April 24, 2003

To: Journalists

Fr: Ralph G. Neas

Re: The Importance of Selective Filibusters Against Bush's Court-Packing Plan

With the recent nomination of William Pryor to the U.S. Court of Appeals for the 11th Circuit, the Bush administration has clearly signaled that it will continue to nominate far-right ideologues for crucial appeals court seats rather than engage in the kind of consultation and compromise that would result in the nomination of more moderate nominees that could win significant bipartisan support.

The administration's continuing refusal to seek a bipartisan solution, even though the Congress like the nation is closely divided, leaves the modern-day filibuster, the Senate procedure requiring 60 senators to agree to a vote on significant issues, as one of the Democrats' only tools for resisting the administration's court-packing plan. Failure to use that tool would mean acquiescence in an ideological takeover of the federal judiciary by judicial activists who are eager to turn back the clock on decades of legal precedent and social justice progress. It is imperative that Senate Democrats make judicious use of the filibuster in order to preserve important legal principles and indeed the very constitutional framework that permits the federal government to defend individual liberties and address national problems.

While Senate Judiciary Committee Chairman Orrin Hatch and some of his colleagues have repeatedly suggested in recent weeks that use of the filibuster is inappropriate and even unconstitutional, the historical record is clear. Both Republicans and Democrats have often demanded 60 votes on what each considered controversial nominations as well as legislation. During the Clinton administration, a number of Republican Senators repeatedly used the filibuster, which has a long and bipartisan pedigree. But they also made extensive use of the much less open and accountable tactic of secret holds by a small number of senators to delay and prevent votes on an unprecedented number of appeals court nominees. Indeed, one third of the Clinton circuit court nominees were blocked between 1995 and 2000. Sen. Leahy has recently described Senate Republicans' approach during the consideration of Clinton administration nominees, which permitted one or a handful of senators, through secret holds, to prevent a nominee from even getting a hearing. Republican leaders who participated in such a scheme have little credibility suggesting that a filibuster is unconstitutional because it permits 40 senators to prevent a final vote. In fact, in 1994, while some Republican senators were engaged in a filibuster against a Clinton administration nominee, Hatch called a filibuster "one of the few tools that the minority has to protect itself and those the minority represents."

That tool is especially important given the Bush administration's actions and Hatch's growing willingness to unilaterally discard bipartisan agreements and violate longstanding

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committee rules in order to turn the Judiciary Committee and the Senate into a rubber stamp for Bush's judicial nominees.

- When he chaired the committee during the Clinton administration, Hatch permitted a single home state senator to prevent action on a nominee through use of the "blue slip" policy; now that there is a Republican in the White House, Hatch has abandoned that policy.
- In January, Hatch held a single hearing for three controversial appeals court nominees – Jeffrey Sutton, Deborah Cook, and John Roberts – even though multiple controversial appeals court nominees on a single day violated a longstanding bipartisan agreement. In the mid-1980s, Senators Strom Thurmond, Joseph Biden, Bob Dole, and Robert Byrd agreed in writing that there would be no more than one controversial nominee scheduled at any one time, an agreement that had been followed under both Republican and Democratic control until Hatch's packed January 29th hearing.
- More recently, Hatch abused his power as committee chair to concoct a new meaning clearly contradicting the plain language of a longstanding committee rule that was designed precisely to prevent such partisan misdeeds by requiring the support of at least one committee member of the minority party to bring items to a committee vote. Hatch has unilaterally suspended that rule to permit him to force committee votes on judicial nominees at will.
- The administration has reportedly advised judicial nominees to be reticent in answering senators' questions, instructing them not to discuss any court decisions that they have not previously addressed in writing. And in an unprecedented move, the administration renominated this year two controversial nominees – Charles Pickering and Priscilla Owen – who were rejected by the Judiciary Committee last year.

Faced with a White House that refuses to engage in dialogue and compromise, and Republican Senate leaders who refuse to respect their own procedures or professed standards of fairness, Democrats have no alternative but to make selective use of the filibuster to stop some of the worst nominees and to try to give the administration a reason to come to the bargaining table in good faith.

The Filibuster in Theory and Practice

It has been wrongly asserted that use of the filibuster is an act of partisanship run amok by senators who are out to prevent President Bush from naming judges to the federal judiciary. In fact, as Sen. Leahy recented pointed out, the Senate, during the 17 months that he chaired the Senate Judiciary Committee, approved 100 Bush nominees to the federal bench in 2001 and 2002 – a record pace of six confirmations per month. Additional judges have been approved by the Senate this year in spite of significant opposition. Democrats have been extremely careful and restrained in the use of the filibuster. The number of nominees confirmed makes it clear that when the administration does choose to nominate judges considered more moderate, such as recent nominees Edward Prado to the Fifth Circuit and Richard Wesley to the Second Circuit, they are likely to be confirmed.

It has also been wrongly asserted that there has been only one filibuster against a federal judicial nomination, the successful Republican filibuster of Supreme Court nominee Abe Fortas in 1968. In fact, cloture votes have been required to end debate on a number of judicial

nominations. According to the Congressional Research Service, cloture motions have been filed and cloture votes held on 14 Court of Appeals nominations since 1980; as recently as 2000, cloture votes were necessary to obtain votes on the nominations of both Richard Paez and Marsha Berzon to the Ninth Circuit. Sen. Bob Smith openly declared he was leading a filibuster, and he described Sen. Sessions as a member of his filibuster coalition. Current Senate Majority Leader Bill Frist was among those voting against cloture on the Paez nomination. Democrats have also demanded 60 votes for controversial nominees, such as Edward Carnes, who was nominated to the Court of Appeals for the 11th Circuit in 1992. Over the years, many other attempted filibusters did not result in a cloture vote.

The current situation – with one party dominating the White House and Congress in spite of a narrowly divided national electorate – demonstrates why our constitutional framework was designed as a system of checks and balances. The filibuster is now the *only* tool that Senate Democrats have at their disposal to try to force the administration and the Republican Senate majority to engage in bipartisan consultation, compromise, and cooperation on judicial nominations. Their only other option would be to stand aside while the administration abuses its power in order to fill the federal courts with judges who are eager to reverse decades of legal precedent and social justice progress on civil rights, privacy and reproductive choice, religious liberty, environmental protection, worker and consumer safety and health and more. That would be a devastating dereliction of senators' duty to their constituents and to the American people and an abdication of their constitutional advise and consent responsibility. If a demand for 60 votes is legitimate with respect to legislation that future Congresses can revisit, it is even more appropriate when considering *lifetime* appointments to powerful positions on the federal judiciary.

The Estrada Filibuster

Appeals court nominee Miguel Estrada, who is an active member of the far-right Federalist Society but has no judicial record for senators to consider, was approved 10-9 by the Senate Judiciary Committee on a party-line vote even though senators had raised important concerns about his record and judicial philosophy on key issues, and in spite of the fact that at his hearing last year Estrada had refused to answer many questions about his jurisprudential views on important Supreme Court precedents and fundamental constitutional questions.

Estrada's silence on fundamental constitutional questions is part of an apparent strategy carefully calculated to prevent nominees' extremist views from becoming known before they are confirmed for lifetime positions on our highest courts. Federalist Society members have been advised not to answer such questions, and have been told that such a stonewalling strategy worked well for Supreme Court Justice Antonin Scalia. Administration officials have reportedly instructed nominees not to discuss any past or present court rulings about which they have not previously expressed their views in writing.

Estrada and some of his supporters have claimed that it would be unethical for him to answer such questions. But some other controversial administration judicial nominees have not tried to hide behind that specious claim. For example, Michael McConnell, who was confirmed to an appeals court seat last fall, freely discussed his understanding and approach to major Supreme Court rulings and doctrines. Timothy Tymkovich, who was recently confired to an

appeals court seat in spite of significant opposition, answered a key question that Estrada refused to answer, identifying several Supreme Court rulings with which he disagreed.

In addition, the administration has refused to release memos Estrada wrote at the Justice Department that could provide senators with additional information with which to evaluate his nomination. The Bush administration and its allies have frequently asserted that Democratic senators have no right to memos Estrada prepared while working in the Solicitor General's office, claiming that a demand for such information is inappropriate, unethical, and unprecedented. In fact, the administration is trying to create a completely new policy of executive privilege, a policy that has no precedent and no legal standing. Estrada himself has told senators that he would be willing to provide senators with those memos and to discuss them but the Bush administration refuses to permit their release.

Sen. Patrick Leahy devastatingly refuted the administration's claims in a February 12 floor speech during which he released correspondence between the Judiciary Committee and earlier Republican and Democratic administrations demonstrating that the same kind of information the Bush administration has declared off-limits has in fact been shared with senators on a regular basis to allow them to fully evaluate nominees to important judicial and other administration positions.

During that speech, Leahy said:

> The Senate has requested, and past Justice Departments have provided, similar memoranda such as memoranda related to appeals, certiorari petitions, and amicus curiae – the decision to join a case as a friend of the court – written by attorneys of the Department of Justice. They have done this in connection with the nominations of Robert Bork to become Associate Justice of the Supreme Court; William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division, to become Associate Attorney General; Benjamin Civiletti, nominated by President Carter to become Attorney General; Stephen Trott, nominated to become a judge in the Ninth Circuit; and then-Justice William Rehnquist, who was nominated by President Reagan to become Chief Justice – among others. (*Congressional Record*, February 12, 2003, p. S2252)

Leahy also cited an example from the current administration: legal memoranda from the White House Counsel's office released in connection with the nomination of Jeffrey Homestead to be the Assistant Administrator of the Environmental Protection Agency.

In addition, Leahy effectively demolished Republican claims that the documents Estrada wrote at the Solicitor General's office were somehow protected by attorney-client privilege. He noted that Circuit Courts in the Seventh, Eighth, and DC Circuits have all agreed that attorney client privilege does not apply to a government attorney, and that Viet Dinh, who now serves as Assistant Attorney General for Legal Policy, said five years ago said that a government lawyer's "employer is not a single person but the United States of America" and more specifically that the government as an employer included the U.S. Senate when it is trying to fulfill its constitutional duties. Yet now, Dinh and his colleagues in the administration are trying to take the Senate out

of that equation and prevent senators from having access to information that would allow them to fulfill their constitutional duties.

As the *New York Times* has editorialized, "The Senate should not be bullied into making this important decision in the dark....The administration has no legal basis for its refusal to supply these documents." (September 25, 2002 Editorial)

A Dishonorable Smear Campaign Against Democratic Senators

Democratic senators have rightly resisted efforts – four to date – to force a final vote on Estrada's confirmation until they have more information with which to evaluate troubling aspects of his record and his approach to important legal issues. Rather than provide such information, the White House and its political allies have launched a remarkably dishonest and dishonorable smear campaign against a number of Democratic senators, alleging that they are anti-Hispanic or that they want to prevent Hispanic Americans from getting good jobs. These include virulent television and radio advertisements in English and Spanish that groups close to the White House are running in a number of states.

A group led by former White House Counsel C. Boyden Gray has run a TV ad that suggests that opposition to Estrada's confirmation reflects bigotry and discrimination, and insinuates that Estrada opponents that don't want Hispanics to get jobs. Former President George H.W. Bush has recently helped Gray's group raise $250,000 for what appears to be a barely concealed campaign to defeat a number of Senate Democrats in next year's elections. The Latino Coalition, a business oriented group that has acted as a cheerleader for Bush administration economic proposals, has produced Spanish language ads accusing Sens. Tom Daschle and Mary Landrieu of finding excuses to oppose Estrada because they want to discriminate against Hispanics.

The vitriolic nature of many of Estrada's supporters has even moved one group supporting his confirmation, the League of United Latin American Citizens, to call on Estrada supporters to stop making the "anti-Hispanic" charges.

These charges are ludicrous given the intense opposition to Estrada's confirmation from a majority of leading national and grassroots Latino legal, civil rights, and workers' rights organizations. In addition to the Congressional Hispanic Caucus, the Mexican American Legal Defense and Educational Fund (MALDEF), and the Puerto Rican Legal Defense and Education Fund (PRLDEF), groups opposing Estrada's confirmation include United Farm Workers of America, United States Hispanic Leadership Institute, Southwest Voter Registration and Education Project, Labor Council for Latin American Advancement, La Raza Lawyers Association of California, Farm Labor Organizing Committee, William C. Velasquez Institute, Coalition of Immokalee Workers, PCUN (Pineros y Campesinos Unidos del Noroeste/ Northwest Treeplanters and Farmworkers United), National Farm Worker Ministry, The Farmworker Association of Florida, and the California branch of the League of United Latin American Citizens (LULAC).

In addition, Dolores Huerta, cofounder of the United Farm Workers, and Mario Obledo, former national president of LULAC, have come out against the Estrada nomination, as well as 15 past presidents of the Hispanic Bar Association.

Hispanic opposition to Estrada's confirmation has grown in part because he has dismissed concerns about the continuing effects of discrimination and has demonstrated little concern for the impact of racial profiling on Latinos and other people of color, and in part because he has refused to answer crucial questions about his approach to the Constitution. That obstructionism is especially troubling in the context of right-wing legal activists' push to abolish affirmative action and to cement a states' rights approach to the Constitution – championed by Supreme Court Justices Antonin Scalia and Clarence Thomas – that is already undermining the federal government's ability to protect individuals' rights.

Unmentioned by Republican senators and their allies like the Latino Coalition is Republicans' blocking of Hispanic Circuit Court nominees Jorge Rangel, Enrique Moreno and Christine Arguello, who were prevented from getting a hearing or a vote, and stalling of others, like Richard Paez, for four years.

A Potential Filibuster Against Priscilla Owen

The appeals court nomination of Texas Supreme Court Justice Priscilla Owen was rejected by the Senate Judiciary Committee last year after a fair and in-depth public hearing. President Bush's January renomination of Owen to the same appeals court for which she had already been rejected by the Judiciary Committee was unprecedented. Until the administration's in-your-face renominations of Owen and Charles Pickering despite their rejections last year, no administration had ever disrespected the Senate's role by renominating a rejected appeals court nominee.

This year's hearing on Owen's nomination provided no new information contradicting the already clear record of her right-wing judicial activism. At the March 13 hearing, Owen joined Hatch and other Republican senators in an effort to explain away three serious concerns that helped lead to the rejection of her nomination: the criticism by White House Counsel Alberto Gonzales and other Bush appointees to the Texas Supreme Court of a number of Owen's frequent dissents and attempts at judicial activism; Owen's judicial activism in attempting to impose additional barriers on the exercise of the right to reproductive choice; and Owen's frequent dissents and efforts at judicial activism in favor of corporate and other interests in cases in which the majority had protected the rights of consumers and other citizens.

Senator Hatch provocatively entitled the March 13 hearing "Setting the Record Straight." In fact, however, the record was no different after the March 2003 hearing than it was after the hearing in July 2002. Justice Owen's record demonstrates that she is a right-wing judicial activist who would allow her ideology to trump her responsibilities as a judge to follow the law, directly contrary to President Bush's asserted goal of appointing judges who would interpret the law, not make it.

Owen's supporters had previously tried to distance her from Gonzales' criticism in a reproductive rights case by claiming that his charge that she was advocating an "unconscionable

act of judicial activism" referred to the dissents of other justices, but not to hers. At Owen's first confirmation hearing, Hatch joined this revisionist bandwagon, claiming that Gonzales was not referring to Owen's dissent "rather to the dissent of another colleague in the same case."

At her March 13 hearing, however, Justice Owen contradicted Hatch with a more sweeping claim that not only was Gonzales' "judicial activism" comment not a reference to her dissent but also that Gonzales had not been referring to "any" of the dissents when he issued that charge. The clear language of Gonzales' opinion simply does not support this remarkable assertion. Owen's claim stands in sharp contrast to what Alberto Gonzales himself has said –- and not said -- about this matter. Indeed, remarks by Gonzales in his current capacity as White House counsel as well as his spokesperson have acknowledged that Owen was a target of his criticism when they served together on the Texas Supreme Court.

Owen also claimed at her March 13 hearing that she was aware of criticism by Gonzales only regarding the reproductive rights case. This is a remarkable claim given that <u>Gonzales, in the relatively short time he served with Owen on the Texas Supreme Court, wrote or joined almost a dozen opinions sharply criticizing opinions written or joined by Owen on the court in a variety of cases concerning the rights of consumers and other citizens.</u> In most of these cases, Gonzales, a strong conservative on the court, was part of the majority that rejected ultra-conservative Owen dissents as ignoring the plain meaning of the law or otherwise engaging in improper judicial activism to try to reach a particular result.

Owen's confirmation is opposed by a broad range of state and national organizations, including more than two dozen Texas groups that had called on President Bush not to renominate Owen, explaining that her opinions have been "extreme and often directly at odds with established rights and protections enjoyed by all Texans." Nothing at Owen's most recent hearing dispelled those concerns or changed the fact that it is her own colleagues who have said, in multiple cases, that she has tried to "judicially amend" or "write out" or "disregard" or "defy" the words of state statutes, or that she has tried to "radically depart" from prior precedent or engage in "judicial sleight of hand" to circumvent the state Constitution.

These numerous statements by conservative judges on a conservative court, some appointed by President Bush himself, continue to demonstrate that Owen's record of right-wing judicial activism would seriously endanger Americans' rights if she is confirmed to a lifetime position on the Fifth Circuit.

Sen. Leahy recently described Owen this way: "Justice Owen was plucked from a law firm by political consultant Karl Rove. She ran as a conservative pro-business candidate for the Texas Supreme Court.... she became the most conservative judge on a conservative court. She stood out for ends-oriented extremist decisionmaking. Now she is being asked to be placed in a lifetime appointment one step below the Supreme Court."

Justice Owen's extreme record, the damage she could cause as a right-wing activist at the appeals court level, and the Bush administration's unprecedented post-rejection effort to push her onto the appeals court all merit strong opposition by Senate Democrats, including the use of the filibuster.

Stopping the Court Packing Plan

The administration's judicial selection process is demonstrably focused on filling important appeals court seats with judicial nominees who share the states' rights and right-wing judicial philosophies promoted by the Federalist Society and championed by Supreme Court Justices Antonin Scalia and Clarence Thomas. As the *New York Times* noted recently,

> Filibustering Judge Owen's confirmation would send the Bush administration two important messages: the president must stop packing the courts with ideologues, and he must show more respect for the Senate's role.... It is not by chance that the Senate is being asked to confirm someone with these views. The White House has culled the legal profession to find nominees with aggressive conservative agendas. It is asking senators to approve, along with Judge Owen, Carolyn Kuhl, who was a strong supporter of maintaining the tax-exempt status of Bob Jones University, which discriminated against blacks; Jeffrey Sutton, a lawyer who has severely set back the rights of the disabled; and James Leon Holmes, who has compared abortion to the Holocaust.

Neither the President nor Senate Republican leaders have spoken honestly with the American people about this goal or the extremely far-reaching consequences of their success for legal principles and protections that are important to Americans: privacy and reproductive choice, civil rights enforcement, environmental protection, worker and consumer safety and health, separation of church and state, and more.

It is urgent that senators slow the confirmation steamroller and make clear to the American people what is at stake before it is too late and we have lost basic rights, liberties, and legal protections we have counted on for more than half a century. Using the filibuster is both appropriate and necessary in order to preserve our those protections as well as the constitutional framework that has made possible the social justice accomplishments of the last half century.

For more information on judicial nominations see www.pfaw.org/independent_judiciary.