Testimony of

The Honorable Patrick Leahy

January 30, 2003

Statement of Senator Patrick Leahy
On the Nomination of Miguel Estrada to the D.C. Circuit
Judiciary Committee Business Meeting
January 30, 2003

At the last Committee vote of the past Congress, the Committee was sharply divided in its evaluation of Judge Dennis Shedd to the Fourth Circuit. Despite unfair attacks against me by a number of Republicans, I kept my commitment that he would receive a Committee vote. Judge Shedd's record in civil rights cases and his record on the bench raised serious concerns among many African Americans living in the Fourth Circuit and across the country. His floor vote was also contentious, with a confirmation vote of 55 to 44. As many people know, Judge Shedd was a former staffer on this Committee for Senator Strom Thurmond. Shortly after Judge Shedd's confirmation, the nation was confronted by the remarks made by the former Republican leader of the Senate who recalled a divisive presidential campaign and the policies of racial segregation.

After all that, people openly speculated whether the President would re-nominate Judge Charles Pickering, whose record on the bench raised serious concerns among many and whose nomination was defeated by a majority vote in this Committee. The President has chosen to re-nominate Judge Pickering, in spite of these concerns.

I do not know of any precedent for a President renominating a judicial nominee voted upon and rejected by this Committee. This President has chosen to renominated Judge Pickering and Justice Priscilla Owen who both were voted on by this Committee last year and rejected.

Although the campaign rhetoric of the Administration as it continued to politicize the selection of federal judges was in large measure about Judge Pickering and Justice Owen and the President has followed through on his threat to renominate them, the agenda for our first meetings includes no mention of either of them.

Perhaps this is a sign that the Republicans on this Committee recognize the unprecedented nature of these renominations and the divisiveness they engender. Senator Hatch has indicated he intends to hold additional hearings on these nominees who both had fair and extensive hearings last year.

It is ironic that while Senator Hatch has unilaterally decided that the nominations of Judge Charles Pickering of Mississippi and Judge Patricia Owen of Texas require additional time and additional hearings, he is insistent that the Committee expedite its consideration of the nomination to the D.C. Circuit of Miguel Estrada. The Chairman has shown no interest in compiling a more complete record on the Estrada nomination.

This is and has been a difficult nomination for this Committee. I said last week that many of us would like to have a record and a strong confidence about the type of judge he would be in order to be able to vote in favor of this nomination. Sadly, that is not the record before this Committee and I do not have that confidence. I remain concerned that he will be an activist on that court, given what we have learned about him and given the insufficient record we have. I urged last week as I have for some time that Mr. Estrada be more forthcoming with this Committee. Neither he nor the Administration have shown any interest in doing so.

Accordingly, we confront a nominee with no judicial experience, no publications since a law school note, and little relevant practical experience. While he counts Justice Scalia, Ken Starr and Ted Olson among his friends and mentors, any information about his decisionmaking, values and judgement have been denied to us.

His selection for this court has generated tremendous controversy. I think that is, in part, because he appears to have been groomed to be an activist appellate judge by well-connected conservatives legal activists.

Just this morning the Congressional Hispanic Caucus and the Congressional Black Caucus restated their concerns and just this week, the Puerto Rican Legal Defense and Education Fund, the Mexican American Legal Defense and Education Fund (MALDEF), and the Southwest Voter Registration and Education Project (SVREP) reiterated their concerns. Likewise, a large number of this country's most respected Latino Labor leaders, including Maria Elena Durazo of HERE, Arturo S. Rodriquez of the UFW, Miguel Contreras of L.A. County Fed., Cristina Vazquez of UNITE and Eliseo Medina of SEIU, have indicated their strong oppostion to this nomination.

I quote briefly from the MALDEF and SVREP letter from Antonia Hernandez and Antonio Gonzalez:

"As a community, we recognize the importance of the judiciary, as it is the branch to which we have turned to seek protection when, because of our limited political power, we are not able to secure and protect our rights through the legislative process or with the executive branch. This has become perhaps even more true in light of some of the actions Congress and the executive branch have taken after 9/11, particularly as these actions affect immigrants.

After an extensive review of the public record that was available to us, the testimony that Mr. Estrada provided before the Senate Judiciary Committee, and the written responses he provided to the Committee, we have concluded at this time that Mr. Estrada would not fairly review issues that would come before him if he were to be confirmed to the D.C. Circuit Court of Appeals. As such, we oppose his nomination and urge you to do the same."

They go out to analyze an array of issues that affect not only the Latino community but all Americans on which they find this nomination wanting. Of course, MALDEF had outlined its concerns in advance of the hearing last fall in a memorandum to the Committee and to the White House. As their current letter notes:

"[T]he Judiciary Committee gave Mr. Estrada ample opportunity to address [their concerns]. Ultimately, Mr. Estrada had the affirmative obligation to show that he would be fair and impartial

to all who would appear before him.

After reviewing the public record, the transcript and the hearing, and all written responses submitted by Mr. Estrada, we conclude that he failed to meet this obligation. He chose one of two paths consistently at his hearing and in his written responses: either his responses confirmed our concerns, or he chose not to reveal his current views or positions."

My view of the record is in accord with theirs and is shared by the respected Puerto Rican Legal Defense and Education Fund.

Senator Schumer chaired a fair hearing for Mr. Estrada last September. I was hoping that the hearing would allay concerns that have been raised about this nomination, but I was left with more questions than answers after all of the steps Mr. Estrada took to avoid answering questions.

The recent statement from Latino Labor leaders makes the following point: "Mr. Estrada is a 'stealth candidate' whose views and qualifications have been hidden from the American people and from the U.S. Senate.

Since his nomination, Mr. Estrada has consistently refused to answer important questions about his views and his judicial philosophy." They go on to note that it would be "simply irresponsible for the Senate to put him on the bench."

After a thorough review, PRLDEF concluded that Mr. Estrada was not sufficiently qualified for a lifetime seat on the nation's second highest court and "that his reportedly extreme views should be disqualifying; that he has not had a demonstrated interest in or any involvement with the organized Hispanic community or Hispanic activities of any kind; and that he lacks the maturity and judicial temperament necessary to be a circuit judge."

I remain concerned about several of the issues raised by PRLDEF based on their review. They noted that "a number of his colleagues have said unequivocally that Mr. Estrada has expressed extreme views that they believe to be outside the mainstream of legal and political thought." According to PRLDEF, Estrada has "made strong statements that have been interpreted as hostile to criminal defendants' rights, affirmative action and women's rights." They also expressed serious concerns about his temperament. People they interviewed about Mr. Estrada described him as "arrogant and elitist" and that he "'harangues his colleagues' and 'doesn't listen to other people.'"

In their view, Mr. Estrada was not even-tempered and was "contentious, confrontational, aggressive and even offensive in his verbal exchanges" with them.

There have been some on the other side of the aisle who have made the outrageous attack that any opposition to Mr. Estrada's confirmation is racist or anti-Hispanic. Such claims are offensive and absurd. Well-respected leaders of the Hispanic community have raised very serious objections and concerns about this nomination.

No one has worked harder to increase Hispanic representation on our courts than PRLDEF, MALDEF and the Congressional Hispanic Caucus. In spite of their strong desire to support Hispanic nominees, they express serious concerns.

Despite this Administration's rhetoric about diversity, Mr. Estrada is the only Latino nominated by President Bush to any of 42 vacancies that have existed on the 13 Circuit Courts of Appeals during his tenure.

Hispanics have not been nominated for any of the four vacancies in the Tenth Circuit, which includes New Mexico and Colorado; the three vacancies in the Fifth Circuit, which includes Texas; the six vacancies in the Ninth Circuit, which includes California and Arizona; the three vacancies in the Second Circuit, which includes New York and Puerto Rico; or any of the three vacancies in the Third Circuit, which includes New Jersey and Pennsylvania.

This, despite the outstanding Hispanic lawyers and judges in each of these Circuits.

I have previously noted how few Latino nominees this President has sent to the Senate and detailed how quickly we have proceeded to consider and confirm Judge Christina Armijo of New Mexico, Judge Phillip Martinez and Randy Crane of Texas, Judge Jose Martinez of Florida, Magistrate Judge Alia Ludlum, and Jose Linares of New Jersey to the district courts under Democratic Senate leadership. I have no doubt we will soon likewise confirm Judge James Otero of California. I would have held his confirmation hearing last year if his ABA peer rating had been received in time.

Of the 10 Latino appellate judges currently seated in the federal courts, eight (or 80 percent) were appointed by President Clinton. Some of these Clinton nominees were denied Senate consideration for years during the period of Republican control of the Senate. For example, the confirmation of Judge Richard Paez to the Ninth Circuit took over 1,500 days, even though he had the full support of his home-state Senators. It was delayed by Republicans for almost five years and 39 Republicans voted against him.

I recall how the nomination of Judge Sonia Sotomayor to the Second Circuit was stalled from Senate consideration for months by anonymous holds because Republicans were concerned that she might be nominated to the Supreme Court. Although she had received a unanimous a Well Qualified rating from the ABA and had first been named to the federal bench by the first President Bush, 29 Republicans voted against her confirmation.

Other circuit court nominees of President Clinton never received hearings or votes, such as Jorge Rangel and Enrique Moreno of Texas, who were both nominated to the Court of Appeals for the Fifth Circuit and Christine Arguello of Colorado who was nominated to the Tenth Circuit. Scores of the last President's judicial nominees were never given hearings or votes and many of them were qualified Hispanic, African American or female nominees.

We worked hard during the last Congress to restore fairness to the judicial confirmation process.

We endeavored responsibly to address the vacancies we inherited as a result of the delay and obstruction of judicial nominations by Republicans, particularly circuit court nominations, during the prior six and one-half years of Republican control of the Senate.

Diversity is one of the great strengths of our nation and that diversity of background should be reflected in our federal courts. Race or ethnicity and gender are, of course, no substitutes for the wisdom, experience, fairness, and impartiality that qualify someone to be a federal judge entrusted with a lifetime appointment.

White men should get no presumption of competence or entitlement. Hispanic and African American men and women should not be presumed to be incompetent. All nominees should be treated fairly. The burden of proof of suitability for lifetime appointment rests on the nominee and the Administration. We must carefully examine the records of all nominees to high offices, but we know the benefits of diversity and how it contributes to achieving and improving justice in America.

As Antonia Hernandez wrote in the Wall Street Journal: "The fact that a nominee is Latino should not be a shield from full inquiry, particularly when a nominee's record is sparse, as in Mr. Estrada's case. It is vital to know more about a nominee's philosophies for interpreting and applying the Constitution and the laws."

It was in connection with the nomination of Judge Dennis Shedd, a white male and former staffer to Senator Thurmond, that Republicans made a "diversity" argument. They argued that Judge Shedd would bring "diversity" to the Fourth Circuit.

The Fourth Circuit was the federal circuit court that had the longest history without an African American judge. It was not until President Clinton's recess appointment of Judge Roger Gregory that the Fourth Circuit was finally desegregated. The Republican Senate majority allowed Republican Senators to use their blue slips and secret objections to block the integration of that court for years during the Clinton Administration as a Democratic President nominated one qualified African American after another. None were accorded a hearing.

Yet, in connection with Judge Shedd's nomination, Republicans extolled the "diversity" Judge Shedd would bring to that court based on his experience as a trial judge.

The D.C. Circuit is an especially important court in our nation's judicial system. It is the most prestigious and powerful appellate court below the Supreme Court. Congress has vested the D.C. Circuit with special jurisdiction over cases involving many environmental, civil rights, consumer protection, and workplace statutes.

During the 1960s and 1970s, Congress passed a number of important laws to protect American workers and the environment rights of all Americans. On the whole, the D.C. Circuit understood the important legal principles of deference to the policy decisions of the legislative branch and to the regulations promulgated by agencies to fulfill their statutory responsibilities. That court interpreted the rules for access to courts to allow citizens significant opportunities to have standing to challenge agency actions affecting their health and the environment.

When President Reagan came to Washington, there was a concerted effort to pack the bench with conservative judges with the hope of moving the law toward the extreme right in terms of limiting opportunities to challenge federal regulations and limiting the power of Congress to enforce constitutional and statutory rights. President Reagan, with the help of a Republican Senate, put Robert Bork on the D.C. Circuit. Like Mr. Estrada, Judge Bork was one of the first judges nominated by the President.

Shortly after winning Bork's confirmation to the D.C. Circuit in 1982, President Reagan pushed through Antonin Scalia's nomination to the D.C. Circuit, and then Ken Starr the following year. He named another five conservative after that for a total of eight appointments to the D.C. Circuit by President Reagan alone.

President George H.W. Bush also took a special interest in the D.C. Circuit, and he chose Clarence Thomas, as one of his first dozen nominees. President Bush succeeded in getting two other judges confirmed to the D.C. Circuit.

Thus, in 12 prior years of Republican administrations, they appointed 11 judges to this 12-member court. Four of these judges were later nominated to the Supreme Court by Republican Presidents, and all but one was confirmed.

Of course, now the Supreme Court has become quite activist, in part through the decisions and views of these former D.C. Circuit appointees. Overall, the D.C. Circuit has produced more Justices on the Supreme Court than any other court in recent history.

Three of the current members of the Supreme Court--Justice Scalia, Justice Thomas, and Justice Ruth Bader Ginsburg-- previously served on the D.C. Circuit.

I am reminded that, as with the case of Justice Scalia, the fact that a nominee has a relatively modest paper trail, or none at all, does not mean that he or she does not have fixed or entrenched views. Similarly, the fact that a nominee insists that he has no views, as Justice Thomas asserted during his hearing, does not mean that he will not begin asserting hard-held views immediately upon confirmation.

I recall, for example, that Clarence Thomas refused to comment on the reasoning of Roe v. Wade and disavowed that he had any views that would prevent him from keeping an open-mind and yet he voted to overrule that precedent within a year of his confirmation and he has steadfastly voted that way over the past decade.

During the period of Republican domination of the D.C. Circuit when Scalia and then Thomas served there, the court began to limit opportunities for individuals and organizations to have standing to challenge government actions.

The court's decisions became increasingly less deferential to agency regulations intended in the areas of labor, environmental and consumer protections. These decisions were praised by Republicans and conservative activists.

When President Clinton took office with a Democratic-led Senate, he was able to win the confirmation of two moderate judges to the D.C. Circuit, Judge Rogers and Tatel. Once Republicans took control of the Senate in 1995, Republicans took pains to block D.C. Circuit vacancies from being filled by President Clinton.

During the six and one-half years of Republican control, three of President Clinton's nominees to the D.C. Circuit alone (along with 76 other Clinton nominees) did not get confirmed in the first Congress they were nominated. The last judge confirmed to the D.C. Circuit after a 2-year battle was Merrick Garland in 1997.

After that, the Republican Senate locked the gates and neither Allen Snyder nor Elena Kagan were allowed a Committee vote. For almost the entire second term of the Clinton Administration, Republicans blocked any and all nominees to the D.C. Circuit.

Had President Clinton's nominees, Mr. Snyder and Professor Kagen, been confirmed, the D.C. Circuit would have only two current vacancies rather than four. And Republican Members of this Committee, have insisted that the D.C. Circuit did not need an 11th or 12th judge on that D.C. Circuit when there was a Democrat in the White House, due to a declining caseload on this court. Yet this Administration has refused to take any steps to address our concerns about the need to maintain balance on the D.C. Circuit.

Given the importance of the D.C. Circuit and the effect of their decisions on the rights of all Americans, I think we must take special care in evaluating nominees to this court.

I think it is noteworthy that it does not appear that Mr. Estrada has had any experience as a practicing attorney since 1989 handling cases within the special jurisdiction of the D.C. Circuit, such as cases involving the National Labor Relations Board, the Occupational Safety and Health Administration, the Federal Communications Commission, the Americans with Disability Act, the Federal Energy Regulatory Commission, the Federal Election Commission, the Endangered Species Act, the Environmental Protection Agency (such as the following environmental statutes: the Resource Conservation and Recovery Act, 42 U.S.C. § 6976; Superfund, 42 U.S.C. § 9613; the Clean Water Act, 42 U.S.C. § 300j; and Clean Air Act, 42 U.S.C. § 7607) or the cases involving alien terrorists or challenges to the 1996 amendments to the Immigration and Nationality Act.

I appreciated the hearing chaired by Senator Schumer last year on the importance of balance on the D.C. Circuit. I commend to everyone here the testimony that was given at that hearing.

Beyond the unique significance of the D.C. Circuit, with the Supreme Court hearing fewer than 100 cases per year, it is the circuit courts that are really the courts of last resort for nearly 30,000 cases each year. These cases affect the Constitution as well as statutes intended by Congress to protect the rights of all Americans, such as the right to equal protection of the laws and the right to privacy, as well as the best opportunity to have clean air and clean water ourselves and in future generations.

These courts are where federal regulations will be upheld or overturned, where reproductive rights will either be retained or lost and where intrusive government action will be allowed or

curtailed. They are the courts where thousands of individuals will have their final appeal in matters that affect their financial future, their health, their lives and their liberty.

The burden of proof for entrusting someone, for life, with these weighty responsibilities over the lives of millions of Americans and non-citizens rests on the nominee.

Our freedoms are the fruit of too much sacrifice to fail to assure ourselves that the judges we vote to confirm have a commitment to upholding the Constitution, following precedent, and listening to claims without fear or favor. When a President is nominating individuals to tip the balance, stack the deck, or to pack the courts with a narrow ideology, the Senate would be abdicating its responsibilities to ignore the very criteria that led to selection of such a nominee.

Under our Founders' design, the political branches share the power of appointment: the President has the power to nominate or propose judges, but the Senate has a corresponding power to confirm or reject those nominations. That is one of the ingenious checks and balances of our federal system. If a nominee's record, or lack of a record, raises doubts, these are matters for thorough scrutiny by the Members of this Committee who are entrusted to review all of the information and materials relevant to a nominee's record relating to fairness, impartiality, bias, experience, or other matters.

When there is no judicial experience to look to, it is all the more critical that the Committee inquire fully into a nominee's experience, record, views and understanding of our fundamental rights.

Chairman Hatch argued for such inquiry when the President was a Democrat. In 1997, he told the Utah Chapter of the Federalist Society:

"[T]he Senate can and should do what it can to ascertain the jurisprudential views a nominee will bring to the bench in order to prevent the confirmation of those who are likely to be judicial activists. Determining who will become activists is not easy since many of President Clinton's nominees tend to have limited paper trails . . . . Determining which of President Clinton's nominees will become activists is complicated and it will require the Senate to be more diligent and extensive in its questioning of nominees' jurisprudential views."

In the case of Mr. Estrada, however, the nominee has refused to provide us many answers at all about the types of jurisprudential views referenced by Chairman Hatch.

Most Americans want nominees who will be fair and impartial judges. An independent judiciary is the people's bulwark against a loss of their freedoms and rights. I think the rights at stake are simply too important to take a chance on a lifetime appointment to this high court, to make a decision we cannot reverse.

What little record we have calls into question his sensitivity, his fairness, and whether he would be neutral referee or an advocate and activist from the bench. For all of these reasons, I cannot vote in favor of his confirmation to the Court of Appeals for the District of Columbia.

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Statement of Senator Patrick Leahy, Ranking Democratic Member,
Senate Judiciary Committee,
On The PROTECT Act
January 30, 2003

I commend Chairman Hatch for placing S.151, the Hatch-Leahy PROTECT Act, on the Committee's agenda and for making the bill an early priority for the Committee in the new congressional session. Our bill is carefully written and purposefully targeted. We have worked hard to write a bill that would make a real difference in fighting crimes of child pornography, and we have produced a bill that would help these prosecutions in several tangible ways.

In the last Congress a bill identical to this one was reported by the Judiciary Committee and passed unanimously by the Senate. Senator Hatch and I worked hard to get that bipartisan bill passed, and I am pleased to continue to work alongside him in this Congress on the issue.

Although this bill is not perfect, it is a good-faith effort to provide powerful tools for prosecutors to deal with the problem of child pornography within constitutional limits. We failed to do that in the 1996 Child Pornography Protection Act ("CPPA"), much of which the Supreme Court struck down last year. We must not make the same mistake again. The last thing we want to do is to create years of legal limbo for our nation's children, after which the courts strike down yet another law as unconstitutional.

I said last week that I hoped that we could pass the bill in the same form as it unanimously passed in the last Congress. That is still my position, but nevertheless I have continued to work with Senator Hatch to craft the strongest bill possible that will produce convictions that will stick.

For that reason, I have worked with the Chairman to craft changes that will improve the bill, which we will be considering today as part of a joint Hatch-Leahy amendment. Together, we have been able to further refine the bill and to improve certain sections, strengthening them against the constitutional challenges that will follow. For instance:

? The Hatch-Leahy amendment creates a new specific intent requirement in the new pandering crime. The provision is now better focused on the true wrongdoers and requires that the government prove beyond a reasonable doubt that the defendant actually intended others to believe that the material in question is obscene child pornography. This is a positive step.

? The Hatch-Leahy amendment narrows the definition of "sexually explicit conduct" for prosecutions of computer-created child pornography. Although there are serious concerns about whether the constitutionality of prosecuting cases involving such "virtual child pornography" would be upheld after the Supreme Court's decision in Free Speech Coalition v. Ashcroft, narrowing the definition of the conduct covered provides another argument that the provision is not as overbroad as the one in the CPPA. I had also proposed a change that contained an even better definition, in order to focus the provision to true "hard core" child pornography, and I hope we will consider such a change as the process continues.

? The Hatch-Leahy amendment saves the existing "anti-morphing" provision from a fresh constitutional attack by excluding 100 percent virtual child pornography from its scope. That morphing provision was one of the few measures from the CPPA that the Supreme Court did not strike down last year. This will help avoid placing our bill in constitutional peril.

? The Hatch-Leahy amendment refines the definition of virtual child pornography in the provision that Senator Hatch and I worked together to craft last year, which will be new 18 U.S.C. § 2252B. These provisions rely to a large extent on obscenity doctrine and thus are more rooted in the Constitution than are other parts of the bill. The Hatch-Leahy amendments include in new 2252B(2) a definition that the image be "graphic" - that is one, where the genitalia are actually shown during the sex act. This is significant for two reasons:

First, because the old law would have required proof of "actual" minors in cases with "virtual" pictures, this clarification will remove a potential contradiction from the new law which pornographers could have used to mount a defense. Second, it will provide another argument supporting the law's constitutionality because the new provision is narrowly tailored to cover only the most "hard core" child pornography. I am disappointed that we could not include a similar definition in S. 151's other virtual child pornography provision, which was included at the request of the Administration. I hope that will be considered as this bill moves forward.

The Hatch-Leahy amendment also clarifies that digital pictures are covered by the PROTECT Act, an important addition in today's world of digital cameras and camcorders.

Although, as I said last week, this bill is not exactly as I would have written it were it my decision alone, I would have voted to pass S.151 exactly as Senator Hatch introduced it. Nevertheless, I was willing to work with Senator Hatch on additional improvements that are set forth in the Hatch-Leahy amendment.

Unfortunately, I cannot support all the changes that Senator Hatch seeks to make part of the bill we have introduced. I believe that some of them go too far and would subject the bill to the same constitutional limbo and risk that brought down the earlier law. Most notable among these is the new prong of the pandering crime that Senator Hatch and I worked so hard to craft last year. It would allow prosecution of anyone who "presented" a movie that was intended to cause another person to believe that it included a minor engaging in sexually explicit conduct, whether or not it was obscene and whether or not any real child was involved. Any person or movie theater presenting films like Traffic, Romeo and Juliet, and American Beauty would be guilty of a felony. The very point of these dramatic works is to cause a person to believe that something is true when in fact it is not. These were precisely the concerns that led seven justices of the Supreme Court to strike down the 1996 Act. We do not want to put child porn convictions on hold while we wait another 6 years to see if the law will survive constitutional scrutiny.

Another new provision in the Hatch amendment includes a mandatory directive to the United States Sentencing Commission to establish penalties for these new crimes at certain levels. In my experience, however, the nonpartisan Sentencing Commission operates best when it is allowed to study an issue carefully and come up with a particular sentencing guideline based upon its expertise in these matters. In child pornography cases the commission has established

appropriately high penalties in the past, and there is no reason to believe that it would not do so again with respect to these new laws.

For these reasons, I note my objection to the Hatch amendment and hope that we will continue to work together to come up with solutions to these concerns as the legislative process continues.

I ask consent that my entire statement be entered in the record, and if our bill is reported, I request the opportunity to place my views in the Committee Report.

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