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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Majestic God, Creator of many different races and colors in the human family, we ask for love as inclusive as Your love and attitudes as free of prejudice as You have shown in Your care for all people.

This month as we gratefully recognize the importance of African Americans in our history, remind us of the truth that Dr. Martin Luther King expressed that ''the content of our character'' is the highest goal we can achieve. So many outstanding black Americans have risen to prominence in our Nation's history because of the content of their character.

We thank You for Phillis Wheatley, who, in the 18th century at a very young age, achieved international fame as the first black woman poet. We remember women's rights activist and abolitionist Sojourner Truth and civil rights heroine Rosa Parks. We also remember Richard Allen, who, at the dawning of the 19th century, mobilized the black community in Philadelphia and formed the first independent black denomination. We praise You for distinguished athletes like Jackie Robinson and educators like George Washington Carver.

As we work today, may these principled Americans be our examples. Let our words, thoughts, and actions reflect the content of Your character. Thank You for being our Lord and Saviour. Amen.

PLEDGE OF ALLEGIANCE

The Honorable HARRY REID, a Senator from the State of Nevada led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDING OFFICER (Mr. BROWNBACK). The majority leader.

SCHEDULE

Mr. FRIST. Mr. President, the Senate will spend the day in executive session deliberating, once again and for the 10th day, the nomination of Miguel Estrada to be a circuit judge for the DC Circuit. Indeed, today will be a very full day. I envision a protracted session extending late into the evening. Rollcall votes are expected in an effort to make progress toward confirming this nominee in order to fill this judicial vacancy.

There is an empty courtroom and a backed up docket awaiting this judge. I hope my colleagues will cooperate so that this ready, willing, and able nominee can report for work at the DC Circuit courthouse.

I ask unanimous consent that a letter to the President dated February 25, 2003, signed by 52 Senators, stating that they ''express the strong, majority support in the United States Senate for Miguel Estrada,'' be printed in the RECORD.

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

UNITED STATES SENATE,
Washington, DC, February 25, 2003.

The Hon. GEORGE W. BUSH,
The White House, 1600 Pennsylvania Avenue, N.W., Washington, DC

DEAR MR. PRESIDENT: We write to express the strong, majority support in the United States Senate for Miguel Estrada, your nominee to the United States Court of Appeals to the District of Columbia Circuit.

Mr. Estrada's professional accomplishments and personal achievement are truly impressive. He graduated magna cum laude from both Columbia College, where he was elected to Phi Beta Kappa, and Harvard Law School, where he served as an editor of the Harvard Law Review. He clerked on the Second Circuit Court of Appeals and the Supreme Court of the United States. Miguel Estrada served with distinction as an assistant U.S. Attorney in the prestigious Southern District of New York, rising to Deputy Chief of the Appellate section, and in the Solicitor General's office during both Republican and Democrat Administrations where he argued fifteen cases before the Supreme Court.

It is no wonder Mr. Estrada received a rare, unanimous rating of ''well qualified'' from the American Bar Association, what many of our colleagues call the coveted ''Gold Standard.''

Mr. Estrada's professional successes are even more remarkable in light of his compelling personal story. After emigrating from Honduras at the age of seventeen, he reached the pinnacle of his profession by overcoming a speech impediment and mastering a second language. These are daunting challenges for anyone; they are particularly impressive when one's profession is the practice of oral advocacy before the nation's highest court.

Despite his obvious qualifications and remarkable personal story, we have been unable to obtain fair consideration on the Senate floor for Mr. Estrada's nomination. Nevertheless, we, the undersigned majority in the United States Senate, commend you for your outstanding choice, and will continue to work diligently to ensure Mr. Estrada receives a simple up or down vote on the Senate floor.

Sincerely,

Mitch McConnel, Zell Miller, Bill Frist, Conrad Burns, Norm Coleman, Lisa Murkowski, Pete Domenici, Joe Kyl, John Cornyn, Jim Bunning, Judd Gregg, Arlen Specter, Orrin Hatch, Robert Bennett, Mike Crapo, Jim Talent, Michael B. Enzi, Lindsey Graham, George Allen, Susan Collins, Ben Nighthorse Campbell, Ted Stevens, Lamar Alexander, Wayne Allard, Richard Shelby, Mike Dewine, Craig Thomas, George V. Voinovich, Richard G. Lugar, Jeff Sessions, John Ensign, Rick Santorum, John E. Sununu, Elizabeth Dole, Don Nickles, Pat Roberts, James Inhofe, Saxby Chambliss, Peter Fitzgerald, Trent Lott, Thad Cochran, Kay Bailey Hutchison, Chuck Hagel, Larry E. Craig, Gordon Smith, John McCain, Sam Brownback, Kit Bond,

● This ''bullet'' symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

John Warner, Chuck Grassley, Lincoln Chafee, and Olmypia Snowe.

Mr. FRIST. I will be very brief, but I will quote four paragraphs from this letter which does demonstrate the majority support of Senators for this nominee. The letter itself is dated February 25, 2003. The letter is to the President of the United States.

First paragraph:

Dear Mr. President, we write to express the strong, majority support in the United States Senate for Miguel Estrada, your nominee to the United States Court of Appeals to the District of Columbia Circuit.

The second paragraph reads:

Mr. Estrada's professional accomplishments and personal achievement are truly impressive. He graduated magna cum laude from both Columbia College, where he was elected to Phi Beta Kappa, and Harvard Law School, where he served as an editor of the Harvard Law Review. He clerked on the Second Circuit Court of Appeals and the Supreme Court of the United States. Miguel Estrada served with distinction as an assistant U.S. attorney in the prestigious Southern District of New York, rising to Deputy Chief of the Appellate section, and in the Solicitor General's Office during both Republican and Democrat Administrations, where he argued fifteen cases before the Supreme Court.

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Mr. President, the last paragraph before the pages of the signators of a majority of people in this body, 52 Senators, reads:

Despite his obvious qualifications and remarkable personal story, we have been unable to obtain fair consideration on the Senate floor for Mr. Estrada's nomination. Nevertheless, we, the undersigned majority in the United States Senate, commend you for your outstanding choice, and will continue to work diligently to ensure Mr. Estrada receives a simple up or down vote on the Senate floor.

Again, there are 4 pages of signatures. The first page is signed by Senators MITCH MCCONNELL and ZELL MILLER, followed by 50 signatures, which is now in the RECORD.

We will have a full day today. I look forward to continuing the discussions as we go forward.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

EXECUTIVE SESSION

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

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session and resume consideration of Executive Calendar Order No. 21, which the clerk will report.

The assistant legislative clerk read the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit.

The PRESIDING OFFICER. The Senator from Nevada.

ORDER FOR RECESS

Mr. REID. Before the majority leader leaves the floor on a matter regarding what we are going to do this afternoon, at 2:30 today it is my understanding the Secretary of Defense will be here to brief Senators. I think it would be in everyone's interest if we had at least an hour recess during the time the Secretary is here.

Mr. FRIST. Mr. President, given the circumstances surrounding and leading to the discussion today at 2:30, that would be satisfactory on our part.

We will likely be in session late this afternoon, into the evening, because there are a number of issues we do want to address. It is appropriate to be in recess from 2:30 to 3:30 today.

Mr. REID. I ask unanimous consent that that be in order.

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

The Senator from Nevada.

Mr. REID. Mr. President, Senator HATCH is in the Chamber, as well as Senator DORGAN, who has been trying to speak for 2 days now. It is obvious there are not enough votes, as indicated by the letter sent to the President. The fact is that there are three ways to dispose of Estrada: No. 1, pull the nomination so we can go to other issues that affect this country, such as the economy, such as have a discussion relating to the global warming document that came out today indicating there certainly needs to be a lot more done regarding global warming. It certainly is time we should be talking about the education of our children. Yesterday, the Democratic leader offered an economic stimulus plan. We wanted to bring that to the floor. So the nomination should be pulled for those other reasons.

If that is not the case, then there is another way of disposing of this matter perhaps—by having the majority file a cloture motion. That failing, it seems to me they should meet our request to have him honestly—I should not say honestly—thoroughly answer questions that have been propounded to him; and, secondly, submit the memos to this body, at least to the Judiciary Committee, so they can review the memos he wrote while he was Solicitor General.

That failing, we can stay in tonight and tomorrow night, whatever the leader decides to do, but as I have indicated before, now that the majority has changed, the majority has to preside and we will have people to protect our interests on the floor, so that is certainly no punishment to us.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I have been interested in the approach by the other side. Yesterday, they came on the floor and said, oh, my goodness, we should get rid of this because we have so many important issues to take care of. There is one way to get it rid of it, and that is to let the people's representatives in the Senate vote. That is what the Washington Post said: Just vote. Vote up or down.

The real reason they are not allowing a vote—because, as we can see from the letter, we have at least 52 votes and there have been at least 3 other Senators on the minority side who have said they are going to vote for Mr. Estrada. So there are at least 55 votes for Mr. Estrada, and I believe there will be others votes as well.

It is one thing to support your party and to stand in an intractable way against the first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia. It is another thing to come on the floor and say we are not going about the people's business because we are dealing with this incidental judicial nomination. Well, it is not incidental. It is one of the most important nominations in the country.

This is a man who really deserves to be on the Circuit Court of Appeals for the District of Columbia. This is a man who has every credential and has not had a glove laid on him. That is why the fishing expedition request into privileged matters. They want to get his recommendations, or I suppose in the future anybody's recommendations, especially Republicans who might have worked in the Solicitor General's Office, on appeals, on certiorari petitions, and on amicus curiae matters. Those have never been given to anybody. Those are the crucial documents upon which the Solicitor General, the people's attorney, makes decisions as to where to go and what to do. There is only one reason they would like to get these privileged documents, and that is they are on a fishing expedition because they have not been able to find anything to hang on Miguel Estrada yet, other than these phony accusations that he has not answered the questions.

My gosh, the hearing transcript is that thick; the briefs he has filed and the answers in the testimony before the Supreme Court, two volumes, that thick. They have more materials on Mr. Estrada to know what he is and what he is about than almost any judicial nominee, other than the Supreme Court, who has been nominated in the whole 27 years I have been in the Senate. I think my colleagues can take it

from me because I have been involved in every one of these nominations. As chairman, now twice, I can say there has very seldom been anybody as scrutinized as Mr. Estrada. And since there is still nothing they can point to that is a good reason for keeping him out of this position, what one has to conclude is the reason they are doing this—well, I will leave that up to the American people, and I will leave it up to the people in the Hispanic community. My personal conclusion is that they do not like having a Republican, Hispanic, conservative who thinks for himself as an independent thinker.

Mr. DURBIN. Will the Senator yield?

Mr. HATCH. Not yet. I will make a statement first before I yield for a question. I will do that later, however. I have been very good about yielding, so I hope my colleague does not feel badly about my decision to make my statement first.

I cannot believe the arguments that have been used in this matter, and I cannot believe my colleagues on the other side, with their feet in concrete, cannot understand why this is such an important nomination.

The fact is this fellow is immensely qualified. I have had countless people tell me that, in addition to my own studies, and I have had a lot of Democrats say he is really qualified—but.

''But'' what? These phony accusations that he has not answered questions? Come on. The Democrats conducted the hearings. They controlled the process. They could have kept the hearings going for days. It would have been very unusual for them to do that, but they could have. The hearings were conducted by Senator SCHUMER. Every Democrat had a chance to come and ask questions. After the hearings were over, they had an opportunity to present written questions to him. Guess how many of those nine Democrats offered written questions. Only two of them.

I will say, the distinguished Senator from Illinois has tried to get to the bottom of what he is concerned about in Federal judgeships. I commend him for it. He wrote questions, and he got answers. Senator KENNEDY, who takes a very active role on the committee, wrote questions, and he got answers. Where were the rest of them? Why all the complaining now, 2 years later? Are we going to make every circuit court of appeals judge wait 2 years?

Actually, we are finding a slowdown in the Federal judiciary like I have never seen before, except for district court nominees about whom they do not seem to worry too much. If they are qualified, district court nominees are the trial court nominees. Circuit court nominees should be qualified, too, and this one—I would not say overly qualified, but not many people can match his qualifications in this whole society today—here, in the 10th or 11th day of debate, he is being treated very shabbily.

We are in the middle of a filibuster, no matter what anyone says. That is exactly what it is. I noted my friend from New York, Senator SCHUMER, said on Sunday this is not a filibuster. If it is not, I don't know what it is. And, frankly, I know a lot about filibusters, having led one of the most important filibusters in history on labor law reform in 1978 that lasted at least a month. It was very tough, mean, miserable, and in some ways tremendously difficult.

My colleague, the distinguished ranking member on the committee, on June 18, 1998, said: ''I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported.''

So I suppose the distinguished Senator from Vermont will be another vote for Mr. Estrada, if he really meant what he said. Knowing him, I am sure he did mean what he said. So that would get us up to 56 votes right there. He also said: ''I do not want to get to having to invoke cloture on judicial nominations. I think it is a bad precedent.''

Boy, I sure agree with that. I spent 6 years during the Clinton years when a lot of liberal judges were put up, who were qualified, arguing with some on our side, a relative few, but some who believed we should filibuster those judges. I said: No way. We can't get into filibustering of judges. It diminishes the power of the administration, the executive office, the executive branch of Government, which is supposed to be coequal with the legislative branch. But in addition to diminishing the power of the executive branch, it diminishes the power of the judiciary with regard to its coequality with the executive branch, so both would be diminished while the executive branch was augmented and made superior over both of those branches.

Why? Because a filibuster means that from here on in, with every nominee who may be ''controversial,'' you are going to have to have a supermajority of 60 votes. Or will you? If the Democrats have their way, that is how it will be. And it will be both ways. There will not be any more well-known liberals or well-known conservatives, as great as many in the past have been, on the courts of this country; there will be people who do not have a paper trail, do not have any opinions, on whom you do not know what is going on in their minds. They will be the only ones who can get through for the circuit court of appeals positions or the Supreme Court. That would be indeed a tragedy for this country.

What we get when we elect a President is a person who picks the judges in this country. The Senate's obligation is to vote on those judges. If you do not like what you see, you vote no. If you like what you see, you vote aye. But they get a vote on the Senate floor. That is not what is happening here.

If press reports are to be believed, some Senators are contemplating a dramatic change to the Senate's treatment of the President's judicial nominees. A new requirement: The nominees to the Nation's courts must receive at least 60 votes in order to be confirmed. Since our friends on the other side are filibustering Mr. Estrada's nomination to the Circuit Court of Appeals for the District of Columbia, and if the filibuster results in the nomination being rejected, Democrats will have forced a permanent change in the political and constitutional landscape, a very dangerous and bad change.

Mr. DURBIN. Will the Senator yield?

Mr. HATCH. I am happy to.

Mr. DURBIN. I will only ask one question and would like the Senator's response.

I think there has been a very constructive and valuable suggestion by one of your colleagues, Senator BENNETT of Utah, who came to the floor last week and suggested, to end this impasse, that we can finally bring this matter to a vote on Mr. Estrada simply by producing the controversial documents to be reviewed by you and Senator LEAHY, and if a decision is made by either of you that there is something worth pursuing by way of written questions or further hearing, then we can bring this to closure.

I asked Senator DASCHLE on the floor yesterday, would this be a good end game for the Estrada issue? He said it was acceptable to him. So I ask the Senator from Utah if he would entertain the suggestion of his colleague, Senator BENNETT, to produce these work documents that reflect on Mr. Estrada's philosophy, for you, personally, for Senator LEAHY personally, and followup, if necessary, so that we can finally move on to important issues that we should be considering on the Senate floor?

Mr. HATCH. That is a good question. I have to say, no administration worth their salt, no executive branch of government worth any constitutional knowledge, would give up those papers, even to people they trust, such as Senator LEAHY and myself. The reason is they have to maintain the dignity of that Solicitor General's Office. They have to maintain the discipline of that office. They have to maintain the privileged nature of those documents. If those documents are disclosed, that means they will have to be disclosed henceforth forever in every case where a person has worked in the Solicitor General's office. It would demean the office and diminish the ability to get forthright and accurate information, and it would impinge upon the work of the Solicitor General.

The only reason those letters were written requesting those documents is that they knew this would constitute a red herring. The only thing they have to argue against Miguel Estrada is a red herring, so they can say: We cannot vote for him because we cannot get these documents. Which is right, they cannot get them. No self-respecting administration would give them.

Mr. DURBIN. One last question. The chairman suggested it would be unprecedented to produce these documents. But is the chairman not aware of the fact that similar documents were produced when William Rehnquist was being nominated to the Chief Justice of the Supreme Court, when Robert Bork's nomination came before the Senate, Benjamin Civiletti, and several other cases?

This is not unprecedented and has happened before. To suggest this administration would be breaking new ground—would the Senator from Utah concede that other administrations, Republican administrations, and Democrat, have disclosed this kind of information? We are suggesting, through Senator BENNETT, a limited disclosure to you and Senator LEAHY—

Mr. HATCH. The Senator is again mistaken. He is absolutely wrong, totally inaccurate.

The fact is the request was for his recommendation on his appeal recommendations, his certiorari recommendations, his amicus curiae recommendations. Those have never ever been given to anybody up here on Capitol Hill. And they shouldn't be given to anybody. Those are the most crucial recommendations the Solicitor General gets and relies upon.

There are some cases where documents for appeal, certiorari, amicus curiae documents, were leaked to Democrat Senators in the past, and there were one or two cases where there were allegations of criminal behavior, or potential criminal behavior, where very selected documents were produced. But there has never, ever been a production of internal, privileged recommendations for appeals, certiorari, and amicus curiae. Again, the Senator is mistaken. I hesitate to point that out, but it is something that has to be pointed out.

I believe with all my heart that my friends on the other side know that. So this is a phony issue they have raised. Here is a man who has the highest rating of the American Bar Association, given by a majority of Democrats who have supported financially other Democrats, and yet they found him worthy of the highest rating of the American Bar Association. I know my colleagues do not like that, even though many of them said he deserves it, he is that good, but we are going to vote against cloture anyway—because we are Democrats, I guess.

Is that really the reason? What is the reason there is a double standard with regard to Miguel Estrada? Is it because we are Democrats? I hope not. Is it because we are liberals? You got that one right. Is it because he is an independent thinker? You have that one right. Is it because he just does not toe the line of the Democratic Party? You got that right. Is it because he is a Republican Hispanic? You got that right. Is it because he is a Republican Hispanic who may be conservative? You bet. Is it because he is a Republican Hispanic who may be conservative who might even be pro-life? I don't know what he is that way, but that is surely part of it.

In other words, it is a double standard, even though we did not take that standard on our side. There were some who wanted to, I admit that. But I didn't take that standard in approving 377 Clinton judges, the second all-time record of judicial confirmations in the history of the Presidency, second only to Ronald Reagan, who had 6 years of a Republican Senate to help him, where President Clinton had only 2 years of a Democrat Senate to help him.

Think about it. What do you conclude is the reason they are fighting this? Because they found something wrong with Miguel Estrada? Show me what it is. Because of this red herring issue—and they know it is a red herring issue—that they know is improper to even ask for?

But counting on their friends in the media to ignore the seven former Solicitors General, four of whom are Democrat, leading liberal Democrat Solicitors General who say those papers should never be given to the legislative branch—it would upset and ruin the work of the Solicitor General of the United States; he is the people's attorney. That is the only thing they have. Yet they are filibustering this man, this Hispanic, this first Hispanic ever nominated to the Circuit Court of Appeals for the District of Columbia, and one of the few ever nominated to the circuit courts of appeals in this country. It is amazing to me.

What really louses this up for them, as far as I am concerned, is their claim that he does not have any judicial experience; therefore, he should not have this position. That is condemning every Hispanic lawyer to never be a Federal court judge, by and large, because hardly any of them have judicial experience. The only way they get it is by rising in the profession, like Miguel Estrada, reaching the top of the profession, and getting nominated by a President of the United States.

It is a tough road for Hispanics. Here is one who has made it, and my colleagues on the other side are standing in his way, blocking his path, taking away his future. He is the embodiment of the American dream, and they are taking away his future as a judge. I suppose part of it also is to discourage conservative Hispanics, conservatives of other minorities, from wanting to be judges if they are Republicans because it is not worth going through this kind of a battle.

I chatted with Miguel Estrada yesterday. Miguel Estrada said it is worth going through this battle. He will do a great job on that court. He will do it in the best interests of the American people, regardless of ideology. That is basically what he said in answers to these questions that were raised by Democrats. He basically said he would follow the law as he always has as a top-flight attorney.

Now, are we going to have to have 60 votes to confirm ''controversial'' nominees? If his nomination is rejected by a filibuster, then Democrats will have forced a permanent change in the political and constitutional landscape.

Never again could any future President—or even this President—fairly expect a judicial nominee, whose nomination reaches the Senate floor, to receive an up-or-down vote. And never again would the Senate minority party fear that blocking of a judicial nominee by partisan filibuster, or 41 votes, was unprecedented.

If the Estrada nomination is permanently blocked by filibuster, the political baseline shifts forever. What is sauce for the goose is going to be sauce for the gander. And I think it is terrible. I am doing everything in my power to fight against that. It is even bigger than this nomination, as important as this nomination is, because it could taint the Federal judiciary henceforth and forever because of partisan politics on the Democrat side.

To understand just how stunningly extraordinary this state of affairs is, one needs to examine the Senate's record of confirming judicial nominations.

The first filibuster of a judicial nominee that resulted in a cloture vote was in 1968. In other words, in all the history of this country, that was the first filibuster, in 1968. Since then, the Senate has confirmed approximately 1,600 judicial nominations—since 1968. That filibuster was on the Fortas nomination. Since then, they have confirmed approximately 1,600 judicial nominations, and the vast majority—nearly 1,500—of them without even a rollcall vote, as most are confirmed by unanimous consent.

Indeed, of those some 1,600 judicial nominations confirmed by the Senate since 1968, only 14 even underwent a cloture vote. And with the exception of the bipartisan 1968 filibuster of Abe Fortas's nomination to be Chief Justice of the United States, the Senate has never—let me repeat that—has never blocked by filibuster a judicial nominee to any court in this land—never; never—until this, I think, ill-fated, hopefully, attempt on the part of some of our colleagues on the other side.

I am just wondering why some of my strong colleagues are being led like lambs to the slaughter in this matter without standing up and saying: Hey, enough is enough. We have made our point. We have roughed this guy up. We made it clear to him that, ''you had better behave yourself on the court or you will never be on the Supreme Court.'' That is part of this, I know. That may be a legitimate part as far as I am concerned. They have a right to rough anybody up, I suppose, although I question the propriety of it from time to time.

What follows is an account of all past debates over judicial nominees which

required cloture votes. The history establishes a consistent, bipartisan resistance to taking the step that some Democrats are really doing right now.

Let me talk about the bipartisan Fortas filibuster because, indeed, that was a bipartisan filibuster. It was not just one side, as it is here. But I decry that. That filibuster should not have occurred either.

Judicial nominations have been especially contentious since the days of the Warren Court. That was from 1954 to 1969. Nowhere has that controversy been more pronounced than for nominees to the Nation's highest court. In particular, Supreme Court nominees such as Abe Fortas, William Rehnquist, and Clarence Thomas all faced considerable opposition in the Senate during their confirmations. Yet despite this controversy, only one nomination, Justice Fortas's nomination to be Chief Justice in the tumultuous summer of 1668, caused the Senate to filibuster and block confirmation.

President Lyndon Johnson nominated Associate Justice Abe Fortas to be Chief Justice in June of 1968. A bipartisan coalition of Senators soon formed to oppose Justice Fortas's elevation. The reasons were varied. Some opposed the nomination because Justice Fortas often joined the ''progressive'' Earl Warren wing of the activist Supreme Court. Other Senators opposed Fortas because of his admissions before the Judiciary Committee that he remained involved in White House political affairs even while serving on the Supreme Court, including advising the President during the Vietnam war and the then-recent race riots in Detroit. When it was discovered that Justice Fortas accepted $15,000—more than $75,000 in 2001 dollars—from controversial sources to teach a 9-week academic course, his support further deteriorated. Yet as the heated 1968 election season continued, some Democrats were wary of defeating Fortas if that meant leaving the nomination to soon-to-be-President-elect Richard Nixon.

Nevertheless, bipartisan opposition to Fortas's elevation was substantial and the filibuster did ensue. The filibuster itself was controversial, as some Republicans, such as Nixon himself, believed that Fortas should receive an up-or-down vote as a matter of principle. That would have been my position at the time. And it is my position now. Senators persisted, and on October 1, a cloture vote failed by a margin of 45 to 43. Twenty-four Republicans and nineteen Democrats voted against the cloture motion, with 10 Republicans and 35 Democrats in favor of cutting off debate. President Johnson then withdrew the nomination.

Now let me chat a little bit about the effect of the Fortas filibuster on future Supreme Court battles.

After the Fortas filibuster, the Senate rejected outright two of President Nixon's nominees to the Supreme Court, Clement Haynsworth—that was on a vote of 45 to 55—and G. Harold Carswell—on a vote of 48 to 51. But neither nominee faced a filibuster attempt despite the close votes. The Fortas affair is, therefore, especially important for what it did not lead to: a pattern of blocking by filibuster controversial judicial nominees.

That refusal to block nominees by filibuster is most dramatic and important in the context of the Supreme Court. The Supreme Court nominations that most divided the Senate since the Haynsworth and Carswell defeats were those of William Rehnquist—in 1972 to the Court, and in 1986 to be Chief Justice—and Clarence Thomas in 1991.

Rehnquist's nomination to be Associate Justice provoked considerable controversy and division within the Senate, but he nonetheless received a full Senate vote after but a few days' debate. The same was true in 1986, when he was nominated to become Chief Justice.

During Clarence Thomas's hard-fought nomination battle of 1991, outside activist groups urged Justice Thomas's Senate opponents to filibuster his nomination, but Senate Democrats, such as then-Judiciary Chairman JOSEPH BIDEN, and leading Thomas opponent Senator Howard Metzenbaum, balked. Former Judiciary Committee Chairman PATRICK LEAHY publicly declared himself ''totally opposed to a filibuster,'' adding, ''We should vote for or against [Thomas].'' I commend my colleague for that. He was right then, and he would be right today to do the same. No filibuster was attempted, and Justice Thomas was confirmed 52 to 48.

As is well known, President Clinton's nominations of both Ruth Bader Ginsburg and Stephen Breyer sailed through the Senate with minimal debate and no filibusters. Justice Ginsburg was confirmed 96 to 3, and Justice Breyer was confirmed 87 to 9.

Now I want to make the point that lower court nominees have never been blocked by filibusters.

Given the Senate's general unwillingness to filibuster nominees—even Supreme Court nominees—it is surprising that the Senate has never blocked by filibuster a nominee to any lower court. Furthermore, the Senate has never blocked—by a partisan filibuster—any judicial nominee, including Justice Fortas. The only successful rejection by filibuster was the aforementioned case of Justice Fortas, which was clearly bipartisan. Thus, there is no historical example of a filibuster conducted solely by one party that denied the President his judicial nominee—until now. This is the first time in the history of this country. It is amazing to me that my colleagues on the other side are so blatant about it.

Now, there have been recent, what some people have called, quasi-filibusters of President Bush's judicial nominees.

During the Democratic control of the Senate during 2001 to 2002, only 17 Bush circuit court nominees reached the floor for votes. In three of the cases where they did—the nominations of Julia Smith Gibbons, Richard B. Clifton, and Lavenski R. Smith—cloture motions were filed, and the motions easily carried. However, none of those cloture votes was responding to a genuine effort to filibuster a nominee. Rather, cloture motions were filed as a Senate time-management device—certainly in the Clifton and Gibbons matters—or in response to a small number of Senators who wished to force the cloture vote to draw attention to another issue unrelated to the nominee—such as in the case of nominee Smith.

Now, despite a Republican majority during 6 years of President Clinton's term, no judicial nominee was ever deprived of a vote on the Senate floor because of a floor filibuster of the nomination.

Many Senators may recall the controversy over President Clinton's nominations of Marsha Berzon and Richard Paez to the U.S. Court of Appeals for the Ninth Circuit. Although most Republican Senators opposed their confirmations, the majority of Republican Senators also opposed any effort to prevent the full Senate from voting on their nominations. Debate on each nomination lasted only 1 day. These were very liberal, some thought activist, nominees, and yet the debate lasted 1 day. We are now on our 11th, I think—10th or 11th—day on this debate.

So debate on each nomination lasted only 1 day, and a majority of Republicans joined all Democrats in supporting cloture motions for debate on each nomination, including over 20 Republicans who would eventually vote against confirmation and a majority of the Republican members of the Judiciary Committee.

In neither case did Republicans mount a party-line filibuster effort to prevent voting on any nominee. Indeed, Majority Leader LOTT filed the cloture motions for the above debates.

The situation was similar in 1994, when some Republicans voiced objections to President Clinton's nomination of H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit. A majority of Republicans supported a cloture motion after a relatively brief period of debate, and cloture was invoked by a vote of 85 to 12. It was clear it was a time-management device. It was not a filibuster. Judge Sarokin was then confirmed by a vote of only 63 to 35.

The only judge nominated by President Clinton who faced a partisan filibuster was Brian Theadore Stewart, a nominee to the Federal District Court in Utah. However, it was the Senate Democrats—not Republicans—who filibustered this Clinton nominee in protest over purported delays in bringing other judicial nominees to the floor. A cloture motion was voted upon on September 21, 1999, and it failed—by falling short of 60 votes—by a vote of 55 to 44,

with all Democrats except Senator Moynihan opposing cloture. But once again, the Democrats' objection was not to Judge Stewart himself, who has since proven to be an excellent judge on the bench, and on October 5, 1999, the Senate confirmed him by a vote of 93 to 5. So it clearly was not a serious filibuster, even though the Democrats used that for various reasons, none of which related to Judge Stewart.

For all the hand wringing about the ''treatment'' of President Clinton's nominees, one thing is clear: Every nomination taken up for debate on the floor received an up-or-down vote.

Even when Democrats attempted to filibuster Republican Presidents' judicial nominees, those efforts were still unsuccessful, as a substantial majority of Senators resisted using the partisan filibuster as a means to block judicial nominations.

When President Bush nominated Edward Carnes to be a judge on the U.S. Court of Appeals for the Eleventh Circuit, in 1992, many Democrats opposed the nomination on the merits, in particular because of his past prosecution of death penalty cases.

Aware of this opposition, the Senate agreed by unanimous consent to 2 days of debate, with a cloture vote to follow. The debate proceeded, and the cloture motion carried by a vote of 66 to 30, with 24 Democrats joining 42 Republicans to close the debate. The Senate proceeded immediately to confirm Judge Carnes by a vote of 62 to 36.

I hope my friends on the other side will realize that they have raised a big fuss here. They certainly got their points across—whatever those points are—whether valid or invalid. It is time to vote on the nomination.

A similarly close cloture vote occurred in March 1986 when the Senate considered President Reagan's nomination of Sidney Fitzwater to be a Federal district court judge in Texas. Many Democrats opposed Judge Fitzwater on the merits and after a few days' debate, Majority Leader Dole filed a cloture motion which, by unanimous consent, was to be voted on the next day the Senate was in session. That cloture motion prevailed, 64–33, with the support of 12 Democrats. The Senate proceeded immediately to confirm Judge Fitzwater by a vote of 52–42.

The only other judicial nominee of President Reagan's to face a cloture vote was J. Harvie Wilkinson to the U.S. Court of Appeals for the Fourth Circuit. Many Democrats opposed the nominee and filibustered the nomination. An initial cloture motion failed on July 31, 1984, 57–39, because some Senators argued that additional information had arisen since Judge Wilkinson's original Judiciary Committee hearings and that further investigation was necessary. Judge Wilkinson returned to the Judiciary Committee on August 7, his nomination was returned to the floor of the Senate, and a second cloture motion prevailed on August 9 by a vote of 65–32. The Senate then proceeded immediately to confirm Judge Wilkinson by a vote of 58–39.

It is apparent that Democrats historically have been more willing than Republicans to vote against cloture motions and to attempt to prevent votes on Republican judicial nominees. In other words, they have been more than willing on occasion to filibuster Republican nominees. Apparently not in true filibusters, however. However, it is important to note that even in the cases above, many Democrats found the filibuster process inappropriate in the judicial nominee context and insisted upon full Senate votes.

Senators, Led by Republican Gordon Humphrey and Democrat Robert Morgan of North Carolina, Filibustered the nomination of Justice Stephen Breyer to be a judge on the U.S. Court of Appeals for the First Circuit in late 1980. Their objection was not to Mr. Breyer's qualifications—indeed, this is the same Stephen Breyer currently serving as a Supreme Court Justice—but to the process by which he was nominated and reported to the full Senate. The Senators argued that the Judiciary Committee had improperly reported out Mr. Breyer's nomination without proper committee approval and without regard to many other earlier-nominated persons waiting for hearings. After forcing the Judiciary Committee to reconvene and approve the nominee through proper procedures, the Senate invoked cloture, 68–28, and confirmed Mr. Breyer, 80–10.

So it clearly was not a filibuster, a real filibuster.

This history demonstrates that while some nominees have been filibustered and cloture petitions filed in those and other situations, the only nominee ever to have been defeated or withdrawn after a filibuster was Abe Fortas in 1968. Even key Democrats who opposed Republican nominees voted for cloture. So, if a partisan filibuster of Miguel Estrada resulted in his nomination being defeated, it would be unprecedented.

A partisan attempt to block Mr. Estrada's nomination by filibuster would contradict the repeated and emphatic statements of Democrats who have served for a long time in positions of special responsibility in these matters. I am calling on those Democrats to continue to be responsible, not irresponsible. To vote against cloture in this case I think would be irresponsible because they know how serious this is. Consider the past comments by Senators regarding judicial and executive nominees:

Senator LEAHY, past Judiciary Chairman and current Ranking Member said:

> If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

That was on June 18, 1998, right in the CONGRESSIONAL RECORD.

The distinguished Senator from Vermont again:

> I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a [floor] vote, up or down, within 60 days.

That was on October 11, 2000.

The distinguished minority leader, Senator DASCHLE, had this to say:

> As Chief Justice Rehnquist has recognized: ''The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.'' An up-or-down vote, that is all we ask for [Clinton judicial nominees] Berzon and Paez.

That was on October 5, 1999.

The distinguished Senator from Delaware, a past Judiciary Committee Chairman said:

> But I also respectfully suggest that everyone who is nominated ought to have a shot, to have a hearing and to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor. . . . It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam president, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote. . . .

That was on March 19, 1997.

The distinguished Senator from Massachusetts, also a past Judiciary Committee Chairman:

> The Chief Justice of the United States Supreme Court said: ''The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.'' Which is exactly what I would like.

That was on March 7, 2000.

Again, Senator KENNEDY, the distinguished Senator from Massachusetts said on February 3, 1998:

> We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. But give them a vote.

That is exactly what I would like.

The Senator from California, Ms. FEINSTEIN, a distinguished member of our Judiciary Committee on September 16, 1999, said:

> A nominee is entitled to a vote. Vote them up; vote them down.

There are others but I will leave it at that. Absent from any of the current debate over Miguel Estrada is any explanation as to why he should be denied the floor vote that every one of President Clinton's judicial nominees who reached the floor received.

The rejection of Abe Fortas to serve as chief Justice of the United States marked the first and only time the Senate has rejected a President's judicial nominee by way of a filibuster. Yet, Miguel Estrada presents none of the concerns that caused a bipartisan coalition of Senators to block Justice Fortas's elevation to Chief Justice. Mr. Estrada is an outstanding nominee, fully qualified for this judgeship, who

has committed to enforce the Constitution as interpreted by the Supreme Court, not to interpose his personal political views into his jurisprudence. The American Bar Association unanimously gave him its highest rating of ''well-qualified''; and Democrats such as President Clinton's Solicitor General, Seth Waxman, and Vice President Gore's attorney, Ron Klain, have praised his intellect, judgment, and integrity.

But the stakes here are much greater than the fate of a single judicial nominee. At issue is whether the Senate should reinterpret its constitutional advise and consent obligation to require 60 rather than 51 votes to confirm a judicial nominee. This is a position that the Senate has never taken in the context of lower court nominees, and Republicans especially have eschewed. To adopt this new standard would fundamentally alter the balance of power between the Executive and the Senate in the judicial confirmation process and would seriously erode the comity that generally has existed between the two branches in the past.

For the life of me, I don't understand why my colleagues on the other side are delaying this explosive issue like they are. They are just asking for it. I think our side is far more capable of conducting filibusters than they are. I think the past proves it. And we have won on them. I think they are totally capable of conducting this filibuster if they ignore all the precedents, if they ignore all the history, if they ignore the Constitution, and the unconstitutionality of what they are doing, they ignore the future and what is going to happen when Democrat nominees become President. I think they are making a tremendous mistake to even go this far. I call upon my colleagues, at least I call upon the reasonable people on the other side, I call upon the people who have good faith in the Senate, who believe in the process, who really want to have a fair deal in judicial nominations, who really don't want to have this whole system break down, although it has been called broken by no less than a former Solicitor General, Walter Dellinger, one of the four who basically have said Miguel Estrada is a good man, and who basically has said these documents should never be given to the legislative branch because they are privileged executive documents—Democrats said that. I think it is very important my colleagues, the ones who are clear thinkers on the other side, the ones who really believe in this institution, the ones who really believe in the judicial nominations process, the ones who really can see the future and not just the instant, that they stop this filibuster and give an up-or-down vote, voting whichever way they want, on Miguel Estrada.

Mr. President, I ask unanimous consent that the distinguished Senator from North Dakota, Mr. DORGAN, be permitted to speak, and then immediately following Senator DORGAN, Senator SPECTER from Pennsylvania be recognized to speak.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). Is there objection?

Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, I hope I perhaps am one of those clear thinkers and ''reasonable'' people the Senator from Utah was referring to. I suspect there are a good many in this Chamber who are self-proclaimed clear thinkers and reasonable people.

I am not out here as a member of the Judiciary Committee. I do not spend a lot of time on judicial issues, on a point of nomination. And on judicial nominations, I want to work with President Bush.

We have had two Republican nominees for judges in the east and west districts of North Dakota in the last year and a half. I have been pleased to work with President Bush on their nominations. We now have investiture of a Republican judge in the western district of North Dakota, someone I supported—a Republican but someone I strongly supported. He will be a fine Federal judge. I know I am going to be proud of him.

There is a nominee before the Judiciary Committee for the east district in Fargo. I likewise have strong support for that nominee of President Bush. I think he will be a fine Federal judge. He is a Republican. But the fact is he will, I think, make us proud of the Federal bench. I am very pleased to say that the President chose well. He consulted with us. And I was very supportive of the two judges who will now assume the bench in the Federal districts of North Dakota.

So I am not someone who comes to this saying I am a Democrat with respect to this process and the process should be political. That is not the way I come to this.

But I do believe this Congress has a responsibility to advise and consent, and it is not a responsibility to have a huge rubberstamp, where the President sends us a nomination and we say, yes, sir; yes, sir, count us in. That is not the responsibility of advise and consent.

The constitutional responsibility for Congress is equal to the President's. He proposes and we make a judgment on his proposal. He sends us a nomination. We make a judgment.

Now this is not some ordinary decision on the floor of the Senate. This is a lifetime appointment. When we decide to confirm a nominee sent to us by the White House, this is not for 2 years or 5 years or 15 years or 25 years; it is for a lifetime. And we ought to take that seriously. I know most Members of the Senate do. So if we are going to be passing judgment on a nominee who is going to be there for a lifetime, let's know a little about the nominee.

I was proud to support Dan Hovland, who is now the confirmed Federal judge in the west district of North Dakota. President Bush nominated him, and I was proud to support him. But unlike Miguel Estrada, Mr. Hovland cooperated with the Judiciary Committee. He was asked during his confirmation process, ''Can you list three Supreme Court cases that you disagree with?'' And unlike Mr. Estrada, Mr. Hovland had no difficulty answering that simple question.

Why would one ask a nominee that question? To get a sense of how they think and reason. Mr. Hovland didn't object to that. Judge Hovland readily identified a couple of recent cases—Thompson v. Western States Medical Center, Behrens v. Peltier. He cited a case that most would cite, Korematsu v. the United States, the case in which the Supreme Court affirmed the conviction of a person of Japanese ancestry for the violation of a curfew order solely because of the individual's ancestry. So Mr. Hovelnd was asked a simple question and was happy to give us a glimpse of how he was thinking about things, and how he viewed some of these decisions. He didn't object to answering that question. He was asked a simple question, and he gave a straightforward answer that was helpful to my colleagues and me.

Other nominees have been asked the same kinds of questions. Mr. Estrada, however, has not been willing to answer those questions. He apparently thinks there is some inherent right to be confirmed by the Senate.

There is no inherent right for a confirmation. We have a responsibility to understand who these nominees are and then to pass judgment on them as to whether or not we think they deserve a lifetime appointment to the bench. As I have indicated, on at least two Federal judgeships in North Dakota, I was proud to support Republicans. I think President Bush chose well.

I don't have the information about Mr. Estrada with which to make that judgment. Some say, well, look, you don't need the information, you don't deserve the information, and we don't want you to get the information. So belly up here and vote. If you don't like it, it doesn't matter, just vote.

Really, how would you vote if you don't have basic information? We have sent Mr. Estrada a letter saying you have not answered basic questions; you have not allowed to have released the basic information. Provide all of that and let's have a vote.

I am for that. For me, this isn't about a filibuster. It is about saying we ought to have nominees provide the basic information to Members of the Senate before there is a vote. Mr. Estrada has not done that. It is simple. He hasn't done that. Perhaps when he does it, he will get a big vote in the Senate. I don't know. But I think it is a terrible precedent for the Senate to allow a nominee to say, I am not going to answer your questions; I will show up and give you my name and tell you

where I went to school, but I don't intend to talk about much else at all.

Mr. Estrada has never been a judge. We don't have judicial record to examine. We don't have any information about that. That is the reason we have asked him the same kinds of questions we have asked others. The difference is he has not responded. I don't understand that.

Let me also say something else. I have listened to my colleague from Utah, and he is one of the more capable Members of the Senate. He talked about delay and how terrible it was to delay this, that, and the other thing. Let me tell you something. We understand what it feels like to be faced with delay on judicial nominations. We have been on the receiving end of it for a long time. Notwithstanding that fact, I don't believe we ought to delay anybody just for the sake of delay. I think we get the information and we move forward. If we don't get the information requested of a nominee, there is no inherent right for a nominee to go to a vote, to receive a lifetime appointment.

We know a little about facing delay. I find it interesting that those who were the architects of delay for so long now come to the floor—many of them—and say it is terrible what has happened here.

I will give you examples of what has happened. James Beatty was nominated by President Clinton to the Fourth Circuit, rated well qualified by the ABA. He had no hearing and no vote. Do you know how long his nomination languished up here? Three years. Do you suppose he knows a little something about delay?

Robert Cindrich, nominated to the Third Circuit, found well qualified by the ABA; he didn't get a hearing and certainly no vote. Not a hearing and not a vote. He would know something about delay, I guess.

H. Alston Johnson, nominated to the Fifth Circuit by the previous administration, was rated well qualified by the ABA. He never got a hearing or a vote. His nomination was up here 696 days. He never got a hearing, never got a vote.

The question is, Why? It was the previous administration that sent them up, and those who controlled the Judiciary Committee at that point didn't want to provide a hearing or a vote. I suppose that is a filibuster in its effect, isn't it?

James Duffy, a Ninth Circuit Court nominee, was up here for 640 days. Well qualified by the ABA, no hearing, no vote.

The list is fairly lengthy. I shall not go through it all. Kathleen Lewis, nominated by the Sixth Circuit, found well qualified by the ABA; no hearing, no vote.

These are just a few nominations that came from the President, the previous administration. Those on the other side who want to push Mr. Estrada through without our getting the information we have asked of him, those are the same Senators who blocked all of these other nominees. They didn't get to the floor or get a hearing, let alone a vote in the committee. Not even a hearing, for gosh sakes. So we understand a little about facing delay.

Some of these delays, as you know, stretched to 4 full years, with not even a hearing. I find it interesting that people here who talk about delay are those who took nominations from the previous administration and said: They are irrelevant as far as we are concerned. We don't even intend to hold a hearing.

Well, Mr. Estrada got a hearing. I think Mr. Estrada would get a vote on the floor of the Senate, as soon as he provided the information he has been requested to provide. The ranking member of the Judiciary Committee and the minority leader have sent a letter and said here is what he has not provided. It is a lifetime appointment. Provide the information and let us move forward. I think that is what we ought to do.

I am not part of a filibuster. I have only spoken one time previously on the floor about Mr. Estrada. It is not a filibuster, as far as I am concerned.

I just don't think the Senate ought to vote on a nominee for a lifetime appointment to the Federal bench—whether it is a circuit court or any court—if the nominee says: I am sorry, I don't intend to answer your questions.

Here is a question posed to Miguel Estrada: What are several Supreme Court rulings over a good many years with which you disagree, and why?

Is that a reasonable thing to ask somebody who aspires to serve on the Federal bench? I think so, and most other nominees have answered that question. The nominee I was proud to support for the western district judgeship in North Dakota didn't object to that. I thought he answered that question easily and with good judgment, which gave me some comfort about that nominee.

Mr. Estrada won't answer that question. I just don't think there is an inherent right—certainly there is no inherent requirement in the Constitution—that we move forward and cast a vote on a nominee that has not yet provided the information that has been requested of him.

This nomination should not yet be on the floor of the Senate. It ought to be in the Judiciary Committee, and the nominee ought to not have his name brought to the floor until he has satisfied the members of the Judiciary Committee with respect to the information they are requesting. The information they are requesting is not unusual, not extraordinary. It is information that has been requested of others and provided by others. And with respect to this lifetime appointment, my feeling is the country will be best served if we decide as a Senate not to treat lifetime appointments to the Federal bench in a trifling way.

It is a trifling way if we say to people, by the way, if your nomination comes before this Senate, you can just get by with saying: I don't intend to answer your questions. I don't have answers to your questions. We don't need to have that dialogue. You have a responsibility to vote because the President sent the nomination down to the Senate.

Well, as I have described, those who ran the Judiciary Committee during the last administration felt no such obligation. They created a special ''jail'' for nominees, and nominations went into that jail and the door was locked forever. A good many of them were very well-qualified men and women, and they didn't even get a hearing, let alone a vote. So I don't think we ought to be lectured by anybody about delays and about tactics that somehow injure a nominee.

Plenty of nominees have been derailed unjustifiably, in my judgment. It is not my intention in any way to derail the nomination of Mr. Estrada. It is my intention as one Member of the Senate to insist—yes, to demand—that a nominee who expects a Senate to consider his or her nomination provide the information requested by the Senate.

The minute this nominee complies with the request of the ranking member of the Judiciary Committee, the former chairman of the committee, for information that was requested on behalf of the members of the minority on the committee and on behalf of dozens of Members in the Senate, I think that nomination should be on the floor of the Senate, and we should have a vote. Until then, I do not think we ought to.

I have voted now for, I believe, well over 100 Federal judges submitted to this Senate by President Bush. I believe I have voted against only one. With respect to the two Republicans nominated in North Dakota, I have been a strong supporter. I have spoken in the committee and on the floor in support of their nominations.

I do not think anyone can take a look at me and say I am trying to obstruct anything. I am not. I think I am pretty clear-headed on these matters. But I do not feel an obligation to vote on anybody until we get the information requested of them, especially for a lifetime appointment. That is clear-headed. That is common sense. And the Senate will rue the day it decides it is all right for nominees to come to the Senate and simply say: I am going to stonewall; I do not provide information; I do not answer questions. That will not, and should not, be the rule of the day with respect to considering lifetime appointments.

HYDROGEN ECONOMY AND FUEL CELLS

Mr. President, one of the problems with having the Estrada nomination on the floor for a great length of time is that there are so many other matters we ought to be working on.

President Bush, in his State of the Union speech and his subsequent appearance a week later in Washington, DC, talked about the need to move to a hydrogen economy and fuel cells as a way of extending America's energy independence, making us less dependent on foreign energy. I support this idea, and I would much rather we all discuss that issue on the floor of the Senate, rather than being at parade rest on the Estrada nomination.

We import over one-half of the oil that we use—20 million barrels a day. Here are our top sources of imported oil: No. 1 is Saudi Arabia; Venezuela is No. 4; Iraq is No. 6. These and other of our top suppliers are beset by turmoil.

The fact is, it makes no sense for our economy to be this dependent on foreign sources of energy, and yet we will always be that dependent unless we do something about transportation. Let me describe why, using this chart.

In this country today, the transportation sector is the sector for the great majority of our imported oil. And as one can see, the total demand for oil is increasing. This line is moving steadily upward. As one can see, the transportation demand is what is driving it; that is, putting gasoline through our carburetors. And we have done that for a century. Nothing has changed. With the Model T Ford, they pulled up to a pump and pumped gas. With a 2003 Ford, you pull up to a pump and pump gas. Nothing has changed in almost a century.

If we do not do something about this demand, this line will continue to go up. We will dramatically increase our dependence on foreign oil, and our economy will be held hostage to things we cannot control.

As you can see from this press release that the White House issued, we import 55 percent of our oil, and that is expected to grow to 68 percent by 2025. Nearly all of our cars and trucks run on gasoline. Two-thirds of the 20 million barrels of oil we use each day is used for transportation, and one-third of it comes from a troubled part of the world. Does this make any sense to anybody?

What the President said—and I fully agree—is we ought to move to a hydrogen economy and fuel cells. He proposed a $1.2 billion program, though only $700 million of that is new money. I think that is too timid, not bold enough, but it is definitely a step in the right direction.

What is that right path? The right path, it seems to me, is to see if we can find a way to power America's transportation fleet in a different manner.

There is a new book written by Jeremy Rifkin called ''The Hydrogen Economy,'' that discusses the possibility of using hydrogen as a fuel, to radically transform our economy. The fact is, hydrogen is ubiquitous. Hydrogen is everywhere. It is in water. Electrolysis can separate hydrogen and oxygen from water, and you can use that hydrogen in a fuel cell to power an electric engine, an electric motor, power a vehicle.

When we use hydrogen fuel cells to power a vehicle, we put only water vapor out the tailpipe. What a wonderful thing.

Now the hydrogen has to be obtained using other energy sources, but we can use every source available to us. We can use fossil fuels, coal, natural gas, but also renewable sources, like wind and solar. By using hydrogen as a fuel, we make the most efficient use of every domestically available fuel source, and what comes out of the tailpipe of a fuel cell vehicle is water vapor. Boy, that makes a lot of sense. The quicker we get to that point, the better.

That does not mean abandoning oil, natural gas, and coal for some long while. But if digging and drilling is our only strategy with respect to our future energy supply, then our energy program is something I call yesterday forever, and it is not an energy program that makes this country secure, that does what we need to do to be reasonably independent with respect to energy sources.

When President Bush moves us in this direction, I say absolutely: I am with you; let's do this. I say let's be bolder than he suggests. Let's be less timid. Let's develop an Apollo-type project, a real project, a big project. With the Apollo project, we said we were going to put a man on the Moon at the end of a decade. Let's do an Apollo-type project where we agree that in the next 5, 10, 15 years we are going to convert America's vehicle fleet to hydrogen economy and fuel cells. We can do that. We cannot do that if we are timid, but we can set goals, and commit the necessary resources.

The goal we ought to set for this country is to have a period, whether it is 10, 15, or 20 years out, in which we have a large number of vehicles that are hydrogen vehicles and fuel cell vehicles.

I am going to introduce a piece of legislation that is a robust Apollo-type project, with $6.5 billion invested over 10 years, and with specific goals. I would like 2.5 million vehicles on the roads by the year 2020 that use fuel cells and hydrogen.

Last year when we wrote the energy bill in the Senate, we passed a provision that I authored, which said that we should have 2.5 million fuel-cell vehicles on the road in this country by the year 2020.

The fact is we already have some cars running on fuel cells. We had a demonstration car go from Los Angeles to New York. I have driven demonstration fuel-cell cars.

Mr. SCHUMER. Mr. President, will my colleague yield for a unanimous consent request?

Mr. DORGAN. Certainly, I will yield for a question.

Mr. SCHUMER. I understand, Mr. President, that there has already been a request that Senator SPECTER immediately follow Senator DORGAN. I haven't had a chance to speak in the last few days. I ask unanimous consent that I be allowed to follow Senator SPECTER when he finishes his remarks.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SCHUMER. I thank the Chair.

I thank my colleague. I think what he is doing on these fuel-cell cars is great and the way to the future. I commend him for his bill.

Mr. DORGAN. Mr. President, I began talking about the Estrada nomination, about how we wish we could resolve that, and turn to other important issues.

I think this issue of fuel-cell vehicles and a hydrogen economy is something we will deal with in an energy bill. I visited with Senator DOMENICI, who is now chairman of the Energy Committee, and my colleague Senator BINGAMAN as well, the ranking member, about this issue.

Now, I want to show my colleagues that this fuel cell technology is not pie in the sky. Here is a fuel-cell vehicle—a Ford Focus production-ready prototype introduced in the autumn of 2002. And this is a fuel-cell vehicle at the hydrogen fueling station. PowerTech Laboratories created this infrastructure for fueling, which, of course, you have to have if you are going to have these kinds of vehicles.

This next chart shows a Nissan X-Terra fueled by compressed hydrogen and tested on public roads in California in the year 2001.

Finally, this is the General Motors Hy-Wire Fuel Concept Car unveiled in August 2002.

The fact is we can do this and should do this as a country, but it won't happen unless we make it happen. That is the point of my legislation.

The Director of Environmental Affairs at Daimler Chrysler has said that political support is vital for the car industry to make inroads in fuel cell technology. They can do a lot themselves, but at a certain point they need legislative and financial support to stimulate this important sector. For that, they need the Government. The European Union has already earmarked 2 billion euros for research over the next 5 years. The central focus will be hydrogen fuel cells.

This is a big idea. This is something our country needs to do. It is the equivalent of going to the Moon by the end of the decade, as John F. Kennedy proposed.

President Bush is right to propose an initiative in this area. I was pleased to support him. I was working with him a year ago. We had in the energy bill goals that I had set. I am convinced we will make much more progress this year.

At a recent hearing, I asked officials from the Department of Energy what kind of vision we have for the year 2025 or 2050 about the type of fuel we are

going to use in American vehicles. The answer was they didn't have a guess. I said: That is interesting. We project out 25 to 50 years and talk about what kind of financial circumstances will exist for Social Security or Medicare. But we have no such goals with respect to the energy? The answer was: No, we don't really have that kind of planning.

It is long past time to start that kind of planning. This country needs a big idea. The President has proposed an approach that I support. It is something I have worked on for the last couple of years. I think by working together—Republicans and Democrats—we can embrace a big idea and move in a very significant way to improve America's energy future to make our country less dependent—less dangerously dependent—on foreign sources of energy. That is my goal.

It is not my goal to turn my back on coal, oil, and natural gas. The fact is the leaders in this effort in this hydrogen economy and in the move to this hydrogen economy will be many of the utility companies and the energy companies of today.

They are the ones in the forefront—United Technologies, Shell, BP. I could go on and name at great length the companies that are involved in this right now at the front end. They are going to be the leaders.

I just think this is the right thing to do. It is important for our country to establish goals. If ever we needed to think about the fragile nature of this American economy, it is now. With the threat of terrorism, with the problems in the Middle East, and with the potential war against Iraq, we ought to be thinking: do we want to depend for over half of our oil from areas of the world that are troubled areas? If not, let us do something about it, and do it now, and let us do it together.

That is why I am introducing my bill, setting forth $6.5 billion over a 10-year period, so that we will establish and reach ambitious goals, in partnership with the private sector, and with the support, I hope, of the President of the United States. I think we can do this, and I think if we do it, it will be extraordinarily helpful to this country.

THE TRADE DEFICIT

Mr. President, one of the other issues I wanted to come to the floor and talk about is the issue of the trade deficit. I think this is a vitally important issue, and I wish my colleagues and I were debating this at length, rather than continuing to dwell on the Estrada matter.

On Thursday last, the Commerce Department announced that our trade deficit was at a record for the year 2002. Our country's deficit in goods last year was $470 billion. That means we sold $470 billion less to other countries than we purchased from other countries. What does all that mean?

This chart shows that our trade deficit has exploded since 1991, a little over a decade ago—and our merchandise trade deficit is now $470 billion. When the Washington Post reported that on the day it was announced, they finally said, it will put a significant damper on U.S. economic growth. Now, the Washington Post is not in the habit of sounding the alarm about the trade deficit. You cannot get them to print an op-ed on that subject. They have a rosy view of trade, and view everyone who raises these questions as some sort of isolationist xenophobes. But here is the Washington Post, in its report last week, saying that the record deficit will put a significant damper on economic growth. They noted that a combination of increasing imports and falling exports clipped a half of a percentage point off the increase in GDP last year.

The Post further reported that nearly one-fourth of the year's trade deficit was with China, which sold $103 billion more in goods to the United States than we were able to sell there. I will speak about China in a couple of moments, but China is by no means the only country with which we have a trade deficit.

This chart shows we have a trade deficit with nearly every country with whom we do business. One notable exception is Australia, but I think that is going to get remedied because our trade negotiators are now negotiating a free trade agreement with Australia, and our trade negotiators are able to lose almost immediately when they negotiate trade agreements.

Will Rogers once said the United States of America has never lost a war and has never won a conference. He surely must have been talking about our trade negotiators.

So every time we have a new trade agreement, it ends up hurting us and helping those with whom we reach the agreement. I guess we are fixing to do an agreement with Australia so perhaps our positive trade balance with Australia will be gone soon.

This chart, sourced from the Department of Commerce, shows that with virtually every major trading partner we have a very large trade deficit. Our deficit with Canada now is $50 billion; deficits with Mexico, $37 billion. Before our negotiators went to negotiate with Canada and Mexico and created this trade agreement, which I thought was a terrible agreement and sold out certain American interests in exchange for other benefits, we had a reasonably modest trade deficit with Canada and a small trade surplus with Mexico. We have managed to turn that into a huge deficit with Canada and a very large deficit with Mexico.

We have deficits with every major Asian country except Singapore. We have deficits with the major economies of Latin America.

Not only do we have deficits with virtually all of our major trading partners, we also have deficits in about every major sector of goods trade. A $110 billion deficit in vehicle trade—vehicles, mind you—a $47 billion deficit in consumer electronics; a $58 billion deficit in clothing, for example.

Some might say agriculture is a bright spot, isn't it, because we are a net exporter of agricultural goods? But even our modest surplus on agricultural products has now been reduced by 30 percent, just over the last year, from $14.2 billion to $10.9 billion in 2002. Our surplus in meats declined by $1 billion. Our deficit in livestock trade reached $1.5 billion. Our deficit in vegetables and fruits reached $2.5 billion.

I mentioned trade with China. We have a deficit with China of $103 billion.

One innocent sounding sector in which we have a trade deficit with China is toys. We have a trade deficit of $14 billion with China in the area of toys. Now, let me describe a news report that I read last year, about conditions in a Chinese toy factory.

The story is entitled ''Worked Till They Drop. Few Protections For China's New Laborers.''

On the night she died, Li Chunmei must have been exhausted. Co-workers said she had been on her feet for nearly 16 hours, running back and forth inside the toy factory, carrying toy parts from machine to machine.

This was the busy season before Christmas.

The factory food was so bad, she said, she felt as if she had not eaten at all. Long hours were mandatory, and at least 2 months had passed since Li and other workers had enjoyed even a Sunday off. ''I want to quit,'' one of her roommates remembered her saying. ''I want to go home.'' Her roommates had fallen asleep when Li started coughing up blood. They found her in the bathroom a few hours later, curled up on the floor, moaning softly in the dark, bleeding from her nose and mouth.

She died before she could arrive at a hospital. The exact cause of her death remains unknown, they say.

What happened to her last November is described by family and friends and coworkers as an example of what China's more daring newspapers have actually given a name. They call it ''guolaosi.'' The phrase means ''overwork death.'' They actually have a name for it in China. It usually applies to young workers who suddenly collapse and die after working exceedingly long hours day after day.

Think of it. Think of working 16-hour days with no day off, inadequate food, in unsafe factories, working children to death in a country where they do it often enough so there is actually a name for it.

Is this the sort of playing field that our manufacturers should be competing in? With children working long hours, for months on end, for virtually no money?

There is another reason, of course, for our trade deficit with China, and that is our markets are open to virtually all of their products, and their markets are not open to ours. The Washington Times ran an article documenting many of the trade barriers that China puts up to our products, particularly the agricultural products. It quotes the American Farm Bureau, which says the Chinese market is no

more open today than it was when China entered the WTO.

At the end of the WTO negotiations, China was a $2 billion market. We expected substantial growth, the Farm Bureau says, but we have not seen that growth because China has not done what it was supposed to do.

Trade barriers are as numerous as they are creative. Import regulations are nearly impossible to figure out. Health inspection standards have changed one month to the next, and it goes on and on.

The bottom line is our agricultural products are not getting into China. China is a country of 1.3 billion people, and they have a $103 billion trade surplus with us, or we a deficit with them. That story in the Washington Times tells us another reason why.

One does not have to travel as far as China to find closed markets for U.S. products. We have a $50 billion trade deficit with Canada. In 2002, for example, our deficit with Canada was $90 million in durum wheat, $160 million in spring wheat. It is pretty easy to calculate that. Do you want to know why? Because our exports to Canada in these areas in wheat are zero. You cannot get it in. I know that personally because I have been on a truck trying to get through the border into Canada with 200 bushels of durum wheat, watching all the Canadian durum ship south on the trip north, and we were stopped at the border.

On February 15 of last year, the USTR found that Canada was guilty of unfair trade, but they said: We will not impose tariff rate quotas. In the absence of tariff rate quotas, one recent study says, U.S. wheat producers lost $124 million in sales in the last crop year.

On April 19, I held a hearing in the Commerce subcommittee I then chaired and talked to agriculture negotiator Ambassador Allen Johnson and said: We need to take action now. I showed him an article in the Bismarck Tribune where the Canadian Wheat Board president was gloating saying USTR had not imposed tariff rate quotas on Canadian wheat. Therefore, they have won. Since the USTR's decision on February 15, last year, enough wheat has come in from Canada to fill 50,000 18-wheel trucks, and the Canadians have not changed their practices at all.

Are farmers upset about that? You are darn right they are. They do not think anybody stands up for them or speaks out for them, and they are sick and tired of it.

We also have a trade deficit with the European Union of $82 billion. One area that is a chronic problem is beef. They will not allow American beef into the European Union. They claim that our beef is made with dangerous growth hormones, even though there is no evidence that such beef is bad for people.

So they have decided that this is what livestock in America looks like: a two-headed cow. Therefore, $100 million in U.S. beef is banned from the EU each year.

Now, we go to the WTO and we get a ruling against the Europeans. What does that mean? Nothing. It does not mean a thing. So then our country takes action against the Europeans. Do you know what we do to the Europeans? We take action against European truffles, goose liver, and Roquefort cheese. Now, my God, that is enough to scare the devil out of any country. Truffles, goose liver, and Roquefort cheese.

Let's talk about Korea. The year 2001, the last year for which I have figures, Korea sent 618,000 automobiles into our country; we were able to get 2,800 cars into Korea. I repeat that because people think that cannot be right. Korea shipped us 618,000 automobiles made in Korea and we were able to get 2,800 U.S. vehicles into the Korean marketplace. Why? Because Korea does not want American vehicles in their marketplace. End of story. We have a $13 billion trade deficit with Korea. If you do not like to talk automobiles, let's talk about potato flakes, the ingredient they use for snack food, and on which they impose a 300-percent tariff.

The list goes on and on. I have not even talked about Japan. We have had a deficit with them forever. It has gone on and on and on. We had a deficit with them when the dollar was strong, when the dollar was weak, when we were growing, when we were in recession, it does not matter.

All of these countries have decided they will use the American marketplace for their benefit and keep American goods out of their marketplace for their benefit. The result is the American consumers pay the price. Some say it is good for consumers that we have all of this trade deficit because this means cheap foreign goods coming in. But our consumers are also people who work. And when you lose your job, which is the result of a trade deficit that is $470 billion, when you lose your job, your time as a consumer is just about over.

One can make a case, I suppose, that the Federal budget deficit is money we owe to ourselves. Some economists make that case. You cannot make that case with respect to the trade deficit. That is money we owe to others outside of this country and will be repaid, inevitably will be repaid, with a lower standard of living someday in this country.

Just once I want our trade negotiators and want this administration and future administrations to stand up for this country's interests. No, not to put a wall around this country. But I would like for this country to believe that its trade policies are in this country's best interests. And they have not been. NAFTA has not been. The United States-Canada FTA was not. The WTO is not.

Just look at the bilateral we did with China—do you know what our negotiators did with China 2 years ago? They sat down, always in secret, and then the door opened, and they trumpeted this new agreement. Do you know what they agreed to with the Chinese? After a phase-in period, we will agree that we will have a tariff on Chinese automobiles that come to the United States that is only one-tenth of the tariff we allow the Chinese to allow on U.S. vehicles that go to China. Our negotiators agreed that we would allow the Chinese to have ten times larger tariffs against U.S. automobiles going to China.

I don't know who agreed to that. I would love to get a name. But these are amorphous groups of people who go over and meet in secret and they lose a trade agreement the minute they sit down with another country.

Harry Truman used to say, I want a one-armed economist because they always say on the one hand this, on the other hand that. I want one economist who supported all the trade agreements we have had to come forward and make a case that this has worked.

It is not working. It is hurting this country. No country will long remain a world power without a strong manufacturing sector. And our manufacturing sector is being sucked out of the middle of this country.

When they talked about NAFTA, with U.S. and Mexican trade, they said U.S.-Mexican trade will all be the product of low-skilled labor coming from Mexico to the United States. That is what we will get from Mexico. Not true. Not true at all. The three largest imports from Mexico, including the maquiladora area, are automobiles, automobile parts, and electronics, the product of high-skilled labor. You can see what is happening in this country as a result of these trade agreements.

Just once I would like to see somebody stand up for this country's producers and its interests. I know a lot of companies that you think of as American companies like these trade agreements. And the chambers of commerce and others that support them support these agreements. Why? Because they are really multinational, international companies. They think this is just fine. Take a jet, fly around the world, look down on the ground and see where you can produce for 14 cents, hire 14-year-olds and work them 14 hours a day. Where can you do that? And then ship the product back to Toledo, Bismarck, Los Angeles, or Denver? Where can you do that? It is about profit, not about strengthening our country. It is about international profit.

I care about this country's long-term economic interests. A $470 billion trade deficit, especially given the circumstances that exist with those with whom we have that deficit—Japan, Europe, Korea, China, Canada, Mexico—shame on us for deciding this is acceptable. It is not acceptable. In the long term it will hurt every child in this country who grows up and experiences a lower standard of living because we

did not have the guts to decide we would demand fair trade with other countries.

Fair trade means if we cannot compete, that is our fault. But fair trade insists that the rules be fair. And no American worker and no American company ought to have to compete against someone that wants to hire 14-year-olds and work them 14 hours a day.

You say it does not happen? I will give you names. Of course it happens. It happens all the time, all over the world. No American should have to compete against a company that decided to renounce its citizenship, moved its headquarters on paper to Bermuda to avoid paying U.S. corporate income tax, and then moved its production to yet a third country, somewhere where they can dump chemicals into the water and chemicals into the area and run a factory that is unsafe, where they hire kids. No American should have to compete against that. It is not fair competition, and at some point, in some way, some day, someone will say this is not in our interest.

It is in our interest to encourage expanded trade; that clearly is in our interest. On behalf of those who produce in this country and who work in production in this country, it is in our interest to demand fair trade rules. Globalization has galloped far ahead of the rules of trade and no one is willing to admit it or do anything about it. And it is injuring this country, inevitably injuring this country.

The question is, When will we have a real debate about it? You can put on a blindfold and listen. You can listen to Democratic Presidents and Republican Presidents and you will not hear a bit of difference on international trade. For 20 years, we have had the same mindless mantra about this trade. And when I finish this speech, some will say that I am a protectionist, a xenophobic isolationist protectionist, someone who just does not get it.

Well, I get it. What I get is I have seen the unfairness that is undermining American farmers, American manufacturers, American businesses, and it ought to stop. The only way it will stop is if we have someone, someplace, somewhere who has the guts to stand up and stop it.

We had a vote in this Chamber recently on something called fast track. They called it trade promotion authority, which is just a goofy way of putting some new clothing on a old, bad deal—fast track. I voted against it. I would not give it to President Clinton. I would not give it to President George H.W. Bush. I did not think either of them should have it.

President George W. Bush now has fast-track authority. What does that mean? That trade agreements are being negotiated in secret somewhere around the world, and when they are done negotiating, they will be brought back to this Chamber for a straight up-or-down vote. Fast track means that no one in this Chamber, under any circumstances, at any time, will ever be able to offer an amendment to strike out an offending provision, to strike out something we think inherently injures this country. Nobody will be able to offer the amendment. Why? Because we decided to handcuff ourselves. I have no idea why Members of the Senate think we ought to be doing that. And it is exactly what we have done.

So this, unfortunately, is not going to get better. It is going to get worse, unless enough of us decide in this country that American jobs are important, that yes, globalism is here, but the rules of globalism must keep pace, and we must insist and demand fair trade. We must demand that other countries open their markets in exchange for an admission to the American marketplace. All of these things are conditions that are inherent to the well-being and stability of this country's future.

I am obviously frustrated, from time to time, about trade issues because no one seems to care. There is a sense that there are only two sides: There are the expansionists and the protectionists. That is fundamentally wrong. There are people like me who believe in expanded trade, but believe, on behalf of the things we fought for for a century in this country, that such expanded trade needs to be done with fair rules.

We fought for a century, I would say, for people to have the right to go into a factory that is safe, to have a safe workplace. We fought for a long while about preventing people from dumping chemicals into streams and the air. People lost their lives demonstrating on the streets for the right to be able to collectively bargain.

And now we decide that did not matter much, just skip all that, and pole-vault over it all and move your plant, in fact, renounce your citizenship while you are at it, become a Bermuda paper company so you do not even pay your taxes.

Bermuda has a navy that has 26 people. Maybe the next time a U.S. company that decides to become a Bermuda paper company, and they are in trouble, and someone wants to expropriate their assets, maybe they ought to call on the Bermudan Navy. Maybe that is where they ought to get their protection.

I am going to come back and speak at some greater length on trade. This is such an important issue.

I represent a State that produces agricultural products, for which we must find a foreign home for a sizable portion of it. I am not anti-trade. I very strongly support expanded trade. But I am sick and tired of this country being taken advantage of. I am sick and tired of seeing wheat farmers being injured by bad agreements and by bad practices that you can't stop. And the same is true with the textile workers. And the same is true for those who manufacture aircraft. It just goes on and on. We have a responsibility to stop it.

We should be a world leader and say we support globalization and world trade, providing the rules are fair. The rules are not fair. We ought to say, we, by God, are going to change them. We have to be the leader that changes those rules to make sure we have a fair chance at a world trade regime that is beneficial not just to those with whom we trade, but beneficial to this country as well.

So I will continue this at a later time. I did tell my colleague that I would be finished at about this time. I thank him for his patience.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I have sought recognition to support the confirmation of Miguel Estrada to be a judge for the Court of Appeals for the District of Columbia Circuit.

We are seeing a Democratic filibuster, which essentially constitutes a revolution on the advice and consent process. It is unprecedented. What we are seeing is the culmination of 41 opposition Senators holding the judicial confirmation process hostage.

The advice and consent function has traditionally been structured where the President makes the nomination and, unless there is some reason to oppose, some objection, some basis for opposition, the confirmation follows.

In this situation there is no reason not to confirm Mr. Estrada. He has an extraordinary academic background. Phi Beta Kappa, magna cum laude from Columbia; magna cum laude from Harvard Law School. He was on the Harvard Law Review. He argued 15 cases before the Supreme Court of the United States. He is the member of a distinguished law practice. He has had service as an Assistant Solicitor General. This is a great American success story of a man coming from a very humble background and achieving real success, with real credentials for the court of appeals.

The opponents to Mr. Estrada have contended that he has not answered questions to their satisfaction in the Judiciary Committee hearing. I suggest that a fair reading of the record shows the contrary.

Nominees are not supposed to give their opinions or judgments on hypothetical cases or in matters which may come before the court. The judicial process works so that cases in controversy depend upon the specific facts. Then briefs are submitted to the court. Then there is oral argument before the court. Then the judges deliberate, talk among themselves, reflect on the case, ultimately come to a judgment, write an opinion, and express themselves as to their conclusions.

That is a very different matter from someone being asked: What is your judgment on issue A? What is your judgment on issue B? How would you find on issue C? The judicial process does not function that way.

Traditionally, nominees have been accorded an understanding that they do not have to answer such questions.

It is commonplace for questions to be asked. And I refer now to the confirmation hearings of Merrick Garland, where I asked now-Judge Garland:

Do you favor, as a personal matter, capital punishment?

Mr. Garland:

That is really a matter of settled law now. The Court has held that capital punishment is constitutional, and lower courts are required to follow that rule.

There was an extended discussion which followed, but the upshot of the matter was that Mr. Garland—now Judge Garland—did not give his views. And I accepted that. He said that it was a matter of established law, and as a lower court judge he would be obliged to follow the law.

There was a very controversial nominee, now Judge Marsha Berzon. She was asked about her view on Roe v. Wade and her thoughts about the abortion issue. And Marsha Berzon responded:

I'm bound by Casey in that regard.

That is referring to the case of Casey v. Planned Parenthood. And Marsha Berzon was a nominee by President Clinton, as was Judge Garland a nominee by President Clinton.

When the shoe was on the other foot, these nominees did not give answers to these questions, but responded in the traditional way. And they were confirmed.

Judge Rogers was questioned by Senator Cohen and asked about constitutional interpretation, where Senator Bill Cohen said:

This is an evolutionary interpretation of what was originally defined at least in the Constitution. Would you agree with that general statement?

Judge Rogers responded, ''My job as an appellate judge is to apply precedent.''

And so it goes with the tradition being established that nominees do not answer specific questions.

Mr. Estrada has agreed to make himself available to talk to any Senator who wishes to talk to him and to respond to inquiries and to have a discussion as to his judicial qualifications and answer questions consistent with appropriate practice. I think that is sufficient, certainly in the context where Mr. Estrada has already had his hearing by the Judiciary Committee and has been reported out.

There has been an effort to obtain the legal papers of Miguel Estrada when he worked as an Assistant Solicitor General. I say with all due respect that that kind of contention is a red herring. Seven former Solicitors General wrote to the then chairman of the Judiciary Committee, Senator LEAHY, outlining this issue in a succinct way. Reading the letter would express it as briefly as it can be expressed. Solicitors General Seth Waxman, a Democrat, Walter Dellinger, a Democrat, Drew Days, a Democrat, Kenneth Starr, a Republican, Charles Fried, a Republican, Robert H. Bork, a Republican, Archibald Cox, a Democrat—a four to three balance for Democrats—wrote as follows:

We write to express our concern about your recent request that the Department of Justice turn over ''appeal recommendations, certiorari recommendations and amicus recommendations'' that Miguel Estrada worked on while in the Office of Solicitor General. As former heads of the Office of Solicitor General, we can attest to the vital importance of candor and confidentiality in the Solicitor General's decision-making process. The Solicitor General is charged with weighing responsibility, of deciding whether to appeal adverse decisions in cases where the United States is a party, whether to seek Supreme Court review of adverse appellate decisions, and whether to participate as amicus curiae and other high-profile cases that implicate an important Federal interest. The Solicitor General has the responsibility of representing the interests not just of the Justice Department nor just of the executive branch but of the entire Federal Government, including Congress. It goes without saying that when we make these and other critical decisions we rely on frank, honest, and thorough advice from our staff attorneys, such as Mr. Estrada. Our decision-making process requires the unbridled, open exchange of ideas, and exchange simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all but vulnerable to public disclosures. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosures. High-level decision-making requires candor, and candor in turn requires confidentiality. Any attempt to intrude into the office's highly privileged deliberations would come at the cost of the Solicitor General's ability to defend vigorously the U.S. litigation interests, a cost that would also be borne by Congress itself. Although we profoundly respect the Senate's duty to evaluate Mr. Estrada's fitness for the Federal judiciary, we do not think that the confidentiality and integrity of internal deliberations should be sacrificed in the process.

It is signed by four former Democratic Solicitors General for Democratic Presidents who were Democrats, and three former Solicitors General who served in that capacity for Republican Presidents.

What is really happening here is that the advise and consent function is being turned into an advise and dissent function. Beyond the qualifications of Mr. Estrada to be on the Court of Appeals for the District of Columbia Circuit, this is obviously a preliminary battle for the next nominee to the Supreme Court of the United States.

I emphasize the issue of the unprecedented nature of this challenge and this procedure where 41 Senators can hold the confirmation process hostage. In order to cut off debate—to get what we call cloture—60 votes are required. So as long as 41 Senators of the opposition party vote against cloture, the nomination process cannot go forward and there cannot be an up-or-down vote on a nominee.

It has been said many times that if the opponents of Mr. Estrada seek to vote him down, let them do so. But it is plain that there are more than 51 Senators who are ready to vote to confirm Miguel Estrada. It is reported that some 55 Senators are prepared to vote for cloture. If this process goes on long enough, I think it is true that 60 votes would be obtained, cloture would be invoked, debate would be cut off, and there would be a vote on Miguel Estrada and he would be confirmed.

But this lengthy process comes at the expense of very important other business of the Senate. The minority leader appeared in the Chamber earlier this week and asked to proceed to a discussion of the economy, which is a very important subject. That was obviously a tactic to make a point of trying to get off of Estrada and going to something else. But we should conclude Estrada not by way of removing the nomination from the floor but by way of voting on Miguel Estrada and then moving on to other very important items.

There are very important issues which this Senate has to consider—an economic stimulus package, the prospects of a war in Iraq, and the issue of terrorism, which I am going to speak about in a few minutes. But right now, there is a stranglehold on the Senate with both sides having dug in.

I will concede that when President Clinton was in the White House and we Republicans controlled the Senate that we did not give due deference to Presidential nominees. The record is also plain that I was willing to and did support Democratic nominees who were qualified. Other Republicans did as well. When we had a majority in the Judiciary Committee, we voted out nominees who were Democrats.

It is my hope that one day we will find a resolution to this issue by establishing a protocol where the practice is established that so many days after a nomination is submitted there is a hearing in the Judiciary Committee; some days later, there is a vote by the committee; so many days after that, there is a floor debate and a vote by the Senate could be extended.

On the most controversial nomination we have had during my tenure, the nomination of Justice Clarence Thomas, which was decided on the 52-to-48 vote with a lot of acrimonious debate remembered well in this Chamber although it was back in October of 1991, the opposition party did not resort to a filibuster. In 1991, the Senate was controlled by the Democrats. They had a majority of the Senators. Justice Thomas was confirmed 52 to 48 in a very hotly contested, very partisan, very controversial nomination.

Now to move to Miguel Estrada to be on the lower court, the District of Columbia Circuit Court, and with a matter of his qualifications, is sending the confirmation process into turmoil from which it may never recover, or if it does recover it is going to be a very long time. The fallout on this issue goes beyond the nomination process but to the essence of collegiality and the workings of the Senate, which is very much to the detriment of this

body and very much to the detriment of the American people whom we are supposed to serve.

It is my hope that we yet might be able to come to some accommodation—not on Miguel Estrada but on the broader issues where we can have a protocol and establish a procedure that is not partisan, not political.

We ought to take the judicial nominating process out of politics so that when you have a Republican President and a Senate controlled by the Democrats, or a President who is a Democrat with a Senate controlled by the Republicans, we do not get into a logjam. And now we have a President who is a Republican and a Senate controlled by the Republicans, but as long as there are 41 who will stand up and oppose and filibuster, then the entire process breaks down.

TERRORISM

Mr. President, I intend to talk on another subject. I have gotten the acquiescence of the chairman of the committee, Senator HATCH. This is not about the Estrada nomination that we are generally talking about, although Senators have talked about other subjects. The subject I am now going to discuss is a matter of great national importance. It relates to a report that was issued yesterday by Senator LEAHY, Senator GRASSLEY, and myself. It is in reference to the issue of terrorism.

The Judiciary Committee is scheduled to have a hearing next Tuesday, and there are matters that require discussion so that we are in a position to get responses from the Director of the FBI and move ahead with the Judiciary Committee hearings scheduled, as I said, for next Tuesday.

Yesterday, as a matter of senatorial oversight, Senator LEAHY, Senator GRASSLEY, and I released a 37-page report that deals with the issue of the FBI's activities under the Foreign Intelligence Surveillance Act (''FISA'') and the ability of the Federal Bureau of Investigation and the Department of Justice to handle counterterrorism. The report can be found on my office's internet website at specter.senate.gov.

It is my view that there is a critical issue of the FBI's competence to handle terrorism, in light of the clear-cut failures of the FBI prior to 9/11, and the FBI's failure to answer important questions about what the FBI has done to correct the current failures.

The report we released yesterday refers to the FBI's handling of the famous Phoenix memorandum, where there was a suspicious person who was taking flight training in the Phoenix area, and he had a big picture of Osama bin Laden on his wall. A detailed FBI report was submitted to Washington and was lost in the shuffle at FBI headquarters.

At pages 31–32 of the report that we filed yesterday, there is a reference to the Phoenix memo. Had it been forwarded to the right personnel and understood at FBI headquarters, the Foreign Intelligence Surveillance Act request in the Moussaoui case from the Justice Department's Office of Intelligence Policy and Review would have been handled in a different manner. With that Phoenix report, coupled with the information from Zacarias Moussaoui's computer, and coupled with other information, 9/11 might well have been prevented.

There was information in the hands of the Central Intelligence Agency about individuals in Kuala Lampur, Malaysia, who later turned out to be among the hijackers on 9/11—information that was not turned over to the Immigration and Naturalization Service. Had it been turned over, those individuals would have been kept out of the United States and would not have been hijackers on 9/11.

There had been information as early as 1996 from a Pakistani named Abdul Hakim Murad, an al-Qaida member, who had plans to fly an airplane into the White House or CIA headquarters.

Had the information on Zacarias Moussaoui been properly handled, it could have led to a FISA search authorization for Moussaoui's computer and the information contained on that computer, and might well have prevented 9/11.

The Zacarias Moussaoui case received national prominence when a conscientious FBI agent named Coleen Rowley wrote a 13-page, single-spaced letter to the FBI Director, which the Judiciary Committee ultimately saw and was the subject of a very important Judiciary Committee hearing last June 6. FBI Agent Rowley was honored on the cover of Time Magazine as one of the persons of the year—three so-called whistleblowers, which is a categorization that doesn't sound too complimentary on its face, but it is very important when somebody knows what is going on within the Government that is wrong and has the courage to stand up and expose it and subject himself or herself to retaliation.

But in the course of what Agent Rowley wrote to FBI Director Mueller, it was apparent the FBI was applying the wrong standard for a warrant under the Foreign Intelligence Surveillance Act.

The letter from Agent Rowley pointed out that they were being held to a standard of preponderance of the evidence—meaning more likely or more probable than not—meaning 51 percent or more. In the course of that hearing, I raised with Director Mueller and with Agent Rowley the case of Illinois v. Gates, 462 U.S. 213, 1983, which appears at pages 23–24 of the report that Senators LEAHY, GRASSLEY, and I released yesterday, which defined probable cause as ''circumstances which warrant suspicion'' under the ''totality of the circumstances analysis.''

This case was decided in 1983 and it referred back to an opinion of Chief Justice Marshall in 1813. So this had been the law for a long time. But at the hearing, Agent Rowley testified that was not the standard that was used, and there is a real question which has yet to be answered as to whether FBI Director Mueller knew what the right standard was.

In light of the fact that a warrant was not obtained under the Foreign Intelligence Surveillance Act, Moussaoui, a key participant in the 9/11 planning, developed into a burgeoning, very major case in the United States in the intervening months. We then proceeded to have a closed-door session, where we brought in attorneys and personnel from the FBI who were in charge of handling warrants under the Foreign Intelligence Surveillance Act. This appears at page 27.

My questioning:

What is the legal standard for probable cause for a warrant?

FBI attorney:

A reasonable belief that the facts you are trying to prove are accurate.

Question by me:

Reason to believe?

Answer by the attorney:

Reasonable belief.

Question by me:

Reasonable belief?

Answer by the attorney:

More probable than not.

My question:

More probable than not?

Mr. President, that is not the standard. The standard is suspicion under the totality of the circumstances. Here is the key attorney who is supposed to pass on applications for warrants under the Foreign Intelligence Surveillance Act, and he doesn't know the standard.

My question was:

Are you familiar with Gates v. Illinois?

Answer:

No, sir.

He doesn't know the baseline case for deciding what the standard is for probable cause, and he is the man who is supposed to approve warrants under the Foreign Intelligence Surveillance Act so that we can find out what men like Zacarias Moussaoui are doing and protect the American people.

I was absolutely astounded at what I heard. I was astounded because the June 6 hearings, more than a month before we had this closed-door session on July 9, were widely publicized. They were on C–SPAN. Maybe nobody watches C–SPAN. Maybe nobody is watching C–SPAN now. Maybe nobody ever watches C–SPAN. But beyond being publicized on C–SPAN, there was extensive newspaper coverage about it. One would have expected that the agents who deal with the Foreign Intelligence Surveillance Act would be looking at a hearing which was squarely on their subject. Or one would also expect that the Director of the FBI, who was at the hearing, and found that key FBI personnel had applied the wrong standard in the Zacarias Moussaoui case—causing them not to apply for a search warrant—that the

FBI Director would take specific steps to see to it that the people in charge of handling those warrant applications would have known what was going on.

From June 6 to July 9 is 33 days. The world could turn in 33 days. People could be doing highly suspicious things, people could be planning terrorist attacks, and no action was taken by the Director of the FBI to see to it that the people who were charged with the responsibility of applying for these warrants did so.

The very next day, I wrote to the Director of the FBI:

> Dear Bob, In a hearing before the Judiciary Committee on June 6 . . . I called your attention to the standard on probable cause in the opinion of then-Associate Justice Rehnquist in Illinois v. Gates. . . .

I go through the business about suspicion and totality of the circumstances. My letter continues:

> In a closed door hearing yesterday, seven FBI personnel handling FISA warrant applications were questioned, including four attorneys.
>
> A fair summary of their testimony demonstrated that no one was familiar with Justice Rehnquist's definition from Gates and no one articulated an accurate standard for probable cause.
>
> I would have thought that the FBI personnel handling FISA applications would have noted this issue from the June 6th hearing; or, in the alternative, that you or other supervisory personnel would have called it to their attention.
>
> It is obvious that these applications, which are frequently made, are of the utmost importance to our national security and your personnel should not be applying such a high standard that precludes submission of FISA applications to the Foreign Intelligence Surveillance Court.
>
> I believe the Judiciary Committee will have more to say on this subject but I wanted to call this to your attention immediately so that you could personally take appropriate corrective action.

Days followed, weeks followed, and no response from Director Mueller.

Then on September 10, I again raised these issues with a representative of the Department of Justice who appeared before the Judiciary Committee. On September 12, I received an undated letter signed by the Assistant Director for the Office of Public and Congressional Affairs. It is very unusual to get undated letters. The representation has been made that the letter was sent on July 25, but it was received in my office on September 12.

Mr. President, I ask unanimous consent that my letter to Director Mueller dated July 10 and the undated response from John E. Collingwood be printed in the CONGRESSIONAL RECORD at the conclusion of my remarks.

Mr. SCHUMER. Reserving the right to object—and I am not going to object—I want to get a time line. My friend has important things to say. How much longer does my colleague from Pennsylvania—if he will yield for a question—expect to hold the floor?

Mr. SPECTER. I will not say regular order, but there is no basis for the inquiry, but I will respond. I expect to be about 15 minutes more.

Mr. SCHUMER. I thank my colleague. I am trying to work out our schedule. I have no objection, of course. I am very interested in what my colleague has to say.

The PRESIDING OFFICER (Mr. THOMAS). Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. Mr. President, the FBI then put out a memorandum dated September 16. That was in response to my questioning the Department of Justice representative at the Judiciary Committee hearings on September 10. Again, Mr. President, I ask unanimous consent that this memorandum be printed in the CONGRESSIONAL RECORD following my statement.

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

(See exhibit 2.)

Mr. SPECTER. Mr. President, I will not read the memo or analyze it in detail, but I invite readers of the CONGRESSIONAL RECORD to do so. This is a virtually unintelligible memorandum, if agents are supposed to read this and know what to do about applications for warrants under the Foreign Intelligence Surveillance Act.

In paragraph 3, it talks about ''which deal with probabilities.'' It makes a reference to ''it requires more than unfounded suspicion,'' but it is not probabilities that involve the standards, it is suspicion. Obviously, not unfounded suspicion, but suspicion based on a totality of the circumstances.

At that stage, I again wrote to Director Mueller noting the questions which I had propounded to him and Special Agent Coleen Rowley on June 6 and the July 10 letter which I wrote to him which had still not been answered. This undated letter from John E. Collingwood provides no answer at all. I will not read it in detail, but it will be in the RECORD.

The closest the letter from John E. Collingwood, the Assistant Director for the Office of Public and Congressional Affairs, comes is:

> This guidance will also address the concerns raised in your letter in your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation.

That is as close as they come to an answer which, obviously, on its face is no answer at all.

So I again wrote Director Mueller on September 24, 2002. I referenced the July 10 letter, and I referenced the fact that on September 12, my office received an undated letter from Assistant Director Collingwood which was totally unresponsive. I referenced the September 16 FBI memo, and concluded by saying I would like an explanation from him as to why it took the FBI so long to disseminate information on the standard for probable cause under Illinois v. Gates for a Foreign Intelligence Surveillance Act warrant. As yet, I have not received an answer from FBI Director Mueller to that important question as to why it took so long.

Then I supplemented that letter on October 1, inquiring what were the specifics on the standard of probable cause used by the FBI for warrants under the Foreign Intelligence Surveillance Act from June 6, the date of our Judiciary Committee hearing, until September 16, when the memorandum went out. As yet, I have not gotten an answer to that letter.

I ask unanimous consent that both of those letters be printed at the conclusion of my remarks.

In the sequence of events, we next sent over to the FBI the report which we issued yesterday to give them an opportunity to review it and an opportunity to make comments. Finally, last Friday, February 21, 2003, we received another letter dated February 20 from the Department of Justice which referenced the outstanding questions—not sent to me, the person who had raised the questions, but sent to Senator HATCH, with a copy to me—and ending with the statement of what standard had been applied. The letter is signed by Acting Assistant Attorney General Jamie E. Brown:

> The standard they employed was consistent with ''Illinois v. Gates'' both before and after they received the memorandum.

That is patently false. The standard which had been employed before the memorandum was more probable than not, 51 percent, as testified by Special Agent Coleen Rowley, and it is undetermined as to what standard was used thereafter.

The issues under the Foreign Intelligence Surveillance Act have been raised in other oversight hearings relating to Wen Ho Lee, when the Department of Justice, on a matter handled by Attorney General Janet Reno personally, declined to request a warrant under the Foreign Intelligence Surveillance Act where there was ample probable cause, a matter which was reviewed in depth by the subcommittee which I chaired on Department of Justice oversight.

The Attorney General designated Assistant U.S. Attorney Randy Bellows to review the Wen Ho Lee case. Mister Bellows filed an extensive report on May 12, 2000, saying that Attorney General Reno was wrong and the subcommittee of the Judiciary Committee was correct that a warrant should have been issued.

Just in the last few weeks, an indictment has been returned, charging Mr. Sami Al-Arian for gathering funds for terrorist organizations since the early 1990s, an indictment based on extensive evidence collected pursuant to the Foreign Intelligence Surveillance Act, raising a real question as to the interpretation by the FBI and the Department of Justice of the Foreign Intelligence Surveillance Act, going back to Wen Ho Lee, going back to the 1990s, and surviving up until very recently, when they failed to utilize the provisions of the Foreign Intelligence Surveillance Act for criminal prosecutions.

Prior to the enactment of the PATRIOT Act in the fall of 2001, the standard for Foreign Intelligence Surveillance Act surveillance had been interpreted by the courts to be that the primary purpose for the surveillance had to be for intelligence gathering, but saying ''primary purpose'' left latitude for some law enforcement purpose.

Then the PATRIOT Act amended the Foreign Intelligence Surveillance Act standards to say ''significant purpose,'' broadening to some extent the issue of using Foreign Intelligence Surveillance Act warrants for law enforcement purposes. So in that substance, there is a persistent question as to the activities of the Department of Justice in implementing the Foreign Intelligence Surveillance Act, passed in 1978, at a time when gathering information and evidence against terrorists is of the utmost importance for the security of the American people.

In our oversight hearing which we conducted last July 9, and in subsequent hearings and correspondence, we asked the Department of Justice for an opinion written by the Foreign Intelligence Surveillance Court, which the Department of Justice declined to give us. We finally had to get it from the court itself. In that matter, the Foreign Intelligence Surveillance Court criticized the Department of Justice and the FBI for some 75 cases where, as the court put it, the applications for search warrants had contained substantial inaccuracies. Then there was an appeal taken, the first such appeal, where the Court of Appeals for the Foreign Intelligence Surveillance Act found that there was broader discretion for law enforcement, which was very important in the war against terrorism.

All of this is very complicated, and I have gone to some length to put this into the RECORD.

I ask unanimous consent, on behalf of Senator LEAHY, Senator GRASSLEY, and myself, that the full text of the report issued yesterday be printed in the RECORD. As I noted earlier, the report can also be found on my office's website at specter.senate.gov.

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

INTERIM REPORT ON FBI OVERSIGHT: FISA IMPLEMENTATION FAILURES

I. EXECUTIVE SUMMARY AND CONCLUSIONS

Working in a bipartisan manner in the 107th Congress, the Senate Judiciary Committee conducted the first comprehensive oversight of the FBI in nearly two decades. That oversight was aimed not at tearing down the FBI but at identifying any problem areas as a necessary first step to finding constructive solutions and marshaling the attention and resources to implement improvements. The overarching goal of this oversight was to restore confidence in the FBI and make the FBI as strong and as great as it must be to fulfill this agency's multiple and critical missions of protecting the United States against crime, international terrorism, and foreign clandestine intelligence activity, within constitutional and statutory boundaries.

Shortly after the Committee initiated oversight hearings and had confirmed the new Director of the FBI, the Nation suffered the terrorist attacks of September 11, 2001, the most serious attacks on these shores since Pearl Harbor. While it is impossible to say what could have been done to stop these attacks from occurring, it is certainly possible in hindsight to say that the FBI, and therefore the Nation, would have benefitted from earlier close scrutiny by this Committee of the problems the agency faced, particularly as those problems affected the Foreign Intelligence Surveillance Act (''FISA'') process. Such oversight might have led to corrective actions, as that is an important purpose of oversight.

In the immediate aftermath of the attacks, the Congress and, in particular, the Senate Judiciary Committee responded to demands by the Department of Justice (DOJ) and the FBI for greater powers to meet the security challenges posed by international terrorism. We worked together to craft the USA PATRIOT Act to provide such powers. With those enhanced powers comes an increased potential for abuse and the necessity of enhanced congressional oversight.

Our oversight has been multi-faceted. We have held public hearings, conducted informal briefings, convened closed hearings on matters of a classified nature, and posed written questions in letters in connection with hearings to the DOJ and FBI. Although our oversight has focused primarily on the FBI, the Attorney General and the DOJ have ultimate responsibility for the performance of the FBI. Without both accountability and support on the part of the Attorney General and senior officials of the DOJ, the FBI cannot make necessary improvements or garner the resources to implement reforms.

At times, the DOJ and FBI have been cooperative in our oversight efforts. Unfortunately, however, at times the DOJ and FBI have either delayed answering or refused to answer fully legitimate oversight questions. Such reticence only further underscores the need for continued aggressive congressional oversight. Our constitutional system of checks and balances and our vital national security concerns demand no less. In the future, we urge the DOJ and FBI to embrace, rather than resist, the healthy scrutiny that legitimate congressional oversight brings.

One particular focus of our oversight efforts has been the Foreign Intelligence Surveillance Act (FISA). This report is focused on our FISA oversight for three reasons. First, the FISA is the law governing the exercise of the DOJ's and FBI's surveillance powers inside the United States to collect foreign intelligence information in the fight against terrorism and, as such, is vitally important to our national security. Second, the concerns revealed by our FISA oversight highlight the more systemic problems facing the FBI and the importance of close congressional oversight and scrutiny in helping to provide the resources and attention to correct such problems before they worsen. Third, members of this Committee led the effort to amend key provisions of the FISA in the USA PATRIOT Act, and the sunset or termination of those amendments in four years makes it imperative that the Committee carefully monitor how the FISA changes are being implemented.

This report is in no way intended to be a comprehensive study of what did, or did not, ''go wrong'' before the 9/11 attacks. That important work was commenced by the Joint Intelligence Committee in the 107th Congress and will be continued by the National Commission on Terrorist Attacks (the ''9/11 Commission'') established by an act of Congress at the end of the last session. The focus of this report is different than these other important inquiries. We have not attempted to analyze each and every piece of intelligence or the performance of each and every member of the Intelligence Community prior to the 9/11 attacks. Nor have we limited our inquiry to matters relating only to the 9/11 attacks. Rather, we have attempted, based upon an array of oversight activities related to the performance of the FBI over an extended period of time, to highlight broader and more systemic problems within the DOJ and FBI and to ascertain whether these systemic shortcomings played a role in the implementation of the FISA prior to the 9/11 attacks.

The FISA provides a statutory framework for electronic and other forms of surveillance in the context of foreign intelligence gathering. These types of investigations give rise to a tension between the government's legitimate national security interests, on the one hand, and, on the other hand, constitutional safeguards against unreasonable government searches and seizures and excessive government intrusion into the exercise of free speech, associational, and privacy rights. Congress, through legislation, has sought to strike a delicate balance between national security and constitutionally protected interests in this sensitive arena.

The oversight review this Committee has conducted during the 107th Congress has uncovered a number of problems in the FISA process: a misunderstanding of the rules governing the application procedure, varying interpretations of the law among key participants, and a break-down of communication among all those involved in the FISA application process. Most disturbing is the lack of accountability that has permeated the entire application procedure.

Our FISA oversight—especially oversight dealing with the time leading up to the 9/11 attacks—has reinforced the conclusion that the FBI must improve in the most basic aspects of its operations. Following is a list of our most important conclusions:

FBI Headquarters did not properly support the efforts of its field offices in foreign intelligence matters. The role of FBI Headquarters in national security investigations is to ''add value'' in two ways: by applying legal and practical expertise in the processing of FISA surveillance applications and by integrating relevant information from all available intelligence sources to evaluate the significance of particular information and to supplement information from the field. In short, Headquarters' role is to know the law and ''connect the dots'' from multiple sources both inside and outside the FBI. The FBI failed in this role before the 9/11 attacks. In fact, the bureaucratic hurdles erected by Headquarters (and DOJ) not only hindered investigations but contributed to inaccurate information being presented to the FISA Court, eroding the trust in the FBI of the special court that is key to the government's enforcement efforts in national security investigations.

Key FBI agents and officials were inadequately trained in important aspects of not only FISA, but also fundamental aspects of criminal law.

In the time leading up to the 9/11 attacks, the FBI and DOJ had not devoted sufficient resources to implementing the FISA, so that long delays both crippled enforcement efforts and demoralized line agents.

The secrecy of individual FISA cases is certainly necessary, but this secrecy has been extended to the most basic legal and procedural aspects of the FISA, which should not be secret. This unnecessary secrecy contributed to the deficiencies that have hamstrung the implementation of the FISA.

Much more information, including all unclassified opinions and operating rules of the FISA Court and Court of Review, should be made public and/or provided to the Congress.

The FBI's failure to analyze and disseminate properly the intelligence data in the agency's possession rendered useless important work of some of its best field agents. In short, the FBI did not know what it knew. While we are encouraged by the steps commenced by Director Mueller to address this problem, there is more work to be done.

The FBI's information technology was, and remains, inadequate to meet the challenges facing the FBI, and FBI personnel are not adequately trained to use the technology that they do possess. We appreciate that Director Mueller is trying to address this endemic problem, but past performance indicates that close congressional scrutiny is necessary to ensure that improvements continue to be made swiftly and effectively.

A deep-rooted culture of ignoring problems and discouraging employees from criticizing the FBI contributes to the FBI's repetition of its past mistakes in the foreign intelligence field. There has been little or no progress at the FBI in addressing this culture.

It is important to note that our oversight and conclusions in no way reflect on the fine and important work being done by the vast majority of line agents in the FBI. We want to commend the hard-working special agents and supervisory agents in the Phoenix and Minneapolis field offices for their dedication, professionalism, and initiative in serving the American people in the finest traditions of the FBI and law enforcement. Indeed, one of our most basic conclusions, both with respect to FISA and the FBI generally, is that institutional and management flaws prevent the FBI's field agents from operating to their full potential.

Although the DOJ and FBI have acknowledged shortcomings in some of these areas and begun efforts to reform, we cannot stress strongly enough the urgency of this situation. The pace of improvement and reform must quicken.

We are issuing this interim public report now so that this information is available to the American people and Members of Congress as we evaluate the implementation of the USA PATRIOT Act amendments to the FISA and additional pending legislation, including the FBI Reform Act. We also note that many of the same concerns set forth in this report have already led to legislative reforms. Included in these was the bipartisan proposal, first made in the Senate, to establish a cabinet level Department of Homeland Security, a proposal that is already a legislative reality. Our oversight also helped us to craft and pass, for the first time in 20 years, the 21st Century Department of Justice Appropriations Authorization Act, P.L. 107–296, designed to support important reforms at the Department of Justice and the FBI. In addition, concerns raised by this Committee about the need for training on basic legal concepts, such as probable cause, spurred the FBI to issue an electronic communication on September 16, 2002, from the FBI's Office of the General Counsel to all field offices explaining this critical legal standard.

Additionally, this report may assist the senior leadership of the DOJ and FBI, and other persons responsible for ensuring that FISA is used properly in defending against international terrorists.

II. OVERVIEW OF FBI OVERSIGHT IN THE 107TH CONGRESS

A. The Purposes of FBI Oversight: Enhancing Both Security and Liberty

Beginning in the summer of 2001 and continuing through the remainder of the 107th Congress, the Senate Judiciary Committee conducted intensive, bipartisan oversight of the FBI. The purpose of this comprehensive oversight effort was to reverse the trend of the prior decades, during which the FBI operated with only sporadic congressional oversight focused on its handling of specific incidents, such as the standoffs at Ruby Ridge, Idaho, or Waco, Texas, and the handling of the Peter Lee and Wen Ho Lee espionage cases. It was the view of both Democrats and Republicans on the Judiciary Committee that the FBI would benefit from a more hands-on approach and that congressional oversight would help identify problems within the FBI as a first step to ensuring that appropriate resources and attention were focused on constructive solutions. In short, the goal of this oversight was to ensure that the FBI would perform at its full potential. Strong and bipartisan oversight, while at times potentially embarrassing to any law enforcement agency, strengthens an agency in the long run. It helps inform the crafting of legislation to improve an agency's performance, and it casts light on both successes and problems in order to spur agencies to institute administrative reforms of their own accord. In short, the primary goal of FBI oversight is to help the FBI be as great and effective as it can be.

So, too, is oversight important in order to protect the basic liberties upon which our country is founded. Past oversight efforts, such as the Church Committee in the 1970s, have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence that these abuses have come after extended periods when the public and the Congress did not diligently monitor the FBI's activities. Even when agencies such as the FBI operate with the best of intentions (such as protecting our nation from foreign threats such as Communism in the 1950s and 1960s and fighting terrorism now), if left unchecked, the immense power wielded by such government agencies can lead them astray. Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and the FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable. In this way, congressional oversight plays a critical role in our democracy.

The importance of the dual goals of congressional oversight—improving FBI performance and protecting liberty—have been driven home since the 9/11 attacks. Even prior to the terrorist attacks, the Judiciary Committee had begun oversight and held hearings that had exposed several longstanding problems at the FBI, such as the double standard in discipline between line agents and senior executive officials. The 9/11 attacks on our country have forever redefined the stakes riding upon the FBI's success in fulfilling its mission to fight terrorism. It is no luxury that the FBI perform at its peak level—it is now a necessity.

At the same time, the increased powers granted to the FBI and other law enforcement agencies after the 9/11 attacks, in the USA PATRIOT Act, which Members of this Committee helped to craft, and through the actions of the Attorney General and the President, have made it more important than ever that Congress fulfills its role in protecting the liberty of our nation. Everyone would agree that winning the war on terrorism would be a hollow victory indeed if it came only at the cost of the very liberties we are fighting to preserve. By carefully overseeing the DOJ's and FBI's use of its broad powers, Congress can help to ensure that the false choice between fundamental liberty and basic security is one that our government never takes upon itself to make. For these reasons, in the post-9/11 world, FBI oversight has been, and will continue to be, more important than ever.

B. Judiciary Committee FBI Oversight Activities in the 107th Congress

1. Full Committee FBI Oversight Hearings

Beginning in July 2001, after Senator Leahy became chairman, the Senate Judiciary Committee held hearings that focused on certain longstanding and systemic problems at the FBI. These included hearings concerning: (1) the FBI's antiquated computer systems and its belated upgrade program; (2) the FBI's ''circle the wagons'' mentality, wherein those who report flaws in the FBI are punished for their frankness; and (3) the FBI's flawed internal disciplinary procedures and ''double standard'' in discipline, in which line FBI agents can be seriously punished for the same misconduct that only earns senior FBI executives a slap on the wrist. Such flaws were exemplified by the disciplinary actions taken (and not taken) by the FBI and DOJ after the incidents at Waco, Texas, and Ruby Ridge, Idaho, and the apparent adverse career effects experienced by FBI agents participating in those investigations who answered the duty call to police their own.

The Committee's pre-9/11 FBI oversight efforts culminated with the confirmation hearings of the new FBI Director, Robert S. Mueller, III. Beginning on July 30, 2001, the Committee held two days of extensive hearings on Director Mueller's confirmation and closely questioned Director Mueller about the need to correct the information technology and other problems within the FBI. In conducting these hearings, Committee Members understood the critical role of the FBI Director in protecting our country from criminal, terrorist, and clandestine intelligence activities and recognized the many challenges facing the new Director.

Director Mueller was questioned very closely on the issue of congressional oversight, engaging in four rounds of questioning over two days. In response to one of Senator Specter's early questions, Director Mueller stated ''I understand, firmly believe in the right and the power of Congress to engage in its oversight function. It is not only a right, but it is a duty.''

In response to a later question, Director Mueller stated:

''I absolutely agree that Congress is entitled to oversight of the ongoing responsibilities of the FBI and the Department of Justice. You mentioned at the outset the problems that you have had over a period of getting documents in ongoing investigations. And as I stated before and I'll state again, I think it is incumbent upon the FBI and the Department of Justice to attempt to accommodate every request from Congress swiftly and, where it cannot accommodate or believes that there are confidential issues that have to be raised, to bring to your attention and articulate with some specificity, not just the fact that there's ongoing investigation, not just the fact that there is an ongoing or an upcoming trial, but with specificity why producing the documents would interfere with either that trial or for some other reason or we believed covered by some issue of confidentiality.''

Incoming Director Mueller, at that time, frankly acknowledged that there was room for improvement in these areas at the FBI and vowed to cooperate with efforts to conduct congressional oversight of the FBI in the future.

Director Mueller assumed his duties on September 4, 2001, just one week before the terrorist attacks. After the terrorist attacks, there was a brief break from FBI oversight, as the Members of the Judiciary Committee worked with the White House to craft

and pass the USA PATRIOT Act. In that new law, the Congress responded to the DOJ's and FBI's demands for increased powers but granted many of those powers only on a temporary basis, making them subject to termination at the end of 2005. The ''sunset'' of the increased FISA surveillance powers reflected the promise that the Congress would conduct vigilant oversight to evaluate the FBI's performance both before and after 9/11. Only in that way could Congress and the public be assured that the DOJ and FBI needed the increased powers in the first place, and were effectively and properly using these new powers to warrant extension of the sunset.

Passage of the USA PATRIOT Act did not solve the longstanding and acknowledged problems at the FBI. Rather, the 9/11 attacks created a new imperative to remedy systemic shortcomings at the FBI. Review of the FBI's pre-9/11 performance is not conducted to assess blame. The blame lies with the terrorists. Rather, such review is conducted to help the FBI prevent future attacks by not repeating the mistakes of the past. Thus, the enactment of the USA PATRIOT Act did not obviate the need to oversee the FBI; it augmented that need.

Within weeks of passage of the USA PATRIOT Act, the Senate Judiciary Committee held hearings with senior DOJ officials on implementation of the new law and other steps that were being taken by the Administration to combat terrorism. The Committee heard testimony on November 28, 2001, from Assistant Attorney General Michael Chertoff and, on December 6, 2001, from Attorney General Ashcroft. In response to written questions submitted in connection with the latter hearing, DOJ confirmed that shortly after the USA PATRIOT Act had been signed by the President on October 26, 2001, DOJ began to press the Congress for additional changes to relax FISA requirements, including expansion of the definition of ''foreign power'' to include individual, non-U.S. persons engaged in international terrorism. DOJ explained that this proposal was to address the threat posed by a single foreign terrorist without an obvious tie to another person, group, or state overseas. Yet, when asked to ''provide this Committee with information about specific cases that support your claim to need such broad new powers,'' DOJ was silent in its response and named no specific cases showing such a need, nor did it say that it could provide such specificity even in a classified setting. In short, DOJ sought more power but was either unwilling or unable to provide an example as to why.

Beginning in March 2002, the Committee convened another series of hearings monitoring the FBI's performance and its efforts to reform itself. On March 21, 2002, the Judiciary Committee held a hearing on the DOJ Inspector General's report on the belated production of documents in the Oklahoma City bombing case. That hearing highlighted longstanding problems in the FBI's information technology and training regarding the use of, and access to, records. It also highlighted the persistence of a ''head-in-the-sand'' approach to problems, where shortcomings are ignored rather than addressed and the reporting of problems is discouraged rather than encouraged.

On April 9, 2002, the Committee held a hearing on the Webster Commission's report regarding former FBI Agent and Russian spy Robert Hanssen's activities. That hearing exposed a deep-seated cultural bias against the importance of security at the FBI. One important finding brought to light at that hearing was the highly inappropriate handling of sensitive FISA materials in the time after the 9/11 attacks. In short, massive amounts of the most sensitive and highly classified materials in the FBI's possession were made available on an unrestricted basis to nearly all FBI employees. Even more disturbing, this action was taken without proper consultation with the FBI's own security officials.

On May 8, 2002, the Judiciary Committee held an oversight hearing at which FBI Director Mueller and Deputy Attorney General Thompson testified regarding their efforts to reshape the FBI and the DOJ to address the threat of terrorism. It was at this hearing that the so-called ''Phoenix Memorandum'' was publicly discussed for the first time. Director Mueller explained in response to one question:

''[T]he Phoenix electronic communication contains suggestions from the agent as to steps that should be taken, or he suggested taking to look at other flight schools . . . . He made a recommendation that we initiate a program to look at flight schools. That was received at Headquarters. It was not acted on by September 11. I should say in passing that even if we had followed those suggestions at that time, it would not, given what we know since September 11, have enabled us to prevent the attacks of September 11. But in the same breath I should say that what we learned from instances such as that is much about the weaknesses of our approach to counterterrorism prior to September 11.''

In addition, Director Mueller first discussed at this hearing that FBI agents in Minnesota had been frustrated by Headquarters officials in obtaining a FISA warrant in the Zacharias Moussaoui investigation before the 9/11 attacks, and that one agent seeking the warrant had said that he was worried that Moussaoui would hijack an airplane and fly it into the World Trade Center.

On June 6, 2002, the Committee held another hearing at which Director Mueller testified further regarding the restructuring underway at the FBI. Significantly, that hearing also provided the first public forum for FBI Chief Division Counsel Coleen Rowley of the Minneapolis Division to voice constructive criticism about the FBI. Her criticisms, the subject of a lengthy letter sent to Director Mueller on May 21, 2002, which was also sent to Members of Congress, echoed many of the issues raised in this Committee's oversight hearings. Special Agent Rowley testified about ''careerism'' at the FBI and a mentality at FBI Headquarters that led Headquarters agents to more often stand in the way of field agents than to support them. She cited the Moussaoui case as only the most high profile instance of such an attitude. Special Agent Rowley also described a FBI computer system that prevented agents from accessing their own records and conducting even the most basic types of searches. In short, Special Agent Rowley's testimony reemphasized the importance of addressing the FBI's longstanding problems, not hiding from them, in the post-9/11 era.

As the head of the Department of Justice as a whole, the Attorney General has ultimate responsibility for the performance of the FBI. On July 25, 2002, the Judiciary Committee held an oversight hearing at which Attorney General Ashcroft testified. The Committee and the Attorney General engaged in a dialogue regarding the performance of the DOJ on many areas of interest, including the fight against terrorism. Among other things discussed at this hearing were the Attorney General's plans to implement the Terrorism Information and Prevention System (TIPS), which would have enlisted private citizens to monitor ''suspicious'' activities of other Americans. After questioning on the subject, Attorney General Ashcroft testified that he would seek restrictions on whether and how information generated through TIPS would be retained. Later, as part of the Homeland Security legislation, TIPS was prohibited altogether.

On September 10, 2002, the Committee held an oversight hearing specifically focusing on issues related to the FISA. Leading experts from the DOJ, from academia, and from the civil liberties and national security legal communities participated in a rare public debate on the FISA. That hearing brought before the public an important discussion about the reaches of domestic surveillance using FISA and the meaning of the USA PATRIOT Act. In addition, through the efforts of the Judiciary Committee, the public learned that this same debate was already raging in private. The FISA Court (FISC) had rejected the DOJ's proposed procedure for implementing the USA PATRIOT Act, and the FISA Court of Review was hearing its first appeal in its 20-year-plus existence to address important issues regarding these USA PATRIOT Act amendments to the FISA. The Committee requested that the FISA Court of Review publicly release an unclassified version of the transcript of the oral argument and its opinion, which the Court agreed to do and furnished to the Committee. Thus, only through the bipartisan oversight work of the Judiciary Committee was the public first informed of the landmark legal opinion interpreting the FISA and the USA PATRIOT Act amendments overruling the FISC's position, accepting some of the DOJ's legal arguments, but rejecting others.

These are only the full Judiciary Committee hearings related to FBI oversight issues in the 107th Congress. The Judiciary Committee's subcommittees also convened numerous, bipartisan oversight hearings relating to the FBI's performance both before and after 9/11.

2. Other oversight activities: classified hearings, written requests, and informal briefings

The Judiciary Committee and its Members have fulfilled their oversight responsibilities through methods other than public hearings as well. Particularly with respect to FISA oversight, Members of the Judiciary Committee and its staff conducted a series of closed hearings and briefings, and made numerous written inquiries on the issues surrounding both the application for a FISA search warrant of accused international terrorist Zacharias Moussaoui's personal property before the 9/11 attacks and the post–9/11 implementation of the USA PATRIOT Act. As with all of our FBI oversight, these inquiries were intended to review the performance of the FBI and DOJ in order to improve that performance in the future.

The Judiciary Committee and its Members also exercised their oversight responsibilities over the DOJ and the FBI implementation of the FISA through written inquiries, written hearing questions, and other informal requests. These efforts included letters to the Attorney General and the FBI Director from Senator Leahy on November 1, 2001, and May 23, 2002, and from Senators Leahy, Specter, and Grassley on June 4, June 13, July 3, and July 31, 2002. In addition, these Members sent letters requesting information from the FISA Court and FISA Court of Review on July 16, July 31, and September 9, 2002. Such oversight efforts are important on a day-to-day basis because they are often the most efficient means of monitoring the activities of the FBI and DOJ.

3. DOJ and FBI non-responsiveness

Particularly with respect to our FISA oversight efforts, we are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered

or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Specter to ask the Attorney General directly, ''how do we communicate with you and are you really too busy to respond?''

Two clear examples of such reticence on the part of the DOJ and the FBI relate directly to our FISA oversight efforts. First, Chairman Sensenbrenner and Ranking Member Conyers of the House Judiciary Committee issued a set of 50 questions on June 13, 2002, in order to fulfill the House Judiciary Committee's oversight responsibilities to monitor the implementation of the USA PATRIOT Act, including its amendments to FISA. In connection with the July 25, 2002, oversight hearing with the Attorney General, Chairman Leahy posed the same questions to the Department on behalf of the Senate Judiciary Committee. Unfortunately, the Department refused to respond to the Judiciary Committee with answers to many of these legitimate questions. Indeed, it was only after Chairman Sensenbrenner publicly stated that he would subpoena the material that the Department provided any response at all to many of the questions posed, and to date some questions remain unanswered. Senator Leahy posed a total of 93 questions, including the 50 questions posed by the leadership of the House Judiciary Committee. While the DOJ responded to 56 of those questions in a series of letters on July 29, August 26, and December 23, 2002, thirty-seven questions remain unanswered. In addition, the DOJ attempted to respond to some of these requests by providing information not to the Judiciary Committees, which had made the request, but to the Intelligence Committees. Such attempts at forum shopping by the Executive Branch are not a productive means of facilitating legitimate oversight.

Second, the FBI and DOJ repeatedly refused to provide Members of the Judiciary Committee with a copy of the FISA Court's May 17, 2002, opinion rejecting the DOJ's proposed implementation of the USA PATRIOT Act's FISA amendments. This refusal was made despite the fact that the opinion, which was highly critical of aspects of the FBI's past performance on FISA warrants, was not classified and bore directly upon the meaning of provisions in the USA PATRIOT Act authored by Members of the Judiciary Committee. Indeed, the Committee eventually had to obtain the opinion not from the DOJ but directly from the FISA Court, and it was only through these efforts that the public was first made aware of the important appeal being pursued by the DOJ and the legal positions being taken by the Department on the FISA Amendments.

In both of these instances, and in others, the DOJ and FBI have made exercise of our oversight responsibilities difficult.

It is our sincere hope that the FBI and DOJ will reconsider their approach to congressional oversight in the future. The Congress and the American people deserve to know what their government is doing. Certainly, the Department should not expect Congress to be a ''rubber stamp'' on its requests for new or expanded powers if requests for information about how the Department has handled its existing powers have been either ignored or summarily paid lip service.

III. FISA OVERSIGHT: A CASE STUDY OF THE SYSTEMIC PROBLEMS PLAGUING THE FBI

A. Overview and Conclusions

The Judiciary Committee held a series of classified briefings for the purpose of reviewing the processing of FISA applications before the terrorist attacks on September 11, 2001. The Judiciary Committee sought to determine whether any problems at the FBI in the processing of FISA applications contributed to intelligence failures before September 11th; to evaluate the implementation of the changes to FISA enacted pursuant to the USA PATRIOT Act; and to determine whether additional legislation is necessary to improve this process and facilitate congressional oversight and public confidence in the FISA and the FBI.

We specifically sought to determine whether the systemic problems uncovered in our FBI oversight hearings commenced in the summer of 2001 contributed to any shortcomings that may have affected the FBI counterterrorism efforts prior to the 9/11 attacks. Not surprisingly, we conclude that they did. Indeed, in many ways the DOJ and FBI's shortcomings in implementing the FISA—including but not limited to the time period before the 9/11 attacks—present a compelling case for both comprehensive FBI reform and close congressional oversight and scrutiny of the justification for any further relaxation of FISA requirements. FISA applications are of the utmost importance to our national security. Our review suggests that the same fundamental problems within the FBI that have plagued the agency in other contexts also prevented both the FBI and DOJ from aggressively pursuing FISA applications in the period before the 9/11 attacks. Such problems caused the submission of key FISA applications to the FISA Court to have been significantly delayed or not made. More specifically, our concerns that the FBI and DOJ did not make effective use of FISA before making demands on the Congress for expanded FISA powers in the USA PATRIOT Act are bolstered by the following findings:

(1) The FBI and Justice Department were setting too high a standard to establish that there is ''probable cause'' that a person may be an ''agent of a foreign power'' and, therefore, may be subject to surveillance pursuant to FISA;

(2) FBI agents and key Headquarters officials were not sufficiently trained to understand the meanings of crucial legal terms and standards in the FISA process;

(3) Prior problems between the FBI and the FISA Court that resulted in the Court barring one FBI agent from appearing before it for allegedly filing inaccurate affidavits may have ''chilled'' the FBI and DOJ from aggressively seeking FISA warrants (although there is some contradictory information on this matter, we will seek to do additional oversight on this question);

(4) FBI Headquarters fostered a culture that stifled rather than supported aggressive and creative investigative initiatives from agents in the field; and

(5) The FBI's difficulties in properly analyzing and disseminating information in its possession caused it not to seek FISA warrants that it should have sought. These difficulties are due to:

(a) a lack of proper resources dedicated to intelligence analysis;

(b) a ''stove pipe'' mentality where crucial intelligence is pigeonholed into a particular unit and may not be shared with other units;

(c) High turnover of senior agents at FBI Headquarters within critical counterterrorism and foreign intelligence units;

(d) Outmoded information technology that hinders access to, and dissemination of, important intelligence; and

(e) A lack of training for FBI agents to know how to use, and a lack of requirements that they do use, the technology available to search for and access relevant information.

We have found that, in combination, all of these factors contributed to the intelligence failures at the FBI prior to the 9/11 attacks.

We are also conscious of the extraordinary power FISA confers on the Executive branch. FISA contains safeguards, including judicial review by the FISA Court and certain limited reporting requirements to congressional intelligence committees, to ensure that this power is not abused. Such safeguards are no substitute, however, for the watchful eye of the public and the Judiciary Committees, which have broader oversight responsibilities for DOJ and the FBI. In addition to reviewing the effectiveness of the FBI's use of its FISA power, this Committee carries the important responsibility of checking that the FBI does not abuse its power to conduct surveillance within our borders. Increased congressional oversight is important in achieving that goal.

From the outset, we note that our discussion will not address any of the specific facts of the case against Zacharias Moussaoui that we have reviewed in our closed inquiries. That case is still pending trial, and, no matter how it is resolved, this Committee is not the appropriate forum for adjudicating the allegations in that case. Any of the facts recited in this report that bear on the substance of the Moussaoui case are already in the public record. To the extent that this report contains information we received in closed sessions, that information bears on abstract, procedural issues, and not any substantive issues relating to any criminal or national security investigation or proceeding. This is an interim report of what we have discovered to date. We hope to and should continue this important oversight in the 108th Congress.

B. Allegations Raised by Special Agent Rowley's Letter

The Judiciary Committee had initiated its FISA oversight inquiry several months before the revelations in the dramatic letter sent on May 21, 2002, to FBI Director Mueller by Special Agent Coleen Rowley. Indeed, it was this Committee's oversight about the FBI's counterintelligence operations before the 9/11 attacks that in part helped motivate SA Rowley to write this letter to the Director.

The observations and critiques of the FBI's FISA process in this letter only corroborated problems that the Judiciary Committee was uncovering. In her letter, SA Rowley detailed the problems the Minneapolis agents had in dealing with FBI Headquarters in their unsuccessful attempts to seek a FISA warrant for the search of Moussaoui's lap top computer and other personal belongings. These attempts proved fruitless, and Moussaoui's computer and personal belongings were not searched until September 11th, 2001, when the Minneapolis agents were able to obtain a criminal search warrant after the attacks of that date. According to SA Rowley, with the exception of the fact of those attacks, the information presented in the warrant application establishing probable cause for the criminal search warrant was exactly the same as the facts that FBI Headquarters earlier had deemed inadequate to obtain a FISA search warrant.

In her letter, SA Rowley raised many issues concerning the efforts by the agents assigned to the Minneapolis Field Office to obtain a FISA search warrant for Moussaoui's personal belongings. Two of the issues she raised were notable. First, SA Rowley corroborated that many of the cultural and management problems within the FBI (including what she referred to as ''careerism'') have significant effects on the FBI's law enforcement and intelligence gathering activities. This led to a perception among the Minneapolis agents that FBI Headquarters personnel had frustrated their efforts to obtain a FISA warrant by raising

unnecessary objections to the information submitted by Minneapolis, modifying and removing that information, and limiting the efforts by the Minneapolis Field Office to contact other agencies for relevant information to bolster the probable cause for the warrant. These concerns echoed criticisms that this Committee has heard in other contexts about the culture of FBI management and the effect of the bureaucracy in stifling initiative by FBI agents in the field.

In making this point, SA Rowley provided specific examples of the frustrating delays and roadblocks erected by Headquarters agents in the Moussaoui investigation:

''For example at one point, the Supervisory Special Agent at FBIHQ posited that the French information could be worthless because it only identified Zacharias Moussaoui by name and he, the SSA, didn't know how many people by that name existed in France. A Minneapolis agent attempted to surmount that problem by quickly phoning the FBI's Legal Attache (Legat) in Paris, France, so that a check could be made of the French telephone directories. Although the Legat in France did not have access to all of the French telephone directories, he was able to quickly ascertain that there was only one listed in the Paris directory. It is not known if this sufficiently answered the question, for the SSA continued to find new reasons to stall.

''Eventually, on August 28, 2001, after a series of e-mails between Minneapolis and FBIHQ, which suggest that the FBIHQ SSA deliberately further undercut the FISA effort by not adding the further intelligence information which he had promised to add that supported Moussaoui's foreign power connection and making several changes in the wording of the information that had been provided by the Minneapolis agent, the Minneapolis agents were notified that the NSLU Unit Chief did not think there was sufficient evidence of Moussaoui's connection to a foreign power. Minneapolis personnel are, to this date, unaware of the specifics of the verbal presentations by the FBIHQ SSA to NSLU or whether anyone in NSLU ever was afforded the opportunity to actually read for him/herself all of the information on Moussaoui that had been gathered by the Minneapolis Division and [redacted; classified]. Obviously[,] verbal presentations are far more susceptible to mis-characterization and error.''

Even after the attacks had commenced, FBI Headquarters discouraged Minneapolis from securing a criminal search warrant to examine Moussaoui's belongings, dismissing the coordinated attack on the World Trade Center and Pentagon as a coincidence.

Second, SA Rowley's letter highlighted the issue of the apparent lack of understanding of the applicable legal standards for establishing ''probable cause'' and the requisite statutory FISA requirements by FBI personnel in the Minneapolis Division and at FBI Headquarters. This issue will be discussed in more detail below.

C. Results of Investigation

1. The Mishandling of the Moussaoui FISA Application

Apart from SA Rowley's letter and her public testimony, the Judiciary Committee and its staff found additional corroboration that many of her concerns about the handling of the Moussaoui FISA application for a search warrant were justified.

At the outset, it is helpful to review how Headquarters ''adds value'' to field offices in national security investigations using FISA surveillance tools. Headquarters has three functions in such investigations. The first function is the ministerial function of actually assembling the FISA application in the proper format for review by the DOJ's Office of Intelligence Policy and Review OIPR and the FISA Court. The other two functions are more substantive and add ''value'' to the FISA application. The first substantive function is to assist the field by being experts on the legal aspects of FISA, and to provide guidance to the field as to the information needed to meet the statutory requirements of FISA. The second function is to supplement the information from the field in order to establish or strengthen the showing that there is ''probable cause'' that the FISA target was an ''agent of a foreign power,'' by integrating additional relevant intelligence information both from within the FBI and from other intelligence or law enforcement organizations outside the FBI. It is with respect to the latter, substantive functions that Headquarters fell short in the Moussaoui FISA application and, as a consequence, never got to the first, more ministerial, function.

Our investigation revealed that the following events occurred in connection with this FISA application. We discovered that the Supervisory Special Agent (SSA) involved in reviewing the Moussaoui FISA request was assigned to the Radical Fundamentalist Unit (RFU) of the International Terrorism Operations Section of the FBI's Counterterrorism Division. The Unit Chief of the RFU was the SSA's immediate supervisor. When the Minneapolis Division submitted its application for the FISA search warrant for Moussaoui's laptop computer and other property, the SSA was assigned the responsibility of processing the application for approval. Minneapolis submitted its application for the FISA warrant in the form of a 26-page Electronic Communication (EC), which contained all of the information that the Minneapolis agents had collected to establish that Moussaoui was an agent of a foreign power at the time. The SSA's responsibilities included integrating this information submitted by the Minneapolis division with information from other sources that the Minneapolis agents were not privy to, in order to establish there was probable cause that Moussaoui was an agent of a foreign power. In performing this fairly straightforward task, FBI Headquarters personnel failed miserably in at least two ways.

First, most surprisingly, the SSA never presented the information submitted by Minneapolis and from other sources in its written, original format to any of the FBI's attorneys in the National Security Law Unit (NSLU). The Minneapolis agents had submitted their information in the 26-page EC and a subsequent letterhead memorandum (LHM), but neither was shown to the attorneys. Instead, the SSA relied on short, verbal briefings to the attorneys, who opined that based on the information provided verbally by the SSA they could not establish that there was probable cause that Moussaoui was an agent of a foreign power. Each of the attorneys in the NSLU stated they did not receive documents on the Moussaoui FISA, but instead only received a short, verbal briefing from the SSA. As SA Rowley noted, however, ''verbal presentations are far more susceptible to mis-characterization and error.''

The failure of the SSA to provide the 26-page Minneapolis EC and the LHM to the attorneys, and the failure of the attorneys to review those documents, meant that the consideration by Headquarters officials of the evidence developed by the Minneapolis agents was truncated. The Committee has requested, but not yet received, the full 26–page Minneapolis EC (even, inexplicably, in a classified setting).

Second, the SSA's task was to help bolster the work of the Minneapolis agents and collect information that would establish probable cause that a ''foreign power'' existed, and that Moussaoui was its ''agent.'' Indeed, sitting in the FBI computer system was the Phoenix memorandum, which senior FBI officials have conceded would have provided sufficient additional context to Moussaoui's conduct to have established probable cause. (Joint Inquiry Hearing, Testimony of Eleanor Hill, Staff Director, September 24, 2002, p. 19: ''The [FBI] attorneys also told the Staff that, if they had been aware of the Phoenix memo, they would have forwarded the FISA request to the Justice Department's Office of Intelligence Policy Review (OIPR). They reasoned that the particulars of the Phoenix memo changed the context of the Moussaoui investigation and made a stronger case for the FISA warrant. None of them saw the Phoenix memo before September 11.'') Yet, neither the SSA nor anyone else at Headquarters consulted about the Moussaoui application ever conducted any computer searches for electronic or other information relevant to the application. Even the much touted ''Woods Procedures'' governing the procedures to be followed by FBI personnel in preparing FISA applications do not require Headquarters personnel to conduct even the most basic subject matter computer searches or checks as part of the preparation and review of FISA applications.

2. General Findings.

We found that key FBI personnel involved in the FISA process were not properly trained to carry out their important duties. In addition, we found that the structural, management, and resource problems plaguing the FBI in general contributed to the intelligence failures prior to the 9/11 attacks. (The Joint Inquiry by the Senate and House Select Committee on Intelligence similarly concluded that the FBI needs to ''establish and sustain independent career tracks within the FBI that recognize and provide incentives for demonstrated skills and performance of counterterrorism agents and analysts; . . . implement training for agents in the effective use of analysts and analysis in their work;?improve national security law training of FBI personnel;?and finally solve the FBI's persistent and incapacitating information technology problems.'' (Final Report, Recommendations, p. 6).) Following are some of the most salient facts supporting these conclusions.

First, key FBI personnel responsible for protecting our country against terrorism did not understand the law. The SSA at FBI Headquarters responsible for assembling the facts in support of the Moussaoui FISA application testified before the Committee in a closed hearing that he did not know that ''probable cause'' was the applicable legal standard for obtaining a FISA warrant. In addition, he did not have a clear understanding of what the probable cause standard meant. The SSA was not a lawyer, and he was relying on FBI lawyers for their expertise on what constituted probable cause. In addition to not understanding the probable cause standard, the SSA's supervisor (the Unit Chief) responsible for reviewing FISA applications did not have a proper understanding of the legal definition of the ''agent of a foreign power'' requirement. Specifically, he was under the incorrect impression that the statute required a link to an already identified or ''recognized'' terrorist organization, an interpretation that the FBI and the supervisor himself admitted was incorrect. Thus, key FBI officials did not have a proper understanding of either the relevant burden of proof (probable cause) or the substantive element of proof (agent of a foreign power). This fundamental breakdown in training on an important intelligence matter is of serious concern to this Committee.

Second, the complaints contained in the Rowley letter about problems in the working relationship between field offices and FBI Headquarters are more widespread. There must be a dynamic relationship between Headquarters and field offices with Headquarters providing direction to the efforts of agents in the field when required. At the same time, Headquarters personnel should serve to support field agents, not to stifle initiative by field agents and hinder the progress of significant cases. The FBI's Minneapolis office was not alone in this complaint. Our oversight also confirmed that agents from the FBI's Phoenix office, whose investigation and initiative resulted in the so-called ''Phoenix Memorandum,'' warning about suspicious activity in U.S. aviation schools, also found their initiative dampened by a non-responsive FBI Headquarters.

So deficient was the FISA process that, according to at least one FBI supervisor, not only were new applications not acted upon in a timely manner, but the surveillance of existing targets of interest was often terminated, not because the facts no longer warranted surveillance, but because the application for extending FISA surveillance could not be completed in a timely manner. Thus, targets that represented a sufficient threat to national security that the Department had sought, and a FISA Court judge had approved, a FISA warrant were allowed to break free of surveillance for no reason other than the FBI and DOJ's failure to complete and submit the proper paper work. This failure is inexcusable.

Third, systemic management problems at FBI Headquarters led to a lack of accountability among senior FBI officials. A revolving door at FBI Headquarters resulted in agents who held key supervisory positions not having the required specialized knowledge to perform their jobs competently. A lack of proper communication produced a system where no single person was held accountable for mistakes. Therefore, there was little or no incentive to improve performance. Fourth, the layers of FBI and DOJ bureaucracy also helped lead to breakdowns in communication and serious errors in the materials presented to the FISA Court. The Committee learned that in the year before the Moussaoui case, one FBI supervisor was barred from appearing before the FISC due to inaccurate information presented in sworn affidavits to the Court. DOJ explained in a December 23, 2002, response to written questions from the July 25, 2002, oversight hearing that:

''One FBI supervisory special agent has been barred from appearing before the Court. In March of 2001, the government informed the Court of an error contained in a series of FISA applications. This error arose in the description of a ''wall'' procedure. The Presiding Judge of the Court at the time, Royce Lamberth, wrote to the Attorney General expressing concern over this error and barred one specifically-named FBI agent from appearing before the Court as a FISA affiant. . . . FBI Director Freeh personally met twice with then-Presiding Judge Lamberth to discuss the accuracy problems and necessary solutions.''

As the Committee later learned from review of the FISA Court's May 17, 2002, opinion, that Court had complained of 75 inaccuracies in FISA affidavits submitted by the FBI, and the DOJ and FBI had to develop new procedures to ensure accuracy in presentations to that Court. These so-called ''Woods Procedures'' were declassified at the request of the authors and were made publicly available at the Committee's hearing on June 6, 2002. As DOJ further explained in its December 23, 2002, answers to written questions submitted on July 25, 2002:

''On April 6, 2001, the FBI disseminated to all field divisions and relevant Headquarters divisions a set of new mandatory procedures to be applied to all FISAs within the FBI. These procedures known as the ''Woods procedures,'' are designed to help minimize errors in and ensure that the information provided to the Court is accurate. . . They have been declassified at the request of your Committee.''

DOJ describes the inaccuracies cited in the FISA Court opinion as related to ''errors in the 'wall' procedure'' to keep separate information used for criminal prosecution and information collected under FISA and used for foreign intelligence. However, this does not appear to be the only problem the FBI and DOJ were having in the use of FISA.

An FBI document obtained under the Freedom of Information Act, which is attached to this report as Exhibit D, suggests that the errors committed were far broader. The document is a memorandum dated April 21, 2000, from the FBI's Counterterrorism Division, that details a series of inaccuracies and errors in handling FISA applications and wiretaps that have nothing whatsoever to do with the ''wall.'' Such mistakes included videotaping a meeting when videotaping was not allowed under the relevant FISA Court order, continuing to intercept a person's email after there was no authorization to do so, and continuing a wiretap on a cell phone even after the phone number had changed to a new subscriber who spoke a different language from the target.

This document highlights the fact apart from the problems with applications made to the FISC, that the FBI was experiencing more systemic problems related to the implementation of FISA orders. These issues were unrelated to the legal questions surrounding the ''wall,'' which was in effect long before 1999. The document notes that the number of inaccuracies grew by three-and-one-half times from 1999 to 2000. We recommend that additional efforts to correct the procedural, structural, and training problems in the FISA process would go further toward ensuring accuracy in the FISA process than simply criticizing the state of the law.

One legitimate question is whether the problems inside the FBI and between the FBI and the FISA Court either caused FBI Headquarters to be unduly cautious in proposing FISA warrants or eroded the FISA Court's confidence in the DOJ and the FBI to the point that it affected the FBI's ability to conduct terrorism and intelligence investigations effectively. SA Rowley opines in her letter that in the year before ''the September 11th acts of terrorism, numerous alleged IOB [Intelligence Oversight Board] violations on the part of FBI personnel had to be submitted to the FBI's Office of Professional Responsibility (OPR) as well as the IOB. I believe the chilling effect upon all levels of FBI agents assigned to intelligence matters and their managers hampered us from aggressive investigation of terrorists.'' (Rowley letter, pp. 7–8, fn. 7). Although the belated release of the FISA Court's opinion of May 17, 2002, provided additional insight into this issue, further inquiry is needed.

Fifth, the FBI's inability to properly analyze and disseminate information (even from and between its own agents) rendered key information that it collected relatively useless. Had the FBI put together the disparate strands of information that agents from around the country had furnished to Headquarters before September 11, 2001, additional steps could certainly have been taken to prevent the 9/11 attacks. So, while no one can say with certainty that the 9/11 attacks could have been prevented, in our view, it is also beyond reasonable dispute that more could have been done in the weeks before the attacks to try to prevent them.

Certain of our findings merit additional discussion, and such discussion follows.

3. FBI's Misunderstanding of Legal Standards Applicable to the FISA

a. The FISA Statutory Standard: ''Agent of a Foreign Power''

In order to obtain either a search warrant or an authorization to conduct electronic surveillance pursuant to FISA, the FBI and Justice Department must establish before the FISA Court probable cause that the targeted person is an ''agent of a foreign power.'' An agent of a foreign power is defined as ''any person who . . . knowingly aids or abets any person in the conduct of [certain] activities.'' Those certain activities include ''international terrorism,'' and one definition of ''foreign power'' includes groups that engage in international terrorism. Accordingly, in the Moussaoui case, to obtain a FISA warrant the FBI had to collect only enough evidence to establish that there was ''probable cause'' to believe that Moussaoui was the ''agent'' of an ''international terrorist group'' as defined by FISA.

However, even the FBI agents who dealt most with FISA did not correctly understand this requirement. During a briefing with Judiciary Committee staff in February 2002, the Headquarters counterterrorism Unit Chief of the unit responsible for handling the Moussaoui FISA application stated that with respect to international terrorism cases, FISA warrants could only be obtained for ''recognized'' terrorist groups (presumably those identified by the Department of State or by the FBI itself or some other government agency). The Unit Chief later admitted that he knew that this was an incorrect understanding of the law, but it was his understanding at the time the application was pending. Additionally, during a closed hearing on July 9, 2002, the Supervisory Special Agent (''SSA'') who actually handled the Moussaoui FISA application at Headquarters also mentioned that he was trying to establish whether Moussaoui was an ''agent of a recognized foreign power''.

Nowhere, however, does the statutory definition require that the terrorist group be an identified organization that is already recognized (such as by the United States Department of State) as engaging in terrorist activities. Indeed, even the FBI concedes this point. Thus, there was no support whatsoever for key FBI officials' incorrect understanding that the target of FISA surveillance must be linked to such an identified group in the time before 9/11. This misunderstanding colored the handling of requests from the field to conduct FISA surveillance in the crucial weeks before the 9/11 attacks. Instead of supporting such an application, key Headquarters personnel asked the field agents working on this investigation to develop additional evidence to prove a fact that was unnecessary to gain judicial approval under FISA. It is difficult to understand how the agents whose job included such a heavy FISA component could not have understood that statute. It is difficult to understand how the FBI could have so failed its own agents in such a crucial aspect of their training.

The Headquarters personnel misapplied the FISA requirements. In the context of this case, the foreign power would be an international terrorist group, that is, ''a group engaged in international terrorism or activities in preparation therefore.'' A ''group'' is not defined in the FISA, but in common parlance, and using other legal principles, including criminal conspiracy, a group consists of two or more persons whether identified or not. It is our opinion that such a ''group''

may exist, even if not a group ''recognized'' by the Department of State.

The SSA's other task would be to help marshal evidence showing probable cause that Moussaoui was an agent of that group. In applying the ''totality of the circumstances,'' as defined in the case of Illinois v. Gates, 462 U.S. 213 (1983), any information available about Moussaoui's ''actual contacts'' with the group should have been considered in light of other information the FBI had in order to understand and establish the true probable nature of those contacts. (The Supreme Court's leading case on probable cause; it is discussed in more detail in the next section of this report.) It is only with consideration of all the information known to the FBI that Moussaoui's contacts with any group could be properly characterized in determining whether he was an agent of such a group.

In making this evaluation, the fact, as recited in the public indictment, that Moussaoui ''paid $6,800 in cash'' to the Minneapolis flight school, without adequate explanation for the source of this funding, would have been a highly probative fact bearing on his connections to foreign groups. Yet, it does not appear that this was a fact that the FBI Headquarters agents considered in analyzing the totality of the circumstances. The probable source of that cash should have been a factor that was considered in analyzing the totality of the circumstances. So too would the information in the Phoenix memorandum have been helpful. It also was not considered, as discussed further below. In our view, the FBI applied too cramped an interpretation of probable cause and ''agent of a foreign power'' in making the determination of whether Moussaoui was an agent of a foreign power. FBI Headquarters personnel in charge of reviewing this application focused too much on establishing a nexus between Moussaoui and a ''recognized'' group, which is not legally required. Without going into the actual evidence in the Moussaoui case, there appears to have been sufficient evidence in the possession of the FBI which satisfied the FISA requirements for the Moussaoui application. Given this conclusion, our primary task is not to assess blame on particular agents, the overwhelming majority of whom are to be commended for devoting their lives to protecting the public, but to discuss the systemic problems at the FBI that contributed to their inability to succeed in that endeavor.

b. The Probable Cause Standard

i. Supreme Court's Definition of ''Probable Cause''.—During the course of our investigation, the evidence we have evaluated thus far indicates that both FBI agents and FBI attorneys do not have a clear understanding of the legal standard for probable cause, as defined by the Supreme Court in the case of Illinois v. Gates, 462 U.S. 213 (1983). This is such a basic legal principle that, again, it is impossible to justify the FBI's lack of complete and proper training on it. In Gates, then-Associate Justice Rehnquist wrote for the Court:

''Standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to ''probable cause'' may not be helpful, it is clear that ''only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'' (462 U.S. at 236 (citations omitted.)

The Court further stated:

For all these reasons, we conclude that it is wiser to abandon the ''twopronged test'' established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ''veracity'' and ''basis of knowledge'' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a ''substantial basis for . . . conclud[ing]'' that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli.''

Accordingly, it is clear that the Court rejected ''preponderance of the evidence'' as the standard for probable cause and established a standard of ''probability'' based on the ''totality of the circumstances.''

ii. The FBI's Unnecessarily High Standard for Probable Cause.—Unfortunately, our review has revealed that many agents and lawyers at the FBI did not properly understand the definition of probable cause and that they also possessed inconsistent understandings of that term. In the portion of her letter to Director Mueller discussing the quantum of evidence needed to reach the standard of probable cause, SA Rowley wrote that ''although I thought probable cause existed ('probable cause' meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney's Office, (for a lot of reasons including just to play it safe), in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%–80% probability and sometimes even higher), and depending upon the actual AUSA who would be assigned, might turn us down.'' The Gates case and its progeny do not require an exacting standard of proof. Probable cause does not mean more likely than not, but only a probability or substantial chance of the prohibited conduct taking place. Moreover, ''[t]he fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause.''

On June 6, 2002, the Judiciary Committee held an open hearing on the FBI's conduct of counterterrorism investigations. The Committee heard from Director Mueller and DOJ Inspector General Glenn Fine on the first panel and from SA Rowley on the second panel. The issue of the probable cause standard was specifically raised with Director Mueller, citing the case of Illinois v. Gates, and Director Mueller was asked to comment in writing on the proper standard was asked for establishing probable cause. The FBI responded in an undated letter to Senator Specter and with the subsequent transmission of an electronic communication (E.C.) dated September 16, 2002. In the E.C., the FBI's General Counsel reviewed the case law defining ''probable cause,'' in order to clarify the definition of probable cause for FBI personnel handling both criminal investigations and FISA applications.

At the June 6th hearing, SA Rowley reviewed her discussion of the probable cause standard in her letter. During that testimony three issues arose. First, by focusing on the prosecution of a potential case, versus investigating a case, law enforcement personnel, both investigators and prosecutors, may impose on themselves a higher standard than necessary to secure a warrant. This prosecution focus is one of the largest hurdles that the FBI is facing as it tries to change its focus from crime fighting to the prevention of terrorist attacks. It is symptomatic of a challenge facing the FBI and DOJ in nearly every aspect of their new mission in preventing terrorism. Secondly, prosecutors, in gauging what amount of evidence reaches the probable cause standard, may calibrate their decision to meet the de facto standard imposed by the judges, who may be imposing a higher standard than is required by law. Finally, SA Rowley opined that some prosecutors and senior FBI officials may set a higher standard due to risk-averseness, which is caused by ''careerism.''

SA Rowley's testimony was corroborated in our other hearings. During a closed hearing, in response to the following questions, a key Headquarters SSA assigned to terrorism matters stated that he did not know the legal standard for obtaining a warrant under FISA.

''Sen. Specter: . . . [SSA], what is your understanding of the legal standard for a FISA warrant?

[SSA]: I am not an attorney, so I would turn all of those types of questions over to one of the attorneys that I work with in the National Security Law Unit.

Question: Well, did you make the preliminary determination that there was not sufficient facts to get a FISA warrant issued?

[SSA]: That is the way I saw it.

Question: Well, assuming you would have to prove there was an agent and there was a foreign power, do you have to prove it beyond a reasonable doubt? Do you have to have a suspicion? Where in between?

[SSA]: I would ask my attorney in the National Security Law Unit that question.

Question: Did anybody give you any instruction as to what the legal standard for probable cause was?

[SSA]: In this particular instance, no.''

The SSA explained that he had instruction on probable cause in the past, but could not recall that training. It became clear to us that the SSA was collecting information without knowing when he had enough and, more importantly, making ''preliminary'' decisions and directing field agents to take investigating steps without knowing the applicable legal standards. While we agree that FBI agents and supervisory personnel should consult regularly with legal experts at the National Security Law Unit, and with the DOJ and U.S. Attorneys Offices, supervisory agents must also have sufficient facility for evaluating probable cause in order to provide support and guidance to the field.

Unfortunately, our oversight revealed a similar confusion as to the proper standard among other FBI officials. On July 9, 2002, the Committee held a closed session on this issue, and heard from the following FBI personnel: Special Agent ''G,'' who had been a counterterrorism supervisor in the Minneapolis Division of the FBI and worked with SA Rowley; the Supervisory Special Agent (''the SSA'') from FBI Headquarters referred to in SA Rowley's letter (and referred to the discussion above); the SSA's Unit Chief (''the Unit Chief''); a very senior attorney from the FBI's Office of General Counsel with national security responsibilities (''Attorney #1''); and three attorneys assigned to the FBI's Office of General Counsel's National Security Law Unit (''Attorney #2,'' ''Attorney #3,'' and ''Attorney #4''). The purpose of the session was to determine how the Moussaoui FISA application had been processed by FBI Headquarters personnel. None of the personnel present, including the attorneys, appeared to be familiar with the standard for probable cause articulated in Illinois v. Gates, and none had reviewed the case prior to the hearing, despite its importance having been highlighted at the June 6th hearing with the FBI Director. To wit:

Sen. Specter: . . . [Attorney #1] what is the legal standard for probable cause for a warrant?

[Attorney #1]: A reasonable belief that the facts you are trying to prove are accurate.

Question: Reason to believe?

[Attorney #1]: Reasonable belief.

Question: Reasonable belief?

[Attorney #1]: More probable than not.

Question: More probable than not?

[Attorney #1]: Yes, sir. Not a preponderance of the evidence.

Question: Are you familiar with ''Gates v. Illinois''?

[Attorney #1]: No, sir.

However, ''more probable than not'' is not the standard; rather, ''only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'' (Gates, 462 U.S. at 36 (citations omitted).)

Similarly, Attorneys #2, #3, and #4 were also not familiar with Gates. Under further questioning, Attorney #1 conceded that the FBI, at that time, did not have written procedures concerning the definition of ''probable cause'' in FISA cases: ''On the FISA side of the house I don't think we have any written guidelines on that.'' Additionally, Attorney #1 stated that ''[w]e need to have some kinds of facts that an agent can swear to a reasonable belief that they are true,'' to establish that a person is an agent of a foreign power. Giving a precise definition of probable cause is not an easy task, as whether probable cause exists rests on factual and practical considerations in a particular context. Yet, even with the inherent difficulty in this standard we are concerned that senior FBI officials offered definitions that imposed heightened proof requirements. The issue of what is required for ''probable cause'' is especially troubling because it is not the first time that the issue had arisen specifically in the FISA context. Indeed, the Judiciary Committee confronted the issue of ''probable cause'' in the FISA context in 1999, when the Committee initiated oversight hearings of the espionage investigation of Dr. Wen Ho Lee. Among the many issues examined was whether there was probable cause to obtain FISA surveillance of Dr. Lee. In that case, there was a disagreement as to whether probable cause existed between the FBI and the DOJ, within the DOJ, and among ourselves.

In 1999, Attorney General Janet Reno commissioned an internal DOJ review of the Wen Ho Lee investigation. The Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation was headed by Assistant United States Attorney Randy I. Bellows, a Senior Litigation Counsel in the Office of the United States Attorney for the Eastern District of Virginia. Mr. Bellows submitted his exhaustive report on May 12, 2000 (the ''Bellows Report''), and made numerous findings of fact and recommendations. With respect to the issue of probable cause, Mr. Bellows concluded that:

''The final draft FISA application (Draft #3), on its face, established probable cause to believe that Wen Ho Lee was an agent of a foreign power, that is to say, a United States person currently engaged in clandestine intelligence gathering activities for or on behalf of the PRC which activities involved or might involve violations of the criminal laws of the United States . . . . Given what the FBI and OIPR knew at the time, it should have resulted in the submission of a FISA application, and the issuance of a FISA order.''

The Bellows team concluded that OIPR had been too conservative with the Wen Ho Lee FISA application, a conservatism that may continue to affect the FBI's and DOJ's handling of FISA applications. The team found that with respect to OIPR's near-''perfect record'' before the FISA Court (only one FISA rejection), ''[w]hile there is something almost unseemly in the use of such a remarkable track record as proof of error, rather than proof of excellence, it is nevertheless true that this record suggests the use of 'PC+,' an insistence on a bit more than the law requires.''

The Bellows team made another finding of particular pertinence to the instant issue. It found that ''[t]he Attorney General should have been apprised of any rejection of a FISA request . . . .'' In effect, FBI Headquarters rejected the Minneapolis Division's request for a FISA application, a decision that was not reported to then Acting Director Thomas Pickard. Director Mueller has adopted a new policy, not formally recorded in writing, that he be informed of the denial within the FBI of any request for a FISA application. However, in an informal briefing the weekend after this new policy was publicly announced, the FBI lawyer whom it most directly affected claimed to know nothing of the new ''policy'' beyond what he had read in the newspaper. From an oversight perspective, it is striking that the FBI and DOJ were effectively on notice regarding precisely this issue: that the probable cause test being applied in FISA investigations was more stringent than legally required. We appreciate the carefulness and diligence with which the professionals at OIPR and the FBI exercise their duties in processing FISA applications, which normally remain secret and immune from the adversarial scrutiny to which criminal warrants are subject. Yet, this persistent problem has two serious repercussions. First, the FBI and DOJ appear to be failing to take decisive action to provide in-depth training to agents and lawyers on an issue of the utmost national importance. We simply cannot continue to deny or ignore such training flaws only to see them repeated in the future.

Second, when the DOJ and FBI do not apply or use the FISA as fully or comprehensively as the law allows, pressure is brought on the Congress to change the statute in ways that may not be at all necessary. From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law. The reaction on the part of the DOJ and FBI has been to call upon the Congress to relax FISA standards rather than engage in the more time-consuming remedial task of reforming the management and process to make it work better. Many times such ''quick legislative fixes'' are attractive on the surface, but only operate as an excuse to avoid correcting more fundamental problems.

4. The Working Relationship Between FBI Headquarters and Field Offices

Our oversight revealed that on more than one occasion FBI Headquarters was not sufficiently supportive of agents in the field who were exercising their initiative in an attempt to carry out the FBI's mission. While at least some of this is due to resource and staffing shortages, which the current Director is taking action to address, there are broader issues involved as well. Included in these is a deep-rooted culture at the FBI that makes an assignment to Headquarters unattractive to aggressive field agents and results in an attitude among many who do work at Headquarters that is not supportive of the field.

In addition to these cultural problems at the FBI, we conclude that there are also structural and management problems that contribute to the FBI's shortcomings as exemplified in the implementation of the FISA. Personnel are transferred in and out of key Headquarters jobs too quickly, so that they do not possess the expertise necessary to carry out their vital functions. In addition, the multiple layers of supervision at Headquarters have created a bureaucratic FBI that either will not or cannot respond quickly enough to time-sensitive initiatives from the field. We appreciate that the FBI has taken steps to cut through some of this bureaucracy by requiring OIPR attorneys to have direct contact with field agents working on particular cases.

In addition to hampering the implementation of FISA, these are problems that the Judiciary Committee has witnessed replayed in other contexts within the FBI. These root causes must be addressed head on, so that Headquarters personnel at the FBI view their jobs as supporting talented and aggressive field agents.

The FBI has a key role in the FISA process. Under the system designed by the FBI, a field agent and his field supervisors must negotiate a series of bureaucratic levels in order to even ask for a FISA warrant. The initial consideration of a FISA application and evaluation of whether statutory requirements are met is made by Supervisory Special Agents who staff the numerous Headquarters investigative units. These positions are critical and sensitive by their very nature. No application can move forward to the attorneys in the FBI's National Security Law Unit (NSLU) for further consideration unless the unit SSA says so. In addition, no matter may be forwarded to the DOJ lawyers at the OIPR without the approval of the NSLU. These multiple layers of review are necessary and prudent but take time.

The purpose of having SSAs in the various counterterrorism units is so that those personnel may bring their experience and skill to bear to bolster and enhance the substance of applications sent by field offices. A responsible SSA will provide strategic guidance to the requesting field division and coordinate the investigative activities and efforts between FBI Headquarters and that office, in addition to the other field divisions and outside agencies involved in the investigation. This process did not work well in the Moussaoui case.

Under the FBI's system, an effective SSA should thoroughly brief the NSLU and solicit its determination on the adequacy of any application within a reasonable time after receipt. In ''close call'' investigations, we would expect the NSLU attorneys to seek to review all written information forwarded by the field office rather than rely on brief oral briefings. In the case of the Moussaoui application forwarded from Minneapolis, the RFU SSA merely provided brief, oral briefings to NSLU attorneys and did not once provide that office with a copy of the extensive written application for their review. An SSA should also facilitate communication between the OIPR, the NSLU, and those in the field doing the investigation and constructing the application. That also did not occur in this case.

By its very nature, having so many players involved in the process allows internal FBI finger-pointing with little or no accountability for mistakes. The NSLU can claim, as it does here, to have acquiesced to the factual judgment of the SSAs in the investigative unit. The SSAs, in turn, claim that they have received no legal training or guidance and rely on the lawyers at the NSLU to make what they term as legal decisions. The judgment of the agents in the field, who are closest to the facts of the case, is almost completely disregarded.

Stuck in this confusing, bureaucratic maze, the seemingly simple and routine business practices within key Headquarters units

were flawed. As we note above, even routine renewals on already existing FISA warrants were delayed or not obtained due to the lengthy delays in processing FISA applications.

5. The Mishandling of the Phoenix Electronic Communication

The handling of the Phoenix EC represents another prime example of the problems with the FBI's FISA system as well as its faulty use of information technology. The EC contained information that was material to the decision whether or not to seek a FISA warrant in the Moussaoui case, but it was never considered by the proper people. Even though the RFU Unit Chief himself was listed as a direct addressee on the Phoenix EC (in addition to others within the RFU and other counterterrorism Units at FBI Headquarters), he claims that he never even knew of the existence of such an EC until the FBI's Office of Professional Responsibility (OPR) contacted him months after the 9/11 attacks. Even after this revelation, the Unit Chief never made any attempt to notify the Phoenix Division (or any other field Division) that he had not read the EC addressed to him. He issued no clarifying instructions from his Unit to the field, which very naturally must believe to this day that this Unit Chief is actually reading and assessing the reports that are submitted to his attention and for his consideration. The Unit Chief in question here has claimed to be ''at a loss'' as to why he did not receive a copy of the Phoenix EC at the time it was assigned, as was the practice in the Unit at that time.

Apparently, it was routine in the Unit for analytic support personnel to assess and close leads assigned to them without any supervisory agent personnel reviewing their activities. In the RFU, the two individuals in the support capacity entered into service at the FBI in 1996 and 1998. The Phoenix memo was assigned to one of these analysts as a ''lead'' by the Unit's Investigative Assistant (IA) on or about July 30th, 2001. The IA would then accordingly give the Unit Chief a copy of each EC assigned to personnel in the Unit for investigation. The RFU Unit Chief claims to have never seen this one. In short, the crucial information being collected by FBI agents in the field was disappearing into a black hole at Headquarters. To the extent the information was reviewed, it was not reviewed by the appropriate people.

More disturbingly, this is a recurrent problem at the FBI. The handling of the Minneapolis LHM and the Phoenix memo, neither of which were reviewed by the correct people in the FBI, are not the first times that the FBI has experienced such a problem in a major case. The delayed production of documents in the Oklahoma City bombing trial, for example, resulted in significant embarrassment for the FBI in a case of national importance. The Judiciary Committee held a hearing during which the DOJ's own Inspector General testified that the inability of the FBI to access its own information base did and will have serious negative consequences. Although the FBI is undertaking to update its information technology to assist in addressing this problem, the Oklahoma City case demonstrates that the issue is broader than antiquated computer systems. As the report concluded, ''human error, not the inadequate computer system, was the chief cause of the failure. . . .'' The report concluded that problems of training and FBI culture were the primary causes of the embarrassing mishaps in that case. Once again, the FBI's and DOJ's failures to address such broad based problems seem to have caused their recurrence in another context.

6. The FBI's Poor Information Technology Capabilities

On June 6, 2002, Director Mueller and SA Rowley testified before the Senate Judiciary Committee on the search capabilities of the FBI's Automated Case Support (ACS) system. ACS is the FBI's centralized case management system, and serves as the central electronic repository for the FBI's official investigative textual documents. Director Mueller, who was presumably briefed by senior FBI officials regarding the abilities of the FBI's computers, testified that, although the Phoenix memorandum had been uploaded to the ACS, it was not used by agents who were investigating the Moussaoui case in Minnesota or at Headquarters. According to Director Mueller, the Phoenix memorandum was not accessible to the Minneapolis field office or any other offices around the country; it was only accessible to the places where it had been sent: Headquarters and perhaps two other offices. Director Mueller also testified that no one in the FBI had searched the ACS for relevant terms such as ''aviation schools'' or ''pilot training.'' According to Director Mueller, he hoped to have in the future the technology in the computer system to do that type of search (e.g., to pull out any electronic communication relating to aviation), as it was very cumbersome to do that type of search as of June 6, 2002. SA Rowley testified that FBI personnel could only perform one-word searches in the ACS system, which results in too many results to review.

Within two weeks of the hearing, on June 14, 2002, both Director Mueller (through John E. Collingwood, AD Office of Public and Congressional Affairs) and SA Rowley submitted to the Committee written corrections of their June 6, 2002, testimony. The FBI corrected the record by stating that ACS was implemented in all FBI field offices, resident agencies, legal attache offices, and Headquarters on October 16, 1995. In addition, it was, in fact, possible to search for multiple terms in the ACS system, using Boolean connectors (e.g., hijacker or terrorist and flight adj school), and to refine searches with other fields (e.g., document type). Rowley confirmed the multiple search-term capabilities of ACS and added that the specifics of ACS's search capabilities are not widely known within the FBI.

We commend Director Mueller and SA Rowley for promptly correcting their testimony as they became aware of the incorrect description of the FBI's ACS system during the hearing. Nevertheless, their corrections and statements regarding FBI personnel's lack of knowledge of the ACS system highlights a longstanding problem within the Bureau. An OIG report, issued in July 1999, states that FBI personnel were not well-versed in the ACS system or other FBI databases. An OIG report of March 2002, which analyzed the causes for the belated production of many documents in the Oklahoma City bombing case, also concluded that the inefficient and complex ACS system was a contributing factor in the FBI's failure to provide hundreds of investigative documents to the defendants in the Oklahoma City Bombing Case. In short, this Committee's oversight has confirmed, yet again, that not only are the FBI's computer systems inadequate but that the FBI does not adequately train its own personnel in how to use their technology.

7. The ''Revolving Door'' at FBI Headquarters

Compounding information technology problems at the FBI are both the inexperience and attitude of ''careerist'' senior FBI agents who rapidly move through sensitive supervisory positions at FBI Headquarters. This ''ticket punching'' is routinely allowed to take place with the acquiescence of senior FBI management at the expense of maintaining critical institutional knowledge in key investigative and analytical units. FBI agents occupying key Headquarters positions have complained to members of the Senate Judiciary Committee that relocating to Washington, DC, is akin to a ''hardship'' transfer in the minds of many field agents. More often than not, however, the move is a career enhancement, as the agent is almost always promoted to a higher pay grade during or upon the completion of the assignment. The tour at Headquarters is usually relatively short in duration and the agent is allowed to leave and return to the field.

To his credit, Director Mueller tasked the Executive Board of the Special Agents Advisory Committee (SAAC) to report to him on disincentives for Special Agents seeking administrative advancement. They reported on July 1, 2002, with the following results of an earlier survey:

''Less than 5% of the Agents surveyed indicated an interest in promotion if relocation to FBIHQ was required. Of 35 field supervisors queried, 31 said they would 'step down' rather than accept an assignment in Washington, D.C. All groups of Agents (those with and without FBIHQ experience) viewed as assignment at FBIHQ as very negative. Only 6% of those who had previously been assigned there believed that the experience was positive—the work was clerical, void of supervisory responsibility critical to future field or other assignments. Additionally, the FBIHQ supervisors were generally powerless to make decisions while working in an environment which was full of negativity, intimidation, fear and anxiousness to leave.''

The SAAC report also contained serious criticism of FBI management, stating:

''Agents across the board expressed reluctance to become involved in a management system which they believe to [be] hypocritical, lacking ethics, and one in which we lead by what we say and not by example. Most subordinates believe and most managers agreed that the FBI is too often concerned with appearance over substance. Agents believed that management decisions are often based on promoting one's self interest versus the best interests of the FBI.''

There is a dire need for the FBI to reconsider and reform a personnel system and a management structure that do not create the proper incentives for its most capable and talented agents to occupy its most important posts. The SAAC recommended a number of steps to reduce or eliminate ''disincentives for attaining leadership within the Bureau.'' Congress must also step up to the plate and assess the location pay differential for Headquarters transfers compared to other transfers and other financial rewards for administrative advancement to ensure that those agents with relevant field experience and accomplishment are in critical Headquarters positions.

Indeed, in the time period both before and after the Moussaoui application was processed at Headquarters (and continuing for months after the 9/11 attacks), most of the agents in the pertinent Headquarters terrorism unit had less than two years of experience working on such cases. In the spring and summer of 2001, when Administration officials have publicly acknowledged increased ''chatter'' internationally about potential terrorist attacks, the Radical Fundamentalist Unit at FBI Headquarters experienced the routinely high rate of turnover in agent personnel as other units regularly did. Not only was the Unit Chief replaced, but also one or more of the four SSAs who reported to the Unit Chief was a recent transfer into the Unit. These key personnel were to have immediate and direct control over the fate of

the ''Phoenix memo'' and the Minneapolis Division's submission of a FISA application for the personal belongings of Moussaoui. While these supervisory agents certainly had distinguished and even outstanding professional experience within the FBI before being assigned to Headquarters, their short tours in the specialized counterterrorism units raises questions about the depth and scope of their training and experience to handle these requests properly and, more importantly, about the FBI's decision to allow such a key unit to be staffed in such a manner.

Rather than staffing counterterrorism units with Supervisory Special Agents on a revolving door basis, these positions should be filled with a cadre of senior agents who can provide continuity in investigations and guidance to the field.

A related deficiency in FBI management practices was that those SSAs making the decisions on whether any FISA application moved out of an operational unit were not given adequate training, guidance, or instruction on the practical application of key elements of the FISA statute. As we stated earlier, it seems incomprehensible that those very individuals responsible for taking a FISA application past the first step were allowed to apply their own individual interpretations of critical elements of the law relating to what constitutes a ''foreign power,'' ''acting as an agent of a foreign power,'' ''probable cause,'' and the meaning of ''totality of the circumstances,'' before presenting an application to the attorneys in the NSLU. We learned at the Committee's hearing this past September 10th, a full year after the terrorist attacks, that the FBI drafted administrative guidelines that will provide for Unit Chiefs and SSAs at Headquarters a uniform interpretation of how—and just as importantly—when to apply probable cause or other standards in FISA warrant applications.

All of these problems demonstrate that there is a dire need for a thorough review of procedural and substantive practices regarding FISA at the FBI and the DOJ. The Senate Judiciary Committee needs to be even more vigilant in its oversight responsibilities regarding the entire FISA process and the FISA Court itself. The FISA process is not fatally flawed, but rather its administration and coordination needs swift review and improvement if it is to continue to be an effective tool in America's war on terrorism.

IV. THE IMPORTANCE OF ENHANCED CONGRESSIONAL OVERSIGHT

An undeniable and distinguishing feature of the flawed FISA implementation system that has developed at the DOJ and FBI over the last 23 years is its secrecy. Both at the legal and operational level, the most generalized aspects of the DOJ's FISA activities have not only been kept secret from the general public but from the Congress as well. As we stated above, much of this secrecy has been due to a lack of diligence on the part of Congress exercising its oversight responsibility. Equally disturbing, however, is the difficulty that a properly constituted Senate Committee, including a bipartisan group of senior senators, had in conducting effective oversight of the FISA process when we did attempt to perform our constitutional duties.

The Judiciary Committee's ability to conduct its inquiry was seriously hampered by the initial failure of the DOJ and the Administrative Office of the United States Courts to provide to the Committee an unclassified opinion of the FISA Court relevant to these matters. As noted above, we only received this opinion on August 22, 2002, in the middle of the August recess.

Under current law there is no requirement that FISA Court opinions be made available to Congressional committees or the public. The only statutory FISA reporting requirement is for an unclassified annual report of the Attorney General to the Administrative Office of the United States Courts and to Congress setting forth with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance under Title I, and (b) the total number of such orders and extensions either granted, modified, or denied. These reports do not disclose or identify unclassified FISA Court opinions or disclose the number of individuals or entities targeted for surveillance, nor do they cover FISA Court orders for physical searches, pen registers, or records access.

Current law also requires various reports from the Attorney General to the Intelligence and Judiciary Committees that are not made public. These reports are used for Congressional oversight purposes, but do not include FISA Court opinions. When the Act was passed in 1978, it required the Intelligence Committees for the first five years after enactment to report respectively to the House of Representatives and the Senate concerning the implementation of the Act and whether the Act should be amended, repealed, or permitted to continue in effect without amendment. Those public reports were issued in 1979–1984 and discussed one FISA Court opinion issued in 1981, which related to the Court's authority to issue search warrants without express statutory jurisdiction.

The USA PATRIOT Act of 2001 made substantial amendments to FISA, and those changes are subject to a sunset clause under which they shall generally cease to have effect on December 31, 2005. That Act did not provide for any additional reporting to the Congress or the public regarding implementation of these amendments or FISA Court opinions interpreting them.

Oversight of the entire FISA process is hampered not just because the Committee was initially denied access to a single unclassified opinion but because the Congress and the public get no access to any work of the FISA Court, even work that is unclassified. This secrecy is unnecessary, and allows problems in applying the law to fester. There needs to be a healthy dialogue on unclassified FISA issues within Congress and the Executive branch and among informed professionals and interested groups. Even classified legal memoranda submitted by the DOJ to, and classified opinions by, the FISA Court can reasonably be redacted to allow some scrutiny of the issues that are being considered. This highly important body of FISA law is being developed in secret, and, because they are ex parte proceedings, without the benefit of opposing sides fleshing out the arguments as in other judicial contexts, and without even the scrutiny of the public or the Congress. Resolution of this problem requires considering legislation that would mandate that the Attorney General submit annual public reports on the number of targets of FISA surveillance, search, and investigative measures who are United States persons, the number of criminal prosecutions where FISA information is used and approved for use, and the unclassified opinions and legal reasoning adopted by the FISA Court and submitted by the DOJ.

As the recent litigation before the FISA Court of Review demonstrated, oversight also bears directly on the protection of important civil liberties. Due process means that the justice system has to be fair and accountable when the system breaks down.

Many things are different now since the tragic events of last September, but one thing that has not changed is the United States Constitution. Congress must work to guarantee the civil liberties of our people while at the same time meet our obligations to America's national security. Excessive secrecy and unilateral decision making by a single branch of government is not the proper method of striking that all important balance. We hope that, joining together, the Congress and the Executive Branch can work in a bipartisan manner to best serve the American people on these important issues. The stakes are too high for any other approach.

PATRICK LEAHY,
U.S. Senator.
ARLEN SPECTER,
U.S. Senator.
CHARLES E. GRASSLEY,
U.S. Senator.

Mr. SPECTER. I ask unanimous consent that the response of the Department of Justice dated February 20, 2003 be printed in the RECORD.

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

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 20, 2003.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is to follow up on outstanding questions from the Committee's hearings on June 6, 2002, at which FBI Director Mueller testified, a closed hearing on July 9, 2002, at which seven FBI personnel testified, and a September 10, 2002, hearing at which an Associate Deputy Attorney General testified on the FISA process. During this latter hearing, and in follow-up letters, dated September 24, 2002 and October 1, 2002, Senator Specter asked for additional information about the circumstances leading up to the FBI's issuance of guidance on the probable cause standard and the number of FBI requests for FISA warrants between June 6, 2002 and September 16, 2002.

In July 2002, the General Counsel's Office undertook to draft a comprehensive memorandum to provide FBI field and headquarters personnel with a practitioner's guide to the FISA process and the changes resulting from the USA PATRIOT Act. A section of that guidance was to be devoted to a refresher discussion of the probable cause standard. Near the end of that month, however, a new General Counsel reported to the FBI and reviewed the initial draft. After discussions with attorneys in the FBI's National Security Law Unit and the Justice Department, it was determined that the guidance would be issued in three separate memoranda. One would provide a broad overview of the FISA process; one would cover recent revisions to the limitations on the sharing of FISA-derived information; and one would clarify the probable cause standard.

These three memoranda were issued in September 2002 and copies are enclosed for your convenience. The 15-page overview of the FISA process was finalized and posted on the FBI intranet on September 12, 2002. The 11-page guidance on the new information sharing procedures was issued on September 18, 2002, and later superceded by the November 18, 2002 decision of the Foreign Intelligence Surveillance Court of Review which approved the Attorney General's March 6, 2002 Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI. The clarification memorandum on the probable cause standard was released on September 16, 2002 and I am advised that, as a

matter of courtesy, a copy was delivered to Senator Specter's office on that date.

In light of the November 18, 2002, decision of the Foreign Intelligence Surveillance Court of Review, the Department issued ''field guidance'' on intelligence sharing and FISA issues on December 24, 2002, which was sent to all United States Attorneys, all Anti-Terrorism Task Force coordinators and all Special Agents of the FBI. It consisted of three documents: (1) a memorandum jointly issued by the Deputy Attorney General and the Director of the FBI discussing the intelligence sharing procedures for foreign intelligence and foreign counterintelligence investigations, including a chart summarizing the March 6, 2002 Intelligence Sharing Procedures; (2) the Attorney General's March 6, 2002 memorandum on Intelligence Sharing Procedures for Foreign Intelligence and Counterintelligence Investigations conducted by the FBI; and (3) a memorandum from the Deputy Attorney General summarizing the November 18, 2002, decision of Foreign Intelligence Surveillance Court of Review. An electronic copy of the field guidance was provided to the Judiciary Committee on January 17, 2003 (an additional courtesy copy is enclosed).

Also on December 24, 2002, the Deputy Attorney General issued a memorandum instructing the Counsel for Intelligence Policy, the Assistant Attorney General for the Criminal Division, and the Director of the FBI to ''jointly establish and implement a training curriculum for all Department lawyers and FBI agents who work on foreign intelligence or counterintelligence investigations, both in Washington, DC and in the field, including Assistant United States Attorneys designated under the Department's March 6, 2002 Intelligence Sharing Procedures. At a minimum, the training shall address the FISA process, the importance of accuracy in FISA applications, the legal standards (including probable cause) set by FISA, coordination with law enforcement and with the Intelligence Community, and the proper storing and handling of classified information.'' A copy of the December 24, 2002, training memorandum is enclosed.

Senator Specter's letter of October 1, 2002, asked as an additional follow-up question about the number of FBI requests for FISA warrants between Colleen Rowley's June 6, 2002, appearance before the Judiciary Committee and the September 16, 2002, issuance of the probable cause memorandum. The number of FBI applications to the Foreign Intelligence Surveillance Court (FISC) for FISA searches and surveillances during this time period is classified at the SECRET level and is being delivered to the Committee through the Office of Senate Security under separate cover and in accordance with the longstanding Executive branch practices on the sharing of classified intelligence information with Congress. Please note that the total annual number of FISA applications for orders authorizing electronic surveillance filed by the government and the total annual number of such applications either granted, modified, or denied by the FISC are not classified and are provided annually to the Administrative Office of the United States Court and to Congress under section 1807 of FISA.

The question of what probable cause standard was used on FISA applications for warrants during that time was posed to supervisors in the National Security Law Unit and in the Office of Intelligence Policy and Review. They responded that the applications—and their discussions about those applications—reflect that the agents and attorneys involved in the FISA process understood and applied the correct probable cause standard in their analyses of the relevant evidence. Based on their observations, the staff's understanding of probable cause—whether based on a reading of *Illinois* v. *Gates*, 462 U.S. 213 (1983), or of any of the other numerous authoritative judicial statements of the probable cause standard—did not change with the issuance of the probable cause memorandum. The standard they employed was consistent with *Illinois* v. *Gates* both before and after they received the memorandum.

I hope that this information is helpful. If you would like further assistance on this or on any other matter, please do not hesitate to contact me.

Sincerely,

JAMIE E. BROWN,
Acting Assistant Attorney General.

Mr. SPECTER. The oversight is going to continue on this matter. We are dealing with a constitutional responsibility of the Congress, that is the Senate and the Judiciary Committee, to conduct oversight on the Department of Justice and on the Federal Bureau of Investigation. This inquiry has demonstrated to this Senator that such oversight is sorely needed.

When I was District Attorney of Philadelphia and an assistant district attorney before that time, I had occasion to deal with a great many applications for search warrants. To find now that the key FBI personnel entrusted with the responsibility to apply for warrants under the Foreign Intelligence Surveillance Act, to get information on agents of foreign powers, at a time when the United States is threatened by terrorism, and they do not know what the right standard is, is just scandalous.

It has already been detailed on the public record that had they followed the right standard, and had the FBI gotten the computer of Zacarias Moussaoui, that 9/11 might have been prevented.

Then when the Judiciary Committee pursues the issue more than a month later at a subsequent hearing, and finds that the key FBI personnel, including their attorneys, do not know the right standard, it is just incredible. Then when the FBI Director does not respond to inquiries as to what the standards are, and days, weeks, and months follow, I wonder what has happened with many matters where terrorists may be plotting other attacks and our law enforcement officials are not doing the job.

This does raise the very fundamental question of whether the FBI is capable of handling counterterrorism in the United States, and what standards are being applied. Senator LEAHY, Senator GRASSLEY, and I have introduced further legislation requiring more reporting. There is a very important issue about civil liberties, but it all turns on appropriate application of the law, and that certainly has not been followed.

I will be sending a copy of this statement to FBI Director Mueller tomorrow when it is in print, and these issues will be raised at the hearing which is scheduled for next Tuesday. We have a hearing scheduled which will include Attorney General Ashcroft, FBI Director Robert Mueller, CIA Director George Tenet, and Secretary of Homeland Defense Tom Ridge. I am urging Chairman HATCH to break it up and to have only one of those individuals appear. If we have all four of them at one time, we will only be hearing opening statements from the Senators and opening statements from the individuals, and along about 1:15, when nobody has gone to lunch, is when we will really get to serious questioning, and the hearing will not exactly be fruitful. So we really need to take these very important individuals one at a time. So stay tuned on some questions for FBI Director Mueller.

I ask unanimous consent to print the letter in the RECORD.

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

U.S. SENATE,
Washington, DC, September 24, 2002.

Hon. ROBERT MUELLER,
Director, Federal Bureau of Investigation, Washington, DC.

DEAR DIRECTOR MUELLER: In a hearing before the Judiciary Committee on June 6, 2002, I questioned you and Special Agent Colleen Rowley about the erroneous standards being applied by the FBI on applications for warrants under the Foreign Intelligence Surveillance Act. I specifically called your attention to the appropriate standards in *Illinois* v. *Gates.*

On July 10, 2002, I wrote to you concerning a closed door hearing on July 9, 2002 where seven FBI personnel including four attorneys were still unfamiliar with the appropriate standard for probable cause of a FISA warrant under Gates.

At a Judiciary Committee hearing on September 10, 2002, I again raised these issues with a representative of the Department of Justice asking why I had not heard about any action taken by the FBI on these issues.

On September 12, 2002, my office received an undated letter from Assistant Director John E. Collingwood (copy enclosed) which was a totally inadequate response. My office has since been furnished with a copy of a memorandum from the Federal Bureau of Investigation dated September 16, 2002, entitled ''Probable Cause'' which references the Gates case.

I would like an explanation from you as to why it took the FBI so long to disseminate information on the standard for probable cause under Gates for a FISA warrant.

Sincerely,

ARLEN SPECTER.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, September 12, 2002.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: I am writing in response to your letter to Director Mueller dated July 10, 2002 regarding the standards applied to applications under the Foreign Intelligence Surveillance Act (FISA).

As you know, the events of September 11, 2001 caused the entire Government to review all of its programs to identify any revisions which may help to prevent another terrorist attack. The FISA review process is critical to our counterterrorism mission and, even before September 11th, we were working with the Department of Justice (DOJ), as well as the FISA Court, to simplify and expedite the FISA procedures. We have made significant progress including implementation of the

FISA procedures to ensure accuracy (known as the ''Woods Procedures''), a copy of which has been provided to the Committee.

In addition, we have been crafting new guidance, in consultation with DOJ, to address the FISA process as modified by the USA PATRIOT Act. This guidance will also address the concerns raised in your letter and your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation. A copy will be provided to the Committee as well.

I appreciate your concerns and your support in these critical matters. Please contact me if you have any questions.

Sincerely,

JOHN E. COLLINGWOOD,
Assistant Director, Office of Public and Congressional Affairs.

U.S. SENATE,
Washington, DC, October 1, 2002.

Hon. ROBERT MUELLER,
Director, Federal Bureau of Investigation, Washington, DC.

DEAR DIRECTOR MUELLER: Supplementing my letter of September 24, 2002, I would like to know how many requests the FBI made for warrants under the Foreign Intelligence Surveillance Act from June 10, 2002, the date of the Judiciary Committee hearing with you and Special Agent Colleen Rowley, and September 16, 2002, the date on the FBI memorandum citing the Gates case.

I would also like to know the specifics on what standard of probable cause was used on the applications for warrants under FISA during that period.

Sincerely,

ARLEN SPECTER.

EXHIBIT 1

U.S. SENATE,
Washington, DC, July 10, 2002.

Hon. ROBERT MUELLER,
Director, Federal Bureau of Investigation, Washington, DC.

DEAR DIRECTOR: In a hearing before the Judiciary Committee on June 6, 2002, I called your attention to the standard on probable cause in the opinion of then-Associate Justice Rehnquist in *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (citations omitted) as follows:

As early as *Locke* v. *United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that ''the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion.'' More recently, we said that ''the quanta . . . of proof'' appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to ''probable cause'' may not be helpful, it is clear that ''only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.''

In a closed door hearing yesterday, seven FBI personnel handling FISA warrant applications were questioned, including four attorneys.

A fair summary of their testimony demonstrated that no one was familiar with Justice Rehnquist's definition from Gates and no one articulated an accurate standard for probable cause.

I would have thought that the FBI personnel handling FISA applications would have noted that issue from the June 6th hearing; or, in the alternative, that you are other supervisory personnel would have called it to their attention.

It is obvious that these applications, which are frequently made, are of the utmost importance to our national security and your personnel should not be applying such a high standard that precludes submission of FISA applications to the Foreign Intelligence Surveillance Court.

I believe the Judiciary Committee will have more to say on this subject but I wanted to call this to your attention immediately so that you could personally take appropriate corrective action.

Sincerely,

ARLEN SPECTER.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: I am writing in response to your letter to Director Mueller dated July 10, 2002 regarding the standards applied to applications under the Foreign Intelligence Surveillance Act (FISA).

As you know, the events of September 11, 2001 caused the entire Government to review all of its programs to identify any revisions which may help to prevent another terrorist attack. The FISA review process is critical to our counterterrorism mission and, even before September 11th, we were working with the Department of Justice (DOJ), as well as the FISA Court, to simplify and expedite the FISA procedures. We have made significant progress including implementation of the FISA procedures to ensure accuracy (known as the ''Woods Procedures''), a copy of which has been provided to the Committee.

In addition, we have been crafting new guidance, in consultation with DOJ, to address the FISA process as modified by the USA PATRIOT Act. This guidance will also address the concerns raised in your letter and your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation. A copy will be provided to the Committee as well.

I appreciate your concerns and your support in these critical matters. Please contact me if you have any questions.

Sincerely,

JOHN E. COLLINGWOOD,
Assistant Director, Office of Public and Congressional Affairs.

EXHIBIT 2

FEDERAL BUREAU OF INVESTIGATION

To: All Divisions.
From: Office of the General Counsel.

PROBABLE CAUSE

Synopsis: The purpose of this Electronic Communication is to clarify the meaning of probable cause.

Details: In recent legislative hearings, questions have been raised about the concept of probable cause as it applies to the Foreign Intelligence Surveillance Act (FISA). While FBI Agents receive substantial legal training and have ample experience applying the concept in their daily work, it is nonetheless helpful to review the case law defining probable cause. Accordingly, the Office of the General Counsel prepared the following summary for the benefit of all FBI Agents.

In *Illinois* versus *Gates*, 462 U.S. 213 (1983, the Supreme Court explained that the probable cause standard is a practical, nontechnical concept which deals with probabilities—not hard certainties—derived from the totality of the circumstances in a factual situation. Probable cause to believe a particular contention is determined by evaluating ''the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act;'' it is a ''fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules.'' 462 U.S. at 231–32.

The courts have broadly defined the parameters of probable cause. While it requires more than an unfounded suspicion, courts have repeatedly explained that probable cause requires a lesser showing than the rigorous evidentiary standards employed in trial proceedings. In Gates, 462 U.S. at 235, the Supreme Court explained that probable cause is less demanding than the evidentiary standards of beyond a reasonable doubt, preponderance of the evidence or even a prima facie case—all that is required to establish probable cause is a ''fair probability'' that the asserted contention is true. It is particularly important to note that probable cause is a lower standard than ''preponderance of the evidence,'' which is defined as the amount of evidence that makes a contention more likely true than not true. See, e.g., *United States* versus *Bapack*, 129 F.3d 1320, 1324 (D.C. Cir. 1997) (preponderance standards means ''more likley than not''); *United States* versus *Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994) (''more probable than not''), BLACK'S LAW DICTIONARY 1064 (5th ed. 1979) (''[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it''). Since probable cause is a lower standard than preponderance of the evidence, an Agent can demonstrate probable cause to believe a factual contention without proving that contention even to a 51 percent certainty, as required under the preponderance of the evidence standard. See, e.g., *United States* versus *Cruz*, 834 F.2d 47, 50 (2d Cir. 1987) (probable cause does not require a showing that it is more probable than not that a crime has been committed); *Paff* versus *Kaltenbach*, 204 F.3d 425, 436 (3d Cir. 2000) (probable cause is a lesser showing than preponderance of the evidence); *United States* versus *Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (same); *United States* versus *Mounts*, 248 F.3d 712, 715 (7th Cir. 2001) (probable cause does not require a showing that it is more likely than not that the suspected committed a crime).

Courts have instructed judges to apply no higher standard when they review warrants for probable cause. The magistrate reviewing an application for a criminal search warrant ''is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'' *Gates*, 462 U.S. at 238. As to arrest warrants, the question for the magistrate is whether the totality of the facts and circumstances set forth in the affidavit are ''sufficient to warrant a prudent man in believing that the [suspect] had committed'' the alleged offense—an evaluation that ''does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands.'' *Gerstin* versus *Pugh*, 420 U.S. 103, 111–12, 121 (1975).

Similarly, a judge of the Foreign Intelligence Surveillance Court reviewing an application for a FISA electronic surveillance order or search warrant must make a probable cause determination based on a practical, common-sense assessment of the circumstances set forth in the declaration. The judge must first find probable cause that the target of the surveillance or search is a foreign power or an agent of a foreign power. While certain non-U.S. persons can qualify

as agents of a foreign power merely by acting in the United States as an officer or employee of a foreign power, a U.S. person can be found to be an agent of a foreign power only if the judge finds probable cause to believe that he or she is engaged in activities that involve (or in the case of clandestine intelligence gathering activities ''may involve'') certain criminal conduct. 50 U.S.C. 1801(b). For an electronic surveillance order to issue under FISA, the judge must additionally find that there is probable cause to believe that each of the facilities or places to be electronically surveilled is being used, or is about to be used, by a foreign power or an agent of a foreign power. 50 U.S.C. 1805(a)(3). For a FISA search warrant, the judge must find probable cause to believe that the premises or property to be searched is owned, used, possessed by or in transit to or from a foreign power or an agent of a foreign power. 50 U.S.C. 1824(a)(3).

We hope this summary clarifies the meaning of probable cause. Agents with questions about probable cause in a case should consult with their Chief Division Counsel, the Office of the General Counsel, or the Assistant United States Attorney or Justice Department attorney assigned to the case.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I think Members on both sides of the aisle greatly respect the work of our colleague on the FBI and we appreciate his work.

Mr. SPECTER. I thank my colleague from New York for the generous comments.

Mr. SCHUMER. Well deserved, not just in my opinion but in the opinion of many Members.

Mr. SPECTER. I thank the Senator.

Mr. SCHUMER. Mr. President, I will continue our discussion on so many issues facing the Nation. Obviously, in the Senate the business is the business of Miguel Estrada. I will comment on that in a few minutes.

I do want to say, however, that some on the other side are attempting to convey the impression that it is we, the Democrats, who continue the debate on Miguel Estrada. We do not. We have, indeed, asked Mr. Estrada to answer the most rudimentary questions that every person who seeks to achieve a lifetime appointment of the high office of judge of the DC Circuit Court of Appeals is asked to answer. There are a large number of Members who will not move to vote until those questions are answered. That seems to be entirely logical.

Let me make clear the reason we continue to debate Mr. Estrada—not the economy, not homeland security, not the many issues that our constituents are asking about—is the choice not of the Democratic minority but of the Republican majority that controls the floor.

In fact, 2 weeks ago, when the Republican majority thought they ought to get other things done, they have. We actually approved three other judges at the majority leader's request. We left the subject of Mr. Estrada and debated those judges. We approved the omnibus budget—late, of course—but we approved that budget, the largest amount of Federal spending we have ever voted on, debated it, amended it, while the Estrada nomination was still pending.

I ask my colleagues on the other side of the aisle, until we resolve this impasse about who Mr. Estrada is and what he actually believes, what his judicial philosophy is, and get the best evidence—not hearsay evidence because there is hearsay evidence on both sides—that we do move to other issues.

When I go to New York, virtually none of my constituents ask me about Miguel Estrada. Yes, you will get some editorials and you get some talk shows talking about him one way or the other. But not average voters. Not even any voter except those in the political class.

My constituents are asking me about the war, when we might go to war and what is happening. I get a lot of negative comments about France, which I am sympathetic toward—not France but the negative comments. And more than that I get questions about the economy. I get question after question after question: What are you guys in Washington doing about the economy?

This morning I flew back from New York and the man at the gate of the airport, obviously somebody who makes an average salary working for Delta Airlines, asked me: Senator, when are you guys going to get the economy going?

We on this side would love to start debating on the economy. We would love to start talking about how we will get people to work. As our minority leader, TOM DASCHLE, put it so well yesterday, the Republicans on the other side of the aisle are concerned about one job, that of Mr. Estrada. And by the way, he already has a job. My guess is he is being paid well into the six figures. He can live quite a nice life, as he deserves, on that ample salary.

But what about the 2.8 million Americans who have lost jobs? What about the tens of millions of other Americans who have jobs, but they are not getting the salaries they used to get in terms of buying power? What about all the companies, the small businesses, that say the business climate is not good enough so they can expand? What about the large businesses? I was reading my clips here and some of the largest companies in upstate New York have stopped putting dollars into research or decreased the amount of money they are putting into research, which is the lifeblood of our future, our information-based economy, because very simply, the economy is so squishy soft.

We have plans to deal with the economy. We would like to debate them. I was told this morning that many think the majority leader will not even bring up a stimulus package until late spring. We cannot afford to wait. We can sit here and make the speeches.

Do you know how many times I have heard that Mr. Estrada graduated from Harvard Law School? It is not new news. We are not making any new points in this debate. I guess every one of the Senators could answer this question: How many former Solicitors General have said that the records should not be revealed? We have heard that probably 100 times on the floor. No new ground is being broken in this debate.

Yet for some strange reason the majority leader seeks to keep us on this issue. We all know what the issue is. It is a simple issue. That is, many Members believe Mr. Estrada has to tell not only the Senate but the American people—because the Founding Fathers regarded us as a mechanism by which the American people could learn—his views on fundamental issues. What is his view of the first amendment and whether it is an expansive view or narrowing view?

Right now we are faced with the age-old conflict between security and liberty as we debate the PATRIOT Act. It is all challenged in court. What are Mr. Estrada's views? How does he see it? Is he hard on the security side? Is he hard on the liberty side? What are his views on the commerce clause?

We all know that there is a move among many Justices in the Supreme Court and judges in the courts of appeals to narrow that commerce clause. Some want to narrow it, in my opinion, so severely we could go back not to the 1930s but the 1890s.

The American people are entitled to know his views. They are not simply entitled to know that Mr. Seth Waxman says he is a good fellow. That is not an answer.

I am sure my colleague from Pennsylvania would admit if he were here, direct evidence is a lot better than hearsay evidence. There are various ways you get direct evidence. One is by asking a witness questions. As anyone who has read the transcript of the hearing that I chaired for Mr. Estrada, he went to every length to avoid any answers that were substantive on any direct questions. I have never seen anything like it.

Of course, subsequent to Mr. Estrada answering that way, I believe there are new nominees saying the same thing. But none of the nominees before were ever so restrictive. And I believe the only reason the others have not answered questions, they were afraid they would embarrass Mr. Estrada, acting at the request of the White House. It is a good guess he has been instructed not to answer these.

Another way is to look at somebody's past history. There is only one place where we can find Mr. Estrada's own views in his past history because he has written very little.

He clearly was not previously a judge; he was a lawyer. He was obviously representing clients; that is, by his writings and by his views when he was in the Solicitor General's office. There are some who say those should not be revealed. There are arguments on that side. But there are no legal arguments and there is plenty of precedent on the other side.

Should everybody who worked in the Solicitor General's Office have to reveal such information? Probably it would be better. I believe in openness. But it wouldn't be essential because just about every nominee who has come before us for this kind of high court has had some kind of record.

There are some who say Mr. Estrada is way to the right of Justice Scalia. If that is true, he should not be approved. If, on the other hand, he is a mainstream conservative, he should be approved.

Of the 106 people the President nominated for judge for whom we voted, on whom we have had votes here in the Senate, I have supported 98, 99, or 100 of them. I am sure the vast majority of those were mainstream conservatives—people I might disagree with on this issue or that. But the real issue here is, Is Mr. Estrada so far out of the mainstream on the second highest court in the land that if the American people knew his views they would be aghast?

Do you know what many people say when they hear this argument? When I went back home and anyone asked me—as I said, almost no one did—but when I was asked or when I entered an opinion, there was not a soul who would disagree that he should reveal what he thinks. There is too much power in this awesome lifetime appointment not to do so.

So the issue is drawn. We know the issue. No one has budged over the last 2 to 3 weeks.

Why are we still debating Estrada? Because the Republican majority insists on doing it. Maybe they think they can win political points. I doubt it. I think most people do not care. Maybe they feel so strongly that they want to keep the Senate tied up. I will tell you, if they do, they are not representing what the American people want, which is debate on other issues.

The two issues I think we should be debating now are the economy and what we are doing about homeland security. Those two issues, in my judgment, are the two that have a real impact. We have disagreements on the war. We know that. That is now pretty much in executive branch hands. But what to do about homeland security and what to do about the economy or what the American people are asking us to do—and I will say to you, ladies and gentlemen of America—the reason we are not debating those extremely serious issues is because the Republican majority insists that we stay on the Estrada issue.

If I heard from the other side new arguments that might convince people, I would say, well, maybe they have a point. But a new argument has not been made on this issue for a week or two. Do you know what. If someone comes up with an ingenious argument that might convince a number of Members on this side, we can go back and debate Mr. Estrada. But right now, I will challenge my good friends, my Republican colleagues on the other side of the aisle, to start doing something about the economy. Let us debate that issue.

Again, I say this to the American people. We do not control the floor.

When they say Democrats are filibustering on Mr. Estrada, that is not true. It is the Republican side that is keeping us debating the issue of Mr. Estrada. They say until you see it our way, we are going to stay with Mr. Estrada. If this were the No. 1 issue most Americans think should be tackled, they might have a point. But it isn't, although I am afraid some of my colleagues are sort of out of touch.

I want to quote my good friend, the junior Senator from Pennsylvania, Mr. SANTORUM. He came out of a White House meeting, according to the National Journal, and said that getting Estrada to the Senate was first and foremost on President Bush's mind.

More important than the war in Iraq? More important than protecting our homeland? More important than starting the economy going and getting the jobs we need? I don't think more than 1 percent of the American people would agree with that analysis. If so, the President ought to rethink. If Mr. SANTORUM is properly reporting on President Bush's views that Estrada is first and foremost, then the President ought to get out on the hustings and start talking to the American people and finding out what is on their minds because it isn't Mr. Estrada.

I would like to talk about one thing about the economy which I think is important. Today, along with my colleague from New Jersey, Senator CORZINE, and my colleague from Michigan, Ms. STABENOW, and my colleague from Delaware, Senator CARPER, all members of the Banking Committee, we put in a sense-of-the-Congress resolution that says the independence of the Federal Reserve Board should be preserved; that praises Chairman Greenspan as an independent voice and that asks this Senate to go on record in support of Mr. Greenspan.

Why have we done that? Very simply, 2 weeks ago Mr. Greenspan, before our Banking Committee, was his usual independent self. He said that while he likes the dividend tax cut, that he was so worried about plunging this Nation into fiscal chaos with huge deficits that we only ought to do it if it could be revenue-neutral—in other words, if we could find other cuts in spending or other increases in taxes that would equal the dividend tax cut—a view, by the way, that I find is corroborated by most of the business leaders I talk to.

Right after that happened, there were reports in all the newspapers that the White House was furious at Alan Greenspan. Bob Novak said in his column—which I believe was entitled, ''Goodbye Greenspan?''—the White House was so angry at Alan Greenspan's show of display of independence that they might not reappoint him.

Mr. BURNS. Mr. President, will the Senator yield for a question?

Mr. SCHUMER. I will be happy to yield in a few minutes. I want to finish my point.

When the Federal Reserve Board was set up, it was supposed to be independent. That is why it was a board. That is why the appointments are for such lengths of time. If you go back and read the history, it was set up to be as far removed from the political forces within the White House and elsewhere as it could be. Sometimes the independence of Chairman Greenspan benefits the White House.

Two years ago, many of us on this side of the aisle were quite upset with him when he encouraged a tax cut that many economists thought seemed too high—not that there shouldn't have been a tax cut, but that it was too large. At that point, the White House was very happy with the independence of the chairman. Now he said something else. Our economy is weaker. We have a large deficit. It is getting worse. The White House, which says we have no money for homeland security and no money to help the States out of their problems, has $670 billion for a tax cut.

I tend to like tax cuts. I tend to support them. But they ought to be stimulative to the economy. They ought to be fair. In other words, the middle-class people ought to get a good, decent share of the benefit. And they ought to be responsible. They ought not throw us into such large deficits that our economy has a burden on its shoulders for a decade. Chairman Greenspan was saying on the last point that we need to correct it.

When I mentioned this resolution in the Banking Committee a few hours ago, I was glad to hear that three or four of my Republican colleagues, including Chairman SHELBY, said that Alan Greenspan was a fine man, that the Federal Reserve Board ought to be independent, and that he ought to be reappointed.

I ask unanimous consent right now to bring up that amendment, to bring up that sense-of-the-Senate resolution because that would help calm the markets that are jittery enough as they are right now.

The PRESIDING OFFICER. Is there objection?

Mr. BURNS. I object.

Mr. SCHUMER. I understand that my colleague objected. It didn't surprise me.

But, again, on the issue of great importance to Americans, the state of this economy, and the independence of the Federal Reserve Board and the need that we don't just become profligate with the tax cut or the spending side, the other side wants not to debate that subject and continue debating Mr. Estrada.

I am happy to debate it. I have been on this floor for many hours. But, again, there are no new arguments that come out. I think every one of us could take a quiz on the three major points the Republican side makes and the Democrat side makes. So I say to my

colleagues, it is time to move on. There is another issue I think we should move on to.

I am going to yield just for the purposes of a question to my colleague because I am going on to another little area.

Mr. BURNS. I thank the Senator from New York.

The reason I objected is, that is not the issue at hand on the floor now, and the proper people are not on the floor to strengthen or weaken his argument on Mr. Greenspan.

But I have been watching the debate on Miguel Estrada with a great deal of interest. I would agree with my friend from New York in that I have traveled through my whole State—not the whole State, but a goodly part of it—and it is not the first question we are asked in townhall meetings or in an occasional meeting on the street.

I understand, though, that the Senator from New York questioned Mr. Estrada for about 90 minutes or so in committee. And I think it is general practice here that if you have more questions, even after the committee hearing is over, you submit written questions. I would inquire of my friend from New York: Did you send Mr. Estrada any written questions after the hearing, after he was voted out of committee and his nomination was brought to the floor?

Mr. SCHUMER. Let me respond to my colleague, I did not. I usually do send written questions. I had ample time to question Mr. Estrada. I got to ask a lot of the questions I wanted to ask. There was one problem: I got no answers. When I asked Mr. Estrada his views on, say, the 1st amendment, or on the commerce clause, or on the 11th amendment, I got back an answer that I found extremely unsatisfying. Some might call it disingenuous. I am not going to go that far. He said: Senator, I will follow the law.

Of course, every judge believes they are following the law. But if following the law was all one needed to say, we would not need a confirmation process. How Justice Scalia thinks we ought to follow the law is quite different than how Justice Breyer or Justice Thomas thinks we ought to follow the law.

If simply following the law told us how a judge would vote on the most important issues, then why is it that judges who tend to be appointed by Republican Presidents—not always, but usually—vote quite differently than judges who get appointed by Democratic Presidents? It is because even as you follow the law, your own views always influence you as a judge. And the higher the court is, and the more important the court is, the more that is the case, because there are fewer precedents.

In fact, I commend to my good friend from Montana a study done by Professor Sunstein of the University of Chicago. He looked at this very DC Court of Appeals, and he said there were huge differences on just about every issue between the judges appointed by Democratic Presidents and judges appointed by Republican Presidents.

So the bottom line is, I asked Mr. Estrada, and first he said: I can't answer these questions because it might influence me when I have to make a future decision. And he cited the canons of ethics. We all know that the canons of ethics means you cannot say: Well, there is a case over there about the logging standards in the Sawtooth Mountains. I think those are in Montana.

Mr. BURNS. You got the right mountains, but you have got the wrong State.

Mr. SCHUMER. Idaho. My family and I have traveled through there, and it is a beautiful part of America. We go hiking out there every summer, although I am sure my friend from Montana would think not enough of the West has rubbed off on me yet, but we are trying.

But in any case, that prospective nominee should not answer. But if you ask a prospective nominee his views or her views on: What are your general views on how much leeway the Federal Government has versus the State governments on how logging should be done or how the environment should be regulated? I would argue to my colleague from Montana that is exactly what we should be asking the nominee, and that is exactly what they should be answering.

Let me read you a quote from your leader on the Judiciary Committee. He said, on February 18, 1997, before the University of Utah Federalist Society:

> Determining which of President Clinton's nominees will become activists is complicated and it will require the Senate to be more diligent and extensive in its questioning of nominees' jurisprudential views.

That is exactly what we are saying. He was asked by Senator FEINSTEIN his views on Roe v. Wade. Now, I do not believe in a litmus test, and I would say, of the 99 or so judges I voted for, who were nominated by President Bush, most of them disagree with my view on choice, but I voted for them because they were mainstream conservatives. They were mainstream.

Mr. BURNS. Will the Senator further yield?

Mr. SCHUMER. I will yield when I finish my point.

But when Miguel Estrada was asked if he had any personal views on Roe v. Wade, he said, no—something to that effect. I said to him: Name three Supreme Court cases already decided that you do not like. There would be no worry about the canons of ethics. And guess what he said. ''I won't answer.''

So after 90 minutes of basically being stonewalled, there was no further point in asking written questions and getting the same answers. It is not that we did not ask the questions. We asked him a ton of questions, my colleague from Illinois and all the members of the Judiciary Committee. He just simply dead flat refused to answer them. And that when you are being nominated for the second most important court in the land, a court that is going to have huge power over every one of our lives.

That is not what the Founding Fathers intended. You read The Federalist Papers. It is not fair to this Senate. It makes a mockery of the process. And most of all, I say to my good friend from Montana, it is not fair to the American people. Because the judiciary is the one unelected branch of Government. It is where the people have the least say. That is why sometimes it garners such fervent opinions, pro and con. But the only chance you have—before this lifetime appointment passes—is at this point. And, in all fairness, I cannot think of anybody who has shown less of what he thinks about the major issues of the day before nomination than Mr. Estrada. I am sure my colleague would agree with me, if you asked 100 Americans: Should nominees for such awesome positions be—not required—but should they reveal their views? I bet 99 or 98 would say: Yes.

So I just want to make one other point. I see my other colleagues are in the Chamber. There is another issue—I am going to yield.

I ask the Senator, do you have another question?

Mr. BURNS. Being that the Senate is made up of about 65 to 70 percent attorneys—and I not being one of those—that was the longest ''yes, I did not ask him any further questions in written form'' I have ever heard. But we have to contend with that in this body.

I watched those hearings with a great deal of interest because I believe, as does the Senator from New York, this is a very sensitive and important part of our role in the Senate. However, I think we have injected a double standard here in this case. And I think that case has been made here. But I would say after——

Mr. SCHUMER. Mr. President, just reclaiming my time, I would say it has been made about 50 times—not very well, in my judgment but 50 times.

Mr. BURNS. If I may finish my question. Didn't he answer that question just about the same as the nominees sent up by the previous President of the United States? That is what I am going back to.

Like the Senator from New York, I think we should be moving on. I contend that we have talked about this, we have discussed it and debated it. The only thing I am saying is let's just vote on him.

I plan to come back to the Chamber later today to make a statement. I was interested in the Senator's discussion and his statement. I thank my good friend from New York for responding to the question.

Mr. SCHUMER. I appreciate that.

Mr. President, let me say this. I don't have all of the nominees here. I have been on the Judiciary Committee for 4 years. I have not come across a nominee to the court of appeals, when given

so many extensive questions, who had so few answers as Miguel Estrada.

I don't think there is a double standard. I will quote one. Probably, the nominee of President Clinton that garnered the most controversy—because my colleagues on the other side thought he was too far out of the mainstream from the left side—happened to be a Hispanic nominee named Richard Paez. As the Senator knows, he was held up for over 1,500 days. Let me read the same question that was asked of Mr. Paez—by the way, these were asked by your colleague, my colleague, our friend, Senator SESSIONS. Senator SESSIONS asked him:

In your opinion, what is the greatest Supreme Court decision in American history?

Did Judge Paez refuse to answer that question, say he could not, as Mr. Estrada did? No. He right away named Brown v. Board of Education.

Senator SESSIONS then asked the same question I asked of Mr. Estrada. He said:

What is the worst Supreme Court decision?

Again, Paez answered without hesitation, without ducking, without hiding behind some legal subterfuge—which I know my colleague from Montana doesn't like—that it was Dred Scott.

So if these questions were fair to ask Judge Paez, why are they not fair to ask Miguel Estrada?

One other point I will make rhetorically is, we have heard some charges here—not directed at any one of us specifically—that asking Mr. Estrada all these questions means we are against Hispanics. Why wasn't asking these questions of Judge Paez anti-Hispanic? If you want to talk about a double standard, the double standard, I am afraid, has been brought up by many of my colleagues on the other side of the aisle who seem to think it was perfectly OK then.

This is what Senator HATCH said about another Hispanic nominee. Her name was Rosemary Barkett—a Hispanic nominee, by the way, with the same kind of rags-to-riches story—well, Miguel Estrada didn't come from poverty, but it was the same quick advancement story. She tried to become a nun. She worked in schools and made herself a lawyer—very admirable, with high ratings from the American Bar Association. Same thing. This is what our good friend, ORRIN HATCH, said:

I led the fight to oppose Judge Barkett's confirmation . . . because her judicial records indicated that she would be an activist who would legislate from the bench.

Why isn't what's good for the goose good for the gander? Senator HATCH believed—and nobody on this side stopped him—that he had to ask this nominee, who also happens to be Hispanic—a Mexican American, not from Central America—a whole lot of questions. He had to go through her records and now all of a sudden when Miguel Estrada comes up, not only are we being told we should not ask questions, but it is a ''double standard'' because he is Hispanic. I think the double standard comes from the people who are making that charge on the other side. They ought to look in the mirror.

I yield to my colleague from Nevada for a question.

Mr. REID. The Senator from New York is a member of the Judiciary Committee, true?

Mr. SCHUMER. I am indeed.

Mr. REID. The Senator is familiar with the record of the Judiciary Committee during the time Democrats were in control of the Senate, true?

Mr. SCHUMER. I am.

Mr. REID. Is it true that a hundred judges were approved during that short period of time when we were in control of the Senate?

Mr. SCHUMER. Exactly true.

Mr. REID. Breaking all records.

Mr. SCHUMER. Yes. Senator LEAHY, our chairman, made every effort to bring nominees through. When I tell my constituents—the few who care about this, frankly, because most of them want us to talk about the economy or homeland security—that we have approved something like 99 out of 106 nominees, a lot of them said we approved too many. Everyone should not be rubberstamped.

Mr. REID. If I may ask another question. It is also true, is it not, that during this session of the legislature, the three judges brought before us other than Estrada have been approved unanimously?

Mr. SCHUMER. My colleague is exactly correct. I brought this up before while we were debating Miguel Estrada, so we could go off the Estrada issue to debate the economy and homeland security, which my good friend from Montana had the good grace to say is also far more on the minds of his constituents.

Mr. REID. If the Senator will yield for another question, is the Senator aware that a poll was conducted by the Pew Research Center. You are familiar with polls, as I am.

Mr. SCHUMER. I am not familiar with that particular one, but Pew Research has a good reputation.

Mr. REID. They did a poll of 1,254 people that was completed on February 18. Is the Senator aware that in that poll, the people were asked how President Bush was handling the economy? Is the Senator aware that 43 percent of the people approved of the way President Bush was handling the economy and 48 percent disapproved?

Mr. SCHUMER. I was not aware of that poll.

Mr. REID. Is the Senator aware of the fact that Senator DASCHLE, the Democratic leader, came to the floor yesterday and asked that a bill that had been moved by the majority leader the day before, a rule 14, S. 414, is the Senator aware that Senator DASCHLE asked unanimous consent to bring that bill to the floor so we could start talking about a way to maybe improve President Bush's numbers as it relates to the economy and talk about stimulating the economy? S. 414, is the Senator aware that it was objected to?

Mr. SCHUMER. I am aware of that. I was sitting on the floor when Senator DASCHLE brought it up. He made an excellent point, I thought. He said the other side seemed to be concerned about one man's job, Miguel Estrada.

By the way—and Senator DASCHLE didn't say this—Mr. Estrada already has a job. My guess is that he is probably making in the high six figures, so he can do pretty well feeding his family.

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

Mr. SCHUMER. In a minute, I will be delighted to yield.

We have 2.8 million fewer Americans in jobs than we had when President Bush took office. We have tens of millions of Americans who have jobs, but their jobs are not as good as the jobs they used to have. We should be debating that issue.

I say to my colleague from Nevada and my colleague from Montana that we should be debating homeland security, which is vital to our future. Those of us who follow football, or basketball, or baseball know that a good team needs both a good offense and a good defense. There are many opinions on the offense, but clearly President Bush has a plan and has implemented it. I have been sometimes critical, but usually supportive, of the President's plan in that regard. But a good team needs defense.

On homeland security, this country is not doing close to what we need to do. Even if, God willing, tomorrow we were to get rid of Saddam Hussein, Osama bin Laden, and al-Qaida, other groups would come forward. Are we protected from shoulder-held missile launchers? Are our planes protected? No. Are we protected from somebody smuggling a nuclear weapon into this country? Are we doing much about it? No.

Is our northern border, which my State shares with Canada for hundreds of miles, at all adequately guarded so bad people cannot come in? No.

Is there money in the President's budget to do these activities? No.

I do not know if this is true of my colleague from Montana, but when I go back and talk to my police chiefs and fire chiefs of big towns, little towns, urban areas, rural areas, and suburban areas, does my colleague know what they tell me? They have huge new responsibilities post 9/11, and they are not getting one thin dime from Washington. In my opinion, most Americans would rather we debate that than debating Miguel Estrada.

So we are at an impasse with Estrada. We believe records should be revealed. The other side says: No, let's vote on him without the records. Nothing has changed in the last week or two. Why don't we just put the issue of Mr. Estrada aside until someone a lot smarter than the Senator from New

York and the Senator from Montana thinks of some kind of compromise, because right now we are at loggerheads and nothing has budged, and why don't we start talking about the economy, which my colleague from Nevada brought up; why don't we start talking about homeland security as we are on the edge of war with Iraq, which is what, again, my good friend from Montana has admitted his constituents would prefer. I can certainly tell the Senator that my constituents in New York would much prefer that.

I yield for another question.

Mr. BURNS. Mr. President, I say to my friend from New York, I did not get questions on homeland security or the economy while I was up there. We will go over those questions later.

I understand what the Senator from New York said about Judge Paez, but in the end, did he get a vote?

Mr. SCHUMER. I say to my colleague——

Mr. BURNS. Yes or no, and I have a followup question.

Mr. SCHUMER. Wait, in the Senate—I have only been here 4 years, and my colleague has been here longer, but we do not do that yes or no, cross-examination stuff. In fact, when I came here, I only spoke for 5 or 10 minutes on subjects, and people thought I was crazy, but I am not going to take that long. I am not going to take more than 5 minutes.

At first, Judge Paez, as my friend knows, was held up for 4 years. If my colleague wants to make it equal, start complaining in 2 more years about Judge Estrada. Second, and far more important than the amount of time, Judge Paez had an ample record in the courts. By the way, so ample that I believe it was 39 Members from the other side—perhaps my friend from Montana; I do not know how he voted—voted against Judge Paez, and when Judge Paez came before us and was subjected to extensive questioning by Senator SESSIONS, by Senator Ashcroft, who was then a Senator, by many of my colleagues on the Judiciary Committee, did he duck? Did he hide behind the legal shibboleth of: I have to see all the briefs before I answer, or it is a case that might come before me? He did not. He had the courage, he had the decency, and, most of all, he had the respect for the advise and consent process to answer those questions. So he deserved a vote.

I say to my colleague, if in 2005 we have a Democratic President—God willing—and if that Democratic President should nominate somebody who many on the other side fear would be so far over to the left that he would do real damage on the bench, I would support my colleagues, if he did not answer questions and had as skimpy a record and did as much of a job of stonewalling, in not bringing that nominee to a vote as I would today.

This is not an issue of left or right, in my judgment. It should not be. This is not an issue even of my view, which is: Should ideology matter when you vote for judges? I believe it should, but some do not. This is a matter, in my judgment—and I mean this sincerely to my colleague—that goes to the sacredness of the Constitution of the United States.

When the Founding Fathers, in their wisdom, set up the advice and consent clause, they did not intend it to be degraded by having a sham hearing where the witness answers no questions.

Mr. BURNS. Mr. President, if my friend from New York will allow a comment, and maybe a followup question.

Mr. SCHUMER. Well——

Mr. BURNS. No, a followup question. That is a long way to say, yes, he got a vote. Is it snowing outside today, right now?

Mr. SCHUMER. Let me say to my colleague that snow comes from the clouds, and it happens when the temperature is below 32 degrees up in the clouds.

Mr. BURNS. I submit it is snowing inside today also.

I thank the Presiding Officer. I thank my good friend from New York.

Mr. SCHUMER. Mr. President, it is always a pleasure to debate with my colleague from Montana. I say to my colleague, this, plain and simple, he knows in his heart—I hope he knows; I think he knows—that what Miguel Estrada did in terms of how he treated this body—all of us—was wrong, and if it is allowed to continue, we will have dramatic changes in the way this country is governed, and that is why so many of us feel so strongly about this issue.

I reiterate to my colleague once more, he is not going to change our views, at least not with the same old arguments. I have been asked about four or five times did Judge Paez get a vote. Let's put this aside and talk about the issues the American people want us to talk about: the economy and homeland security. If my colleague can get the record of Mr. Estrada, we will be happy then to bring him to a vote.

I thank my colleague. I yield the floor.

The PRESIDING OFFICER (Mr. CHAMBLISS). The Senator from Illinois.

Mr. DURBIN. I thank the Chair.

Mr. President, I thank my colleague from New York and my seatmate on the Senate Judiciary Committee for the statement he made on this important nomination. I think he has made this point. I listened earlier today when President Bush spoke to the Latino Coalition at the White House, in the Executive Office Building. I listened to what he said about Miguel Estrada. I find it difficult to quarrel with any of the statements he said about the man's quality.

I met him personally. There is no doubt he has an inspiring life story, having come to the United States from Honduras with limited knowledge of English and, in a matter of a few years, reaching the heights of a legal education at Harvard Law School. Then, of course, there are his opportunities to serve our Government in a legal capacity, and now in private practice. All of these attest to his legal acumen, his legal skills, and the fact he has overcome adversity. Those are qualities we want to respect and reward when it comes to those seeking public service.

The issue before us is one that is narrow in one respect but much broader in another. It is narrow in that we are not questioning his academic or legal credentials or even his experience. I quarrel with those who say he has never been on the bench, in the judiciary. That is not good enough from my point of view. I have seen first timers on the bench in Federal and State courts who have done very well.

What we are questioning—the narrow aspect—is whether he has been forthcoming, honest, and candid in revealing his views on issues, not going so far as to be intrusive in terms of pending cases before the court, or not suggesting he answer a question that is a conflict of interest, but rather that he comes to the heart of the question: What is in his mind? Is he truly a conservative—and we expect those nominees from this President—or is he something more? And if he is something more, should we pause, should we reflect on this fact? Should we ask the hard question of whether this man is entitled to a lifetime appointment to the bench which the President characterized today as the second highest court in the land, the DC Circuit Court of Appeals?

Sadly, when one looks at the record of responses from Miguel Estrada, it is unfortunate. It is truly unfortunate because I believe he has views that he can share with us. I believe he certainly has the knowledge to answer the questions. But he was coached and trained and cautioned not to come to Capitol Hill and be honest and open in his answers.

I am sure the people at the Department of Justice said: Miguel, you may want to answer these questions, but do not do it. Trust us, do not answer them. Give them an evasive answer for anything. Try to move on, get it behind you, get this to the floor. You have enough votes, and you never have to answer those questions.

He probably said at some point: Wait a minute; I do not mind answering a question such as which Supreme Court case do I disagree with. And they said: Be careful. If you start answering those questions, we do not know where this could lead.

He followed that advice, or followed someone's advice. He came before the Judiciary Committee and refused to answer the questions.

So now we have a broader issue. The broader issue is this: If the Senate, and particularly the Judiciary Committee, is to accept this approach from nominees, why in the world are we here? Why do we swear to uphold this Constitution when it comes to advice and

consent? Why is it we go through any process whatsoever with nominees? Because we know if Miguel Estrada comes through under these circumstances, the order of the day will be for future nominees: Evasion, concealment, refusal to answer the most basic questions. If that is the case, then, frankly, I think we are not meeting our responsibility.

The broader issue is a constitutional responsibility of this Senate. It has been raised before and should be raised again. There is an easy way to end this impasse and end it within a matter of days. We have asked Miguel Estrada to produce the documents which he generated in the Solicitor General's Office, documents which we can review—in fact, we could review them on a restricted basis.

One of the Republican Senators I admire very much, Mr. BENNETT of Utah, suggested these documents be produced and given to Senator HATCH, a Republican, and Senator LEAHY, a Democrat. They can review them. I do not have to see them as a member of the Judiciary Committee. They can decide whether they merit further inquiry, either with written questions or another hearing. If they decide, on the basis of that in camera and private review, that they do not merit that kind of followup, I will accept Senator LEAHY's judgment on that.

I do not speak for myself only. Yesterday, Senator DASCHLE came to the floor and I asked him point blank if Miguel Estrada will produce this documentation, which he says he wants to voluntarily turn over, to be reviewed by Senators HATCH and LEAHY, and if there is anything controversial we have a chance to follow up or not, can this bring the matter to a close, to a vote?

I think Senator DASCHLE spoke for virtually all of us on the Democrat side and said: Yes, it can. I think that is a fair way to bring this to a conclusion.

This morning I said to Senator HATCH: Isn't that a way to bring this to an end? Isn't that a reasonable way, a dignified way, that does not turn loose all these documents for the world to see and for the press to pore over but gives it to Senator HATCH and Senator LEAHY to review them and see if there is anything that merits a followup?

Senator HATCH said: That is absolutely unacceptable. These are privileged documents and never have they been released and we are not going to start now. Start releasing internal memos and documents like this, and there is no end to it and the White House is right. Despite Miguel Estrada's objections, the White House is right to refuse to release those documents.

I call the attention of my colleagues and those following this debate to the fact that Senator HATCH perhaps did not tell the whole story because when we look at requests for writings such as Miguel Estrada's writings, in the past the Department of Justice has provided memos by attorneys during the following nominations: William Bradford Reynolds, nominated to be Associate Attorney General, the Republican Department of Justice provided the documents then. Robert Bork, the controversial—celebrated in some quarters—nominee to the Supreme Court, he, too, was asked to provide the documents. The Department of Justice did. Benjamin Civiletti, nominated to be Attorney General, provided similar documents to this Congress for review by the Senate Judiciary Committee; Stephen Trott, nominated to the Court of Appeals for the Ninth Circuit, same standard applied, documents provided from the Department of Justice.

Finally, I know it is at the bottom of the list and it maybe should have been at the top, Justice William Rehnquist, when he was nominated to be Chief Justice of the Supreme Court, was asked by those before me who were members of the Judiciary Committee for memoranda that he had prepared. They were provided by the Department of Justice.

For Senators' staff and others to argue that this request is patently unreasonable, unacceptable, and unprecedented, I suggest that in five specific instances, Democratic and Republican Departments of Justice, with Democratic and Republican Attorneys General, these documents have been provided.

Let me go further. I am going to ask in a moment for these letters to be printed in the RECORD, but we have letters to the then-chairman of the Senate Judiciary Committee, JOE BIDEN, from the State of Delaware, relative to the nominations of two individuals, Judge Robert Bork to the Supreme Court—I am sorry. Both of these related to Judge Robert Bork's nomination to the Supreme Court.

It is interesting that the Ronald Reagan Department of Justice, with a Republican Attorney General, produced the very documents that we are discussing today, which Senator HATCH and others have said are unprecedented, that there has never been a request of this nature.

Frankly, in reading the letter of transmittal of presentation from the Department of Justice, we see they decided that in the interest of disclosure, in the interest of openness and candor, that they would cooperate, as they say, to the fullest extent possible with the committee to expedite Judge Bork's confirmation process.

And I quote further from this letter signed by John Bolton, Assistant Attorney General:

> Accordingly, we have decided to take the exceptional step of providing the committee with access to responsive materials we currently possess, except those privileged documents specifically described above. Of course, our decision to produce these documents does not constitute a waiver of any future claim of privilege.

And it should not. But in this instance, the Department of Justice, with the Robert Bork nomination to the Supreme Court before them, made a decision to cooperate with the committee.

In this case, Miguel Estrada, realizing he has never sat on the bench before, and he does not have a body of opinion to which we can turn to understand his judicial philosophy and thinking, has said he is prepared to turn over these memos so we can review them. He believes they are not controversial. He believes they will shed light, perhaps, on his point of view. I think he is probably right, but we will not know.

Mr. CRAPO. Will the Senator yield for and respond to a question?

Mr. DURBIN. I am happy to respond to a question.

Mr. CRAPO. I have been listening to the arguments the Senator has made. I have been listening very carefully to the examples the Senator is pointing out about other nominations in which documents were provided. It is my understanding, however, that the Department of Justice has never disclosed confidential deliberative documents on career lawyers in the Solicitor General's Office. These are documents dealing with recommendations on internal deliberations regarding appeals and certiorari or amicus recommendations in pending cases.

From the information I am aware of that the White House has provided in each of the cases that the Senator has listed, there is a very clear difference in each of those cases. Take the situation of Judge Bork to which the Senator was referring. The materials involving Judge Bork were very carefully limited to those that focused on his observations on political questions, such as President Nixon's assertion of the executive privilege or the pocket veto. Never has the Department of Justice allowed access to internal career lawyers' working documents on appeals or on certiorari or amicus recommendations, and that is what I understand the Senator to be requesting.

First, does the Senator understand the distinction that is made between these document explanations that have been made? And does the Senator believe the Senate should start the precedent, which has never been done in this Senate, of asking for access to these career lawyers' deliberations on confidential matters in the Solicitor's Office?

Mr. DURBIN. In response to my colleague, I believe this is a good-faith question and it is one that deserves an honest reply. Do I believe there are some internal memoranda and writings generated within the Department of Justice that should not be subject to public disclosure? I certainly do. I think lines should be drawn.

In the Bork case, the lines were drawn. They said some of the documents you have requested we will produce in the spirit of cooperation; some we cannot and should not produce. And if that is the response

from the Department of Justice when it comes to Miguel Estrada, we may quarrel with their dividing line, but at least it would demonstrate a cooperative effort to work with the Senate Judiciary Committee.

So if they say to us they can give certain memoranda, but they draw the line on others, at least we are moving forward in the process. But at this moment in time, I say to my colleague and friend, the Department of Justice has said flat out: No, not ever; we will not produce anything.

Mr. CRAPO. Will the Senator yield further?

Mr. DURBIN. If I can finish, and then I will be glad to yield for another question.

In the Bork situation, they said: We wish to cooperate to the fullest extent possible. We have decided to take the exceptional step of providing the committee with access to responsive materials we currently possess, except those privileged documents specifically described above.

The Department of Justice, in the Bork situation, said we are drawing a line but we are providing you with these internal memos and information. Now, if the same thing is to apply to Miguel Estrada, as I said, we can debate where the lines can be drawn, but Mr. Gonzales in the White House said, no, we will not consider producing anything.

It leads Members to conclude on this side of the aisle that there is something very damaging in these materials that they do not want disclosed. It is the only conclusion you can draw. The fact that Miguel Estrada volunteered the information, the fact that he is prepared to waive the privilege if it exists, is an indication he does not think the controversy is there, but this White House, tentative and concerned about whether or not Miguel Estrada has said some things that could jeopardize his nomination, refuses to disclose.

I yield to the Senator.

Mr. CRAPO. If I understand correctly, you are reading that the internal work documents of a career attorney of the Solicitor General's Office in making recommendations on how to handle cases would not be something this Senate should try to investigate or to cause to be disclosed?

In each of the cases you have discussed, either it was specific charges of misconduct about which very narrow documents were disclosed or general comments on politics such as the case of Justice Bork. And if you are agreeing with that, perhaps there is some progress we can make. It is my understanding the demand for disclosure is far broader than what you have just described.

Mr. DURBIN. Let me say in response to my colleague, in the case involving Robert Bork, I am reading from a letter from Thomas Boyd, the Acting Assistant Attorney General—and I ask unanimous consent these letters be printed in the RECORD.

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

DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,

Washington, DC, August 24, 1987.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR CHAIRMAN BIDEN: This responds further to your August 10th letter requesting certain documents relating to the nomination of Judge Robert Bork to the Supreme Court. Specifically, this sets forth the status of our search for responsive documents and the method and scope of review by the Committee.

As we have previously informed you in our letter of August 18, the search for requested documents has required massive expenditures of resources and time by the Executive Branch. We have nonetheless, with a few exceptions discussed below, completed a thorough review of all sources referenced in your request that were in any way reasonably likely to produce potentially responsive documents. The results of this effort are as follows:

In response to your requests numbered 1–3, we have conducted an extensive search for documents generated during the period 1972–1974 and relating to the so-called Watergate affair. We have followed the same procedure, in response to request number 4, for all documents relating to consideration of Robert Bork for the Supreme Court by President Nixon or his subordinates. We have completed our search and relevant Department of Justice and White House files for documents responsive to these requests. The Federal Bureau of Investigation also has completed its search for responsive documents, focusing on the period October-December 1973 and on references to Robert Bork generally.

Most of the documents responsive to requests numbered 1–4 are in the possession of the National Archives and Records Administration, which has custody of the Nixon Presidential materials and the files of the Watergate Special Prosecution Force. The Archives staff supervised and participated in the search of the opened files of the Nixon Presidential materials and the files of the Watergate Special Prosecution Force, which was directed to those files which the Archives staff deemed reasonably likely to contain potentially responsive documents.

Pursuant to a request by this Department under 36 C.F.R. 1275, the Archives staff also examined relevant unopened files of the Nixon Presidential materials, and, as required under the pertinent regulations, submitted the responsive documents thus located for review by counsel for former President Nixon. Mr. Nixon's counsel, R. Stan Mortenson, interposed no objection to release of those submitted documents that (a) reference, directly or indirectly, Robert Bork, or (b) were received by or disseminated to persons outside the Nixon White House. Mr. Mortenson on behalf of Mr. Nixon objected to production of the documents which are described in the attached appendix. Mr. Mortenson represents that these documents constitute purely internal communications within the White House and contain no direct or indirect reference to Robert Bork.

Mr. Mortenson also objected on the same grounds to production of unopened portions of two documents produced in incomplete form from the opened files of the Nixon Presidential materials:

1. First page and redacted portion of fifth page of handwritten note of John D. Ehrlichman dated December 11, 1972.

2. All pages other than the first page of memorandum from Geoff Shepard to Ken Cole dated June 19, 1973.

Mr. James J. Hastings, Acting Director of the Nixon Presidential Materials Project, has reviewed these two documents and has advised us that the unopened portions of neither document contain any direct or indirect reference to Judge Bork.

Our search has not yielded a copy of the document referenced in paragraph ''a'' of your request numbered 3, which, as you correctly note, is printed at pages 287–288 of the Judiciary Committee's 1973 ''Special Prosecutor'' hearings.

Among the documents collected by the Department are certain documents generated in the defense of *Halperin*. v. *Kissinger*, Civil Action No. 73–1187 (D. D.C.), a suit filed against several federal officials in their individual capacity, which remains pending. The Department has an ongoing attorney-client relationship with the defendants in Halperin, which precludes us from releasing certain documents containing client confidences and litigation strategy, without their consent. 28 C.F.R. 50.156(a)(3).

All documents responsive to request number 5, concerning the pocket veto, have been assembled.

All documents responsive to request number 6 have been assembled. The exhibits filed by counsel for Edward S. Miller on July 12, 1978 and referred to in your August 10 letter, remain under seal by order of the United States District Court for the District of Columbia. However, a list of the thirteen documents has been unsealed. We have supplied copies of eleven of these documents, including redacted versions of two of the documents (a few sentences of classified material have been deleted). We have supplied unclassified versions of two of these eleven documents, as small portions of them remain classified. We are precluded by Rule 6(e) of the Rules of Criminal Procedure from giving you access to two other exhibits—classified excerpts of grand jury transcripts—filed on July 12, 1978. We also searched the files of several civil cases related to the Felt and Miller criminal prosecution, as well as the documents generated during the consideration of the pardon for Felt and Miller.

With respect to request number 7, Judge Bork has previously provided to the Committee a number of his speeches, which we have not sought to duplicate. We have sought and supplied any additional speeches, press conferences or interviews by Mr. Bork, as well as any contemporaneous documents which tend to identify a date or event where he gave a speech or press interview during his tenure at the Department.

On request number 8, there are no documents in which President Reagan has set forth the criteria he used to select Supreme Court nominees, or their application to Judge Bork, other than the public pronouncements and speeches we have assembled.

Our search for documents responsive to request number 9 has been time-consuming and very difficult, and is not at this time entirely complete. In order to conduct as broad a search as possible, we requested the files in every case handled by the Civil Rights Division or Civil Division, between 1969–77, which concerned desegregation of public education. Although most of these case files have been retrieved, several remain unaccounted for and perhaps have been lost. We expect to have accounted for the remaining files (which may or may not contain responsive documents) in the next few days. We have also assembled some responsive documents obtained from other Department files. The Department of Education is nearing completion of its search of its files, and those of its predecessor agency, HEW.

We have assembled case files for the cases referred to in question 10, with the exception of *Hill* v. *Stone*, for which there is no file. We have no record of the participation of the United States in *Hill* v. *Stone*, or consideration by the Solicitor General's office of whether to participate in that case.

A few general searches of certain front office files are still underway, and we expect those searches to be concluded in the next few days. We will promptly notify you should any further responsive documents come into our possession.

As you know, the vast majority of the documents you have requested reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch. The disclosure of such sensitive and confidential documents seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities. For these reasons, the Justice Department and other executive agencies have consistently taken the position, in response to the Freedom of Information Act and other requests, that it is not at liberty to disclose materials that would compromise the confidentiality of any such deliberative or otherwise privileged communications.

On the other hand, we also wish to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process. Accordingly, we have decided to take the exceptional step of providing the Committee with access to responsive materials we currently possess, except those privileged documents specifically described above and in the attached appendix. Of course, our decision to produce these documents does not constitute a waiver of any future claims of privilege concerning other documents that the Committee requests or a waiver of any claim over these documents with respect to entities or persons other than the Judiciary Committee.

As I have previously discussed with Diana Huffman, the other documents will be made available in a room at the Justice Department. Particularly in light of the voluminous and privileged nature of these documents, copies of identified documents will be produced, upon request, only to members of the Judiciary Committee and their staff and only on the understanding that they will not be shown or disclosed to any other persons. Please have your staff contact me to arrange a mutually convenient time for inspection of the documents.

As I stressed in my previous letter, if the Committee is or becomes aware of any documents it believes are potentially responsive but have not been produced, please alert us as soon as possible and we will attempt to locate them.

Should you have any questions or comments, please contact me as soon as possible. Thank you for your cooperation.

Sincerely,

LAURA NELSON
(For John R. Bolton,
Assistant Attorney General).

APPENDIX

DOCUMENTS SUBJECT TO OBJECTION

(By Mr. Nixon's Counsel)

1. Memorandum to Buzhardt and Garment from Charles Alan Wright, January 7, 1973. Subject: June 6th meeting with the Special Prosecutor (document No. 8).

2. Memorandum to Buzhardt and Garment from Charles Alan Wright, January 7, 1973. Subject: June 6th meeting with the Special Prosecutor (document No. 9).

3. Memorandum to Garment from Ray Price, July 25, 1973. Subject: Procedures re: Subpoena (document No. 13).

4. Memorandum to General Haig from Charles A. Wright, July 25, 1973. Subject: Proposed redrafts of letters (document No. 14).

5. Draft letter to Senator Ervin dated July 26, 1973. Subject: two subpoenas from Senator Ervin (document No. 15).

6. Draft letter to Judge Sirica dated July 26, 1973. Subject: subpoena duces tecum (document No. 16).

7. Memorandum to the Lawyers from Charles A. Wright, July 25, 1973. Subject: Thoughts while shaving (document No. 17).

8. Memorandum to the President from J. Fred Buzhardt, Leonard Garment, Charles A. Wright, dated July 24, 1973. Subject: Response to Subpoenas (document No. 18).

9. Memorandum to Ray Price from Tex Lezar, dated October 17, 1973. Subject: WG Tapes (document No. 20).

10. Memorandum to Leonard Garment and J. Fred Buzhardt from Charles A. Wright, dated August 3, 1973. Subject: Discussions with Philip Lacovara (document No. 25).

11. Memorandum to the President from Leonard Garment, J. Fred Buzhardt, Charles A. Wright, dated August 2, 1973. Subject: Brief for Judge Sirica (document No. 26).

12. Memorandum to Len Garment, Fred Buzhardt, Doug Parker and Tom Marinis from Charlie Wright, dated August 1, 1973. Subject: note regarding brief (document No. 27).

13. Memorandum to the President from J. Fred Buzhardt, Leonard Garment, Charles A. Wright, dated July 24, 1973. Subject: Response to Subpoenas (document No. 28).

14. Draft letter to Senator Ervin dated July 26, 1973. Subject: two subpoenas issued July 23rd (document No. 29).

15. Draft letter to Judge Sirica dated July 26, 1973. Subject: subpoena duces tecum (document No. 30).

16. Memorandum to J. Fred Buzhardt, Leonard Garment, Charles A. Wright, from Thomas P. Marinis, Jr. (Undated). Subject: Appealability of Cox Suit (document No. 31).

17. Notes (handwritten) (Undated). Subject: [appears to be notes of oral argument] (document No. 32).

18. Memorandum to the President from Charles Alan Wright, dated September 14, 1973. Subject: Response to Court's memorandum (document No. 34).

19. Handwritten notes (document no. 36).

20. Memorandum to J. Frederick Buzhardt from Charles Alan Wright, dated June 2, 1973. Subject: Executive privilege (document no. 41).

21. Memorandum to J. Frederick Buzhardt and Leonard Garment from Charles Alan Wright, dated June 7, 1973. Subject: June 6th meeting with Special Prosecutor (document no. 42).

22. Memorandum to J. Fred Buzhardt from Robert R. Andrews, dated June 21, 1973. Subject: Executive Privilege (document no. 43).

23. Memorandum to J. Fred Buzhardt and Leonard Garment from Thomas P. Marinis, Jr., dated June 20, 1973. Subject: Prosecutor Wright's attempt to obtain document (document no. 44).

24. Memorandum to J. Frederick Buzhardt and Leonard Garment from Charles Alan Garment (sic), dated June 7, 1973. Subject: June 6th meeting with Special Prosecutor (document no. 46).

25. Draft letter to Senator from Alexander Haig, dated December 12, 1973. Subject: Response to letter of the 5th (document no. 60).

26. Draft letter to Senator from Alexander Haig, dated December 12, 1973. Subject: Response to letter of the 5th (document no. 61).

27. Proposal re: transcription of tapes dated October 17, 1973. (document no. 63).

28. Typed note with handwritten notation: Sent to Buzhardt 12/11/73. Undated. Subject: papers Buzhardt sent to Jaworski (document no. 66).

29. Chronology—Presidential Statements, Letters, Subpoenas dated March 12, 1973. Subject: chronology of same (document no. 71).

30. Handwritten note dated 1/31/74 (January 31, 1974). Subject: Duties and responsibilities of Special Prosecutor (document no. 82).

31. Memorandum to Fred Buzhardt from William Timmons, dated 7/30/73 (July 30, 1973). Subject: refusal to release taped conversations (document no. 91).

32. Memorandum to J. Fred Buzhardt from Paul Troible, dated October 30, 1973. Subject: Cox's disclosure of Kleindienst's confidential communication (document no. 92).

33. Proposal regarding transcription of tape conversations dated 10/17/73 (October 17, 1973). (document no. 94).

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 10, 1988.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: This letter requests that the Committee return to the Justice Department all copies of documents produced by the Department in response to Committee requests for records relating to the nomination of Robert Bork to the Supreme Court. As Assistant Attorney General John Bolton noted in an August 24, 1987, letter to you, many of the documents provided the Committee, ''reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.'' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

Although the Committee's need for these documents has ceased, their privileged nature remains. As we emphasized in our August 24, 1987, letter, production of these documents to the Committee did not constitute a general waiver of claims of privilege. We therefore request that the Committee return all copies of all documents provided by the Department to the Committee, except documents that are clearly a matter of public record (e.g., briefs and judicial opinions) or that were specifically made a part of the record of the hearings.

Please contact me if you have any questions. Thank you for your cooperation.

Sincerely,

THOMAS M. BOYD,
Acting Assistant Attorney General.

Mr. DURBIN. In this May 10, 1988, letter from Thomas Boyd to JOE BIDEN, then-chairman of the Senate Judiciary Committee:

As Assistant Attorney General John Bolton noted in an August 24, 1987, letter to you, many of the documents provided the Committee, ''reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.'' We provided these privileged documents to the Committee in order to respond fully to the Committee's request and to expedite the confirmation process.

In response to my friend, the point I am making is they did not draw the same absolute line being drawn by the

Bush White House for Miguel Estrada. They disclosed information which reflected purely internal deliberations and the work product of attorneys and confidential legal advice and did it in the spirit of cooperation. They drew a line, but the line was on the side of disclosure. The line drawn by the Bush White House for Estrada is on the side of concealment, the refusal to disclose this information.

Mr. CRAPO. Will the Senator yield further?

Mr. DURBIN. I am happy to yield.

Mr. CRAPO. If I understand correctly, you are saying, based on the letter, that you indeed are seeking the disclosure of these confidential internal work documents and you believe that letter shows the precedent for disclosure exists, is that correct?

Mr. DURBIN. Certainly the precedent exists. The statement made on the floor by Senator HATCH and others that this has never been done or only been leaked—he used that term this morning—is not a fact.

I concede the point made by my colleague that they do draw a line. The Department of Justice said no to everything, but they did disclose the information I just described when it came to Robert Bork. At this moment in time I don't think this Department of Justice has even entered into an honest conversation with the Senate Judiciary Committee members about whether that line can be drawn. They have said categorically that they are not going to allow anything to be produced.

That is why we are at this impasse. It is troublesome to have a nominee with great credentials, a great resume, a good paying job as an attorney in the District of Columbia. He has not served as a judge so he does not have written opinions. We are trying to get to the heart of the matter. What are his values? Is he conservative or something else?

Mr. CRAPO. Will the Senator yield?

Mr. DURBIN. I am happy to yield for a question.

Mr. CRAPO. I understand your position now, which is that you are asking for the disclosure of this broad array of confidential documents.

I assume you are aware that every living former Solicitor General has rejected this request. This letter was signed by Democrats Seth Waxman, Walter Dellinger, and by Republicans, Ken Starr, Charles Fried, Robert Bork, and Archibald Cox for the very reasons we have been talking about.

I want to get at this principle. Is it the correct policy, is it the right thing for us to do in the Senate, to change the practice? I understand you can list a few cases where there were exceptions in the history of handling judicial nominations in this country, but if you look at the thousands, indeed tens of thousands of judicial nominations, the policy and practice of the Senate has been not to delve into the confidential documents for the very reason every former living Solicitor General has said it would compromise the ability of its office to do its work effectively.

Do you believe it is the right policy for the Senate to begin putting some standard on those who would become nominees of any President, Republican or Democrat, to a position in the U.S. Judiciary? Should we open this door and start demanding that the Solicitor General's Office, the Justice Department, and other contacts, or in any other situation, start revealing these confidential internal work documents by career lawyers?

(Mrs. DOLE assumed the Chair.)

Mr. DURBIN. In response, Miguel Estrada does not see a problem with this at all.

Mr. CRAPO. Miguel Estrada believes his papers will show support for him. But the principle here is the principle—

Mr. DURBIN. I would like to respond, if I could. In fact, because Miguel Estrada does not see a problem with this is an indication to me that perhaps some in the White House are being overly cautious again. They coached Miguel Estrada to come before us and not answer questions and now when he says, disclose the memoranda, they are saying, no, no, we did not want the Senate raising that.

Going to the point raised by the Senator as to in the history of this Senate how often this has occurred, let me reflect on this for a moment. In most instances, this will never happen. There are only a few nominees who will come before the Senate who actually have generated this kind of documentation in the Solicitor General's Office or the Department. And many of those nominees will have an open record as judges with their writings to indicate what they believe. And most, if not all, of them will have been responsive to the questions that we have asked of the nominees.

We find ourselves backed into this corner with Miguel Estrada because he does not have a body of established opinions as a judge. He does not have an abundance of writings reflecting on his philosophy. He has not answered the questions which we have asked of him. And we are straining to find some information on which to base a reasoned judgment about his nomination to the second highest court of the land for a lifetime appointment.

We find ourselves in the difficult, and I think somewhat rare, situation that has been created by Miguel Estrada and the strategy of the White House in sending this nominee to Capitol Hill. I think that is rare. I hope it does not happen again.

I yield for a question.

Mr. CRAPO. It is not just the White House. As I indicated, this is every living former Solicitor General in the United States who is saying this issue goes far beyond the Miguel Estrada nomination. It goes to the core of what the Senate should be dealing with in terms of its investigation of judicial nominees and what they can do to our judicial system and to the Justice Department in that context.

But you indicated also in your answer that Miguel Estrada did not answer the questions asked of him by the Judiciary Committee. I wish to clarify this because I understand he would not reveal the documents that we are discussing.

Were there any other questions which you asked him or which you are aware of that he has not answered?

Mr. DURBIN. Let me suggest you look at the questions asked of him by Senator KENNEDY, written questions after the nominee appeared, that went to specific decided cases and asked for his response or reasoning. Time after time he came back and said: Well, I have to read all of the pleadings that were filed and all the briefs that were filed before I would hazard an opinion upon this.

Similarly, when Senator SCHUMER asked him what I thought to be a perfectly reasonable question, one that had been asked by Republican Senators of Clinton nominees, repeatedly he refused to answer. The question was one that you would dream of in a constitutional law course in law school. The question was: Name a Supreme Court decision in the last 40 years—or a followup question, at any time in its history—that you would find objectionable.

If that were the question on the final at law school, you would breathe a sigh of relief. You can think of one case with which you disagree. But this man, seeking a lifetime appointment to the second highest court in the land, would not answer that question.

I asked: Which Federal court judge, living or dead, would you emulate or admire on the bench? He went on to say, first, that he could not name a single Federal court judge, living or dead, he would try to emulate on the bench.

He then, in later response to the same question, said: I admire some of the Federal Court Justices I have worked with. I can understand that. That is a reasonable response.

But do you understand how we, sitting on this side of the table, are saying how can this man, who is clearly a gifted individual with extraordinary legal talent, be so afraid to share with us one Supreme Court case that he disagrees with?

That was a question Senator SESSIONS asked of Richard Paez, and I don't believe a Democrat stood up and said: That is not fair. You have gone too far.

It is a reasonable question. It gives you insight. Is he going to mention Brown v. Board of Education? Is he going to mention Roe v. Wade? What case is he going to mention? He wouldn't mention one. Doesn't that trouble you? I ask my colleague and friend, doesn't that trouble you, that someone who is seeking that kind of legal appointment wouldn't be honest and candid with you? For the sake of yielding to my colleague for a question

and for him to answer my question, I will yield.

Mr. CRAPO. I will respond and ask a question, how is that?

Mr. DURBIN. Sure.

Mr. CRAPO. Not having sat in the hearing, I don't know how much it would trouble me. I can't tell you if a witness would not answer my questions I wouldn't be troubled by it. I don't think that would cause me to try to filibuster the nomination, which is really one of the core issues we are dealing with here. I might vote no because of it. And you are perfectly entitled to vote no if you don't like the answers to your questions. But we are way beyond not liking the answers to questions here. We are seeing a filibuster of a nomination to the Circuit Court of Appeals for the District of Columbia. It is based, as I understand it, in large part on the fact that confidential documents are not disclosed.

What I am trying to get at is: What else? What I have heard at this point is the nominee did not identify which was his favorite and least favorite Supreme Court case, and that he would not say how he would have judged a particular case until he had read the briefs and studied the matter more carefully. Frankly, I think that makes him a better candidate.

Mr. DURBIN. I am sorry, I am going to have to interject at that point. We didn't ask him how he would rule on a particular case. We asked him, on deciding cases, to explain his position on an accepted standard of law. We could not and should not and I don't think any Member would ask him how he would rule on a specific case pending before the Court. That is way beyond the bounds.

Let me just say, though, this is an interesting thing on which I think my colleague might reflect. This comes from the Legal Times of April 2002. It's a quote:

> President George W. Bush's judicial nominees received some very specific confirmation advice last week: Keep your mouth shut. Justice Scalia called DC Circuit Judge Silberman at one point, the latter recalled, and told him he was about to be questioned about his views about Marbury v. Madison, the nearly 200-year-old case that established the principle of judicial review.

That's almost the first case—McCulloch v. Maryland and Marbury v. Madison—the first two cases you'll ever read in constitutional law. Listen to what Silberman told him.

> ''I told him as a matter of principle he should not answer that question either,'' Silberman said.

So you understand we are not just dealing with my interpretation as to whether or not Miguel Estrada is cooperative; we are dealing with a strategy: Keep your mouth shut. Don't tell the Senate, don't tell the American people, don't put on the record who you are and what you believe. Zip your mouth, hold tight, wait for the vote, and we will give you a lifetime appointment to the second highest court of the land. I don't think that is a fair way to approach this process.

Mr. CRAPO. Will the Senator yield?

Mr. DURBIN. After I finish. When the Clinton nominees came before the Judiciary Committee under the control of the Republicans, they were peppered with questions. Some of those questions I think went way beyond the realm of reasonable inquiry.

I can recall one woman from California who was asked to explain how she had voted on every proposition before the California voters over the previous 10 years; in other words, to disclose the secrecy of the ballot place, how she had voted and why on every proposition. That was a question propounded by a Republican Senator from the Judiciary Committee, still serving there, to this Clinton nominee. She said that is unfair, and we agreed with her. Because of that stance she took, she waited forever and ever to be confirmed.

In this situation I think what we are dealing with is a reasonable inquiry—positions on Supreme Court Justices, Supreme Court cases. We are not asking for Miguel Estrada to disclose his personal conscience and feelings on issues that may be of some personal note to him, but, rather, to focus on his view of the law. I think that is reasonable. I hope we will continue in our efforts to do that.

I might say to the Senator, I am going to move to another topic. If he is interested in staying, of course, he might.

Mr. CRAPO. Will the Senator entertain one more question before he moves on? I do appreciate him allowing me to engage in this discussion with him.

Again, I am trying to make it clear so we understand just exactly what it is that is being said Miguel Estrada has not disclosed. We talked about the documents in the Solicitor General's Office that he prepared as a career attorney. We talked about his failure to identify which was his favorite and least favorite Supreme Court case. And apparently—I was not at the hearing because I don't sit on the Judiciary Committee—he did not answer Senator KENNEDY's questions about some current cases to the satisfaction of the Senators.

Is there anything else that is holding him back? Again, the reason I am getting at this is because we are facing a remarkably unique circumstance here, the filibuster of a circuit court nomination on the basis of nondisclosure. I want to get out exactly what that nondisclosure is so we and the American public can understand that. Then we can deal with it on a very focused basis, on a point-by-point basis and, where there is merit on either side, deal with it.

But the general charges, it seems to me, of nondisclosure and not answering questions to the satisfaction of a Senator usually result in a Senator saying I don't like the way the answers were given so I am going to vote no on the nomination. Instead, at this point we are facing a filibuster, which I believe is a serious threat to the manner and the protocol with which the Senate has approached Presidential nominations to the judiciary and is much broader than just the nomination of this individual judge.

So we have two issues which to me are much broader than this specific nomination. The first is whether we should have the Senate start inquiries into confidential Solicitor General documents, and the second is whether the Senate should be stopped from voting on a Presidential nomination by a filibuster when we are dealing with nominations to the judiciary. That will change the way this Senate has operated historically.

Mr. DURBIN. Let me just say to my colleague, I have given him great leeway in his questioning.

Mr. CRAPO. You have.

Mr. DURBIN. And for specific reason. I thank him for coming to the floor, even though we disagree on this issue. This deliberative body doesn't deliberate much. There is not much debate on the floor of the Senate and that is sad. I thank him for coming to the floor and for engaging me in questions. I think he will find, almost without exception, I always yield for questions because I happen to believe that is what this is about. It is a deliberative body. We should express our points of view. Let our colleagues and those following debate decide who is right and who is wrong. I thank him for asking those questions.

I think what he has said is he has a difference of opinion from my point of view on the disclosure of documents. That is an honest difference. I think what I have said is in the past there has been disclosure, lines have been drawn, but in this case the White House said no disclosure when it comes to Miguel Estrada's documents, and that is an important issue before us.

Second, he has asked for a bill of particulars: Give us the specific questions that you didn't like when it came to Miguel Estrada's responses. I have given him several. That is not an exclusive or exhaustive list. I think other members of the Judiciary Committee could come up with more.

If the Senator is suggesting we should resubmit the questions and see if he takes the test a second time whether he can pass it, maybe that would move us down the road a little closer to a final vote on this individual.

I want to add here it is unusual for there to be a filibuster on a nominee to such an important bench, but it is not unprecedented. I don't know if my colleague was in the Senate when the Richard Paez nomination came before us. But the fact is, he would not have been confirmed had it not been for a cloture vote that had to be filed. Paez, who waited patiently for over 4 years before the Senate Judiciary Committee, finally had to have a cloture vote in which he prevailed to become a Federal judge.

The Republicans, then in a position to launch a filibuster, did it on a Hispanic nominee not that long ago, in March of 2000. We know when it came to Richard Paez, the standard used by many Republican Senators was we will filibuster him. It took a cloture vote to stop the filibuster. I don't know if the Senator was in the Senate at that time. I think he was. I do not know how he voted. But the fact is some Members felt strongly enough about the Paez nomination that they went ahead and initiated this kind of filibuster.

THE ECONOMY

Mr. President, I would like to move on to another issue if I can. It is one I think bears some attention by the Senate and those following the deliberation. We are now in the third week of debating Miguel Estrada. It is an important issue.

Today, I noticed when President Bush spoke to the Latino Coalition in the Executive Office Building, the first issue he raised was not Miguel Estrada but it was an important issue—and I am sure he did that for emphasis—but when it came to the issues raised by the President of the United States to the Latino Coalition in the Executive Office Building, the first issue he raised was the state of the economy. It is interesting to me that though the President raised this issue, we can't raise this issue on the floor of the Senate.

Yesterday, the minority leader, TOM DASCHLE, made a unanimous consent request which I am going to repeat in a few moments that we move from this debate to a debate on the state of the economy—and I think for good reason.

As you look across America, you think people will realize our economy is in a sad state. This is a recession which has gone on entirely too long. My friends on the Republican side say this is a Clinton recession. I am afraid the statute of limitations has run on that particular complaint.

At this point in time, 2.5 million jobs have been lost since President Bush took office. He is going to have to take ownership for this recession.

There are many factors which led to this recession. There is no doubt the economy heated up prior to his coming into office, and there was going to be a correction. There is no doubt as well that terrorism and 9/11 took its toll on the economy, and continue to, I might add.

There is also no doubt that the economic policy pursued by the Bush tax cut 2 years ago failed. It didn't work. We continue to lose jobs by the cut in interest rates to try to get the economy moving forward again. Frankly, we are in a terrible situation. We understand our economy needs a boost. Consumer confidence in America is at a 10-year low. It was reported yesterday that the Consumer Confidence Index plummeted from 4.6 to the revised 7.8, this the lowest reading since October of 1993.

Unemployment is on the rise. Since January 2000, the number of unemployed increased by nearly 40 percent with nearly 8.3 million Americans out of work, and 2.3 million private sector jobs lost.

Contrast that with the Clinton administration where 22 million jobs were created. In the Bush administration of 2 years and a few months, 10 percent of those jobs have been lost—a 2.3 million increase in the creation of jobs. What we have in the Bush administration is the elimination of jobs which were previously created by the Clinton administration.

Unemployment spells are lengthening because companies are not hiring. It isn't a problem of losing a job today and finding another one next month. The average number of weeks individuals spend unsuccessfully seeking work increased by a month over the past year. Approximately 20 percent of all the unemployed have been looking for work for more than 6 months. Wage growth is now stagnant. The shortage of jobs has slowed—I might add, as has the increase in the cost of health insurance, another issue which this administration summarily ignores.

Today, President Bush spoke to the Latino Coalition about small businesses and what we need to do to help small businesses. Instead of a tax plan that will help small businesses, let me suggest as follows. What the Bush tax plan offers to the wealthiest individuals in America is a three-layered cake. What the Bush tax plan offers to small business is crumbs; things that, frankly, are not controversial in terms of expensing. But the vast majority of the tax cut the President is pushing will not stimulate today's economy, but it will burrow us deep into a deficit which, frankly, is not fair. The fact is they are giving tax breaks to the wealthy people.

The President failed to mention what I would suggest would be the top one or two complaints of small businesses in America today. You pick them. Open the phone books and call a small business person and ask, What is your problem today? They will say the economy is not strong. People aren't buying. What about your expenses in business? What kind of problems do you face? I guarantee you the answer will be the cost of health insurance. And not a word, not one word from the Bush administration about how to deal with that.

I introduced a bill to give a tax credit to small businesses which would allow them to provide health insurance for their employees. It doesn't answer the problem. But at least it is sensitive to trying to help small employers employ their people as well as the owners of the business dealing with health insurance protection. That, to me, is a reasonable approach, and something that would help small businesses, which is summarily ignored by the Bush administration.

The track record we have now for job creation is the worst in 58 years. In order for the Bush administration to tie the Eisenhower administration for the worst job creation record ever, President Bush would have to create 96,000 jobs a month starting today to the end of his term. He is not going to get that done, I am afraid. I hope I am wrong. I hope the economy turns around.

But isn't it interesting, with the economy in a basket struggling to survive, that we can't even engage in a debate on the floor of the Senate about what steps we can take to get this economy back on track. I don't have to tell you about the crisis most States are facing when it comes to their budgets. Illinois will have about a $5 billion deficit which the Governor is going to have to wrestle with under extraordinary circumstances. He will have to cut spending, I am sure. There are some who will say he should raise taxes. Whatever he does will not help us move out after a recession. In fact, it puts a damper on economic growth at a time when we should be putting stimulus. So that situation is out there as well.

I might also add that the situation when it comes to homeland security is also a damper on the economy. So many business people across America are worried about their vulnerabilities when it comes to the economy. They hope this government, starting in Washington, will provide a helping hand. But it hasn't happened, because this administration has been strong on rhetoric and press conferences, but weak when it comes to providing the money so that State and local resources can be increased and enhanced.

Who are you going to call if there is a threat of terrorism in the community? Are you going to ask for a telephone number for 1600 Pennsylvania Avenue to try to get through to President Bush or Vice President Chaney? Not likely. You are likely to call 9–1–1 and a local policeman or firefighter is going to be the voice at the other end of the call. If they are not trained, if they are not equipped, frankly, homeland security is a farce.

We know what is going on in the Middle East today. Troops numbering 180,000 have been sent by our government—military personnel and support personnel—in preparation for the invasion of Iraq. It is clear that America is preparing to attack. But we know from the homeland security side that America is not prepared to defend. We are not prepared to defend the hometown families and neighborhoods and communities across America. This administration has not come up with the resources we need to make that happen.

At this point, I would like to introduce into the RECORD—it probably has been done before, but it certainly bears repeating—a letter sent to President Bush by my friend and colleague, and ranking Member of the Senate Committee on Appropriations, Senator

ROBERT C. BYRD of West Virginia. The letter is dated February 23, 2003. The reason I want to enter it at this point is that Senator BYRD goes through chapter and verse of the take by Democrats in Congress and Congress in general to persuade the Bush administration to put more money into homeland security. He spells out in graphic detail how this White House has stopped our efforts every step of the way. It is a sad reality that as we face terrorists at home we are not providing the resources that are necessary to the local first responders.

I ask unanimous consent that the letter be printed in the RECORD.

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

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
Washington, DC, February 25, 2003.

Hon. GEORGE W. BUSH,
Office of the President, The White House, Washington, DC.

DEAR MR. PRESIDENT: In your remarks to the National Governors Association on February 24, 2003, you claimed that Congress was to blame for a reduction in homeland security funding in Fiscal Year 2003. Such a claim is wrong, and I urge you to correct it.

If enacted, the Administration's Fiscal Year 2003 request for first responders, for instance, would have eliminated funding for the Justice Department's Office of Domestic Preparedness; it would have eliminated funding for the Community Oriented Policing Services (COPS) hiring initiative; it would have discarded the Edward Byrne Memorial and the Local Law Enforcement Assistance Block grant programs; and it would have provided absolutely no support for the Assistance to Firefighters grant program.

A lack of Administration commitment to first responders is just the beginning of the empty rhetoric coming from the White House on homeland security funding.

Since September 11, 2001, you have signed, with great fanfare, legislation to authorize improvements in airport, seaport, and border security. Yet, your Administration has opposed efforts to fund those bills. On December 10, 2002, you announced a plan for state and local governments to vaccinate 10 million first responders for a potential smallpox attack. But your Administration has passed the responsibility of paying for these vaccines to the state and local governments.

Last August, you rejected $2.5 billion that Congress, in an overwhelming bipartisan fashion, approved for homeland security efforts. Congress had designated those funds as emergency priorities in the Fiscal Year 2002 Supplemental Appropriations bill. This package include funds to begin to meet the billions of dollars of outstanding applications from 18,000 fire departments for equipment and training. The legislation also included grant funding to make police and fire equipment interoperable—a critical weakness in response efforts on September 11, 2001. The homeland security package contained critical funding for port security, for security enhancements at small and medium airports, and for federal law enforcement counterterrorism efforts. The legislation included funding to strengthen security at nuclear plants and laboratories and to protect the nation's food and water supply.

Instead of embracing this package and agreeing with Congress on its urgency, you called it wasteful. It only took your signature to address these vulnerabilities, but you refused and called the funding wasteful.

I must note that the Senate Appropriations Committee approved that funding unanimously. In fact, the Committee last July approved each of the 13 appropriations bills on a unanimous, bipartisan basis. But your Administration objected again and again to these bills despite the overwhelming needs facing the nation.

This past January, during Senate consideration of the Fiscal Year 2003 Omnibus Appropriations bill, I offered two amendments, both aimed at increasing investments in homeland security initiatives from coast to coast. The amendments focused on funding authorization bills that you signed with great fanfare. But again the Administration said the funds were unnecessary and urged the Senate to reject these amendments. The political strong-arm tactics worked, and the amendments were rejected to partisan votes (roll call votes #002 and #003).

Last spring, the Senate Appropriations Committee held five days of hearings to examine homeland security priorities. The Administration was represented by six Cabinet secretaries, the Attorney General, and the Director of the Federal Emergency Management Agency. They argued the case for homeland security funding plan. However, every local government representative and every representative of fire, police, and emergency response agencies testified that the Administration's funding plan was seriously flawed. They testified that doing away with the funding programs which have proved so valuable was shortsighted and irresponsible.

In your remarks to the governors, you characterized the Congress's decision to use existing and effective programs to deliver funding to our first responders as micromanagement. Congress chose to fully fund your $3.5 billion first responder request through existing, effective channels rather than launch a new, untested program. This was a responsible decision.

In the Fiscal Year 2003 appropriations legislation, Congress chose to be responsible by listening to the men and women on the front lines of homeland security. We heard their needs and answered their calls for help. But, time and time again, the Administration has turned its back to the nation's first responders. Enough is enough.

I appreciate your desire to protect the nation from terrorist attack, but the job cannot be accomplished with continued political grandstanding. The country needs an Administration that takes an honest approach to homeland security instead of continually making empty promises to the nation's police, fire, and emergency medical teams. The American people want to know that if there is an attack close to their homes, their local doctors and nurses have the training to treat the injured. They want to know that their local firemen have the ability and equipment to handle a chemical or biological attack. They want to know that their local police officers are trained in identifying and responding to the variety of terrorist attacks that we now could face.

The enemy is not Congress, Mr. President. The enemy is the terrorist who stands ready to exploit the nation's many security gaps. Especially now, when the terror alert is high and war is looming at our doorstep, we must be acutely aware of the sharply increased threat of attack here at home. Instead of pointing fingers and assigning blame, I implore you to expedite the release of the homeland security funds in the Fiscal Year 2003 appropriations legislation and the funds that still are unobligated from the Fiscal Year 2002 appropriations bills. The fact that these dollars, approved by Congress in December 2001, sit idle is beyond comprehension. I also hope that you consider expanding the investment in homeland security in the upcoming supplemental bill. As a nation, we know where our vulnerabilities lie, and we can be sure that the terrorists do, as well. We should take every step possible to protect the American people and to provide critical funding for homeland security initiatives.

As we move forward, I urge you to work with Congress in a bipartisan fashion to provide homeland security funding will make a significant investment in the protection of the American people.

Sincerely yours,

ROBERT C. BYRD.

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

Mr. DURBIN. I would be happy to yield.

Mr. REID. I appreciate very much the Senator entering that letter from Senator BYRD.

I ask the Senator from Illinois: Is he aware that the reason Senator BYRD wrote that letter is because President Bush, at the signing of the omnibus bill when we lumped 11 appropriations bills—is the Senator aware that he had the audacity to say at the signing of that bill that it was OK, but he was upset with Congress for not providing more money for homeland security? Is the Senator aware that is why Senator BYRD wrote that letter, because it is just not true?

Mr. DURBIN. Yes. I am aware of it. It is sadly troubling, because what the President did in making that statement is to mischaracterize what happened.

The Senator may recall, as I do, that Senator BYRD came before this body early on and said to us we have a problem in America. If we are going to protect America, we need to make a substantial investment in changes such as a statewide communications system for Nevada and Illinois so the police, fire, and medical responders can all be on the same network if there is terrorist activity or a disaster. These investments are basic. And also in the area of bioterrorism, to make sure that doctors, nurses, and health care personnel are adequately trained and that hospitals are ready if there is anthrax, God forbid, as we faced on Capitol Hill.

Senator BYRD came time and time again to this floor and begged us, as a nation, to be responsive. Unfortunately, time and time again, he was rejected.

When we finally sent a $2.5 billion amount to the White House, asking them to put that into homeland security, it was effectively vetoed—$2.5 billion stopped. So the President cannot point the finger at Congress.

I say to my friend from Nevada, I am anxious to follow the debate we are going to face in a few weeks when we have this administration come before us and tell us they need $26 billion for Turkey—$6 billion in grants and $20 billion in loan guarantees for Turkey—which has been their demand if we are going to be using Turkey as a base of operations for an invasion of Iraq.

I want the administration to explain to the American people how we can afford $26 billion for the defense and security of Turkey and cannot afford $2 billion for the defense and security of the United States of America when it comes to homeland security. That is going to be an interesting debate.

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

Mr. DURBIN. I am happy to yield for another question.

Mr. REID. Is the Senator aware that one of the reasons Senator BYRD was so upset—and that is probably too calm a term for how he reacted to this statement of the President. Senator BYRD, you will recall, when he was chairman of the Appropriations Committee, last year, held a series of hearings that went over 2 weeks, where we called in various administration officials, people from communities in States around the country, to find out what their needs were for homeland security. That is why he brought the money number before the Congress. And he was rejected by the President.

Is the Senator aware of that?

Mr. DURBIN. I am not only aware of it, I attended many of those hearings, as I believe the Senator from Nevada did as well. And Senator BYRD took it very seriously. He brought in the experts when it came to law enforcement, fire protection, and medical personnel, and asked them what they needed. It was not this porkbarrel that we are often accused of here and of dreaming up ideas on how to spend money.

He asked the people on the ground: What do you need? What will help? When they identified those needs, he put that into legislation, which was rejected by this administration.

So we have a situation, if you would step back for a second, where we have an economy on the ropes. We have a President with a failed economic policy. We have a war on terrorism, which continues to pursue Osama bin Laden, with very little success. We have a homeland security program headed up by a man we both respect, Tom Ridge, which, unfortunately, is not sending the resources necessary to State and local governments so they can protect America.

Instead, we are preparing to launch an invasion of Iraq. We are putting the billions of dollars necessary into that effort and, unfortunately, short-changing homeland security in the process. That, to me, shows misguided priorities.

The President cannot get away with blaming Congress for this. It really is a creation of his own administration and their own priorities in spending.

Mr. REID. I have three questions I wish to ask the Senator. Will the Senator yield for the first question?

Mr. DURBIN. I am happy to yield.

Mr. REID. I had in my office yesterday—and I am wondering if the Senator had people from Illinois in his office recently—people who came from Nevada and represented 911 centers, especially the Las Vegas Metropolitan Police Department, which is a very large police department. I spoke to a woman who has worked there for 20 years. She proceeded to tell me that she is frightened for the people of Clark County. That is in the Las Vegas metropolitan area. If someone calls on a regular telephone from their home, they know where that call is coming from.

But a lot of people—because computer use has become so prevalent, and they are using computers for telephones, and because of the use of cell phones—if someone calls from a computer or cell phone to 911, they have no idea where, or who, or anything about that. It is a terrible tragedy for the American people.

Is the Senator aware that is something that money for homeland security would identify because the technology is there, they just need money to be able to do it?

Mr. DURBIN. The Senator's point is well taken because I visited the 911 center in Chicago. It is really state of the art. But there are gaps that they face as well. They need the funding for training, for improving the communications network, money that is not forthcoming from this administration, from this White House.

I pray to God we never face another terrorist event in America. But if we do, this administration will be held accountable as to whether it spent the money, when it should have, to prepare America to defend itself. And when it comes to this kind of communication effort, I am afraid we have not done that.

Mr. REID. I listened to the Senator outline, as he is so adept at doing, the situation we have in the American economy today, with 2 million people unemployed. The Senator has laid out a very good picture of what we have going on in America today.

Is the Senator aware of the nonpartisan organization called the Pew Research Center? Is the Senator aware of that organization?

Mr. DURBIN. Yes, I am.

Mr. REID. I ask, is the Senator aware they conducted a poll, which was completed on February 18, of 1,254 adults? Is the Senator aware that when asked the question on how President Bush is handling the economy, 43 percent of the people said yes, he is doing fine, but that 48 percent of the people asked that question disapproved? Is the Senator aware of those numbers?

Mr. DURBIN. I heard those numbers when the Senator from Nevada mentioned them earlier. But I think reality has caught up with the administration. Generally, Americans give the President high marks as a President. And the numbers have come down, but only slightly. His general overall rating is positive. I think a lot of that reflects on his leadership since 911 and perhaps in the Middle East. But when asked specifically about the state of the economy, that is when the chickens come home to roost.

I think that is the point where the President and the White House is failing. They have failed because their economic policy—giving tax cuts to the wealthiest people in America, generating the biggest deficits in our history—really has us headed down the road which we all understand would be a road of economic ruin.

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

Mr. DURBIN. I am happy to yield for a question.

Mr. REID. Is the Senator aware that this same poll asked how President Bush is handling tax policy? The Senator has made a number of statements on this floor, and he personally disagrees with the tax policy enunciated by this President. I am happy to report, from this poll, people in America agree with the Senator and not the President.

Is the Senator aware that 42 percent of the people approve of the way George W. Bush is handling tax policy, and 44 percent disapprove? Is the Senator aware of that?

Mr. DURBIN. I had not heard those numbers before, but I think I can understand why the American people reached that conclusion. Because the President promised the age-old Republican response: If you just cut taxes on the wealthiest people in America, it is bound to enliven and energize the economy. Well, he did it. I voted no when it came to that issue. But it passed. It did not work. What happened was we wound up with a deficit and a weaker economy.

So the Bush tax plan failed in the first instance. Now the President has said: I have a new economic policy, and it is called: More of the same; let's try to do this, and do it at even greater levels, which will drag us more deeply into deficit.

I would like to illustrate this point to the Senator from Nevada by showing him a couple charts, if I can find them.

President Bush, on January 29, 2002, in his State of the Union Address, was quoted as saying:

> Our budget will run a deficit that will be [a] small and short term [deficit.]

Then, take a look at what this means. We are going to have record deficits in terms of the Bush administration, the legacy that is going to be left from the President. The actual deficits, which our children will have to pay, are going to break records.

Isn't it interesting that the Republicans, who have fashioned themselves as fiscal conservatives, now find themselves, once again, in a posture of creating the biggest deficits in the history of the United States—harkening back to President Ronald Reagan's administration?

But if you take a look at the surpluses, which we thought we would enjoy for a long time to come, they started with $236 billion to $127 billion. We are paying down the debt in the Social Security trust fund. And then it falls off the table.

In comes the George Bush tax plan, and the state of the economy, and the recession, and look at these deficits start to grow—in the range of $300 billion plus. The administration just gives the back of the hand to those deficits and says they are not really long-term problems.

They are long-term problems because they have to be repaid. And it does not show the kind of discipline, in which we should be engaged. The tax plan proposed by the President is a plan which, sadly, is going to plunge the United States more deeply into deficit and is not going to revive the economy.

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

Mr. DURBIN. I will yield for one last question. I see another colleague is in the Chamber.

Mr. REID. I actually have two questions. I know the Senator is anxious to leave.

I will first lay the basis for my question. The numbers the Senator has on that chart are basically inaccurate to the effect that it does not include the disguise that is taking place down at Pennsylvania Avenue, because Social Security surpluses are there to dampen the amount of the deficit. Actually, the deficit is about $485 billion, not $304 billion, because the Social Security surpluses are being used to disguise the budget.

Is the Senator aware of that?

Mr. DURBIN. I am aware of that. I think it is a good point to be made. These true deficits are at the expense of the Social Security trust fund. In the closing years of the Clinton administration, surpluses that we generated were paying off the debt of the Social Security trust fund, making it a stronger program for years to come, as baby boomers will arrive and ask for benefits.

Now, in the Bush administration, with tax cuts for the wealthiest people in America, we are raiding the Social Security trust fund and weakening it at a time when we know we need it the most.

Mr. REID. Last question. The Senator has spoken about the need for us to be doing something other than just talking about a man who is fully employed, in contrast to the 2.8 million people who have lost jobs under this administration. The man we are debating now has a job downtown where he makes lots of money. We should be doing something else. The Senator, I am sure, is not aware of this statement because it was made during the noon hour and he has been on the floor. I would like the Senator to tell me if he is familiar with Robert Novak.

Mr. DURBIN. Yes. He is an Illinois resident, who grew up in Joliet. I have been on ''Crossfire'' with him many times.

Mr. REID. Bob Novak said today:

Well, the Republicans figured that they would be home at their recess last week and find out what the people wanted. Apparently, the people weren't interested in Estrada, because the Republicans have no idea what to do in the Senate. They had a leadership meeting yesterday afternoon [that was Tuesday] couldn't figure anything out, had a luncheon of all the Republican senators, didn't figure it out. All that's decided is, they're not going to ask for a cloture vote to force an end to the filibuster, because they'd lose that. But they have no strategy for around-the-clock sessions. They don't know what to do. The Democrats are winning.

So that former resident of the State of Illinois said this, and would the Senator agree with him?

Mr. DURBIN. The Senator is putting me on the spot to agree with Bob Novak. I will not question his conclusion, unless the Senator on that side would like to correct the record. That is the problem faced by the Republican caucus.

I say to the Senator from Nevada that I am prepared to deliver them from their plight. I am prepared to give them hope and direction. I am going to make a unanimous consent request that we stop this debate right now and move immediately to the consideration of an economic stimulus package and that we engage all of the Senators, Democrats and Republicans, to come to the floor and talk about what we can do to turn the economy around, create jobs, create consumer confidence, give businesses some hope, try to find some way to put Americans back to work.

Let's stop talking about Miguel Estrada, who has a good job downtown for a law firm, and start talking about the millions of Americans who are worried about their jobs and whether they will have them in the future.

When I make the unanimous consent request, if there is no objection, I say to those following the debate, we will move directly to the economic stimulus package. In that debate, perhaps by the end of the week, we can come up with something that shows that the Senate cares, that this Congress cares about the state of the economy.

Now, if by chance a Republican Senator stands up and objects to my unanimous consent request, that Senator is saying that he does not want us to talk about the economy, doesn't want us to talk about economic stimulus; he wants us to stay mired down in one judicial nomination for the remainder of this week. I cannot believe any Republican Senator would object to this unanimous consent request, which I will make now. I believe it is going to finally move us away from this judicial nomination to the issue people care about across America, getting this economy moving.

Madam President, I ask unanimous consent that the Senate proceed to legislative session and begin the consideration of Calendar No. 21, S. 414, a bill to provide an economic stimulus package for America.

The PRESIDING OFFICER. Is there objection?

Mr. CRAPO. Madam President, reserving the right to object. I will not object if the request for unanimous consent is amended to provide that prior to moving to the legislative calendar, the Senate move no later than 6 p.m. today to a vote on the Estrada nomination, up or down, and then proceed to the legislative calendar under the consideration of both the Republican and Democratic plans.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Madam President, I ask unanimous consent to modify the request of the distinguished junior Senator from Idaho, that his request be changed to that the vote on Estrada would occur only after the memos from the Solicitor General's Office are provided to us, and that following that, he submits himself to questioning.

Mr. CRAPO. Madam President, I will not accept that modification to my request.

Mr. REID. I object to his request.

Mr. CRAPO. I object to the previous request.

The PRESIDING OFFICER. Objection is heard.

Mr. DURBIN. Madam President, there you have it. I tried my best to move this debate away from one man, one nomination, to the state of the economy.

Basically, what the Senator has said is that unless we can have this one nominee, we don't care about the economy; let it languish, falter, and let the American people lose hope. We are going to stick with this one political issue.

I think there is a way out of this morass with Miguel Estrada. I think we can do it cooperatively, with the production of documents and the honest answering of questions. I don't think we should delay the business of the Senate indefinitely and ignore the serious problems facing our Nation in the process. I hope there will be some reconsideration of the issue.

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

Mr. DURBIN. I will.

Mr. CRAPO. Madam President, it seems to me that we can easily move to any of these other issues that the Senator and his colleagues have been discussing, which we all agree need to be addressed. We can easily move there if your side will agree to give up trying to stop the nomination of this one single judge.

So one could say that those who want to hold the floor and focus on this nomination are willing to delay debate of other issues until we vote on this particular nomination, or that those who are filibustering—which is generally understood by the public as an act of stopping a procedure and moving to a vote—this particular nomination are unwilling to move to these other economic issues.

Would you not agree that it really comes down to the question of whether we want to agree to change the precedent of the Senate and open up investigation into these confidential documents of the Solicitor General's Office?

Mr. DURBIN. I will say to my friend, we have talked about this at length. I

believe it is unprecedented. We are asking for the writings of Mr. Estrada so we may know who he is. I don't think that is unreasonable.

There are three conceivable outcomes of the nomination. One is that there be a cloture vote called for by Senator FRIST to try to bring an end to this debate on the floor. That is his right.

As I noted, there was a cloture vote called on Richard Paez, a Hispanic nominee of the Clinton administration. So it has happened before.

There could be a decision by Senator FRIST to move this nomination back to the calendar. I think the best outcome would be that, finally, Miguel Estrada would be open, candid, honest, and not conceal what he truly believes about the state of law in America. If he is seeking a lifetime appointment to the second highest court of the land, that is the least we can ask of him.

Those are the potential outcomes. What I tried to do was circumvent even those three and say let's move to the economy, and maybe at some later time move back to Miguel Estrada. But the Senator said, no, we don't want to talk about the economic situation in America, about unemployment, about job loss and loss of consumer confidence, the biggest deficits in the history of the United States. We just want to talk about one judicial nomination. That is unfortunate.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

A SAFER WORLD

Mr. LEAHY. Madam President, regarding this debate on Miguel Estrada, we do have a lot of other issues that seem to be ignored. I am back home almost every week in Vermont and I don't find anybody talking to me about Miguel Estrada. Even when the White House has sent people up and various special interest groups to attack me, nobody seems to care—''either the press, the people in my State,'' or anybody else. But what they do care very much about is the economy and Iraq.

More than a half century ago in the aftermath of two catastrophic world wars, the United Nations Charter was signed in San Francisco. It was dedicated to the prevention and peaceful resolution of conflict. The U.N. was largely a creation of the United States, with the support of the other great world powers.

The U.N. has had a difficult history. With the notable exception of the Korean war, the Soviet Union and the United States each worked throughout the Cold War to ensure that the U.N. Security Council remained little more than a toothless forum for debating and passing resolutions of little or no effect.

Even in recent years, the United Nations has had a string of failures. It was unable to prevent the slaughter of half a million people in Rwanda. It failed to prevent the destruction of the former Yugoslavia, which was ultimately stopped only by NATO's intervention. United Nations resolutions seeking to resolve the Israeli—Palestinian conflict have been routinely ignored.

The United Nations has also passed resolutions aimed at eliminating Iraq's nuclear, chemical, and biological weapons programs, but the Iraqi Government has flagrantly tried to subvert those resolutions.

The United Nations is frequently blamed for these failures. It is convenient to ridicule a multilateral organization that often seems to be its own worst enemy. But there are also many examples of U.N. successes, like peacekeeping missions that are strongly supported by the United States but rarely involve any commitment of U.S. troops.

The U.N.'s effectiveness depends on the political—will or lack of will—of its 191 member states. No country—no country—bears more responsibility than the United States for the success or failure of the United Nations. This has never been more true than today when solving so many of the world's problems—especially combating terrorism—depend on U.S. leadership and the cooperation of other nations.

Not surprisingly, when it has served its interests, this administration has praised the United Nations and has urged the Congress to provide the funds to support it. In fact, a Bush administration publication states:

> Acting through the United Nations allows the United States to share the risks and costs of responding to international crises.

I applauded President Bush when he went to the United Nations last September to seek a resolution calling for the return of U.N. weapons inspectors to Iraq. I and others here had urged him to take that step, at a time when many of the President's advisers were insisting that a resolution was both unnecessary and unwise.

And I commended Secretary Powell for recognizing the importance of securing United Nations support for disarming Iraq, and for his work in obtaining a unanimous vote of the U.N. Security Council for that resolution.

Since then, the inspectors have reported mixed cooperation from the Government of Iraq. They have visited hundreds of sites but have not found significant evidence of Saddam Hussein's weapons of mass destruction, despite Saddam Hussein's failure to explain what happened to the thousands of tons of chemical and biological weapons material that was known to exist when the inspectors left Iraq 5 years ago.

The administration's response, with justification, is that Saddam Hussein is once again playing a cat-and-mouse game of deceiving the inspectors, and that time has finally run out. But the solution is not to direct threats and name-calling at some of our oldest allies, or to dismiss the U.N. as irrelevant just because some of its members disagree with us. It is counterproductive and beneath a great nation.

It is no less harmful to mislead the American people. Yesterday's Washington Post reported that the President and other administration officials continue to say publicly that the President has not made a final decision about whether to invade Iraq. These statements lack credibility, especially when the Pentagon continues to amass tens of thousands of U.S. troops on Iraq's borders.

Yet the White House is telling our potential coalition partners that the decision to invade Iraq has been made. The President has made it, they say, and nothing the U.N. Security Council says or does will change that. They warn that unless the U.N. Security Council abandons the inspections process and supports a U.S.-led military invasion, the United Nations will become irrelevant.

At the same time that White House officials dismiss any meaningful role for the Security Council in the decision to go to war, they are calling on the U.N. to prepare to help take care of as many as 2 million Iraqi refugees once the war begins. And they make no secret of the fact that they expect the U.N. to play a central role in the reconstruction of a post-Saddam Iraq.

One of the lessons of the gulf war was that it was far safer for our troops, and of critical importance to our continued relations with the Arab world, to build a broad international coalition in support of the use of force. The importance of that coalition has been lauded by administration officials and Members of Congress, time and again, in public statements and in testimony.

Nothing that has happened since, and nothing that we have heard from this President or his advisers leads one to believe that we should go to war without such a coalition. To the contrary, with the threat of international terrorism fueled by Islamic extremists who fan the flames of hatred of Americans, the arguments for building a strong coalition with the backing of the United Nations are even more compelling.

It has been 28 years since I was first elected to represent my State of Vermont in the Senate. I have served during the administrations of five Presidents Democrat and Republican. I have had my share of agreements and disagreements with each of these Presidents on issues of great importance—from the Vietnam war to the dilemma we face today with Iraq.

But never, in all those years, have I seen such an opportunity to use the tremendous influence of the United States to unite the world behind the common goal of disarmament and in doing so to strengthen the United Nations, mishandled with such arrogance.

Today, apparently only weeks away from a war with Iraq, the United States is telling the rest of the world, ''We don't need you.'' Even though we will be risking the lives of American men and women in uniform to enforce a United Nations resolution, we are

going to war in spite of our U.N. allies who urge caution and patience.

The administration's ultimatum on Iraq is but the latest example of its disdain for working with other nations to solve global problems from arms control to the environment.

They thumbed their noses at the Kyoto Treaty, even though the United States uses wastefully a quarter of the world's resources and is by far the largest contributor to global warming.

They sabotaged the International Criminal Court, despite the fact that the United States was instrumental in its conception.

They have walked away from the Anti-Ballistic Missile Treaty and from an agreement to strengthen the biological weapons convention.

Reasonable people may disagree about the merits of these treaties, but the administration has simply walked away. They have offered no constructive alternatives, they have unnecessarily poisoned relations with allies, and they have undermined our Nation's interests.

This pattern has not only alienated and angered those whose support we need, it has made it easier for others to ignore their own international obligations. It has needlessly and recklessly squandered the good will we felt after September 11, when the Star-Spangled Banner played outside Buckingham Palace and France's Le Monde declared, ''We are all Americans''. This attitude has made us less secure, not more. The administration squandered that worldwide support.

I have no doubt, nor does anyone in this Chamber, that our armed forces can defeat Saddam Hussein's army, which according to all reports is far weaker than it was a decade ago. Nor do any of us differ about the desire to see an end to Saddam Hussein's despicable regime. But the risk that he will use chemical or biological weapons, and of the horror that could result for our own troops, as well as the civilian casualties, are hardly mentioned by the White House.

In the meantime, the situation in Afghanistan so recently the focus of attention remains extremely unstable.

In fact, I read today that Afghanistan has become the largest opium exporter in the world.

The survival of the Karzai government is far from certain, as Pakistan, Russia, and Iran continue to provide support and sanctuary to Afghan warlords and to the Taliban who fled.

Osama bin Laden continues to broadcast threats against Americans, and al-Qaida remains active in dozens of countries.

A nuclear crisis on the Korean peninsula threatens to spiral out of control.

In the Middle East, hardly a day passes without shootings or bombings by both Israelis and Palestinians. The administration appears to have abandoned that crisis.

Our allies are divided about the need to abort the U.N. inspections process and launch a preemptive military invasion of Iraq, and a majority of the American people oppose the use of unilateral U.S. military force.

I am not among those who believe that under no circumstances would force ever be justified to disarm Saddam Hussein. But why now, when there is such discord even among those who agree about the need for Iraq to disarm? Why now, when there is no realistic chance that Saddam Hussein will seek to carry out an act of aggression as long as the U.N. inspectors are there? Why now, when the United Nations is seized with this issue? Why now, when giving the inspectors more time could bring more key nations on board with us if the use of force becomes necessary? Why rush to act in a way that will weaken the United Nations, that will further isolate us from many of our closest allies and create more anti-Americanism and quite possibly more terrorists?

This country is not close to being united in favor of a preemptive, unilateral war with Iraq. It is not a question of whether we can defeat Saddam Hussein. It is a question of the long-term risks to our own security.

The President should listen to the American people. Hundreds of thousands of Americans have braved the freezing cold in recent weeks, as have millions of people in Europe and elsewhere, to demonstrate their opposition to the President's policy. They are protesting not in sympathy with the Iraqi government but in opposition to a war that might yet be prevented.

So today, as our Government moves inexorably towards war, we must continue to question, we must continue to debate, we must continue to do everything we can to support a policy that makes our country and the world safer, not only for tomorrow but for next year and beyond.

If war comes, let us be able to say that it was only because we and our allies exhausted every other option, that we acted with the support of the Security Council, and in doing so we made the United Nations stronger.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

FOSTER CARE REFORM

Mrs. CLINTON. Madam President, I thank my friend and colleague from Vermont for his thoughtful comments. He always brings a really good analysis of any situation to the floor and shares it with us, and I am very grateful to him for that.

Occasionally a movie comes to the screen that brings to life the stories that have become routine in our newspapers and on our television stations, and because of that constant repetition we sometimes become numb to the news. That happens across the board on many issues, but there is one in particular I wish to address that I do not think we can ever afford to be numb to or indifferent toward, and that is the abuse and neglect so many children in our country live with every day, the children who are shuffled in and out of our foster care systems, often with little guidance from or connection to any adult. Too often these stories end in the most tragic way possible.

Seven-year-old Faheem Williams in Newark, NJ, was recently found dead in a basement, with his two brothers in a deplorable condition, having been chained in that basement for weeks at a time. Six-year-old Alma Manjarrez in Chicago was beaten by her mother's boyfriend and left to die outside in the snow and cold of the winter. And despite 27 visits by law enforcement officials to investigate violence, 7-year-old Ray Ferguson from Los Angeles was recently killed in the crossfire of a gun battle in his neighborhood.

Unfortunately, I could take up quite a few minutes of my allotted time telling even more tragic stories such as these, but today I want to focus on a different kind of story, a story of hope and possibility, the story of Antwone Fisher.

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

Mr. Fisher survived that childhood of neglect, abuse, and violence, and has lived to inspire us all and send a stern reminder that it is our duty to reform the foster care system. I believe we have a moral obligation to make sure that no child languishes in this system, left to develop his or her own survival skills, without the attention, guidance, discipline, and love every child is entitled to from at least one caring, responsible adult.

I believe Antwone Fisher's success story should be the rule, not the exception. Tonight, House Majority Leader TOM DELAY and I will be cohosting a screening of the movie ''Antwone Fisher''—Mr. Fisher's life story. This is a screening for Members of Congress, but I urge anyone listening or watching today to seek this movie out in their movie theater, because it is an inspirational story. It makes you cry, it makes you laugh, but it leaves you with the very strong fundamental faith that every one of us can do something to help a child like Antwone have a better life.

TOM DELAY and I decided to host this together because we both feel it is imperative to raise national awareness about foster care. Because Antwone Fisher's story is inspirational, we hope his movie will give all of us in this Chamber and in the House the inspiration to tackle this tough issue.

In the year 2000, Congressman DELAY and I received an award together from the Orphan Foundation of America for

the work we have both done over many years in the area of foster care and adoption. My staff and Congressman DELAY's staff have been working together to try to figure out how we could, across party lines, from both Houses of Congress, help to create the kind of attention that is needed in the lives of our foster care children.

I commend the commitment Congressman DELAY and his wife Christine have. This is not just an issue for them. They are certainly strong advocates for foster children, but they are also foster parents.

I hope my colleagues in the Senate will join us tonight at the Motion Picture Association for this viewing. For those who cannot join and for those who are watching at home, I want to share a little bit about Antwone Fisher's story. People should know that his book, called ''Finding Fish,'' is just as good as the movie. So go out and buy that. Pass it around. Make sure everybody you go to school with, you work with, you go to church with sees this book and sees this movie.

I would like to read a section from the book. Here is how Mr. Antwone Fisher describes his life story:

The first recorded mention of me and my life was from the Ohio State child welfare records: Ward No. 13544. Acceptance: Acceptance for the temporary care of Baby Boy Fisher was signed by Mr. Nesi of the Ohio Revised Code. Cause: Referred by division of Child Welfare on 8–3–59. Child is illegitimate; paternity not established. The mother, a minor is unable to plan for the child.' The report when on to detail the otherwise uneventful matter of my birth in a prison hospital facility and my first week of life in a Cleveland orphanage before my placement in the foster care home of Mrs. Nellie Strange. According to the careful notes made by the second of what would be a total of thirteen caseworkers to document my childhood, the board rate for my feeding and care costs the state $2.20 per day.

Fisher continues to describe the document and writes that the child welfare caseworker felt that his first foster mother had become ''too attached'' to him and insisted that he be given up to another foster home.

The caseworker documents this change,

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

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

I know a little bit about this because when I was a law student in the late 1960s and very early 1970s, I worked for the Legal Services Organization. The first case I was assigned to was representing a foster mother who had signed up with the State of Connecticut to care for foster children, and in the contract she signed, it said she would never try to adopt any of her foster children. She was just a weigh station. The children were supposed to be just passing by and through. This little girl who came to live with my client was a child of mixed race, a beautiful little girl. She was left with her foster mother for a couple of years. And, boy, did that foster mother get attached. Wouldn't you want a person taking care of a child to become attached? And just as with Antwone Fisher's case, when the State found out that the foster mother had gotten attached to this little girl, they decided they needed to move her on, put her up for adoption, take her to another foster home, but to break the attachment.

I was part of trying to reverse that rule that governed in all the States in the 1960s and early 1970s. I was unsuccessful, although later in Arkansas I tried a case where I was able to reverse that rule, making the argument that is not the best interests of the child supposed to be the guiding standard? Why would we let a bureaucracy and the rules of a bureaucracy determine what is in the best interests of a child, as long as that child was well cared for and that child had a home that was loving and supportive? Why would we break it up?

That is what happened to Antwone Fisher. All through his case files, everyone always seemed to be slipping away in one sense or another. When he arrived at his next foster home and as he grew, he was first not told about the circumstances of his birth. All he knew was that he felt unwanted, that he did not belong anywhere to anyone. It was not long before he came to the conclusion that he was an uninvited guest. It was his hardest earliest truth that he wanted to belong somewhere. He wanted a mother and a father. He never knew that. He never knew a mother, a father, or a permanent home. Instead, he was left to fend for himself until he was expelled from foster care at the age of 18.

That is what we used to do everywhere. It is what we still do in lots of places. When you finish high school, you turn 18, whichever happens first, you are out on the street. I have literally known children whose foster parents and case workers came into the little bedroom, maybe, that they shared with somebody else, took all their belongings, put it in a black garbage bag, handed the garbage bag to the child and said: We are finished with you.

I cannot even imagine that, but that is what happens. That is what happened to Antwone Fisher when he found himself, at the age of 18, on the streets and homeless.

Luckily, somewhere deep inside him, in some sacred place, he found the courage and resilience to keep going with his life, and he found his way to a recruiting station where he volunteered for the U.S. Navy. He needed a place to sleep; he needed food to eat; he needed to be safe on the streets, and thank goodness he did. Thank goodness the U.S. Navy took a chance on Antwone Fisher.

There are lots and lots of children just like him in our foster care system. There are approximately 542,000 children in our Nation's foster care system; 16,000 of these young people leave foster care every year just like Antwone Fisher had to. We worked during the last several years to try to improve conditions.

In 1999, when I was First Lady, I advocated for and Congress passed the Chafee Foster Care Independence Act which provides States with funds to give young people assistance with housing and health care and education. It is funded at $140 million annually. That is not nearly enough for the needs of these children, but I am very grateful that we are doing something to recognize what it means to be the age of 18 and have nowhere to go. I have even met foster children who got admitted into college and during the holidays when most of us who went to college look forward to going home and seeing our friends and seeing our family, they begged to be able to stay in the dorm, even if the heat was turned off, because they had no home to go to.

This bill came after the very important bipartisan Adoption and Safe Families Act of 1997 where we made the most sweeping changes in the Federal child welfare law since 1980 that once and for all said a child's safety is the paramount issue in any placement. If you cannot return a child to his or her home with their biological parents, with their natural family, then let's move to relieve that child of the past and put that child in a position to be adopted and placed in a permanent home.

The next major hurdle we need to tackle is the financing system. Currently, we spend approximately $7 billion annually to protect children from abuse and neglect, to place children in foster care, and to provide adoption assistance. The bulk of this funding falls to States as reimbursements for low-income children taken into foster care when there is a judicial finding that continuation in their home is not safe. This funding provides payments for foster families to care for foster children, as well as training and administrative costs which gives children a safety net. But it is not enough because the financing is focused on the time when the child is in foster care. The longer the child stays in foster care, the more money the States get, which makes no sense to me. We ought to have the incentives in the other direction.

Try to provide the services so you can reunite a child with their family or make the decision to terminate parental rights and put a permanency plan into effect so the child can have a better shot at the future.

I appreciate that President Bush has put a proposal on the table to change the way foster care is financed. I look forward to working with him and my

colleagues to try to deal with some of these legitimate issues around financing. But I cannot support block-granting our child welfare system because it is imperative we have standards. If the States could have done this on their own, without Federal oversight funding and standards, they would have done so.

Therefore, we have to ask ourselves, How do we maintain child safety protections that we passed in the Adoption and Safe Families Act? How do we require the targeting of funds to prevention and postfoster care services? What happens if there is a crisis and more foster care children enter the system? These are all important questions. They deserve answers. But it is critical we begin the process to look at how we change the incentives.

In the past, my colleagues, Senators LANDRIEU, DEWINE, and GRASSLEY, put forth a proposal to restructure the priorities in our child welfare system. I think their proposal was headed in the right direction. It ensured that incentives were in place so that foster care stays would be shorter. I applaud my colleague Senator ROCKEFELLER, who has been a long-time champion on these issues, for his welfare reform bill which offers an alternative to financing child welfare by aligning foster care and adoption assistance with TANF eligibility.

I look forward to tackling this hard issue in the months ahead. I look forward to seeing the number of children in foster care decrease. I look forward to seeing more children in foster care being reunited with their birth families or being placed into permanent, loving homes.

For those of you who want more insight into what this issue is truly all about, I urge you to see the movie ''Antwone Fisher,'' to read Mr. Fisher's book ''Finding Fish,'' to understand that may be just one story but it stands for countless others, innocent children to whom we owe a chance for a better life.

I ask unanimous consent that an article appearing in USA Today be printed in the RECORD.

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

[From USA Today]

EASING FOSTER CARE'S PAIN UNITES DISPARATE POLITICIANS

(By Hillary Rodham Clinton and Tom DeLay)

Occasionally, a movie shines the spotlight of public recognition onto a problem that lingers deep in the nation's shadow. It forces the country either to confront the issue or look away. Today, the movie is Antwone Fisher, and the 542,000 children languishing in our broken foster care system are the issue.

Antwone Fisher tells the true story of a boy born in prison and abandoned by his mother to years of abuse, both emotional and sexual, in foster care. The compelling story of his life, written by Fisher, is about a child's hope and resilience despite an uncaring system. While we cheer Fisher's success against such abysmal odds, the movie also reminds us that too many still suffer needlessly in a foster care system that is inherently flawed.

When Fisher turned 18, the system dropped him onto the streets. Fisher turned to the Navy, where he discovered structure, discipline, the power of education and strong guidance from an adult mentor. This powerful catalyst turned Fisher's life around. But what about all of the others in our foster care system whose longing for meaning and direction goes unrequited?

Every year 16,000 young adults age out of this system. Many grew up without guidance and faced enormous hardships. The foster care system simply did not teach them the basic skills to live independently in the world. They never learned how to cook, balance a checkbook or apply for a job. Without this critical guidance, they emerge from a system unwanted and uncertain about navigating life's turns. In short, they enter adulthood the way they spend their childhood: alone.

RESET PRIORITIES

Fisher's story should spark broad reforms of the foster care system, which needs to be changed, one community at a time, so that no more children fall through the cracks. Despite our political differences, we are committed to working together so that children like Fisher do not languish in foster care until at 18, then get expelled with little guidance and support.

The federal government now gives states almost $7 billion annually to protect children from abuse and neglect, place children in foster care and provide adoption assistance. But the timing is off: Most of the money goes to states for use after a child is removed from a troubled home. Instead, it should be used to provide more preventive resources—to keep children out of foster care to begin with—and to assist children after they leave the system.

Senators and representatives from both parties acknowledge that we have to change the way we finance our foster care system. Greater emphasis needs to be put on reducing both the number of children in the system and the length of time they stay in foster care. American's children need safe, permanent homes—something Fisher never knew as a child.

BUSH OFFERS ONE PLAN

We can find a bipartisan solution to reform the way we finance our child welfare system, but both the House and Senate must make reforms a priority. President Bush has offered one proposal that deserves careful consideration. He wants to give states an option to change the way foster care is financed so they can do more to prevent children from entering foster care, shorten the time spend in such care and provide more assistance to children and their families after they leave the system.

Although reform is never easy, there are proven legislative successes in this area. During the past five years, Congress has passed two major bipartisan child-welfare bills, which we both strongly supported. One helped to nearly double the number of children being adopted from foster care, and the second has helped to provide better transition services for older children who, like Fisher, never are adopted and age out of the foster care system at 18.

We are no doubt surprising many of our friends by writing this piece together, but that just underscores our point. If a public-policy dilemma can bring the two of us together, it clearly deserves a hard look from everyone. Fisher's success should be the norm for all children who travel through the foster care system, not be one exceptional spark in the darkness of countless children's lives.

RECESS

The PRESIDING OFFICER. The hour of 2:30 having arrived, under the previous order the Senate stands in recess until 3:30.

Thereupon, the Senate, at 2:30 p.m., recessed until 3:30 p.m. and reassembled when called to order by the Presiding Officer (Mrs. DOLE).

Mr. REID. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

N O T I C E

Incomplete record of Senate proceedings.

Today's Senate proceedings will be continued in the next issue of the Record.