# Sen. Schumer performs an unexpected service

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The explicit purpose of the unusual hearing presided over by Sen. Charles Schumer on Thursday morning, May 9 — the one-year anniversary of President Bush's first eleven judicial nominations for the United States Circuit Court of Appeals, only three of whom have been given confirmation hearings by the Democratic-led Senate Judiciary Committee — was to justify the committee's go-slow strategy. In fact, the testimony of the four witnesses (whom Schumer had invited to discuss their failure to be confirmed by the Republican-led Senate Judiciary Committee during the second Clinton administration) served as a stinging reproach to the conduct of both Sen. Schumer and his colleagues on the Senate Judiciary Committee in the second Bush administration.

In his opening statement kicking off "Ghosts of Nominations Past: Setting the Record Straight," Sen. Schumer declared that Senate Democrats on the committee had been doing their level best to grapple with a breakdown in the process caused by Republicans. The problem, according to Sen. Schumer, went well beyond the stalling resorted to by Republicans when they were last in charge of the Senate Judiciary Committee. The crux of the matter was President Bush's determination to pack the federal courts with "right-wing ideologues" in the mold of Scalia and Thomas, judges well outside of the mainstream, bent on implementing their extremist political views through conservative judicial activism. What was needed, Sen. Schumer proclaimed, was for the president to nominate moderates — by which he seemed to mean those who would interpret and enforce the law, rather than disregard and willfully rewrite it in order to advance a fierce partisan agenda. To ensure balance in the federal judiciary, Sen. Schumer called on members of the Senate Judiciary Committee to place examination of a nominee's judicial philosophy and temperament front and center.

The chief problem with Schumer's account is its incoherence. The reason he offered for the current Senate Judiciary Committee's unprecedented delay in scheduling confirmation hearings for President Bush's first round of nominees — the content of their judicial philosophy, and the temperament they will bring to their judicial duties — is precisely the subject that he also insisted it was the task of confirmation hearings to investigate.

Is Bush nominee Miguel Estrada — a partner in the D.C. law firm of Gibson Dunn, and a rising star in Republican legal circles — a right-wing extremist? Is Bush nominee John Roberts — a partner at the D.C. law firm of Hogan and Hartson, and regarded by

knowledgeable Democrats and Republicans alike as one of the outstanding appellate advocates in the land — outside the mainstream? Is Bush nominee Michael McConnell — a law professor at the University of Utah College of Law, and respected by many liberal legal academics as one of our leading scholars of religion and the law — likely to abuse the power of a federal judge by legislating from the bench?

My guess is that all three will make exemplary judges. Nevertheless, many of the *questions* that Schumer, his colleagues, and a slew of left-liberal interest groups raise about the Bush nominees are fair. Indeed, an excellent place to pursue them — and to obtain fair *answers* — would be in the very confirmation hearings that Sen. Schumer and his colleagues have, for over a year, obdurately refused to provide.

Or, at least, so suggested the very witnesses Sen. Schumer called to the Senate on the morning of May 9 to chronicle Republican malfeasance on the Senate Judiciary Committee in the 1990s. In their statements, all of the disappointed Clinton nominees deplored the treatment they had suffered. All were concerned that the Republican obstructionism that kept seats on critical circuits open during the Clinton administration should not be rewarded by the filling of those seats with Bush nominees. Yet all nevertheless plainly affirmed that the denial or delay of a confirmation hearing to a nominee was an inappropriate retaliatory tactic.

Judge Jorge Rangel, nominated by President Clinton to the United States Court of Appeals for the Fifth Circuit in July 1997, waited over a year for a confirmation hearing. When the Senate adjourned in the fall of 1998, he wrote to President Clinton to request that his name not be resubmitted to the next session of Congress, because of the personal and professional cost of being kept in limbo. Yet at the Schumer hearing he insisted: "Even with the passage of time, I find it difficult to reconcile my experience in the confirmation process with the basic notions of fair play, justice, and due process that have guided me in my career." The lesson for the process, according to Judge Rangel, was not more obstructionism but less: "Hopefully, our presence here today will in fact set the record straight so that other judicial nominees, regardless of their party affiliation, will not suffer the same fate."

Kent Marcus, a law professor at Capital Law School in Columbus, Ohio, was nominated by President Clinton in 1999 to a seat on the Sixth Circuit Court of Appeals. He, too, was denied a hearing. Though stung by his experience, he offered a clear prescription to Sen. Schumer and members of the Senate Judiciary Committee: "More candid and open discussion about nominees — at timely nomination hearings — will reflect well on the entire Senate and will remove the frustrating mystery confronted by past nominees."

Bonnie Campbell, former attorney general of Iowa and now a D.C. lawyer at Arent Fox, received a hearing for her nomination to the Eight Circuit Court of Appeals in 1999, but was denied a vote on the Senate floor. Her conclusion? "Recently, President Bush said that every nominee for the federal bench should be given a vote of the Senate, and I agree with him."

Enrique Moreno, an El Paso Texas lawyer, was nominated by President Clinton in September 1999 to fill a vacancy on the Fifth Circuit. Despite his disappointment over never himself having received a hearing, Moreno offered this advice to Sen. Schumer: "With all due respect, I have a simple and unoriginal observation about the nomination process. Nominees should get a hearing, hopefully a timely hearing. A nominee should receive an open public debate about the merits of his or her nomination."

Will Sen. Schumer and his colleagues on the Senate Judiciary Committee learn from the unanimous message delivered by Sen. Schumer's hand-picked witnesses? Will the Senate Judiciary Committee promptly schedule hearings for Bush nominees in accordance with the conclusions about fair process entered into the record by the disappointed Clinton nominees?

Not if the Democrats on the Senate Judiciary Committee listen to the left-liberal legal academics and pundits who advise them to stall, to let the Bush nominees languish, to withhold hearings for as long as possible. But the denial of hearings — as each and every one of the impressive men and women Sen. Schumer invited to testify on Thursday morning suggested — is a counsel of cynicism. It encourages the belief that law really is reducible to politics. And such a belief is wrong, destructive of constitutional democracy, and must be rejected.

Republicans of course share responsibility for the current ugly state of affairs, and they too should take steps to restore a saner, more constitutionally adequate nomination process. President Bush can lead the way by doing his part to break the impasse. It would be unseemly and detract from the dignity of his office — and would be politically impractical, to boot — for him to withdraw even a single one of his nominations. But surely he can find a few excellent lawyers and judges, undoubted Democrats, who believe in judicial restraint and in enforcing, not rewriting, the law, and nominate them to the federal bench. Such a step would be a gesture of political goodwill; it would appeal to the increasingly powerful block of swing voters in the country; and it would serve the public interest by sending the salutary (and true) message that you don't have to be a good Republican or a good Democrat to be a good judge.

Meanwhile, Sen. Schumer should take to heart what the witnesses he carefully selected to set the record straight said about fair process and the constitutional obligations of the Senate Judiciary Committee. In accordance with their unanimous counsel, he should persuade his colleagues on the Senate Judiciary Committee that Estrada, Roberts, McConnell, and the rest of the Bush nominees deserve hearings. How else can the members of the Senate perform their constitutionally mandated duty to advise the president on the men and women he wishes to appoint to the federal bench?