

Why Have a hearing at all?

Memorandum

June 21, 2002

TO : Senators Kennedy, Schumer, Durbin, and Cantwell

FROM : [REDACTED]

SUBJECT : Strategy on Judges

In advance of the Judiciary Democrats' meeting on Tuesday at 2:15, below is the strategy regarding judges that we recommend that you suggest to Senator Leahy.

1. Cancel or Reschedule Deborah Cook, 6th Circuit nominee. Senator Leahy is suggesting that a hearing for Deborah Cook be scheduled for August 1st, and, Senator Leahy may have promised Senator DeWine that he will hold a hearing for Cook this year. Cook is extremely controversial on labor, employee rights, and right to jury issues and should not have a hearing this year. If Senator Leahy has indeed promised DeWine a Cook hearing, we suggest that he schedule Cook for after the November elections. Given our schedule of controversial nominees (see below), it will be difficult to mount any effective challenge to Cook if she is scheduled for early August. We recommend that Reena Raggi (2nd Circuit) be scheduled for early August instead of Deborah Cook.

2. Limit the Number of Hearings
Senator Leahy has promised hearings for Priscilla Owen, Miguel Estrada, and Michael McConnell. Other than these nominees, and the two remaining non-controversial nominees Reena Raggi (2nd Circuit) and Jay Bybee (9th Circuit), no additional judges should be scheduled.

3. Timing of Hearings
Owen. The consensus is to make Priscilla Owen the big fight for July 18th, as Senator Leahy has suggested, with the hope that we will succeed in defeating her.

Estrada. Miguel Estrada will be more difficult to defeat given the sparseness of his record. We agree with Senator Leahy that Estrada should be scheduled for September 19th. This will give the groups time to complete their research and the Committee time to collect additional information, including Estrada's Solicitor General memos (see below).

McConnell. McConnell will also be difficult to defeat. While he has a clear anti-choice record, he has the strong support of some Democrats and progressives. McConnell's clear anti-choice record, however, makes him a good nominee to bring up before the November elections. While Senator Leahy has suggested that a hearing for McConnell be scheduled on October 3rd, we would suggest October 10th, to provide enough time for preparation after the difficult Estrada

hearing.

Suggested Schedule:

July 18th: Priscilla Owen - 5th Circuit
 August 1st: Reena Raggi - 2nd Circuit (non-controversial) —instead of Cook.
 September 5th: Jay Bybee - 9th Circuit (supported by Reid)
 September 19th: Miguel Estrada - D.C. Circuit
 October 10th: Michael McConnell - 10th Circuit

4. **Obtaining Estrada's Solicitor General's Memos**

Senator Leahy took the important first step of asking for Memoranda that Estrada produced while working at the Solicitor General's Office. Unfortunately, the Department of Justice has refused to turn over the memos, and Senator Leahy has been harshly criticized for this in the Press (two pieces in the Washington Post alone). We expect the Administration will continue to fight any attempt to turn these over, but there is precedent for getting these Memos—it was done for the Bork nomination and three other lower court nominations. We suggest that you encourage Senator Leahy to continue fighting the Administration for these Memos and, if possible, that one of you help him in this fight.

U. Michigan scandal

Memorandum

TO :

SENATOR (Kennedy)

Bag

April 17, 2002

FROM :

SUBJECT :

Call from Elaine Jones re Scheduling of 6th Circuit Nominees

Elaine Jones of the NAACP Legal Defense Fund (LDF) tried to call you today to ask that the Judiciary Committee consider scheduling Julia Scott Gibbons, the uncontroversial nominee to the 6th Circuit at a later date, rather than at a hearing next Thursday, April 25th. As you know, Chairman Leahy would like to schedule a hearing next Thursday on a 6th Circuit nominee because the Circuit has only 9 active judges, rather than the authorized 16. (These vacancies are, as you know, the result of Republican inaction on Clinton nominees). Senator Leahy would also like to move a Southern nominee, and wants to do a favor for Senator Thompson.

Talk about political!!

Elaine would like the Committee to hold off on any 6th Circuit nominees until the University of Michigan case regarding the constitutionality of affirmative action in higher education is decided by the en banc 6th Circuit. This case is considered the affirmative action case most likely to go to the Supreme Court. Rumors have been circulating that the case will be decided in the next few weeks. The thinking is that the current 6th Circuit will sustain the affirmative action program, but if a new judge with conservative views is confirmed before the case is decided, that new judge will be able, under 6th Circuit rules, to review the case and vote on it.

LDF asked Senator Leahy's staff yesterday to schedule Richard Clifton, an uncontroversial nominee to the 9th Circuit, before moving Gibbons, but they apparently refused. The decision has to be made today (or by early Thursday morning) since the hearing will be noticed on Thursday.

[redacted] and I are a little concerned about the propriety of scheduling hearings based on the resolution of a particular case. We are also aware that the 6th Circuit is in dire need of additional judges. Nevertheless we recommend that Gibbons be scheduled for a later hearing: the Michigan case is important, and there is little damage that we can foresee in moving Clifton first. (It should be noted that Clifton was nominated three months before Gibbons and that Clifton's seat, and not Gibbons', has been designated a judicial emergency.) Elaine will ask that no 6th Circuit nominee be scheduled until after the Michigan case is decided. This may be too much to promise: we only have three uncontroversial circuit court nominees left and two of these are from the 6th Circuit.

Recommendation: Let Elaine know that we will ask Senator Leahy to schedule Gibbons after Clifton. Given the dearth of uncontroversial nominees, however, the Committee will probably have to hold a hearing for Gibbons on May 9th even if there's yet no decision in the Michigan case.

Influence of special interests

P.06

Memorandum

TO : SENATOR (Kennedy)

BAG
June 4th, 2002

FROM : [REDACTED] and [REDACTED]

SUBJECT : Meeting with Groups on Judges - Wednesday, 11:50am

As you know, the meeting with the groups to discuss the strategy on judicial nominations is scheduled for tomorrow at 11:50. Both Senator Schumer and Senator Durbin will be able to attend. The six principals who will attend are: (1) Wade Henderson, (2) Ralph Neas, (3) Leslie Proff of the NAACP LDF, (4) Nancy Zirkin, (5) Nan Aron, and (6) Kate Michelman. It turns out that neither Marcia nor Judy can make it tomorrow - Marcia has a board meeting and Judy, a family emergency.

We expect that the agenda will include a discussion of: (1) delaying a hearing for Dennis Shedd, a nominee to the Fourth Circuit, who Sen. Leahy would like to schedule on June 27th; (2) which circuit court nominees should be scheduled prior to adjournment; and, (3) our next big fight.

Schedule

At present, there is only one noncontroversial circuit court nominee (with a complete file and blue slips) who has not already been scheduled for a hearing. This nominee is John Rogers (6th Circuit), who Senator Leahy will likely schedule for a hearing on June 13th. In addition, there have been two recent nominees to the 2nd Circuit and to the Ninth Circuit, whose records are now being researched, and who may prove to be noncontroversial.

Senator Leahy would then like to schedule Dennis Shedd on June 27th, Judge Priscilla Owen after the July 4th recess, and Miguel Estrada in September.

The groups should be encouraged to propose some specific nominees who can be moved forward before adjournment. Clearly, there are few nominees who are noncontroversial, but the groups should be pushed on whether they would agree on a hearing for some controversial nominees such as Steele, Tymkovich, or Michael McConnell (for whom Leahy has already promised a hearing), on the theory that these nominees are less problematic than others.

Shedd

Senator Leahy has told the groups that he would like to have a hearing on Dennis Shedd this month. Senator Hollings is supportive of Dennis Shedd's nomination and is, reportedly, pressuring Senator Leahy to move forward on a hearing. The groups have strong concerns about Shedd. He is quite bad on civil rights and federalism issues, and he has hundreds of unpublished opinions that have not yet been reviewed. The groups are opposed to having a hearing on him this month in part because they do not believe that they will be able to do an adequate review of

his extensive record by June 27th, particularly given that they are gearing up to oppose Judge Owen. (1)

We believe that you should hear the groups' concerns regarding Shedd, but that you should strongly encourage the groups to work with South Carolina groups and individuals to apply pressure on Senator Hollings. We know that some of the groups, including LCCR and the NAACP will meet with Sen. Hollings on Thursday regarding Shedd, but more pressure will likely need to be applied because Sen. Hollings is quite committed to moving Shedd this month.

Recommendation: Encourage groups to work with South Carolina groups to influence Sen. Hollings.

Our Next Big Fight

The current thinking from Senator Leahy is that Judge Owen will be our next big fight, after July 4th recess. We agree that she is the right choice - she has a bad record on labor, personal injury, and choice issues, and a broad range of national and local Texas groups are ready to oppose her. The groups seem to be in agreement with the decision to move Owen in July.

Recommendation: Move Owen in July. ↑

cc: [REDACTED]

MEMORANDUM

To: Senator Durbin
 From: [REDACTED]
 Date: June 5, 2002
 Re: Meeting with Civil Rights Leaders to Discuss Judicial Nominations Strategy
 Thursday, June 6, 5:30pm, Russell 317

Senator Kennedy has invited you and Senator Schumer to attend a meeting with civil rights leaders to discuss their priorities as the Judiciary Committee considers judicial nominees in the coming months. This meeting was originally scheduled for late Wednesday morning.

This meeting is intended to follow-up your meetings in Senators Kennedy's office last fall. The guest list will be the same: Kate Michelman (NARAL), Nan Aron (Alliance for Justice), Wade Henderson (Leadership Conference on Civil Rights), Ralph Neas (People For the American Way), Nancy Zirkin (American Association of University Women), Marcia Greenberger (National Women's Law Center), and Judy Lichtman (National Partnership).

The meeting is likely to touch upon the following topics:

- Their floor strategy for opposing D. Brooks Smith, who was voted out of Committee 12-7.
 - Their concerns with Dennis Shedd, a controversial 4th Circuit nominee from South Carolina. Under pressure from Senator Hollings — who apparently is backing Shedd because the trial lawyers want him off the district court bench — Chairman Leahy is planning to hold a hearing in late June. The groups would like more time to read through Shedd's many unpublished opinions, which were only recently provided to the Committee, and to request court transcripts. Based on a preliminary review, this nominee poses a number of problems: he has narrowly interpreted Congress's power under the 14th Amendment (in one instance, he was unanimously reversed by the Supreme Court); he has a long track record of dismissing civil rights claims; he once revoked indigent status for a litigant who used her mother's computer and fax machine to file pleadings; and he has made insensitive comments about the Confederate flag. ✓
 - The Judiciary Committee's schedule for the summer and fall. In spite of the White House's intransigence, the Committee continues to schedule hearings at a rapid pace — every two weeks through the end of the session. Bruce Cohen has outlined the following schedule:
 - June: Rogers (6th Circuit-KY); Shedd (4th Circuit-SC)
 - July: Owen (5th Circuit-TX); Rzaqi (2d Circuit-NY)
 - Sept: Estrada (DC Circuit); possibly Bybee (9th Circuit-NV) (backed by Reid)
 - Oct: McConnell (10th Circuit-UT)
- Leahy has effectively promised that Owen, Estrada, and McConnell would get hearings this year. Like Shedd, these three will generate significant opposition and controversy. The groups feel that Owen is vulnerable to defeat, but Estrada and McConnell will be hard to vote down in Committee.

• The White House's unwillingness to compromise. On NPR this week, White House Counsel Alberto Gonzalez said:

I'm not sure this [judges] is an area where there should be a great deal of compromise on principle. Regrettably, . . . we may have to be patient and wait to see what happens in the November election. And that may be viewed as a sort of crass political assessment but that is in fact true. One way to get this thing moving is to take back the Senate so that we can at least get our judges onto the full Senate floor.

At the moment, a number of Democrats — Edwards, Graham, Nelson (FL), Levin, Stabenow — are in stalled negotiations with the White House over judges.

MEMORANDUM

June 12, 2002

TO : SENATOR (Kennedy)

FROM : [REDACTED]

SUBJECT : Judges - Schedule for the Year & Chaining A Hearing

I. Schedule for the Year and the Shedd and Cook Problems

As you know, during your meeting with the groups, you and Schumer discussed approaching Leahy regarding the Shedd hearing. You proposed telling him that because of the number of unpublished opinions and the divisiveness of the nomination (angering the African American community prior to the election), you think we should refrain from having a hearing on Shedd in June. Based on the groups recommendation, you were also going to propose an end-of-June hearing on another nominee. The following has happened in the interim:

Lott approached Daschle with an unreasonable request for nominations hearings before the July 4th recess. Daschle told him "no" but approached Leahy to discuss a more aggressive hearing schedule. The proposed schedule is as follows:

• June 13 th	Rogers (6 th Circuit)
• June 27 th	Shedd (4 th Circuit)
• July 18 th	Owen (5 th Circuit)
• August 1 st	Cook (6 th Circuit)
• September 5 th	Raggi (2 nd Circuit)
• September 19 th	Estrada (DC Circuit)
• October 3 rd	McConnell (10 th Circuit)

The August 1st Cook hearing is a surprise to us, and it will be a huge problem for the judges coalition. For many, many months they have told us that Cook is highly problematic - particularly for labor. Cook is consistently bad on labor/workplace injury cases, right to jury trial issues, civil rights and rights of criminal defendants cases. Her frequent dissents (from the moderate majority) show a pattern at least as egregious as Pickering. We must press Leahy not to schedule Cook (Cook is strongly supported by DeWine, but how many times did Hatch disregard your request to move DC Circuit nominee Alan Snyder?).

Regarding Shedd, Wade Henderson spoke with Mark Childress and Childress is going to speak with Hollings' staff director. But, because we feel Leahy will not cancel the Shedd hearing unless Hollings' backs off (and because several of the outside groups believe the same), we don't think you should expend a great deal of effort trying to change Leahy's mind about the Shedd hearing.

Instead, you should speak with Schumer, and the two of you should bring Durbin up to

speed (since he couldn't attend the meeting in your hideaway). The three of you should approach Leahy as soon as possible and tell Leahy that:

- You are very concerned about Shedd because he has numerous unpublished opinions and because his nomination will infuriate the African American community before the SC election, but you understand the Hollings problem. If Hollings can be moved, you propose postponing the Shedd hearing.
- You understand he is contemplating a more aggressive hearing schedule that includes a hearing for Debbie Cook for the 6th Circuit, and you believe she should not get a hearing this year. For months, labor and other groups have told us that she is highly problematic, and we should send her nomination back to the White House. We won't suffer publically if we don't have a nomination hearing for her.
- Ultimately, if Leahy insists on having an August hearing, it appears that the groups are willing to let Tymkovich go through (the core of the coalition made that decision last night, but they are checking with the gay rights groups).

Given this information, do you want to talk to Schumer - and Durbin - about having this conversation with Leahy and then speak with Leahy? We strongly recommend that you have these conversations, and we believe Leahy must be approached quickly.

DECISION:

Yes, I will talk to Schumer and Durbin; the three of us will go to Leahy _____

No, I will not speak with Schumer and Durbin or Leahy _____

II. Chairing A Hearing

As you know, Senator Leahy asked that you chair the last nominations hearing, but given your schedule, you could not. His staff is now asking us to choose the hearing you would like to chair (see the schedule above).

_____ and I propose that you chair the Owen hearing on July 18th. As you know, Owen will probably be our next big fight. The grassroots organizations are organized in Texas, and the national groups are prepared, as well. In addition, Judiciary Democrats expect to fight her, hearing attendance should be good, and the issues are clear - Enron/pro-business and choice.

You should know, the Leahy staff (and the Schumer staff) propose that you chair the Estrada hearing. _____ and I disagree. Although other staffers see Estrada as a civil rights problem, because he has no record, there isn't civil rights ammunition. We don't believe Estrada is "your kind of fight." We think Durbin or Schumer might be better for the Estrada hearing (and, at least on the staff level, there's interest from the Schumer office).

DECISION: I will chair a hearing on

Shedd (6/27)

Owen (7/18)

Cook (8/1)

Raggi (9/5)

Estrada (9/19)

McConnell (10/3)

(we want this to go
away)

cc: [REDACTED]

2001-2002 - Durbin : Kennedy memo showing role of
MEMORANDUM *special interest groups*

To: Senator Durbin
From: [REDACTED]
Date: October 15, 2001
Re: Meeting with Civil Rights Leaders, Tuesday, October 16, 2001 at 5:30 p.m.

You are scheduled to meet with leaders of several civil rights organizations to discuss their serious concerns with the judicial nomination process. The leaders will include: Ralph Neas (People For the American Way), Kate Michelman (NARAL), Nan Aron (Alliance for Justice), Wade Henderson (Leadership Conference on Civil Rights), Leslie Proff (NAACP Legal Defense & Education Fund), Nancy Zirkin (American Association of University Women), Marcia Greenberger (National Women's Law Center), Judy Lichtman (National Partnership), and a representative from the AFL-CIO. The meeting will take place in 317 Russell, with Senators Kennedy and (possibly) Schumer also present.

The immediate catalyst for Tuesday's meeting was the announcement last Thursday that the Judiciary Committee would hold a hearing in one week on district court judge Charles W. Pickering, Sr., a highly controversial nominee for the Fifth Circuit. The interest groups have two objections: (1) in light of the terrorist attacks, it was their understanding that no controversial judicial nominees would be moved this fall; and (2) they were given assurances that they would receive plenty of notice to prepare for any controversial nominee.

Judge Pickering, you will recall, has a checkered past: he wrote a law review student note recommending that the Mississippi legislature restore its miscegenation law; as a state legislator, he opposed the Equal Rights Amendment and voted to seal the records of the infamous sovereignty commission; and as a Republican activist, he promoted an anti-abortion plank to the national party platform. He has written some controversial opinions while serving on the district court, criticizing prisoner access to the courts and the "one person-one vote" principle. The interest groups believe that a high percentage of Pickering's opinions are unpublished, one reason why they object to the lack of time to prepare for his hearing.

Recognizing that Thursday's hearing is likely to go forward, the groups are asking that the Committee hold a second hearing on Pickering in a few weeks, when they will have had adequate time to research him fully. The decision to schedule Pickering's hearing was made by Senator Leahy himself, not his staff, so the groups are likely to ask you to intercede personally. They will also seek assurances that they will receive adequate warning of future controversial nominees.

MEMORANDUM

To: Senator Durbin
 From: [REDACTED]
 Date: November 6, 2001
 Re: Meeting with Civil Rights Leaders, Tuesday, November 6, at 5:00 p.m.
 317 Russell

Following up on a meeting in mid-October, you are scheduled to meet with leaders of several civil rights organizations to discuss their serious concerns with the judicial nomination process. The leaders will likely include: Ralph Neas (People For the American Way), Kate Michelman (NARAL), Nan Aron (Alliance for Justice), Wade Henderson (Leadership Conference on Civil Rights), Leslie Proff (NAACP Legal Defense & Education Fund), Nancy Zirkin (American Association of University Women), Marcia Greenberger (National Women's Law Center), and Judy Lichtman (National Partnership). The meeting will take place in 317 Russell, with Senators Kennedy and Schumer also present.

Today's meeting is likely to touch on a number of related issues. The primary focus will be on identifying the most controversial and/or vulnerable judicial nominees. The groups would like to postpone action on these nominees until next year, when (presumably) the public will be more tolerant of partisan dissent. They would also like to develop a strategy for moving these nominees. Among their priorities: (1) they want to ensure that they receive adequate notice before controversial nominees are scheduled for hearings; (2) they think Senator Leahy should use controversial nominees as bargaining chips, just as the Republicans did; and (3) they are opposed to holding hearings during recess. Although Senator Leahy has resisted these moves so far, they are reasonable requests in our estimation. *Is Leahy in charge?*

There will likely be a discussion about how to respond effectively to recent Republican charges that the pace of judicial nominations is too slow. The Republicans have continued to hold-up the appropriations bills. As of Friday, it was their intention to launch a new campaign this week, charging the Democrats with hindering the war effort by not confirming judges who are needed to approve wire taps and search warrants. This claim is deeply flawed, because the Committee has been especially quick to move along district court judges and the White House has not nominated people to fill more than half of the current vacancies.

MEMORANDUM

To: Senator Durbin
 From: [REDACTED]
 Date: November 7, 2001
 Re: Meeting with Civil Rights Leaders Yesterday to Discuss Judges

Due to the floor activity last night, you missed a meeting with Senator Kennedy and representatives of various civil rights groups. This was intended to follow-up a meeting in Senator Kennedy's office in mid-October, when the groups expressed serious concern with the quick hearing for Charles Pickering and the pace of judicial nominations generally.

Yesterday's meeting accomplished two objectives. First, the groups advocated for some procedural ground rules. These include: (1) only one hearing per month; (2) no more than three judges per hearing; (3) giving Committee Democrats and the public more advance notice of scheduled nominees; (4) no recess hearings; and (5) a commitment that nominees voted down in Committee will not get a floor vote. Earlier yesterday, Senator Leahy's staff committed to the third item in principle.

Second, yesterday's meeting focused on identifying the most controversial and/or vulnerable judicial nominees, and a strategy for targeting them. The groups singled out three — Jeffrey Sutton (6th Circuit); Priscilla Owen (5th Circuit); and Caroline Kuhl (9th Circuit) — as a potential nominee for a contentious hearing early next year, with a eye to voting him or her down in Committee. They also identified Miguel Estrada (D.C. Circuit) as especially dangerous, because he has a minimal paper trail, he is Latino and the White House seems to be grooming him for a Supreme Court appointment. They want to hold Estrada off as long as possible. ✓

Attached is a table that I compiled, evaluating the 19 Court of Appeals nominees and a few of the controversial district court nominees. Based on input from the groups, I would place the appellate nominees in the categories below. Asterisks indicate that a Senator has placed a hold on the nominee.

Good

Clifton (9th Cir.)*
 Melloy (8th Cir.)
 O'Brien (10th Cir.)
 Howard (1st Cir.)
 B. Smith (3rd Cir.)

Bad

Shedd (4th Cir.)
 Roberts (D.C. Cir.)
 L. Smith (8th Cir.)
 ✓ Pickering (5th Cir.)
 Tymkovich (10th Cir.)
 Gibbons (6th Cir.)
 Steele (11th Cir.)

Ugly

Boyle (4th Cir.)*
 ✓ Owen (5th Cir.)
 Sutton (6th Cir.)*
 Cook (6th Cir.)*
 McConnell (10th Cir.)
 ✓ Estrada (D.C. Cir.)
 ✓ Kuhl (9th Cir.)*

EMK

MEMORANDUM

TO : SENATOR (Kennedy)
 FROM : [REDACTED]
 SUBJECT : Judges and the Latino Community
 DATE : February 28, 2002

Ralph Neas called to let us know that he had lunch with Andy Stern of SEIU. Andy wants to be helpful as we move forward on judges, and he has great contacts with Latino media outlets - Univision and others. Ralph told Andy that you are anxious to develop a strategy for the Supreme Court and a strategy for dealing with conservative Latino Circuit Court nominees that are hostile to constitutional and civil rights. Ralph and Andy discussed the possibility of a relatively small meeting to discuss media strategy, and Andy believes there are several Latino media leaders who share our concerns and would like to meet with you. Ralph proposes that you meet with key Latino media leaders, Raul, Antonia, Wade, and Ralph. [REDACTED] and I think this is a very good idea.

Would you like to have such a meeting to discuss media strategy and the Latino community? If so, Ralph and Andy will take the lead in getting everyone to DC.

DECISION:

Yes, I want to meet with them _____

No, I don't want to meet _____

cc: [REDACTED]

MEMORANDUM

To: Senator Durbin
From: [REDACTED]
Date: June 3, 2002
Re: Meeting with Civil Rights Leaders to Discuss Judicial Nominations Strategy

Senator Kennedy has invited you and Senator Schumer to attend a meeting with civil rights leaders to discuss their priorities as the Judiciary Committee considers judicial nominees in the coming months. For example, they believe that the Committee's current pace for nominations hearings (every two weeks) is too quick; and they need more time to consider the record of Judge Dennis Shedd, a controversial 4th Circuit nominee whom Senator Hollings is backing.

This meeting is intended to follow-up your meetings in Senators Kennedy's office last fall. The guest list will be the same: Kate Michelman (NARAL), Nan Aron (Alliance for Justice), Wade Henderson (Leadership Conference on Civil Rights), Ralph Neas (People For the American Way), Nancy Zirkin (American Association of University Women), Marcia Greenberger (National Women's Law Center), and Judy Lichtman (National Partnership). The meeting has been tentatively scheduled for late Wednesday morning.

Assuming your schedule permits, do you want to accept Kennedy's invitation and attend the meeting?

EMK

MEMORANDUM

BAG

September 27, 2002

TO: SENATOR (Kennedy)

From: [REDACTED]

Re: Members Meeting on Judges—Monday or Tuesday, Place TBA

There will be a judiciary members' meeting early next week. We are trying to schedule the meeting for Monday, after the 5:30 vote, though Leahy has proposed after the Caucus lunch on Tuesday, which would conflict with your schedule. Sen. Leahy is calling this meeting at the request of several members, and, we recommend that the following items be discussed: (1) Delaying a hearing for Cook; (2) Putting off a vote on McConnell or Estrada until after the recess; and (3) next Thursday's vote on Shedd.

Cook

As you know, Debbie Cook—who currently sits on the Ohio Supreme Court—is a nominee to the 6th Circuit who is fiercely opposed by labor and civil rights groups in Ohio. Sen. Leahy wants to schedule Cook for a hearing on October 9th or 10th, because he feels he has made a promise to DeWine to do so.

While we haven't finished reviewing Cook's record, Justice Cook—like Justice Owen—seems terrible in cases involving workers and consumers. She is the most prolific dissenter on the moderate Ohio Supreme Court. In her judicial campaigns—Ohio, like Texas, elects its judges—she has received more money than any other justice from manufacturing and business, and has received no money from labor unions. The Ohio Chamber Commerce has given her its highest ratings for her decisions in employment law, insurance, and medical malpractice cases. On the other hand, the Ohio Academy of Trial Lawyers has written the committee that Cook is "willing to disregard precedent, misinterpret legislative intent and ignore constitutional mandates in an effort to achieve a result that favors business over consumers." Ohio NOW and the Ohio Employment Lawyers' Association have written that Cook's "anti-worker record is becoming legendary in Ohio" and that her opinions seek to undermine the enforcement of state and federal civil rights laws. She is known for adopting strained or extreme legal propositions to deny relief for workers, and is seen as "heartless" and indifferent.

Sen. Leahy has asked whether you would be willing to chair a hearing for Cook on October 9th or 10th. We believe that you should agree to chair her hearing, but that you should push back against scheduling this hearing before the elections. The Committee has held hearings on too many controversial nominees in a row. Not only would preparing for Cook's hearing be a challenge, but it would demoralize Democrats' key constituents—in particular, labor—to have a hearing for her before the election.

AFL-CIO has weighed in with Daschle and Reed (as well as Leahy) about delaying Cook, and Reed and Daschle have said they will discuss Cook with Leahy. Sen. Levin, who is opposed to moving any additional 6th Circuit nominees given that the White House is not cooperating with him regarding nominees to that circuit, will likely be approaching Democratic members about

delaying Cook.

Recommendation: Agree to chair a hearing for Cook, but after the election in the lame duck session.

McConnell and Estrada

Sen. Leahy might want to schedule a Committee vote on McConnell and Estrada before the recess. We think this is a terrible idea and that voting on (and for) these nominees would be demoralizing to our base before the election. McConnell likely has sufficient votes to go through the Committee, but members have not yet submitted follow-up questions to him regarding contradictory statements he made at the hearing about his views on abortion, the Bob Jones case, and the constitutionality of the FACE Act. As for Estrada, he just had his hearing and we certainly should not move him forward without resolving the matter concerning the SG memos.

Recommendation: Do not schedule a vote on McConnell and Estrada until after the election.

Shedd

Shedd--the nominee to the Fourth Circuit who has terrible record in cases involving civil rights, women's rights, disability and federalism and who is fiercely opposed by Southern Civil Rights groups (see attached article)-- is scheduled for next Thursday's Exec. We do not know how other members will vote regarding Shedd. We have heard that Sen. Edwards and Sen. Durbin are leaning against Shedd.

It is likely that Leahy will voice vote Shedd and we suggest that you record a "no" vote on him. Particularly given the high percentage of African-Americans on the Fourth Circuit and the Republicans' resistance to placing Clinton nominees on that Court, it seems necessary to resist a judge with such a dismal record on core civil rights and constitutional issues. While Shedd doesn't have the "cross-burning" case of Pickering to disqualify him, he is as bad--perhaps worse--on the core substantive issues.

cc: [REDACTED]

Buildup to Owen & Estrada filibusters

P. 20

Senator Must See By 1/30
Senator Has Seen _____

MEMORANDUM

TO: [REDACTED]
FROM: [REDACTED]
CC: [REDACTED]
RE: Members Meeting with Leader Daschle
DATE: January 30, 2003

This afternoon, Democratic members of the Judiciary Committee met with Leader Daschle and Assistant Leader Reid to discuss Miguel Estrada. In addition to Daschle and Reid, Senators Leahy, Durbin, Edwards, Kennedy, Feinstein and Schumer attended.

All in attendance agreed to attempt to filibuster the nomination of Miguel Estrada, if they have the votes to defeat cloture. They also agreed that, if they do not have the votes to defeat cloture, a contested loss would be worse than no contest.

All in attendance, including Senators Daschle and Reid, voiced the view that the Estrada nomination should be stopped because: 1) Not to do so would set a precedent, permitting the Republicans to force through all future controversial nominees without answering Senators' questions or providing important information; 2) Estrada is likely to be a Supreme Court nominee, and it will be much harder to defeat him in a Supreme Court setting if he is confirmed easily now; 3) The process must be slowed down and the Republicans' attempt to set up an automatic "assembly line" of controversial nominees thwarted; and 4) The Democratic base is particularly energized over this issue.

It is expected that a motion to proceed to the nomination will be brought to the floor on Monday. The Democrats do not intend to oppose that motion. A motion for cloture could be voted on as early as Wednesday.

Leader Daschle asked all Democratic members of the Committee to spend the time between now and Tuesday speaking to Senators who have questions about Estrada, and to attempt to recruit votes to oppose cloture. The topic may also be discussed at the Democratic Senators' retreat tomorrow. On Tuesday, Senator Daschle intends to raise it at the policy lunch, and presumably conduct a vote count.

Everyone also agreed to keep this matter confidential.

MEMORANDUM

February 4, 2003

TO : SENATOR (Kennedy)

FROM : [REDACTED]

SUBJECT : Judges, Judiciary Issues, Meeting with Civil Rights Leaders

Estrada

The Senator-to-Senator conversations continue and things appear to be going well. That being said, we've heard that Breaux will support Estrada. Landrieu is a problem, but many are focused on her. Bayh is also on the fence. Edwards spoke with him without much luck, and Senator Bayh, Sr. is going to speak with him, too. Would you be willing to speak with him, as well? I understand he has some substantive questions that we've been trying to answer through his staff, but he's also concerned because he doesn't want to be like the Republicans or part of a witch hunt. I think you -- speaking from 40+ years of experience -- can help him understand how the process has changed and why it's important to focus on Estrada (he refuses to answer questions, we know of his temperament/ideological problems, he'll fly to the Supreme Court and we won't be able to stop him). Do you want to speak with Bayh?

You should also know that Wade spoke with Kerry and told him that they want him to take a leadership role on this issue. Kerry agreed but wants to speak with you. I think you should encourage Kerry to speak on the floor. Do you agree?

Judiciary Hearing (Wednesday 9:30 a.m.) & Exec (Thursday 9:30 a.m.)

Hearing. As you know, there will be a nominations hearing on Wednesday at 9:30 a.m. [REDACTED] put a memo in the bag on Monday evening -- the nominee is Jay Bybee (9th Cir.). Not surprisingly, Bybee is an awful nominee. As the memo outlines, he has serious immigration, gun control, tribunal/detainee problems. We believe you should attend the hearing and ask him questions. I know that the Powell speech begins at 10:30 and there will be press associated with it. But, if you could drop by the hearing for 15 minutes (@11:30) to ask Bybee questions, it would be very, very helpful. We know this is a marathon and not a sprint and that we have to choose our battles, but we also feel that it's important to ask the bad nominees questions at the hearing. Bybee shouldn't get a complete pass and at this point, only 2 or 3 Democrats can attend the hearing.

Exec. There will be a Judiciary Exec on Thursday at 9:30. I don't think you need to attend, but you should know that (a) we expect Sutton, Roberts, and Cook to be on the schedule and held over and (b) the nasty conceal/carry gun bill (the one you fought at the end of last year) will also be on the schedule. We'll have it held over, but this means we should discuss your strategy for next week.

Conversation with Daschle - Estrada and Beyond

- Tom, thanks so much for your hard work on the Estrada nomination. You have done a terrific job rallying the caucus. Because of you, I think we will be successful.
- I know this is hard work, and it's difficult getting the caucus to stick together around the issue of judicial nominations. Accordingly, I hope we can develop a long-term strategy that acknowledges the importance of the issue and the problems associated with a filibuster strategy.
- Given Bush's plan to pack the courts, there are many bad nominations coming down the track. I know we can't fight all of them, but we should have a short list of consensus nominees that we agree to filibuster.
- I'm concerned that after this fight, several in our caucus won't be willing to filibuster again, and Bush will fill the courts with conservatives. If we develop a long-term strategy, we can let members vote for many nominees because we've all agreed that from time to time, we have to stick together. What do you think?

EMK

Talking Points on Estrada for Caucus

- We must filibuster Miguel Estrada's nomination. He is clearly an intelligent lawyer, but being a judge requires more. He must demonstrate his commitment to core constitutional values, and he has to prove that he has the ability to be fair and impartial. By design, we know very little about Mr. Estrada, but the burden is on him to prove to us that he is fit for a life-time appointment. He simply hasn't done that.
- He has serious temperament problems. He's been criticized by his direct supervisor in the Solicitor General's Office as too ideological to be a judge. Members of the Hispanic Caucus and other Latino leaders have described him as not being "even-tempered" and as having a "short fuse."
- As Pat and Chuck have described, Estrada has virtually no paper trail, and he has refused to answer the most basic questions about his views. Over and over again, the Justice Department refuses to provide us with the documents from Estrada's time in government practice. That's simply unacceptable.
- I've been here for 40 years and I've worked with Republican and Democratic Administrations in the confirmation process. This Administration is the worst. They are applying a litmus test at 1600 Pennsylvania Avenue and then they dare us to prevent them from packing the courts of appeals with ideologues. As [redacted] and [redacted] can attest, any attempt to work with them is rebuffed.
- If we allow them to place a stealth, right-wing zealot on this court, we have only ourselves to blame. Although a few Hispanic groups support Estrada, we have the support of many of the largest, oldest Hispanic organizations, including dozens of Hispanic labor leaders across the country, MALDEF, the Puerto Rican Legal Defense Fund, and the Congressional Hispanic Caucus.
- These groups are taking their message and their concerns about Estrada to mainstream and to Spanish-language press. The Republican claim that we are anti-Hispanic won't stick. We have too much support, and their record is hostile to the interests of that community.

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- The D.C. Circuit is far too important to appoint someone about whom we have so many questions. Key labor, civil rights, environmental, and administrative law cases are decided there, and we know it is a "feeder" circuit for the Supreme Court. The White House is almost telling us that they plan to nominate him to the Supreme Court. We can't repeat the mistake we made with Clarence Thomas.

EMK

OWEN TALKING POINTS FOR CAUCUS

• Maria and others have highlighted how Owen has distorted the law in the Jane Doe parental notification cases. What these cases show is that Owen will disregard the clear language of a statute to put forward her own view. That's why then-Judge Gonzalez called her reading "unconscionable judicial activism"

• The sad thing is that women's rights are not the only area of concern. She is to the far-right of the right-wing Texas Supreme Court. She has racked up more dissents in cases involving workers, consumers, victims of personal injury than any other Judge on the Texas Supreme Court except one. She is criticized by her colleagues for distorting the law not only in the Jane Doe cases but in these cases involving the rights of victims as well.

• The 5th Circuit was traditionally a bastion of fairness and justice even in the toughest of times. It has already been turned into one of the least fair and least just circuit courts. We have an obligation to make sure it doesn't get any worse.

• I think it's important that people look through the material on Owen, consider these arguments, and listen to the debate on the floor before making up their mind on how to vote.

• I know there is some concern that we have a lot of bad judges in the pike and we do have others (such as Sutton, who is ready for floor action). But Owen, is clearly one of our worst. She had nine votes against her in Committee. Even if, at the end of the day, we don't defeat Owen's nomination, we have to mount a fight to make clear to the public what's at stake with judges, and to dissuade the White House from sending us such controversial nominees.

Memorandum

BAG

April 7, 2003

TO : SENATOR (Kennedy)

FROM : [REDACTED]

SUBJECT : OWEN-ON FLOOR

We have heard that the Republicans will move to a vote on Owen's nomination this afternoon. Leadership plans to withhold consent to a time agreement, and we imagine that the debate could begin as early as tonight and continue at least through tomorrow. [REDACTED] is talking to leadership about the possibility of convening a meeting with Judiciary Dems. Owen will be discussed in Caucus tomorrow, and we will provide you talking points. We have also heard that Sen. Feinstein is convening a meeting of the women Senators today after the floor vote.

We have heard that several Democratic Senators have expressed concern about any filibuster of a judicial nominee that is based on substance, as opposed to process. The Senators that may be wavering or opposed to an extended debate are: Lincoln, Pryor, Carper, Graham, Nelson (FI), Nelson (NE), Bayh, Landrieu, Breaux, Dorgan, Conrad, Baucus, Hollings, Bryd and Miller.

It would be helpful, if during the floor vote, you spoke to some of these Members. The key points are:

- Owen is extremely bad on choice issues, worker's rights, civil rights, environmental protection. She is clearly one of the worst of Bush's nominees.
- She is to the far-right of a very right-wing court, is criticized by her colleagues for her extreme dissents, including by White House counsel Justice Gonzalez when he was on the Court. A very broad coalition of Texas-based women, labor, civil rights, worker's right groups oppose her, as well as all the major Washington groups.
- It is important that Democrats keep their powder dry until the Caucus and Leadership have decided how best to proceed on her nomination.

They got over this after Estrada.

cc: [REDACTED]

From: Allison Herwitt [AHERWITT@prochoiceamerica.org]
 Sent: Wednesday, April 02, 2003 11:04 AM
 Cc: [REDACTED]
 Subject: Owen floor vote

At any time, Senate leaders may bring the nomination of Priscilla Owen to the Fifth Circuit Court to the floor for a full Senate vote. *NARAL Pro-Choice America strongly opposes this nomination and will score this vote in the 2003 Congressional Record on Choice.*

This is how They enforce discipline:

Last year the Judiciary Committee rejected nominations of both Priscilla Owen and Charles Pickering - both based on the nominees' records of hostility to constitutional freedoms and civil rights. In spite of this, President Bush renominated both individuals. Last week the Judiciary Committee, now under anti-choice control, reversed course and approved the Owen nomination, sending it to the floor in spite of its earlier defeat. The Owen nomination represents a grave threat to a woman's right to choose; pro-choice senators should not approve this lifetime appointment to the federal bench.

- Priscilla Owen is a dedicated conservative judicial activist whose record on the Texas Supreme Court clearly indicates her willingness - indeed, her eagerness - to restrict freedom of choice and undermine *Roe v. Wade*. Owen was a regular dissenter to an already conservative court on the issue of reproductive rights. Her writing in one case led former Texas Supreme Court justice, now White House counsel, Alberto Gonzales, to characterize her dissent as "an unconscionable act of judicial activism."
- Owen has repeatedly attempted to legislate from the bench to create impossibly high barriers - nowhere found in Texas law - to prevent a young woman from exercising her right to choose. She inappropriately and unconstitutionally wanted the Court to force young women to consider religious issues in the decision of whether to have an abortion. She wanted the Court to require young women to demonstrate that they understand "that many women experience emotional and psychological" harm from abortion, even though this claim is not medically supported. She even tried to legislate from the bench and create a new barrier, not in the state statute, forcing a young woman to prove to a public official that she considered the impact of abortion on the fetus.

Clearly, these are actions of a judicial activist intent on using her power to influence and rewrite - not fairly interpret - the law. Were she confirmed to a lifetime appointment to the Fifth Circuit, her decisions could affect women's reproductive freedom for a generation to come.

Many of President Bush's judicial nominees, including Priscilla Owen, have sought to reassure the Senate about their views on a woman's right to choose by claiming they will follow "settled law." This is a simplistic and facile response to a legitimate concern. In the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court relaxed the standard by which laws restricting abortion were to be judged. The test for such laws was no longer "strict scrutiny," but merely whether such laws imposed an "undue burden" on a woman's right to choose. This lower standard has given the green light to anti-choice advocates and state legislators, and indeed, many new restrictions on reproductive rights have been enacted post-*Casey*. State laws abridging freedom of choice are evaluated by judges who use their own discretion in deciding whether an anti-choice law imposes an "undue burden." Yet when one is hostile to the right in the first instance, it is questionable whether one would ever find the burden undue. Indeed, NARAL Pro-Choice America's analysis of 32 court of appeals cases applying *Casey* shows that only 15 of these cases were decided by unanimous panels. That is, more than half the time, judges viewing the same facts and law reached different conclusions. In other words, in this post-*Casey* era, "settled law" is actually in turmoil.

Finally, in understanding the potential consequences of the Owen nomination, and others like it, one must consider the importance of circuit courts overall. While Supreme Court nominations receive the most public

attention, circuit courts can have just as much or more effect on the law as the Supreme Court. The Supreme Court typically hears fewer than 100 cases a year; the federal courts of appeal, the courts immediately below the Supreme Court, decide almost 30,000 cases a year. Thus, for most Americans, these are the courts of last resort. Conservative activists realized this long ago, and set out on a patient but relentless effort to capture the courts. Patrick Buchanan summed up the right-wing's plan: "[Our conservative judicial appointment strategy] could do more to advance the social agenda - school prayer, anti-pornography, anti-busing, right-to-life and quotas in employment - than anything Congress can accomplish in 20 years."

President Bush and anti-choice advocates and lawmakers are continuing to implement this strategy, and nominations like Priscilla Owen's are critical to their success. NARAL Pro-Choice America urges senators to vote "no" on the Owen nomination.

Attached are important materials on Priscilla Owen's work to undermine reproductive rights. We hope you find this information helpful and, as always, invite you to call Allison Herwitz at 973-3003 or Donna Crane at 973-3047 with any questions.

<<Owen Hearing Analysis FINAL.doc>> <<Owen Report FINAL 7-15-02.doc>>

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