



May 18, 2004

## The Daschle Edict — A Judicial Obstruction Update

The 108<sup>th</sup> Congress will go down in history as the one in which the judicial confirmation process was fundamentally altered. For example, the Senate has logged more cloture votes on judicial nominations during the 108<sup>th</sup> Congress than through all previous Congresses combined. The Senate also witnessed the first forced withdrawal of a judicial nominee due to a filibuster when, after languishing for two years, circuit court nominee Miguel Estrada decided that he no longer would allow his life to remain in limbo.<sup>1</sup> Partisan filibusters are blocking another five nominations and more are threatened, despite the fact that these filibusters are without precedent in Senate history.<sup>2</sup>

In January and February of this year, President Bush responded to Democrats' obstruction by exercising his constitutional right to make two recess appointments — one for Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit, and another for William Pryor to the U.S. Court of Appeals for the Eleventh Circuit.<sup>3</sup> Recess appointments are not new — more than 300 federal judges have been given recess appointments since the founding of the nation.<sup>4</sup> But while some recess appointments of past Presidents may have been designed to evade the Senate's advice and consent obligations under the Constitution, these appointments were different. President Bush made these recess appointments only after a majority of Senators had gone on record supporting the nominations. The recess appointments were a response to the unprecedented use of the filibuster to block a final vote on the nominations, not an effort to avoid the Senate majority's right to confirm or reject a nominee.

Some Democrats nevertheless expressed outrage that the President would exercise the recess appointment power — despite the majority support that Judges Pickering and Pryor command. On March 26, Minority Leader Tom Daschle announced that Democrats would not cooperate on any judicial nominations unless the White House “gives us assurances that it will no longer abuse the process and that it will once again respect our Constitution's essential system of checks and balances.”<sup>5</sup> Senator Daschle thereby announced a complete shutdown of the judicial nominations process; no judicial nominees at any level will receive up-or-down votes.

### The Nominees Being Blocked by Senator Daschle

Senator Daschle's obstruction of the judicial nominations process affects courts throughout the nation. Fully 32 judicial nominations are currently pending on the Senate floor, including 12 for circuit courts and 20 for district courts. As can be seen from the chart below, many nominees passed out of the Judiciary Committee *with no opposition*.

**Judicial Nominees on the Executive Calendar**  
(updated as of May 17, 2004)

Nominee	Court	Committee Vote	Judicial Emergency? <sup>6</sup>
<b>CIRCUIT COURTS</b>			
Priscilla Owen	5 <sup>th</sup> Circuit	10-9 (originally nominated 5/9/2001)	✓
Charles Pickering <sup>7</sup>	5 <sup>th</sup> Circuit	10-9 (originally nominated 5/25/2001)	
Carolyn Kuhl	9 <sup>th</sup> Circuit	10-9 (originally nominated 6/22/2001)	✓
Bill Pryor <sup>8</sup>	11 <sup>th</sup> Circuit	10-9 (originally nominated 4/9/2003)	
Janice Rogers Brown	D.C. Circuit	10-9 (originally nominated 7/25/2003)	
Bill Myers	9 <sup>th</sup> Circuit	10-9 (originally nominated 5/15/2003)	
William Haynes, III	4 <sup>th</sup> Circuit	10-3 (6 passed) (originally nominated 9/29/2003)	
Raymond Gruender	8 <sup>th</sup> Circuit	19-0 (originally nominated 9/29/2003)	
Diane Sykes	7 <sup>th</sup> Circuit	14-5 (originally nominated 11/14/2003)	
Franklin Van Antwerpen	3 <sup>rd</sup> Circuit	19-0 (originally nominated 11/21/2003)	
Peter Hall	2 <sup>nd</sup> Circuit	19-0 (originally nominated 12/9/2003)	✓
William Benton	8 <sup>th</sup> Circuit	19-0 (originally nominated 2/12/2004)	✓
<b>DISTRICT COURTS</b>			
J. Leon Holmes	D. Arkansas	10-9 (reported w/o recommendation)	
Dora Irizarry	E.D. New York	Voice vote with Senators Feinstein, Grassley, DeWine, Kyl, Chambliss, and Cornyn recording votes in opposition	✓
Roger Benitez	S.D. California	Voice vote with no opposition	✓
Dennis Saylor	D. Massachusetts	Voice vote with no opposition	
Sandra Townes	E.D. New York	Voice vote with no opposition	✓
Ken Karas	S.D. New York	Voice vote with no opposition	
Judith Herrera	D. New Mexico	Voice vote with no opposition	✓
Virginia Hopkins	N.D. Alabama	Voice vote with no opposition	
Ricardo Martinez	W.D. Washington	Voice vote with no opposition	
Walter Kelley	E.D. Virginia	Voice vote with no opposition	✓
Gene Pratter	E.D. Pennsylvania	Voice vote with no opposition	✓
Bill Duffey	N.D. Georgia	Voice vote with no opposition	
Lawrence Stengel	E.D. Pennsylvania	Voice vote with no opposition	✓
Jane Boyle	N.D. Texas	Voice vote with no opposition	
Marcia Cooke	S.D. Florida	Voice vote with no opposition	✓
Juan Sanchez	E.D. Pennsylvania	Voice vote with no opposition	✓
James Robart	W.D. Washington	Voice vote with no opposition	✓
Paul Diamond	E.D. Pennsylvania	Voice vote with no opposition	✓
Robert Harwell	D. South Carolina	Voice vote with no opposition	
George Schiavelli	C.D. California	Voice vote with no opposition	

In addition to the nominations above that the Judiciary Committee has already considered and sent to the floor, other nominations languish in the Committee due to Democrats' threats of filibusters. Those nominees for whom filibusters have been threatened include seven more circuit court nominees and two district court nominees.<sup>9</sup>

## A Comparison with Prior Administrations

The chart below shows the numbers of judges nominated by the past five Presidents and how their judicial nominations fared in the Senate. The chart shows that a greater percentage of President Bush's nominees are being blocked today than in any of these previous administrations, *despite the fact that all of his judicial nominees have bipartisan, majority support*. And it exposes the wrong-headedness of the oft-repeated assertion that President Clinton's nominees received poor treatment — instead showing that, on the whole, his judicial nominees were treated better than those of the first President Bush. While Senate Democrats sometimes tout the raw numbers of nominees whom they have permitted to go through the normal advice and consent process, the data below put those numbers in the proper perspective.

### Judicial Appointments and Confirmations Historical Comparison: First Four Years of a Presidency (updated as of May 17, 2004)

President	TOTAL Nominations Submitted	TOTAL Nominations Confirmed	Percent of ALL Nominees Confirmed	District Court Nominees Submitted	District Court Nominees Confirmed	Percent of District Court Nominees Confirmed	Circuit Court Nominations Submitted	Circuit Court Nominations Confirmed	Percent of Circuit Court Nominees Confirmed
<b>President Bush (to date)</b>	222	173	78%	171	143	85%	51	30	<b><u>59%</u></b>
<b>Clinton</b>	236	199	84%	197	169	86%	39	30	77%
<b>George H.W. Bush</b>	244	179	73%	191	137	72%	53	42	79%
<b>Reagan</b>	181	164	91%	143	130	91%	38	34	89%
<b>Carter</b>	278	258	93%	218	202	93%	60	56	93%

The chart above further proves what was asserted repeatedly during the November 12-14, 2003, marathon debate on judicial nominations: Democrats have focused their obstruction strategy on the circuit courts of appeal.<sup>10</sup> (The Supreme Court grants review of very few cases every year, so these circuit courts issue the final decisions on the vast majority of federal cases and are crucial to the administration of justice nationwide.) While fewer than 60 percent of President Bush's circuit court nominees been confirmed, the prospects for currently-pending circuit court nominees is more dire. Even before Senator Daschle announced his blanket opposition to all judicial nominees at any level, Democrats or their activist allies had announced an intention to block by partisan filibuster fully 14 of the 20 circuit court nominees in the Judiciary Committee or on the Executive Calendar.<sup>11</sup> In other words, even if Senator Daschle lifts his edict, Democrats still plan substantial obstruction of circuit court nominees.

## Election Year Politics is No Excuse for the Present Obstruction

It has been suggested by some Democrats that few (if any) judicial nominees deserve confirmation because this is a presidential election year. It is true that judicial confirmations traditionally have slowed every four years for a variety of reasons, including, for example, scheduling issues for nominations that come late in the year. However, the facts also show that the Senate is woefully behind on confirmations during a presidential election year, as the chart below demonstrates.

<b>Judicial Nominees Confirmed in Presidential Election Years<sup>12</sup></b>		
<b>Year</b>	<b>Courts of Appeals</b>	<b>District Courts</b>
1980	10	52
1984	10	33
1988	7	34
1992	11	54
1996	2	18
2000	8	31
<b>2004</b>	<b>0</b>	<b>4</b>

Even if one accepts that nominations should be treated differently during Presidential election years, it is plain that the Senate is not keeping pace with past practices.

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### Endnotes:

<sup>1</sup> For discussion of why President Johnson’s withdrawal of Justice Abe Fortas’s nomination to be Chief Justice in 1968 was due to lack of majority support and *not* due to a filibuster, see discussion and citations to authority at pages 4-5 of the Senate RPC paper, “The Judges Debate: A Summary,” January 27, 2004 (available at [http://rpc.senate.gov/\\_files/2JudgesReissue012704SD.pdf](http://rpc.senate.gov/_files/2JudgesReissue012704SD.pdf)).

<sup>2</sup> In addition to the debate summary cited in footnote 1, see also the Senate RPC paper, “The Miguel Estrada Nomination: Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent,” February 10, 2003 (available at [http://rpc.senate.gov/\\_files/JUDICIARYsd021003.pdf](http://rpc.senate.gov/_files/JUDICIARYsd021003.pdf)).

<sup>3</sup> Judge Pickering received a recess appointment on January 17, 2004. Judge Pryor received a recess appointment on February 20, 2004.

<sup>4</sup> Congressional Research Service, “Recess Appointments of Federal Judges,” September 5, 2001 (noting that the Department of Justice has catalogued at least 309 recess appointments of federal judges); see also data compiled in Stuart S. Buck, James C. Ho, et al., “Judicial Recess Appointments: A Survey of the Arguments,” January 2004 (available at <http://www.fed-soc.org/pdf/recapp.pdf> and on file at the Senate Republican Policy Committee).

<sup>5</sup> Senator Daschle, *Congressional Record*, March 26, 2004, at S3201.

<sup>6</sup> A judicial emergency is determined by the nonpartisan Judicial Conference. For courts of appeals, a vacancy is defined as “any vacancy in a court of appeals where adjusted filings per panel are in excess of 700; OR any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel.” For district courts, it is defined as “any vacancy in a district court where weighted filings are in excess of 600 per judgeship, OR any vacancy in existence more than 18 months where weighted filings are between 430 and 600 per judgeship, OR any

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court with more than one authorized judgeship and only one active judge.” For more information on judicial emergencies, see <http://www.uscourts.gov/vacancies/emergencies2.htm>.

<sup>7</sup> Judge Pickering received a recess appointment to the 5<sup>th</sup> Circuit on January 17, 2004, after having been denied an up-or-down vote in the 107<sup>th</sup> Congress and in the first session of the 108<sup>th</sup> Congress due to an all-Democrat filibuster. Under the Constitution he can serve until the end of the current session of Congress. The President has since renominated him for the permanent seat, and his nomination therefore remains pending.

<sup>8</sup> Judge Pryor received a recess appointment to the 11<sup>th</sup> Circuit on February 20, 2004, after having been denied an up-or-down vote due to an all-Democrat filibuster. Under the Constitution he can serve until the end of the *next* session of Congress, i.e., until late 2005. The President has since renominated Judge Pryor for the permanent seat, and his nomination therefore remains pending.

<sup>9</sup> The circuit court nominees are Sixth Circuit nominees David McKeague, Susan Neilson, Richard Griffin, and Henry Saad, Fourth Circuit nominees Claude Allen and Terry Boyle, and D.C. Circuit nominee Brett Kavanaugh. The district court nominees are both in the Eastern District of Michigan: Thomas Ludington and Dan Ryan.

<sup>10</sup> For more discussion of Democrats’ focus on the courts of appeals, see pages 2-3 of the “The Judges Debate: A Summary” by the Senate RPC, *supra* note 1.

<sup>11</sup> The only circuit court nominees who had escaped the filibuster threats were Raymond Gruender (8<sup>th</sup> Circuit), Franklin Van Antwerpen (3<sup>rd</sup> Circuit), Diane Sykes (7<sup>th</sup> Circuit), Peter Hall (2<sup>nd</sup> Circuit) and Duane Benton (8<sup>th</sup> Circuit). And Democrats and their activist group allies have not given any indication of how they will treat Tom Griffiths, who was just nominated to the D.C. Circuit a few days ago.

<sup>12</sup> Data from Congressional Research Service, RL31635, “Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003,” February 20, 2004. Figures for 2004 are based on examination of the *Congressional Record*.