It is a great honor and pleasure for me to speak to you. I've spent the past 40 years in public interest advocacy and teaching, and am inspired and inspired by the great compassion, courage, creativity, commitment, and competence that you law students bring to make a bright future for public interest law in the future.

My topic is one of vital importance to all of us as lawyers; as citizens, voters, and other political actors; and as human beings. It is of vital importance also to our families, our neighbors, our co-workers, our present and future clients -- to everyone, not only in this country but throughout the world. The topic is the federal judiciary -- and, in particular, the current crisis in appointments to the federal bench. I hope that what we will discuss this evening will increase your knowledge and understanding of this crisis, and will encourage you to learn more; to discuss what you've learned with your families, your neighbors, and your co-workers (and fellow students); and to take action -- and encourage others to take action -- by writing and calling your Senators, by writing letters-to-the-editor and "op ed" articles, and by speaking out at public forums. You should be among the best-informed and most concerned people regarding this issue, and you have both opportunity and obligation to share what you know with others.

Even those of you who have had only one year of law school understand very well that judges wield enormous power in the United States. They decide how centuries' old common law rules apply to contemporary conflicts and determine the meaning of agreements, of conveyances, of regulations, of ordinances, of statutes, and of constitutions. No more than a few months of competent legal education would be required to establish that all judges are "activist" judges, that all judges "make law." Of course, there are many situations in which virtually all lawyers and judges would reach the same conclusion about the meaning of a legal standard and its application to particular facts. Those situations do not usually result in litigation, and, if they do, the litigation usually is resolved by an early motion to dismiss or for summary judgment or judgment on the pleadings. Cases that require substantial consideration by judges -- particularly federal judges, to whom I'll confine further discussion -- almost always are cases that reasonable judges might decide in any one of several ways. That is why appellate courts often reverse lower courts (and often are themselves reversed by higher appellate courts). That is why multi-judge courts -- including the U.S. Supreme Court -- often divide into majority and dissenting groups -- often with more than two views being expressed.
And the issues with respect to which federal judges make law are immensely important to everyone: Whether and under what circumstances may a woman have an abortion? Whether and under what circumstances may a same-sex couple be arrested for engaging in consensual sexual activity? Whether and in what ways may a state university (or its law school) take affirmative steps to enroll students of color -- or secure faculty of color? Federal judges constantly decide issues about civil liberties, civil rights, human rights (including all forms of discrimination in housing, employment, and public accommodations, whether the discrimination be based on race, gender, sexual orientation, disability, age, or some other characteristic); environmental protection; immigration restrictions; and criminal justice. The list of important questions that are decided by federal courts is virtually endless -- and it includes, as we well know, deciding who will hold the office of the presidency of the United States -- a decision made by the present members of the Supreme Court in Bush v. Gore four years ago.

The federal judges who make decisions about these crucial issues are, as you know, appointed for their lifetimes, "during good Behavior," subject to removal only by impeachment. The Constitution assures them lifetime tenure -- and security against any diminution of their compensation -- in order to promote judicial independence. And the founders of the Nation understood that it was essential that the judges who exercise these great powers for their lifetimes possess, as Alexander Hamilton wrote in Federalist No. 78, "integrity and moderation . . . ." Hamilton wrote that "considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts . . . ." This is the basis for the sub-title of my talk: "The Struggle for 'Integrity and Moderation.'"

In the administration of George W. Bush, "integrity and moderation" have not been the hallmarks of judicial selection. To the contrary, this administration has looked for judicial candidates whose nominations will appeal to political groups whose support is important to George W. Bush and to business groups that will contribute large sums of money to the Bush campaign. Thus, this administration has selected candidates who oppose abortion rights; candidates who would restrict the claims of minorities, GLBT persons, and persons with disabilities; candidates who support corporate and state authority rather than environmental, claims or the claims of workers, defendants, prisoners, or other individuals; candidates who oppose the separation of church and state; candidates who oppose immigration; and candidates who would restrict civil liberties to strengthen government authority. Moreover, in the search for these candidates, the administration has been so concerned with substantive adherence to the right-wing agenda that it has allowed these considerations to outweigh those of integrity and competence, nominating several people whose integrity or ability -- or both -- are not admirable.

\[\text{1 Constitution of the United States, Art. I, Section 1.}\]
\[\text{2}\]
\[\text{508}\]
\[\text{3 The Federalist No. 78, Modern Library ed., 509.}\]
Fortunately, of course, the president is not permitted simply to appoint people to the federal bench. The constitution requires that these appointments be made only "by and with the Advice and Consent of the Senate . . . ." This, Hamilton wrote in The Federalist No. 76, "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."

In this Bush administration, the necessity of Senate consent has to some extent "prevent[ed] the appointment of unfit characters . . ." to the federal bench. Voting on judicial nominations has largely been dictated by party. For most of the first two years after the 2000 election, the Republicans were a minority in the Senate because Senator Jim Jeffords of Vermont had left the party, become an Independent, and voted with the Democrats. This meant that the Democrats held the majority on the Senate Judiciary Committee, which was chaired by Senator Patrick Leahy of Vermont. The Democratically-controlled committee -- and then the full Senate - - acted favorably on all but two of the nominations sent by the administration. The only two nominations which the Judiciary Committee refused to approve were those of Charles W. Pickering and Priscilla Owen.

With the 2002 congressional elections, however, the Republicans achieved a one-vote majority in the Senate. This meant that the Republicans held a majority in the Senate Judiciary Committee, which now is chaired by Senator Orrin Hatch of Utah. In general, the Senate Judiciary Committee has approved the nominations submitted by the administration; the controversial nominations have been approved by a strict party-line vote. Among other things, the committee reversed its earlier decisions and sent to the floor of the Senate the nominations of Charles W. Pickering and Priscilla Owen.

Since 2003, when the Republicans achieved their one-vote majority in the Senate and the Senate Judiciary Committee began to approve all judicial nominations and send them to the floor of the Senate, the only way that Democrats have been able to prevent approval of nominations has been by use of the "filibuster" -- that is, the Senate's allowance of unlimited debate on a matter unless three-fifths of the Senate votes to end debate, for "cloture." I'll talk more about the filibuster in a few moments, but since that topic gets a great deal of public attention, I want to emphasize that it affects only a tiny number of judicial nominations. Only six judicial nominations have been subjected to a filibuster. Of these six, one has been withdrawn, and two of the nominees have been appointed to the bench by use of the recess appointment power. Three nominations that have been filibustered still are pending before the Senate.

---

4Constitution, Art. II, Section 2, Clause 2.

5Federalist 76, p. 494.
In the time that we have this evening, I want to discuss five things. First, I want to describe and discuss the nomination process, the filibuster, and the recess appointment power, to be sure that all of you have the background necessary to understand what's been happening and what is likely to happen. Second, I'll give you some background about how the nomination and confirmation process in the Bush administration compares to what happened in previous administrations, particularly that of Bill Clinton. Third, I'll describe the six nominees who have been subject to the filibuster, including the two who have been given recess appointments. Fourth, I'll discuss some of the nominations that still are pending before the Senate, including those that I think are likely to be filibusted. Fifth, and finally, I'll discuss the roles that you all can and, I think, should play in this process. I don't expect you to memorize everything that I have to say. The text of this speech will be available on the Web, on my Web page, reachable through the IU-Indy Web page and on the Amaker Retreat Web page. Also, thanks to the hard work of Julia Maness, we've included in your materials a list of resources -- Websites, books, and Senators' contact information -- that would provide helpful information. We are eager to have all of this material disseminated, so you should feel free to copy and distribute any or all of it -- and to encourage others to take action on these issues.


The usual judicial nomination process in administrations prior to this one has been that potential candidates have been "vetted" by the Justice Department and the White House, that the administration has consulted with both Republic and Democratic leadership and members of the Senate Judiciary Committee, and that potential nominations have been scrutinized by the ABA's Judicial Selection Committee. Then the nominations have been submitted to the Senate, and the Senate Judiciary Committee has followed an informal "blue slip" policy and a formal rule, Rule IV.

Several changes are being made in this process. First, this administration does not consult with the Democrats in the Senate at all, and does not submit candidates' names to the ABA until after the nominations have been made -- which means that the ABA Committee cannot discourage the naming of unqualified people. Second, the Senate Republicans have changed the method of handling nominations. When the Republicans controlled the Senate during the Clinton presidency, the "blue slip" policy allowed home state senators absolute veto power over nominees from their states, and Judiciary Committee Chairman Orrin Hatch sometimes extended that veto power to Senators whose states were within the circuit effected. Thus, the Republican Senate exercised vast power to veto nominations made by President Clinton. In this Republican administration, however, Chairman Hatch has announced that home state senators' views would be merely advisory, not dispositive. Thus, California nominee Carolyn Kuhl (nominated for the 9th Circuit) received a committee hearing and a floor vote even though both her home senators oppose her. Hers is one of the nominations being filibustered. Similarly, Michigan nominee Henry Saad, for the Sixth Circuit, received a committee hearing despite opposition from both his home state senators.
In addition to this change in the "blue slip" policy, the Senate Republicans are threatening another change, with respect to the filibuster, which I'll discuss now.

The filibuster is made possible because the Senate's rules allow unlimited debate. If even a single senator objects to ending debate on any matter, debate continues unless a supermajority of the Senate votes for cloture. Under Senate Rule XXII, cloture on any matter except changes in the Senate rules requires the votes of 3/5s of all senators duly chosen and sworn -- which means 60 senators. (Cloture with respect to a proposed change in Senate rules requires 2/3 of senators present and voting.) Thus, with respect to judicial nominations and all other substantive matters, if 41 senators would refuse to vote for cloture, debate could continue forever. This means that on any matter about which senators hold such strong views that they are prepared to use the filibuster, 60 votes are required for Senate action. On highly controversial judicial nominations, the Republicans do not have 60 votes.

The filibuster has a fascinating history, and I commend to you an article by Professors Catherine Fisk and Erwin Chemerinsky, in 49 Stan. L. Rev. 181 (1997). As I hope you all know, the filibuster was famous -- or infamous -- for enabling a combination of Southern Democrats and conservative Republicans to prevent anti-lynching, anti-poll tax, and any other form of civil rights legislation from passing the Senate between the post-Civil War era and 1957. The longest filibuster in the Senate was that against the CRA of 1964 -- it held up the Senate for 74 days. The 1965 Voting Rights Act was filibustered for a month.

Since the 1970's, however, filibusters have not actually held up the work of the Senate. The Senate has adopted a "two-track" system for floor debate, allowing the controversial proposal to be considered for only part of a day, while the other business of the Senate is carried on for the rest of the day. This has created the "stealth filibuster," whereby any "credible threat that forty-one senators will refuse to vote for cloture" on a matter will keep that matter off the floor. The proponents of a controversial nomination or bill may bring the matter up for a vote from time to time to test whether the credible threat is real, but once it is clear that 41 senators will oppose a matter, the rest of the Senate's work goes on without interruption. Thus, the spectacle that the Senate Republicans staged a few months ago, bringing cots to the Senate floor to paint a picture of Senate business being held up by those who opposed the six nominees -- that spectacle was just that -- a spectacle. The only people who delayed the Senate's consideration of other matters were the Republicans, who tied up the Senate floor for three days by pretending that filibusters tie up the Senate floor. The reality is that as soon as the opposition makes clear that it has 41 votes against cloture, there is no reason for the Senate to spend any time on the matter.

---

7Fisk & Chemeromsalu 108 for '64 and '65 CRAs.
8
9Fisk & Chemerinsky 203.
Much that one reads in the newspapers or hears on radio or television news is not entirely accurate. This is the case with statements that use of the filibuster for nominations is exclusively a Democratic device or entirely unprecedented. In the Clinton administration, Republican senators filibustered "to block key pieces of the President's legislative agenda," including economic stimulus, campaign finance reform, lobbying reform, health care reform," a bill to prohibit hiring permanent replacement workers for striking employees, and racial justice provisions in a crime bill. Republicans filibustered five nominations for the State Department even though the senators apparently had no objections to the nominees, but sought to gain leverage in a dispute with the administration. Republicans filibustered Dr. Henry Foster's nomination to be Surgeon General. Earlier, Republicans used a filibuster against the nomination of Abe Fortas to be Chief Justice of the United States, in large part in "ideological reaction against the Warren Court . . . .".

Some Republicans have made threats about trying to change the Senate rules governing cloture, but this seems unlikely as they would be hard put to assemble the 2/3 vote needed to change the Senate rules and any effort to circumvent the Senate rules probably would be opposed even by many Republicans. This session of Congress has been remarkably partisan and rancorous, but Senators tend to remember that worms always turn, that minorities become majorities, and that serious tinkering with Senate procedures to favor today's majority may wreak havoc on those same people when they become the minority.

The final introductory matter for us to understand is the recess appointment process. Article II, Section 2, Clause 3 of the Constitution provides that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Thus, the president is able to make people federal judges for the duration of the Senate term. As you surely know, George W. Bush has used this power to appoint to the federal bench two people whose nominations had been filibustered, Charles W. Pickering and William Pryor. Their commissions will expire when this session of the Senate expires, at the end of 2004.

II. Judicial Nominations and Confirmations in this and Recent Administrations.

The statistics I'm about to give you were current as of March 19, 2004. Since the beginning of the Bush administration in January 2001, 173 judicial nominations have been confirmed, most of them when the Democrats controlled the Senate. (The Democratic Senate's record of confirming Bush nominees compared very favorably to any 2-year period of Republican control during the Clinton administration.) In the three years of this administration, 30 court of appeals nominations have been confirmed -- which is as many as were confirmed in the 4 years of the Clinton administration.

---

10Fisk & Chemerinsky

11Kalman 355-8
Some of the nominees who have been confirmed have been very conservative, very controversial figures. I would point, for example, to the nomination of Michael McConnell, an extremely conservative law professor who was confirmed for a seat on the Tenth Circuit -- when the Democrats still controlled the Senate. The fact is that the Democrats have been very conciliatory toward the Republicans. President Clinton nominated only moderate people who would be acceptable to Republicans and did not nominate people -- like Peter Edelman, a distinguished law professor and public servant -- to whom Senator Hatch and other conservative Republicans objected. And when the Democrats controlled the Senate, they were conciliatory to the Bush administration, confirming nominees like McConnell who were extremely conservative but people of integrity and ability. The Republicans, by contrast, have gone out of their way to be confrontational -- as the recess appointments make particularly vivid.

Of the nominations made in this administration, one has been withdrawn. Only two nominations have been rejected -- those of Pickering and Owen, which were rejected in the 107th Congress but then were resubmitted in the 108th, so the nominations still are pending. (And Pickering's nomination for a lifetime appointment still is pending even though he received a recess appointment, because the recess appointment will expire.) As I have mentioned, six nominations have been subjected to filibusters; one of those nominations, that of Miguel Estrada, is the nomination that has been withdrawn.

There are 47 pending judicial nominations. At the end of the Clinton administration, there were 63 nominees unconfirmed. The judicial vacancy rate now is 5.2% -- far lower than the nearly 12% at the end of the Clinton presidency and the lowest it's been since 1990. Republican appointees now comprise 57% of the federal judiciary, a significant change from the end of the Clinton administration when 54% of the judiciary had been appointed by Democrats. You may also be interested to know that of the Bush administration's nominees, 21% have been women (by contrast, 30% of President Clinton's nominees were women -- 30% to 21%), and 19% of the Bush nominees are minorities, while 25% of President Clinton's nominees were minorities. And Bush's nominees are conservative -- even when they are women or minorities. They are people with ties to the right wing and to business interests.

---

1219 Ct App; 28Dist; 18 pending on floor (8/10); 12 had hearing but no comm vote (5/7); 17 have had no hearing (6/11), (1 Dist. Ct. Scheduled for hearing);
III. THE NOMINATIONS THAT HAVE BEEN SUBJECTED TO FILIBUSTERS.

Six nominations have been subjected to filibusters, those of Charles Pickering, William Pryor, Priscilla Owen, Carolyn Kuhl, Janice Rogers Brown, and Miguel Estrada. I'll begin with Pickering and Pryor, the two who've been given recess appointments.

A. Charles W. Pickering, Sr.

Charles W. Pickering, Sr. has been a federal district judge in Mississippi since 1990. Trent Lott, the former Republic Majority Leader in the Senate, is his patron. Congressman Charles W. Pickering, Jr. is his son. The Pickering nomination was rejected by the Senate Judiciary Committee when the Democrats controlled the Senate. The Bush administration resubmitted the nomination and the Republican controlled committee approved the nomination and sent it to the floor of the Senate, where it was subjected to a filibuster. On January 16, 2004, while the Senate was out of session, President Bush made the recess appointment of Charles W. Pickering to the Fifth Circuit.

I'll tell you first why Pickering himself should not be on the federal bench at all -- and certainly should not be elevated to the court of appeals. And then I'll tell you why using the recess appointment power for him was particularly objectionable.

Pickering has expressed his strong disapproval of the Voting Rights Act and the "one person, one vote" doctrine. After a jury had convicted a man who burned a cross on the lawn of an interracial couple with a small child, District Judge Pickering used highly unethical means to try to force the prosecutors to drop the charges that prompted the minimum sentence of five years. He has expressed strong opposition to reproductive freedom. As a student, he wrote a law review article advising how to make Mississippi's miscegenation statute enforceable. As a state senator, he cast several votes against voting rights for Blacks. At his 1990 district court confirmation hearing he testified that he had never had any contact with Mississippi's notorious state Sovereignty Commission, established after Brown v. Board to oppose integration, but recently released records of the state Sovereignty Commission state that then state Senator Pickering had asked to be advised about developments regarding a Commission investigation into union organizing in his hometown. CW Pickering should not be elevated to the federal appellate bench.

Recess appointments of judges have been made in the past -- indeed, Earl Warren was appointed to be Chief Justice by recess appointment, and Justice Brennan and Stewart were recess appointees as well. But those appointments were made to enable the Supreme Court to do its work -- when the Supreme Court is lacking a justice, lower court decisions may be allowed to stand by evenly divided votes -- and, more importantly, those appointment were not controversial. Other recess appointments were made to increase diversity on the federal bench -- Thurgood Marshall and William Hastie first were recess appointees. But no serious questions had been raised about the qualifications of these people to serve as federal appellate judges.
In the case of Charles Pickering, 2/5s of the Senate and a substantial number of citizens of the United States had made very clear their substantive, reasonably based, strong objection to the elevation of Charles Pickering to the Fifth Circuit. [If the Fifth Circuit had been in need of further help, it could have designated District Judge Pickering, or any other district judge, to sit with it -- or could have invited a judge from another court of appeals to sit with it.] There was no need for the Pickering recess appointment, and very strong reason not to make it. That the recess appointment was made for the purpose of appeasing the anti-choice, anti-civil rights, ultra-conservative right wing was made even more clear by the fact that President Bush chose to make the appointment on the eve of the Dr. Martin Luther King, Jr. birthday holiday.

**B. William Pryor.**

William Pryor has been the Attorney General of Alabama. He is anti-choice, anti-voting rights and other civil rights, certainly including gay-rights; anti-separation of church and state, and anti-environmental protection. He is in favor of something: cruel and unusual punishment. As if all of this were not enough, he has serious ethical problems. In a reasonable world, he never would have been nominated to the federal bench; it is a disgrace that he was. And the notion that he sits on the federal appellate court under a recess appointment should shame everyone involved in that process. (Those of you who are IU-Indy might like to talk to Professor Klein about William Pryor. Professor Klein lived and taught in Alabama before we were so fortunate as to persuade him to join our faculty. Ask mild-mannered, moderate Professor Klein what he thinks about William Pryor -- and watch the sparks fly!)

I could talk for an hour about Pryor, but let me give you only a few illustrations:

[insert re Pryor]

**C. PRISCILLA OWEN**

Texas Supreme Court Justice Priscilla Owen has been nominated to the Fifth Circuit. She has the distinction of having been criticized by President Bush's own White House Legal Counsel, Alberto Gonzalez, who served with her on the Texas Supreme Court and said that she had engaged in "an unconscionable act of judicial activism" in distorting the state parental notification statute so as to deny a minor access to abortion. The fact that Alberto Gonzalez criticizes her is significant -- it helps to fill out the picture that these judicial choices are being controlled by Karl Rove, who is concerned not with the administration of justice but with shoring up the radical right's support for this administration.

Priscilla Owne is, of course, anti-choice -- I invite you to find a Bush nominee who is pro-choice. She is anti-choice, but pro-business. She has voted in ways that benefit numerous corporations, including Halliburton and Enron, after receiving campaign contributions from them. She combines hostility to individual human beings with lack of work ethic -- she is notoriously slow and has a huge backlog of cases. In one situation, she wrote an opinion
reversing a jury award against Ford Motor Company on behalf of a boy who'd been rendered quadriplegic in a car crash. She took so long to write the opinion -- more than two years -- that the court issued a separate statement apologizing for its delay. The boy died while awaiting the new trial.

D. CAROLY KUHL

Carolyn Kuhl is a judge on the California Superior Court who has been nominated to sit on the Ninth Circuit. She is of course vigorously anti-choice and is hostile to civil rights. She also seems to have problems telling the truth, having made several significant misrepresentations even to the Senate Judiciary Committee.

When she was a DOJ lawyer in the Reagan administration, she aggressively pushed the Department to seek reversal of Roe v. Wade in a case in which the right to choose was not at issue, and worked to limit the scope of sexual harassment suits. She also spearheaded the effort to persuade the administration to try to reinstate tax-exempt status for Bob Jones University and other schools that discriminate on the basis of race. This position was opposed by more than 200 staffers in the DOJ Civil Rights Division and even by Ted Olson, who's now the Solicitor General. Her insensitivity to human rights is perhaps most evident in her shocking decision rejecting a right-to-privacy claim brought by a breast cancer patient whose oncologist allowed a male drug salesman to "sit . . . by the examining table" while the patient, "nude from the abdomen up," was examined. The doctor and drug salesman "both . . . laughed" during the examination; when the patient later learned that the man was a drug salesman and not, as she had thought, another physician, she "began to cry from shame and anger." Judge Kuhl accepted the defendants' arguments that "no reasonable person would have found [the drug salesman's] presence to be highly offensive, and that this was nothing more than 'a situation which [the plaintiff] found socially uncomfortable.'" I'm glad to be able to tell you that this decision was unanimously reversed by a California appellate court. Before the Judiciary Committee, Judge Kuhl misrepresented her roles in these cases, among other things.

E. JANICE ROGERS BROWN

Janice Rogers Brown, a Justice on the California Supreme Court, has been nominated for the District of Columbia Circuit. It's going to difficult for me to hold to a reasonable length my discussion of JRB, as I drafted the 14-page analysis of her record that was the basis for SALT's opposition to her nomination. JRB holds extremist, radical views -- and applies them in her judging. She opposes New Deal programs, which she says "inoculated the federal Constitution with a kind of underground collectivist mentality." She has denounced the Supreme Court decisions upholding major New Deal legislation, calling those decisions "the triumph of our socialist revolution." She has called for a return to the discredited doctrine of Lochner v. New York -- a doctrine rejected by every member of the Supreme Court. She has a narrow view of the public interest, considering that persons who seek to vindicate civil rights are, as she said in a lone dissent in a disability discrimination case, "individuals whose only concern is their own
narrow interests." She alone on her court would have banned continuation of second-parent adoptions by unmarried people. She was the sole dissenter from her court's holding that the Fair Employment and Housing Commission was authorized to award damages for emotional distress suffered by an African-American police officer who was rejected by a landlord because of the officer's race. She is of course anti-choice. She disrespects precedent, not only arguing for a return to Lochner but rejecting the application of strict scrutiny, arguing in a separate dissent that the Supreme Court's "hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid." She's challenged the foundation of the right to privacy, the right to travel, and the right of parents to control the upbringing and education of their children. She would expand radically the interpretation of the Takings Clause. And with this all she is injudicious, inconsistent, inaccurate, and contemptuous of her judicial colleagues. No one concerned with "integrity and moderation" on the federal bench would have dreamed of appointing her to it.

F. MIGUEL ESTRADA

Since the nomination of Miguel Estrada for the DC Circuit has been withdrawn, I won't spend much time discussing it, but I do want to mention that it because it's been the basis for scurrilous attacks by the Republicans. Estrada withheld information from the committee and misrepresented his positions. His supervisor in the SG's office, the widely-respected constitutional scholar Paul Bender, said that Estrada was an ideologue who could not be trusted to provide neutral statements. The bases for strong opposition to him were evident, which explains why the nomination was withdrawn. But the Republicans now have argued that the nomination was rejected because the Democrats are anti-Latin -- an absurd charge, particularly in light of the many Latino and Latina persons nominated by Bill Clinton and then left unconfirmed by the Republican-controlled Senate -- and the fact that Estrada's nomination was opposed by PRLDF, MALDEF, and the Congressional Hispanic Caucus, among other groups. This is related to a similarly scurrilous charge by the Republicans -- that the opposition to William Pryor was based on his being a Catholic! The ludicrousness of this should be evident from the fact that four of the Judiciary Committee Democrats who opposed Pryor are Democrats -- Senators Kennedy, Leahy, Durbin, and Biden [?] It was Senator Hatch who first asked Mr. Pryor his religion -- and it was Senator Hatch who then led the cry that Pryor had been opposed for being a Catholic.

IV. SOME PENDING NOMINATIONS

Fourth, I want to tell you about some pending nominations that are likely to be filibustered.

WILLIAM MYERS, III -- 9th Circuit

William Myers III has an extreme anti-environmental record, both in his private practice and as Solicitor of the Interior Department, where he advanced policies favoring his former clients in the grazing and ranching industries. Myers recently resigned as Solicitor of the Interior
Department, allegedly for personal reasons, but in the wake of two separate ethical investigations by DOI's IG. The IG is investigating whether meetings he held with lobbyists for the grazing industry violated a recusal agreement he signed before he assumed this office. The second investigation concerns Myers's role in a sweetheart deal, reached over the objections of the US Attorney, for a rancher who, according to EarthJustice, frequently disregarded laws governing public grazing. The committee is about to vote on this nomination. His nomination has been opposed by a record number of groups -- more than 150, including many that never before took positions on judicial nominations.

WILLIAM HAYNES, II -- 4th Circuit

Haynes is the author and chief defender of the administration's policies of holding US citizens as enemy combatants without access to attorneys or the right to appeal their detention to civilian courts and of holding foreigners at Guantanamo Bay without the protections of the Geneva Convention. This nomination will go to the floor. I'd be surprised if it were not subjected to a filibuster.

DIANE SYKES -- 7th Circuit

Those of us from Indiana -- and other states within the 7th Circuit -- should be especially concerned about Diane Sykes, now a justice on the Wisconsin Supreme Court, whose nomination for a seat on the 7th Circuit has been sent to the Senate floor. When she was appointed to the Wisconsin Supreme Court by then-governor Tommy Thompson -- now Secretary of the Department of Health & Human Services -- she was thought by some to be unqualified and "ideologically rigid." She is anti-choice and has a record of favoring corporations and insurance companies over individuals, and disrespecting the rights of the accused. She was, for example, the sole dissenter from a decision reversing a conviction by a jury that included a person who spoke no English. In another case, she was the sole dissenter from a holding requiring the exclusion of evidence gathered as a result of an interrogation of a person in custody who had not been issued Miranda warnings. She has argued that the Wisconsin Supreme Court should not require the state to provide basic educational opportunities to all students despite an explicit clause in the state Constitution requiring equal educational opportunities. Although she is otherwise a tough, "law-and-order" judge, she was very soft when, as a state trial judge, she presided over the case of two anti-abortion protestors. According to the Milwaukee Journal Sentinel, she "gave the men unusual leeway to argue that the social value of their protest outweighed their violation of the law." She told the defendants: "I respect you a great deal for having the courage of your convictions and for the ultimate goals that you sought to achieve by this conduct. You possess fine characters and your motivations were pure." She then sentenced them to 60 days in jail with work-release privileges, stating that their "illegal activities divert the public attention from your positive efforts." Planned Parenthood, the National Abortion Federation, the National Employment Lawyers Association, and NARAL Pro-Choice America have opposed her.
CLAUDE ALLEN -- 4th Cir.

HHS Deputy Secretary Claude A. Allen has been nominated to the 4th Circuit over the angry opposition of the two senators from Maryland, since the vacant seat is that of the late Judge Francis Murnaghan of Maryland -- and Allen is from Virginia. Allen is a staunch social conservative who has devoted much of his career to advancing the agenda of the religious right on reproductive rights, sex education, AIDS, gay and lesbian rights, welfare, and the right to die. In addition to this opposition from Maryland, the Allen nomination has been opposed by civil rights and health advocacy groups because of Allen's actions with respect to reproductive freedom, STD, end of life decisions, and children's health.

The Maryland objections are not trivial. After Judge Murnaghan died on August 31, 2000, President Clinton nominated an African-American federal district court judge from Maryland, Andre M. Davis, to fill the seat. No hearing or vote was held on this nomination. Republican Senators claimed that the 4th Circuit did not need more judges, though 5 of the 15 seats were vacant. This was claimed as the justification for not acting on the Davis nomination and 3 others for the 4th Circuit. It was only after Bush became President and nominated former aides of Senators Helm and Thurmond that Republican senators became willing to fill these seats. Allen was the first African-American to work for Senator Jesse Helms.

BRETT KAVANAUGH -- D.C. Circuit

Kavanaugh wrote key sections of the Ken Starr report on President Clinton and led the Bush administration's judicial selection process. Even Republicans anticipate that this nomination will be filibustered.

V. WHAT YOU CAN DO

Judicial nominations is a huge, crucially important issue -- and each of you, acting individually and without a huge amount of effort, can do a huge amount to influence this process. Remember that the crucial actors here are the members of the Senate -- and, in particular, the members of the Senate Judiciary Committee. You can exercise a huge amount of influence on your senators by communicating with them directly -- by telephone, email, fax, or regular mail; by writing letters-to-the-editor and op-ed pieces; and by encouraging others to do the same things. Law students and law professors and legal groups have a great deal of influence -- particularly when addressing legal issues. Make the calls to your Senators, to say "please oppose the nomination of X" and to say "thank you for opposing" or "please reconsider your support for" the nomination. One particularly easy way for you to stay in touch with your Senators is to get on the elists maintained by the Alliance for Justice and People for the American Way. They will periodically notify you when controversial nominations are coming up for votes, and often will offer you a 2-click way of emailing your senator. And all of the information you could possibly want is readily available at the Websites of these two organizations, the Alliance for Justice and...
People for the American Way. Go to independentjudiciary.com. I have found it to be totally reliable.

* * * * *

Thank you for your careful attention to this long and detailed talk. I've brought a good deal of material about judicial nominations with me, and will be glad to discuss it, and other matters, with you during this weekend. The first two Amaker Retreats were wonderful, and I'm confident that this one will be, too. I want to close by reading with you this poem by Marge Piercy: The Low Road.

Marge Piercy, *The Moon is Always Female* (Knopf 1987)

**The low road**

What can they do

to you? Whatever they want.

They can set you up, they can

bust you, they can break

your fingers, they can

burn your brain with electricity,

blur you with drugs till you

can't walk, can't remember, they can

take your child, wall up

your lover. They can do anything

you can't stop them

from doing. How can you stop

them? Alone, you can fight,

you can refuse, you can

take what revenge you can

but they roll over you.

But two people fighting

back to back can cut through

a mob, a snake-dancing file

can break a cordon, an army

can meet an army.

Two people can keep each other

sane, can give support, conviction,

love, massage, hope sex.

Three people are a delegation,

a committee, a wedge. With four

you can pay bridge and start

an organization. With six

you can rent a whole house,

eat pie for dinner with no

seconds, and hold a fund raising party.

A dozen make a demonstration.

A hundred fill a hall.

A thousand have solidarity and your own newsletter;

ten thousand, power and your own paper;

a hundred thousand, you own media;

ten million, you own country.

It goes one at a time,

it starts when you care

to act, it starts when you do

it again after they said no,

it starts when you say *We*

and know who you mean, and each
day you mean one more.

Thank you very much.