

Statement of
The Honorable Orrin Hatch.

United States Senator
Utah
February 5, 2004

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Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary Hearing On The Nomination of

WILLIAM MYERS FOR THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

It is my pleasure to welcome before the Committee this morning three exceptional nominees for the federal bench.

Our circuit nominee today is Bill Myers, who has been nominated to fill a vacancy on the Ninth Circuit, the most notoriously liberal federal court in the United States. This is the court that gave us the infamous Pledge of Allegiance case, which held that the Pledge of Allegiance is unconstitutional because it contains the word "God." As a result, public schoolchildren in the nine western states and two territories that constitute the Ninth Circuit are forbidden from pledging allegiance to the flag of the United States, even as their mothers and fathers, uncles and aunts, other relatives and friends are fighting in Iraq, Afghanistan, and all over the world against terrorists to preserve our national security and the ideals that we most treasure in our nation.

Unfortunately, the Pledge of Allegiance case is not an anomaly. For example, the Ninth Circuit has reversed death sentences at an increasingly high rate, which moves it out of step with all other circuit courts. While all other circuit courts uphold approximately 80% of death penalty convictions, the Ninth Circuit has gone the other way, reversing a majority of convictions in most years and approximately 80% of convictions over the last three years. Most recently, in the September 2003 Summerlin decision, an 11 judge, en banc Ninth Circuit panel ruled 8 to 3 that the U.S. Supreme Court's 2002 decision in *Ring v Arizona*--which held that capital defendants have a constitutional right to a jury determination of the facts supporting their death sentences--applies retroactively to over 100 death row inmates who were sentenced by judges. Of the 11 panel judges, ONE was appointed by a Republican President. The majority opinion not only ignored Supreme Court precedent regarding the Arizona Supreme Court's construction of its own state law, and not only--in the words of the dissenters--"wander[ed] far afield" of *Ring v Arizona* and the precedents on which that decision was based, but reversed the death sentence of a rapist and murderer in the process. The dissenters persuasively explained: "The majority opinion's analysis is not compatible with Supreme Court precedent, our prior rulings, or the law of our sister circuits." Result-oriented and ideology-driven decisions like Summerlin are perfect examples of why the Ninth Circuit desperately needs good, constitutionalist judges.

The Ninth Circuit has also held in recent years that California's so-called three strikes law, which imposes life sentences on career criminals, was unconstitutional. It held that a prisoner who was convicted of making terrorist threats had a right to procreate through artificial insemination. This case, which became known as the procreation by FedEx case, was later reversed by an en banc panel of the Ninth Circuit, but just barely. Yet another gem from the Ninth Circuit held that prisoners have a constitutional right to pornography, which had been banned because inmates had used it to harass women guards. Fortunately, saner heads prevailed, and this case was reversed en banc.

Plenty of Ninth Circuit decisions, however, are not corrected en banc, which has led to the Ninth Circuit holding the dubious distinction of having the highest and widest Supreme Court reversal rate in the country among the federal courts of appeals. Over the past seven years, the Supreme Court has reversed an average of 80 to 90% of the Ninth Circuit cases it hears. In the 2002 term, the Supreme Court reversed the Ninth Circuit in 15 of 19 cases, 8 times unanimously. In 2003, the Supreme Court reversed three Ninth Circuit decisions by unanimous summary reversal, which means that the Court simply reversed on the basis of the petition for certiorari, without asking for briefs or oral arguments. I fear, however, that the Ninth Circuit is beyond embarrassment.

I find it interesting that of the 26 active judges on the Ninth Circuit, 17 of them were appointed by Democratic presidents, and 14 of them were appointed by President Clinton alone. In fact, 4 Clinton nominees to the Ninth Circuit were confirmed in 2000, a presidential election year. Despite this record, only one of President Bush's three nominees to the Ninth Circuit was confirmed in the 107th Congress. I'm proud that this Committee's record has been better so far in the 108th Congress, with three of four Ninth Circuit nominees confirmed. But the continuing filibuster of the fourth nominee, Carolyn Kuhl, based on gross distortions of her record and a rigid pro-abortion litmus test, is a national disgrace. So much for achieving any so-called balance.

Let me also note what Senator Schumer said about Bush nominee and current Ninth Circuit judge Jay Bybee before voting to confirm him to that court last year: "Jay Bybee, make no mistake about it, is a very conservative nominee. It is fair to put him in a similar category with many of the more conservative nominees we have had. If Mr. Bybee were nominated to another court that is hanging in the balance or where most of the nominees were conservative, I probably wouldn't vote for him. If he were nominated for the Supreme Court, for example, there would be a different calculus. But Mr. Bybee is nominated to the Ninth Circuit. The Ninth Circuit is by far the most liberal court in the country. Most of the nominees are Democratic from Democratic Presidents. It is the court that gave us the Pledge of Allegiance case which is way out of the mainstream on the left side. Therefore, I think Jay Bybee will provide some balance." Similarly, confirming mainstream nominees like Bill Myers will be another step towards restoring some measure of balance to the Ninth Circuit.

As you will hear in greater detail from Senators Craig and Crapo, and Idaho's Congressmen, Bill Myers has an exemplary record that includes service as a successful, committed advocate and public servant. As Solicitor for the Department of the Interior--a position to which he was confirmed in 2001 without opposition--Mr. Myers supervised over 300 attorneys and 100 support

staff in 19 separate offices throughout the United States, and managed a \$47 million annual budget. He has served as counsel here in the Senate, to our former colleague Senator Al Simpson, and in both the Department of Justice and Department of Energy. His confirmation is supported by Democrats--including former Wyoming governor Mike Sullivan and former Idaho governor Cecil Andrus, who also served President Carter as Secretary of the Interior--and Republicans alike.

Unfortunately, no judicial nominee these days seems to escape criticism by the left-wing special interest groups. Bill Myers is no exception. I expect that we will hear attacks on his record as the Interior Department's Solicitor, where he was doing his duty to represent the policy positions of the United States. We will probably hear attacks on his record in private practice stemming from the types of clients he represented and the positions he took on their behalf--as if ranchers and those who make economic uses of Western lands are less entitled to representation than the big city, liberal environmental groups that attempt to dictate Western land policy while referring to most of our nation as "flyover country." And I expect that some will try to import debates on various environmental and public lands policy issues into this nominations hearing, in an attempt to smear both Bill Myers and the Bush Administration.

Let me emphasize again, for those who still don't get it: the Constitution did not and does not establish federal courts as the policymaking branch of the government. Federal judges don't make policy. And policy debates ought to have no place in our consideration of a nominee's qualifications to serve as a federal judge--unless we think that he or she doesn't understand the proper role of federal judges under our Constitutional system. Absent absurd distortions of his record, there is zero evidence that Bill Myers doesn't understand that proper role.

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