

FEDERALISM & SEPARATION OF POWERS 2004 UPDATE: FIRST QUARTER

EXECUTIVE & LEGISLATIVE ACTIONS

Judicial Nominations and Judicial Independence

On January 16, the President recess appointed Judge Charles Pickering to the Fifth Circuit Court of Appeals. Pickering's recess appointment was soon followed by a second appointment: Attorney General Bill Pryor was recess appointed to the Eleventh Circuit Court of Appeals in February. Absent Senate confirmation, Pickering's appointment will expire at the end of the 108th Congress. Pryor's appointment will expire at the end of the first session of the 109th Congress.

After the President's recess appointment of Pryor, Senate Minority Leader Tom Daschle vowed to block all of the President's judicial nominees unless Bush promises to cease and desist from making recess appointments. When President Bill Clinton recess appointed Roger Gregory to the Fourth Circuit Court of Appeals, Daschle stated, "You should know that 300 justices have been recess-appointed, [including] 11 Supreme Court nominees. . . . So we do this fairly commonly."

Former solicitor of the Department of the Interior William Myers is likely to become the seventh filibustered judicial nominee, joining Pickering, Pryor, Justice Priscilla Owen, Justice Janice Rogers Brown, Judge Carolyn Kuhl. Miguel Estrada withdrew his nomination last fall. Myers has been nominated to the Ninth Circuit Court of Appeals.

For Additional Reading:

- Bob Davis & Robert S. Greenberger, *Two Old Foes Plot Tactics in Battle Over Judgeships*, WALL ST. J., Mar. 02, 2004, available at <http://committeeforjustice.org/cgi-data/news/files/32.shtml>.
- Marion Edwyn Harrison, *Daschle: The Baffling And "Unbaffling" Of A Senator*, FREE CONGRESS FOUND., Apr. 1, 2004, at <http://www.freecongress.org/commentaries/040331mh.asp>.
- Editorial, *Daschle's Duplicity*, N.Y. POST, Apr. 4, 2004, at <http://www.nypost.com/postopinion/editorial/18117.htm>.

Same-Sex Marriage

In early February, San Francisco Mayor Gavin Newsom disregarded California state law and began issuing marriage licenses to same-sex couples in his city. Other local officials across the nation soon followed suit. There are 38 states that have passed laws protecting the traditional definition of marriage. As the issue came to a head in late February, President Bush officially endorsed an amendment to the Constitution that would prohibit same sex marriage. The leading proposal appears to be an amendment introduced by Representative Marilyn Musgrave. The Federal Marriage Amendment is H.J. RES. 56.

Many opponents of the amendment argue that states should be able to decide this issue for themselves; a federal definition of marriage should not be forced upon the entire nation. However, proponents of the amendment argue that a federal constitutional amendment is necessary to prevent activist judges from imposing same-sex marriage upon the entire nation in violation of the rule of law and the legislative process. The amendment, as introduced in the House, provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

A second, slightly more tailored proposal has been floated as an alternative. This language would forbid judges from relying upon the federal Constitution to require same-sex marriage in any state; however, since it would explicitly leave the definition of marriage to states, state constitutions could be construed to require same-sex marriages under this proposal. The second proposal reads:

Civil marriage shall be defined in each state by the legislature or the citizens thereof. Nothing in this Constitution shall be construed to require that marriage or its benefits be extended to any union other than that of a man and a woman.

For Additional Reading:

- A new website run by conservatives opposed to the Federal Marriage Amendment can be found here: <http://www.lawfullywedded.com>.
- Eric Shumsky, *GOP Bucks States' Rights: Evidence Shows in Amendment Targeting Gay Marriage*, DETROIT FREE PRESS, July 8, 2003, available at http://www.freep.com/voices/columnists/eshum8_20030708.htm.
- Opposing views on the National Review blog: *It's Not About Federalism*: http://www.nationalreview.com/thecorner/04_02_01_corner-archive.asp#024569, and *It is About Federalism*: http://www.nationalreview.com/thecorner/04_02_01_corner-archive.asp#024574.
- Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, WASH. POST, Feb. 14, 2004, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A40866-2004Feb13?language=printer>.
- Lynn D. Wardle, *FMA Time: We Need a Federal Marriage Amendment*, NAT'L REV. ONLINE, Feb. 17, 2004, at <http://www.nationalreview.com/comment/wardle200402170918.asp>.
- William Kristol & Joseph Bottum, *For the Marriage Amendment: The Case For a Federal Marriage Amendment.*, WKLY. STANDARD, Feb. 23, 2004, at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/730uykx.asp>.
- Stanley Kurtz, *National Nuptials: Orrin Hatch's State-By-State Plan Falls Short*, NAT'L REV. ONLINE, Mar. 15, 2004, at <http://66.216.126.164/kurtz/kurtz200403150902.asp>.
- Maggie Gallagher, *An Ambiguous Amendment*, NAT'L REV. ONLINE, Mar. 29, 2004, at <http://www.nationalreview.com/comment/gallagher200403290933.asp>.

Executive Privilege and the 9/11 Commission

On April 8, 2004, National Security Advisor Condoleezza Rice publicly testified before the 9/11 Commission. She did so after several weeks of pressure from Democrats and the media to do so. The Bush Administration had maintained that a congressional commission could not require testimony from a presidential advisor who was not confirmed by the Senate without violating the separation of powers. Some critics of this position noted that Rice had already

testified in private. If the purpose of the doctrine is to protect confidentiality, how would her public testimony violate this confidence in any way that her private testimony and media interviews had not already done? Others, however, noted that Rice would be the first National Security Advisor required to testify on a non-criminal matter in public. Despite the fact that the 9/11 Commission agreed to deem Rice's testimony as "non-precedent-setting," they fear that her testimony may put future Presidents in a situation where they are forced to allow their NSA to testify inappropriately.

For Additional Reading:

- Mark Goldblatt, *Condi's Moment*, NAT'L REV. ONLINE, Mar. 31 2004, at <http://www.nationalreview.com/comment/goldblatt200403310819.asp>.
- Bruce Fein, *Executive Privilege Folly*, WASH. TIMES, April 6, 2004, at A14, available at <http://washingtontimes.com/commentary/20040405-095053-8269r.htm>.
- Terry Eastland, *President's Privilege: Why Bush Didn't Want Condoleezza Rice to Testify Before the September 11 Commission—and Why She's Going to Do So Today*, WKLY. STANDARD, April 8, 2004, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/957gvkpn.asp>.
- Donald Lambro, *Calm at the Inquiry Front*, WASH. TIMES, Apr. 8, 2004, at A16, available at <http://washingtontimes.com/commentary/20040407-092909-4670r.htm>.

Also of Interest:

- The International Court of Justice recently issued a ruling in [Avena \(Mexico v. United States\)](#). The ruling addresses United States procedure in death penalty cases involving foreign nationals. A discussion of possible separation of powers and federalism implications inherent in this ruling appear on *The Volokh Conspiracy* website: http://volokh.com/2004_03_28_volokh_archive.html#108076849700974027.
- A new blog on Crime and Federalism can be found here: <http://www.federalism.blogspot.com/>.