

## ***The Free Congress Commentary***

### ***Judicial Vacancies and the Returning Senate: Responsibility or More Obstruction?***

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***April 20, 2006***

The Second Session of the 109<sup>th</sup> Congress is about to reconvene after another of its frequent recesses. The Senate again will face its (generally shirked) Constitutional duty to 'advise and consent" to Presidential nominations to the Federal Judiciary. Doubtless the same liberal Democratic Senators will continue their obstructionism, endeavoring to block as many nominations as possible until the Memorial Day recess, then until the summer recess, then until the Labor Day (or extended summer) recess, then - bullseye! - until the autumnal adjournment of the Second Session preceding the November 7, 2006 elections (in which one third of Senate seats and all House seats are up for election).

The media focuses upon Supreme Court nominations. However, nominations to the United States Courts of Appeal for the First - Eleventh and District of Columbia Circuits are immensely important. Those Circuits, and the more specialized United States Court of Appeals for the Federal Circuit, account for over 95% of all final Federal appellate adjudications.

There are eighteen Court of Appeals vacancies and twenty-two Federal Courts with 'Judicial Emergencies" - a term of art which simply means the backlog is unusually prejudicial to litigants.

Some Democrats accurately allege that the President at times has been very slow in nominating and, needless to say, the Senate cannot formally consider a nomination until the Senate receives it. However, in most, if not all, instances, there are justifications for the relative White House slow tempo. These include the fact that the President, reflecting an approach of unrequited grace, does not want to pile upon the Senate. Far more serious, and already damaging to the Federal Judiciary, is the fact that many eminently qualified attorneys, academics and judges of lesser courts do not choose to

accept a nomination because they recognize the risk that at best the Senate will move slowly in considering their nomination, at worst - and so frequently - they will be subjected to months or even years of verbal abuse and diversion of valuable working time.

Some of the Senatorial torture of nominees readily is reflected in the timetables of record. As examples: The Terrence W. Boyle nomination for the Fourth Circuit (which has a 'judicial emergency') was received by the Senate on May 9, 2001 (not a typo - almost five years past!); the William Myers Ninth Circuit ('judicial emergency') nomination on May 15, 2003; the William Haynes Fourth Circuit ('judicial emergency') nomination on September 29, 2003; the Brett M. Kavanaugh District of Columbia Circuit nomination on November 8, 2001; the Henry W. Saad Sixth Circuit ('judicial emergency') nomination, since withdrawn at Judge Saad's request, on November 8, 2001. Those nominations at least got to the hearing stage in the Judiciary Committee. Three more date from September 29, 2005; December 16, 2005; January 25, 2006.

Notwithstanding demagoguery and varied media misrepresentation, the Federal Bench is not the plumb much of the lay public apparently perceives. It is an infrequent attorney in private practice of the eminence one would want on the Federal Judiciary who is not earning more than the judicial salary. The much-touted retirement benefit - full lifetime salary at age 65 after 15 years or age 70 after ten years - undoubtedly is a boon to a handful but for many it is no sinecure in light of income lost which could have been invested and, of course, it is contingent upon longevity. For judges of lesser courts it is a compensation and prestigious step up. For academics there are too many variables to generalize a comparison - e.g., basic salary, extraneous lecturing honoraria, publishing opportunities, sometimes lesser workload. The point is that many nominees and potential nominees forego opportunities if confirmed and all in the prevailing climate of Senatorial viciousness risk needless misery in the confirmation process.

The likelihood during the remainder of this year of material amelioration of Senatorial conduct - let's just say: of a return to historical normalcy and basic courtesy - is problematical or worse. Among other things, the organized Bar needs to do more. The largest such organization, the American Bar Association ('ABA" - growing in numbers, diminishing as a percentage of American lawyers), currently is leftist led. Although many of its Sections continue to accomplish sound work in technical areas of the law, the national leadership focuses elsewhere. (Having served four years on the ABA Board of Governors, ten in the ABA House of Delegates, and as Chairman of one Section, one Conference and two Standing Committees, this writer painfully notes the leftist ABA polarization.) State bars vary.

Because there is so little general media focus upon individual nominees short of the Supreme Court, those readers who know their Senators would do well to discuss the problem with them (whether to encourage objectivity or merely to express appreciation and encouragement, depending upon the Senator). The imminent emphasis appears to be upon the Boyle and Kavanaugh nominations.

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