

Trump finds his '10th justice' (and it's not Miguel Estrada)

By [Jonathan H. Adler](#) March 8

Last night, the White House announced that President Trump will nominate acting Solicitor General Noel Francisco to be the next solicitor general of the United States. This ends several weeks of speculation about who would get the SG nod.

Who is Noel Francisco? He's a former partner at Jones Day and a highly accomplished appellate lawyer. He has argued numerous cases in front of the Supreme Court, including *Noel Canning v. NLRB* and *Hobby Lobby v. Sebelius*. Like all of those reportedly considered for the pick, he is highly qualified for the position. He should do an excellent job. Once confirmed, Francisco will also be the first person of Asian descent to serve as SG (though he was not the first Asian American to serve as acting SG, as that honor went to Neal Katyal). Francisco also served in the White House counsel's office and as a deputy assistant attorney general in the George W. Bush administration.

The Francisco pick continues the Trump administration's pattern of making excellent choices to fill out the Justice Department's leadership, including Rod Rosenstein as deputy AG and Rachel Brand as associate AG.

The Francisco nomination has one interesting wrinkle. Because Francisco has been serving as acting SG — in the anticipation that he would be the principal deputy in the office — he will have to relinquish this position before he can be nominated. As a consequence, the acting SG spot will be filled by someone else until Francisco is confirmed (likely longtime SG veteran Edwin Kneedler, unless a new principal deputy is named in the interim).

And here's another tidbit: Like Trump's Supreme Court nominee, Judge Neil Gorsuch, Francisco has been critical of the *Chevron* doctrine. In a 2011 hearing, Francisco suggested that, under *Chevron*, the courts have become too deferential to agency interpretations of statutes.

Since November, there has been substantial speculation about whom Trump would pick as the next SG among the Beltway appellate elite. Others reportedly considered for the job were George Conway, Kannon Shanmugam, Christopher Landau and Charles "Chuck" Cooper (who withdrew his name from consideration).

Another prominent attorney reportedly considered for the position was Miguel Estrada, a partner at Gibson Dunn. Estrada put a quick end to these rumors, however, issuing the following statement:

I was immensely lucky to have the chance to serve our country years ago, but it did not work out. I have only respect and best wishes for those who agree to serve despite the deterioration of the confirmation process over the years, but everyone who knows me in this town knows that I would never accept a job that requires Senate confirmation or, for that matter, willingly place myself in any situation (e.g., a hearing room) in which convention requires that I be civil to Chuck Schumer.

What's Estrada's beef with Sen. Schumer (D-N.Y.)? For starters, Schumer led the campaign to block Miguel Estrada from the U.S. Court of Appeals for the D.C. Circuit in 2001. After Estrada was nominated, Schumer declared that he was "a stealth missile—with a nose cone—coming out of the right wing's deepest silo." Schumer led Senate Democrats in demanding access to confidential memos from the SG's office — against the opposition of prior SGs from both parties — and repeatedly filibustered Estrada's nomination.

This was the first time ever that a lower court nominee was filibustered (though it would not be the last). It was also the first time that a final vote on a judicial nominee was blocked by the minority on a partisan basis. (Opposition to the nomination of Abe Fortas to be chief justice was bipartisan, and it's unclear whether Fortas had majority support, as there were not even 50 votes in favor of cloture on his nomination.)

Were that not enough, leaked memos from Democratic staff on the Senate Judiciary Committee revealed what many suspected: Estrada was blocked because of his ethnicity. "He is Latino," a memo noted, and was thus "politically dangerous" as a potential Supreme Court pick. Keeping him off the D.C. Circuit was seen as a way to keep him off SCOTUS.

The Estrada nomination fight was ugly. For more than two years he sat in limbo, at great professional and personal cost. It's difficult to recruit clients when a nomination for a lifetime appointment is pending. On the personal side, in the midst of the nomination fight, Estrada's wife miscarried and would later die of an alcohol and sleeping pill overdose.

Twenty-eight months after he was initially nominated, Estrada withdrew his name from consideration. It's no wonder that he does not want to go through any of this again (and no wonder that when many on the right hear the name "Merrick Garland," they respond "Miguel Estrada").

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