THE FEDERALIST SOCIETY

Judicial Confirmations

Hon. C. Boyden Gray, Wilmer Cutler Pickering

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MR. LEO: My name is Leonard Leo, and I am Executive Vice President of the Federalist Society. It is my pleasure to welcome everyone to this afternoon's debate on the judicial confirmations process.

All of you in this room, and many watching on C-SPAN this afternoon, are at least somewhat familiar with the current conflict in the United States Senate regarding the nomination of Miguel Estrada to serve as a judge on the federal appeals court here in Washington, D.C., which is often referred to as the second most powerful court in the country. The Senate is about to enter week two of a filibuster in opposition to the nomination, and right now, both sides in this battle show no signs of backing down. Senate Democrats believe that Mr. Estrada has not been forthcoming respecting his views, and Senate Republicans contend he has provided ample information and is extremely well qualified to

serve.

The Estrada battle brewing on the floor of the Senate has, to be sure, significant political undercurrents, but also is a reflection of a far deeper division over how the judicial confirmation process should be carried out. Over the past couple of decades, with increasing frequency, the ideology of judicial nominees has been scrutinized. The scrutiny sometimes touches generally on judicial philosophy but, in many instances, also has involved questions about political philosophy, policy preferences, and how a nominee might, if confirmed to serve on the federal bench, decide cases in particular areas of the law, such as abortion and civil rights. Some believe it is entirely appropriate to consider a nominee's ideology in order to ascertain how he or she might decide cases in particularly controversial areas. Senator Charles Schumer has been an ardent defender of this perspective, saying, "It's not that we don't consider ideology. It's that we don't talk about it openly. It is high time that we return to

a more open and rational consideration of ideology when we review nominees."

In contrast, White House Counsel Alberto Gonzalez has argued in several letters to the Senate that ideological considerations have no place in the Senate's present consideration of nominees. Quoting a statement by Senator Joseph Biden from 1997, Judge Gonzalez' most recent letter states, "Any person who is nominated for the district or circuit court, who in fact any Senator believes will be a person of their word and follow *stare decisis*, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life."

It also bears noting that views about this process may, for some, be driven by the Supreme Court's decision in *Bush v. Gore*. Several scholars, most notably Bruce Ackerman of Yale Law School, have suggested that a President who supposedly holds his office as a result of a flawed Supreme Court decision should not be permitted to

appoint new members to that court. And more than a few have extrapolated from this argument and implied that President Bush's appointment authority in general should not be recognized in the same way as other Presidents who have preceded him.

Here with us today to sort out some of these competing views is former White House Counsel C. Boyden Gray and Alliance for Justice President and Founder, Nan Aron.

Mr. Gray is presently a partner in the Washington, D.C. law firm of Wilmer Cutler & Pickering and is Chairman of the Committee for Justice, a group that has been quite vocal in supporting President Bush's judicial nominees. He served as White House Counsel during the first Bush administration.

Nan Aron, the President of the Alliance for Justice, founded that organization in 1979 and has played a leading role in the public interest legal movement nationwide. The Alliance for Justice has been extremely active in the judicial confirmations process, offering views about both

particular nominees as well as the way in which the process should function.

Mr. Gray and Ms. Aron will each have four minutes for initial remarks, then I will ask a couple of questions, and we will then open the floor up for questions -- and I would stress *questions* -- from the audience. No filibustering; at least not here.

Boyden.

MR. GRAY: Thank you, Leonard. The question of ideology and judicial nominations is an issue that's probably never going to get totally resolved. The simple point that I want to make, which I will try to illustrate with the example of Estrada, is that the Constitution commits the nomination process initially to the President, and if the public doesn't like what the President does, they can change the President. The Senate then has an obligation to vote on the President's nomination. One can argue back and forth about whether the Senate should be able to take ideology equally into account, as the President does. I

would argue that it shouldn't, but I would also argue that, in a sense, it's moot because if 51 senators decide to reject a nominee, there's no way to tell exactly what motivated any one of those, or all of those, 51 Senators. The key point, though, is that the 51 should have the chance to vote.

Whether it's a situation where one party controls the Senate and another the White House, can one committee bottle up a nominee? I would argue, no. The full Senate should have a vote, and the same is true, of course, when one party controls both bodies. A filibuster should not be used to block the Senate from working its will. For 200 years, we didn't do this. If filibusters were thought to be part of the process for considering judicial nominations, someone probably would have thought of it before today.

Now, in the case of Miguel Estrada, the ideological issue, of course, is quite confused because there are two arguments that the Democrats are making against him. One is that he is a total cipher, has left no paper trail, it's impossible to

make a judgment about him because he has left no paper trail and has answered no questions. The other argument against him, which I had to face last night on television, is that he's a conservative activist, and therefore must on all accounts be stopped from getting on the bench.

You can't have it both ways; he can't be both the cipher and a conservative activist. Actually, I think he's neither. Certainly, the public record, which is fairly complete -- 15 arguments in the Supreme Court; with briefs you can look at. To be sure, they've been edited by his colleagues, but his oral arguments were not, and his testimony was not, and his testimony was quite complete. He answered questions about judicial philosophy, generally speaking, about judicial review, about the scope of review, about scope of congressional authority, about statutory construction, about how to look at environmental issues. He went across the board and answered questions.

What he refused to answer were specific

questions. "Do you agree with *Roe v. Wade*? Do you agree with two federal circuit cases on the death penalty? Do you agree or do you not agree with two cases on product liability?" He should have refused. As Lincoln said, "We should not ask nominees for their position on specific issues, and they should not answer. And if they should, we should despise them for it because it would be to compromise the independence of the judiciary for them to commit themselves." And that would be a violation of separation of powers, it would be a violation of the ABA rules.

So, it's not clear to me that ideology is, on the surface anyway, what bothers people about Estrada. I don't really know what it is, but the Senate is entitled to vote on him, and they should. He has a highly qualified rating from the ABA, a record that any one of us would die to have, at Columbia, and at Harvard Law School, and the Solicitor General's Office. Anyone who's served with such distinction for President Clinton and has so much support from many of his top lawyers, Ron

McLean, Seth Waxman, Randy Moss, should be acceptable to the American people. But in any event, let the full Senate vote. I would personally accept the verdict of a majority vote.

Thank you.

MS. ARON: Thank you, Federalist Society, for inviting me here. I'm always pleased to debate and talk with my colleague, C. Boyden Gray. So, it's a pleasure to be here. I think the nomination of Miguel Estrada has everything to do with why we're here, and also why the Senate's role in the confirmation process is so important. We will have a wonderful opportunity to see that role played out over the next couple of weeks.

Let me begin by saying I'm always happy to talk about the federal courts and what judges do because what judges do has such a direct effect on almost every aspect of American society. Federal judges have a huge impact on the quality of the water we drink, the air we breathe, the kind of workplace protections that safeguard working families across America, that have helped people of

color and women end discrimination in the workplace. Federal judges are often the only recourse that American's have for any redress of any grievances. They can't often go to the federal government. They may not be able to go to their member of Congress. But the federal courts are there to help everyone -- not just the rich, but ordinary Americans.

This Administration, however, has a very radical plan for changing that federal judiciary. It has come up with a set of judges and nominees who will turn the clock back on all of the rights and protections that Americans have fought so hard for over the past several decades. These nominees will undermine our civil rights, will restrict a woman's right to choose, attack the rights of workers, and will overturn environmental protections that have been in place for decades.

One nominee, for instance, Jeffrey Sutton -- considered for a seat on the 6th Circuit Court of Appeals -- argued before the Supreme Court that a breast cancer survivor could not sue her state

employer under the Americans with Disabilities Act after being fired by a woman supervisor who said she didn't like sick people at the workplace.

One nominee, Deborah Cook, also nominated to a seat for the 6th Circuit Court of Appeals, decided in her role as a Supreme Court justice that a corporation that exposed its workers to toxic chemicals and then lied about it would not have to compensate an employee who developed lung disease as a result.

And one nominee, Carolyn Kuhl, named for a seat on the 9th Circuit Court of Appeals, was one of two lawyers in the Reagan Administration who argued for the reinstatement of tax-exempt status for Bob Jones University. These are the kind of nominees that this President has put forward.

I will just conclude my opening statement that it is up to the Senate. The Senate is not just some marginal player in this game. The Senate has a co-equal role. A co-equal role to decide to withhold its consent if it believes that a nominee is not qualified. These are not nominees to any

position. These are people who will hold lifetime positions. Look at our current Supreme Court Justice Rehnquist, put on the court by President Nixon. He has been there through seven presidents. Once you put a judge on the bench, they are there for life. Therefore, our Constitution asks the Senate to take on a very important role. That is to use all its care, all its concern, to make sure that the people who become judges are the very best people.

As this debate ensues, it is certainly our view that Miguel Estrada does not merit a lifetime appointment on the D.C. Circuit, the second most important court in this nation. We are calling on the Senate to do the hard thing, but the right thing, which is, in the end, withhold its consent on his nomination.

Thank you.

MR. LEO: I'll throw out a couple of questions to our two speakers, and then we'll open up the floor for questions from the audience.

First, a question about Constitutional

process. The Constitution says that the President nominates with the advice and consent of the Senate. The Senate is not supposed to be a rubber stamp of the President's nominees, and many would also say it was not intended to second-guess each nominee and reinvent the vetting process that one hopes a President undertakes.

So, how do we strike a balance here? What, in your view, are the appropriate parameters for legitimate Senate scrutiny of a judicial nominee? Boyden, why don't you start us, and then Nan.

MR. GRAY: I think certainly we start with integrity and character; that should be a given. But it's not as easy as it might appear on the surface. Then you go to judicial capacity, intellectual fire power, legal ability. Then you go, I think, for temperament. The fourth thing is, and I think it's a legitimate inquiry, "What is the general philosophy of the nominee in question?" Where I think everyone should agree a line should be drawn is committing on specific issues. That, I

think, is and should be off limits. It has traditionally been off limits, and I think it should stay off limits.

MR. LEO: Nan.

MS. ARON: Well, I would certainly agree that you want judges who are of excellent caliber. You want judges of impeccable honesty. You want judges who will be fair, who will be balanced, and I think equally important, you want judges with a demonstrated commitment to equal justice. You want to know that people who are going to be on the federal courts interpreting laws that affect our everyday lives are people who have, as lawyers, done work, contributed to efforts to help people who are underrepresented in society, have a fair shake and equal access to the courts.

And so, therefore, in this particular scheme, where we're talking about judges, you want a judge who will be fair and put his or her own personal views aside and be able to give each party who appears before that judge a fair shake.

MR. LEO: Now, this may get a little

complicated because of the difference between courts of appeals and the Supreme Court and the role the President plays. But let me throw out just a couple of follow-ups here. Let's take some particular questions that a Senator might be able to ask.

For example, would it be appropriate for a Senator to ask a nominee during a hearing, "What are your views of cases such as *Roe v. Wade* or *Brown v. Board*"? Is it appropriate for a Senator to ask about a specific case and that nominee's views about whether that case was rightly or wrongly decided? Boyden?

MR. GRAY: I think at some point, a case becomes so embedded in the life of the country, it's okay to say it's rightly or wrongly decided because that individual is not going to have anything to do about it as a judge. *Brown* certainly is in that category, and I would argue that so is *Marbury v. Madison*, for example.

Roe v. Wade gets more tricky because it's such a code word for a whole tangled set of issues

that are on the periphery that have not all yet been decided, so it's very, very difficult once you get into that. While *Roe v. Wade* is settled law, some issues peripheral to it are not. So, I think that gets into very dangerous territory, anything that's a live issue today. Certainly, equal protection is not; it seems to me the basic questions have long been settled. But certainly, there are issues one has to be careful about.

If you look at the question that was asked of Estrada -- "What Supreme Court case do you disagree with in the last 40 years?" is what they asked him. When I said you can't ask anybody about a case that's recent enough that all the permutations and combinations have not yet been resolved, his detractors said, "Oh, no, no, we're talking about any case going way, way back." And of course, in the congressional debate, people say, "Well, he could have talked about *Plessie v. Ferguson*. What does he think about separate but equal?" But that case was decided a lot longer than 40 years ago. I think any case within the

last 40 years is problematic.

MR. LEO: Nan.

MS. ARON: That's ridiculous. *Roe v. Wade* is one of the landmark cases of the last century. It's the case that gave women in this country -- rich women, poor woman, old women, young women -- the right to believe that the Constitution applied to them, as well as to their male counterparts. Of course you want to know what a nominee thinks about *Roe v. Wade*.

Let me tell you all a little story. That is, when Clarence Thomas was up for his hearing for elevation to the Supreme Court, he walked up to the table, he swore on a Bible he would tell the truth, the whole truth, nothing but the truth, and then he was asked a series of questions about *Roe v. Wade*. To everyone's shock, he didn't have an opinion about *Roe v. Wade*. Moreover, he had never talked about *Roe v. Wade* to anyone, it turned out, even though he was at Yale Law School when *Roe v. Wade* was decided. He didn't really have any view, he said, on the issue, even though his own sister had

had an abortion. Now, this is not to cast doubt on Clarence Thomas's integrity -- although I do need to add that a year later, he joined with Justice Scalia in seeking to overturn *Roe v. Wade*. This is a story to indicate that it is absolutely imperative for members of the Senate to find out what a nominee's view is about such a critical protection as the right to choose. Miguel Estrada, at his hearing, didn't have a view on abortion or *Roe v. Wade* or affirmative action, for that matter, or the rights of immigrant workers to a safe workplace. He had no view on *Romer v. Evans*, couldn't name justices that he admired most or decisions he admired least.

My point is that when you're up for the second most important court in the country, the Senate is not doing its job unless it finds out from people like Miguel Estrada just what their views are.

MR. LEO: But you would acknowledge it's a hard line to draw. Neither of you are suggesting that we would want to predetermine outcomes in

cases during a confirmation hearing, are you?

MS. ARON: No one is saying that you should be able to ask a nominee about a case that is upcoming in the Court. But this is settled law. In fact, these nominees are coached by the White House now, and were coached by the White House during the Reagan and Bush years, when they're asked questions about such issues such as *Roe v. Wade*, to reply, "I will follow settled law." Well, we know from Justice Thomas, and we know from hundreds of other nominees who have gone before that Senate Judiciary Committee, and pledged to that committee, looking each Senator directly in the eye, "I will follow settled law." And the minute they're confirmed, they will do exactly what they want to do.

MR. LEO: Boyden.

MR. GRAY: I find this all so dizzying, really, because when President Bush 41 was elected, we -- Attorney General Thornburg and I -- were asked down to the Hill, where we were read the riot act by Senators Biden and Kennedy and Hatch and Thurmond, Knoeck and Leahy, that under no

circumstances would they even grant a hearing to anyone that they caught as having been asked by the Administration about their views on any specific issue. We said we won't do that; don't worry.

And they sent a Senate questionnaire -- as they have all throughout the Clinton years. Question: Have you been asked about your views on a specific issues? The point being, if you have, you're out, you're finished, if the White House has done this. You cannot do this.

Even if you do, you can't be sure, over the course of a judicial lifetime, whether the person is going to act the way you want them to act. The most famous example, of course, is Oliver Wendell Holmes, who constantly frustrated his former boss, Theodore Roosevelt, who put him on the court. They practically had a total falling out, even though they'd been very, very close personal friends prior to the nomination. The independence of the judiciary is such a central part of the greatness of this country that to mess with it seems to me to be a very, very risky thing.

In a footnote, I would say that, in answer to questions, Estrada has indicated who he admires -- Emalia Kurst[?]; Kennedy, for whom he had clerked; and Justice Powell. He has said who his models are. I don't know where this thing comes that he won't answer that question. He has answered that question.

MS. ARON: Well, I just need to add one thing. Several months ago, a judge on the D.C. Circuit Court of Appeals, Laurence Silberman, I think appeared before the Federalist Society and made the statement that he, in fact, coached nominees and urged nominees to say as little as they could during their hearings. In fact, he talked about the nomination of Antonin Scalia from the D.C. Circuit to the United States Supreme Court and said I told that Scalia, don't you answer those questions; don't say a word. And in fact, Scalia didn't answer any questions, the Senators hushed up, and that was it. He was confirmed without the public or the Senate having the opportunity to know what Scalia thought or believed.

That's exactly what this White House is counting on today, that it's coaching its nominees so that they will say nothing and then, once they become judges, carry out their own personal agendas on the federal bench.

MR. LEO: Boyden, if I could change subjects and ask you a question. There's a lot of fuss about the pace with which nominees are being considered, getting hearings, reaching the floor, getting votes on the floor. How do you respond to the point that the goal post was moved long ago with Republican Senates holding up Democrat nominees, and with some Republican Senators scrutinizing them for ideology just as readily. How would you respond to that charge?

MR. GRAY: I think the numbers show pretty clearly over the three decades or so that both parties have engaged in gamesmanship, if you will, in the final year, before your term ends. Certainly, the Republicans did it to President Carter, even though they weren't in control of the Senate at the time. The Democrats certainly did it

to us, to President Bush 41 at the end of his term. And I will concede, as I have to, that Republicans did it to President Clinton in the fourth -- it slopped over into the fifth -- year, in the middle of his presidency.

There were 29 judicial vacancies at one point -- judicial emergencies, excuse me -- at one point, 1996, 1997, which led the ABA to issue a resolution urging confirmation, similar to the one that the ABA just last August, issued in connection with the current set of nominees.

At the end of the day, however, the vacancies got filled. And in fact, there were considerably fewer vacancies and fewer judges left on the table, as it were, at the end of Clinton's eight years than there were at the end of Bush 41. That's somewhat counter-intuitive, but the numbers are very, very clear. There were fewer vacancies at the end of Clinton than there were at the end of Bush 41. So Clinton, at the end of the day, got his judges through, and the comparisons are always difficult because you can play with numbers.

But what has happened is people have tried to compare the fourth years with the first two, and now three, years, of the Bush 43. That's where the comparison should fall down. What you should compare is apples and apples, the first two and three years, and then compare the fourth year and the fourth year. But the first three years should be on a comparable basis.

What we see currently is an appellate confirmation rate very dramatically lower than President Clinton enjoyed, Bush, Reagan, and Carter.

MR. LEO: Nan.

MS. ARON: Well, these numbers can be a little dizzying. But let me just say -- and then maybe we can agree not to have to talk about numbers anymore -- at the end of the Bush Administration, it turned out that a Democratic Senate confirmed 64 judges, compared to only the 39 judges that a Republican Senate confirmed at the end of Clinton's term.

But you can also look at the numbers in a

different way. That is, at the end of Bush Sr.'s term -- now, there are 13 circuits in the country, and at the end of his term, every circuit, all 13 circuits across the country, were dominated by judges appointed by Republican presidents. At the end of Clinton's eight-year term, only three of the 13 circuits had majority democratically-appointed judges. So, I think that gives you a sense, in terms of the number, in terms of the impact of what those presidencies had on the composition of the federal bench.

MR. GRAY: I don't understand the numbers. I'd like to agree, but I have one response, then we don't have to talk about numbers anymore. President Clinton got his 190 per four-year term. That's what it's come out to for the last three decades. Total, he was only six shy of what President Reagan got. There were nearly 100 vacancies in the federal judiciary at the time that I talked about earlier in response to your question, when there was a slowdown in the fourth year of his first term. But at the end of the

Clinton Administration, there were only 41 vacancies, which were far fewer than there were at the end of Bush 41. So those vacancies largely got filled; you can never catch up completely because the retirements always stay ahead of the nominations.

MR. LEO: Nan, if I could allude to something I mentioned in the introduction today, how do you respond to the suggestion that this is really all just about *Bush v. Gore*, and that Senate Democrats don't really want to recognize the President's authority here? Or, at a minimum, it's about missed opportunities with President Clinton failing to be effective in nominating his own ideologues to the bench, not that they were nominated and not confirmed, but that he didn't pay as much attention to the courts as some people would have wanted, and so now the Democrats in the Senate are trying to cut losses. How would you respond to that argument?

MS. ARON: Well, I would certainly acknowledge that there is a group of law professors

around the country that do believe this President, because he did not win the election, does not have the authority to select Supreme Court justices, and I think that view holds among many.

It's my view that, because this President did not win the election, he does not have a mandate to fill the federal bench with people who will close the door to those who seek access to justice. He does not have a mandate hostile to the rights of most Americans -- all Americans -- in this country. I think, in fact, you know, he will select who he wants to select. Presidents do; that's one of the great privileges and honors of that Office.

My focus is really with the Senate because the Senate has just as much power in our system to say to the President, "We don't like your choices." Senates don't like to do that. They don't like to say no. Senators don't want to be called obstructionists. They like to vote yes. They love to vote for new programs, new initiatives -- they don't like to be in the position of saying

no. But the fact is, this President's nominees are so dangerous to the rights of most Americans that I would hope that this Senate takes its responsibility carefully and does step up to the plate and vote no. And you know what? They're going to have to do it not just once, not just twice, but they're going to continue to have to do it until this President who sends up people who will not be harmful to all the concerns that we all take for granted.

MR. LEO: Boyden.

MR. GRAY: To take Estrada as an example, I challenge anybody to find anything in his record, which is there, there's a lot of record to look at, that suggests he doesn't have solicitude for protection under the law. I don't see any indication that he is anything but perfect for the judiciary. I see nothing that anyone can find in his record to suggest there should be any problem with his confirmation, in any aspect of his jurisprudential views, which are on record for anyone to read.

Having said all that, I guess I'll repeat, if 51 Senators decide to reject him or any other of President Bush's nominees, at the end of the day you can't get judicial review of that, take it into the court saying five voted for the wrong reasons. That's politics. That's the way the system's supposed to work. I'd accept the 51-49 vote. I wouldn't like it. The Democrats might pay a price for it in the next election. We'll see; the public will tell us.

I would like to see the full Senate vote. I don't know where the justification is for insisting on a super-majority for this purpose, and I've not heard Nan try to defend that, but that's what the Democrats are doing. They're going to filibuster in order to deny President Bush's nominees.

MS. ARON: I have to tell you something, Boyden. That is, in 1991, in an interview that you and Jack Quinn had on the John McLaughlin show, you in fact supported the notion of filibusters quite strongly.

After all, I can't think of a better instance where a filibuster is warranted than in the nomination of Miguel Estrada. Here is a man whose own supervisor, when he was in the Solicitor General's Office -- his own supervisor -- said he was too much of an ideologue to be a fair judge. Here's a man who appeared before the Congressional Hispanic Caucus. Now you would think you'd want to be careful in appearing before the Congressional Hispanic Caucus. He wouldn't share his views about affirmative action, on the rights of workers to get fair wages, and benefits, and in fact, he was even disdainful of some of those rights.

In an interview he had with the Puerto Rican Legal Defense Fund, he called the comments of one of the officials at the Puerto Rican Legal Defense and Education Fund bone-headed. Here's an individual who interviewed clerks for Justice Kennedy of the Supreme Court because he wanted to make sure that no liberals clerked for Justice Kennedy. At least two individuals have spoken about the kinds of questions they were asked by

Miguel Estrada during their interview. One was told point-blank by Miguel Estrada, you're too liberal to be a clerk for Justice Kennedy. Now, that doesn't suggest to me or to the very large coalition of organizations that's come together to oppose this confirmation a man who's going to be open-minded, a man who won't allow his personal predilections to interfere with his decision-making. No. This guy, Miguel Estrada, has a very specific agenda.

MR. GRAY: If you read his testimony, he was quite complete on his answers about following *Adarand* and about accepting Supreme Court jurisprudence in the area of affirmative action. I think you can't get too specific in answers to those questions. But he answered all those questions. Presumably, you would have asked follow-up questions if you thought his answers were incomplete. He had fewer follow-up questions than almost any other nominee so far put through the hearing process.

MS. ARON: Maybe I could just ask Boyden

a question because that raises, of course, the issue of -- well, if we're not going to press Miguel Estrada to answer those questions, where were you or where was your Committee for Justice when nominees for judgeships under the Clinton Administration were being called back to one, two, and sometimes three, hearings?

One nominee, Margaret Morrow, who was being considered for a district court seat in California, was asked her personal view on 160 initiatives that were decided by the voters in California. Now tell me -- that is excessive; that is ludicrous. But where was the outrage when men and women who enjoyed bipartisan support for eight years were pummeled the Senate Judiciary Committee with inane questions much of the time?

My favorite question was Senator Sessions, who used to call these nominees up and say, "Now, tell me something, are you now or have you ever been a member of the American Civil Liberties."

MR. LEO: That sounds like a familiar

question, actually.

MR. GRAY: Have you now have you ever been a member of the Federalist Society?

MS. ARON: No one asks that; they probably should. But they don't have to because all the nominees are members of the Federalist Society. They wouldn't need to.

MR. LEO: Okay. I think we set the table sufficiently, so why don't we open it up to questions from the audience.

AUDIENCE PARTICIPANT: I have a question for Nan Aron. I was confused by two things that you said that seemed to be inconsistent. You said several times, if necessary, let the Senate, full Senate, vote no if they disapprove. I agree with that completely. But then, you seemed to say don't let the Senate vote at all because the majority of the Senate will approve Estrada and other nominations of the President. So, you seem, on one hand, to advocate the democratic solution -- let the full Senate vote up or down. But then, you go to the anti-democratic solution, which is don't let

the Senate vote at all. And as we know, the Appointments Clause of the Constitution requires a simple majority vote, not a super-majority. So, I wonder how you reconcile your democratic and anti-democratic impulses.

MS. ARON: I guess I would start by saying I don't view one as more democratic than the other. I don't deem a vote on the merits more democratic than a filibuster. I can't imagine a more important opportunity for the Senate now to be filibustering this nomination. And I think the Senate should continue to filibuster Miguel Estrada's nomination mainly because he has stonewalled before the Committee. He's refused to answer questions. He's refused to hand over six years' worth of memoranda he wrote at the Solicitor General's office.

It is my view that this is such an important court to which he is being considered that the Senate needs to have all the information before it to make up its mind. And I don't think the Senate has all the information. Once they do,

I certainly will work to see that his nomination is defeated by the full Senate. But at this point, the Senate does not have that opportunity to make that determination.

MR. GRAY: He's got a fairly sizeable track record -- 45 briefs or so, 15 oral arguments, a full day of testimony. I don't know what more you would want. You want his internal memoranda from the Solicitor General's Office; that would set a terrible precedent. That's never been done before. All living former Solicitors General have opposed it, including the Democratic Solicitor Generals.

His briefs do reflect, however, what he does. It's like a judge's opinion. And I certainly don't think anybody would say, "Well, gee whiz, let's get the early drafts of every opinion", any more than we would demand of the media first drafts of your stories before it went into the editing process. What's the point of that anyway? What you want to see is the finished product.

If you're worried about what the

spontaneous Estrada is like, go and read his oral arguments. Go and re-read his testimony, where he did answer, Nan, a dozen or so questions about judicial philosophy on a range of topics from the scope of judicial review, to the scope of congressional authority, to a general approach to questions of the environment and affirmative action. He was quite discursive on those issues. What he didn't give, as I said in my opening remarks, was a specific answer to a specific questions about, do you agree with two cases involving the death penalty, do you agree with protective orders in product liability cases in the following contexts? Those were too specific for him to answer and he didn't. He properly didn't.

MR. LEO: Question back there.

AUDIENCE PARTICIPANT: This question is primarily for Mr. Boyden Gray, but I'd also love to hear Ms. Aron's take on the issue.

A key role of the D.C. Circuit is to decide cases that interpret federal statutes on the environment, worker's protection, and civil rights.

With that in mind, isn't it fair for potential judges who might sit on this court to say how they stand on these federal statutes, especially set-in-stone statutes like the Clean Air and Clean Water Acts? With an Administration that's working to weaken our clean air and clean water-enforced protections, I would say it's more important than ever to know where our justices stand on these important issues.

MR. GRAY: To repeat for the third or fourth time, he can't talk about a specific case. He was very, very clear in answers to questions of this very kind in his hearings that he would defer in the area of the environment. He felt that congressional legislation was due a very high degree of deference. So, I don't think he's going to go upsetting and undermining congressional jurisprudence.

The D.C. Circuit, as you probably know, adheres more closely to the so-called *Chevron* Doctrine than probably any other circuit court, and I think he was expressing complete adherence to the

approach that case sets out, which says all doubts go to the agency and to the Congress. You know, it's not the judge's job to redefine what the statute meant.

MS. ARON: I guess I would say that statutes like the Clean Water Act, the Clean Air Act, worker protection statutes, are among our most proud accomplishments over the past decade. There's just no question about it. They are a critical mark in our society's advance, in terms of protecting Americans across the country.

You know, when George Bush ran for the presidency, he didn't say, "Huh, as President, I'm going to overturn that Clean Water Act, and that Clean Air Act" Down the toilet it goes; Americans with disability, senior citizen statutes, "I'll have nothing to do with it." He didn't say any of that, and of course, he couldn't say any of that. He wouldn't have gotten many votes.

But what he's done is more insidious, it's more cynical, it's more underhanded. That is he has appointed nominees who will ever so quietly,

once they're confirmed to be judges, they will interpret those laws, those wonderful accomplishments and achievements in such a way as to overturn them. And therefore, this strategy doesn't get half the amount of the attention it deserves to get because people are focused, as they should be, on environmental laws and consumer laws and worker safety laws. But the fact is, in appointing judges like Jeffrey Sutton, like Deborah Cook, like Carolyn Kuhl and like Miguel Estrada, you are engaging in a very secret program to overturn the very enactments that people have spent so long trying to get Congress to adopt.

AUDIENCE PARTICIPANT: I have a quick question about the nomination of Jeffrey Sutton. In law school, law students are taught that everyone deserves competent legal representation, whether it be an accused rapist or a death row inmate or whoever. My question, I guess, is, when considering the judicial nominee, should we consider arguments they make on behalf of their clients, and should we equate those arguments on

behalf of clients as their personal views?

MR. GRAY: A lawyer's duty is to represent his client. A lawyer, of course, in most cases has the opportunity to decline to take on a client. Certainly, I have. So, to some extent, you can take those arguments into account. And of course, in terms of an individual's own commitment to the rule of law, you can see over the long haul of a person's private practice, has he done pro bono cases. Jeffrey Sutton certainly has done more than his fair share, and I think has taken unnecessary hits for his supposed views on the Americans with Disabilities Act, when he has personally defended several alleged victims of discrimination, and sought their vindication through the ADA itself.

MS. ARON: Well, I think the case of Jeffrey Sutton is a very interesting one because with Jeffrey Sutton, it's not simply a question of one or two cases that he handled on a pro bono basis.

Jeffrey Sutton, a lawyer at Jones Day in

Cincinnati, Ohio, has been the architect of a theory -- not just a mere player or a lawyer taking on a case on occasion -- he's been the leading voice, an architect of a theory known as federalism, which asserts that congressional enactments, laws that Congress passed, shouldn't be upheld by courts as they apply to women who are victims of domestic violence, as they're applied to environmental plaintiffs, as they're applied in the case I mentioned to persons with disabilities.

He attempted at his hearing to disavow his participation in this movement known as the federalism movement. But in fact, he was interviewed in a newspaper a year or two ago as saying, in fact, that he embraces the notion of federalism. Well, if played out, all the laws -- the enactments passed by Congress -- in Jeffrey Sutton's world, would have no place in American society whatsoever. And he has argued case after case in the Supreme Court. He has written briefs. He has spoken at conferences, putting forth the view that Congress has no authority or power to be

enacting such important laws.

I think Jeffrey Sutton is not the kind of person we want on the 6th Circuit Court of Appeals, who's going to decide our rights and protections under hundreds of statutes that have been passed.

MR. LEO: Yes.

AUDIENCE PARTICIPANT: Since we're on Jeffrey Sutton, the ADA cases that he argued were based on 11th Amendment jurisprudence. And I guess basically my question is, then, do you think the 11th Amendment is dangerous?

MS. ARON: No, I certainly don't. But his views are also based on the Commerce Clause. But I certainly don't think the 11th Amendment is dangerous. I think his views spring much more from a desire to strategize a way to overturn important congressional enactments, and the 11th Amendment has been found by Jeffrey Sutton and his cohorts as a convenient method for doing so.

MR. GRAY: Let me make a point, I think, of clarification about the Americans with Disabilities Act. The implications from the

questions and answers here are that he's somehow gutted the ADA and said that people can't recover, people can't sue, people can't get reimbursed, people can't get the jobs that they were denied.

That's not what the principal ADA case actually involved. What it involved was not whether anyone could sue for discrimination against most employers. The question was, could a disabled person sue for damages against a state as the employer? What he argued, and won, was that they could get reinstatement or the could get their job back or they could get the job, but what they couldn't get from the state were damages. And I think it's more than a footnote that the Americans with Disabilities Act itself contained no provision for damages. Back pay; get the job that you were denied in the first instance; but the damages part was added later by the Civil Rights Act of 1991. That's, I think, more than just a simple footnote.

MR. LEO: Over here.

AUDIENCE PARTICIPANT: Again, regarding Mr. Sutton. It's been said here today that

ideology doesn't matter and shouldn't matter. And the question to both panelists is why do you think so much energy was put into Mr. Sutton's testimony and his supporters' statements to deny his history? Again, it is common knowledge in Washington, and certainly common knowledge in the Federalist Society, being that Mr. Sutton is an active officer of the Federalist Society, that he's a states' rights leader. Yet, the drumbeat has been that he's just representing clients.

In fact, it's in his personal writings where he has proven himself to be an ideologue, proven himself to be against federal protections not only for disability but for women, for the aged, and many other average Americans. My question is, with this whitewashing, with this denial of his activism, when does it become an issue of character? When does it become an issue of judicial temperament, when so much energy is put into denying one's past?

MS. ARON: I think we saw a little bit of that during the 1987 hearing of Robert Bork, who

was up for a seat on the Supreme Court. Here was an individual who had a huge amount of writings and speeches. He had been the proud promoter of views such as state's rights, the doctrine of original intent. And all of a sudden, he appeared before the Senate Judiciary Committee and, each day of his hearing, seemed to run away from that record more and more. Well, I think that's a very convenient tactic taken by nominees for federal judgeships.

They do one of two things. Those are people who do have very large records. One is, they change and begin to tell a very different story of what they've been doing. I think that's very much the case of Jeffrey Sutton. Or, in the case of Miguel Estrada, you simply don't say anything at all, and you hope, with every last breath you have, that the Senate will give you a pass, no matter what.

And so, I think we see two strategies being played out before this committee right before our very eyes. Again, I go back to the role of the Senate. That is, these Senators don't want to say

no. Some of them couldn't be bothered. They don't want to have to look at this person's record. They don't want to have to be bothered talking to these people or meeting with those people or reading through hundreds of decisions or law review articles. But the fact is, our Constitution requires these Senators to do that. And these Senators, at least all but one of the Democrats on the Senate Judiciary Committee, said to Jeffrey Sutton, "I don't believe you. I don't believe your changed story and your changed circumstance. You don't get a passing grade from me." And I'm hoping that when the full Senate considers his nomination, they will reach that very same conclusion.

MR. GRAY: I hope the full Senate does vote. I hope it's an up or down vote of the full Senate, and not a filibuster, that determines his nomination.

MR. LEO: Yes.

AUDIENCE PARTICIPANT: I think it's possible that many Americans find the whole notion of politics either in the Senate or in the White

House side, abhorrent to the selection of judges. Maybe they're naive. But I think many people find all of this, the ideological screening that goes on, contemptible in a pretty important way. And by the way, this seems relatively new. It's not a controversy that used to go on, at least, throughout American history. Is there a way for people of good faith and good intentions to work together to come up with a process for selection and confirmation of judges that is less politically influenced and less contentious, without undermining the powers of either the President or the Senate under the Constitution? Is there a way to find a way out of this morass, where there's less obvious political influence?

MR. LEO: Boyden.

MR. GRAY: As I said in my opening remarks, I think what we're in now is just a whole new escalation, a whole different ballgame. You can't take politics out of it. The President's going to do what the President's going to do, and I do believe the full Senate will do what the full

Senate will do, and you'll never be able to figure out exactly why or explain exactly why. Historians will argue, journalists will argue, politicians will argue, why a Senate vote went the way it did.

What's happening here, though, is now the use of a filibuster, and that's a brand-new ballgame. I just don't think that's correct. It's based on perceptions about ideology, which I think are very, very illegitimate to begin with, but never very reliable in the long run in any event. The Constitution provides that the President has the call in who he nominates. If the full Senate wants to reject, that is the full Senate's prerogative. But let's see what happens with the full Senate.

There are so many tails, of course, of politics in the selection process, I just don't think you're going to find some way of saying, all right, let's have a joint Presidential/ Congressional commission to come up with recommendations for judges. I just don't think anything like that would ever work. But I think

the system has worked for 200-plus years, with presidents making the basic call and when they've nominated people who cause difficulty beyond the public's ultimate willingness to accept, there were in fact rejections. But they've been very, very infrequent, and I hope that this process that we're now embarked on is not pursued.

MS. ARON: I think I pretty much agree with Boyden on that. When you look over history, one out of every five nominees to the Supreme Court didn't make it. In fact, George Washington's own nominee, the first nominee to the Supreme Court, didn't make it because of a bad vote he had cast on the Jay Treaty. But having said that, I think, in fact, the Constitution creates a framework by which there will at least be two parts of government that have some say in this.

But having said that, when you look back on the Clinton Administration and the eight years of its judicial selection, this was an administration that charted a pretty centrist course for its judges. Time and time again, you

never saw a nominee to any court -- any nominee -- that didn't have the explicit endorsement of Orrin Hatch. And sometimes we didn't like the fact that President Clinton was checking with Orrin Hatch on all of his nominees. Nevertheless, no one was ever sent to the Committee who didn't have his endorsement -- some endorsement; a tacit endorsement, even.

I should just add that, even then, with his okay, look at the pummeling that Clinton's nominees took from the Republicans for those eight years. I mean, you talk about Estrada, oh, my goodness, his story doesn't begin to compare to stories of some of Clinton's nominees.

Richard Paez, up for a seat on the 9th Circuit Court of Appeals. He waited longer than any other nominee in modern history to be elevated to the 9th Circuit. Four years it took him to move from the district court to the court of appeals. And he's just one of several nominees who simply didn't move.

I would say the Republicans didn't even

need a filibuster for the eight years of the Clinton Administration because they blocked so many judges, they wouldn't give nominees hearings before the Senate Judiciary Committee. John Ashcroft, our current Attorney General, was the guy of anonymous holds for eight years. Oftentimes there would be a nominee and there's be a hold placed on that nominee, and you never knew who put that hold on. You knew, after a while, it was John Ashcroft. And remember, these were nominees who were sent out by an administration that had already gotten the okay from some of the Republicans.

So, we're not even talking filibusters during Clinton because many of these qualified candidates never even made it out of committee. That's the sadness of this whole thing. And of course a filibuster is necessary right now. The filibuster is the only way in the United States Senate to say no to a majority. And in a case of such importance, like a federal judgeship, you want these Senators to employ a filibuster. It's the only way they have to express their view.

MR. LEO: I thought the previous question was interesting. It brings to mind something I was going to mention earlier. This is a somewhat recent phenomenon, relatively speaking. With increasing frequency, we see more acrimonious exchanges in the Senate on judicial nominees. I wonder to what extent that is a function of either the role that courts now play in society or what various political constituencies expect of the courts. The charitable view would be, that, we have a lot more federal law, and so judges need to be more involved. And the less charitable view would be that political liberals can't get what they want from the political institutions, so they go to the courts.

But it seems to me that however you want to slice it or characterize it, the stakes, to many, just maybe seem higher today, and maybe that's contributing to the intensity with which people are focusing on the courts. I'm curious whether in the battlefield you sense that.

MR. GRAY: Let me take a stab at that. I

do believe that the left of center views the courts as an avenue to get things that they can't get through the legislature. To me, the best example is tort liability, which has now become a form of regulation by litigation, which even has the *Washington Post* nervous, because a lot of these regulations are occurring outside their service area, as it were, and are not subject to as much scrutiny and influence as they would like to have. They can have it over a jury in the District but not over a jury in Dubuque, not being a national newspaper.

But all kidding aside, the role of the trial lawyer and trial money in this whole process has become a little bit puzzling. What happened at the federal level is, over the course of time, with 12 years of Reagan and Bush judges, the appellate judiciary has tightened up considerably on the application and operation of Rule 23, which is the class action rule that permits the amassing of these huge mass tort claims against defendants, which cannot be defended because the risks of

defense are too great.

That is an area where I think trial lawyers would love to see more accommodating judges appointed to the federal judiciary. And that is an example of where the fight over what is really a legislative prerogative is being fought out in the judiciary, and we ought to be very, very careful about that.

MR. LEO: Nan, I'm also curious about your thoughts on this.

MS. ARON: I'm not sure I've ever known any time recently where the American Trial Lawyers Association has ever weighed in on a nomination. But I do think, and I would agree with you, that the issue has received a lot more public attention and scrutiny over the past two years.

When George Bush came into office, he did something that we didn't see much of during the Clinton Administration. And that is, almost right from the beginning, he set out to make judgeships an important part of his overall agenda. He assembled a small group of lawyers, mostly from

this organization, the Federalist Society, brought them into the White House, and he quickly scheduled a series of interviews with nominees. In fact, press reports at the time were that the nominees were coming in during the day, during the night, round the clock, so that this Administration could really hit the ground running on implementing its judicial selection program.

The other thing this Administration did, which was really unheard of and quite radical, is it basically threw the American Bar Association out of the process. I love to hear Orrin Hatch refer to ABA ratings as the gold standard. These are the very ratings that Orrin Hatch and some of his colleagues ran from. "The ABA is a terrible organization." And now, of course, they tout those ratings as the gold standard.

But what Bush did was exclude the American Bar Association and marginalize its role, so that the name given to the American Bar Association is not given to the ABA before the nomination is made so that lawyers could really

weigh in on the process. The name is sent to the ABA after the nomination is made. And therefore, it's of very little value, and the lawyers who are called by the ABA have very little inducement to give any view at all.

So, this President came in, excluded the American Bar Association, assembled its team, and then held a press conference at the White House, at which it very proudly and publicly paraded its nominees before the camera. I think this upped the ante. And of course, the nominees that appeared at the White House were the Jeffrey Suttons, were the Carolyn Kuhls, were people who stood for the hostility that this Administration feels towards environmental, consumer, and civil rights laws and constituents.

So, in fact, it has been a very, very public issue right from the beginning for this Administration. And of course, it will become even more public, and even greater scrutiny once there is a vacancy from the Supreme Court. Then I think everyone knows what this game is about, and what

hopes this Administration has to achieve in picking a likely justice on the Supreme Court.

MR. LEO: Question. Right up front.

AUDIENCE PARTICIPANT: This question is for Boyden. I wonder if you can tell me your reaction to Republicans accusing Democrats of being racist with the Miguel Estrada nomination, especially in light of all the "I'm a really qualified Clinton nominee that never got a hearing," such as Jorge Renhow and Enrique Moreno.

MR. GRAY: I'm not familiar with those earlier nominations. As far as I know, I think President Clinton got 11 Hispanics to the bench, which is the highest of any administration up until then. In Bush 41, we had a lot of potential nominees that we wanted to pursue but they were just a bit too young. Now, of course, they're of a good age.

I don't know what's going on with Estrada. The scuttlebutt is he's being opposed now because the Democrats are nervous that it would be very hard to defeat him in a Supreme Court

nomination context because he is Hispanic. So, they try to deny him that validation that he would get by going on the court of appeals. I think that's kind of targeting, in a sense, because he is Hispanic. While I can understand the motivation for it, I just think it's wrong and I think the full Senate will not uphold that theory, if allowed to vote.

MS. ARON: Well, I guess I would say that there have been many, many in Congress and the Senate Judiciary Committee who have charged that the Democrats are anti-Latino by engaging in this filibuster. And I think such a charge couldn't be farther from the truth. His race has nothing to do with his qualifications.

Where were these Senators, where was the Committee for Justice, when Enrique Moreno and Jorge Ronhow were not given hearings? Two individuals who had bipartisan support, considered for the 5th Circuit, never even given a hearing by the Senate Judiciary Committee. Where were these Senators when Sonya Sotomayer, originally a Bush

nominee to a district court, seeking elevation to the 2d Circuit -- where were they when she had to wait 15 months for her elevation? Where were these senators? Where is Orrin Hatch, who has made this outrageous allegation, when Christine Arguello, up for a seat on the 10th Circuit, never ever got a hearing? And that's a mere handful of the people of color who were simply put aside and blocked from ever getting judgeships during the Clinton Administration. Where were all these people who now charge the Democrats of being anti-Latino?

MR. LEO: Yes, right there.

AUDIENCE PARTICIPANT: Ms. Aron, you seem to rely on the confirmation process to accomplish what Congress can do through other means. For example, if Congress wants to protect individuals, they can expand federal court jurisdiction, create new federal causes of action, and if they don't like the way a judge is behaving, they can simply impeach him. Is this not evidence of weak political will?

MS. ARON: I can't think of -- I guess I

can. I can think of the last time a judge was impeached, but it's more than ten years ago. And these are for high crimes and misdemeanors. It's almost impossible to impeach a federal judge for the commission of a high crime and misdemeanor. And what I always found quite amusing was statements by people like Tom Delay in the House. Any time a judge issued a ruling with which he disagreed, the Delay would be right on the floor of the House saying "impeach that judge". It's not done, and it shouldn't be done unless there's a real valid reason for that to occur.

Congress isn't about to expand in large causes of action. You know that; I know that. This is not a Congress that necessarily, at least with a majority party, sees its role as expanding its capacity to meet the needs of the people of this nation. And neither house sees this role as its role. Therefore, I think that that notion would simply fail, given the current makeup in leadership in both the House and Senate today.

MR. GRAY: I hope you're not suggesting

that because the majority party, in your view, won't expand rights, the court should do it?

MS. ARON: No. But I say that the courts are there to interpret those rights and interpret those statutes. And certainly, you want to have courts that do it in a way that respect and respond to what Congress is doing, not simply overrule what it's done.

MR. LEO: Final question.

AUDIENCE PARTICIPANT: This question is for Mr. Gray. I just wanted to know, although the Constitution doesn't seem to distinguish between the two, should appeals court judges be subject to the same scrutiny and judged by the same standards as judges who are nominees for the Supreme Court?

MR. GRAY: My own personal view is, not having checked my answer with Leonard -- no, my own personal view is that there is a difference. An appellate judge is bound by Supreme Court precedent, and therefore can't change it. And therefore, you can probably defer more to a president in that case. A Supreme Court nominee is

different because a Supreme Court nominee has the capacity to affect more law. But whether or not I would agree with that is irrelevant. That, in fact, is the case. In fact, Supreme Court nominees do get closer consideration, and that's inevitable and probably unavoidable.

To bring it back to the case of Estrada, the irony is that the Democrats feel that once he got seasoning on any court, but certainly the D.C. Circuit would be an adequate court, it's almost like the AAA farm team, that you couldn't defeat him. If he were in the full glare of a public examination of the kind that normally accompanies the Supreme Court nomination, he would get confirmed and you couldn't stop him, so you've got to stop him now when no one's looking.

It's like one of the people yesterday at a press conference we had said: that, for the run-of-the-mill appellate nominees, certainly for a district court nominee, for most of the public, an appellate court's no different than a tennis court. I that's overstating it, but there's a certain

amount of truth in that. Now, the Supreme Court's different. The Supreme Court is definitely different, but that is the irony here. If Estrada were being nominated for the Supreme Court, the irony is that he'd probably be confirmed far more quickly.

MS. ARON: Just let the record reflect that was someone at his press conference, not our press conference. But if I could, I certainly think working people know the federal courts. I think citizen groups who care about the environment and our consumer laws, they certainly know what a federal court is. Persons with disabilities, senior citizens, young people -- they certainly have needed the forum of the federal courts.

Having said that, let me just say that I certainly hope that the two years of debates that we've had over appellate court nominations has served to educate all of us to the need to give appellate court nominees the same scrutiny as we would a Supreme Court nominee. After all, the Supreme Court used to hand down about 150 decisions

a year. Now, the court hands down about 74 or 75. And, if you look at the current makeup of the Supreme Court, you'll notice that almost all -- I think it's seven of the current justices -- came from the courts of appeals. So, given the fact that these judges are really making the law of the land in so many important aspects, I think it's incumbent to apply the same very stringent standards to them as the Senate would apply to a Supreme Court nominee, and I'm glad to see that many of the Senators both on the Committee and the Senate, I think, appreciate the role that they are being called upon to play.

MR. LEO: Those of you who follow "Happenings" here in Washington know that the confirmation battle over Miguel Estrada has been quite pitched and emotional, and I think it's a real credit to our speakers here today, and to our audience, that we were able to have a serious and civil exchange about not just that particular nomination but also the proper role of the Senate in the confirmations process.

Please join me in thanking our speakers.

(The panel was concluded.)