

THIRD BRANCH CONFERENCE

June 13, 2006

The Honorable Ted Stevens
The Honorable William H. Frist, M.D.
The Honorable Mitch McConnell
The Honorable Rick Santorum
The Honorable Jon Kyl
The Honorable Kay Bailey Hutchison
The Honorable Elizabeth Dole
and copied to all Majority Senators.

United States Senate
U.S. Capitol
Washington, DC

Re: Stewarding the Third Branch

Dear Senators:

As the representatives of millions of Americans who support you in elections, we write to ask you to devote more effort on and off the Senate floor to confirming the President's circuit court nominees.

We write to remind you of your duty, but also because we are concerned that if the Majority that assured the confirmation votes of Chief Justice Roberts and Justice Alito lose *just one seat* in the next election, the future of the Supreme Court and the federal appellate bench will *again* be imperiled by use of filibusters. We write because we fear that the Majority is ignoring the impact of the nominations debate on its ability to gain the support of those small margins of voters that the Majority needs to secure unobstructed confirmations.

By contrast, and for example, you are planning to devote valuable Senate floor time to debating a flag-desecration constitutional amendment. While most of us would support such an amendment, we believe this is a misguided use of time.

In a survey, 150 conservative opinion and grassroots organization leaders, all with nationally or state recognized names, were asked to rate the flag-burning amendment as a priority before November on a scale of 1 to 5, with 5 being high in importance and 1 being low. With 125 responding, 75 rated it 1 (or lower), 99 rated it 2 or lower, and only 18 rated it 4 or 5. But when these 18 were asked to prioritize the use of Senate time between flag desecration and nominations, *all* who responded chose the judge issue.

We believe your valuable time is better spent on any number of things, such as Senator Kyl's Pledge Protection Act. *But we all agree that debate on judicial nominations is time better spent, and time well spent early to build up steam.*

Today the circuit courts have 18 vacancies. They are nearly 10 per cent vacant and President Bush has the lowest confirmation rate of circuit court nominations for any president, below 75 per cent.

So far you have allowed several circuit nominees to be defeated: Miguel Estrada, Charles Pickering, Carolyn Kuhl, and, most recently, Henry Saad of Michigan had to withdraw his nomination in the face of a deal by the Gang of 14 and the acquiescence of Majority leaders.

One nominee for the vitally important Ninth Circuit, **William Myers**, has been the subject of *a filibuster* for nearly two years. His nomination was denied cloture on July 20, 2004 by a vote of 53 to 44, with two still-serving Democrats voting with all 51 Republicans. Despite an election that enhanced the Majority, no effort has been made to press his confirmation since then, not even a second cloture vote.

Judge **Terrence Boyle**, nominated to the Fourth Circuit, *a circuit that now hangs in the balance*, is now the longest waiting judicial nominee in history. He may be the first obstructed nominee in Senate history to wait on the Senate executive calendar for a year without even a cloture vote. Rather ordinary, insubstantial, eleventh-hour charges against him have gone unanswered. Not a single senator has addressed the charges in his defense. *It is no wonder that the White House is having trouble recruiting qualified men and women to serve on the bench. Opponents are to be expected, but not the carelessness of friends like you.*

William "Jim" Haynes, nominated to the vital Fourth Circuit, also has set a record for you. He has waited the longest for a Judiciary Committee vote after having a hearing. As General Counsel of the Department of Defense during a national crucible, Jim Haynes has done a difficult job and deserves our thanks for his service. Instead, he has faced years of delay and a *silent filibuster* that denies him even the courtesy of addressing the reasons for delay. Haynes had his hearing on November 19, 2003. The Majority senator obstructing the Haynes nomination over policy disputes was too busy to attend.

With the departure of **Judge Michael Luttig**, the Fourth Circuit now needs Judge Boyle and Mr. Haynes more than ever. But even more pronounced is the urgency in the Ninth Circuit, a court that can only be described as a national scandal. This is the appellate court so often reversed and most often in the news. Yet you presently are slow walking **three Ninth Circuit nominees**. In addition to the filibustered Myers nomination, two other solid Ninth Circuit nominees are presently available on the Senate calendar.

Please note that, with the exception of Jim Haynes, the problem we address does not lie with **Chairman Specter**. He is moving nominees out of Committee at a reasonable clip.

The Haynes delay is, however, contrary to the Chairman's pledge three years ago to move nominees at a stated pace.

Although we cite numbers and statistics, our reason for writing is not about numbers. They can be too easily used to give the illusion of accomplishment. Your duty is to give Advice and Consent on the president's nominees, all of them. An up or down vote, hopefully leading to confirmation, is always the goal.

But if opponents engage, we believe debate is itself a gain. If opponents obstruct through abuse of Senate rules, highlighting that obstruction is vitally important, and not just for political advantage. ***It serves the Republic that the American people be fully alerted to what is at stake when they vote as the ultimate stewards of the Third Branch.***

The judicial issue is a growing force among voters, and each battle over nominations provides ***an educable moment***, an opportunity for a worthwhile national debate that helps to catalyze the differences between liberals and conservatives to the American people.

No doubt some of you will think that because this is an election year, it is expected that judicial nominations will slow down. Not by us. This old Senate tradition must give way to our experience in the last two elections.

Many of you ran and won in 2002 and 2004 because, in part, you promised to support the President's judicial nominees and end Minority party obstruction. Perhaps you must advise your colleagues who last ran in 2000 that things have changed. Perhaps you should consider those 2006 candidates who are not yet in your meetings.

In March 2002, after the Judiciary Committee rejected Charles Pickering, Leader Frist, then NRSC chairman, was asked whether the Pickering controversy would have any effect on the 2002 election. He said, "No." He was wrong: In five states that year, it had a direct effect. In three states it related directly to the small margin that gave three Majority senators their seats. It was for a reason that in his one debate with a former vice-president in Minnesota, Norm Coleman mentioned Judge Pickering, the beleaguered Mississippi judge.

Likewise, many of you heard Senator Allen, as chairman of the NRSC, express a certain reluctance to spend much floor time on judges. His mantra for 2004 success was "Jobs jobs, jobs." He too was wrong. You have a larger majority than Senator Allen expected because he was wrong, and it was judges and judge-related issues that gave the president Ohio and a second term...not "jobs."

In sum, we ask you to move circuit nominees to an honest up or down vote. We ask you to spend scheduled Senate floor time in vigorous debate, and we ask you to bundle the Ninth Circuit nominees to highlight the errors of the Ninth Circuit. If Democrats obstruct, view it as the role they will play in growing your majority.

In 2003, the current GOP Senate leaders made their mark on the judge issue with a bang; we do not wish for you to end now with a whimper.

Sincerely,

Manuel Miranda, Chairman, Third Branch Conference
 Stephen A. O'Connor, Publisher, *Human Events*
 Paul Weyrich, Coalitions for America
 Hon. Abigail Thernstrom, United States Commission on Civil Rights
 Ambassador Alan Keyes, Declaration Alliance
 Donald E. Wildmon, American Family Association
 David Keene, American Conservative Union
 James L Martin, 60 Plus Association
 Dr. Carl Herbster, AdvanceUSA
 Richard A. Viguerie, ConservativeHQ.com
 Lori Roman, ALEC (American Legislative Exchange Council)
 William J. Murray, Religious Freedom Coalition
 Andrea Lafferty, Traditional Values Coalition
 Sean Rushton, Committee for Justice
 Jeffrey Lord, author, *The Borking Rebellion*
 Deal Hudson, Morley Institute for Church and Culture
 James J. Fotis, Law Enforcement Alliance of America
 George Landrith, Frontiers of Freedom
 L. Brent Bozell III, Media Research Center
 Bill Donohue, Catholic League
 Fr. Frank Pavone, Priests for Life
 Rick Scarborough, Vision America Action
 Jan Larue, Concerned Women for America
 Kay Daly, Coalition for a Fair Judiciary
 Jeffrey Mazzella, Center for Individual Freedom
 Rabbi Aryeh Spero, Caucus for America and host of "Talking Sense".
 Joseph Cella, FIDELIS
 Colin A. Hanna, Let Freedom Ring, Inc.
 C. Preston Noell III, Tradition, Family, Property, Inc.
 Rev. William Owens, Coalition of African American Pastors
 Rev. Miguel Rivera, National Coalition of Latino Clergy & Christian Leaders
 Samuel B. Casey, Christian Legal Society
 Thomas Brejcha, Thomas More Society, Pro-Life Law Center
 Dean Mathew D. Staver, Liberty Counsel and Liberty University School of Law
 Stephen M. Crampton, AFA Center for Law & Policy
 Dr. Dale Burroughs, Biblical Heritage Institute
 Dr. Gary Cass, Center for Reclaiming America for Christ.
 Amy Ridenour, Americans for the Preservation of Liberty
 Tim Echols, Family Resource Network / TeenPact / Teen Leadership School
 Chuck Muth, Citizen Outreach
 William Greene, RightMarch.com

Larry Cirignano, CatholicVote.org
 Mike Krempasky, RedState.com
 Jeff Ballabon, Center for Jewish Values
 Steven Mosher, Population Research Institute
 Jim Boulet, Jr., English First
 Jonathon Moseley, Esq., Legal Affairs Council
 Gary Palmer, Alabama Policy Institute
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 John Stemberger, Florida Family Policy Council
 Dr. Patricia McEwen, Life Coalition International
 Dr. Don Racheter, Public Interest Institute (IA)
 Julie Lynde, Cornerstone Institute of Idaho
 Micah Clark, American Family Association of Indiana
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 Mike Franco, Western Massachusetts Republicans
 Gary Glenn, American Family Association of Michigan
 Len Deo, New Jersey Family Policy Council
 Ed Holdgate, New Hampshire Right to Life PAC Chairman
 Karen Testerman, Cornerstone Policy Research (NH)
 Marie Tasy, New Jersey Right to Life
 Bill Brooks, North Carolina Family Policy Council
[Forest Thigpen, Mississippi Center for Public Policy](#)
 Rev. Russell Johnson, Ohio Restoration Project
 David Crowe, Restore America (OR)
 Diane Gramley, American Family Association of Pennsylvania
 Robert R. Galbreath Jr., Citizens for a Constitutional Republic
 Thomas Smith, America 21 (TN)
 Cathie Adams, Texas Eagle Forum
 Hon. Kenneth Whitehead, Falls Church Republican Committee (VA)
 Dr. Kenneth L. Hutcherson, Mayday for Marriage (WA)
 Julaine K. Appling, The Family Institutue of Wisconsin
 John C. Eastman, Professor of Law (CA)
 David Gibbs III (FL)
 Rodolfo E. Milani (FL)
 James Hochberg (HI)
 Judge Darrell White (Ret.) (LA)
 Don Feder (MA)
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 Robert W. Peters, Esq. (NY)
 Jill Stanek, columnist (IL)
 Chris Dickson, "The Dickson/Chappell Report" (IN/OH)

Third Branch is a coalition of grasstop leaders working to improve the federal courts.