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**From:** Jennifer Oschal [P6/b(6)] ( Jennifer Oschal [P6/b(6)] [ UNKNOWN ] )

**To:** "Manuel Miranda (Frist)" <Manuel\_Miranda@frist.senate.gov> ( "Manuel Miranda (Frist)" <Manuel\_Miranda@frist.senate.gov> [ UNKNOWN ] ), Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] ), "Leonard A. Leo" <lleo@fed-soc.org> ( "Leonard A. Leo" <lleo@fed-soc.org> [ UNKNOWN ] )

**Subject:** : FW: Federal Judges

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR:Jennifer Oschal [P6/b(6)] ( Jennifer Oschal [P6/b(6)] [ UNKNOWN ] )

CREATION DATE/TIME:13-MAR-2003 17:14:28.00

SUBJECT:: FW: Federal Judges

TO:"Manuel Miranda (Frist)" <Manuel\_Miranda@frist.senate.gov> ( "Manuel Miranda (Frist)" <Manuel\_Miranda@frist.senate.gov> [ UNKNOWN ] )

READ:UNKNOWN

TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )

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TO:"Leonard A. Leo" <lleo@fed-soc.org> ( "Leonard A. Leo" <lleo@fed-soc.org> [ UNKNOWN ] )

READ:UNKNOWN

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FYI - see attached

-----Original Message-----

From: Stephen Presser [mailto:s-presser@law.northwestern.edu]

Sent: Thursday, March 13, 2003 4:30 PM

To: [P6/b(6)]

Subject: RE: Federal Judges

Dear Jennifer:

I've attached an Estrada op-ed I've dispatched to the Chicago Tribune. I likened the battle over Estrada to the War in Iraq. I hope I'll know in a day or two whether they'll take it. If you can use it in any other markets, though, I'm sure that would be fine, although I'd wait a day or two. Feel free to pass it on to anyone you'd like. I hope it's useful, and I'd be interested in hearing anything you have to say about it.

Presser

- att1.htm - The War in the Middle East and the War in the Senate.doc

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File attachment <P\_B3ZNE003\_WHO.TXT\_1>

ATT CREATION TIME/DATE: 0 00:00:00.00

File attachment <P\_B3ZNE003\_WHO.TXT\_2>

FYI - see attached

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Presser



## The War in the Middle East and the War in the Senate

By Stephen B. Presser

The Bush administration is now waging war on two fronts. The first is in the Middle East, and the second is in the United States Senate, over the nomination of Miguel Estrada to the United States Court of Appeals for the District of Columbia Circuit. Our justification for war in Iraq is to avert threats to the United States from a rogue regime and to promote democracy in that country and in the region generally. The war in the Senate, less noticed, is also about averting danger to the country and promoting democracy, although this aspect of the battle has rarely been articulated.

At stake in the current Senate war is ostensibly the fate of an individual, but the principles involved are applicable to other nominations pending. Right now the Democrats have the forty votes necessary to prevent cutting off debate on Estrada and thus allowing a vote on his nomination to reach the Senate floor. Once it does, Estrada will be confirmed, and thus the resort to this delaying tactic. Some have argued that what the opponents of Estrada (a minority of Senators) have done is to rewrite the Constitution in order to require a 60-vote Senate supermajority to confirm Presidential nominees. This in itself is an affront to popular sovereignty, since the job of amending the Constitution is supposed to be that of 2/3 of the members of the House and Senate and three-quarters of the state legislatures, so that Constitutional Amendments do reflect the will of the people.

As disturbing as any back-door Amendments to the Constitution, however, are Estrada's opponent's reasons for seeking to deny him an up or down vote. Their ostensible claim is that Estrada has not been forthcoming enough about his "judicial ideology," that he has refused to furnish his lawyers' work papers from the time he was in the Justice Department, and that he did not sufficiently clearly indicate at his hearing what his views were on legal topics that might be expected to come before him as a judge. For several months now, some Senate Democrats have appeared, in hearings of the Judiciary Committee and on the floor of the Senate, clearly to take the position that, in evaluating nominees for the bench, it is appropriate to consider "judicial ideology," by which they mean a preference for particular outcomes of cases that might be litigated in court.

Until relatively recently, however, the Senate generally adhered to the criteria for evaluation set out in the Federalist Papers, the famous series of essays on the Constitution written by Hamilton, Madison, and Jay. In those essays the job of the Senate was to judge the character and fitness of potential judges, by examining their reputation and their training, but not to demand the assurance of particular outcomes once a nominee reached the bench. Indeed, if one reads the Federalist, one gets a clear impression that if a President nominates a person of high character and accomplishment, there is a presumption in favor of the candidate, and the Senate should only object where it has evidence that the President is mistaken in his evaluation. In Estrada's case there is no doubt about his character, and the relevant body of the lawyers' professional association, The American Bar Association, has rated Estrada "well qualified," which is the highest evaluation it accords to nominees.



Estrada indicated at his hearings that, as a judge, he would be bound to follow previous precedents, and, as was proper for a nominee, he declined to indicate any personal views of his in opposition to any such precedents. It does appear that the Senate Democrats were concerned that Estrada, if placed on the Court of Appeals, and then, perhaps later ascending to the United States Supreme Court, might overturn federal court decisions in the areas of abortion, affirmative action, and religion in the public square, areas of extreme importance to vocal constituencies of many Senators. They claimed to want more information on these points, but what they really seemed to be doing was signaling their fear that a judge or a Justice Estrada might render rulings of which they might disapprove -- not because he would be failing to act in an appropriate judicial manner, but because they preferred particular policy choices in these areas.

But if the criterion for picking judges or Justices has become the particular results they will generate on the bench, then we will have turned non-elected judges into legislators, and we will be denying the separation of powers and the popular sovereignty on which our Constitution is based. When he was running for President, then Governor Bush made clear his desire that public policy choices not be made by judges, and that he would nominate judges who would see their role as following the rules laid down by laws and the Constitution rather than making up new ones. His nomination of Estrada (and of other like-minded individuals) is an attempt to fulfill that campaign pledge. If the President loses the war in the Senate, if judging becomes simply an extension of politics by other means, the danger to our Republic, our liberties, and our rule of law will not be as clear as that posed by tyrants and the possessors of weapons of mass destruction, but it will be no less real.

Stephen B. Presser is the Raoul Berger Professor of Legal History at Northwestern University School of Law.