CM**, Brown WE, Yankowitz J, Zeng SM, Bender BG, Reiss AL. Effects of X-monosomy and X-linked imprinting on superior temporal gyrus morphology in Turner syndrome. *Biological Psychiatry*. 2003 Sep 15; 54(6):636-46.

Chang KD, Dienes K, **Blasey C**, Adleman N, Ketter T, Steiner H.Divalproex montherapy in the treatment of bipolar offspring with mood and behavioral disorders and at least mild affective symptoms. *Journal of Clinical Psychiatry*, 2003, Aug; 64(8):936-42.

Johnston C, Hessl D, **Blasey C**, Eliez S, Erba H, Dyer-Friedman J, Glaser B, Reiss AL. Factors associated with parenting stress in mothers of children with fragile X syndrome. *Journal of Developmental and Behavioral Pediatrics*. 2003 Aug; 24(4):267-75.

Glaser B, Mumme D, **Blasey C**, Morris M, Dahoun S, Antonarakis S, Reiss A, Eliez S. Language skills in children with velocardial facial syndrome (deletion 22q11.2). *Journal of Pediatrics*. 2002 Jun: 140 (6), 61-75.

Adleman N, Menon V, **Blasey** C, White C, Reiss A. A developmental fMRI Study of the Stroop Color-Word Task. *Neuroimage*. 2002. Jul: 16 (1): 61-75.

Eliez, S, Blasey C, White, C, Menon, V, Reiss, A. Functional brain imaging study of mathematical reasoning abilities in velocardial facial syndrome (del22q11.2). *Genet Med*. 2001 Jan-Feb; 3(1):49-55.

Yang TT, Menon V, Eliez S, **Blasey C**, Gotlib I, Reiss A. Amygdalar activation associated with positive and negative facial expressions. *Neuroreport: For Rapid Communication of Neuroscience Research*, Vol 13(14), Oct 2002, 1737-1741.

Marks AS, Nichols M, **Blasey C**, Huffman, L. Girls with ADHD and associated behavioral problems: Patterns of comorbidity. *North American Journal of Psychology* Vol 4(3), 2002, 321-332.

Hessl D, Glaser B, Dyer-Friedman J, **Blasey C**. Cortisol and behavior in fragile X syndrome. *Psychoneuroendocrinology*, Vol 27(7), Oct 2002, 855-872.

Dienes KA, Chang KD, **Blasey CM**, Steiner H. Characterization of children of bipolar parents by parent report CBCL. *Journal of Psychiatric Research* Vol 36(5), Sep-Oct 2002, 337-346.

Huffman L, Koopman C, **Blasey** C, Hill K. A program evaluation strategy in a community-based behavioral health and education services agency for children and families. *Journal of Applied Behavioral Science* Vol 38(2), Jun 2002, 191-215.

Feinstein C, Eliez S, **Blasey** C, Reiss A. Psychiatric disorders and behavioral problems in children with velocardiofacial syndrome: Usefulness as phenotypic indicators of schizophrenic risk. *Biological Psychiatry* Vol 51(4), Feb 2002, 312-318.

Chang K, **Blasey** C, Ketter T, Steiner H. Family environment of children and adolescents with bipolar parents. *Bipolar Disorders* Apr 2001, 73-78.

Eliez S, **Blasey** C, Chromosome 22q11 deletion and brain structure. *British Journal of Psychiatry* Vol 179(3), Sep 2001, 270.

Eliez S, **Blasey** C, Freund L, Reiss A. Brain anatomy, gender and IQ in children and adolescents with fragile X syndrome. *Brain* Vol 124(8), Aug 2001, 1610-1618.

Eliez S, **Blasey** C, Schmitt E. Velocardiofacial syndrome: Are structural changes in the temporal and mesial temporal regions related to schizophrenia? *American Journal of Psychiatry* Vol 158(3), Mar 2001, 447-453.cc

Sample of Professional Presentations (not updated, please refer to peer reviewed publications)

Arnow, B., Manber, R., & **Blasey**, C. (2002, November). Does reactance level predict outcome in medication, cognitive behavioral analysis system of psychotherapy or combined treatment for chronic depression? (R. Manber, Chair). Symposium presented at the 36th annual meeting of the Association for the Advancement of Behavior Therapy, Reno.

Manber, R., Arnow, B., & **Blasey**, C. (2002, November). Patient's skill acquisition and response to treatment (R. Manber, Chair). Symposium presented at the 36th annual meeting of the Association for the Advancement of Behavior Therapy, Reno.

Hunkeler, E.M., Arnow, B., Robinson, R., Lee, J., **Blasey**, C., & Fireman, B. Prevalence and characteristics of primary care patients with depression and chronic pain. (2002, December). Poster presented at the 41st annual meeting of the American College of Neuropsychopharmacology, San Juan, Puerto Rico.

Arnow, B.A., Hunkeler, E.M., **Blasey**, C., Fireman, B., Lee, J., Robinson, R., & Hayward, C. (2003, May). Prevalence and characteristics of patients with depression and/or chronic pain (David K. Gittelman, Chair). Symposium presented at the 156th annual meeting of the American Psychiatric Association, San Francisco.

Hunkeler, E.M., Arnow, B.A., Lee, J., **Blasey**, C., Fireman, B., Robinson, R.L., & Dea, R. (2004, May). Major depressive disorder and comorbid chronic pain, a costly condition. Poster presented at the 157th annual meeting of the American Psychiatric Association, New York.

Blasey, C., Lee, J., Hayward, C., Hunkeler, E., Constantino, M., Fireman, B., Robinson, R., Dea, R., & Arnow, B.A. (2004, July). Comorbidity of depression and pain among primary care patients. Paper presented at the 112th meeting of the American Psychological Association, Honolulu, Hawaii.

Arnow, B.A., Treatman, C., & **Blasey**, C. (2004, November). Noncompleters in clinical trials: Implications for research and treatment. Paper presented at the meeting of the North American Chapter of the Society of Psychotherapy Research, Springdale, Utah.

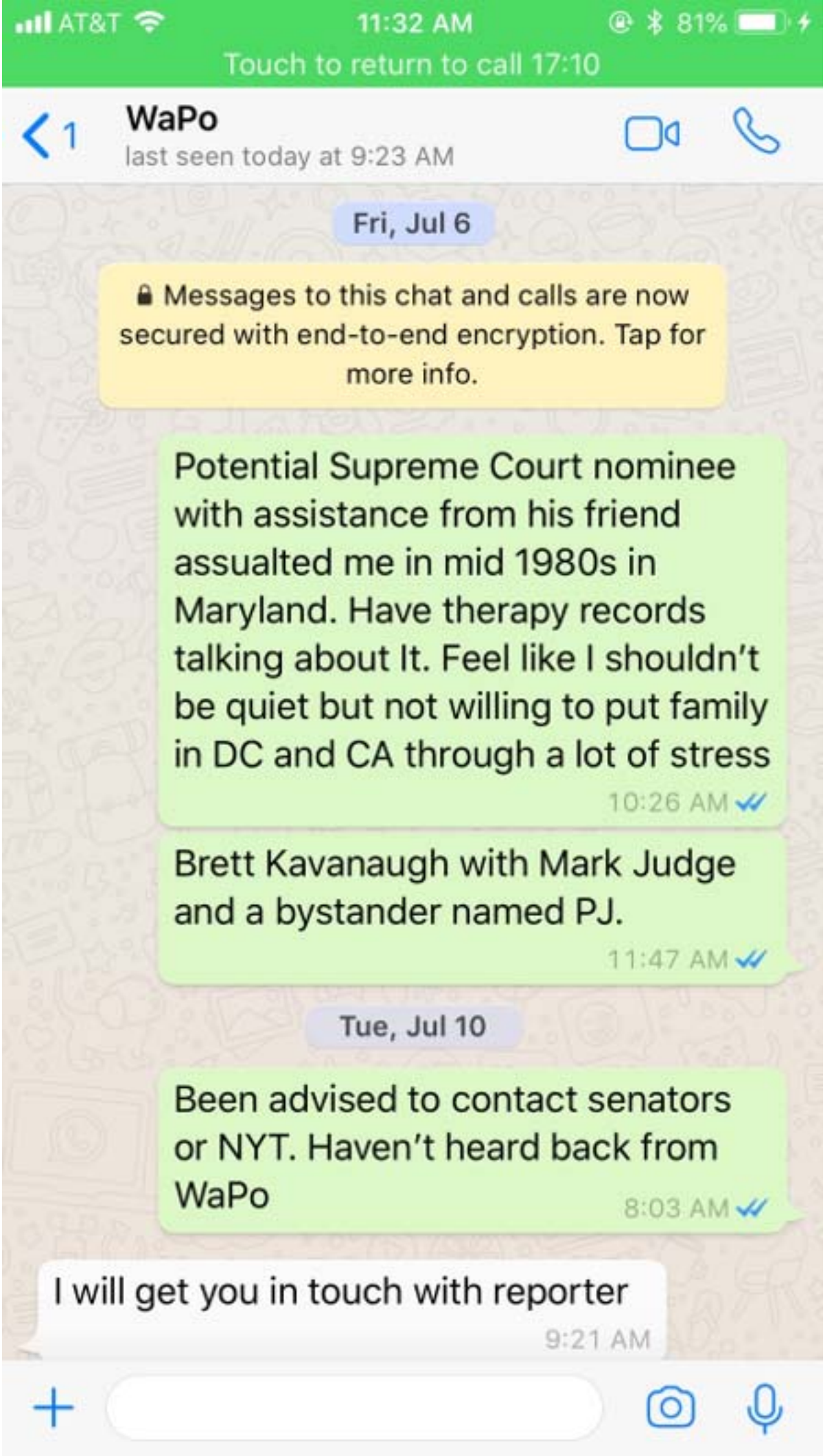
Arnow, B.A., **Blasey**, C., Manber, R., Markowitz, J.C., Klein, D.N., & Kocsis, J.H. (2010, June). Early therapeutic alliance and outcome in CBASP and BSP: Results from the REVAMP Trial. Paper presented at the 41st Annual Meeting of the Society for Psychotherapy Research, Asilomar, CA.

Arnow, B.A., **Blasey**, C., Steidtmann, D., & Manber, R. (2011, June). Cognitive behavioral analysis system of psychotherapy with and without medication for chronic depression: Is there an acute phase triage point? Importance of early response for treatment outcome in different mental health care settings (Bernd Puschner, Moderator). Symposium presented at the 42nd Annual Meeting of the Society for Psychotherapy Research, Berne, Switzerland.

Steidtmann, D., Arnow, B., **Blasey**, C., & Manber, R. (2011, September). Do patient's pre-treatment beliefs about illness causes and preference for treatment modality moderate therapeutic alliance quality and treatment outcome in two types of psychotherapy? Paper presented at the North American Society for Psychotherapy Research, Banff, Canada.

Personal Interests and Hobbies

Surfing, Surf travel (Hawai'i, Costa Rica, South Pacific Islands, French Polynesia), Oceanography, Hawai'ian and Tahitian Culture, Spanish Language, College Athletics, AAU Youth Basketball, Palo Alto Youth Soccer


AT&T
11:32 AM
81%
Touch to return to call 17:10
1
WaPo
last seen today at 9:23 AM
Fri, Jul 6
Messages to this chat and calls are now secured with end-to-end encryption. Tap for more info.
Potential Supreme Court nominee with assistance from his friend assualted me in mid 1980s in Maryland. Have therapy records talking about It. Feel like I shouldn't be quiet but not willing to put family in DC and CA through a lot of stress
10:26 AM
Brett Kavanaugh with Mark Judge and a bystander named PJ.
11:47 AM
Tue, Jul 10
Been advised to contact senators or NYT. Haven't heard back from WaPo
8:03 AM
I will get you in touch with reporter
9:21 AM

July 30, 2018

CONFIDENTIAL

Senator Dianne Feinstein

Dear Senator Feinstein:

I am writing with information relevant in evaluating the current nominee to the Supreme Court. As a constituent, I expect that you will maintain this as confidential until we have further opportunity to speak.

Brett Kavanaugh physically and sexually assaulted me during High School in the early 1980's. He conducted these acts with the assistance of his close friend, Mark G. Judge. Both were 1-2 years older than me and students at a local private school. The assault occurred in a suburban Maryland area home at a gathering that included me and 4 others. Kavanaugh physically pushed me into a bedroom as I was headed for a bathroom up a short stairwell from the living room. They locked the door and played loud music, precluding any successful attempts to yell for help. Kavanaugh was on top of me while laughing with Judge, who periodically jumped onto Kavanaugh. They both laughed as Kavanaugh tried to disrobe me in their highly inebriated state. With Kavanaugh's hand over my mouth, I feared he may inadvertently kill me. From across the room, a very drunken Judge said mixed words to Kavanaugh ranging from "go for it" to "stop". At one point when Judge jumped onto the bed, the weight on me was substantial. The pile toppled, and the two scrapped with each other. After a few attempts to get away, I was able to take this opportune moment to get up and run across to a hallway bathroom. I locked the bathroom door behind me. Both loudly stumbled down the stairwell, at which point other persons at the house were talking with them. I exited the bathroom, ran outside of the house and went home.

I have not knowingly seen Kavanaugh since the assault. I did see Mark Judge once at the Potomac Village Safeway, where he was extremely uncomfortable seeing me.

I have received medical treatment regarding the assault. On July 6, I notified my local government representative to ask them how to proceed with sharing this information. It is upsetting to discuss sexual assault and its repercussions, yet I felt guilty and compelled as a citizen about the idea of not saying anything.

I am available to speak further should you wish to discuss. I am currently vacationing in the mid-Atlantic until August 7th and will be in California after August 10th.

In Confidence,

Christine Blasey

Palo Alto, California

[redacted]

KATZ, MARSHALL & BANKS, LLP

By Electronic Mail
September 18, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for reaching out yesterday afternoon. Dr. Christine Blasey Ford looks forward to working with you and the Committee.

As you know, earlier this summer, Dr. Ford sought to tell her story, in confidence, so that lawmakers would have a fuller understanding of Brett Kavanaugh's character and history. Only after the details of her experience were leaked did Dr. Ford make the reluctant decision to come forward publicly.

In the 36 hours since her name became public, Dr. Ford has received a stunning amount of support from her community and from fellow citizens across our country. At the same time, however, her worst fears have materialized. She has been the target of vicious harassment and even death threats. As a result of these kind of threats, her family was forced to relocate out of their home. Her email has been hacked, and she has been impersonated online.

While Dr. Ford's life was being turned upside down, you and your staff scheduled a public hearing for her to testify at the same table as Judge Kavanaugh in front of two dozen U.S. Senators on national television to relive this traumatic and harrowing incident. The hearing was scheduled for six short days from today and would include interrogation by Senators who appear to have made up their minds that she is "mistaken" and "mixed up." While no sexual assault survivor should be subjected to such an ordeal, Dr. Ford wants to cooperate with the Committee and with law enforcement officials.

As the Judiciary Committee has recognized and done before, an FBI investigation of the incident should be the first step in addressing her allegations. A full investigation by law enforcement officials will ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions.

We would welcome the opportunity to talk with you and Ranking Member Feinstein to discuss reasonable steps as to how Dr. Ford can cooperate while also taking care of her own health and security.

Sincerely,

Debra S. Katz

Lisa J. Banks
Attorneys for Dr. Christine Blasey Ford

cc: The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary

September 22, 2018

Dear Senator Grassley:

There has been a lot of back and forth between your staff and my counsel, and I appreciate the chance to communicate with you directly. I kindly ask you to use your best discretion regarding this personal letter.

When I first learned that Brett Kavanaugh was on the short-list of nominees to fill a Supreme Court vacancy, prior to the President's selection among a list of what seemed to me as similarly-qualified candidates, I contacted my Congressperson's office in an attempt to provide information that could be useful to you and the President when making the selection from among a list of candidates. The decision to first report the assault to my Congresswoman, Rep. Anna Eshoo, was a very difficult one, but I felt that this was something that a citizen couldn't NOT do. I felt agony yet urgency and a civic duty to let it be known, in a confidential manner, prior to the nominee being selected. While it was difficult, I was able to share my information with two contacts during the period between the short list announcement and Mr. Kavanaugh's selection.

Mr. Kavanaugh's actions, while many years ago, were serious and have had a lasting impact on my life. I thought that knowledge of his actions could be useful for you and those in charge of choosing among the various candidates. My original intent was first and foremost to be a helpful citizen – in a confidential way that would minimize collateral damage to all families and friends involved.

I then took the step of sending a confidential letter to one of my Senators, Ranking Member Feinstein, and I understand that you have a copy of that letter. I am certainly prepared to repeat the facts in the letter and to provide further facts under oath at a hearing. I would welcome the opportunity to meet with you and other Senators directly, person to person, to tell you what occurred. I will answer any questions you have. I hope that we can find such a setting and that you will understand that I have one motivation in coming forward – to tell the truth about what Mr. Kavanaugh and his friend Mark Judge did to me. My sincere desire is to be helpful to persons making the decision.

In addition to talking with you and other Senators directly, I have asked my lawyers to continue discussions with your staff about the conditions you have proposed. As I am not a lawyer or a Senator, I am relying on them and you to ensure that the Committee will agree to conditions that will allow me to testify in a fair setting that won't disrupt families and become a media TV show. While the nationwide outpouring of love has been heartwarming, I am spending considerable time managing death threats, avoiding people following me on freeways, and disconcerting media intrusion, including swarms of vans at my home and unauthorized persons entering my classroom and medical settings where I work. I have received an inordinate number of requests to appear on major TV shows to elucidate further information, to which I have not responded. My goal is to return soon to my workplace, once it is deemed safe for me and importantly, for students. Currently, my family has physically relocated and have divided up separately on many nights with the tremendous help of friends in the broader community. Through gracious persons here and across the country, we have been able to afford hiring security. While I am frightened, please know, my fear will not hold me back from testifying and

you will be provided with answers to all of your questions. I ask for fair and respectful treatment.

Kind regards,

Christine Blasey

DECLARATION OF RUSSELL FORD

I, Russell Ford, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I have a Master of Science degree and a Doctor of Philosophy degree in mechanical engineering from Stanford University.

2. I have been married to Christine Blasey Ford since June 2002. We have two children.

3. The first time I learned that Christine had any experience with sexual assault was around the time we got married, although she did not provide any details.

4. Christine shared the details of the sexual assault during a couple's therapy session in 2012. She said that in high school she had been trapped in a room and physically restrained by one boy who was molesting her while another boy watched. She said she was eventually able to escape before she was raped, but that the experience was very traumatic because she felt like she had no control and was physically dominated.

5. I remember her saying that the attacker's name was Brett Kavanaugh, that he was a successful lawyer who had grown up in Christine's home town, and that he was well-known in the Washington, D.C. community.

6. In the years following the therapy session, we spoke a number of times about how the assault affected her.

7. The next time she mentioned that Mr. Kavanaugh was the person who sexually assaulted her was when President Trump was in the process of selecting his first nominee for the Supreme Court. Before the President had announced that Judge Neil Gorsuch was the nominee, I remember Christine saying she was afraid the President might nominate Mr. Kavanaugh.

8. These conversations about Mr. Kavanaugh started again shortly after Justice Anthony Kennedy announced his resignation and the media began reporting that Mr. Kavanaugh was on the President's "short list."

9. Christine was very conflicted about whether she should speak publicly about what Mr. Kavanaugh had done to her, as she knew it would be emotionally trying for her to relive this traumatic experience in her life and hard on our family to deal with the inevitable public reaction. However, in the end she believed her civic duty required her to speak out.

10. In our 16 years of marriage I have always known Christine to be a truthful person of great integrity. I am proud of her for her bravery and courage.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 25th day of September, 2018.

Russell Ford

DECLARATION OF KEITH KOEGLER

I, Keith Koegler, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I graduated from Amherst College in 1992 with a Bachelor's Degree in History. I earned my Juris Doctor degree from Vanderbilt Law School in 1997.

2. I have known Christine Blasey Ford and her husband, Russell Ford, for more than five years, and consider them close friends.

3. We met when I was coaching their son's baseball team. Our children are close friends and have played sports together for years. I have spent a lot of time with Christine and her husband traveling to and attending our kids' games. Our families have also gone on vacation together.

4. The first time I learned that Christine had experienced sexual assault was in early summer of 2016. We were standing together in a public place watching our children play together.

5. I remember the timing of the conversation because it was shortly after Stanford University student Brock Turner was sentenced for felony sexual assault after raping an unconscious woman on Stanford's campus. There was a common public perception that the judge gave Mr. Turner too light of a sentence.

6. Christine expressed anger at Mr. Turner's lenient sentence, stating that she was particularly bothered by it because she was assaulted in high school by a man who was now a federal judge in Washington, D.C.

7. Christine did not mention the assault to me again until June 29, 2018, two days after Justice Anthony Kennedy announced his resignation from the Supreme Court of the United States.

8. On June 29, 2018, she wrote me an email in which she stated that the person who assaulted her in high school was the President's "favorite for SCOTUS."

9. On June 29, 2018, I responded with an email in which I stated:

> "I remember you telling me about him, but I don't remember his name. Do you mind telling me so I can read about him?"

10. Christine responded by email and stated:

> "Brett Kavanaugh"

11. In all of my dealings with Christine I have known her to be a serious and honorable person.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 24th day of September, 2018.

Keith Koegler

DECLARATION OF ADELA GILDO-MAZZON

I, Adela Gildo-Mazzon, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I have known Christine Blasey Ford for over 10 years and consider her to be a good friend. Our children attended elementary school together.

2. In June of 2013, Christine and I met at a restaurant that was then called Pizzeria Venti Mountain View, located at 1390 Pear Avenue, Mountain View, California.

3. I remembered the year of the meeting because I was temporarily working in the South Bay at that time. I would pass Mountain View on my way home, so that restaurant was a convenient place to arrange a meeting. I believe this was the only time I ever went to this restaurant. I also have a receipt from the restaurant from that meal.

4. During our meal, Christine was visibly upset, so I asked her what was going on.

5. Christine told me she had been having a hard day because she was thinking about an assault she experienced when she was much younger. She said that she had been almost raped by someone who was now a federal judge. She told me she had been trapped in a room with two drunken guys, and that she then escaped, ran away, and hid.

6. Christine said it was a scary situation and that it has impacted her life ever since.

7. The last time I saw Christine was in May 2018.

8. After reading her first person account of the assault in *The Washington Post* on September 16, 2018, I contacted Christine's lawyers to advise them that she had told me about this assault in 2013.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 24th day of September, 2018.

Adela Gildo-Mazzon

DECLARATION OF REBECCA WHITE

I, Rebecca White, hereby state that I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the following facts:

1. I have been friends with Christine Blasey Ford for more than six years. We are neighbors and our kids went to the same elementary school.

2. In 2017, I was walking my dog and Christine was outside of her house. I stopped to speak with her, and she told me she had read a recent social media post I had written about my own experience with sexual assault.

3. She then told me that when she was a young teen, she had been sexually assaulted by an older teen. I remember her saying that her assailant was now a federal judge.

4. I have always known Christine to be a trustworthy and honest person.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Executed on this 25 day of Sept, 2018.

Rebecca White

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

September 23, 2018

DELIVERED VIA EMAIL

Ms. Beth Wilkinson
Ms. Alexandra Walsh
Wilkinson Walsh & Eskovitz
2001 M Street NW
10th Floor
Washington, D.C. 20036
bwilkinson@wilkinsonwalsh.com
awalsh@wilkinsonwalsh.com

Dear Ms. Wilkinson and Ms. Walsh:

As you are aware, the Senate Judiciary Committee will hear testimony from Dr. Christine Blasey Ford and your client, Judge Brett M. Kavanaugh, during the continuation of Judge Kavanaugh's confirmation hearing on September 27, 2018. This session of the hearing is an important part of the Senate's constitutional duty to advise the President on his nominee and, if the circumstances merit, to consent to the nomination. To assist the Committee in performing this duty, and to make the hearing a productive one, I ask that you provide the Committee the following documents:

1. Copies of any and all written, audio-visual, or electronic materials relating to the allegations raised by Dr. Ford against Judge Kavanaugh;

2. Copies of all written, audio-visual, or electronic materials upon which Judge Kavanaugh intends to rely for his written or oral testimony before the Committee.

I recognize that Dr. Ford has not submitted any statement or other evidence to the Committee as of today, and that it may be unfair in some sense to require your client to submit evidence in response to allegations that have not yet been made to the Committee. Nevertheless, the general nature of Dr. Ford's allegations are publicly known. That is why I ask you to provide the materials identified above. Please provide the requested materials to the Committee no later than Tuesday, September 25. But, consistent with fundamental notions of due process, your client may submit additional evidence on September 26 in response to evidence submitted by Dr. Ford of which he was previously unaware.

Committee rules also require that Judge Kavanaugh submit his biography and written testimony by 10:00 a.m. on Wednesday, September 26. I thank you for your assistance in this matter.

Sincerely,

Chuck Grassley

Chuck Grassley
Chairman