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From: Matthew E. Smith (CN=Matthew E. Smith/OU=WHO/O=EOP [WHO])

To: Bradford A. Berenson (CN=Bradford A. Berenson/OU=WHO/O=EOP@EOP [WHO]), Brett Kavanaugh (Brett Kavanaugh [WHO]), Abel Guerra (CN=Abel Guerra/OU=WHO/O=EOP@EOP [WHO])

Subject: : From Legal Times

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TO:Bradford A. Berenson (CN=Bradford A. Berenson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO:Brett Kavanaugh (Brett Kavanaugh [WHO])

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TO:Abel Guerra (CN=Abel Guerra/OU=WHO/O=EOP@EOP [WHO])

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The Hard Sell for a Place on the Bench

Most nominees stay out of the fray, but some must lobby for themselves

By Jonathan Groner
Legal Times

D.C. Circuit nominee Miguel Estrada

Photo: Stacey Cramp

Miguel Estrada was not planning on attending President George W. Bush's kickoff for Hispanic Heritage Month last fall. But then the White House called and asked Estrada to come. So the nominee for a seat on the U.S. Court

of Appeals for the D.C. Circuit found himself in the East Room, along with Housing and Urban Development Secretary Mel Martinez and New York Mets shortstop Rey Ordoñez, among others. From the podium, Bush pointed out Estrada. "America needs to have him on the bench," the president said. The nominee took a bow. It was an extraordinary moment in the nomination of a federal judge, a process that mostly plays out behind the scenes. But in some

cases, administration officials and the candidates themselves will step beyond the op-ed articles and political rhetoric in an effort to gain advantage in the confirmation wars. And as Senate Democrats and the Bush administration prepare for a second year of battle over the future of the federal bench, the Oct. 12 White House event accents an important reality about the politics of judicial nominations: While most nominees will remain barely visible while awaiting confirmation, a handful at the center of the storm will be playing a larger role on their own behalf. "The vast majority of nominees are requested to do absolutely nothing," says a Bush administrator

source knowledgeable about the judicial selection process. "They are disabled from speaking with the press or indeed from doing anything to advance their cause. But there is a small minority of nominees against whom forces have mobilized and who are therefore likely to be called in to help counteract those forces." Estrada, who is seen by liberal critics as an "ultra-conservative" who must be carefully scrutinized, is one nominee who has been enlisted in his own defense. Jeffrey Sutton, a nominee for the 6th Circuit, also reached out after his nomination was announced in May, meeting

with members of advocacy groups that are critical of his nomination. Last fall, Sutton met for about 30 minutes at a restaurant in D.C.'s Union Station

with Andrew Imparato, president of the D.C.-based American Association of People With Disabilities. "I think he wanted to make sure that we knew where

he was coming from on the law," says Imparato. "He was a very nice guy, but I

remained convinced after the meeting that there are problems with his jurisprudence. I did not change my views on the nomination. We are opposed to

it." Sutton declines to discuss his meetings with interest groups, terming them confidential. But he would not be the only one in recent times to try to

disarm his enemies. Eleanor Acheson, who as assistant attorney general for policy development spearheaded the Clinton administration's judge-picking team, says it was not uncommon for Clinton picks to push their nominations in

meetings with lawmakers and others. But she warns that the tactic can backfire. "If you put the nominees out there, they can blow themselves up," she says, referring to the possibility of a gaffe in a meeting with a key interest group or senator. "You could have someone who would make a great judge, but they have a difficult personality, or blah-blah too much."

Visiting the White House Earlier on Oct. 12, before the president made a point of mentioning Estrada, the Gibson, Dunn & Crutcher D.C. partner met with several Hispanic leaders in an unpublicized White House session that centered entirely on his nomination. "We had an opportunity to hear him speak

about his background, and several people asked him follow-up questions," says

Marisa Demeo of the Mexican-American Legal Defense Fund, who was present. Like other liberal organizations including the Alliance for Justice and People for the American Way, MALDEF has yet to offer a thumbs up or thumbs down on Estrada. Estrada's meetings with Hispanic groups have clear political

purposes. They are an effort to humanize the nominee, combating what the White House sees as a misconception that he is a hard-liner. They can also

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viewed as a way of peeling off the Hispanic organizations from the liberal coalition that for years has opposed conservative choices for the federal courts. It wasn't the first time that the 40-year-old Estrada, a Honduran-born U.S. citizen, had met with key Hispanic-Americans. Earlier in the fall, he sat down at the D.C. offices of Wilmer, Cutler & Pickering with

leaders of the national and D.C. Hispanic bars-a meeting that soon helped him

land the endorsement of both bar groups. "I am happy to be as helpful as the

administration wants me to be," says Estrada, who declines to discuss the specifics of the meetings. "If the White House calls me, I'll show up. But

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won't take it upon myself to arrange a meeting. That would not be appropriate." Sutton, the 6th Circuit nominee, has also stepped in to push for his own cause, on the issue that is causing his nomination grief. A partner in the Columbus, Ohio, office of Jones, Day, Reavis & Pogue, Sutton,

41, has been opposed by disability-rights groups because he has successfully

argued cases before the Supreme Court that cut back on the protections of the

Americans With Disabilities Act. Sutton and Bush administration officials insist that these arguments were simply examples of an advocate doing his job, noting that the Supreme Court found that they were clearly based on constitutional principles of federalism. Sutton and his supporters say the cases don't reflect hostility to the rights of the disabled. A parallel argument is being made on behalf of John Roberts Jr., a Hogan & Hartson partner who has been tapped for the D.C. Circuit. Like Sutton, Roberts, 46, has drawn fire from liberal groups because of his advocacy. While serving as

President George H.W. Bush's deputy solicitor general, Roberts wrote a brief

in a case involving federal funding for abortion counseling that cast doubt on the existence of a constitutional right to abortion. Unlike either Estrada

or Sutton, Roberts has not made any perceptible effort to meet with critics or move his nomination forward. Roberts declines comment. Elliot Mincberg, legal director of the liberal People for the American Way, says there's no legal or ethical problem with one-on-one meetings between nominees and hostile interest groups, but he thinks they can be a waste of time. "I really

don't know how much that helps," says Mincberg, a veteran of many confirmation battles who was not discussing any specific nominee.

"Historically, it has not made a large amount of difference. In fact, sometimes if a group is already formally opposed to a nominee, it can be awkward to meet with the nominee." Several other reasons are often given for

why this type of direct persuasion can be problematic. The administration official says the most important point is not to ruffle any feathers in the Senate. "There's a general concern that if anyone gets too far in front, they'll be perceived as treading on Senate prerogatives. Senators may see this as the equivalent of hearings outside the hearing room. We just don't want them in the fray," says this source. A lawyer who has been in the confirmation storm says that in addition to the problem of "seeming to

interfere with the Senate process," a nominee also has to make sure that he or she "doesn't look as if they're working too hard for it." In other words, it's best simply to practice law and go on with one's life. But Acheson says this rule has to be modified under the proper circumstances-if it's a political battle and the nominee can make a good impression. "When the fight is over ideology," she says, "your time should be spent in doing as much outreach as possible, even if you don't directly change a single mind. You get points just for offering yourself up to meet people, as long as you are someone who has no trouble spending a couple of hours talking about who you are and where you come from." Acheson has advice for the Bush administration along those lines. "Even if you know that the interest groups will make war, no matter how tough they can be, the best thing to do is to show that you're not afraid," she says. Acheson points out that in the late 1990s, Richard Paez -- then a U.S. district judge in California who was nominated for a slot on the 9th Circuit -- came to Washington, D.C., several times to meet with senators and staff members. Paez, whose nomination languished for four years before he was confirmed by a 59-39 vote, had drawn fire from the GOP for his views on affirmative action and judicial activism. "We worked very hard to get him into meetings at which he would explain his background, who he was, and why he was dedicated to public service. The important thing was to address the issues and to respect them," says Acheson. Paez did not return a call seeking comment. As one lawyer who has been nominated in the past but asks to remain anonymous says, "Sometimes it's psychologically and emotionally helpful for your opponents if they see you face to face. These days, there are just too many drive-by shootings by interest groups." Date Received: January 14, 2002

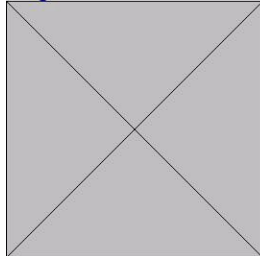
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In fact, sometimes if a group is already formally opposed to a nominee, it can be awkward to meet with the nominee." Several other reasons are often given for why this type of direct persuasion can be problematic. The administration official says the most important point is not to ruffle any feathers in the Senate. "There's a general concern that if anyone gets too far in front, they'll be perceived as treading on Senate prerogatives. Senators may see this as the equivalent of hearings outside the hearing room. We just don't want them in the fray," says this source. A lawyer who has been in the confirmation storm says that in addition to the problem of "seeming to interfere with the Senate process," a nominee also has to make sure that he or she "doesn't look as if they're working too hard for it." In other words, it's best simply to practice law and go on with one's life. 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