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**Subject:** : from Hotline

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: [REDACTED] P6/b(6)

CREATION DATE/TIME: 27-MAR-2003 14:08:27.00

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## 19 ESTRADA: What Next?

The New Republic's Crowley writes, In "the most important judicial battle of the Bush administration to date" -- over Miguel Estrada's nomination -- the GOP has "few good options. Thanks to the careful spadework of" Sen. Min. Leader Tom Daschle, Dems "are prepared to sustain their filibuster indefinitely -- or at least until" GOPers "meet their one key demand": the Bush admin "must release dozens, perhaps hundreds, of internal memos Estrada wrote as a top lawyer in the solicitor general's office" from '92 to '97. Dems "covet those memos," containing Estrada's "recommendations and legal opinions about a range of" SCOTUS cases involving the federal gov't, "because they're the only way to assess this genial cipher." Just 41, Estrada "has never been a judge and has hardly published an opinionated word. Because he is such a blank slate," many Dems are "convinced" Estrada is a "stealth" ideologue who could wind up" on the SCOTUS as a Hispanic Clarence Thomas.

To hear GOPers tell it, the Dem memo request "is outrageous, unheard of, nothing less than a threat to the republic." Senate Dems "haven't been swayed by these arguments" because "they're really not true" -- Dem researchers "unearthed records from at least five judicial-confirmation hearings" in which gov't legal memoranda "were delivered to the Senate." Their "favorite example" is the DoJ's release of memos during Robert Bork's '87 confirmation battle, "written by a lawyer in the solicitor general's office who held precisely the same job as Estrada." Also, "instructive are memos written by" Justice William Rehnquist when he was a SCOTUS clerk in the '50s, "made available to the Senate" for his '71 and '86 hearings. Dems "don't know just what cases Estrada might have had a hand in," but they believe "he concentrated primarily on criminal cases" and may have "questioned or criticized a lot of landmark criminal decisions," according to one Judiciary Cmte aide.

Senior Dem Judiciary aides say "several" GOP senators "would prefer to release at least some of the memos; two GOPers, ex-Sen. Maj. Leader Trent



Lott (R-MS) and Sen. Robert Bennett (R-UT) "have said as much publicly." However, as one Dem aide puts it: "The White House said no." This raises a question about the WH's "real motivation: Is it safeguarding Estrada's nomination or safeguarding the secrecy of executive branch documents? Time and again," from the papers of ex-presidents to notes from Dick Cheney's energy-plan meetings to DoJ deliberations over the Clinton scandals, "the Bush administration has viewed the privileged nature of its internal documents as inviolable."

This leaves Senate GOPers "in a tight spot: trying to shepherd through" a nominee the WH "very much supports but lacking any clear means, short of giving up the memos, to get him through. Little wonder, then, that they're contemplating extreme measures." Two "potential scenarios" have Dems "chewing their nails." The first would be an "audacious" GOP effort to change Senate rules to "outlaw filibusters" on judicial nominations. The other -- "arguably more plausible" -- option would be a recess appointment, "possibly as soon as next month's Easter recess." Estrada could serve until the end of '04 before having to face a Senate vote on his permanent confirmation, however, while a recess appointment would be "a short-term victory" for the WH, "it could come at a heavy cost -- Estrada's future" as a SCOTUS justice. Thus, GOPers "appear stuck with a bitter stalemate" and "'nuclear' options that could blanket them and their nominee in radioactive fallout. Their only way out would appear to be releasing Estrada's memos" (3/31 issue).  
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