Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
November 6, 2003

U.S. SENATOR PATRICK LEAHY

CONTACT: Office of Senator Leahy, 202-224-4242
VERMONT

Statement Of Senator Patrick Leahy
On The Nomination Of William Pryor
Second Cloture Vote
November 6, 2003

As President Reagan used to say, there you go, again. The Republican leadership, following the script laid out for it by a White House intent on bending all other branches of government to its will, toward its vision of some sort of unitary government, has brought us here to vote on a second cloture petition on the nomination of William Pryor to the U.S. Court of Appeals for the Eleventh Circuit. I assume they recall that they failed in this effort a few months ago at the end of July because of the controversy this nomination has engendered.

Hollow Priorities

Only the Republican leadership can answer why it refuses to proceed on what all of us know are the real priorities of the American people in these final days of this legislative session. We have several annual appropriations bills on which the Senate has yet to act. They include appropriations for our veterans, for law enforcement, for the State Department, for the federal judiciary, for housing and for much more. There is the unfinished business of providing a real prescription drug benefit for seniors. There is the Nation's unemployment and lack of job opportunities that confound so many American families. There are the corporate and Wall Street scandals that concern so many of those who have invested and placed their trust and financial security at risk in our securities markets. There is the need to perform real oversight of the USA PATRIOT Act and to provide real oversight for the war in Iraq.

Rather than consider those important matters, why would the Republican leadership insist on rehashing the debate on one of the handful of judicial nominees on which further Senate action is unlikely. Certainly when they were considering the judicial nominees of a Democratic President in the years 1995 through 2000, they showed no concern about stranding more than 60 of President Clinton's judicial nominations without hearings or votes. They did not demand an up or down vote on every nominee but were content to use anonymous holds to scuttle scores of qualified nominees. Indeed, they stood cavalierly by while vacancies rose from 65 in January

1995 to 110 when Democrats assumed Senate leadership in the summer of 2001. They presided over the doubling of circuit court vacancies from 16 to 33 during that time.

So why do they insist that the Senate now consume this precious floor time to rehash the debate on one of the President's most controversial nominees to the independent federal judiciary, the nomination of William Pryor? Perhaps it is to give the Republican leadership another chance to make false arguments about judicial nominations. Perhaps it is to give some a platform for baseless and McCarthyite accusations that Senators oppose Mr. Pryor because of his religion. Or perhaps it is to distract from the real concerns that affect Americans every day.

168 Nominees Confirmed

If the Republican leadership has staged this vote in order to try to persuade the American people that Democrats are obstructing the President's judicial nominees, they are going to have to stray far from the facts, because the facts show that Senate has made progress on judicial vacancies when and where the Administration has been willing to work with the Senate. Indeed, yesterday the Senate confirmed the 168th of this President's judicial nominees - 100 of them, confirmed by the previous Democratic-controlled Senate, in just 17 months. We could confirm several more if the Republican leadership would just schedule the votes. There is another nominee from New York who was supported unanimously by the Judiciary Committee and is just waiting to be confirmed. As I noted earlier this week, there are also nominees from New York and Arkansas who will require debate but who will also be voted upon after fair debate. The number of confirmations could easily total 170 or more if the Republican leadership were interested in advancing the judicial nominations of this President. But, of course, more progress might undercut the partisan message that some are trying to peddle. Maybe that is why for two weeks the Republican leadership has failed to schedule votes on judicial nominees who will be approved, and have chosen, instead, to focus on the handful of the President's most extreme and divisive nominees.

The truth is that in less than three years' time, the number of President Bush's judicial nominees the Senate has confirmed has exceeded the number of judicial nominees confirmed for President Reagan, the "all time champ" at getting federal judges confirmed, in all four years of his first term in office. A handful of the most extreme and controversial nominations have been denied consent by this Senate in the proper exercise of its duties under the rules. Only four. One-hundred-sixty-eight, seven, to four. That is in stark contrast to the more than 60 judicial nominees from President Clinton who were blocked by a Republican-led Senate.

McCarthyite Smears

If debates like this are staged to give some a platform for repulsive smears that Democrats are opposing Mr. Pryor because of his religion, they will have to enter a realm of demagoguery, repeating false allegations and innuendo often enough to hope that some of their mud will stick.

Senate Democrats oppose the nomination of William Pryor to the Eleventh Circuit because of his extreme - some, with good reason, use the word "radical" -- ideas about what the Constitution says about federalism, criminal justice and the death penalty, violence against women, the Americans with Disabilities Act, and the government's ability to protect the environment on

behalf of the American people. Of course, those substantive concerns will not do much to help raise money for the Republican Party or seem provocative in a flyer placed on windshields late on the day before an election and hardly get a mention on the evening news. So some Republican partisans will be putting the truth to one side. They dismiss the views of Democratic Senators doing their duty under the Constitution to examine the fitness of every nominee to a lifetime position on the federal bench and choose, instead, to use smears and the ugliest accusations they could dream up.

This started in the aftermath of the first rejection of the Pickering nomination in the Judiciary Committee. After the Committee voted not to recommend him to the full Senate, insinuations were made on this Senate floor that Democrats opposed him because he is a Baptist. From that time to now, I have waited patiently for Republican Senators to disavow such charges which they know to be untrue.

Just a few weeks ago, Republican Senators on the Judiciary Committee trotted out an offensive cartoon targeting a nominee, and asked us to denounce it. Even though it was taken off a website run by two private individuals, of whom I had never heard before and who have no connection to Democratic Senators, we appropriately denounced it without hesitation.

Abusing Religion For Wedge Politics

But when slanderous accusations were made by Republican Senators, and ads run by a group headed by the President's father's former White House counsel and a group whose funding includes money raised by Republican Senators and even by the President's family, no apologies or denunciations were heard. Other Republican members of the Judiciary Committee and of the Senate have either stood mute in the face of these McCarthyite charges, or, worse, have fed the flames.

These accusations are harmful to the Senate and to the Nation and have no place in this debate or anywhere else. Just a few weeks ago, President Bush rightly told the Prime Minister of Malaysia that his inflammatory remarks about religion were "wrong and divisive." He should say the same to members of his own party. Today, Republican Senators have another chance to do what they have not yet done and what this Administration has not yet done: Disavow this campaign of division waged by those who would misuse religion by playing wedge politics with it. I hope that the Republican leadership of the Senate will finally disavow the contention that any Senator is being motivated in any way by religious bigotry.

An Extreme And Divisive Nomination

Instead, the Senate's debate should center the nominee's qualifications for this lifetime post in the federal judiciary. There is an abundance of substantive and compelling reasons why William Pryor should not be a judge on the Eleventh Circuit. Opposition to Mr. Pryor's nomination is shared by a wide spectrum of objective observers. Mr. Pryor's record is so out of the mainstream that, even before last month's hearing, a number of editorial boards and others weighed in with significant opposition.

Last April, even the Washington Post, which has been exceedingly generous to the Administration's efforts to pack the courts, termed Mr. Pryor "unfit." Both the Tuscaloosa News and the Hunstville Times wrote in early May against the nomination. Other editorial boards across the country spoke out, including the San Jose Mercury News and the Pittsburgh Post-Gazette. Since the hearing, that chorus of opposition has only grown and now includes the New York Times, the Charleston Gazette, the Arizona Daily Star and the Los Angeles Times. I will submit a sampling of these editorials and columns for the Record.

We have also heard from a number of organizations and individuals concerned about justice before the federal courts. The Log Cabin Republicans, the Leadership Conference on Civil Rights, the Alliance for Justice, NARAL and many others have provided the Committee with their concerns and the basis for their opposition. We have received letters of opposition from organizations that rarely take positions on nominations but feel so strongly about this one that they are compelled to write, including the National Senior Citizens' Law Center, the Anti-Defamation League and the Sierra Club. I submit copies of letters of opposition for the record.

The ABA's evaluation also indicates concern about this nomination. Their Standing Committee on the Federal Judiciary gave Mr. Pryor a partial rating of "not qualified" to sit on the federal bench. Of course this is not the first "not qualified" rating or partial "not qualified" rating that this Administration's judicial nominees have received. As of today, more than two dozen of President Bush's nominees have received indications of concerns about their qualifications from the ABA's peer reviews.

All of this opposition came before these newspapers, public interest organizations, and the bar association were aware of sworn statements made by former Alabama Governor Fob James and his son, both Republicans, explaining that Mr. Pryor was only hired by James to be the state's Attorney General after promising that he would defy court orders, up through and including orders of the Supreme Court of the United States. In sworn affidavits Governor James and his son recount how Pryor persuaded them he was right for the job by showing them research papers he had supervised in law school about "nonacquiesence" to court orders. Indeed, under penalty of perjury, the former Republican Governor and his son say that Mr. Pryor's position on defying court orders changed only when he decided he wanted to be a federal judge.

If true, this information, consistent with the activism and extremism present elsewhere in Mr. Pryor's record, is still shocking. To think that this man would come before the Senate after having made a promise like that - to undermine the very basis of our legal system - and ask to be confirmed to a lifetime position on the federal bench, is beyond belief.

While this is only the latest show of disrespect for the Constitution shown by Mr. Pryor, it is not the only one.

Activist And Crusader

Like Jeffery Sutton, Mr. Pryor has been a crusader for the federalist revolution, but Mr. Pryor has taken an even more prominent role. Having hired Mr. Sutton to argue several key federalism cases in the Supreme Court, Mr. Pryor is the principal leader of the federalist movement, promoting state power over the federal government. A leading proponent of what he refers to as

the "federalism revolution," Mr. Pryor seeks to revitalize state power at the expense of federal protections, seeking opportunities to attack federal laws and programs designed to guarantee civil rights protections. He has urged that federal laws on behalf of the disabled, the aged, women, minorities, and the environment all be limited.

Limiting Worker And Environmental Protections

He has argued that the federal courts should cut back on the protections of important and well-supported federal laws including the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Civil Rights Act of 1964, the Clean Water Act, the Violence Against Women Act, and the Family and Medical Leave Act. He has repudiated decades of legal precedents that permitted individuals to sue states to prevent violations of federal civil rights regulations. Mr. Pryor's aggressive involvement in this "federalist revolution" shows that he is a goal-oriented, activist conservative who has used his official position to advance his "cause." Alabama was the only state to file an amicus brief arguing that Congress lacked authority to enforce the Clean Water Act. He argued that the Constitution's Commerce Clause does not grant the federal government authority to prevent destruction of waters and wetlands that serve as a critical habitat for migratory birds. The Supreme Court did not adopt his narrow view of the Commerce Clause powers of Congress. While his advocacy in this case is a sign to most people of the extremism, Mr. Pryor trumpets his involvement in this case. He is unabashedly proud of his repeated work to limit Congressional authority to promote the health, safety and welfare of all Americans.

Mr. Pryor's passion is not some obscure legal theory but a legal crusade that has driven his actions since he was a student and something that guides his actions as a lawyer. Mr. Pryor's speeches and testimony before Congress demonstrate just how rooted his views are, how much he seeks to effect a fundamental change in the country, and how far outside the mainstream his views are.

Mr. Pryor is candid about the fact that his view of federalism is different from the current operation of the federal government - and that he is on a mission to change the government to fit his vision. His goal is to continue to limit Congress's authority to enact laws under the Fourteenth Amendment and the Commerce Clause - laws that protect women, ethnic and racial minorities, senior citizens, the disabled, and the environment - in the name of sovereign immunity. Is there any question that he would pursue his agenda as a judge on the Eleventh Circuit Court of Appeals - reversing equal rights progress and affecting the lives of millions of Americans for decades to come?

Mr. Pryor=s comments have revealed insensitivity to the barriers that disadvantaged persons and members of minority groups and women continue to face in the criminal justice system.

Attacking The Voting Rights Act

In testimony before Congress, Mr. Pryor has urged repeal of Section 5 of the Voting Rights Act - the centerpiece of that landmark statute - because, he says, it "is an affront to federalism and an expensive burden that has far outlived its usefulness." That testimony demonstrates that Mr. Pryor is more concerned with preventing an "affront" to the states' dignity than with guaranteeing

all citizens the right to cast an equal vote. It also reflects a long-discredited view of the Voting Rights Act. Since the enactment of the statute in 1965, every Supreme Court case to address the question has rejected the claim that Section 5 is an "affront" to our system of federalism. Whether under Earl Warren, Warren Burger, or William Rehnquist, the United States Supreme Court has recognized that guaranteeing all citizens the right to cast an equal vote is essential to our democracy--not a "burden" that has "outlived its usefulness."

His strong views against providing counsel and fair procedures for death row inmates have led Mr. Pryor to doomsday predictions about the relatively modest reforms in the Innocence Protection Act to create a system to ensure competent counsel in death penalty cases. When the United States Supreme Court questioned the constitutionality of Alabama=s method of execution in 2000, Mr. Pryor lashed out at the Supreme Court, saying A[T]his issue should not be decided by nine octogenarian lawyers who happen to sit on the U.S. Supreme Court." Aside from the obvious disrespect this comment shows for the Nation's highest court, it shows again how results-oriented Mr. Pryor is in his approach to the law and to the Constitution. Of course an issue about cruel and unusual punishment ought to be decided by the Supreme Court. It is addressed in the Eighth Amendment, and whether or not we agree on the ruling, it is an elementary principle of constitutional law that it be decided by the Supreme Court, no matter how old its members.

Mr. Pryor has also vigorously opposed an exemption for persons with mental retardation from receiving the death penalty, exhibiting more certainty than understanding or sober reflection. He authored an amicus curiae brief to the Supreme Court arguing that the Court should not declare that executing mentally retarded persons violated the Eighth Amendment. After losing on that issue, Mr. Pryor made an unsuccessful argument to the Eleventh Circuit that an Alabama death-row defendant is not mentally retarded.

Mr. Pryor has spoken harshly about the moratorium imposed by former Illinois Governor George Ryan, calling it a "spectacle." Can someone so dismissive of evidence that challenges his views be expected to hear these cases fairly? Over the last few years, many prominent Americans have begun raising concerns about the death penalty, including current and former supporters of capital punishment. For example, Justice O'Connor recently said there were "serious questions" about whether the death penalty is fairly administered in the United States, and added: "[T]he system may well be allowing some innocent defendants to be executed." In response to this uncertainty, Mr. Pryor offers us nothing but his obstinate view that there is no problem with the application of the death penalty. This is a position that is not likely to afford a fair hearing to a defendant on death row.

Mr. Pryor's troubling views on the criminal justice system are not limited to capital punishment. He has advocated that counsel need not be provided to indigent defendants charged with an offense that carries a sentence of imprisonment if the offense is classified as a misdemeanor. The Supreme Court nonetheless ruled that it was a violation of the Sixth Amendment to impose a sentence that included a possibility of imprisonment if indigent persons were not afforded counsel.

Like Carolyn Kuhl, Priscilla Owen and Charles Pickering, Mr. Pryor is hostile to a woman's right to choose. There is every indication from his record and statements that he is committed to

reversing Roe v. Wade. Mr. Pryor describes the Supreme Court's decision in Roe v. Wade as the creation "out of thin air [of] a constitutional right," and opposes abortion even in cases of rape or incest.

Mr. Pryor does not believe Roe is sound law, neither does he give credence to Planned Parenthood v. Casey. He has said that "Roe is not constitutional law," and that in Casey, "the court preserved the worst abomination of constitutional law in our history." When Mr. Pryor appeared before the Committee, he repeated the mantra suggested by White House coaches that he would "follow the law." But his willingness to circumvent established Supreme Court precedent that protects fundamental privacy rights seems much more likely.

Mr. Pryor has expressed his opposition to fair treatment of all people regardless of their sexual orientation. The positions he took in a brief he filed in the recent Supreme Court case of Lawrence v. Texas were entirely repudiated by the Supreme Court majority just a few months ago when it declared that: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private conduct a crime." Mr. Pryor's view is the opposite. He would deny certain Americans the equal protection of the laws, and would subject the most private of their behaviors to public regulation.

A Record Of Activism

On all of these issues -- the environment, voting rights, women's rights, gay rights, federalism, and more -- William Pryor's record of activism and advocacy is clear. That is his right as an American citizen, but it does not make him qualified to be a judge. As a judge it would be his duty to impartially hear and weigh the evidence and to impart just and fair decisions to all who come before the court. In their hands, we entrust to the judges in our independent federal judiciary the rights that all of us are entitled to enjoy through our birthright as Americans.

The President has said he is against what he calls "judicial activism." How ironic, then, that he has chosen several of the most committed and opinionated judicial activists ever to be nominated to our courts.

The question posed by this controversial nomination is not whether Mr. Pryor is a skilled and capable politician and advocate. He certainly is. The question is whether -- not for a two year term, or a six year term, but for a lifetime -- he would be a fair and impartial judge. Could every person whose rights or whose life, liberty or livelihood were at issue before his court, have faith in being fairly heard? Could every person rightly have faith in receiving a just verdict, a verdict not swayed by or yoked to the legal philosophy of a self-described legal crusader? To read Mr. Pryor's record and his extreme views about the law is to answer that question.

The President has chosen to divide the American people, the people of the 11th Circuit, and the Senate with this highly controversial nomination. He should clean the slate and choose a nominee who can unite the American people.

# # # # #