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

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

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

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

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

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

The other thing that I know that you will care about is his judicial philosophy, and I have found him to have the proper judicial philosophy, understanding the role of a judge, to interpret the law based upon the case and the facts and evidence, and in this case an appellate court reviewing the case

file; as well as the importance of precedent in protecting the United States Constitution.

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

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

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

Thank you very much.

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

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

case -- by this committee as it goes through this nomination by the president of the United States.

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

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

SEN. WARNER: I thank the chair.

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

SEN. SCHUMER: The senator from Oklahoma.

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

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

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

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

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

SEN. SCHUMER: Thank you very much.

(Remaining members' introductions omitted.)

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

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

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

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

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

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

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

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

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

When it comes to the environment, the court plays a big role. When Congress passed the Clean Air Act in 1970, we gave the EPA the authority to set clean air standards -- the power to determine how much smog and pollution is too much. In 1997, having reviewed literally thousands of studies, it toughened standards for smog and soot. The EPA's actions were going to improve air quality but cost businesses money. Industry groups appealed the EPA decision, and a majority Republican panel on the D.C. Circuit reversed the EPA's ruling. In

doing so the court relied on an arcane and long-dead concept known as the non-delegation doctrine. It was a striking moment of judicial activism that was pro-business, anti-environment and, in the opinion of many, highly political. While that decision ultimately was reversed by a unanimous Supreme Court, most other significant decisions of the D.C. Circuit have been allowed to stand without review.

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

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

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

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

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

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

Democratic and Republican nominees, and the same with Republicans. That's not what happened, and we know that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

Senator Hatch.

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

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

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

all Republicans, or not necessarily, in the case of the Democrat presidents, all Democrats, but, by and large, mostly. I mean, that's just the nature of our process.

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Without objection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This past week, I met with a number of leaders of Hispanic organizations from all across this country. I asked them what they think or

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

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

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

SEN. SCHUMER: Without objection.

SEN. HATCH: Could I say one more thing?

SEN. SCHUMER: Please.

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

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

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

Then in 1977, Mr. Bender testified before this committee against tough anti-child pornography laws, in a hearing entitled "Protection of Children

Against Sexual Exploitation." In his testimony he rejected the notion that Congress could prohibit child pornography in order to protect children from harm because, quote, "The conclusion that child pornography causes child abuse involves too much speculation in view of the social situation as we know it. And the fact that it seems that most kids who act in these films probably are doing these acts aside from the films anyway," unquote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ESTRADA: Thank you, Senator Schumer, for having me here this morning. I also wish to thank our chief executive for giving me the opportunity

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Sir, your record in terms of legal excellence I don't dispute. I doubt any members of this committee does. But we have lots of other

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEN. SCHUMER: Without objection.

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

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

Once again, to me it becomes painfully clear that the liberal interest groups may very well be the ones controlling the actions and agenda of this committee. It's starting to really worry me. And the Journal continued to voice its criticism in a subsequent editorial which appeared on June 11th calling the request, quote, "outrageous," unquote, and noting that the true goal

was, quote, "to delay, to try to put off the day when Mr. Estrada takes a seat on the DC circuit court of appeals from which President Bush could promote him to become the first Hispanic-American on the U.S. Supreme Court," unquote.

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

SEN. SCHUMER: Without objection.

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

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

SEN. SCHUMER: You rarely do.

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

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

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

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

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

It is the Department of Justice that has an institutional interest in refusing to comply with my Democrat colleagues' request. And I, for one, understand and agree with the department's position. But the department's

recalcitrance in this dispute should neither be imputed to nor held against Mr. Estrada.

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

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

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

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

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

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

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

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

Senator Leahy.

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

SEN. SCHUMER: Without objection.

SEN. LEAHY: I will not go into the unfortunate character attack made against Mr. Paul Bender, a man I've never met, do not know, but I would hope

that this would not deter people who are for or against any nominee, you or anybody else, that they would not hesitate to send information and their views to this committee and would not fear that they're just going to have their character shredded on C-SPAN if they do. I think it's beneath this committee when that happens.

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

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

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

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

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

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

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

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

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

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

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

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

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

SEN. LEAHY: Oh no, please do.

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

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

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

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

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

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

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

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

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

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

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

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

Just two things. I want to -- I was asked by Senator Hatch to please announced that Senator Kyl had to go to the Intelligence Committee and he's going to try to come back. I'd also want to just ask unanimous consent to put

the letter of January 27, 2000, from the U.S. Department of Justice Office of Legislative Affairs in the record, which states the current Justice Department position, as I understand it, on giving up these documents. And they say "Our experience indicates that the department" -- the Justice Department -- "can develop accommodations with congressional committees that satisfy their needs for information that may be contained in deliberative material while at the same time protecting the department's interest in avoiding a chill on the candor of future deliberations." And I'd like to add that for the record, because I think it's not exactly on all fours with what was said before.

Let me call on Senator Grassley.

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

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

MR. ESTRADA: Absolutely, Senator.

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

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

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

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

SEN. GRASSLEY: I thank you for those answers. I'm not going to go into the statements that have been exchanged between my colleagues on Mr. Bender, but I do have -- I don't have -- I don't know Mr. Bender, but I do work -- I did work with an issue that he played a prominent role in in the previous administration, and that was dealing with the Knox case. And I guess since I sponsored a resolution that disapproved of the Clinton administration's position on that Knox case, as it was heavily influenced by Mr. Bender's decisions, and that passed 100 to zero, so that we would not have arguments against a case that would let a twice-convicted child pornographer free to continue his tendency to

lure underage girls into criminal relationships, I think that when that sort of person comes out in opposition to you, that it ought to be pointed out, as it probably has been pointed out in stronger ways than I will, that that's reason to ignore, to a considerable extent, his distraction from your qualifications to be on the circuit court of appeals.

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

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

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

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

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

MR. ESTRADA: Thank you, Senator.

SEN. KENNEDY: Thank you very much.

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

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

my work in the solicitor's general, and I want to see these released," did you ever talk to him personally?

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

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

MR. ESTRADA: No. No.

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

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

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

MR. ESTRADA: Ah --

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

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

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

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

MR. ESTRADA: Well, Senator --

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

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

SEN. KENNEDY: Now, Mr. --

SEN. HATCH: Well, if he does --

SEN. KENNEDY: -- I want to ask Mr. Estrada, as -- as the -- Senator Schumer pointed out, the D.C. Circuit Court of Appeals probably has a greater impact on the lives of people than any other court for the reasons that he has outlined, but I'll just mention them again. It makes the decisions about the protections health care workers, their exposure to toxic chemicals. It does it with regards to fair -- the labor laws, interpreting the protections of our labor laws for workers, whether they -- these laws are going to apply to workers

and whether there's going to be adequate compensation or fair compensation. It has a whole range of employment discrimination cases on race, on gender, on disability. It has important regulations, it makes judgments about drinking water, the safety of drinking water, toxic sites, brown fields, again, environmental issues -- about smog and soot. Now we have -- we've doubled the number of children that are dying from asthma every year now. It's one of the few child's diseases that is going up in terms of deaths. They make important decisions about smoke and soot in the air. Right choose. The rights of gay men and lesbians, like Joseph Stafford, a midshipman at the U.S. Navy Academy, discharged because he told his classmates that he's gay. First Amendment rights on television. Sentencing commission. Equal protection and due process of the law.

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

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

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

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

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

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

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

MR. ESTRADA: Well certainly, Senator. I am a practicing lawyer. I work -- I walk into courtrooms pretty much it is all the time, and whether it is

one of my firm's corporate clients or whether it is Tommy Strickler, the death row inmate, I always have a knot in my stomach about whether I am going to do right by that client.

SEN. KENNEDY: One of the areas that you have been every active in on the pro bono also was on the issues of challenging the various anti-loitering cases. One in particular comes to mind, and that is the position that you took with regards to the NAACP Indianapolis anti-loitering case. In that case the NAACP, which is a premier organization in terms of knocking down the walls of discrimination over a long period of time -- enormous credibility -- and here that they felt that those particularly loitering were interfering in their programming, counseling teenagers that were involved in crime and drugs, and also the conduct -- to conduct voter outreach and registration. Now, you made the case before the court that the NAACP should not be granted standing to represent the members, these members. And as I look through the case I have difficulty in understanding why you would believe that the NAACP would not have standing in this kind of a case when it has been so extraordinary in terms of fighting for those who have been left out and left behind, and in this case was making the case of intervention, because of their concern about to the youth in terms of their employment, battling drugs, and also in terms of voting.

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

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

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

significant minority community support. And I thought that that was an argument that the court should consider in the context of this narrow legal doctrine that it was adverting to.

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

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

Senator Sessions.

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

I would note that Lloyd Cutler, who served as President Clinton's White House counsel, and is a distinguished lawyer of many years' service, has stated it would be a tragic development, testifying before this subcommittee, "it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one." Would you have any comment on that, Mr. Estrada? Do you see the legal process as a political thing or a legal matter?

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

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

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

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

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

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

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

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

MR. ESTRADA: That's usually the case.

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

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

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

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

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

SEN. SCHUMER: Senator Kohl.

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

SEN. SCHUMER: Excuse me, senator -- I'm sorry -- we said we would break at 12:30, but in courtesy to Senator Feinstein who has been waiting here

for a while, we will do Senator Kohl, Senator McConnell, Senator Feinstein. But anyone else who comes in, we are going to have to wait until two o'clock when we resume -- if that's okay with everybody. Okay. Thank you. Sorry to interrupt, senator.

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

In all of those cases I felt that I knew what we were getting when we voted. There was some record or some writing that gave me an idea about how the nominee might perform as a judge. We do not have, as you know, much of a public record or written record of you. You have opinions of course on many issues, I am sure, but we do not hardly know what any of them might be. And some of us might have a tough time supporting your nomination when we know so little.

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

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

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

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

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

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

MR. ESTRADA: There -- as you know, Senator, there is a wealth of case law on that subject matter. Generally, Congress has passed a number of statutes that try to safeguard the environment, things like the Clean Air Act, NEPA, any

number of other statutes that are enforced sometimes by the EPA, for example. And as a general matter, I think all judges would have to greet those statutes when they come to court with a strong presumption of constitutionality. There are claims in the courts that sometimes, in a particular case, those statutes, like some other statutes, may be used to transgress the Constitution. And I know that there are people who may claim that there may be takings or arguments of that nature. Obviously one would have to look carefully at the case law from the Supreme Court under the just-compensation clause of the Fifth Amendment, but I don't know that I can tell you in the abstract how those cases should come out, other than to say that I recognize that as a general matter, the enactment of Congress in this area, as in any other, come to the courts with a strong presumption of constitutionality.

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

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

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

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

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

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

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

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

SEN. KOHL: All right, last question, sir. In their letter, the Puerto Rican Legal Defense & Education Fund criticized you for making, and I quote, "several inappropriately judgmental and immature comments" about their organization. They also called you, quote, "contentious, confrontational, aggressive, and even offensive," unquote. Why do you think they said these things about you? What happened at that meeting that would lead this organization to make such a strong statement? And what statements were you referring to when you said "bone-headed"? (Laughter.)

MR. ESTRADA: (Laughs.) I --

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

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

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

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

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

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

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

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

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

I really have no questions, but I do want to make a statement. One of the dilemmas of being the least senior member of the committee is you have to

wait around for a while. My friends on the other side have said they want mainstream judges. I think that you, Mr. Estrada, fit this category quite nicely.

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

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

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

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

So I thought the best way to determine who, in my colleagues' view, is in the mainstream is to look at decisions of some of the 377 Clinton judges whom my colleagues strenuously supported and argued were, quote, "in the mainstream." For example, one of the class of 1984 (sic/means 1994), Judge Shira Sheindlin, recently, in a case regarding a terrorist witness, a terrorist witness -- federal agents did their job by detaining a material witness to the attacks of 9/11, a Jordanian named Osama Awadalla.

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

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

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

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

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

Another judge that I expect was considered by the other side to be in the mainstream, Judge Jed Rakoff, one of Judge Sheindlin's colleagues from the Clinton class of '95, has ruled that the federal death penalty in all applications, in all applications, is unconstitutional. Some of our colleagues share this position, but that position is at odds with the views of the majority of Americans. It is also very clearly a failure to follow Supreme Court precedent. Indeed, Judge Rakoff's ruling was so brazenly violative of the precedent that even the Washington Post, which is against the death penalty as a policy matter, came out against his decision as "gross judicial activism."

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

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

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

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

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

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

Well, Judge McKay (sp) of the tenth circuit has held that it is far broader than that. Specifically, a transsexual inmate, Josephine Brown, brought a 1983 action against the state of Colorado alleging that by not providing female estrogen therapy, Colorado had, in fact, punished her and that its

punishment was of such cruel and unusual nature as to be violative of the Eighth Amendment to the Constitution.

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

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

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

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

Now I'll go to Senator Feinstein.

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

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

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

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

MR. ESTRADA: I have -- my view of the judicial function, Senator Feinstein, does not allow me to answer that question. I have a personal view on the subject of -- of abortion, as I think you know. And -- but I have not done what I think the judicial function would require me to do in order to ascertain whether the court got it right as an original matter. I haven't listened to parties. I haven't come to an actual case of controversy with an open mind. I haven't gone back and run down everything that they have cited. And the reason I haven't done any of those things is that I view our system of law as one in which both me as an advocate, and possibly if I am confirmed as a judge, have a job of building on the wall that is already there and not to call it into question. I have had no particular reason to go back and look at whether it was right or wrong as a matter of law, as I would if I were a judge that was hearing the case for the first time. It is there. It is the law as it has subsequently refined by the Casey case, and I will follow it.

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

MR. ESTRADA: I believe so.

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

Perhaps the most damaging evidence against Estrada comes from two lawyers he interviewed for Supreme Court clerkships. Both were unwilling to be identified for fear of reprisal. The first told me, and I quote, "Since I know Miguel -- since I knew Miguel, I went to him to help me get a Supreme Court clerkship. I knew he was screening candidates for Justice Kennedy. And Miguel told me 'No way, you're way too liberal.' I felt he was definitely submitting me to an ideological litmus test, and I am a moderate Democrat. When I asked him why I was being ruled out even without an interview, Miguel told me his job was to prevent liberal clerks from being hired. He told me he was screening out liberals because a liberal clerk had influenced Justice Kennedy to side with the majority and write a pro-gay rights decision in a case known as Roemer v. Evans, which struck down a Colorado statute that discriminated against gays and lesbians."

Did this happen?

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

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

MR. ESTRADA: As far as I know, unless it is a very bad joke that I have forgotten, the answer is no. As I started telling Senator Schumer, I know that I don't do that. I know that Justice Kennedy has other people who help him, including my former co-clerk, Harry Littman (sp), who was a U.S. attorney in Pennsylvania who was appointed by former President Clinton, and who is a Democrat. I know that that's not what Justice Kennedy does. And I know that I personally, as I started to say to Senator Schumer, have from time to time, even though my role is simply to take people that he sends me to interview and give him my comments for his consideration, from time to time, I have met an exceptionally bright lawyer who I think warrants his attention and whose application otherwise may not have come to his attention. And I think I have probably put the effort of interjecting myself into this process in that fashion twice in my life. One of them was for a young woman who I knew for a fact was a Democrat and who is currently working for -- for Senator Leahy. And I thought very highly of her, and I spent a lot of my time telling Justice Kennedy of what a high view I had of her talent, and why he should hire her.

SEN. FEINSTEIN: No, I just wanted to ask that question because since you answered Senator Schumer's question no, I wanted to corroborate that this

incident was a false incident, and you have effectively said to me it was a false --

MR. ESTRADA: Yes --

SEN. FEINSTEIN: -- this did not happen.

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

SEN. FEINSTEIN: Right. Right. I understand.

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

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

MR. ESTRADA: Senator, as I recall, I haven't looked into the area of guns and commerce since the Lopez case. I do recall that there is still another case, a pre-Lopez case that -- that as I sit here and I try to think about it, I am pretty certain was not called into any question by the court in Lopez itself -- a case by the name of Scarborough, I think, versus the U.S., where the court ruled that if -- if a statute passed by Congress in the area of gun control, and I think in that case it was the Gun Control Act of 1968, has a jurisdictional element that attaches to the crime, that that is all right under the Commerce Clause. As I recall, the Scarborough case, what the court ruled, is that if the government were to prove that the firearm had at any time in its lifetime been in interstate commerce, even if that had nothing to do with the crime at issue, that that would be an adequate basis for the exercise of Congress' power. And I haven't looked at the case law, and I suppose if I had something that I had to rule on I would have to, but my best recollection, as I said, now is that the court left standing the Scarborough rule, and that that's still a good law, that I would, of course, follow. SEN. SCHUMER: Thank you.

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

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

MR. ESTRADA: Thank you, Senator.

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

END.

AFTERNOON SESSION OF PANEL II OF A HEARING OF THE SENATE JUDICIARY COMMITTEE TOPIC: JUDICIAL NOMINATION CHAIRMAN: SENATOR CHARLES SCHUMER (D-NY) WITNESS: MIGUEL ESTRADA, D.C. CIRCUIT NOMINEE LOCATION: 106 DIRKSEN SENATE OFFICE BUILDING TIME: 2:13 P.M. EDT DATE: THURSDAY, SEPTEMBER 26, 2002

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SEN. SCHUMER: (Sounds gavel.) Okay, ladies and gentlemen, the hearing will come to order. Well, actually, since Senator Feinstein was the last questioner, we're really up to a Republican. But, as you can see that they have no questions to ask you, Mr. Estrada.

MR. ESTRADA: Senator Schumer, in relation to the last question that Senator Feinstein did ask me, there is something else I want to say about it, if I could.

SEN. SCHUMER: Please.

MR. ESTRADA: This goes to the question that you asked me. And as I --
SEN. SCHUMER: Which question? Let's just be --

MR. ESTRADA: This is -- both your question and her question in relation to the hiring of clerks for Justice Kennedy, what my role is --

SEN. SCHUMER: Yes.

MR. ESTRADA: And I realized as I was trying to drink my Coke that she read a statement from a magazine which contained an implicit -- I guess I'll call it an assumption -- that I should have challenged out of deference and respect for Justice Kennedy. Justice Kennedy is one of my mentors, and I have a great deal of personal affection for him. I would not want anybody to think that this man who is at the pinnacle of his legal life is a dupe who can be sort of moved one way or another by 22-year-olds. When I was his law clerk, I knew him as a man who knew his own mind. And when I have some role in talking to possible law clerk candidates for him, my view is to look for somebody who will work well for him and who will do his bidding after he comes to his own judgment. And I mention that last point because I also --

SEN. SCHUMER: I didn't think anything you said before, when you answered explicitly to me, and then the same way to Senator Feinstein, contradicted that in any way. But you are welcome to make the record clear.

MR. ESTRADA: Well -- and -- right. And -- but I also want to make clear that as I thought about that and that premise there is a set of circumstances in which I would consider somebody's ideology -- if you want to call it that -- in trying to interview somebody for Justice Kennedy, whether on the left or on the right. And that is to say if I thought that there was

somebody who had views that were so strongly held on any subject, whether the person thinks that there ought not to be a death penalty, or whether the person thinks that the income tax is not constitutional, or anything -- if I think that the person has some extreme view that he would not be willing to set aside in the service of Justice Kennedy, I would make sure that Justice Kennedy would know that. And I guess it is possible for somebody to think that he was turned down in a sense on the basis of his politics. But that would not be the case. It would be on the basis of a judgment that whatever class of politics he might have he would not be willing to put them aside in the service of the justice.

SEN. SCHUMER: Okay, that is understood. That is not the question I had asked you, as you know.

MR. ESTRADA: Right. But as I thought about the number of times that I -- that you asked your question, I wanted to make sure that I was not understood as saying that I was not taking the ideology of somebody into account, because from time to time I do interview somebody who is 22 or 23 who has some very strongly felt views about how the world ought to run. And if those views are based on a political world view, whether it be left or right, that he would not be willing to put aside in the service of Justice Kennedy, I would consider that as a very strong point for why the justice ought not to hire him --

SEN. SCHUMER: Right. But let me just repeat the question though. Have you ever told anyone -- I want to ask it again -- that you would not -- I am going to read you the exact question I asked you this morning: Have you ever told anyone that you do not believe any person should clerk for Justice Kennedy, because that person is too liberal, not conservative enough, because they didn't have the appropriate ideology, politics or judicial philosophy, or because you were concerned that person would influence Justice Kennedy to take positions you did not want him taking? Now, you answered that unequivocally no to me earlier this morning.

MR. ESTRADA: Right.

SEN. SCHUMER: Has that answer changed?

MR. ESTRADA: No, it has not, if we understand --

SEN. SCHUMER: Okay.

MR. ESTRADA: -- that the explanation that I just gave does apply to it. It's --

SEN. SCHUMER: But you would still say no to that specific question, which whatever you added later?

MR. ESTRADA: Subject to the caveat that if I concluded that somebody has strongly held views of the left or of the right that would make him unsuitable as a law clerk for Justice Kennedy, because he would not then follow the justice's wishes and instructions, it is possible I suppose that I could have said that that was reason --

SEN. SCHUMER: Now, wait. I'm getting a little confused now.

MR. ESTRADA: I just want to make sure that I understand the question.

SEN. SCHUMER: The question is pretty clear. It's the same exact question I asked this morning: Have you ever told anyone that you do not believe any person should clerk for Justice Kennedy, because that person is too liberal, not conservative enough, because that person did not have the appropriate ideology, politics or judicial philosophy, or because you were concerned that person would influence Justice Kennedy to take positions you did not want him taking? That's a yes or no question. That's not speculative about your recommendation.

MR. ESTRADA: Well, and my answer is I have taken into account the ideological leanings of a potential law clerk only when it appears to me -- and this is something that I don't have a final say on, but I do tell Justice Kennedy -- that this person has a strongly held view on a subject that he will not be willing to put aside in the service of the justice. I mean, sometimes -- this is why I am concerned about understanding what the question is exactly.

SEN. SCHUMER: The question is very clear.

MR. ESTRADA: And I am hoping that it will --

SEN. SCHUMER: The question is not what your thought process is, sir. You are as good a lawyer as I am -- probably much better. The question did not ask your thought process. The question did not ask did you recommend or not recommend people. It said -- and I'll give you one more chance, if you want to retract your answer this morning, which you twice today did not -- this afternoon did not. And you brought this subject up -- I didn't -- this afternoon: Have you ever told anyone that you do not believe any person should clerk for Justice Kennedy, because that person is too liberal, not conservative enough, because that person did not have the appropriate ideology, politics or judicial philosophy, or because you were concerned that person would influence Justice Kennedy to take positions you did not want him taking? Yes or no?

MR. ESTRADA: I am concerned, senator, about the compound aspect of the question --

SEN. SCHUMER: It's "or" -- it's "or" -- it would be any of those.

MR. ESTRADA: All right. I -- now that you have drawn that to my attention, it is possible that interviewing a candidate -- I can't think of any now -- but it is possible that I may have come to the conclusion that the person's ideology was so strongly engaged in what he thought as a lawyer that he would not be able to follow the instructions in the chambers as set forth by Justice Kennedy.

SEN. SCHUMER: How many times did you do that?

MR. ESTRADA: I cannot think of any single example now.

SEN. SCHUMER: You cannot.

MR. ESTRADA: But I -- but it is one of the aspects that I would explore in trying to find whether the law clerk candidate was suitable for Justice Kennedy. I can't -- I don't have a number in my head as to the number of candidates whom I've interviewed over the years. I cannot think of an example right now. But as I listen to the list of categories, separated by the "or," it occurred to me that I had not sufficiently focused on whether I had

told somebody that it was because of ideology. And I can think of a circumstances in which I might --

SEN. SCHUMER: Ideology or it's so far over that they wouldn't obey the opinions?

MR. ESTRADA: That --

SEN. SCHUMER: Because now you are saying two different things again.

MR. ESTRADA: I thought I was saying the same thing, Senator Schumer. I'm sorry. I was saying if I made a judgment that the person had a strongly held ideological view of subject X, that he would not recognize his appropriate role as a law clerk, following the instructions of Justice Kennedy, and to help him get his work done. If I thought that that was the case, and if the reason was his ideology, I mean, I think I would have told Justice Kennedy for a person. It is possible that I may have told somebody else, since when he -- this is actually the area of my concern -- I speak to Justice Kennedy about these issues. Obviously I tell him my impressions of what I think of the candidates. If the impression is this person has a deeply committed view that the death penalty never should be applied, and Justice Kennedy is the circuit justice for a death circuit -- all of the states in the circuit for which he is a circuit justice have the death penalty, if I recall -- this is somebody who would not be a very useful law clerk for Justice Kennedy. It is possible in talking to the justice -- I don't recall all of my conversations with him -- that I would have said this person is an ideological opponent of the death penalty, and therefore if you take that as an example -- i.e., my conclusion that the person would not follow the instruction of the justice -- I would have said what your question said.

It is possible as well that in talking with some of the former law clerks who do this for Justice Kennedy, who are, as I pointed out earlier, both Democrats and Republicans, that I would have said something of that nature. So that as I parse through the wording of the question, it occurs to me that without the qualifier I can't give you an unqualified answer. I mean, I cannot tell you and assure you that I do not view it as my job. And I think it would be insulting to the justice to try to find law clerks of a particular political persuasion, because that is not what I am tried to do to him. I am trying to help him, not to hinder him..

SEN. SCHUMER: Senator Feingold has to go. I want to come back to this in a little bit.

SEN. RUSS FEINGOLD (D-WI): Thank you, Mr. Chairman. And welcome to the committee, Mr. Estrada. Between August 1992 and December 1995, the police in Chicago arrested more than 42,000 people and issued more than 89,000 dispersal orders pursuant to an anti-loitering statutes ostensibly targeted at gang members. The statute was challenged and was found to be unconstitutional in both the Illinois Supreme Court and again in the United States Supreme Court.

You filed an amicus brief on behalf of a number of groups in support of the statute, and you argued in favor of it on the radio. I happen to believe that the United States Supreme Court got it right when it struck down the statute for being unconstitutionally vague. As the court noted, under the statute, even if a gang member and his father are loitering near Wrigley Field to see Sammy Sosa leaving the ballpark, if the purpose of the father and son is not apparent to an onlooking police officer, the officer shall order them to

disperse, and perhaps even arrest them. The breadth of the ordinance that you defended troubles me, as it allowed the police almost unfettered discretion that could be used to literally pick up -- pick on people an officer might not like. What is your response to the concern that was expressed about the effect of this kind of ordinance on the spirit of the community? In arresting over 42,000 people in three years, didn't the police teach the youth of the community that sitting in a park while dreaming of the future, or chatting on a street corner with a friend might get them arrested and locked up with a criminal record?

MR. ESTRADA: Senator, we are talking about the ordinance that was passed by the city of Chicago in 1992. And, as you know, that was passed -- that was an ordinance that had a great deal of community support in the city, and support of Mayor Daley. Before the case got to the Supreme Court, it had been, as you mentioned, in the state courts of the state of Illinois. And one of the key rulings in the case was made not by the U.S. Supreme Court but by the Supreme Court of Illinois, which interpreted the language in the ordinance very broadly.

Part of the argument that I was trying to persuade the courts to accept was the proposition that the Illinois Supreme Court read the "no apparent purpose" section of the ordinance a little bit too broadly, in the sense that if you read it in a common-sense fashion it was clear that what the city council meant was for no apparent purpose other than to engage in gang activity. And that was the view of the ordinance that was also taken by the solicitor general's office in the Clinton administration, which filed a brief on the same side I did, and I think by 31 states of the union.

When the case got to the Supreme Court, because of the limited power of the Supreme Court of the United States, the majority of the Court felt bound to accept the construction of the statute or standard by the highest court of a state, and therefore read it -- read that language without the common-sense qualification. There was no opinion for the court on the controlling points in the Supreme Court of the United States. The decisive votes were cast by Justices O'Connor and Steve Breyer, and they wrote separately in an opinion to point out that the outcome of the case turned on the construction given by the state courts to that language, and that the language would have been more narrowly construed, and probably would have been okay.

SEN. FEINGOLD: Well, let me just comment that when I read that there were over 42,000 arrests for loitering I did become concerned that the statute might be working too well. And the Supreme Court of Illinois said the ordinance provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement. So obviously I am troubled by your defense of the statute, but I heard your answer.

Let me ask a different kind of question about this. The vast majority of law enforcement officers put their lives on the line every day to protect all of us, and of course they discharge their duties honorably. But we also know that in some cases there are officers who do not. We have all heard about the beating of Rodney King in California, the racial profiling of the New Jersey state troopers and the abuse of Abner Louima in New York. What we sometimes forget is these are not the only incidents of misconduct. Last year the Department of Justice Civil Rights Division, Criminal Section, received over 10,000 complaints, most of them concerning law enforcement misconduct, that resulted in about 2,500 FBI investigations.

So I was a little surprised to learn that during your appearance on the radio show "Justice Talking" in 1999, you stated the following. Quote: "There's no question in my mind that the country has changed quite a great deal in the last 30 or 40 years and that we have somewhat fewer worries now about interracial interactions between white PD and minority members of the public," end of quote.

Do you really believe that racial profiling and racially- motivated law enforcement misconduct are no longer problems in this country today?

MR. ESTRADA: No, I do not. I am -- I will once again emphasize I'm unalterably opposed to any sort of race discrimination in law enforcement, Senator, whether it's called racial profiling or anything else.

The comment that you make, as you point out, was in the context of pointing out that these were laws that have been put on the books with significant support from minority communities, people that felt that the presence of a visibly lawless element of gang members dealing in drugs and engaging in other types of similar activity was something that ought to be addressed by the city council.

I know full well that we have real problems with discrimination in our day and age. But I also know that as I was a young child growing up in a foreign country, there were clips that the local TV station had to illustrate what the racial situation was in the United States. And for some reason, they always chose to take those sad days where you had the law enforcement officers with firehoses and dogs coming after the members of minority communities. And I know that that is in the recent past. And I think we have to go much farther. But I think, thinking about that and thinking about where we are now and how far we have come, I couldn't help but point out in that radio broadcast that, as many problems as we may have now, we have sure come a long way.

And when we have people of all racial backgrounds telling their elected representatives that gangs are a problem and that they don't feel safe in the street, there ought to be lawyers who are willing to go into court and make sure that all of the appropriate ethically reasonable legal arguments that could be said in defense of the popular judgment are tendered to the court.

SEN. FEINGOLD: I appreciate your observation. I've got to tell you, though, that based on what my constituents have told me, I'm not at all sure that African-Americans and Hispanic-Americans in my state feel as comfortable today as they might have 30 years ago with law enforcement. I suppose it could depend on the part of the country.

But the issue of racial profiling, I think, is very much on the minds of many people in our country, and I know that your comments about having fewer worries must mean that you still take that into account, because I think it is a severe problem that frankly needs legislative attention as well as the enforcement of current law.

When you appeared on "Justice Talking," you were debating the validity of the law with Harvey Grossman, who also happened to live in one of the Chicago neighborhoods affected by the law. You said, quote, "One of the things that we do as a society, by reason of being a democracy, is that we vote on what we think is a good idea, see if it works, and if it doesn't, then we scrap it. But what we do not do is take the person that lost all of his arguments in the debate and try to bring the courts to trump on his side," end of quote.

I'd like you to explain that comment. I believe that the president of the United States and this Congress have a very important function. I also believe that our Constitution ensures that just because Congress passes a law that the president then signs, it does not mean that opponents of that law cannot bring a challenge in court if they believe they have a valid argument.

I just passed a law where that's happening everyday. In fact, one of the primary roles of the court system is to protect, as Alexis de Tocqueville once said, against the tyranny of the majority. Correct me if I'm wrong, but didn't the opponents of this law merely carry out their civic duty in challenging the statute in court? Do you believe the court should be open to individuals who believe their rights are being violated by government action?

MR. ESTRADA: Absolutely, Senator. And the statement that you quoted, I think, does reflect what I think is an appropriate balance, whether the body that has passed the law is a city council or whether it is this Congress. If I am sitting as a judge, if I am fortunate enough to be confirmed, I have to take into account, when a challenge comes into the courtroom, the proposition that laws come to courts with a presumption of constitutionality.

SEN. FEINGOLD: But then why did you feel in this case that the thousands of people who were arrested in the National Black Police Association and the Hispanic Law Enforcement Association were wrong to use the courts to challenge the constitutionality of the statute?

MR. ESTRADA: The point I was making, Senator Feingold, is that I thought that many of the arguments being urged for the proposition that we ought not to have this ordinance were more of a legislative character than of a judicial character, which is not to say that they were not good arguments or that they were not arguments that reasonable people could make, but in the context of a debate in the radio where we were not arguing the case in court, many of the arguments being made were perfectly reasonable things for people to say but were the sort of things that are usually given to legislative bodies and not to courts.

I, of course, adhere to the view that anybody who thinks that his rights have been violated, whether under a Constitution or a statute, has a legal right to go into court and every expectation of finding a judge who will take his claim seriously.

SEN. FEINGOLD: Thank you, Mr. Estrada. Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you. Before we go to the next witness, I just -- since you had opened this up again, Mr. Estrada, I want to clarify this, because I'm unclear. And this was in reference to a question you had that I had asked you. I'm going to read you the passage from "The Nation" magazine. Please listen carefully, and I'll read any part you want again.

It said, "Perhaps the most damaging evidence against Estrada comes from two lawyers he interviewed for Supreme Court clerkships. Both were unwilling to be identified by name for fear of reprisals. The first told me, quote, 'Since I knew Miguel, I went to him to help me get a Supreme Court clerkship. I knew he was screening candidates for Justice Kennedy. Miguel told me, quote, "No way. You're way too liberal," unquote.

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

Which parts of that statement are false? All of it? You said all of it earlier today. MR. ESTRADA: I don't have any reason to think that any part of it is true, Senator. But what I'm saying is I don't know any of the circumstances of what the actual interview was. And what people take away from it and what they think they recall is not necessarily what I thought actually happened. And my concern is I am certain that I have never used an ideological test to screen anybody for Justice Kennedy.

SEN. SCHUMER: Then you couldn't have said, "No, you're way too liberal," right?

MR. ESTRADA: Unless I knew the person through an interview or some other interaction and I knew that he had an ideological commitment to some issue that would make him --

SEN. SCHUMER: Well, wait a second.

MR. ESTRADA: -- an unsuitable law clerk.

SEN. SCHUMER: This morning I asked you a question about that. You denied it unequivocally. Senator Feinstein went over two hours later, read you this very passage, and you denied it unequivocally. Are you changing your answer now? Did you say yes or no to this clerk, "No way, you're way too liberal"? You've denied that twice.

MR. ESTRADA: I -- Senator, I am certain that I never said that to anybody.

SEN. SCHUMER: Thank you.

MR. ESTRADA: But I will not -- but I have to tell you that it is possible that I said to somebody, including Justice Kennedy, "Mr. X has an ideological view of this area of the law, and therefore he would be unsuitable." It's possible.

SEN. SCHUMER: That is not the question. I didn't ask you what you said to Justice Kennedy. You did not also say -- you didn't tell this interviewee that you didn't like it that a liberal clerk influenced Justice Kennedy to side with the majority and write a pro- gay rights decision in Roemer v. Evans?

MR. ESTRADA: Senator, I am certain that I don't know who was working for Justice Kennedy when Justice Kennedy had that case in front of him --

SEN. SCHUMER: I didn't ask you that question, sir. I asked you if you said -- you're a very accomplished man; you know the question I've asked. I said to you, did you say to this clerk -- did you talk to him that you didn't like the fact that a liberal clerk had influenced Justice Kennedy to side with the majority and write a pro- gay rights decision in a case known as Roemer v.

Evans? Yes or no? This does not take a peroration. This takes a yes or no answer if you're being truthful with this committee. SEN. HATCH: Now, wait a minute.

MR. ESTRADA: The best I can tell you --

SEN. SCHUMER: Please, let him answer.

SEN. HATCH: Mr. Chairman, wait a minute, Mr. Chairman.

SEN. SCHUMER: This question was brought up earlier today.

SEN. HATCH: Wait, wait just -- I understand. But let me --

SEN. SCHUMER: And Mr. Estrada had suggested that he wanted to speak about it again. I want to clarify that, and then you can come back as soon as I'm finished clarifying. Mr. Estrada?

SEN. HATCH: (Inaudible.)

SEN. KENNEDY: Let's let the witness answer.

SEN. SCHUMER: I asked a yes or no question.

SEN. HATCH: It's not a yes or no question.

SEN. SCHUMER: Yes, it is.

SEN. HATCH: That's the problem. It's a very unfair question.

SEN. KENNEDY: Let the witness answer.

SEN. HATCH: First of all, the person isn't known. He's anonymous. Now, we have a rule in this committee that we've always abided by. Senator Biden was one of the chief enforcers of it; I agree with it. You don't confront a person with anonymous statements that are from one side of a person's mouth that he doesn't seem to recall --

SEN. SCHUMER: He answered --

SEN. HATCH: -- and take advantage of him that way. I think it's wrong.

SEN. SCHUMER: Let me say that this morning, when asked this question, Mr. Estrada didn't say, "I don't know the person," didn't say, "I'm not sure." He said no. I'm asking again. Okay? Did you say to any clerk -- doesn't matter who it is --

SEN. HATCH: This anonymous person.

SEN. SCHUMER: -- that -- that is correct. It's written in an article here. Maybe the article's wrong. But I think this committee --

SEN. HATCH: The point is, maybe the characterization is wrong.

SEN. SCHUMER: My friend, I think the committee's entitled to an answer.

SEN. KENNEDY: Let's let him answer the question.

SEN. HATCH: Let's not just take advantage of an unsolicited, I think, improper question about an unknown person --

SEN. SCHUMER: Okay. Well, the record --

SEN. HATCH: -- which we've never done before in this committee.

SEN. SCHUMER: Oh, we've done it --

SEN. HATCH: If you've got a person, have him come out and say what he has to say. Then we'll find out what he did or didn't say to him.

SEN. SCHUMER: Let me repeat my question. Did you say to any law clerk that you were upset because a liberal clerk had influenced Justice Kennedy to side with the majority and write a pro-gay rights decision in a case known as Roemer v. Evans?

MR. ESTRADA: Senator Schumer, what I've been trying to say is that I don't know every conversation I had with every human being in my life, and the statement that you're reading comes from a magazine that says that this is a person that I interviewed who I don't -- you know, I have no idea who this person could be. I don't know what the circumstances could be.

And as I said to Senator Feinstein this morning, conceivably I could have said something like that in the nature of a joke. And in answer to your question, I already -- I don't know the circumstances. And I'm sorry --

SEN. SCHUMER: Are you retracting your answer this morning that you said no?

MR. ESTRADA: I said to Senator Feinstein, as I recall, Senator Schumer --

SEN. SCHUMER: To me in my question, I asked you a general question, but related to that, and you said no. MR. ESTRADA: And that's part of what I brought up. And as I said earlier today, after you highlighted the disjunctives in your question, including telling any person who is a living person whether I had considered the issue of ideology, I would have to change my answer. Frankly --

SEN. SCHUMER: And say --

MR. ESTRADA: -- I have not focused on all of the disjunctives in your question, because, as I explained to you, it is sometimes appropriate for me to advise the justice if somebody has an ideological view of the law that would make him a bad law clerk.

With respect to "The Nation" excerpt that you just quoted, I think the first time I heard it this morning was when Senator Feinstein read it to me. And my best and only answer to that is it is not the type of thing I would say seriously. And I have no reason to think I ever said it to anybody.

But I don't know the circumstances, because it is a statement that I said to somebody at an unknown time, in an unknown place, who never knew who the person is that I said something. And I just don't have that sort of a memory.

SEN. SCHUMER: Well, but in all due respect, sir, twice, when asked right on point this morning, you said no. And I think we have some credibility problems here.

MR. ESTRADA: Well, if I did that --

SEN. HATCH: Oh, come on.

SEN. SCHUMER: I'm going to call on Senator Edwards.

SEN. HATCH: Gee whiz.

SEN. SCHUMER: Senator Edwards.

SEN. EDWARDS: Do you want to give Senator Hatch a chance?

SEN. SCHUMER: Oh, did you want to -- go ahead, Senator.

SEN. HATCH: Well, listen, I do, but I'm going to defer to Senator Edwards. But I'd just like -- if you would just yield to me for this one statement.

SEN. SCHUMER: Please.

SEN. HATCH: You know, this is really offensive. In all honesty, he's being very badly treated by this committee. And I think he's one of the few who's ever come before the committee who's had this type of treatment. I go back to Senator Biden's comment. Here's what he said. He said, "It's my hope and expectation that a thorough hearing, continued investigation and hearing, can be completed and that we will -- not my expectation -- we will vote on Tuesday night at 6:00."

Quote -- this is all quote -- "But let me conclude by suggesting once again the nominee has the right to be confronted by his accuser. So any accusation against any nominee before any committee which I chair that is not able to be made public to the nominee will not be made known to the Senate unless the individual wishes to do it all by themselves. Then it's known to the nominee. This is not a star chamber.

Now, I think, you know, there's a -- there's a question of fairness here. And to say there's a question of credibility because he doesn't know who in the world you're talking about. He's -- he's probably talked to hundreds of people, and -- and you don't know how a person has characterized the meeting from their perspective. And I think it's very unfair to expect him to confront somebody that isn't known. And that's always been the rule of this committee, as far as I know. It wasn't just Senator Biden speaking there. We've all tried to abide by that rule.

Now, I'll be glad to ask some questions after Senator Edwards.

SEN. SCHUMER: Yeah. I would simply say that I think the question was completely in bounds. It was not a surprise question. It was in a published magazine article.

SEN. HATCH: So what.

SEN. SCHUMER: And -- and I think it's a fair question because the whole issue we're discussing here is -- one of the issues we're discussing are the views of the nominee, how much ideology matters. He said now that he would recommend to Justice Kennedy that certain people's ideology kept them off limits --

SEN. HATCH: When they're extreme --

SEN. SCHUMER: Exactly.

SEN. HATCH: That's what all of us would --

SEN. SCHUMER: So it does matter --

SEN. HATCH: -- we would follow that, every one of us.

SEN. SCHUMER: And I think that it was -- I think these questions are on point, particularly in light of the fact that the record is so -- we don't have much of a record. But let me go to Senator Edwards.

SEN. EDWARDS: Thank you, Mr. Chairman. Good afternoon, Mr. Estrada.
MR. ESTRADA: Good afternoon, Senator.

SEN. EDWARDS: I have a couple of areas I'd like to ask you about. This -- I think this general debate that you had in Chicago has been talked about some already, but let me use some language that you used. You said that -- you said to the lawyer that you were debating that he should -- now I think I'm quoting you now correct, please correct me if I'm wrong -- that he should explain exactly what words in the Constitution as opposed to his own inclinations say that the city can't do this. I just want to take that quote for a minute and ask you about a couple of specific examples.

In 1963, as you well know, the United States Supreme Court unanimously said that Earl Gideon could not be -- was a poor -- a poor -- an indigent man, couldn't be sentenced to five years in jail unless he was offered a lawyer. Can you tell me, to use your language, exactly what words in the Constitution created that right for Earl Gideon?

MR. ESTRADA: Yes, Senator, I think, as the court explained in the opinion, the Sixth Amendment gives the right in all criminal prosecutions to the accused to have the assistance of counsel.

SEN. EDWARDS: But what words in the Constitution said that he was entitled to that right, and to have it paid for by the -- by the government, which I believe is what the decision said?

MR. ESTRADA: Well, that's what the -- that's what the course said in the Gideon case. It --

SEN. EDWARDS: What words in the -- I'm sorry, I didn't mean to interrupt.

MR. ESTRADA: --to have the assistance of counsel.

SEN. EDWARDS: Right. What words in the Constitution created that right?

MR. ESTRADA: The words I just quoted from the Sixth Amendment.

SEN. EDWARDS: Okay. And to be paid for by the government, where does that right come from?

MR. ESTRADA: Well, the court reasoned in the Gideon case that if you have the right to have the assistance of counsel and you cannot afford it on its own, then this is a -- the Constitution -- (inaudible) -- give you the right, the government that is bound by that constitution must make sure that you have the right that the constitution gives you, and therefore pay for that lawyer.

SEN. EDWARDS: But the language of the Constitution refers to the right to counsel, not to the right to have that counsel paid for by the government, if I'm not mistaken, is that correct?

MR. ESTRADA: I don't know that I can do justice to this issue, which took several pages in the Gideon case. I frankly have always taken it as a given that that's -- the ruling in the case, and have never as an academic exercise gone back and looked at all of the possible arguments or even any of the briefs in the case. I take that as a given that the court -- that the court ruled that Sixth Amendment does require government to pay for counsel for indigent defendants. As I recognize that the Supreme Court has said in numerous occasions in the area of privacy and elsewhere that there are unenumerated rights in the Constitution, and I have no view of any sort, whether legal or personal, that would hinder me from applying those rulings by the court. But I think the court has been quite clear that there are a number of unenumerated rights in the Constitution. In the main, the court has recognized them as -- as being inherent in the right of substantive due process and the liberty clause of the Fourteenth Amendment.

SEN. EDWARDS: The reason I ask you about that -- I understand that those -- that that has been the interpretation of the Supreme Court -- but you used the specific language in your -- in your interaction during this debate, that you asked your opponent to say exactly what words in the Constitution, and as I guess you well know, Mr. Estrada, the -- in the Gideon case, and Miranda, for example, another important United States Supreme Court decision, there are no exact words, to use your language, in the Constitution that says there's a right to remain silent, that there's a right to all those rights that are enumerated in Miranda. And the same thing which you just made reference to would be true in the decision of Roe v. Wade, which created a constitutional -- recognition of a constitutional right to a woman's right to choose. Now, all those are cases where the exact language of the Constitution didn't create those rights. You would acknowledge that, I assume.

MR. ESTRADA: Well, I -- I mean, I don't know that I have gone back and looked at each of the examples that you cited, but I do acknowledge that at least it is true of the Roe line of cases and others, some of them similar and some others in other areas, that the Supreme Court has repeatedly recognized that there are unenumerated rights in the Constitution. It is also the case that -- that a judge who is engaged in the judicial function by coming to a case of this type must of course weigh the language of the Constitution. The Constitution is a fairly old document, and that is relevant to our purposes because we have some 535, if not 540 volumes of Supreme Court cases which, if

they haven't answered every question under the Constitution, they have certainly mapped out major areas and given us answers to many, many of the details. And I would not want to have this -- this question in the abstract without making clear that in my view, of course, I was not saying in this radio debate that the appropriate conduct for courts is to be guided solely by the bare text of the Constitution because that is not the legal system that we have.

I do recognize that if you're talking about the role of courts, as opposed to people that go on NPR and have a debate on an issue of policy, courts are required to consider not only the text of the document but the 530-odd volumes of Supreme Court cases. There are lower court cases. There are contemporaneous and later documents. There is a whole host of interpretative aid, cannons of construction, that bear on the answer, on the right answer to a case like Gideon. And so that's why I don't want to give the impression that I was giving a recipe for how courts might go about their business, because that's -- that's not what I think.

SEN. EDWARDS: Are you a strict constructionist?

MR. ESTRADA: I'm a fair constructionist, I think.

SEN. EDWARDS: Do you consider yourself a strict constructionist?

MR. ESTRADA: I consider myself a fair constructionist. I mean, that is to say I don't think that it should be the goal of courts to be strict or lax. The goal of courts is to get it right. And that may be in some cases to interpret the text as it is written because other consideration of every element of help that there is to give the text meaning tells us that that's what the lawmaker intended. But it may be appropriate to give it a more general construction. I think we can have laws and constitutional texts of both types. It is not necessarily the case in my mind that, for example, all parts of the Constitution are suitable for the same time of interpretative analysis.

SEN. EDWARDS: Wait -- excuse me. I'm sorry, I didn't mean to interrupt you.

MR. ESTRADA: No, no , no. I --

SEN. EDWARDS: Were you finished?

MR. ESTRADA: The example I was going to give is, you know the Constitution says, for example, that you must be 35 years old in order to be our chief executive. There is not a lot of hard study that has to go into figuring out whether somebody is in compliance with the 35 year old requirement. You can read it and say, "I'm 40 and I can run." There are areas of the Constitution that are more open-ended. And you adverted to one, like the substantive component of the due process clauses, where there are other methods of interpretation that are not quite so obvious that the court has brought to bear to try to bring forth what the appropriate answer should be. SEN. EDWARDS: Let me ask the same question a little differently. The president gave a speech last night at a fundraiser where he referred specifically to your nomination among others, and he said for a stronger America, we need good judges. We need people who will not write the law from the bench, but people who -- and I'm quoting him now -- "strictly interpret the Constitution." Do you fall within the president's definition?

MR. ESTRADA: I have not spoken to the president about this or any other subject. I don't know what he meant. If I had to take his text as a statute, I would want to know more about the circumstances in order to figure out whether I can answer your question. I mean --

SEN. EDWARDS: You haven't been asked that question by anyone during the course of your nomination process?

MR. ESTRADA: No. I was asked very few similar questions, and they generally had to do with how I go about generally interviewing the Constitutional and statutes, and I gave the answer that I gave you a few minutes ago.

SEN. EDWARDS: Let me ask you one last thing, and I know that I'm -- I'm running past my time, if I can, Mr. Chairman.

SEN. SCHUMER: Please.

SEN. EDWARDS: This is something also that you said earlier on a radio show, and I'm quoting you now. You said, "One of the things we do as a society, by reason of being a democracy, is that we vote on what we think it's a good idea to see if it works, and if it doesn't, then we scrap it." Then you said, "But we do not do is take the person that lost all his arguments in the debate and try to bring the courts to trump on his side." Now, I want to ask you about an example. Let's suppose a town said that -- passed a referendum saying they were going to bar women from serving on juries. Now -- and a woman, or women, a group of women wanted to challenge that law. Would that be a legitimate challenge, in your judgement?

MR. ESTRADA: Of course.

SEN. EDWARDS: So you recognize that the court itself has an enormous responsibility in our government, interpreting the law, and enforcing the law, and enforcing the Constitution?

MR. ESTRADA: Absolutely.

SEN. EDWARDS: So this language that you used before -- what did it mean? What we do not do is take the person who lost all of his arguments in the debate and try to bring the courts to trump on his side. Tell me what you meant by that.

MR. ESTRADA: It means that we have a healthy debate in the legislature about the policy pros and cons and whether the law is a good idea. And, the party that, in the judgment of the majority has the better of the argument wins. Now, that is a forum for the policy argument. What we do not do is then take policy, as opposed to legal arguments, and run into court.

In the example that you gave me, I can foresee what the obvious legal challenge would be. It would be a violation of equal protection. There's clearly a law that applies that would be the basis for the challenge. We were having, in the exchange that you cite, a radio debate on a city ordinance in which I thought part of what was being said was a policy argument as to why this is a bad idea as opposed to why this ought to be declared unconstitutional by the court. And in my mind, there is a very clear difference between the types of arguments that are suitable for a body like this, and the types of arguments that are suitable for bodies like courts. Courts take -- take the laws that

have been passed by you and give you the benefit of understanding that you take the same oath that they do to uphold the Constitution, and therefore they take the laws with the presumption that they are constitutional. It is the affirmative burden of the plaintiff to show that you have gone beyond your oath. If they come into court, then it is appropriate for courts to undertake to listen to the legal arguments -- why it is that the legislature went beyond his role as a legislator and invaded the Constitution.

But they're different types of arguments that play in different forums, and I was pointing out that for the policy you go to your fellow citizens, and for the legal arguments you go to the court.

SEN. EDWARDS: My time is up. I would just point out that this was a law that you were debating that was ultimately held, I believe, unconstitutional by the Supreme Court. Thank you, Mr. Chairman. I appreciate it. Appreciate the time.

SEN. SCHUMER: Thank you, Senator Edwards. And now we have had two Democrats go in a row. We are on our second round. Everyone has asked questions the first time. So I'll defer to my friend and colleague, Senator Hatch.

SEN. HATCH: Well, thank you, Mr. Chairman. Now, let's go back to this anonymous apparently accusation in one of the most liberal magazines in the country that you are supposed to, out of all the thousands of people you met be able to conjure up just who it is. And apparently this person is griping because they were either unsuitable for the Supreme Court clerkship job, or for some reason or other didn't get it. And it appears to me that they hold it against you. Now, assuming that it's even true, as I understand it you are saying that you, in interviewing potential clerks for Justice Kennedy, that you didn't want people on either extreme.

MR. ESTRADA: That's right.

SEN. HATCH: You didn't want extremely left-wing people, and you didn't want extremely right-wing people.

MR. ESTRADA: That's right. I want people who understand that their job is to help Justice Kennedy do what he wants, and that they don't bring an independent point of view on how the court should vote. They are doers and helpers for Justice Kennedy. He is the person who has gone through this process and sits on the Supreme Court. It is his judgment that is being voted on. I mean, he is the person who has the vote -- not the law clerk.

SEN. HATCH: Right. Well, I read the one quote from Senator Biden -- I'll read another one in Lexis/Nexis. "Committee Chair Joseph Biden, according to a staff" -- now, he was chairman of this committee at the time -- "Committee Chairman Biden, according to a staff, felt strongly that he was not going to circulate some anonymous charge." Now, Mr. Estrada, you have been asked by a number of senators on the other side about your role in the selection of Supreme Court law clerks. Do you feel that you were fair in examining these people?

MR. ESTRADA: Absolutely, senator.

SEN. HATCH: Did you look at their capabilities and whether or not they would be suitable for the justice?

MR. ESTRADA: That is the only thing that I look for, senator.

SEN. HATCH: I presume the justice talked to you about what type of people he'd like to have work with him?

MR. ESTRADA: That's correct.

SEN. HATCH: What were the criteria basically, if you could just do it 30 seconds or so.

MR. ESTRADA: He wants the smartest people he can find that will do his bidding.

SEN. HATCH: That would agree with him and do what he asked them to do, right?

MR. ESTRADA: Right, right, exactly.

SEN. HATCH: Did he say, "I want conservatives," or "I want liberals"?

MR. ESTRADA: No.

SEN. HATCH: Did he say he wanted any kind of ideology?

MR. ESTRADA: No.

SEN. HATCH: Just the smartest people that he could find --

MR. ESTRADA: That will do his bidding.

SEN. HATCH: That would do his bidding. In other words, help him do his job on the Court the way he thinks it ought to be done -- right? That's what you mean by "bidding"?

MR. ESTRADA: Yes.

SEN. HATCH: Now, I don't want you in a game of gotcha here with some anonymous set of sources. And I can tell you this: even if they surfaced and somebody accused you of this, man, I would put great suspicion on their accusations, because they didn't get the job. And so undoubtedly there's -- assuming that the anonymous accusations were made, they didn't get the job, and naturally they're griping about it. They were accepted. And the easiest target would be you. So let me just say this: You have bipartisan support for your nomination from some of the top lawyers in the country -- from the top people who served in the government, both Democrats and Republicans. And I pointed out bipartisan support for your nomination, and I noted -- I think it's worth noting that you yourself seem to be blind to partisanship, when offering your support to well-deserved colleagues. You already mentioned your support for a staffer of Senator Leahy to clerk for Justice Kennedy.

MR. ESTRADA: Yes, I did, senator, and I -- as I said, my role usually is simply to talk to people who live in this area so that I can give my views to the justice --

SEN. HATCH: Did you ask that staffer whether that staffer was liberal or conservative?

MR. ESTRADA: I knew she was liberal.

SEN. HATCH: You knew she was liberal?

MR. ESTRADA: Yes, I knew she was liberal. I -- you know, she is -- actually she is left of center. She's a moderate person.

SEN. HATCH: I understand -- I understand she's an extremely brilliant staffer, right?

MR. ESTRADA: Excuse me?

SEN. HATCH: She's an extremely brilliant staffer, right?

MR. ESTRADA: Yes. She is --

SEN. HATCH: And you recognized that.

MR. ESTRADA: She is a brilliant lawyer.

SEN. HATCH: And you recommended her, even though she was Senator Leahy's staffer, a known Democrat, and more liberal than you.

MR. ESTRADA: She later came to work for Senator Leahy. At the time she was working with me in the Clinton Justice Department, and I worked with her while I was working in the Clinton Justice Department, and tried to get her into Justice Kennedy --

SEN. HATCH: Well, I remember --

SEN. LEAHY: If the senator would yield just a moment, this is fascinating to me, because I had never knew -- had any way of knowing what her politics were or what her attitudes were -- left, right or center. Apparently you had a far tougher screening method than I did, so I -- one of the reasons for coming to these hearings. And now you are telling me things about my staff that I never knew, Mr. Estrada. MR. ESTRADA: Well --

SEN. LEAHY: -- I give you credit for finding these things out.

SEN. HATCH: Okay, I remember you contacted me to voice your support for the nomination of Aliberto Jose Jordan (ph), a Clinton nominee to the U.S. District Court for the Southern District of Florida.

MR. ESTRADA: Yes, I did, senator.

SEN. HATCH: He was a colleague from your days clerking at the Supreme Court --

MR. ESTRADA: Yes, he was.

SEN. HATCH: -- of whom you thought highly, and who you thought should be confirmed -- right?

MR. ESTRADA: Yes, I did, senator.

SEN. HATCH: Mr. Jordan currently serves on that court with much distinction. You also indicated support for a wide variety of others to me that were more liberal than you, that were Clinton nominees. So you have a record of bipartisanship. I don't want you bullied by this committee. And you don't have to take it, as much as you are in a very tenuous difficult position. Now, what I am saying, in closing, I want to point out that your actions are not actions of a right-wing ideologue. They show instead that you are a person who gives credit where credit exists, and where it's due, because it's the right thing to do -- and not because of some hidden agenda that you might want to advance.

I'd like to spend just a few minutes on a couple of other things that have been raised. I would like to ask you a few questions about the anti-gang loitering cases that you worked on that have been raised here. And although some have attempted to mischaracterize the statutes that were at the crux of these cases as racially discriminatory, my understanding is that the exact opposite is true: that these statutes were enacted to protect the quality of life of low-income minorities whose neighborhoods were too often devastated by drug violence. Is that right?

MR. ESTRADA: That was my impression of them, senator, and that was one of the reasons why I thought it was worthwhile to give my time for free --

SEN. HATCH: That's what you were told too, wasn't it?

MR. ESTRADA: Exactly. SEN. HATCH: Okay. For example, according to a 1997 report issued by the Clinton Justice Department, gangs have, quote, "virtually overtaken certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and life- style changes among law-abiding residents," unquote.

Another Reno era Justice Department report concluded that from the small business owner who is literally crippled because he refuses to pay protection money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking; the harmful impact that gang violence is both physically and psychologically debilitating. And, Mr. Estrada, you told us that you were involved in the City of Chicago v. Morales case at the request of the Chicago mayor.

MR. ESTRADA: Well, the legal department of --

SEN. HATCH: Well, the department of the Chicago mayor, Mayor Daley, right?

MR. ESTRADA: Of the city, yes. Yes.

SEN. HATCH: Okay. Now, Mayor Daley, one of the primary opponents -- proponents of the Chicago ordinance you defended -- let me just read you a few quotes about the ordinance by Mayor Daley, whom the New York Times described as "the law's fiercest advocate." And those are quotes. I think these quotes will dispel any notion that the law was somehow intended to hurt rather than help minority residents of Chicago.

In November of last year, Mayor Daley defended his anti-loitering law in the Chicago Sun Times by offering, quote, "I tell you one thing -- those drug dealers and gang bangers are terrorists too," unquote. He has repeatedly explained that his anti-loitering law is designed to protect residents from gang activity. In June 1999 he explained, quote, "It's the average person on a

block. It's a senior citizen. It's an 8-year-old girl going to school or trying to get to the bus stop, or someone trying to go to the store. They can't go there. The gangs and drug dealers own the corner, and that is what this is all about," unquote. And again in January of 2000 he said, quote, "These aren't middle class communities. These are poor communities. People want a right to survive. It's as simple as that," unquote. I could go on and on. But, instead, Mr. Chairman, I would like to submit for the record a list of quotes by Mayor Daley in support of the anti-gang loitering ordinances.

SEN. LEAHY: Without objection, so ordered.

SEN. HATCH: And the one thing I find ironic is that the persons who criticize the anti-gang loitering statutes rarely live in the neighborhoods plagued by chronic gang activity. Now, let me just see here. Although Senator Kennedy earlier made the point that community leaders objected to these ordinances, my understanding is that these ordinances were enacted in direct response to pleas by members of gang-infested communities. As Mayor Daley explained, quote, "We held hearings all over the city to find out what community leaders wanted. Their message was very clear: Do whatever you have to do to satisfy the court, but get those gang bangers and dope dealers off our corners," unquote. Benny Meeks (ph), head of the Southwest Austin Council on Chicago's West Side lived in a neighborhood where gang members routinely sold drugs on street corners and inundated passers-by. According to Meeks, quote, "If we don't use this law as a tool, how are we going to get these guys off the corner? What about the constitutional rights of my neighbors whose kids have to walk by that corner every day on their way to school?," unquote.

Another Chicago resident, 74-year-old Emmett Moore (sp), saw his house sprayed with bullets during a gang turf war. Referring to the anti-gang loitering law, he said, quote, "The Constitution is supposed to protect my rights too. What's a more basic right than feeling safe on my property or being able to walk on my street?"

The Annapolis ordinance was an even more explicit example of underprivileged minority residents taking the initiative to combat crime in their neighborhood. Under the Annapolis ordinance, an area could be designated as a, quote, "drug-loitering-free zone," unquote, only if a neighborhood association or resident first submitted a petition to the city council -- is that right?

MR. ESTRADA: That's my recollection of it, senator.

SEN. HATCH: How did you get involved in the Annapolis case?

MR. ESTRADA: Because of my work in the Chicago case, I got a call by the county -- sorry -- excuse me -- by the city lawyer for the city of Annapolis. He had passed -- his city had passed this drug loitering ordinance. The city was sued in court. He tried to keep up with the litigation, but he didn't have a very large staff, and the NAACP, which brought the suit, as was pointed out earlier, had the help of a very large Washington law firm that had come in to do the other side of the case for free. So he was feeling a bit outgunned, and he called somebody here in Washington by the name of the State and Local Legal Center, which tries to help states and localities with issues like that. And since they knew I had done the brief for free in the Chicago case for the National League of Cities, he called -- they gave him my name, and he called me.

SEN. HATCH: Mr. Estrada, some critics have decried the Annapolis case, because it challenged the NAACP's standing to bring action against the ordinance. But isn't it true that the decision to challenge the NAACP standing was made by other lawyers before you ever even got involved in the case? MR. ESTRADA: That is right, senator. By the time that I was asked to come and do the case what was left of the briefing was the reply brief. The argument had already been made in the opening brief, and of course it would be appropriate if the argument had any (colorable ?) basis for me to make any reasonable ethical argument that I could to support the argument that had already been made by the city lawyers in the opening papers. As I explained I think to Senator Kennedy earlier, I thought that it was important as part of that standing argument that the fact that minority communities were strongly in favor of these ordinances -- now, not all of them, of course, but many of them -- that that fact ought to bear in the analysis of a claim, where the claim was that these laws were intended to be discriminatory.

SEN. HATCH: Okay. Now, I apologize to my colleagues, but I would like to finish this line of questions, and they have been kind enough to allow me. Mr. Estrada -- thank you, Mr. Chairman.

SEN. LEAHY: And I have no objection, but just give me some ballpark time so I can --

SEN. HATCH: Be happy to do it. Yeah, I should be through in just a few minutes.

Now, Mr. Estrada, though your efforts to defend the constitutionality of these statutes were unsuccessful, you may have lost the battle but I think you won the war, as they say. I am referring to the Supreme Court's decision in Morales. Although the Court held that the Chicago ordinance was unconstitutionally vague, Justices O'Connor and Breyer wrote a concurring opinion that gave the municipalities a roadmap on how to enact constitutionally-sufficient anti-loitering laws. Is that correct?

MR. ESTRADA: That is right, senator.

SEN. HATCH: Under Mayor Daley's leadership. And I commend him for it. And I think everybody in those minority communities commend him for it. And I commend you for trying. Because, like I say, I think you won the war under Mayor Daley's leadership, and following the O'Connor/Breyer roadmap. Chicago enacted a new ordinance in the year 2000 -- is that right?

MR. ESTRADA: That's right.

SEN. HATCH: Now, has that ordinance been challenged in court along the same lines of the ordinance you defended?

MR. ESTRADA: I have been advised by the city lawyer for the city of Chicago that that is the case. And I have also been advised that a ruling has been issued by the court in that case upholding --

SEN. HATCH: Upholding the order. MR. ESTRADA: -- the constitutionality of the ordinance.

SEN. HATCH: Now, just one last little bit here, because this needs to be put to bed. I don't want you mistreated here in this committee. The problem of inner-city gang violence is so pervasive that we have here in Congress

recognized that, and we addressed it in 1994. Mr. Estrada, are you familiar with 18 U.S.C. Section 521?

MR. ESTRADA: Yes, I know the statute, Senator.

SEN. HATCH: Can you tell us what that statute provides?

MR. ESTRADA: Sure. It deals with the problem of gang membership by defining what gangs are and what types of activities they engaged in, in a manner somewhat similar to what the city of Chicago had done. And it provides for enhanced prison sentences for the commission of crimes in association with gang activities.

SEN. HATCH: Mandated additional prison sentences, aren't they? And I would like to note that eight of my Democratic colleagues on this committee who were members of Congress in 1994 voted in favor of that statute. And I think that's important. By the way, Mayor Daley, was he a Republican or Democrat?

MR. ESTRADA: I have heard that he's a Democrat. I never met him.

SEN. HATCH: Well, I have heard that myself. Thanks, Mr. Chairman.

SEN. SCHUMER: Let the record stipulate that Mayor Daley is a Democrat. (Laughter.) Chairman Leahy.

SEN. LEAHY: Mr. Estrada, one of the things that I've done -- because I have been so impressed by it -- is for 20 years or more I heard Senator Thurmond ask basically the same question of judicial nominees, and I try to make sure it's always asked of them. That refers to what kind of a temperament they would have in a courtroom, the judge being really different than any other officer might be -- can be basically the king, or more than that it can be the dictator -- can do things the president can't get away with, somebody in elected office can't get away with. They have a life term, and they could make or break the career of lawyers or litigants, or anybody else, by -- sometimes just by their attitude toward them. They can humiliate a lawyer if they're having a bad day. They could favor one over the other. As Senator Thurmond has pointed out over and over and over again, how wrong that would be. And you would agree, I would assume, with Senator Thurmond and me on that point. Would you?

MR. ESTRADA: Yes, I would.

SEN. LEAHY: Now, earlier, I understand -- and I had stepped out prior to this -- Senator Kohl asked you about a meeting you had with the Puerto Rican Legal Defense Fund. Later they opposed your nomination. And then you've had meetings with the Congressional Hispanic Caucus, and following that they opposed your confirmation. They suggested in a press conference -- I paraphrase, but they said you were reluctant to answer their questions, that you were rude and dismissive. They had their chance to make their statement. How would you respond?

MR. ESTRADA: Senator --

SEN. LEAHY: I'm trying to make sure you get equal time here, so --

MR. ESTRADA: Yes, Senator. Thank you. I think that there is nothing more important or there are very few things that are more important to the job

of a judge than having an appropriate temperament. And as a practicing lawyer, I have seen this first-hand.

I've been in the trial courts in the federal system. I have been in the appellate courts in the states and federal system. And I have been in the Supreme Court numerous times. And I can represent to you that I have the scars to show the lessons I have learned about temperament, like I am sure many lawyers do who practice in our courts. SEN. LEAHY: I've tried hundreds of cases. I know exactly what you mean.

MR. ESTRADA: And I have taken those lessons to heart and I understand the importance of having judges who will be attentive and courteous.

My meetings with both of the groups that you identified were, from my point of view, courteous and civil. Chairman Reyes from the Congressional Hispanic Caucus was a prince to me. He was -- he and most of his colleagues had a very pleasant exchange with me.

I did get a letter from them last night letting me know that after our meeting with them, they have decided not to endorse my candidacy. As you pointed out, my reluctance to answer questions about the case law, coupled with the (loitering?) cases that have been mentioned, are listed in their letter as the main issues.

It was -- I tried very hard not to say anything that could be construed as offensive in making clear that I could not answer questions that might come before the courts. And I believe I succeeded in doing that.

I do know that there was at least one member of the caucus at the meeting who was visibly upset that I wasn't willing to express views on how I might rule on cases that might come before me, and in particular with respect to the area of affirmative action. I did not think, in good faith, that I could respond to that type of specific questions, and given the (pendancy?) of my candidacy.

But I thought all of us on both sides conducted ourselves civilly and pleasantly. I was aware at the time that there was one or two members who were very unhappy with my inability to answer some of these very specific questions.

With respect to the Puerto Rican Legal Defense & Education Fund, I made myself available to them for an interview after they wrote to you calling me some unflattering things. And, once again, I tried and, I believe, succeeded in having, with all of them, a civil exchange that I thought was a pleasant one.

There was one exchange that has been adverted to earlier today, in the morning session, in which the chairperson of the Puerto Rican Legal Defense & Education Fund made some statements, which I already related to the committee and I would rather not repeat --

SEN. LEAHY: I don't mean to have you have to repeat yourself in that, and you did. The fact that people have written something critical about you -- this is probably going to come as an extraordinary surprise, but people have written critical things about even members of this committee -- (laughter) -- MR. ESTRADA: I find that very hard to believe, Senator.

SEN. LEAHY: -- on both sides of the aisle. But have you ever felt that any member of the Congress has ever discriminated against you?

MR. ESTRADA: Have I ever felt -- no.

SEN. LEAHY: And do you believe any member up here would do that?

MR. ESTRADA: I don't believe so, Senator. I don't know any of you as a person, but I am confident in the wisdom of your respective constituents. And I am the type of person that gives everybody the benefit of the doubt and the benefit of assuming that unless it is affirmatively demonstrated, they act in good faith.

SEN. LEAHY: Mr. Estrada, I read an article back a while ago regarding the low number of minority Supreme Court law clerks. Now, they're not under any law, any affirmative action law, in the Supreme Court. You had talked about the statistics which show little representation by minorities. I'm talking about a USA Today article by Tony Morrow (sp).

You said, quote, "If there is some reason for underrepresentation, it would be something to look into. But I don't have any reason to think it's anything other than a reflection in society." The article, I think (prior to this prompting ?) that there have been four Hispanic clerks hired by the sitting justices.

Without going into whether the Supreme Court should or not, on the more general legal issue, do you think there is a role for statistical evidence of discriminatory impact in establishing a pattern of practice of discrimination?

MR. ESTRADA: I am not a specialist in this area of the law, Senator Leahy, but I am aware that there is a line of cases, beginning with the Supreme Court's decision in Griggs, that suggests that in appropriate cases that may be appropriate. But I am not a specialist in that area of the law. I mean, I do understand that there is a major area of law that deals with how you prove and try disparate- impact cases.

SEN. LEAHY: Well, if you had a hiring or selection process about race or gender -- could that pass -- can you think of one that would pass the strict-scrutiny test that was articulated, for example, in the Adirand case?

MR. ESTRADA: I don't know that I should give out -- that it would be appropriate for me, Mr. Chairman, to give out a hypothetical of something that would meet the Adirand case. As you know, the Supreme Court in the Adirand case stated, as a general rule, that the consideration of race is subject to strict scrutiny. That means that though it may be used in some cases, it has to be justified by a compelling state interest. And with respect to the particular context, there must be a fairly fact-bound individual assessment of the fit between the interest that is being asserted and the category being used. That is just another way of saying that it is a very fact-intensive analysis in the context of a specific program and in the context of the justifications that are being offered in support of the program. And I don't know that I can try to hypothesize one.

SEN. LEAHY: Let me ask you this. Is diversity a factor that an employer or a school could take into consideration?

MR. ESTRADA: I am aware that there is a division in the courts of appeals with respect to the question. I do not recall whether the DC circuit has spoken to that question. I'm fairly certain they haven't.

SEN. LEAHY: I'm sorry, sir. Somebody was speaking. I didn't hear the -- you said you recall what?

MR. ESTRADA: I'm aware that there is a circuit split; the courts of appeals are in disagreement as to the correct legal answer to the question that you just posed. I am fairly certain that the court for which I am being considered has not passed on the issue, though I am not really sure. But because this is a matter that is being actively litigated in the courts and may come before the court if I am confirmed, I don't think it would be appropriate generally to answer that question, Senator.

SEN. LEAHY: Let me ask you a question -- and I may do some follow-up questions on that -- the Supreme Court, in 1996, in the Roemer v. Evans case, said, in effect, that in Colorado that a law that had the effect of discriminating against homosexuals and lesbians violated the equal-protection clause. Are you familiar with that case?

MR. ESTRADA: I read it when it came out. I was in the SG's office at the time. I haven't read it for four or five years, I don't think.

SEN. LEAHY: Do you recall whether you ever discussed it with anyone?

MR. ESTRADA: I do not recall.

SEN. LEAHY: Do you recall whether you ever, in writing or otherwise, expressed views about that case and the manner in which it was decided?

MR. ESTRADA: I do not recall, Senator.

SEN. LEAHY: What do you think about the case? MR. ESTRADA: I read it when it came out. I have a general impression of the general holding. As with other cases from the Supreme Court, as a practicing lawyer, I usually take them to try to get to the bottom line and see what the rule of law is. There was a time where I could parse through it right after I read it. I know of no reason, whether in law or in my own private personal views, why I would not be able to apply the ruling of the court to like cases which came before me.

SEN. LEAHY: Well, you would have to. I mean, any court of appeal would have to apply Roemer if they had a case -- (inaudible). They'd have to apply Roemer.

MR. ESTRADA: Absolutely.

SEN. LEAHY: We all agree with that. Would you -- and my time is up, so I ask you to submit this in writing -- would you give me your views on -- don't worry, we'll remind you of this; I don't mean to -- would you let me know what you think of the decision as it is in that case? I mean, what are your views in that case? Do you agree -- would you have decided the same way? And realizing this is not hypothetical, because, I mean, you're bound by it today.

MR. ESTRADA: Well, I understand that, Senator. And I think, to that question, I ought to answer by pointing out to what my view is of judging. And as I said, I think, earlier, I think it is imperative that, in judging, the person come to it with an appropriate process. And that entails withholding judgment, having an open mind, hearing from parties, and hearing from the briefs

and doing all of the leg work to try to ascertain which of the two litigants, or if there are more, any of the litigants is right.

It would be impossible for me, with respect to this case, not having been the judge in it, to tell you whether I would rule this or the other way, because I think we have not engaged in the type of appropriate process that I think is essential to judging.

SEN. LEAHY: I'll give you a chance to give me your views on the decision. And, of course, you can always, in your response, say you don't want to. And I understand that. I'll let you make -- I'll let you decide how to answer.

MR. ESTRADA: Thank you, Senator. I think my answer, to the best of my ability, is I can't know, because I was not a judge in the case. And the question as framed is inherently an unknowable for somebody in my position, who has not sat through the case, listened to the arguments, conferred with the colleagues, and done all of the leg work of investigating every last clue that the briefs and the arguments offer up.

Not only that, but in the context of our federal system of courts, it is imperative for somebody who is a judge to respect what we call the case-of-controversy requirement, which is to say cases are not abstract questions of law. They involve real people. And the color of the case, so to speak, or the tenor of it, really does take on a very urgent character when you have to deal with the real person who has all of the real arguments in front of you and is not an intellectual exercise as to what might be a good rule of law. SEN. LEAHY: I'll take that as being your answer, and I'll save you the time of having to write another. Thank you. Thank you, Mr. Estrada. I appreciate you taking the time.

SEN. SCHUMER: Senator Brownback.

SEN. SAM BROWNBACK (R-KS): Thank you, Mr. Chairman. Mr. Estrada, welcome to the committee, and welcome to your wife and to your mother. I'm delighted to have you here. Being at the end of the bench, most things have been covered, and I don't have any piercing line of questioning to go into.

I really am a great admirer of yours. I had a chance to meet with you privately. I'm an admirer of your fortitude and your background and what you've gone through. I'm an admirer of your resume: magna cum laude out of Harvard, Columbia, graduated near the top of your class. I think all those are a very impressive product that you've produced through the life and a dedicated -- dedicated life that you've had to be able to help a number of other people out, and to see -- see what you can do for their betterment, for the betterment of this country.

I'm sorry that in this process now we seem to be more -- more caught up on a set of ideological tests than qualifications. And that seems to be what's coming forward more and more. I look through this pedigree and this background that you bring to the job, your unanimous "highly qualified" rating by ABA, your work for the Clinton Justice Department, your work for private law firms, your work for the Supreme Court, your work for a circuit court -- that's an impeccable background and shows a great breadth of service that you've had as well -- U.S. attorneys office, I believe the Southern District of New York as well as in that your personal background that you bring to the job as well, that

would seem to me to be the very type of person that we would want on the circuit -- on the D.C. Circuit --

MR. ESTRADA: Thank you, Senator.

SEN. BROWNBACK: -- would be that -- would be all of that added together. The unanimous "well qualified" that you bring from the ABA, and they -- they review for judicial temperament. I've read this before to people, but in their own investigation that you had to go through, your legal writings are examined, prospective nominees, they conduct personal interviews in the ABA background, confidential interviews regarding integrity, professional competence, judicial temperament of a prospective nominee -- all that you've gone through, been through. I believe you've been waiting now for -- how long for a hearing?

MR. ESTRADA: I was nominated on May 9th, 2001, Senator.

SEN. BROWNBACK: We've been -- been going now for a year and a few months in the process. I add that all together and say "here is an incredibly well-qualified, broad-based individual." I believe you'd be the first Hispanic-American on the D.C. Circuit, from what I've seen, which is something I think that we should as well applaud with your background and having that as a broadening force on the D.C. Circuit, a breadth of background that that would bring to -- bring to the D.C. Circuit as well, which I think is a -- would be an important, laudable goal, to add that on top of the qualifiers -- I think one has to be qualified for the bench, qualified in judicial temperament and breadth and ability and expertise, and you've got to get through that threshold, but then once you're through that, you add more on top of it, of breadth and experience.

And I -- I think it's a very bad precedent we're moving towards here, when you look at that breadth of qualification, that type of nominee, that type of personal background and fortitude that you bring, and then to see that, well, there's people that are just going to opposed this strictly based on ideological purposes. I think we're poorer for it. I know people are going through a number of different questions on items you've written -- you've -- your opinions are known, but the blockage here is on a ideological purposes is why you haven't been brought up to date. And I think we're poorer for that.

I appreciate that you've been willing to put yourself through this process. I'm hopeful that we're going to still be able to get you confirmed. I think that would be the right thing for this country, and show a breadth of opinion on this -- this dias that we could put somebody of your caliber and qualifications and background on the D.C. Circuit. I don't know that that's going to take place, and I think we as a country will be poorer -- poorer for it.

So, my main point is to thank you for being willing to put yourself forward through this, and I'm -- you dedicate your life for the betterment of yourself and others. That's a remarkable story of accomplishments that you've already had, and I hope we're going to be able to add on top of that the circuit court position as well, and it's certainly well -- well-deserved on your part.

MR. ESTRADA: Thank you, Senator.

SEN. BROWNBACK: Mr. Chairman.

SEN. SCHUMER: Senator Kennedy.

SEN. KENNEDY: Well, it's been a long afternoon, long day for you, Mr. Estrada, but we thank you very much for staying with us. And I just have a few questions that I'd like to get your attention on.

As I mentioned, and the record is very clear, the point that we -- I was making earlier today about the NAACP, and your challenging their right to reflect to the local community, which had been the NAACP in the case of Annapolis was involved in counseling youth, as well as in various voter registration, and they felt that they had a right to be able to challenge the statute, and you believed that they should not. And I was making the point that the NAACP works in a very significant and important way in representing minorities -- others as well -- in that what we refer to as representational standing. And they have in issues of civil rights, discrimination, unemployment, and many other issues. And they were attempting to do it here, representing the community, because there was a division. No one is obviously justifying the gang and criminal activity. I think we can all dismiss that. We all dismiss that. The fact is the vote in Chicago among black aldermen was clearly against the statute. And I put that -- the names of those who voted on that -- in the record.

So I want to go, really go beyond that, rather than talking about the statute I was talking about the NAACP and the time that you took to oppose their position of standing in representing the community. And you opposed it, and it was later -- their position was upheld in the court.

But let me just move on to just one final area, and that is the issue that has been raised by a number of the organizations -- the Council of La Raza, DAFL, the Southwest Registration Education Project -- about the willingness of you to consider all sides and be fair- minded in the consideration of cases that would be before you in the District Court. I think we could use the word, sort of "temperament," if I could, in sort of characterizing it.

The importance of the court -- I mentioned earlier in the day its impact on the lives of people, which is enormously important. I think it's important also that anyone who is going to be on the court, no matter their personal views as a judge, that they have the ability, the inclination, to listen, to understand both sides of the argument.

Earlier this week under the Judiciary Committee hearing, chaired also by Senator Schumer, we had what I considered to be an excellent definition of how a judge should comfort themselves by a former judge, Ab Mikva. And he told us that the kind of judges that we want on the D.C. Circuit reflect moderation. He used the words, "We want judges who can hear with both ears, not decided the case before hearing the evidence; can remain reasonable even when their juices are flowing all around." And since some have raised the question about whether you possess those key qualities of both moderation now and openness and fairness, you have been called too much of an ideologue to serve as a judge. You said that you would have difficulty separating yourself from your personal ideological views. Some of your colleagues reportedly said that you do not listen to other people. According to one group with whom you met you were not even-tempered or open, and you even said that their criticisms of you might be illegally actionable.

Those views were represented in the letter which I have here, which I will include in the record. I am not going to spend the time on that. But I am

interested in hearing from you how you would respond to those that have raised those issues about your temperament and how you would proceed.

MR. ESTRADA: Well, senator, let me start by giving you my best assurance that I am a person who listens with both ears, and who will be able, if I am fortunate enough to be confirmed, to take the lessons of private practice, which as I mentioned earlier to Senator Leahy, do involve going to courtrooms all over the country and getting a first-hand look at what the importance of judicial temperance. I am aware of some particular criticisms that you've read. I think I've spoken to a couple of them today. But I think I would like to emphasize that I have been in practice since -- I have been a lawyer since 1986, and I have been fortunate enough to have met and dealt with a broad range of people in my life, whether they are on the other side of the table, or co-counsel or judges and justices before whom I practice.

Just two days ago I got a copy of a letter that I understand has been sent to the committee some time back -- I just got it a couple of days ago. And the letter is from the head of the legal aid office in the Southern District of New York. As you may know, I was a federal prosecutor in that office. And the head of legal aid has written to the committee to point out how he and the members of his office, as my opponents in litigation, thought that I was a person of fairness and integrity, with whom they could deal fairly. And he has endorsed my nomination on the basis of his own experience, and that of his colleagues in the office when I was a prosecutor. And I think he has told you that I was tough but fair. Some of my former lawyers in the solicitor general's office, who identify themselves with both parties, have also written to the committee to emphasize their view that I am a person of integrity who will treat all litigants fairly. And so has one of my supervisors, a very important one, Seth Waxman, who was, as you may call, President Clinton's second solicitor general. He has also written to the committee, as have any number of other people who were political appointees of the Clinton administration under which I served for four years. I am extremely pleased that they and I understood at the time that our business was to be fair, and to get our jobs done, and that we have managed to forge lasting friendships from that time period.

The last item I would mention, senator, since I do think that this is about my extensive record in the law, is that there are all of those cases that I have handled. And as I think I mentioned earlier to you, when I see an injustice I try to get involved. And when I see a community need, I try to get involved. And that may not be in the taste of everybody. I am certain that there are people in the world who don't think all that well of me for having taken a death penalty case, just as I am certain that there are people in the world who don't think all that well of me for trying to help minority communities that passed these gang laws. But, to my mind, what should come clear, come through that record, is the level of care that I have taken over the years to make sure that I give back to the community and that I do so in a way that is fair, that advances the ball for our society. And it is my hope that when you look at the totality of the record, including those who have known me over the years, the judges before whom I have appeared, who were interviewed by the ABA, and all the rest of the record that you have in front of you, that you will conclude without hesitation that I am the type of person who listens with both ears, and will be fair to all litigants.

SEN. KENNEDY: Well, I thank you for your response. And if you have that letter -- because I don't believe the committee has the letter from the Southern District. I would like you to submit it, if you would, in this part. I think you were giving your answer about bringing the lessons from the private

sector to this issue, I think those are enormously important. I mean, we have some enormously gifted, talented advocates, some extraordinarily able and gifted attorneys, but individuals that don't necessarily make great judges, particularly in the circuit, as we mentioned, that are dealing with some of the neediest causes and issues that affect the individuals that have really been left out and left behind. And this is an attitude that I think is enormously important and significant -- more so in terms of this position than I think in others. And I want to take the full opportunity to look at your record and what you have done and what does reflect it. I think all of us are impressed by your legal abilities. The real issue I think for myself is whether this translates itself into really being able to be fair and open- minded and considerate of the many individuals who don't have strong, effective, brilliant lawyers or special interests, and whose lives are going to be directly affected by the outcome of that circuit. And we have seen, as others have pointed out, where the interests of those individuals increasingly are being left out and left behind. I won't take time to review those statistics or conclusions, but that is a factor. So this is an important quality.

I want to thank the chair very much for --

SEN. SCHUMER: I thank you, Senator Kennedy. We have a vote going on -- I think seven minutes have gone into it. But, Senator Sessions assures me that he only has a few questions. We can probably get those in first. Then I have a few more -- Senator Hatch. Then we'll get on to the other nominees. But we'll do those after my final round of questions. Senator Hatch's will occur after the vote. But we'll go to Senator Sessions right now.

SEN. SESSIONS: Thank you, Mr. Chairman. I would just like to point out, with regard to endorsements, Mr. Estrada does have a number of endorsements from Hispanic groups, including the League of United Latin American Citizens, the largest and oldest Latino organization in the country, and the Hispanic Bar Association. So you certainly do have support in the Hispanic community.

And with regard to your principled and correct position on judging cases that you haven't heard and are not a judge in, I would like to quote again from Lloyd Cutler, who was a counsel to President Clinton, White House counsel, who has been a student of the judiciary, and served I believe on the Miller Commission, which dealt with how to confirm judges. He in 1985 wrote, "What the Senate ought not to do is determine through questioning a nominee's views on emerging issues of constitutional doctrine, or issues likely to face the courts in the future. Why? Because these questions are really a signal to a nominee that he will become a judge only if he promises to be a specialist -- to be a yes-man to the powers to be."

And then he went on to note that, "I think when we ask perspective judges their views on an issue likely to arise in the future, we are locking those judges into a position. The constitutional prohibition on advisory opinions tells us that justice is achieved by well-informed, concrete decisions rather than hypothetical speculation."

And, also, as you indicated, you hadn't heard the arguments and read the briefs. So you should not be making those kinds of comments in advance. And Senator Schumer has admirably said we ought to get away from gotcha politics and gotcha hearings here. And I do think, Senator Schumer, that today we slipped a bit with pressing him on an unnamed source statement that he has not had, and demanding answers that would be difficult I think for him to give. I noticed in that article it said -- it quoted you as saying "Estrada is like a

stealth missile with a nose cone coming right out of the right-wing's deepest silo." Did you say that?

SEN. SCHUMER: I would say I can't recall.

SEN. SESSIONS: Okay, yes or no. (Laughter.) These hearings are -- we are open -- Senator Schumer is open. But we need to be open- minded. We need to be listening to you, not having our minds made up before we come.

And another thing that I noticed in these hearings that are troubling to me is the suggestion by Senator Kennedy that a lawyer's objecting to an entity's standing somehow reflects the hostile opinion of the group. Isn't it true, Mr. Estrada, just briefly, that a group to intervene and be a party to a lawsuit has to meet certain legal requirements of standing. And if you object to a person's or a group's standing, that does not mean you have any adverse opinion toward that group or person?

MR. ESTRADA: That is right, senator. I mean, I was -- I was -- thank you for giving me the opportunity to say this, and I am sorry Senator Kennedy has left. But obviously I have the highest respect for the history of the NAACP in this country breaking down racial barriers. That was not what was at issue in the case. It was simply whether in the particular case there would be appropriate litigants to be raising this challenge.

SEN. SESSIONS: The law is clear that every group and every person can't intervene in every case in America. And I think you were perfectly correct in representing your client there.

And with the Legal Aid Society letter, I would just note they wrote on September 16th -- that's from Mr. Joy (ph), the attorney in charge: "Miguel and I met while he was an assistant United States Attorney in the Southern District of New York. We had a number of cases together where he represented the government, and I the defendant -- including one case which went to trial, and a number of others that were resolved by guilty pleas. In addition to myself, the other lawyers in my office dealt with him on cases of their own. We were all tremendously impressed with his intellect and extraordinary memory. And he clearly was one of the smartest attorneys in the office which prides itself in attracting the best and the brightest. Yet throughout he was imminently practical in the judgments he made, and he had a down-to-earth approach to his cases. I found him to be fair and straightforward -- a prosecutor who did not treat defendants unduly harshly." And that is what the American Bar Association has found about you in talking to as many as 50 of your colleagues, judges, adversaries, when they rated you unanimously well qualified. Mr. Chairman, this is an extraordinarily qualified nominee. I believe he definitely needs confirmation.

SEN. SCHUMER: And on that temporary note we are going to recess for hopefully for no more than 10 minutes. (Sounds gavel.) The committee is in recess. (Recess.)

SEN. SCHUMER: Okay, I think we are ready to resume, once and for all. And I want to thank Mr. Estrada -- it's been a long day -- for being here. And I want to thank all the others. And we are going to get to you as quickly as we can.

Okay, let me go to another bunch of questions here for our nominee. Now, in asking questions about judicial philosophy, I am mindful of the

importance, as you have stressed, I think correctly, of not seeking a precommitment from any nominee regarding how he or she will rule in any case that may come before him or her on the bench. That said, there is nothing absolutely wrong with your commenting on specific already-decided Supreme Court cases. I know of no one who feels that that is improper to do. I am sure you regularly do so in private. Nearly every lawyer worth his salt in the country engages in that kind of debate and discussion. I do. We do on this committee. I've done it with most of my colleagues here and there. And when a big case comes down, it's only natural for us to talk about it, in my office and in other places. And I am sure that's the case for you too, Mr. Estrada. You have friends who were former solicitor generals, law professors, partners in law firms. You clerked on the Supreme Court, we all know that you discuss Supreme Court opinions all the time. If you didn't, you probably wouldn't be qualified to serve on the D.C. Circuit. So it's not really enough to say you haven't read all the briefs and listened to oral arguments to give us your general views on cases. And I think you have something of an obligation to let the committee know.

So I want to ask you this, and my first one is a general one. Other than cases in which you were an advocate, please tell us what three cases from the last 40 years of Supreme Court jurisprudence you are most critical of. And just give me a couple of sentences as to why for each one.

MR. ESTRADA: Senator, I think there are cases that I have been critical of that I can think of. I can't -- I cannot say that I have made it my business to be in the business of being a critic of the Supreme Court, since my job generally entails getting the cases, figuring out what the rule of law is, and trying to make arguments for my clients on the basis of the rule as stated, rather than to going back and trying to second-guess it. I am not even sure that I could think of three that I would be -- that I would have a sort of adverse reaction to, if that's what you are getting at. But the reasons that I would even think of the cases in those terms would have to do with what the cases do for the administration of justice; whether they give enough guidance to lower courts, and whether they fulfill, you know, the court's job in ruling on the question at the time. So it would be more of -- this is not really useful to me as a practitioner, and probably won't be useful to the judges. I don't really think I am -- as a practicing lawyer, I think I would be reluctant to say that I will be critical of the outcome, because I have got to take it for what it is. SEN. SCHUMER: So you, with all of your legal background and your immersion in the legal world, you can't think of three, or even one single case that the Supreme Court has decided that you disagree with?

MR. ESTRADA: I don't know that I am in a position to say that I disagree with any case that the Supreme Court has ruled on, or that I think that the Court got it right, because I think, you know, as I explained earlier, I ought not to undertake to in effect call the Court to task for the purpose of having gotten something wrong, when I haven't been in their shoes, in the sense of having had access to all the materials, arguments, research and deliberation that they had. I mean, I can read a case, and it may seem to me when I read the case that this or the other one of the opinions is particularly well argued. And sometimes I have that sort of reaction -- fairly frequently. But I don't have the reaction of, Oh, I think this is wrong?

SEN. SCHUMER: You don't? Not to a single case in the last 40 years? I mean, I'll tell you one for me. I think Buckley v. Valeo was an awful decision.

MR. ESTRADA: Well, it certainly was wrong.

SEN. SCHUMER: I wish it had changed. Now, if I were to be nominated tomorrow by President Bush to sit on the court -- (laughter) -- I don't think saying that would disqualify me. Now, you are a lot closer to that than me, that nomination. But I mean I find it hard to believe that you can't opine -- Mr. Estrada, we are trying to find out how you think here. And --

MR. ESTRADA: I'm happy to deal with that question, senator. I can tell you how I approach cases.

SEN. SCHUMER: But I didn't ask that, because I am not asking how you approach cases. That is a legitimate question, and some have asked -- like it. I want to know how you feel about cases. And you have said more broadly than any other witness I've come across -- you have given us virtually no opinion on anything. That's because it might come up in the future. My reading of that ruling is different. If I were to ask you specific cases, that's fine. But asking you generally about views that might come before the Court, we have had witness after witness tell us their views on things like that. Just look at last week, Mr. McConnell's testimony. But now I am getting away from that, respecting, disagreeing very much with, and thinking the record is not very filled in here. But I am getting to older cases, cases that have already been argued. So you can't have that reason, and you can't tell us a one.

MR. ESTRADA: But the problem is the same, Senator Schumer, because in taking Case A and looking at whether the court's got it right, or whether I think they got it right, I have only the benefit of the opinions. I haven't seen the litigants. I haven't -- the case is ruled on, but I don't get to see what didn't make it onto the opinion.

SEN. SCHUMER: Sir, in all due respect, I have not read the brief of Buckley v. Valeo. I don't think that disqualifies me from having an opinion on the holdings of the case and its effect on America and its effect on law. I think it interpreted the First Amendment too broadly.

MR. ESTRADA: Senator --

SEN. SCHUMER: To say that the only time you can opine on a case is when you've read all the briefs, strikes -- well, it's an argument I have never heard before.

MR. ESTRADA: The only time that I will feel comfortable in opining whether the court got it right is if I had done everything the court had to do in order to actually issue a ruling.

SEN. SCHUMER: I didn't ask you if the court got it right. I asked you cases that you, from your viewpoint, would disagree with.

MR. ESTRADA: I mean, there are certainly cases --

SEN. SCHUMER: I am not asking you for the quality of the legal reasoning. I am asking you -- you have certain predispositions -- we all do -- no one is a tabula rosa (sic). Let me just read you a quote.

MR. ESTRADA: Rasa.

SEN. SCHUMER: Judge Scalia, a friend of yours, Justice Scalia: "Indeed, even if it were possible to select judges who didn't have preconceived views on legal issues, it would hardly be desirable to do so." You don't seem to have any.

MR. ESTRADA: Well, actually, senator, I have to say that I was trying to answer a different question when you said that. If you are asking whether I have views on issues of public concern, that may be implicated in the cases that make it to the court, of course I do. I have all sorts of views. I have all sorts of views --

SEN. SCHUMER: Well, tell me three cases you've disagreed with.

MR. ESTRADA: I don't think in light of the position for which I am being considered, Senator Schumer, that I ought to say that, because it would be a preconception, as Justice Scalia said in that opinion. And he went on to say that what's key about our system -- this is the state election cases, as I recall -- is that the first duty of the judge is to recognize that we all have them, and then put them aside. And out of deference for the job for which I am being considered and for which I hope to be fortunate enough to be confirmed, the one thing that I do not want to do is to share personal views which to me have no bearing on how I would do my job as a judge. SEN. SCHUMER: Let me just -- have -- are you saying though you have never shared your opinion on any case where you haven't read the briefs and heard the arguments, with others?

MR. ESTRADA: If you are asking whether I have opinions about the public policy case -- issues that are implicated in the case, or the quality of the job that the court did in writing the opinion, I have shared opinions like that, and --

SEN. SCHUMER: So, why don't you share them with us?

MR. ESTRADA: Because they do fall within the area of preconceptions that Justice Scalia identified, which I would be loathe to give out -- the impression would have anything to do with my job as a judge, if I were confirmed.

SEN. SCHUMER: Well, of course it will have things to do with your job as a judge. Everyone who has written on jurisprudence knows that. No one comes in as a tabula rosa (sic). We have another quote from Justice Rehnquist somewhere around here which says the same thing. Chief Justice Rehnquist: "Since most justice comes to this bench no earlier than their middle years" -- you're at the very beginning of your middle years -- "it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of sweeping clauses of the Constitution in their interaction with one another. It would be not merely unusual but extraordinary if they had not at least given opinions as to constitutional issues in their previous legal careers." And you are still refusing to give us any?

MR. ESTRADA: Yeah. I mean, I have read -- not recently, but I have read Justice Rehnquist's opinion. I think its his opinion in Chambers and Laird v. Tatum that you are reading.

SEN. SCHUMER: I don't know where it's from.

MR. ESTRADA: That was his opinion in Chambers and Laird v. Tatum, which I think Justice Scalia then quoted in the case that you cited earlier. But all to the point that we all recognize that we have private views on many issues. And our job, if we get to be judges, is to make sure that people understand that they come before us that we will give ears to the contrary argument.

SEN. SCHUMER: You just said an hour ago that when you were giving recommendations to Justice Kennedy about law clerks, you did look at their views. You must have asked them questions or heard something about it. And now yet you are saying -- and that's for a law clerk. And now you are saying for a judge, a life-time appointment, you won't share those views with the committee.

MR. ESTRADA: Senator --

SEN. SCHUMER: It seems to me a bit contradictory.

MR. ESTRADA: The question that I asked in doing my job for Justice Kennedy are intended to ascertain whether there are any strongly felt views that would keep that person from being a good law clerk to the justice. If the person tells me that they think that we ought not have the death penalty, but that he or she is more than happy to work on a case for the justice in which the outcome is that one of them will be upheld, I have no further job to do. I would never tell the justice that that person, he or she, is an unsuitable law clerk. I ask about these things solely for the purpose of gaining the person's assurance that he is a person who follows law; that is the assurance that I am here to give you today, whatever my personal views on any issue may be. I will put them aside to the best of my ability and follow what the Supreme Court tells me is the governing legal framework.

SEN. SCHUMER: You have said that to us, and we are not sure that will happen. And unless you allow us to probe a little further as to how you think and what you do, we can't come -- we can't judge whether that will actually happen or not. We don't know you. And the purpose of this hearing is to get to know you a little better. And, in all due respect, you are not letting us do that hardly at all. I mean, you know, we have had a lot of reading of your wonderful history, which I commend you for. But that's not the only reason, at least in the opinion of many, if not most, to vote yes on somebody who was nominated for at least what I consider the second most important court in the land.

MR. ESTRADA: I am happy to try to answer any question that I think I can appropriately answer, Senator Schumer, consistent with the nature of the job that I would undertake were I to be confirmed.

SEN. SCHUMER: Let me just ask you one more question. There was only one issue that you did address, Roe v. Wade. Why were you willing to talk about that case when Senator, I believe it was Feinstein, asked, but no other?

MR. ESTRADA: I thought my answer to the question was that I would follow the case, and that I take the holding of the case as stating what it holds, which is that there is a right, as the --

SEN. SCHUMER: Nope. I thought you used the word "morally" -- I don't remember -- we could look at the record. But I didn't think you just said it was the holding of the case. You said it's settled law. And then you talked

about some other normative words. I don't remember. We could get the record and look.

MR. ESTRADA: And what I -- what I was pretty sure I had said, senator, which is what I was about to repeat now, which is to say it is the holding of the case, I have no personal, moral, philosophical view, or view of any other type, that would keep me from following the holding of the case. I did not think I in any way implied what my view might be.

SEN. SCHUMER: Okay. I think that's basically it for me. I'm going to say something in conclusion, but I will first let Senator Hatch do what he has to do.

SEN. HATCH: Thank you, Mr. Chairman. I earlier quoted from the code of ethics, and it's worth repeating. Canon 5 of the Code of Judicial Conduct of the American Bar Association expressly forbids -- expressly forbids nominees to judicial duty from making, quote, "pledges or promises of conduct in office or statements that commit or commit the nominee with respect to cases, controversies or issues that are likely to come before the courts." Now, that's an important -- I think you've answered these questions just right.

Now, your career has been marked by a commitment to equal justice for all people and everybody under the law. I think we have gotten to know you pretty well here today. Both in government service and in private practice you have sought to ensure that all citizens receive the law's fullest protections and benefits, whether they are death row inmates, abortion clinics targeted by violent protestors, or inner- city residents victimized by gang violence.

I would like to ask you specifically about your representation of Tommy David Strickland -- Strickler -- in his death row appeal before the Supreme Court. Can you tell us about that case and about how you got involved?

MR. ESTRADA: Yes, senator. I was sitting at my office at Gibson, Dunn one afternoon and the phone rang, and there was -- there were actually two or there people on the line in different parts of the country. One of them was an attorney from Richmond who had been handling the case until then. Her name is Barbara Hartung. Another one was an attorney who identified himself from being from the NAACP Legal Defense Fund in New York. I think his name was David Kendall. And there was another lawyer who had been helping Ms. Hartung -- I think in Florida. I think his last name was Olive. And they told me that they had tried to get help in the representation in this case from a law professor at Georgetown law school, who had then just had a young child, and she was not in a position of doing the case. I knew this faculty member from Georgetown, because she and I had been U.S. Attorneys together, and she recommended me to Ms. Hartung as somebody who might be interested in this case, having worked with me at the Southern District of New York.

They called and I got told about the case, and asked them to send me the papers, or some of the papers so I could see what the issues were. They did that I think by overnight mail, and I looked through it. And, frankly, as a practicing lawyer, I was frankly horrified about what had happened in that case. And I told them that I would do the case -- that I would do the case for free. I wrote the briefs in the Supreme Court, the opening brief and the reply brief, with the help of Ms. Hartung, and got to know all through the record -- argue the case in the Supreme Court I believe in 1999, and unfortunately lost. It was one of those cases in which I as a litigant on that side had to win a large number of points to get to the end, and I won all but one. I mean, I had --

many of the things I had seen that were wrong with the case the Court did agree were wrong with the case. But, unfortunately, there was one final step that they said, Well, that one you don't get. And the result was that we lost the entire case. But there was a lot of merit in the case, I think as the judgment of the Court did recognize, because they ruled for my side in the case in all but one of the issues.

SEN. HATCH: You represented him for free. Do you remember approximately how many hours you spent on that?

MR. ESTRADA: Yes. I think I estimated between four and five hundred hours on that case.

SEN. HATCH: Let me just read a portion of the letter the committee received from your co-counsel in the case, Barbara Hartung. Ms. Hartung says that you, quote, "Value highly the just and proper application of the law." Now, in this particular case this man had abducted a young girl and murdered her.

MR. ESTRADA: That was what the state claimed they had proved at trial.

SEN. HATCH: Yeah. Said that you quote, "Value highly the just and proper application of the law. Miguel's respect for the Constitution and the law may explain why he took on Mr. Strickler's case, which the bottom concerned the fundamental fairness of the capital trial and death penalty. I should note that Miguel and I have widely divergent political views, and disagree strongly on important issues. However, I am confident that Miguel Estrada will be a distinguished, fair and honest member of the federal appellate bench." I would like to submit the whole letter to the record, if I can, Mr. Chairman. Is that okay? Submit the whole letter to the record?

SEN. SCHUMER: Without objective.

SEN. HATCH: Okay, now, let me just say that earlier Senator Kennedy asked about your fairness, your ability to consider all sides of an issue before making a determination. And I think some of the best testimony on your fairness comes from Ron Klain, who served this committee well on the majority side, on the Democratic side. He served as chief of staff to former Vice President Al Gore. Mr. Klain wrote in a letter to the committee, quote, "Miguel will rule justly toward all, without showing favor to any group or individual. The challenges he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, genuinely devoted to helping those in need. Those without means or without advantage will get a fair hearing from Miguel Estrada," unquote. As Mr. Klain explained in his letter, he has known Mr. Estrada since you were both in law school. Now, in my opinion it speaks volumes that those who know you the best are the ones who would vouch on the record for their words and actions on your fairness.

Now, I think that -- now, Senator Schumer is getting the point of my next line of questions, and that is this: I believe that your answers amply illustrate that even assuming that you are pro life -- and I have no idea or care whether you are -- you apply the laws articulated by the Supreme Court regardless of your personal views.

I would like to ask about a case you argued in the Supreme Court on behalf of the Clinton administration, and that was NOW v. Scheidler. Can you just tell us about the background of that case?

MR. ESTRADA: Yes, senator. The -- that was a case that came out of litigation between Operation Rescue and some abortion clinics. I think it was in the Midwest. And Operation Rescue -- I mean, I am sorry, the clinic sued Operation Rescue, using a federal statute, called the Racketeer Influence and Corrupt Organizations law. They lost in the 7th Circuit when the 7th Circuit found that Operation Rescue, since it was not motivating by -- motivated by a desire to earn money, but was doing this for philosophical reasons, could not be reached under this law, which is really intended to go after people who engage in violent conduct. I worked on the case when I was in the solicitor general's office. I wrote a brief arguing that this was a misreading of the statute, because there was nothing, as I argued in the brief, that indicated that the economic purpose requirement wasn't a statute. I also argued the case. Solicitor general Drew Days --

SEN. HATCH: So you wrote the brief and you argued the case in the Supreme Court on behalf of NOW?

MR. ESTRADA: That's correct.

SEN. HATCH: And against the pro-life protestors who were accused of violence?

MR. ESTRADA: That is right. That is right, senator.

SEN. HATCH: How did the Supreme Court rule?

MR. ESTRADA: The Supreme Court ruled unanimously for the position that I advocated.

SEN. HATCH: And they basically ruled that the RICO statute could be used to punish pro-life activists who protest in a violent fashion outside of abortion clinics?

MR. ESTRADA: Yes, with respect to the issue. Then in front of the court. I think the case has now been tried and is now back in front of the Supreme Court on a different issue. But --

SEN. HATCH: Okay, but the Court held that RICO does not require pecuniary purpose by the defendant to maintain a cause of action, right?

MR. ESTRADA: That was the issue in the case, yes.

SEN. HATCH: Well, I'd like to point out that NOW has held the Supreme Court decision in Scheidler as a, quote, "Our landmark lawsuit in which a unanimous jury declared the defendant guilty of racketeering. And NOW won the first-ever nationwide injunction against anti-abortion extremists," unquote. I would also like to point out that on the NOW website there is an article by Vera Haller of Women's Enews that applauds your choice as a judicial nominee. The article notes that you supported anti-racketeering laws against abortion foes in the Schiedler case, and observes that, quote, "His arguments were not ideological," unquote.

The article further notes that, quote, "His presence on the list of judicial nominees was seen by some as a sign that President Bush hoped to avoid contentious confirmation battles in the Senate." SEN. SCHUMER: Spoken by a left-wing interest group. Something you don't like.

SEN. HATCH: No, I like the people who stand up for women's rights.

Let me just say this -- and Miguel you have -- (laughter) -- after all, I have three daughters and three sons, and I have I think 12 or 13 granddaughters.

Now, let me just say this. On August 3rd of 1995 we held a hearing for President Clinton's nominee William Sessions. Mr. Sessions had served as Senator Leahy's campaign manager. So there was no doubt that many on the Republican side of this table disagreed with his political ideology. We asked Mr. Sessions, "Are you committed to following Supreme Court precedent on the rulings for the federal Court of Appeals for your district faithfully, and giving them full force and effect, even if you personally disagree with such precedent or ruling?," unquote. He answered, "Yes, Mr. Chairman, I am." Despite his record of partisan political activity, that answer was good enough under the old standard, where the Senate bore the burden of finding out or finding a strong reason to reject a nominee. And the Republican Senate confirmed him by unanimous vote.

On June 16th, 1999, I held a hearing for President Clinton's nominee Karen Schreier. Ms. Schreier served as chairman of the South Dakota Democratic Party. So there was no doubt that we on the Republican side disagreed with her political ideology. And I asked her at that time -- I said, "Are you committed to following the precedents of the higher courts faithfully, and giving them full force and effect, even if you personally disagree with such precedents?" She answered, "Yes, Mr. Chairman, I definitely am." Now, despite Ms. Schreier's record of partisan political activity, that answer was good enough under the old standard, where the Senate bore the burden of finding a strong reason to reject any nominee. The Republican Senate confirmed her by an overwhelming vote of 94 to 4.

On May 10th, 2000, we held a hearing for President Clinton's nominee James Brady. Mr. Brady had served as a vice chair to the Democratic National Committee. Thus again there was no doubt that we on the Republican side disagreed with his political ideology. Mr. Brady was asked this question: "If a U.S. district judge or a U.S. Court of Appeals judge concludes that a Supreme Court precedent is flatly contrary to the Constitution, are there any circumstances under which the judge may refuse to apply that precedent to the case before him?," unquote. Mr. Brady answered, "No, there are no circumstances under which a United States district judge or a United States Court of Appeals judge may refuse to apply that precedent to the case before him." Now, despite Mr. Brady's record of partisan political activity, that answer was good enough under the standard we've used up until recently. The old standard, where the Senate bore the burden of finding a strong reason to reject a nominee -- and not just some frivolous reason that they call strong. The Republican Senate confirmed Mr. Brady by an overwhelming vote of 83 to 16. These same questions were asked of President Clinton's district and circuit nominees alike. I never shifted the burden back to these nominees.

My understanding is that Mr. Estrada has never -- never -- headed a political campaign in his life, either at the national or the state level. Instead he's been a lawyer, and a distinguished one at that. Imposing a double standard on Mr. Estrada has no basis in the original history of the Constitution, and it is not what the Republican Senate did to President Clinton's nominees, even though -- who did have a record of partisan political activity. I could go on and on. Now, to impose a double standard on Mr. Estrada

I think would be shameful on the part of this committee, and on the part of the Senate as a whole. Mr. Estrada should be treated no differently than the way partisan Democrat nominees, who said they would observe and follow faithfully the rule of law, were treated as they were brought before the committee by me as chairman anyway when we were in control -- and I might add when Senator Biden was in control. These type of things you just claimed did not -- we did not use the standard that some are suggesting we use now that Mr. Estrada is the nominee to the Second Court of Appeals for the District of Columbia.

Now, Mr. Chairman, I think this has been a good hearing. I see a very excellent man before us. I see a man who is totally qualified for the second Court of Appeals for the District of Columbia. I see a man who is devoted to the law, who is devoted to doing what's right, who will listen with both ears, who will be fair to all litigants, and who is smart enough to understand what the law is, and who I believe is a man of great conviction, a man of great capacity, and a man of great ethical and moral standing, and there is no question in anybody's mind a great lawyer.

So I hope that this committee will not delay his nomination any further now that we are in the 16th month since you were nominated by the president. I hope we can get this nominee in front of the committee, out of the committee and voted upon on the floor before we finally recess. And I hope, Mr. Chairman, you will be of assistance in getting that done. Thank you.

SEN. SCHUMER: Thank you, Mr. Hatch. And thank you for your patience all day long. I'm just going to be brief in my final statement. Then we'll get to the next witness.

First -- and I don't like playing the game tit-for-tat, but Mr. Estrada is being treated much better than the last two nominees for the D.C. District Court of Appeals, Mr. Snyder (sp) and Ms. Kagan who waited 15 and 18 months respectively, and never got a hearing. This vacancy might well -- well, we have 12 -- so we still might have this vacancy, but if you want to talk about double standard, let's look at that one. Now, let me give you my view of the hearings. Mr. Estrada, you have shown that you have -- you're an excellent lawyer, and you have shown you have a great deal of patience, which I think is very important. But I have to tell you this: I think many of us emerge from this hearing, we think we have more questions than answers. This hearing has raised more questions than you have answered.

You will not answer anything about your views of prospective cases, going far beyond what the canons of ethics say. They talk about specific cases -- not about general views on constitutional issues. And, amazingly enough, you will not answer your views of previous cases. So the irony is the only cases you will talk about are the ones you have already litigated, because the only ones you will talk about are the ones where you have seen the brief. Well, we don't need those. We have those. That is part of the spare record that we have.

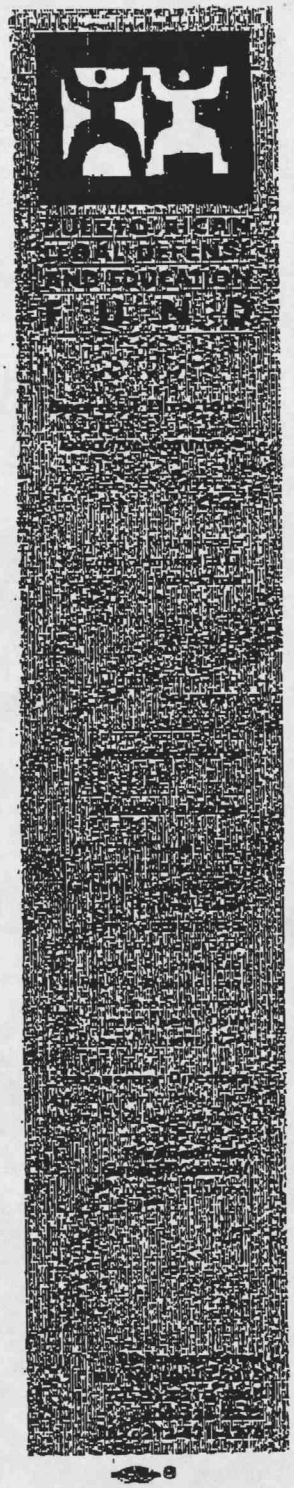
And so, as I said, I think most of us emerge from this hearing with more questions at the end of the day than we had at the beginning of the day. I think that makes it more important than ever that we be able to see your record when you were in the solicitor general's office, because otherwise the record is so sparse, and your unwillingness to answer anything about your views of how you would be a judge, give us very, very little to go on other than your assurance, which we received from witness after witness, that you will simply follow the law. To me that's not enough. And I hope that we can come to an accommodation

with the administration and get the records. I don't know what's in those solicitor general records. They may vindicate you. They may not. They may be somewhere in between. But we really need a record -- much more of a record than you've given us today when we are nominating somebody to the second highest court in the land.

I thank you for your patience. I thank your family for being here. And you are -- you are free to go.

MR. ESTRADA: Thank you, Senator.

END.



September 17, 2002

POSITION STATEMENT ON THE NOMINATION OF MIGUEL A. ESTRADA TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I. BACKGROUND

On May 9, 2001, Miguel A. Estrada was nominated by President George W. Bush to the United States Court of Appeals for the District of Columbia Circuit. That court is widely considered to be the second most powerful court in the nation and traditionally has served as a launching pad for judges to be appointed to the United States Supreme Court. Mr. Estrada has been touted as the first Hispanic-American nominated to the D.C. Circuit, and many believe that he is being groomed to be the first Hispanic-American Supreme Court Justice. Because of the tremendous importance of this nomination to our nation's nearly 40 million Latinos, and to all Americans in general, the Puerto Rican Legal Defense & Education Fund (PRLDEF), has decided to take a position on his nomination.

Since Mr. Estrada was nominated, PRLDEF has sought to learn as much as it could about his background and qualifications for the important, life-tenured position of Circuit Judge. Because our offices are located seven blocks away from "Ground Zero" in New York City, our diligent efforts were interrupted by a six-month delay to mourn, reflect, and recover after the tragic events of September 11. Thereafter, we resumed our extensive examination of Mr. Estrada's history and record. We reviewed his available writings, although such writings are extremely limited. We conducted dozens of interviews with individuals familiar with Mr. Estrada, including those who have studied and worked with him as well as those who have lived in the same communities with him. We also surveyed all available news media reports and other public materials concerning Mr. Estrada. Finally, we interviewed Mr. Estrada himself.

As a national civil rights organization primarily concerned with advancing and protecting the civil and human rights of the Latino community and all Americans through litigation, policy analysis, and education, we sought to answer several questions in evaluating Mr. Estrada's nomination. First and foremost, is Mr. Estrada sufficiently qualified? Second, are or should Mr. Estrada's reportedly extreme views be disqualifying? Third, would Mr. Estrada's life experiences bring to the D.C. Circuit the unique sensitivities and perspectives of Hispanic-Americans? Finally, does Mr. Estrada possess the proper judicial temperament required for appeals court nominees?

For the reasons stated below, we believe that Mr. Estrada is not sufficiently qualified; that his reportedly extreme views should be disqualifying; that he has not had a demonstrated interest in or any involvement with the organized Hispanic community or Hispanic activities of any kind; and that he lacks the maturity and judicial temperament necessary to be a circuit court judge. Accordingly, we oppose his nomination and urge the United States Senate Judiciary Committee to reject his nomination.

II. CONCERNS ABOUT HIS QUALIFICATIONS

While the positions Mr. Estrada has held and his intellectual abilities may initially appear impressive, they are neither as complete nor as impressive in depth and scope as those of many others who have been or could be appointed to the elevated position of Circuit Judge. Mr. Estrada seems to us to have had insufficient experience for the position of United States Circuit Judge, especially in the powerful D.C. Circuit. His experience is not as extensive as that of others who have been appointed to the federal appellate courts and have had greater depth and breadth of experience.

Historically, both judicial experience and academic experience have been given great weight in considering nominations for circuit court judgeships. Perhaps mostly due to his relatively young age of 39 when he was nominated, however, Mr. Estrada had not had any judicial experience whatsoever. Nor has he had any academic or teaching experience. Much of his legal experience has been devoted to handling criminal law

matters. In addition, he simply has not developed a sufficient record upon which one could fairly evaluate his positions, fairness and reasoning skills.

Traditionally, the written record from either scholarly works or judicial opinions has historically served as the best basis upon which candidates for appellate courts have been evaluated. Where a written record does not exist, life experiences and activities have been relied upon to help measure fairness and reasoning skills. Mr. Estrada's record provides a wholly inadequate basis upon which to conclude that he can be a fair and impartial appeals court judge. This is especially relevant and important given the fact that a number of his colleagues have said unequivocally that Mr. Estrada has expressed extreme views that they believe to be outside the mainstream of legal and political thought. Unfortunately, we could not fully test these strong impressions against Mr. Estrada's very limited record. If Mr. Estrada first served as a district court judge or in another judicial capacity, we would have a much more complete record upon which to assess his later nomination to the court of appeals.

III. CONCERNS ABOUT HIS VIEWS

Despite the absence of a written record of Mr. Estrada's views, concerns over whether Mr. Estrada could impartially serve on an appellate court have been heightened because individuals who have worked with and even supervised him have both privately and publicly stated that he is an ideologue with extremely strong ideological views, and would have difficulty keeping those views from affecting his judgment when deciding cases as an appellate judge. He has reportedly made strong statements that have been interpreted as hostile to criminal defendants' rights, affirmative action and women's rights. Additionally, he has clearly chosen to be actively engaged principally with ideological causes and organizations, such as the Federalist Society and the Center for the Community Interest. Members of these groups have been outspoken on the issues we believe are of concern to minorities, the very groups Mr. Estrada should be sensitive to. It is also particularly noteworthy that some of the most ideologically extreme organizations in our nation have endorsed his nomination.

Because of Mr. Estrada's very limited written record, coupled with his refusal to answer detailed questions about his ideological views, the public and private reports of his extreme ideological views were not effectively rebutted, and should therefore be disqualifying.

The Senate Judiciary Committee asked Mr. Estrada to provide information on the ten most significant litigated matters that he personally handled and whether he had played any role in a political campaign. Curiously, Mr. Estrada failed to include two important activities in his response. He neglected to mention that he participated in the preparation of a brief in the Bush v. Gore election recount litigation, and that he served on the Bush Department of Justice Transition Team.

When questioned on whether the Supreme Court has hired enough minority law clerks, Mr. Estrada's response was "If there was some reason for underrepresentation, it would be something to look into ... but I don't have any reason to think it's anything other than a reflection of trends in society." He said that he does not know whether he has been a beneficiary of affirmative action or not. He explained that he may be for or against affirmative action depending upon the particular issues at hand.

Bush Administration supporters of Mr. Estrada tout his nomination by stressing that he is the first Hispanic to be nominated to the D.C. Circuit Court of Appeals, and could become the first Hispanic Supreme Court Justice. This "Hispanic" touting is at odds with Mr. Estrada's clearly expressed desire to be judged only "on the merits." Mr. Estrada's views on the ethnic dimension of his candidacy notwithstanding, it is clear that the Bush Administration fully intends this to be a "Hispanic" nomination to the Court. This intent is what compels our interest in and underscores both the importance of this nomination and the relevance of this issue to the Hispanic community.

IV. CONCERNS OF THE HISPANIC-AMERICAN COMMUNITY

Of greatest concern to the Latino community is Mr. Estrada's clear lack of any connection whatsoever to the issues, needs, and concerns of the organized Hispanic community. It is indeed ironic that someone promoted as a Hispanic has neither shown any demonstrated interest in, nor has had any involvement with any Hispanic organizations or activities throughout his entire life in the United States. Nor has he been involved with, supportive of, or responsive to issues of concern to Latinos.

Some have attempted to portray his story as a compelling one of a Hispanic who came to this country speaking little to no English. In stark contrast with this story, however, the reality is that Mr. Estrada appears to have come from a privileged background and received English training and education prior to his arrival in the United States. This training enabled Mr. Estrada to participate fully in the educational opportunities afforded to him in the United States. As the son of a lawyer and a bank vice president who had the resources to finance superior educational opportunities for him, Mr. Estrada has not lived the educationally or economically disadvantaged life his proponents would have others believe. Nor have Mr. Estrada's life experiences resembled or been shared with those of Latinos who have experienced discrimination or struggled with poverty, indifference or unfairness.

Knowledge of people and of their aspirations for fairness and justice should be possessed by all candidates for judicial office. Mr. Estrada has lived a very different life from that of most Latinos — a life isolated from their experience and concerns. Once he made it, he both disappeared from and never became connected or committed to the Hispanic community. As a result, we believe that he lacks the sensitivity and perspectives shared by the majority of Hispanic-Americans in our country. During our interview with him, he took offense at the view that he is disconnected from the Hispanic community, but he countered those concerns merely by asserting that he listens to Hispanic music and reads Spanish language books. We believe that he is disconnected from the real-world activities that would enable him to contribute uniquely to the

development of the law and the enhancement of the administration of justice, as have other Hispanics who have served as judges before him.

V. CONCERNS ABOUT HIS JUDICIAL TEMPERAMENT

We have serious concerns about Mr. Estrada's judicial temperament. Simply put, he has been described as one who is arrogant and elitist. It has been reported that he "harangues his colleagues" and "doesn't listen to other people." We witnessed these qualities first-hand during our interview.

Based largely on our personal observations, we now firmly believe that Mr. Estrada lacks the maturity and temperament that a candidate for high judicial office should possess. In our view, he does not have the humility or the demeanor typical of worthy nominees to our nation's federal bench. He does not appear to us to be even-tempered. While Mr. Estrada may have been understandably apprehensive about the opportunity to meet with PRLDEF to allay its concerns, he was surprisingly contentious, confrontational, aggressive and even offensive in his verbal exchanges with us.

He made several inappropriately judgmental and immature comments about PRLDEF. He characterized some of PRLDEF's president's comments as "boneheaded." He indicated that were it not for his quasi-public status as a judicial nominee, our comments might otherwise be actionable. He stated that we "had probably already made up [our] minds to oppose his nomination because the person [we] had supported had lost the presidential election." In fact, PRLDEF had not made up its mind nor had it endorsed any presidential candidate. Mr. Estrada also made a fleeting reference to "[our] Democratic senator friends on the Hill." In fact, PRLDEF has Republican senator friends on the Hill as well. He also challenged PRLDEF's board chair on how [we] could say that "there is a strong consensus among Hispanic attorneys and Hispanics in general that they do not want to see a Hispanic Clarence Thomas on the U.S. Supreme Court."

VI. CONCLUSION

For all of the above reasons, we strongly believe that Mr. Estrada's nomination should be opposed and rejected. Potential nominees who aspire to such important positions as circuit judges should be better qualified and possess the unquestioned ability to be fair, opened-minded and committed to equal justice for all Americans. They should be connected to the real-world concerns of the people who will be governed by their decisions. They should also be even-tempered. In our view, Mr. Estrada clearly does not possess the qualities necessary to be placed in such an important position of trust—for a lifetime—interpreting and guarding the rights of ordinary Americans.

For more information contact the offices of
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Direct Line 212-739-7494

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	[Letter] - To: Patrick J. Leahy - From: Alberto R. Gonzales	1	09//17/2002	P6/b6;

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COLLECTION:
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SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
[Estrada, Miguel Hearing Panels] [2]

FRC ID:
9701

OA Num.:
2171

NARA Num.:
2082

FOIA IDs and Segments:
2018-0016-P
2017-0345-F

RESTRICTION CODES

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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June 24, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

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 the Solicitor General.

As former heads of the Office of the Solicitor General -- under Presidents of both parties -- we can attest to the vital importance of candor and confidentiality in the Solicitor General's decisionmaking process. The Solicitor General is charged with the weighty 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* in 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 made these and other critical decisions, we relied on frank, honest, and thorough advice from our staff attorneys, like Mr. Estrada. Our decisionmaking process required the unbridled, open exchange of ideas -- an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking 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 United States' litigation interests -- a cost that also would be borne by Congress itself.

Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process.

Sincerely,

Seth P. Waxman

On behalf of
Seth P. Waxman
Walter Dellinger
Drew S. Days, III
Kenneth W. Starr
Charles Fried
Robert H. Bork
Archibald Cox

cc: The Honorable Orrin G. Hatch
The Honorable Alberto R. Gonzales
The Honorable John D. Ashcroft

O'MELVENY & MYERS LLP

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SHANGHAI
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January 16, 2002

OUR FILE NUMBER
600,000-012

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WRITER'S E-MAIL ADDRESS
rklain@omm.com

The Honorable Patrick Leahy
Chairman
U.S. Senate Committee on the Judiciary
SD-224, Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

When we talked recently, I told you that I was supporting the nomination of Miguel Estrada to be a Judge of the U.S. Court of Appeals for the District of Columbia Circuit. Given that I did not have, at that time, a chance to explain the basis for my position in depth, I thought I might put my views in writing for your consideration.

At the outset, let me be clear that I write this letter with mixed emotions. Not mixed emotions about Miguel: if President Bush is to fill this seat on the D.C. Circuit, I believe Miguel is an outstanding candidate who merits confirmation. Rather, I think it is unfortunate that this vacancy exists at all due to the Senate's failure to confirm two outstanding, and well-qualified candidates for this court nominated by President Clinton. In this case, that unfairness is particularly ironic, as I met both Elena Kagan – President Clinton's nominee for this position – and Miguel Estrada – President Bush's nominee -- when we were all law students. The federal judiciary would be better off if the Senate had confirmed Professor Kagan last year – and then, with a subsequent vacancy arising during the Bush administration, Mr. Estrada were nominated and confirmed. But unfortunately, that is not the way that things worked out.

That said, I would hope that Miguel Estrada would gain your support for confirmation this year. I believe that Miguel is a person of outstanding character, tremendous intellect, and with a deep commitment to the faithful application of precedent. I have known Miguel for 15 years, and have seen him in a variety of contexts and circumstances. Though Miguel is politically conservative, I support his confirmation for three reasons that go beyond those factors that are obvious on their face; *i.e.*, three reasons that go beyond his outstanding credentials, his intellect, and his incredible record of achievement as a lawyer.

First, Miguel is a serious lawyer who takes the law very seriously. Yes, Miguel has passionate views about legal policy and can be a strong advocate in a debate. But I have no doubt that, on the bench, Miguel will faithfully apply the precedents of his court, and the Supreme Court, without regard to his personal views or his political perspectives. His belief in the rule of law, in a limited judiciary, and in the separation of powers is too strong for him to act otherwise. He will not be one of those "conservatives" who gives speeches about judicial restraint, but then becomes an unabashed judicial activist on the bench. He will do his job as the law, the Constitution, and his duty requires. I do not think we can ask more of a judge on an intermediate appellate court.

Second, Miguel will rule justly toward all, without showing favor to any group or individual. When I worked on the Judiciary Committee staff, one of your colleagues once said to me, "Adversity in youth can affect potential judges one of two ways: it can make them compassionate towards those in need – feeling empathy for their plight – or it can make them cold-hearted – feeling as if 'I made it without help, so you can, too.'" Miguel is one of those individuals who falls firmly in the first category: the challenges that he has overcome in his life have made him genuinely compassionate, genuinely concerned for others, and genuinely devoted to helping those in need. In the political arena, Miguel favors very different policies than you and I do to achieve these ends. But his commitment to them is without question – and the fact that he would bring this commitment with him to the bench, in the dispensation of justice to all, is also without question. Those without means or without advantage will get a fair hearing from Miguel Estrada.

Third, Miguel will bring an independent streak to his judging, that may serve to surprise those who have nominated him – and I think will give every litigant, from any point of view, a fair chance to persuade Miguel of the rightness of his or her case. Make no mistake about it, Miguel is conservative, and in cases where those sorts of labels matter, is more likely to rule "that way" than the judges nominated to the D.C. Circuit by President Clinton. Miguel Estrada will not be "the David Souter" of the D.C. Circuit. But I do think that Miguel will be more independent, more open-minded, more likely to "break ranks" than other potential nominees of this conservative President. Miguel is a rigorous skeptic – and I have seen him be as skeptical about conservative shibboleths as liberal ones. He will ask tough questions of both sides, and give both sides a chance to win him over. This powerful intellectual quality is not unhinged from a compassion for people – rather, it is harnessed by Miguel in service of that compassion. It is a quality that will make Miguel a very fair judge.

In closing, I appreciate your consideration of this letter and the views expressed here. I wish you the best in trying to untangle the difficult mess that the confirmation process has become. And I hope you will see fit to support Miguel Estrada's confirmation when the Committee acts on that nomination.

With best wishes,

Sincerely,

Ronald A. Klain
of O'MELVENY & MYERS LLP

RK:csm

cc: Bruce Cohen
Helaine Greenfeld

DC1:496124.2
01/16/02

O'MELVENY & MYERS LLP
Strategic Counseling Group

Miguel:

I hope it does you justice.

I had a good chat with Sen. Leahy. This will work out well, I believe.

Let me know what else I can do.

Ron

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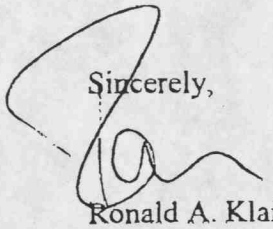

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