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001	Email	fcfnnn041002 Inside: John Nowacki's Commentary... [page 3] - To: [Distribution List] - From: Tim Goeglein	1	04/10/2002	P6/b6;

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Subject Files - FG006-27 (Office of Senior Advisor - Karl Rove)

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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THE WHITE HOUSE
WASHINGTON

518197
FG006-27

FACSIMILE TRANSMITTAL SHEET

TO: Paul Gigot	FROM: Karl Rove
COMPANY: WSJ	DATE: 04/16/02
FAX NUMBER: (917) 510-2880	TOTAL NO. OF PAGES INCLUDING COVER: 6
PHONE NUMBER: (917) 510-2821	SENDER'S REFERENCE NUMBER:
RE:	YOUR REFERENCE NUMBER:

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NOTES/COMMENTS:

Only 7 of 29 circuit nominees have been confirmed, and only one this year. Only 3 of the 11 original May 9, 2001, nominees have received hearings. Roger Gregory is the only circuit judge from a state with two Republican Senators who has been confirmed thus far.

	<u>Total</u>	<u>DC</u>	<u>Split</u>	<u>Rep.</u>	<u>Dem.</u>
Confirmed Circuit Nominees	7	1	3	1	2
Pending Nominees (No hearing)	18	2	2	8	6
Pending Nominees (Has had hearing)	4	0	0	4	0

Over half the pending nominees (no hearing) are from states with Republican Senators or the DC Circuit (no Senator), even though just over a third of the states have two Republican Senators.

http://cantwell.senate.gov/news/releases/2002_03_14_pickering.html

March 14, 2002

Senator Maria Cantwell's Statement on the Nomination of Charles Pickering

Mr. Chairman, I share my colleagues' belief in the importance of the confirmation process. Federal Judges serve for lifetime terms, and are responsible for interpreting our Constitution and our laws in ways that have real implications for the ability of regular Americans to assert their rights.

In evaluating judicial nominations, among the factors I consider include whether the nominee demonstrates:

The highest level of professional ethics and integrity, and have the ability to distinguish between personal beliefs and the issues that come before the court. Unfortunately, I believe Judge Pickering falls short in meeting these criteria. Judge Pickering is an honorable person he is simply the wrong person to fill this very important position.

Like my colleagues, I am troubled by Judge Pickering's handling of the case of United States v. Swann, where a white defendant was tried for burning a cross on the lawn of an interracial couple. Judge Pickering had multiple ex parte conversations with prosecutors and Justice officials in an effort to get the sentence of Mr. Swann lowered. In doing so, Judge Pickering seems to have lost sight of the ethical limitations on his own actions, and the extent to which he was failing to maintain judicial independence. As Brenda Polkey, the victim of the cross burning said, her "faith in the justice system was destroyed" by Judge Pickering's efforts to reduce Mr. Swann's sentence. In every aspect of government we need to work hard and keep faith with the public.

This case indicates how deeply held Judge Pickering's views are, and how far he will go to arrive at an outcome he believes to be correct. The difficulty that he has in keeping his personal views out of his judicial decision making are obvious not only in this case but in several opinions in which he goes beyond the facts of the case to state his belief of what the law ought to be.

Because of this troubling record of not following precedent, and of overstepping ethical bounds to achieve a particular outcome, at his hearing I asked Judge Pickering questions that focused on the right to privacy.

I asked Judge Pickering about privacy as it pertains to consumers' rights-- specifically medical and financial records -- as it pertains to an individual's right to privacy in the context of government surveillance, and with regard to a woman's right to make personal decisions about her body. In response, he declined to state whether he believed that any right to privacy was conferred by our Constitution.

While my concern about how Judge Pickering would rule on cases of fundamental privacy rights is not the only factor in my decision to oppose his elevation to the Circuit Court, it is one I believe is important.

The Fifth Circuit covers three states -- Louisiana, Texas and Mississippi - that have each passed more anti-choice legislation restricting a woman's right to make personal choices about her own body than any other states. In fact, all three states continue to have unconstitutional and unenforceable laws prohibiting a woman from receiving an abortion on their books, because the legislature in each of these states will not repeal the laws. This is the context against which we must consider the President's nomination of Judge Pickering.

While Judge Pickering has repeatedly pledged to restrain his personal ideological views and follow the legal precedent of the Supreme Court, given the unique role that the Fifth Circuit plays in protecting not only the constitutional right to privacy enunciated in Roe and affirmed in Casey, but also in protecting women's access to abortion providers in the states within the Fifth Circuit, I am concerned about Judge Pickering's willingness to say where in the Constitution privacy is protected and his willingness to follow the law.

Judge Pickering's actions on the bench reveal at times a lack of understanding of the requirements of judicial ethics and a failure to meet the very highest standards of the legal profession. Judge Pickering has exhibited an inability to distinguish his personal beliefs from judging the issues before the court. Therefore, I can not support his elevation to the Fifth Circuit.

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Brett M. Kavanaugh
04/11/2002 03:10:22 PM

Record Type: Record

To: Karl C. Rove/WHO/EOP@EOP
cc: Matthew A. Schlapp/WHO/EOP@EOP, Chris Henick/WHO/EOP@EOP
Subject: Sen. Schumer comments re Estrada

No transcript, but Press/Media Affairs pulled together the following pieces on Sen. Schumer's comments.

Washington Times (4/11/02):

Sen. Charles E. Schumer, New York Democrat, said the accusations "don't pass the laugh test." He said the remarks "were absurd, laughable, and demeaning to our process." "It is a smoke screen and a diversion, and it will not work. We will not be stampeded or bamboozled by the cheap-shot argument made today," he said.

Democrats are concerned that Mr. Estrada's views are "way out of the mainstream." Mr. Schumer said he questioned Mr. Estrada's stances on civil rights and abortion. Mr. Estrada will get a hearing and a vote sometime this year, but Mr. Schumer could not provide a specific month. Mr. Schumer said he is still studying Mr. Estrada's record and has not decided whether he will vote for him.

Los Angeles Times (4/11/02):

Sen. Charles E. Schumer (D-N.Y.) said Estrada would not get favorable treatment simply because he is a Latino. "I don't care if a nominee is white, black, Latino or anything," he said. "If they are in the mold of Scalia and Thomas, I'm not going to be stampeded into voting for them."

AP Online (4/11/02)

Sen. Charles Schumer, D-N.Y., called the discrimination complaint "absurd, laughable and also demeaning." "I don't care if a judge nominee is white, black, Latino or something else, if they are in the mold of Justices (Antonin) Scalia and Thomas, I am not going to be stampeded into voting for them," he said. . . . "I think it sort of clouds the argument that we ought to do these quickly when they took their sweet time back then," Schumer said.

Fox News (4/10/02)

SCHUMER: You know, it's awfully hard in this town to say that certain things don't pass the laugh test. But what Senator Santorum did this morning fits in that category. Again, black, white, Hispanic, or anything else, Asian-American, if they're way out of the mainstream, I'm not going to vote for them.

CAMERON: On the Hill, when reporters mentioned delays to Schumer, he acknowledged inaction. But a Democratic staffer contradicted the senator when he began to say all the nominees would soon have their hearings.

SCHUMER: Correct. And they all will this year. Doesn't that -- No, sorry, nope. Mr. Estrada will get his hearing.

UNIDENTIFIED REPORTER: This year?

UNIDENTIFIED REPORTER: This year?

SCHUMER: Yes. He's been promised a hearing this year.



Brett M. Kavanaugh
04/15/2002 10:57:39 AM

Record Type: Record

To: Karl C. Rove/WHO/EOP@EOP, Susan B. Ralston/WHO/EOP@EOP

cc:

Subject: Further information on judges

The information on confirmed circuit court judges is as follows:

Only 7 of 29 circuit nominees have been confirmed, and only one this year. Only 3 of the 11 original May 9, 2001, nominees have received hearings. Roger Gregory is the only circuit judge from a state with two Republican Senators who has been confirmed thus far.

Confirmed Circuit Nominees

- Roger Gregory (Virginia, CA4) - R
- William Riley (Nebraska, CA8) - S
- Sharon Prost (CA Federal Circuit; that is specialized circuit that handles patent, claims, and other issues)
- Barrington Parker (New York, CA2) - D
- Edith Clement (Louisiana, CA5) - D
- Harris Hartz (New Mexico, CA10) - S
- Michael Melloy (Iowa, CA8) - S

Note that we do expect Terrence O'Brien (Wyoming, CA10) and Jeffrey Howard (New Hampshire, CA1) to be confirmed soon. Both have now had hearings without any public opposition, and the Committee has voted O'Brien to the floor.

Of those Over half the pending nominees (w/ hearings) are from Republican states or the DC circuit (w/ Senator), even though

2 D	18
2 R	18
split	14
	-

the first over a third of the splits have been Republicans



Brett M. Kavanaugh
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Tim Goeglein
04/10/2002 09:03:40 AM

Susan -
Disunion Giant

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Lezlee J. Westine/WHO/EOP@EOP, Matthew E. Smith/WHO/EOP@EOP

Subject: fcfnnn041002 Inside: John Nowacki's Commentary: Why Confirm Estrada? Ask the Democrats?

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Free Congress Foundation's
Notable News Now
April 10, 2002

The Free Congress Commentary
Why Confirm Estrada? Ask the Democrats.
By John Nowacki

Several Senators, House members, representatives of Hispanic groups, attorneys and grassroots activists will hold a rally this afternoon to show their support for the nomination of Miguel Estrada to the U.S. Court of Appeals for the DC Circuit. Mr. Estrada, a prominent Washington attorney, was nominated on May 9, 2001, and though nearly a year has passed, the Democrat leadership of the Senate has chosen to do nothing with his nomination. No Senate vote. No committee vote. No real hint of when he'll even receive a hearing. And no good reason why.

It isn't as if he's not qualified. Mr. Estrada is a widely respected attorney at a well-known DC law firm, who served as an Assistant U.S. Solicitor General from 1992-1997, during both the first Bush and Clinton Administrations. He is also a former Assistant U.S. Attorney for the Southern District of New York, where he served as Deputy Chief of the Appellate Section.

Mr. Estrada has argued fifteen cases dealing with civil and criminal issues before the U.S. Supreme Court, prevailing in ten of them. He has tried ten cases as a prosecutor and argued seven cases before the U.S. Court of Appeals for the Second Circuit. Mr. Estrada clerked for a Carter appointee on the Second Circuit before clerking for Justice Anthony Kennedy on the Supreme Court, and the American Bar Association has rated him "well-qualified" for a seat on the DC Circuit.

And it isn't as if there is a substantive objection to Mr. Estrada's confirmation. A representative of the liberal Alliance for Justice, for example, recently expressed some vague concern about Mr. Estrada's "approach

to issues" while admitting that, in truth, "we don't know that much about him."

In short, there's no excuse for the Democrats' refusal to act. No excuse, except politics.

Democrats and their allies on the Left have made it clear that they will fight over circuit court nominations in a way previously reserved for Supreme Court nominees. And when they can't cobble together some rationale for opposing a nominee - as they did with Charles Pickering and are attempting to do with Brooks Smith and Priscilla Owens -- they simply stall. And stall. And stall.

The fact that Mr. Estrada is Hispanic is apparently also working against him -- not because Democrats don't want Hispanics on the bench, but because they don't want Republican-appointed Hispanics on the bench.

But apart from all these arguments - Mr. Estrada's qualifications, his stellar résumé, and his excellent reputation - there are other arguments for Senate action on the nomination, arguments put forward by Senate Democrats themselves.

On October 11, 2000, Senator Patrick Leahy, now Chairman of the Judiciary Committee and scheduler of hearings, said: "I have said on the floor, although we are different parties, I have agreed with Governor George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days."

Mr. Estrada has been waiting for a hearing and a Senate vote, up or down, for 336 days. And counting.

On July 25, 2000, Mr. Leahy said: "The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed without justification for too long . . . That is our constitutional responsibility. It should not be shirked."

On March 7, 2000, Senator Tom Daschle - now the Senate Majority Leader - said: "There is a dire shortage-we have a judicial emergency right now, throughout the country. And it's important for us to respond to that emergency, confirm the many, many judges whose nominations are still languishing either in committee or on the floor."

There were 75 vacancies then. There are 95 vacancies now.

On March 19, 1997, Mr. Leahy said: "But we should also remember that when we just put numbers here, numbers do not tell the whole story. The DC Circuit's docket is by far the most complex and difficult in the Nation."

Four of the twelve seats on the DC Circuit are now vacant.

On that same day, Senator Richard Durbin, a current member of the Judiciary Committee, said: "I submit that this debate is not just about numbers. It is about the administration of justice; the fair, prompt, equitable, and thorough administration of justice is at stake."

Mr. Estrada should be confirmed, and the Senate does indeed have a

responsibility to move forward on this nomination, which has been delayed without justification for far too long. If Democrats really believe that judicial vacancies impair the administration of justice, they should give Miguel Estrada a hearing and a vote. They've made the case. Now it's time for them to act.

John Nowacki is the director for Legal Policy at the Free Congress Foundation.

Message Sent To:

Susan B. Ralston/WHO/EOP@EOP
Timothy E. Flanigan/WHO/EOP@EOP
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(b)(6)

next on the nomination of Charles W. Pickering for the Fifth Circuit Court of Appeals. **I fully expect we will also have hearings on other nominations for which consensus will be difficult, including such nominees as Judge Priscilla Owen , Professor Michael McConnell , and Miguel Estrada."**

Leahy press statement on April 10:

"Despite their record in blocking not one but several nominees to this very same federal circuit court, **Senate Republicans asked for a pledge of a hearing on the Estrada nomination. In January, as part of the good-faith steps that Democrats have taken to repair the damage done over the last six years by Republican inaction on so many nominees - and especially, so many nominees to the D.C. Circuit - I gave that pledge.** Certainly the Republican senators who made statements today are aware of that announcement."

Schumer quote on April 10 (Fox News Transcript):

CAMERON: On the Hill, when reporters mentioned delays to Schumer, he acknowledged inaction. But a Democratic staffer contradicted the senator when he began to say all the nominees would soon have their hearings.

SCHUMER: Correct. And they all will this year. Doesn't that -- No, sorry, nope. Mr. Estrada will get his hearing.

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SCHUMER: Yes. He's been promised a hearing this year.