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Issue



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 5, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter dated May 15, 2002, requesting appeal recommendations, certiorari recommendations, and amicus recommendations that Miguel Estrada worked on when he was employed at the Department of Justice.

The categories of documents that you have requested are among the most highly privileged and deliberative documents generated within the Department of Justice. The Solicitor General must have the benefit of candid and confidential advice in order to discharge his critical responsibility of deciding what appeals the Government will take and what positions the Government will adopt in pending litigation. Attorneys like Mr. Estrada who serve as Assistants to the Solicitor General are asked to render candid, unbiased, and professional advice about the merits of potential appeals. They do so by preparing exactly the kinds of recommendation memoranda that you have requested. These documents review the substantive legal issues in a case, the broader jurisprudential implications of the case, policy considerations, the strength of the factual record, and the overall likelihood of success on appeal.

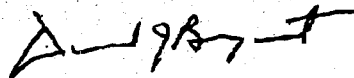
If highly privileged and deliberative documents of this kind are not shielded from disclosure, the Department will face the grave danger that Assistants to the Solicitor General, and others in comparable positions, will be chilled in the future from providing the candid and independent analysis that is essential to high-level decisionmaking. As the unanimous Supreme Court recognized: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). The Court observed that "the importance of this confidentiality is too plain to require further discussion." *Id.* Simply put, the Department cannot function properly if our attorneys write these kinds of documents with one eye focused on the effect that their words, if made public, might have on their qualification for future office.

For these reasons, the Department has a longstanding policy -- which has endured across Administrations of both parties -- of declining to release publicly or make available to Congress the kinds of documents you have requested.

We trust that you will appreciate the important institutional interests that lead us to decline your request. In our judgment, the Committee has had ample time and alternative means for obtaining assessments of how Mr. Estrada's performance as an Assistant to the Solicitor General bears on the merits of his nomination. In particular, you have been free to inquire of the Solicitors General under whom Mr. Estrada served their views as to his qualifications for the position to which he has been nominated.

On January 25, 2002, you promised a Committee hearing for Mr. Estrada this year. So that the Committee can meet your commitment, we would request that you contact me or Judge Gonzales, as soon as possible to discuss this matter if you have any questions or concerns.

Sincerely,



Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

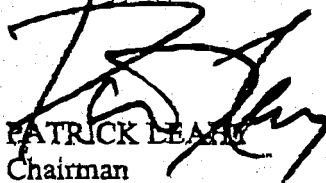
May 15, 2002

Miguel Estrada
Gibson Dunn & Crutcher
1050 Connecticut Ave NW # 900
Washington, DC 20036

Dear Mr. Estrada:

In connection with your nomination to the United States Court of Appeals for the D.C. Circuit, I write to request that you send the Judiciary Committee appeal recommendations, certiorari recommendations, and amicus recommendations you worked on while at the United States Department of Justice. If you do not have these documents in your possession, please advise where we may obtain them.

Sincerely,


PATRICK LEAHY
Chairman

GIBSON, DUNN & CRUTCHER LLP

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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May 22, 2002

Direct Dial
(202) 955-8257

VIA FACSIMILE & OVERNIGHT MAIL

Patrick J. Leahy, Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Chairman Leahy:

I write in response to your letter of May 15, 2002, which requests copies of appeal recommendations, certiorari recommendations, and amicus recommendations that I worked on while I was employed as an attorney by the United States Department of Justice from late 1992 to mid-1997. The pre-decisional memoranda you seek are Executive Branch records within the control of the Department of Justice. I respectfully suggest that the Committee direct its request to the Department.

Very truly yours,



Miguel A. Estrada

MAE/vfl



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 5, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

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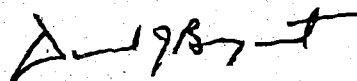
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For these reasons, the Department has a longstanding policy -- which has endured across Administrations of both parties -- of declining to release publicly or make available to Congress the kinds of documents you have requested.

We trust that you will appreciate the important institutional interests that lead us to decline your request. In our judgment, the Committee has had ample time and alternative means for obtaining assessments of how Mr. Estrada's performance as an Assistant to the Solicitor General bears on the merits of his nomination. In particular, you have been free to inquire of the Solicitors General under whom Mr. Estrada served their views as to his qualifications for the position to which he has been nominated.

On January 25, 2002, you promised a Committee hearing for Mr. Estrada this year. So that the Committee can meet your commitment, we would request that you contact me or Judge Gonzales, as soon as possible to discuss this matter if you have any questions or concerns.

Sincerely,



Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Minority Member



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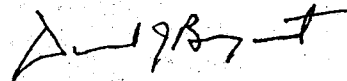
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Sincerely,

A handwritten signature in black ink, appearing to read "D. J. Bryant". The signature is stylized and written in a cursive-like font.

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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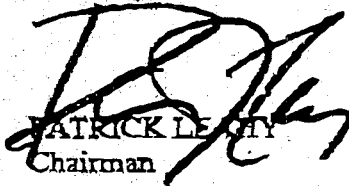
May 15, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Ashcroft:

In connection with the nomination of Miguel Estrada to the United States Court of Appeals for the D.C. Circuit, I write to request that the Department of Justice send to the Judiciary Committee appeal recommendations, certiorari recommendations, and amicus recommendations Mr. Estrada worked on while at the Department of Justice. This should assist the Committee in considering his nomination.

Sincerely,


PATRICK J. LEAHY
Chairman