

DEMOCRATS ON JUDGES

A series of Democrat memos on judicial nominations was leaked to the Wall Street Journal, where it was the subject of a November 14 editorial. The most disturbing information in the memos is highlighted in the editorial, which is attached. As one memo makes clear, for example, Democrats specifically targeted Miguel Estrada because he is Hispanic. (That memo alone would seem to give Estrada a prima facie Title VII claim.)

The source of the memos is unclear. The sheer volume of the memos, however, suggests that the memos weren't simply misplaced by someone – they appear to have been intentionally leaked by a Democrat. Also, the memos, which begin in late 2001, cut off suddenly in April 2003. This suggests that they came from a former staffer, rather than someone who recently accessed Democrats' computers. Finally, the only information blacked out in the memos is staffers' names. Whoever leaked these memos did not care about the Senators, but apparently knew the staffers and cared enough to spare them embarrassment.

It bears keeping in mind that the groups and ideology described in these memos are driving not just Judiciary Democrats, but virtually all of the Senate Democrats. With the exception of Senator Nelson of Nebraska and Senator Miller, every Democrat Senator has voted to repeatedly filibuster judicial nominees this year. Indeed, aside from these two and Senator Breaux, who supported cloture on Estrada and Pickering, Senator Nelson of Florida (Estrada) and Senator Jeffords (Pickering), every other Democrat has voted to filibuster every single nominee targeted by the groups and Judiciary Democrats. Senate Democrats have voted to filibuster judicial nominees 16 times so far this year.

Two noteworthy themes emerge in the memos:

1. The Extreme-Left Groups' Total Control over the Democrats' Actions on Judicial Nominations. The memos repeatedly make clear that a small collection of extreme-left groups – abortion groups, race organizations, and leftist groups specifically focused on judges – are driving the Democrats' agenda and decisions. These groups tell Democrats which judicial nominees to attack and vote down, when to hold hearings on which nominee, how many hearings to hold, and rules for allowing floor votes. The memos even indicate that the groups persuaded Democrats to delay nominations in order to affect pending cases. Two of the Durbin memos identify the principal groups as: National Abortion Rights Action League, Alliance for Justice, Leadership Conference on Civil Rights, People for the American Way, Association of University Women, National Women's Law Center, and National Partnership. All of these groups support abortion on demand and partial-birth abortion, oppose parental notification, and support widespread use of race in public hiring and distribution of public benefits. Passages from the memos include:

- Singling Out Estrada A June 2002 memo to Kennedy, Schumer, Durbin, and Cantwell urges delaying a hearing on Miguel Estrada in order to “give the groups time to complete their research.” A November 2001 memo to Durbin also notes that the groups have “identified Miguel Estrada 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.” Later, a January 2003 memo advocates filibustering Estrada because “the Democratic base is particularly energized over this issue.”

- Manipulating the Michigan Race-Preferences Case An April 2002 memo to Kennedy indicates that NAACP “would like the [Judiciary] 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. . . . 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, the new judge will be able . . . to review the case and vote on it.” The Kennedy memo later states that the staffers “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 judges.” But the memo concludes: “Nevertheless we recommend that Gibbons be scheduled for a later hearing: the Michigan case is important.” Apparently, the NAACP got what it wanted. Gibbons is one of five judicial nominees who received a Judiciary Committee hearing on April 25, 2002. Democrats allowed the other four nominees to be voted on in the full Senate on May 9, before the Sixth Circuit decided the Michigan case. The vote on Gibbons was delayed until July 29 – well after Michigan was decided.
- Whom to Move; No Hearing for Dennis Shedd A June 2002 memo to Kennedy recommends that “the groups be encouraged to propose some specific nominees who can be moved forward before adjournment.” And in relation to Fourth Circuit nominee Dennis Shedd, the memo notes that “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 27, particularly given that they are gearing up to oppose Judge Owen.” The memo concludes that “you should strongly encourage the groups to work with South Carolina groups to individuals to apply pressure on Senator Hollings.” (A June 2002 memo to Durbin notes that Senator Hollings “apparently is backing Shedd because the trial lawyers want him off the district bench.”)
- Calculating the Vote A June 2002 memo to Durbin notes that “the groups feel that Owen is vulnerable to defeat, but Estrada and McConnell will be hard to vote down in Committee.”
- No “Controversial” Nominees After 9-11; Second Hearing for Pickering An October 2001 memo to Durbin notes that the groups object to holding a hearing on Charles Pickering on the ground that “in light of the terrorist attacks, it was their understanding that no controversial judicial nominees would be moved this fall.” The memo also notes – prior to the Judiciary Committee’s having held any hearing on Pickering – that “the groups are asking that the Committee hold a second hearing on Pickering in a few weeks.” The Democrats acceded to this request.

- Setting the Agenda Describing a forthcoming meeting with the groups, a November 2001 memo to Durbin notes that “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.” A follow-on November 2001 memo to Durbin describes the results of the meeting: “the groups advocated for some procedural 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) a commitment that nominees voted down in Committee will not get a floor vote.” Also, with regard to identifying “controversial and/or vulnerable” nominees, the memo notes that “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 an eye to voting him or her down in Committee.”

2. Ideological Extremism and Crass Partisanship. The memos also reveal the extreme views and attitudes and cold political calculations motivating the Democrats’ actions on judges.

- The Ideological Fringe A November 2001 Durbin memo sets the tone by noting that “most of Bush’s nominees are nazis.” Jay Bybee, a nominee to the Ninth Circuit, gets off relatively easily: a February 2003 Kennedy memo merely describes him as “an awful nominee.” Another memo, titled “Owen Talking Points for Caucus,” attacks the whole Fifth Circuit, describing it as “one of the least fair and least just circuit courts.” But the most abuse is directed at Miguel Estrada. Interestingly, though Judiciary Democrats argued to themselves that they should defeat Estrada because he is Hispanic and an attractive Supreme Court nominee, they told a different story to other Democrats. A document titled “Talking Points on Estrada for Caucus” states that Estrada “has serious temperament problems” – that he is not “even-tempered” and “a short fuse.” (None of this came out in Estrada’s committee hearing.) The “Talking Points” conclude by declaring Miguel Estrada “a stealth, right-wing zealot.”
- The Triumph of Politics The fall 2002 memos repeatedly urge Democrats to delay nominees for purposes of election politics. A September 2002 Kennedy memo notes that a hearing has been proposed for Sixth Circuit nominee Deborah Cook for early October. The memo argues that it “would demoralize Democrats’ key constituents – in particular, labor – to have a hearing before the election.” (Cook did not receive a hearing until the next January, after Republicans took control of the committee.) The same memo expresses alarm that committee votes may be scheduled for McConnell and Estrada before the recess. It states that “we think this is a terrible idea and that voting on (and for) these nominees would be demoralizing to our base before the election.” The Democrats’ need to satisfy “the base” was not limited to periods before elections. A January 2003 memo describes a meeting attended by Daschle, Reid, Leahy, Durbin, Edwards, Kennedy, Feinstein, and Schumer. The memo notes that “all in attendance, including Daschle and Reid, voiced the view that the Estrada nomination should be stopped because,” among other reasons, “the Democratic base is particularly energized over this issue.”