

Testimony of

The Honorable Russ Feingold

January 30, 2003

Statement on Miguel Estrada

MR. FEINGOLD: Mr. Chairman, I will vote against Miguel Estrada today. Let me take a moment to explain why.

First, I want to discuss the background of this nomination, which I think is an important factor in our consideration of it. The D.C. Circuit, to which Mr. Estrada has been nominated, is widely regarded as the most important federal circuit. It has jurisdiction over the actions of most federal agencies. Many of the highest profile cases that have been decided in recent years by the Supreme Court concerning regulation of economic activity by federal agencies in areas such as the environment, health and safety regulation, labor law, went first to the D.C. Circuit. In the area of administrative law and the interpretation of the major regulatory statutes such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the National Labor Relations Act, and even the Federal Election Campaign Act, the D.C. Circuit is the last word, as the Supreme Court accepts relatively few cases.

The D.C. Circuit is now evenly split, and has been for some time, between nominees of Democratic and Republican Presidents. There are four judges who were appointed by Republicans and four by Democrats, and there are four vacancies. In the last Congress of President Clinton's term, he made two nominations that were never acted upon by this Committee. In one case, the Committee held a hearing but never scheduled a vote, and in another, the Clinton nominee wasn't even given the courtesy of a hearing.

Now we hear that President Bush is not only going to fill those two seats, but also two others that Republicans have argued for years didn't need to be filled at all because of the court's supposedly smaller workload in comparison to other circuits. So this nomination is a pivotal nomination, and this circuit could very quickly become divided 8 to 4 between Republican appointees and Democratic appointees.

I am disappointed that the Bush Administration has not been willing to extend an olive branch on this Circuit in particular. There are enough vacancies to accommodate both of the pending nominees and the two nominations by President Clinton who were treated so badly in the 106th Congress. But that does not seem likely to happen.

It is worth mentioning as well that seats on the D.C. Circuit have also in recent years served as springboards for the Supreme Court. Three of the current nine justices on the Supreme Court, Justices Scalia, Ginsburg, and Thomas, first sat on the D.C. Circuit. Many commentators and activists, on the right and the left, believe that Mr. Estrada is being groomed for a Supreme Court appointment.

For all of these reasons, I believe it is my duty to give this nomination very close scrutiny. Unfortunately, Mr. Estrada has not made this task easy. In fact, by failing to answer the committee's questions candidly and completely, he has made it even more difficult. Unlike many of the circuit court nominees that the committee has reviewed so far, Mr. Estrada is not a judge on a lower court, with a record of judicial opinions that we can review to get an idea of his views and his judicial philosophy. And unlike some of the other nominees we have seen, he is not a law professor, with extensive written work which we can review and about which we can question him. He is a private attorney, with no published writings since law school. The Justice Department has refused to let the committee see his memos from when he worked in the Solicitor General's office, which may or may not be revealing of his views.

So we were left with the hearing to explore with Mr. Estrada directly the question of what kind of judge he will be on the D.C. Circuit. And at the hearing, Mr. Estrada steadfastly refused to help us. And his way of refusing was extraordinary. He took the position that he could not express an opinion about a case that had already been decided by the Supreme Court unless he took the time to review not only the opinion of the court, but all the briefs and the arguments of the parties, and also, and I'm quoting here from one of his answers: "[doing] all the legwork of investigating every last clue that the briefs and the arguments offer up." Mr. Estrada gave us no evidence of the kind of judge he will be, and for me, given the importance of this Circuit, and the history of appointments to this Circuit, that is not enough.

In a few areas, we have something to go on because Mr. Estrada undertook pro bono representation of a group called the Center for Community Interest on whose board he served. And I was not reassured by what I learned. Mr. Estrada not only defended an anti-loitering statute ultimately struck down by the Supreme Court, but on a radio program he took a very aggressive stance in dismissing the arguments made against the statute. He even went to far as to suggest that there was something improper about bringing the legal challenge. That attitude carried over in his arguments in a challenge to another anti-loitering ordinance, in which Mr. Estrada argued that the NAACP did not have standing to challenge the law.

I was also not satisfied with Mr. Estrada's answers to questions concerning his role in helping screen law clerk applicants for Justice Anthony Kennedy of the Supreme Court. Allegations have been made that Mr. Estrada saw himself as an ideological gatekeeper of sorts, with the task of making sure that no one who was too liberal for his tastes should get to be a clerk for the Justice. After first asserting that comments ascribed to him were meant as a joke, Mr. Estrada then gave very careful and lawyerly answers to followup questions. I cannot say for certain that he was untruthful. But he was certainly was not forthcoming. Both in this area and in his answers to questions concerning specific decisions of the courts or legal principles, I think the committee has the right and the duty to demand more openness and responsiveness from someone whose public record is so thin and who has been nominated for such an important judicial position.

Let me be clear. I probably would vote to confirm Miguel Estrada to a federal District Court judgeship. He has a distinguished academic and employment record. But for this crucial seat on this crucial court, I need to be confident that a nominee, if confirmed, will be fair, impartial, and not devoted to advancing an ideological agenda. Based on the record before me, I do not have that confidence in Mr. Estrada. I must therefore reluctantly vote No.

Thank you Mr. Chairman.