

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Email	Assertion... [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS] - To: Paul Colborn - From: Martha Pacold	2	05/30/2002	
002	List	Index to Unreleased Documents... [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS]	5	01/10/2014	
003	List	Index to Supplemental Release... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS]	1	01/10/2014	
004	Memorandum	Miguel Estrada... [6 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS]	6	N.D.	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

[Nominations] [Folder 2]

FRC ID:

9797

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
005	Letter	[Letter] [4 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS] - To: VPOTUS - From: Patrick Leahy	4	04/09/2002	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

[Nominations] [Folder 2]

FRC ID:

9797

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material **SUPERSEDED**

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Email	Assertion... - To: Paul Colborn - From: Martha Pacold	2	05/30/2002	P5;
002	List	Index to Unreleased Documents...	5	01/10/2014	P5;
003	List	Index to Supplemental Release...	1	01/10/2014	P5;
004	Memorandum	Miguel Estrada...	6	N.D.	P5;
005	Letter	[Letter] - To: VPOTUS - From: Patrick Leahy	4	04/09/2002	P5;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

[Nominations] [Folder 2]

FRC ID:

9797

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

THE WHITE HOUSE
WASHINGTON

June 12, 2002

Mr. Brett Kavanaugh

On Tuesday at the Southern Baptist Convention, they passed a resolution in support of the President's judicial nominations. With 16 million members, the Southern Baptist Convention is the largest Protestant denomination.

Warmly,



Tim Goeglein
Special Assistant to the President &
Deputy Director of Public Liaison

From: Martha Pacold
To: Paul Colborn
Date: May 30, 2002
Re: Assertion of Executive Privilege over Documents in Connection with Chief Justice Rehnquist's Nomination

On June 17, 1986, President Reagan nominated then-Justice Rehnquist to be Chief Justice. On July 23, Senator Thurmond, Chairman of the Senate Committee on the Judiciary, sent a document request letter to Attorney General Meese on behalf of Senator Biden, the ranking minority member of the Committee, and other Democratic members of the Committee. This memo describes the OLC documents requested, the initial negotiations over disclosure, the assertion of executive privilege, and the subsequent compromise under which the documents responsive to a narrowed request were made available for review.

Documents Requested

The letter requested "all memoranda, correspondence, and other materials" on certain subjects from 1969-71, when Chief Justice Rehnquist served as Assistant Attorney General for the Office of Legal Counsel. The subjects were: executive privilege; national security, including but not limited to domestic surveillance, anti-war demonstrators, wiretapping, reform of the classification system, the May Day demonstration, the Kent State killings, and the investigation of leaks; the nominations of Blackmun and Carswell to be Supreme Court justices; civil rights; and civil liberties. The letter requested all materials on these subjects designating then-Assistant Attorney General Rehnquist as a recipient, or prepared by him or his staff for his approval, or bearing his name/initials.

Initial Negotiations

After the Committee's July 23 request, the Department of Justice and the Judiciary Committee negotiated over disclosure, as reflected in a series of letters:

- On July 25, OLA Assistant Attorney General John Bolton replied to the July 23 request in a letter to Senator Thurmond, enclosing some of the requested materials. However, the Department withheld some nonpublic materials ("confidential memoranda, opinions, and other deliberative materials whose release would compromise OLC's continuing ability to provide objective legal advice to the executive branch") under a "long-standing policy" that it had "consistently taken . . . in response to Freedom of Information Act and other requests." These documents included both final memoranda signed by then-Assistant Attorney General Rehnquist and internal OLC memoranda from staff attorneys to Rehnquist.
- On July 29, Senator Biden requested that the Department of Justice reconsider its decision to withhold the confidential OLC documents.

- On July 30, John Bolton responded to Senator Biden's request in a letter explaining the Department's long-standing policy against releasing OLC memoranda, and enclosing a 1975 letter of then-Assistant Attorney General Scalia explaining this policy.

Assertion of Privilege

- On July 31, during testimony on the nomination before the Judiciary Committee, John Bolton stated that the President was asserting executive privilege over the requested materials. The reasons for this decision to assert privilege in the absence of a subpoena are unclear, but no documentation of the decision appears to exist other than Bolton's statement.
- Between the assertion of privilege and August 5, negotiations between the Department and the Judiciary Committee continued.

Subsequent Compromise

- On August 5, after several days of negotiations, the Department and the Judiciary Committee reached a compromise under which selected Committee staff members and senators could review in confidence the materials covering seven particular areas—the Committee having receded from its three broad requests for executive privilege, civil liberties, and civil rights documents. The seven areas were domestic surveillance by the military, wiretapping, mass arrests in connection with May Day antiwar demonstrations, the Kent State killings, reform of the classification system and investigation of leaks, Supreme Court nominations, and the Ellsberg matter. The documents made available for review are identified on the attached index.
- According to some accounts, the Department of Justice may have agreed to the arrangement because there were enough votes to force a subpoena or even delay the Rehnquist and Scalia confirmation proceedings. See Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability 120–21 (Johns Hopkins University Press 1994); Nadine Cohodas, Scalia Headed for Confirmation, Congressional Quarterly Weekly Report 1844 (August 9, 1986); Linda Greenhouse, Senate Unit Wins Access to Memos Rehnquist Wrote, New York Times A1 (August 6, 1986).
- On August 7, the Department sent an index of four additional documents to the Committee and stated that it would provide access to these documents under the terms of the agreement. These documents are identified on the attached index to the supplemental release. (Items 1–3 of the index were documents over which executive privilege was asserted on July 31, but which became subject to review by the Committee under the August 5 agreement. They were not included in the first set of materials provided under the agreement because they did not arrive from a Maryland records center until the late afternoon of August 6. Item 4 was not subject to privilege, but was included in the index because Senator Biden had requested it.)

Attachments (2)

INDEX TO UNRELEASED DOCUMENTS RESPONSIVE TO AUGUST 4, 1986 REQUEST

I. Laird v. Tatum -- military surveillance

1. 3/25/69 memo to the Attorney General from WHR:
"Draft memorandum to the President on Civil Disturbance Plan"

The memo describes a plan which covers four distinct chronological phases of a civil emergency. It provides certain procedures for coordination and planning for such an emergency, as well as suggestions for the use of federal troops by the President in response to requests for assistance in suppressing such a disturbance.

2. 12/14/70 memo to Kleindienst from WHR:
"Proposed DOD directive relating to civil disturbances"

This is a cover note to a draft letter to General Exton commenting on the legal aspects of the directive regarding the use of federal troops to control civil disturbances. Draft and final copies of letter are attached.

3. 3/17/71 memo to WHR from a staff attorney:
"Preparation for Second Senate Appearance March 17, 1971
Relating to Constitutional and Statutory Sources of
Investigative Authority in the Executive Branch."

The memo provides for WHR a quick summary of First Amendment cases relating to government investigations and the "chilling effect" on First Amendment rights.

II. Reform of the Classification System and Investigation of Leaks

1. 7/24/69 memo to Hoffman, Legis. and Legal Section from WHR:
"Legislative Program #142 -- Internal Security Division's
Proposal to Prohibit Transmission of Unclassified Strategic
Information."

This is a comment on proposed legislation to amend espionage laws allowing the President to reclassify certain information as vital to national security and prevent its release to certain foreign governments. The memo discusses legal problems with broad language and makes recommendations for further study.

2. 7/8/71 memo to John Dean from WHR in his position as Chairman, Interdepartmental Security Committee.

The memo discusses several executive orders dealing with access to classified information. Memo discusses the committee's recommendations re adoption of a "need to know" basis for allowing access to certain information and need for revision of relevant executive orders.

3. 7/8/71 cover memo to members of the Interdepartmental Security Committee from WHR.

This is a letter describing the various draft documents that have been circulated or written by the committee which cover the subject of access to classified information.

4. 6/24/71 OLC draft report from WHR:
"Report of Justice Department Working Group
Concerning Review of Security Procedures Pursuant to
NSSM-113"

The report examines the law and discusses the problems of how to prevent and punish unauthorized leaks of classified information.

5. 6/29/71 draft memo to WHR from staff attorney:
"Analysis of Defense Working Group Recommendations for
Amendment of E.O. 10501"

This is a legal analysis of suggested amendments to the Executive Order governing the system for classifying documents.

6. 8/10/71 draft memo to WHR from a staff attorney:
"Some Thoughts on Revision of E.O. 10501"

These are general comments on the goals of the administration to simplify the classification system and reduce the amount of classified material and delegating the authority to classify information.

7. 9/17/71 draft memo to WHR from a staff attorney:
"Potential Constitutional Problems Involved in Prosecutions
for Disclosing Classified Information."

Comment on a proposed misdemeanor statute which would punish the unauthorized release of information. The memo discusses the First Amendment problems with such criminal prosecution.

8. 1/7/71 memo to John Dean from WHR:
"Executive Authority to Classify Defense Information and Material and to Invoke Sanctions for Disclosure."

This memo reviews possible measures available to the government to punish people for leaking classified information, including a discussion of civil, criminal and administrative remedies, as well as Executive Order 10501, which describes the classification system.

9. 7/13/71 memo to Mardian from a staff attorney; copy to WHR:
"Possible Constitutional Defenses to be Asserted by Various Corporate Officers and Employees of Newspapers in Boston Grand Jury Investigation of the Publication of the Pentagon Papers."

This is a discussion of possible constitutional objections in response to a subpoena duces tecum that might be served on members of the press.

10. 2/3/71 memo to Mardian from WHR:
"Disclosures of Classified Information and Coordination and Clearance of Official Statements."

This memo forwards a classified memo prepared for the White House outlining steps that can be taken through agency regulation and procedures to safeguard classified information.

III. May Day Arrests

1. 10/5/71 draft memo to WHR from a staff attorney:
"Present posture of the Sullivan case in the District of Columbia Circuit."

The memo provides a history of the case so far, and a few suggestions as to legal motions that might be taken by the government to obtain a rehearing of the case.

2. 4/28/71 memo to DAG from WHR:
Re: May Day "What tactics on the part of law enforcement personnel are permissible to prevent the planned disruption of ingress and egress to Washington?"

Memo examines bases under D.C. and federal law for control of May Day demonstrations.

3. 4/28/71 draft memo to WHR from a staff attorney;
"Criminal Liability and Possible Injunctive Relief under
the Civil Rights Acts for the Planned May Day Disruptions
of Traffic."

The memo discusses the possibility of obtaining an injunction
against the upcoming May Day demonstrations.

IV. Kent State Killings

1. 8/26/71 letter to John Mitchell from Sen. Kennedy.

The letter confirms a request to investigate why
no grand jury was called for Kent State killings.

V. Judicial Nominations

1. 11/19/69 memo to Belew, White House, from WHR;
attaching memo with rebuttal re Judge Haynsworth
participation in Brunswick cases.

The attached memo discusses the background of allegations
that Judge Haynsworth acted improperly in participating in
post-judgment motions in the Brunswick case.

2. 4/20/70 memo to Landau from a staff attorney.

This memo summarizes the history of Senate opposition to
Supreme Court appointments on the basis of political philosophy.

VI. Wiretapping

1. 4/1/69 memo to John Dean from WHR:
"Summary of Memorandum re: Constitutional decisions Relating
to Criminal Law," with attachment, "Commission to Evaluate
Recent Constitutional Decisions in the Field of Criminal Law."

The memo contains a summary of Supreme Court cases dealing
with the constitutional rights of criminal defendants, including
cases on electronic surveillance, and discussing the
possible appointment of a commission to consider constitutional
changes.

2. 1/28/70 memo to William Ruckelshaus from WHR:
"Indemnification of Person Sued as a Result of their
Cooperation or Participation in FBI Electronic Surveillance."

The memo discusses recommendations made with respect to guaranteeing reimbursement to FBI agents and to private persons who are sued as a result of their participation in FBI electronic surveillance.

3. 2/4/70 memo to WHR from William Ruckelshaus:
"Payment by the United States to private parties involved in electronic surveillance activities with the Federal Bureau of Investigation."

This memo discusses reimbursement procedures as well as summarizes pending litigation concerning persons being sued for participation in FBI surveillance activities.

4. 1/26/70 memo to WHR from a staff attorney:
"Reimbursement of Persons Sued as a Result of their
Cooperation or Participation in FBI Electronic Surveillance."

This memo describes the various recommendations for reimbursing government employees and private parties who are sued as a result of their participation in FBI surveillance activities.

5. 2/20/70 memo to Ruckelshaus from WHR:
"Black v Sheraton Corp."

This memo responds to an inquiry about an OLC consideration of matters involved in Black, a suit about FBI surveillance.

VII. Ellsberg Matter

See documents numbers 7 and 9 in category II above.

INDEX TO SUPPLEMENTAL RELEASE TO SENATE JUDICIARY COMMITTEE

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

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

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

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

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

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

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

MIGUEL ESTRADA CRITIC PAUL BENDER

Miguel Estrada's principal critic is former Clinton Administration Principal Deputy Solicitor General Paul Bender, who has repeatedly attacked Estrada in the press, calling him an "ideologue" and questioning Miguel's judgment and ability to state the law in a neutral and fair way.

Bender is no stranger to political controversy because of his own extreme liberal views.

While serving as the "political deputy" from 1993 to 1996 in the Clinton Administration's Office of Solicitor General, Bender developed a reputation as a strident personality with strong liberal views. Reports of conflicts between Bender and career lawyers in the Clinton Solicitor General's Office were so widespread that appellate lawyers far outside of Washington began asking about the atmosphere in the office, and that about one-third of the assistants, including one 16-year career veteran, had left the office since Bender arrived. See Joan Biskupic, "Politics Still Plays a Role in Solicitor General's Office", *Washington Post*, February 22, 1994 at A1; Al Kamen, In the Loop, *Washington Post*, March 18, 1994 at A24.

Bender angered career attorneys shortly after arriving at the Department of Justice in 1993 when he demanded that the Department reverse its position that the Supreme Court should not hear a case involving an appeal by a transsexual inmate who claimed that federal prison officials subjected him to "cruel and unusual punishment" by transferring him to a prison where he was raped by another inmate. Bender argued that the Department should have supported the inmate's claim, causing career lawyers to warn that Bender's outlandish approach would expose prison officials to tremendous court liability. See Paul Barrett, "Solicitor General Appears High on List for Supreme Court Seat," *Wall Street Journal*, March 3, 1994 at B6.

In addition, Bender was the architect of the legal brief in a case (see below) which became a political embarrassment for the Clinton Administration and Reno Justice Department. Bender approved a brief filed with the United States Supreme Court in September 1993 in the case of United States v. Knox, which sought to overturn the conviction of a repeat child pornographer and known pedophile. See Jerry Seper, "Aide Blamed For Porn Law Proposal: Bender Has Long Sought Liberalization", *Washington Times*, November 19, 1993 at A1.

Nine of the ten current Democrat members of the Senate Judiciary Committee voted for resolutions condemning Bender's position on child pornography in the Knox case.

It would be the height of hypocrisy for Senate Democrats to rely on Bender's views of Estrada's qualifications for the federal bench, and to continue to repeat Bender's description of Estrada as "an ideologue", when all but one current member of that Committee has determined in the past that Bender's views were too liberal and too out of the mainstream for their own taste.

ESTRADA CRITIC PAUL BENDER

Background and Career: Paul Bender currently is a Professor of Law at the Arizona State University School of Law. He has been on the law school's faculty since 1997, when he returned to academia after serving as the Principal Deputy Solicitor General of the United States from 1993 to 1996. From 1984 to 1989, Bender served as the Dean of the Arizona State Law School, and from 1960 to 1984 was a law professor at the University of Pennsylvania Law School.

Bender's allegations against Estrada: Bender, who served as Deputy Solicitor General while Miguel Estrada was a line attorney in the Solicitor General's office, is the only former colleague to criticize Estrada publicly since his nomination on May 9, 2001. Bender has made the same criticisms repeatedly throughout the past year.

Bender has said that while he served as Principal Deputy, he never assigned Estrada cases involving the rights of women, homosexuals, or criminal defendants because he "didn't trust his judgment." Bender added that Estrada's "ideological viewpoints are very strong, similar to those of Scalia and Thomas...and that causes his judgment to be unbalanced." (Frater, "Tilting the Bench Farther to the Right", *National Journal*, May 19, 2001)

Bender also has said he found Estrada so "ideologically driven that he couldn't be trusted to state the law in a fair, neutral way." He alleged that "Miguel is smart and charming, but he is a right-wing ideologue. He has an agenda that's similar to Clarence Thomas'. I don't think it reflects the agenda of most Hispanics." (Savage, "Stakes Are High in Push for Latino Court Nominee" *Los Angeles Times*, April 11, 2002 at A1)

Bender is a liberal activist whose own extremist views on matters such as pornography make him completely unsuitable to judge Miguel Estrada's qualifications for the federal bench.

Bender has a thirty year history of pursuing a pro-pornography agenda, and has stated publicly that sexually explicit material should not be banned "any more than material about war, crime, housing, poetry and music." See Jerry Seper, "Aide Blamed For Porn Law Proposal: Bender Has Long Sought Liberalization", *Washington Times*, November 19, 1993 at A1.

In 1993, Bender pressed his pro-pornography agenda while serving as Principal Deputy Solicitor General in the Clinton Administration, forcing President Clinton, and the United States Congress (including nine of the ten current Democrat members of the Senate Judiciary Committee) to publicly reject his views.

- ✓ In a case which became a political embarrassment for the Clinton Administration and Reno Justice Department, Bender approved a brief filed with the United States Supreme Court in September 1993 which sought to overturn the conviction of a repeat child pornographer and known pedophile. See Jerry Seper, "Aide

Blamed For Porn Law Proposal: Bender Has Long Sought Liberalization'
Washington Times, November 19, 1993 at A1.

- ✓ Stephen Knox was charged (and later convicted) of receiving and possessing child pornography under the Child Protection Act ("CPA") after the U.S. Customs Service found in Knox's apartment several videotapes of partially-clad girls (some as young as age ten) wearing bathing suits, leotards or underwear in sexually seductive poses with close-ups shots of their genitals. See United States v. Knox, 776 F.Supp. 174 (M.D.PA 1991).
- ✓ The Bender brief sought to reverse the previous Bush Administration's policy of liberally interpreting the CPA to define as child pornography any materials which showed clothed, but suggestively posed young children.
- ✓ In that brief and in a subsequent brief filed when the case was remanded to the Third Circuit, Bender and Solicitor General Drew Days argued that the plain language of the CPA allowed a conviction for child pornography only if the genitals or pubic area exhibited are at least somewhat visible or discernible through the child's clothing. See Knox v. United States, 32 F.3d 733 (3d Cir. 1994).
- ✓ On November 3, 1993, the United States Senate voted 100-0 for a resolution to reject Bender's position in the case. Current members who voted for the resolution included Senators Leahy, Kennedy, Biden, Feingold, Feinstein, and Kohl. See *Congressional Record*, November 3, 1993, roll call vote n.350 on amendment n.1098 at p.S15019.
- ✓ Upon learning of the Justice Department's position in the case and after the Senate voted unanimously to denounce it, **President Clinton wrote to Attorney General Reno in November 1993 to argue that the Department's new interpretation of the CPA left the child pornography law too narrow and emphasized that he wanted "the broadest possible protections against child pornography and exploitation."** See Michael Isikoff and Ruth Marcus, "Clinton Enters Child Pornography Dispute," *Washington Post*, November 12, 1993 at A1.
- ✓ The House later voted 425-3 in 1994 to condemn the Department's position, finding that Bender's argument would "bring back commercial child pornography and lead to a substantial increase of sexual exploitation of children." Then-Representatives Cantwell, Durbin, Schumer, Torricelli and Tim Johnson all voted for the resolution. See *Congressional Record*, roll call vote 133, April 20, 1994 at p.H2538.
- ✓ After Congressional pressure and the rebuke by President Clinton, Attorney General Reno later reversed Bender's position, and filed her own brief which

restored the Bush Administration interpretation of the CPA. See Pierre Thomas, "Reno Takes Tougher Stance on Child Pornography", *Washington Post*, November 11, 1994 at A3.

In 1977, Bender testified against tough anti-child pornography laws at a Senate Judiciary Committee hearing entitled "Protection of Children Against Sexual Exploitation."

- ✓ According to Bender's testimony, he rejected the notion that Congress could prohibit child pornography in order to protect children from harm because "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..." See "Protecting Children Against Sexual Exploitation," Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 95th Congress, 1st Session, May 27, 1977 at p.105.
- ✓ Bender testified that in order to prohibit child pornography and not run afoul of the First Amendment, "you would have to have a finding, based on evidence, that in fact, the distribution of this type of film substantially increases the incidence of child abuse before you could possibly support the constitutionality of [new laws prohibiting child pornography.]" *Id.*
- ✓ Bender noted that in his experience "the estimates of the size of the pornography problem are usually much, much too large." *Id.* at p.111.
- ✓ Bender concluded that he "could not find any discernible harm to children from being exposed to explicit sexual materials as children....the harms that we found to children who were exposed to these things were harms that flowed, not from the materials, but from the social settings in which they saw them." *Id.* at p.112.

From 1968 to 1970, Bender served as the controversial Chief Counsel to the President's Commission on Obscenity and Pornography, and his pro-pornography views were again roundly rejected by the United States Senate.

- ✓ Bender was the architect of the Commission's report which 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 included no exception to this decriminalization for child pornography. See The Report of the Commission on Obscenity and Pornography, September 30, 1970 at p.57 ("Bender Report").
- ✓ Dissenting members of the Commission described the Bender Report as "a Magna Carta for the pornographer." See The Report of the Commission on Obscenity and Pornography, Statement of Dissenting Commissioners Hill, Link and Keating,

September 30, 1970 at p.456 ("Dissenting Report")

- ✓ The dissenters also noted that Bender's views coincided with those of the American Civil Liberties Union, and its sister organization, the Philadelphia Civil Liberties Organization, of which Bender was a member. They argued that "the two million dollars voted by Congress have gone primarily to "scholars" who would return conclusions amenable to the extreme minority views of Mr. Lockhart [Commission Chairman], Mr. Bender and the ACLU." (Dissenting Report at p.458).
- ✓ In 1970, the Senate voted 60-5 for a resolution which rejected the Commission's report and recommendations, with nine additional Senators announcing that if they had been present, they would have supported the resolution. Current members of the Senate voting for the resolution included Senators Byrd, Hollings, Inouye, Stevens and Thurmond. No current member supported Bender's views. *See Congressional Record*, October 13, 1970 at p.36478.
- ✓ One Democrat Senator noted during the debate that "the Congress might just as 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." *See Congressional Record*, October 13, 1970 at p.36460 (Statement of Senator McClellan, D-AR).

Given Bender's history of promoting pornography, including child pornography, and the fact that nine current Democrat members of the Senate Judiciary Committee have voted to condemn his views in the past, it would be curious if these Committee members now are willing to rely on Mr. Bender to provide an unbiased, politically-neutral view of Miguel Estrada's qualifications for the federal bench.

In addition to Bender's controversial views on pornography, he has taken extreme liberal positions in other matters:

- ✓ Bender in 1998 argued that convicted murderer James Hamm should be admitted as a member of the Arizona Bar.

Hamm was convicted in 1974 and sentenced to 25 years to life after pleading guilty to killing a Tucson, Arizona man during a drug deal.

Bender, who taught Hamm constitutional law at Arizona State Law School, called Hamm "a poster boy for rehabilitation in prison" and argued that he should be admitted to the bar because "he's not going to steal from clients or file frivolous suits." *See Lisa Brennan, "Arizona State Law Grad's Bar Admission Faces Opposition," National Law Journal*, January 19, 1998 at A6.

- ✓ Bender also sits on the advisory board of the Coalition of Arizonans to Abolish the Death Penalty, a group whose membership includes such noted liberals as authors Barbara Kingsolver, Nancy Mairs and Leslie Marmon Silko, anthropologist Brackette Williams, homeless advocates Nancy Bissell and Gordon Packard, and singer Linda Ronstadt. See www.caadp.org/advisoryboard.htm

Bender is the only former member of the Clinton Administration familiar with his record who has criticized Miguel Estrada. In fact, most everyone has praised Estrada's record and qualifications for the federal bench:

- ✓ **Ronald Klain, Chief of Staff to Vice President Al Gore:**

"Ronald Klain, who was chief of staff to Vice President Al Gore and has known Estrada since Harvard, said Estrada would be able to 'faithfully follow the law.'" (*Washington Post*, p. A31, May 23, 2001.)

- ✓ **Drew Days III, served with Mr. Estrada in the Clinton Justice Department:**

"I think he's a superb lawyer." *Legal Times*, 5/14/01

- ✓ **Seth Waxman, Solicitor General under President Clinton**

Called Estrada an "exceptionally well-qualified appellate advocate." *The Washington Post*, 5/23/01.

- ✓ **Randolph Moss, Clinton Administration Chief of the Justice Department's Office of Legal Counsel**

"I write to express my strong support for the nomination of Miguel Estrada to the United States Court of Appeals for the District of Columbia ... Although I am a Democrat and Miguel 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." (*Excerpt from Letter to the Senate Judiciary Committee, May 18, 2001*).

"Randolph Moss, who clerked for Justice John Paul Stevens while Estrada clerked for Kennedy, says he 'did not find Estrada at all divisive. He was always an extremely principled guy, very honest and ethical. I worked amicably with him.'" (*Legal Times*, p. 1, June 25, 2001.)

- ✓ **Robert S. Litt, Deputy Assistant Attorney General in the Clinton Justice Department**

"Miguel has an absolutely brilliant mind. He is a superb analytical lawyer and he's an outstanding oral advocate." (*Washington Post*, p. A31, May 23, 2001.)

THE WHITE HOUSE
WASHINGTON

April 25, 2002

Dear Senators Feinstein and Boxer:

Thank you for your April 17 letter about the judicial vacancy crisis in the Ninth Circuit. Thank you also for forwarding the names of three candidates for the Ninth Circuit. We had already begun evaluating those individuals, as well as several others.

I share your concern about "a Circuit already facing heavy caseloads and complex appeals." As you know, three Ninth Circuit vacancies have existed since President Bush took office (two slated for California and one for Hawaii). A fourth vacancy occurred this year (slated for Nevada). All of the current Ninth Circuit vacancies have been classified as "judicial emergencies" by the Judicial Conference of the United States.

I appreciate your informing me of the impending fifth vacancy in the Ninth Circuit due to Judge Fernandez's retirement (again slated for California). This will leave the Ninth Circuit with only 23 active judges on a 28-judge court. And the workload crisis on the court is even more serious than the numbers reflect. The Judicial Conference has asked for two new permanent and three temporary judges on the Ninth Circuit to help cope with the caseload -- thus, a total of 33 that are needed according to the Judicial Conference. In light of the Judicial Conference's proposals, the Ninth Circuit needs a nearly 50% increase in the number of active judges.

The President has responded to the Ninth Circuit vacancy crisis in the same decisive manner that he has responded to the national judicial vacancy crisis. Nearly a year ago, he submitted two nominations, Judge Carolyn Kuhl of California and Richard Clifton of Hawaii. For the new vacancy slated for Nevada, following our consultations with Senators Reid and Ensign, the President soon will be moving forward on an excellent nominee. We also had discussed with you last year a fourth potential Ninth Circuit nominee, Congressman Chris Cox of California. Finally, the President also intends to move forward expeditiously on the vacancy created by Judge Fernandez's retirement.

Despite the crisis in the Ninth Circuit, President Bush's pending nominees for that Circuit -- Judge Kuhl and Mr. Clifton -- have now waited more than 10 months for hearings before the Senate Judiciary Committee. The delay has occurred notwithstanding the fact that Judge Kuhl and Mr. Clifton, like all of the President's circuit court nominees, are mainstream candidates with superb qualifications, experience, character, and integrity. Indeed, Judge Kuhl received a well-qualified rating and Mr. Clifton a qualified rating from the American Bar Association. A year ago, as you know, Senators Leahy and Schumer referred to the ABA rating as the "gold standard" for evaluating judicial nominees.

Because Judge Kuhl is a pending nominee from your State, we respectfully request that Senator Boxer return the "blue slip" as Senator Feinstein has done and that you both ask Chairman Leahy to schedule a hearing and vote for Judge Kuhl. Judge Kuhl is particularly deserving of your support, in my judgment, given her extensive experience in federal and state government, in the Executive and Judicial Branches, in public service and private legal practice. She is a woman of character and accomplishment. Judge Kuhl has a combination of intellect, experience, and character that makes her ideally suited to be an excellent circuit judge.

Given her record, it is no surprise that Judge Kuhl has garnered bipartisan support from California and national leaders. Those supporters include people you know well: Vilma Martinez, who is an accomplished and nationally respected California attorney and is a past President of the Mexican American Legal Defense and Education Fund; Walter Dellinger, who was head of the Office of Legal Counsel and Acting Solicitor General under President Clinton; Ron Olson, who is a renowned attorney and partner at Munger Tolles & Olson in Los Angeles; and Rex Heinke, President of the Los Angeles County Bar Association.

We understand that certain special interest groups have raised questions about Judge Kuhl -- particularly her position on abortion rights. We do not know Judge Kuhl's policy views or moral views on abortion. As I advised Senator Feinstein, we do not ask nominees their personal views on this issue. But regardless of what her views are, we are confident that she would faithfully apply precedent as a circuit judge. Indeed, in the questionnaire she submitted to you last year, Judge Kuhl wrote as follows:

The constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been established by both *Roe v. Wade* and *Planned Parenthood v. Casey* [citations omitted]. As a judge I am fully committed to following the precedent established by these cases and would do so fairly and properly. As I told you in our meeting and told Senator Feinstein in my meeting with her, as a judge I am and would be pro-choice in the sense that I am fully committed to following the state laws that protect a woman's right to have an abortion and Supreme Court precedent stating that a woman's right to choose to have an abortion is protected under the Constitution.

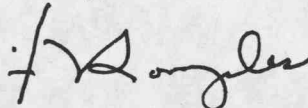
We believe that Judge Kuhl's statement fully and persuasively addresses any legitimate question whether she would follow precedent as a circuit judge.

The Senate's delay with respect to Judge Kuhl is especially unfortunate because Judge Kuhl took the extraordinary step in 1998 of writing to then-Chairman Hatch to support a hearing for Judge Richard Paez, one of President Clinton's nominees who had not received a prompt hearing and vote. This episode, of course, is just one of many examples in Judge Kuhl's career where she has shown herself to be concerned with law and process.

To the extent that there are additional issues regarding Judge Kuhl, we respectfully suggest that a hearing is the proper forum in which to air and address them. As the President stated last May 9, and as the Chief Justice requested "on behalf of the judiciary" in his annual report, all judicial nominees should receive a prompt hearing and vote in the Senate.

Thank you again for your letter, and I look forward to working with you to resolve the judicial vacancy crisis in the Ninth Circuit and in the federal courts more generally.

Sincerely,

A handwritten signature in dark ink, appearing to read "A. Gonzales", with a stylized initial "A" and a long, sweeping underline.

Alberto R. Gonzales
Counsel to the President

The Honorable Dianne Feinstein
The Honorable Barbara Boxer
United States Senate
Washington, DC 20510

cc: The Honorable Patrick Leahy
The Honorable Orrin Hatch
The Honorable Daniel Inouye
The Honorable Daniel Akaka
The Honorable Harry Reid
The Honorable John Ensign
The Honorable John McCain
The Honorable Jon Kyl
The Honorable Patty Murray
The Honorable Maria Cantwell
The Honorable Larry Craig
The Honorable Mike Crapo
The Honorable Gordon Smith
The Honorable Ron Wyden
The Honorable Ted Stevens
The Honorable Frank Murkowski



United States Senate
WASHINGTON, DC 20510-0504
<http://feinstein.senate.gov>

April 17, 2002

Honorable Alberto Gonzalez
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Judge Gonzalez,

This letter is to offer our assistance to you in quickly selecting well qualified, moderate nominees to fill the current vacancies in the Ninth Circuit Court of Appeals.

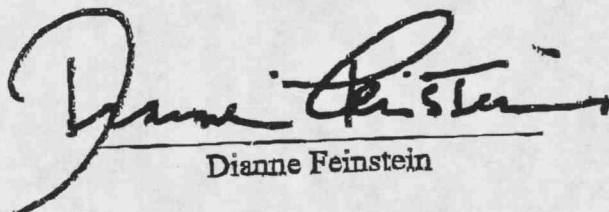
It has come to our attention that Judge Ferdinand Fernandez of the Ninth Circuit Court of Appeals will be retiring on June 1, 2002. His retirement will leave a third vacant California spot in a Circuit already facing heavy caseloads and complex appeals.

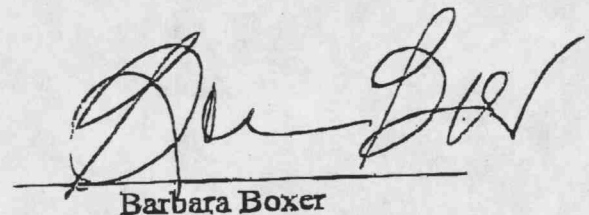
Our judicial advisory committees have been working well to vet and forward qualified, broadly supported nominees for the federal District Courts in California – in fact, the first two of those nominees will likely receive votes in the Judiciary Committee this week. We appreciate the time and effort you have put in to make these committees work, and we look forward to continuing to work with you on seeing that nominees coming out of these committees with such strong bipartisan support swiftly move through the Senate confirmation process.

While our advisory committees do not cover nominees to the Court of Appeals, we believe that a cooperative model offers the best opportunity to successfully nominate and pass qualified candidates to the Ninth Circuit bench.

California has a number of highly qualified, moderate candidates that would be excellent additions to the Ninth Circuit. Judge Irma Gonzalez of the Southern District of California, Judge David Levi of the Eastern District of California, and Milan Smith, a distinguished attorney (and, incidentally, Senator Gordon Smith's brother) are just three of many examples of individuals you might want to consider for these vacancies. Working together, it is our hope that we can all join in support of Circuit Court nominees that will enjoy an expeditious confirmation process. We look forward to working with you in this regard.

Sincerely,


Dianne Feinstein


Barbara Boxer

EDWARD M. KENNEDY, MASSACHUSETTS
JOSEPH R. BIDEN, JR., DELAWARE
HERBERT KOHL, WISCONSIN
DIANNE FEINSTEIN, CALIFORNIA
RUSSELL D. FEINGOLD, WISCONSIN
CHARLES E. SCHUMER, NEW YORK
RICHARD J. DURBIN, ILLINOIS
MARIA CANTWELL, WASHINGTON
JOHN EDWARDS, NORTH CAROLINA

ORRIN G. HATCH, UTAH
STROM THURMOND, SOUTH CAROLINA
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
JON KYL, ARIZONA
MIKE DEWINE, OHIO
JEFF SESSIONS, ALABAMA
SAM BROWNBACK, KANSAS
MITCH MCCONNELL, KENTUCKY

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

April 9, 2002

The Honorable Richard Cheney
Vice President of the United States
United States Capitol
Washington, D.C. 20510

Dear Dick,

I saw a news report that you used the occasion of a groundbreaking at the Prettyman Courthouse to scold the Senate and criticize the progress we are making on filling judicial vacancies. You reportedly complained that the Senate is not keeping up with attrition. While that criticism may have been valid in the past, it is not appropriate since the change in majority last summer.

It is true that from January, 1995, when Republicans assumed majority control of the Senate until last summer when they relinquished it, vacancies in our federal courts rose from 63 to 110, an increase of almost 75 percent. But since the change in the Senate majority, we have been working hard to help fill judicial vacancies, and we have begun to reverse that trend. We have been able to keep up with a high level of attrition and, in fact, reduce the judicial vacancies by almost 15 percent in fewer than 10 months.

Because of Senate inaction over the six and one-half years that preceded the change in majority, we are faced with multiple vacancies in a number of Circuits. Indeed, vacancies on the Courts of Appeals grew under the Republican Senate majority from 17 to 33, nearly doubling. Since the change in majority, an additional five vacancies have arisen on the Courts of Appeals but we have, nonetheless, been able to outpace attrition and to reduce what had been a growing number of Circuit Court vacancies under the Republican majority.

It was not until July 10, 2001, that new members were assigned to the Judiciary Committee following a delayed reorganization of the Senate, when vacancies stood at 110. Since that time, the Senate has confirmed 42 judges nominated by President Bush. That total has been achieved in fewer than 10 months. It exceeds the year-long totals for 1996, 1997, 1999 and 2000 - four of the six years in which Republicans most recently controlled the Senate. It exceeds the annual average for the six and one-half years of Republican control.

What to write to him

JULIAN A. WILSON TO SENATOR

- honorable of members for

THAN STATION 4 JOURNAL

*INANCE
VACANCIES
S.
NOV*

*# VACANCIES
AS OF 4
SUM/
REASON*

*9.5 LIA,
ND 60
for form
IN
NON-RECEIVED*

The Honorable Richard Cheney
April 9, 2002
Page Two

During Republican control of the Senate, in 76 months the Senate confirmed only 46 Court of Appeals judges. During the first nine months of Democratic control of the Senate, seven judges were confirmed to our Courts of Appeals and a total of 10 Court of Appeals nominees participated in hearings.

I expect the Judiciary Committee to report additional nominees to the Senate this week from the hearing held just before the Easter recess, and I have scheduled another hearing for seven more judicial nominees this week. I am continuing to work to help fill judicial vacancies left after six and one-half years of Republican control of the Senate as well as those currently arising through attrition.

I am familiar with the circumstances in the D.C. Circuit over the last several years during which Allen Snyder was accorded a hearing but never scheduled for a Committee vote and Elena Kagan was never accorded a hearing. Indeed, only one vacancy in the D.C. Circuit has been filled since 1995 – in 1997, after the nomination had been pending more than 17 months.

3 Clinton
Nelson,
Drew,
Ginsburg

I am familiar with the circumstances in the Sixth Circuit and with Judge Merritt's warnings over the last several years that these circumstances would arise if the Senate did not act. In spite of all of my efforts to obtain hearings and action in 1999 and 2000, the Committee and Republican Senate leadership would not act on either of the two nominees from Michigan – one of whom set a record by never being accorded a hearing over a span of more than four years, and the other, the daughter of a former Solicitor General and Court of Appeals Judge – nor on the Ohio nominee, a law professor and long-time public servant, with significant bipartisan support.

There are many problems that have grown over time. The Senate cannot remedy them all simultaneously, immediately or unilaterally. Frankly, many continue to require White House cooperation, which continues to be lacking.

Consider, for example, the Fifth Circuit. Since 1999, Chief Judge King of the Fifth Circuit has declared a state of emergency in the Circuit – such that the hearing and determination of cases and controversies could be conducted by panels of three judges selected without regard to the qualification in 28 U.S.C. § 46(b) that a majority of each panel be composed of judges of the Fifth Circuit. The nominations hearing I convened last fall for Judge Clement was the first hearing for a nominee to the Fifth Circuit in six years. She was the first judge confirmed to the Fifth Circuit in seven years. As you know, Judge Clement was among the first nominees named by the President after he withdrew all pending judicial nominations in March, 2001.

But see
Hickman

Similarly, the Senate proceeded promptly last summer after the change in majority to confirm Judge Gregory to the Fourth Circuit. We proceeded to confirm Judges Riley and Melloy to the Eighth Circuit, and Judge Hartz to the Tenth Circuit – all Circuits with multiple vacancies.

But see
Shedd
Boyle

The Honorable Richard Cheney
April 9, 2002
Page Three

The Senate confirmed Judge Parker to the Second Circuit and Judge Prost to the Federal Circuit as well.

We have proceeded with hearings on Judge Pickering to the Fifth Circuit, Judge Smith to the Third Circuit and Judge O'Brien to the Tenth Circuit. We will have a hearing including Jeffrey Howard, the President's nominee to fill a vacancy on the First Circuit, this week.

As I seek to accommodate Republican Senators' requests, I get whipsawed by criticism from the Administration. The first five Court of Appeals nominees on which we have held hearings this year were all to accommodate Republican Senators. We have held hearings on Judge Melloy, at the request of Senator Grassley; Judge Smith, at the request of Senator Specter; Judge O'Brien at the request of Senator Enzi; and held a followup hearing for Judge Pickering, who was strongly supported by Senator Lott. This week's hearing for Mr. Howard is at the request of Senator Smith.

(N25 IN
2 N25
SMES

As I have noted, there are many problems among the Circuit and District Courts that have grown over time. Yet, as we move forward to solve problems, all we hear are complaints about other vacancies, without any acknowledgment of the progress we have been making. That is not contributing to changing the partisan tone or helping to fill judicial vacancies.

We can accomplish a great deal more by working together. Our task is complicated when the Administration chooses not to work with home-state Senators and when it sends nominations that divide instead of unite the American people and the Senate. The Executive Branch may view its responsibility narrowly as merely to nominate. I urge you to work with all Senators so that we can have greater consensus with regard to these important nominations and they can be confirmed and appointed expeditiously. One of the lessons of the last year is that consensus nominees are considered and confirmed more quickly.

The Administration has yet to nominate anyone for 38 of the current vacancies or for 17 of the judicial emergency vacancies. Many of the nominations the Administration has made lack the support of home-state Senators and many made this year still lack an ABA peer review. When the Administration decided to change the 50-year tradition of ABA involvement early in the selection process, it unnecessarily extended the time that nominations must now remain pending before the Committee while we await those peer reviews.

(N25 IN
726

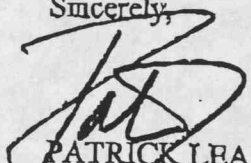
In spite of all the difficulties, the Senate Judiciary Committee is now holding more hearings for more nominees, and the Senate is confirming them faster than when the Senate was controlled by a Republican majority.

The Honorable Richard Cheney
April 9, 2002
Page Four

In the last five months of last year, the Senate confirmed more judges, including more Court of Appeals judges, than in the first year of the first Bush Administration and more judges and many more Court of Appeals judges than were confirmed in all of 1996, when a Republican Senate majority would only act on 17 District Court nominees and not a single nominee to the Courts of Appeals was confirmed. We are continuing to consider judicial nominees at a faster pace than the Republican majority. During the first three months of this year, the Senate has already confirmed another 14 Circuit and district judges, a total not reached by the end of March during any of the six and one-half preceding years of a Republican majority.

It is regrettable to see more and more evidence that Republicans are choosing to make this matter one for political gamesmanship and fundraising. Working together the Administration and the Senate could go a long way to ending the longstanding vacancies crisis with the appointment of consensus nominees.

Sincerely,


PATRICK LEAHY
Chairman

Dick - We should be
working together on this -
your administration is doing
better on judges than
you know. You call.


EXEC. OFC. PRESIDENT
COUNSEL TO THE PRESIDENT
United States Senate
WASHINGTON, DC 20510
2002 MAR 18 PM 3:41

March 11, 2002

BRETT

From: Patrick

Alberto Gonzales
Counsel to the President
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Judge Gonzales:

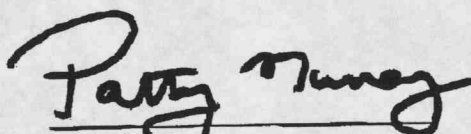
We were pleased to receive your letter of March 5, confirming that you have come to agree to the use of a bipartisan commission process for identifying and evaluating candidates for future vacancies on the federal bench in Washington state. As we have stated repeatedly, we are confident that a bipartisan commission that recommends nominees by a majority vote will produce excellent candidates for nomination.

With regard to the current pending vacancy in Tacoma, we will promptly assemble a group of experienced attorneys and community leaders to evaluate candidates, including Ronald Leighton. We will furnish the White House with our thoughts and recommendations accordingly.

With regard to future vacancies, a bipartisan commission of respected attorneys and community leaders would be assembled with ourselves appointing one half of a six member commission, and the White House or its designee appointing the other half of the members. In order to be recommended by the commission, candidates would need to receive the support of the majority of the members. We then will interview the candidates and forward recommendations to the White House. With regard to the preservation of rights and execution of responsibilities articulated in your letter, we agree.

It is our understanding that this process shall remain in place through the duration of the Bush Administration.

Sincerely,



Patty Murray
United States Senator



Maria Cantwell
United States Senator

United States Senate

WASHINGTON, DC 20510

November 15, 2001

The Honorable Thomas Daschle
Majority Leader
United States Senate
S221 The Capitol
Washington, D.C. 20510

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Majority Leader and Mr. Chairman:

As the entire Senate Republican Conference, we write to request that the Judiciary Committee schedule hearings at the earliest opportunity for Miguel Estrada and John Roberts, nominees for judgeships on the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Estrada and Mr. Roberts were among the first group of judicial nominees submitted by President Bush on May 9, 2001; they and six other impeccably qualified Circuit Court nominees submitted that day have now waited over six months for their confirmation hearings.

Mr. Estrada is an outstanding candidate for appointment to the federal appellate bench. His impressive record of professional and academic accomplishments includes distinguished service as an Assistant to the Solicitor General of the United States, as an Assistant United States Attorney for the Department of Justice, and as a law clerk both to Judge Amalya Kearse of the Second Circuit and to Supreme Court Justice Anthony Kennedy. In private practice, Mr. Estrada has earned his reputation as a top-notch advocate among the elite appellate bar in Washington, D.C. In sum, his resume reflects accomplishment in nearly all aspects of the law, including government and private sector achievement and both trial and appellate excellence.

Mr. Estrada's career accomplishments are particularly remarkable in light of his personal experience as an immigrant to this country. Born in Tegucigalpa, Honduras, Mr. Estrada immigrated to the United States as a teenager. Speaking virtually no English upon arrival, Mr. Estrada went on to graduate Phi Beta Kappa from Columbia College and finished at the top of his Harvard Law School class.

Our view of Mr. Estrada's qualifications and reputation is evidently shared by the American Bar Association Standing Committee on the Federal Judiciary, which voted Mr. Estrada unanimously *Well Qualified* for appointment to the D.C. Circuit over four months ago on July 9, 2001. In addition, Mr. Estrada's legal skills also have been recognized by prominent attorneys who served with him in the Justice Department during the Clinton Administration, such as Seth Waxman and Robert Litt.

Mr. Estrada's reputation for excellence is also shared by many other organizations representing the interests of Hispanic constituencies whose heritage he shares. Mr. Estrada has received significant support from key groups such as the League of United Latin American Citizens, the U.S. Hispanic Chamber of Commerce, and the Hispanic Business Roundtable. Copies of letters of support from these and other important organizations are also enclosed.

Finally, we are excited about the historic nature of Mr. Estrada's nomination. If confirmed, he would be the first Hispanic-American to sit on the D.C. Circuit, widely recognized as the second most important appellate tribunal in the country. As noted by Rafael Santiago, National President of the Hispanic National Bar Association: "It is encouraging that President Bush has started tapping the substantial pool of Hispanic legal talent throughout the country. Mr. Estrada's confirmation will break new ground for Hispanics in the judiciary. The time has come to move on Mr. Estrada's nomination."

In light of his extraordinary legal skills, we also believe that John Roberts deserves prompt consideration by the Judiciary Committee. As one leading Washington attorney commented: "If you called into central casting for the perfect appellate judge, this is who they'd send." Indeed, Mr. Roberts is one of the leading Supreme Court litigators in the nation, having argued 33 cases before that court. He has also argued dozens of cases before the Courts of Appeals around the country. His resume reflects an unmatched record of success and achievement, including degrees with numerous honors from Harvard College and Harvard Law School, clerkships with Judge Henry Friendly on the U.S. Court of Appeals for Second Circuit in 1979-1980 and with then-Associate Justice William H. Rehnquist on the Supreme Court of the United States in 1980-81.

Like Mr. Estrada, Mr. Roberts has honed his skills both in government service, as Special Assistant to Attorney General William French Smith, Associate Counsel to President Reagan, and Principal Deputy Solicitor General of the United States from 1989 to 1993, and in private practice at the prestigious firm of Hogan & Hartson from 1986-89 and since 1993.

Mr. Roberts will bring to the bench the type of experience that only a lifetime of appellate advocacy can bring. He has argued cases on both "sides" of many constitutional and statutory issues. He has represented criminal defendants and the government trying to prosecute criminals. He both has defended the government against First Amendment claims and made such claims for private clients against the government. He has advocated for and against civil rights claimants, bankruptcy creditors, antitrust defendants, and native populations. He has argued on varying sides of procedural issues such as preemption and standing. He is, in short, a lawyer's lawyer and would immediately become a leader on the D.C. Circuit. It was thus no surprise when he, like Mr. Estrada, received an unanimously *Well Qualified* rating from the ABA Standing Committee on the Federal Judiciary on June 20, 2001.

The Republican Conference thanks you both for your prompt assistance with this request. We look forward to working together on these most important nominations.

Sincerely,

Don Mills Phil Muen Don Mills

Don Ky L Phil Muen John Eng

11/13/01 Nonmember

Matt McConnell Phil Muen Alan Perts

Ing Chang Craig Thomas George Allen

Walt Dessen Ed Voad C. J. Chy

Susan Collins Michael B. G. John Warner

Test Lett Wayne Allard Jim Bunning

Paul Hany Art Bond Josh H. Mullen

Richard Shelby Byrd John Carl

Jefferson W. H. H. H. John

John Robert John Helm

John John John John

Strom W. H. H. H. F. H. H. H.

Sam John John John

John John John John

John John John John

Richard John

Brett

THE WHITE HOUSE

WASHINGTON

March 5, 2002

The Honorable Patty Murray
The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senator Murray and Senator Cantwell:

I write to continue our discussions about the nomination of district court judges in the State of Washington.

To begin with, I regret that Senator Cantwell was called away on Senate business on February 13, but I want to thank Senator Murray for taking the time to meet with me that day. As I said to Senator Murray, I continue to believe that we can find common ground regarding President Bush's nomination of district court judges in Washington. Several district court judges in Washington are eligible for senior status or retirement over the next three years. We owe it to the people of the State of Washington and of the United States both to assist the President's effort to nominate judges of the highest quality for district court vacancies in Washington and to ensure the swift confirmation of qualified nominees. I know that you agree.

You have expressed your disagreement about the process by which Ronald Leighton was selected for nomination by President Bush for the one current vacancy in Washington. I respectfully ask that you put aside your process concerns for a moment, and examine Mr. Leighton's qualifications. Mr. Leighton is widely respected and supported in Washington by persons of various political, legal, and ideological perspectives. As you know, he was first nominated to this court a decade ago, but unfortunately never received a hearing during that Presidential election year. We are confident that Mr. Leighton's experience, reputation for fairness, and temperament will satisfy the Senate that he is highly qualified for this seat.

Respectfully, I request that you meet with Mr. Leighton and, if you so desire, select a group of experienced attorneys in Washington who also can interview him and evaluate his qualifications on your behalf. These meetings would be highly useful, we believe, in assuring you that Mr. Leighton is a highly qualified nominee who warrants swift Senate confirmation.

As to future vacancies, you have requested that a bipartisan commission be established to evaluate applicants for district court seats. I will not repeat in detail here my general reservations concerning the effectiveness of such commissions. But as an accommodation to you, and in recognition of recent practice in the State of Washington, we have agreed — and now reiterate our agreement — to your request for a bipartisan commission for evaluating future Washington district court applicants. In a previous meeting, you said that as a function of properly discharging your responsibility as a Senator you must reserve the right to reject any name

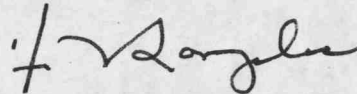
March 5, 2002

Page Two

approved by such a commission. In that same meeting, I said that for constitutional reasons the President must likewise reserve the right to look beyond the names approved by the commission. Thus, all parties have agreed that the commission can be a source for identifying and evaluating candidates. Consistent with our discussions about the constitutional roles of the President and the Senate, I also propose that neither the President nor you be bound to adhere to the commission's evaluations in all instances.

We look forward to your response and to finding common ground. Thank you for the time you have spent working with us on this important issue.

Sincerely,

A handwritten signature in dark ink, appearing to read "A. Gonzales", with a stylized flourish at the end.

Alberto R. Gonzales
Counsel to the President

cc: The Honorable Patrick Leahy
The Honorable Orrin Hatch
The Honorable Jennifer Dunn

THE WHITE HOUSE

WASHINGTON

February 5, 2002

See attached list
Dear Senator ~~Allard~~:

I understand that at last week's retreat, many Senators asked questions about the status of judicial appointments. In response, I wanted to provide you the latest information.

Today, there are 99 vacancies in the federal courts (out of 853 judgeships), which is 12% of the federal judiciary. Chief Justice Rehnquist recently warned that the "alarming number" of vacancies hinders the federal judiciary's ability to dispense justice and serve the American people. To respond to the vacancy crisis, the President has nominated judges at a record pace, 90 to date, which is more than any previous President had nominated by this point in the Presidency.

However, the Senate has thus far voted on only 31 of the 90 nominees. The pace of Senate votes on judicial nominees has been disappointing in light of the high number of vacancies and pending nominees. For that reason, the Chief Justice has expressly asked the Senate to vote promptly on the President's judicial nominees. And as President Bush begins his second year in office, the Administration has joined the Chief Justice in respectfully requesting that the Senate make the judicial vacancy crisis a priority and vote promptly on the President's judicial nominees.

Attached to this letter is information regarding the status of judicial appointments that you may find useful as you consider and address the judicial vacancy crisis:

- a 3-page summary of the progress of Administration and the Senate in responding to the judicial vacancy crisis;
- the President's May 9, 2001, remarks in announcing his first 11 judicial nominees;
- the Vice President's November 15, 2001, speech referencing the judicial appointment process;
- the Vice President's December 4, 2001, letter to Chairman Leahy;
- an op-ed published in the *Wall Street Journal* on January 25, 2002, in which I summarized the Administration's view on the status of judicial appointments; and
- the *Washington Post*'s editorial of November 30, 2001, which explains the need for the Senate to move rapidly in voting on judicial nominees.

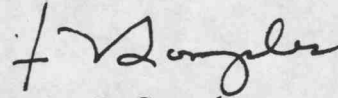
I hope that you find this information of assistance.

I look forward to working with you to expeditiously confirm the President's judicial nominees -- including the eight nominees from May 9, 2001, who now have been waiting nearly nine months for a hearing.

Page Two
The Honorable Wayne ~~Allard~~
February 5, 2002

Please do not hesitate to contact me with any questions or suggestions about judicial appointments.

Sincerely,

A handwritten signature in dark ink, appearing to read "A. Gonzales", with a stylized flourish at the end.

Alberto R. Gonzales
Counsel to the President

The Honorable Wayne ~~Allard~~
United States Senate
Washington, DC 20510

<u>Full Name</u>	<u>First</u>	<u>Mid</u>	<u>Last</u>	<u>Suf</u>	<u>Party</u>	<u>State</u>	<u>Nick's Salutation</u>	<u>Body</u>	<u>Zip</u>
Wayne Allard	Wayne		Allard		R	CO	Senator Allard	United States Senate	20510
George Allen	George		Allen		R	VA	Senator Allen	United States Senate	20510
Robert Bennett	Robert		Bennett		R	UT	Senator Bennett	United States Senate	20510
Christopher Bond	Christopher		Bond		R	MO	Senator Bond	United States Senate	20510
Sam Brownback	Sam		Brownback		R	KS	Senator Brownback	United States Senate	20510
Jim Bunning	Jim		Bunning		R	KY	Senator Bunning	United States Senate	20510
Conrad Burns	Conrad		Burns		R	MT	Senator Burns	United States Senate	20510
Ben Nighthorse Campbell	Ben Nighthorse		Campbell		R	CO	Senator Campbell	United States Senate	20510
Lincoln Chafee	Lincoln		Chafee		R	RI	Senator Chafee	United States Senate	20510
Thad Cochran	Thad		Cochran		R	MS	Senator Cochran	United States Senate	20510
Susan Collins	Susan		Collins		R	ME	Senator Collins	United States Senate	20510
Larry Craig	Larry		Craig		R	ID	Senator Craig	United States Senate	20510
Mike Crapo	Mike		Crapo		R	ID	Senator Crapo	United States Senate	20510
Mike DeWine	Mike		DeWine		R	OH	Senator DeWine	United States Senate	20510
Pete Domenici	Pete		Domenici		R	NM	Senator Domenici	United States Senate	20510
John Ensign	John		Ensign		R	NV	Senator Ensign	United States Senate	20510
Mike Enzi	Mike		Enzi		R	WY	Senator Enzi	United States Senate	20510
Peter Fitzgerald	Peter		Fitzgerald		R	IL	Senator Fitzgerald	United States Senate	20510
Bill Frist	Bill		Frist		R	TN	Senator Frist	United States Senate	20510
Phil Gramm	Phil		Gramm		R	TX	Senator Gramm	United States Senate	20510
Chuck Grassley	Chuck		Grassley		R	IA	Senator Grassley	United States Senate	20510
Judd Gregg	Judd		Gregg		R	NH	Senator Gregg	United States Senate	20510
Charles Hagel	Charles		Hagel		R	NE	Senator Hagel	United States Senate	20510
Orrin Hatch	Orrin		Hatch		R	UT	Senator Hatch	United States Senate	20510
Jesse Helms	Jesse		Helms		R	NC	Senator Helms	United States Senate	20510
Tim Hutchinson	Tim		Hutchinson		R	AR	Senator Hutchinson	United States Senate	20510
Kay Bailey Hutchison	Kay Bailey		Hutchison		R	TX	Senator Hutchison	United States Senate	20510
James Inhofe	James		Inhofe		R	OK	Senator Inhofe	United States Senate	20510
Jon Kyl	Jon		Kyl		R	AZ	Senator Kyl	United States Senate	20510
Trent Lott	Trent		Lott		R	MS	Mr. Leader	United States Senate	20510
Richard Lugar	Richard		Lugar		R	IN	Senator Lugar	United States Senate	20510
John McCain	John		McCain		R	AZ	Senator McCain	United States Senate	20510
Mitch McConnell	Mitch		McConnell		R	KY	Senator McConnell	United States Senate	20510
Frank Murkowski	Frank		Murkowski		R	AK	Senator Murkowski	United States Senate	20510
Don Nickles	Don		Nickles		R	OK	Senator Nickles	United States Senate	20510
Pat Roberts	Pat		Roberts		R	KS	Senator Roberts	United States Senate	20510
Rick Santorum	Rick		Santorum		R	PA	Senator Santorum	United States Senate	20510
Jeff Sessions	Jeff		Sessions		R	AL	Senator Sessions	United States Senate	20510
Richard Shelby	Richard		Shelby		R	AL	Senator Shelby	United States Senate	20510
Bob Smith	Bob		Smith		R	NH	Senator Smith	United States Senate	20510
Gordon Smith	Gordon		Smith		R	OR	Senator Smith	United States Senate	20510
Olympia Snowe	Olympia		Snowe		R	ME	Senator Snowe	United States Senate	20510
Arlen Specter	Arlen		Specter		R	PA	Senator Specter	United States Senate	20510
Ted Stevens	Ted		Stevens		R	AK	Senator Stevens	United States Senate	20510
Craig Thomas	Craig		Thomas		R	WY	Senator Thomas	United States Senate	20510
Fred Thompson	Fred		Thompson		R	TN	Senator Thompson	United States Senate	20510
Strom Thurmond	Strom		Thurmond		R	SC	Senator Thurmond	United States Senate	20510
George Voinovich	George		Voinovich		R	OH	Senator Voinovich	United States Senate	20510
John Warner	John		Warner		R	VA	Senator Warner	United States Senate	20510