Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
April 1, 2004

Opening Statement of Senator Patrick Leahy
Executive Business Meeting of the Senate Judiciary Committee
April 1, 2004

I begin by welcoming Chairman Hatch back to the Committee after another recent back operation. We are all glad that he has returned and extend to him our best wishes and our hopes that his recovery will be comfortable, and that it soon will be complete.

Three weeks ago a majority of Senators on this Committee wrote to the Department of Justice urging an investigation into the theft of confidential Democratic computer files by Republican staff from at least 2001 into 2003. Characteristically, we have not heard back from this Department of Justice.

I continue to work with Chairman Hatch to schedule the oversight hearings we should be holding on a number of topics. I hope that the Attorney General is making swift progress after his surgery and will be able to join us, without too much more time passing by, for some thorough oversight sessions. We have not had the Attorney General appear before the Committee for more than a year, and he has not made an extended appearance for much longer than that. There are many outstanding requests for information and many more matters that need to be explored.

We are all glad to see that the 9/11 Commission has taken its mandate seriously and is performing some of the investigation that we on this Committee had proposed and hoped that we could perform in 2002. Unfortunately, our efforts were blocked by Republican objections that fall. Now, almost two years later, some of the facts are coming out. The government's preparedness in the fall of 2001 for potential terrorist attacks is an important issue and one that for too long has been avoided.

With respect to nominations, the Democratic Leader since our last meeting has clearly articulated the problems created by this Administration's abuse of its recess appointment power and its partisan approach to filling bipartisan boards and commissions. I have spoken to these issues over the last several months - and over the years, as well. Current examples of White House intransigence to working with us to fill vacancies are the two vacancies on the Sentencing Commission without nominees. Senator Hatch and I had recommended in January 2003 that Judge Castillo be nominated to a full term. More recently Senator Daschle renewed that recommendation of behalf of Senate Democrats and urged the President to nominate Ron Weich to the Commission, which has recently lost its chair with the resignation of Judge Murphy. I hope the White House will work with us to promptly nominate those outstanding individuals.

With respect to judicial nominations, this Committee has already held more hearings this year than were held in all of 1996, the last year of President Clinton's first term. When this Committee considered the nominations of Mr. Myers and Mr. Hall and the President's nominees to the District Courts that are newly on this agenda, we will have considered 24 judicial nominees since the beginning of the year. Those 24 lifetime appointments include seven to the circuit courts. By April 1 in 1996, the Committee had not reported a single circuit court nominee and had reported only four district court nominees. By April 1 in 2000, the Committee had reported only one circuit court nominee and only one district court nominee. Of course, the Senate has already confirmed 173 judicial nominations of this President, more than were confirmed for President Reagan in his entire four-year first term.

We now have 16 vacancies in the circuit courts. That is the number of vacancies that existed when Republicans took majority control of the Senate in 1995. Unfortunately, through Republican obstruction of moderate nominations by President Clinton, those circuit vacancies more than doubled, rising to 33 by the time Democrats resumed Senate leadership in the summer of 2001. We steadily reduced circuit vacancies over the 17 months that Senate Democrats were in charge. Even though an additional 15 circuit vacancies have arisen since 2001, we have done what Republicans refused to do when President Clinton was in the White House by not only keeping up with attrition but actually working to reduce vacancies. We have now reduced circuit vacancies to the lowest level since Republican Senate leadership irresponsibly doubled those vacancies in the years 1995 through 2001. The number of vacancies would be even lower if the White House would work with us on presidential nominations.

We should recognize the progress we have made. I certainly recognize the entirely different approach to judicial nominations Republicans have taken with a Republican President's nominations in contrast to their systematic obstruction of Senate action on President Clinton's judicial nominations.

I will not offer more extended remarks at this point but will want to be heard along with others in connection with the Myers nomination, and also on the Hall nomination if we are able to act on it today.

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Statement Of Senator Patrick Leahy, Ranking Member
The Myers Nomination
Executive Business Meeting Of The Senate Judiciary Committee
April 1, 2004

Today I will cast my vote against the confirmation of William Myers for the Ninth Circuit Court of Appeals. William Myers represents how this President has misused his power of appointing judges to the federal bench. As a member of this Committee and its former Chairman, I have consistently worked to fulfill my constitutional duty of confirming judges who will ensure a fair, independent judiciary made of members who are fit to serve in a lifetime position. Mr. Myers is neither qualified nor independent.

I have carefully reviewed the record that Mr. Myers has logged in private practice and in the Bush Administration. I asked him a series of questions at his hearing in February and later in writing, after that hearing. I, and my colleagues on this Committee, gave Mr. Myers the opportunity to be heard and to make his case that he would be a fair and impartial adjudicator if confirmed to the federal bench. Unfortunately, the only conclusion I have been able to arrive at is that, if confirmed, Mr. Myers would be an anti-environmental activist on the bench. He has a consistent record of using whatever position and authority he has had to fight for corporate interests at the expense of the environment and of the interests of the American people in environmental protections. Even Mr. Myers' hometown newspaper warned that as solicitor at the Department of the Interior: "Myers sounds less like an attorney, and more like an apologist for his old friends in the cattle industry." We have received no assurances that he would not do the same from the bench. He has a record of extremism when it comes to environmental protections, having gone as far as comparing the federal government's management of public lands to "the tyrannical actions of King George" over the American colonies, arguing that the government is fueling "a modern-day revolution" in the American West.

An Anti-Environmental Activist

For 22 years, Mr. Myers has been an outspoken antagonist of long-established environmental protections, usually wearing the hat of a paid lobbyist for mining companies' and grazing interests. At his hearing, he attempted to defend his anti-environmental statements and actions by saying he was acting as an attorney, "on behalf of his clients." But an attorney also has a duty to follow the law and, on more than one occasion, his advocacy has pushed the limits of the law. As The New York Times editorialized, Mr. Myers "regularly took positions that, though legally insupportable, would have had a devastating impact on the environment."

As the chief lawyer at the Department of the Interior, Mr. Myers disregarded the law in order to make it easier for companies to mine on public lands - a position consistent with his prior role lobbying for mining interests while he was in private practice. First, he interpreted the mining law in a way that would allow the reversal of Secretary Babbitt's rejection of a permit for Glamis Mining Co. on land in the Southeastern California desert. A federal court concluded that Mr. Myers' interpretation was wrong and called into question his ability to interpret a statute as he violated "three well-established canons of statutory construction." In addition, he acted without government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe, or other Colorado River Tribes, before taking action to imperil their sacred places.

As Solicitor General at the Interior Department, Mr. Myers encouraged two Northern California congressmen to sponsor legislation that would have given a private firm eight acres of valuable federal land in Yuba County, California. Recognizing that the government did not have the right to turn over the land without compensation, he told the landowners that the "department would support private relief legislation" to accomplish that goal. The Department has since withdrawn its support for the private relief bill after its own agents produced readily available documents that conclusively proved that the government owned the land.

Mr. Myers' record on the environment would raise serious concerns no matter where he would be sitting as a judge. However, it is especially disturbing given the court to which he has been nominated. William Myers has been nominated to a circuit court with an expansive reach. The Ninth Circuit Court encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In addition to the tens of millions of people within those States, the jurisdiction of that circuit extends over an area of the country which contains hundreds of millions of acres of national parks, national forests and other public lands, tribal lands, and sacred sites. Judges on the Ninth Circuit decide legal disputes concerning the use and conservation of many of the most spectacular and sacred lands in America and often make the final decision on critical mining, grazing, logging, recreation, endangered species, coastal, wilderness, and other issues affecting the nation's natural heritage. These judges are also the arbiters on treaty, statutory, trust relationship, and other issues affecting American Indian tribal governments, Native Americans, and Alaska Native groups. The Ninth Circuit Court of Appeals plays an enormous and pivotal role in interpreting and applying a broad range of environmental rules and protections that are important to me and to millions of Americans, as well as to future generations of Americans.

Environmental Protections At Stake

At Mr. Myers's hearing, I raised concerns over what might be at stake if Mr. Myers is confirmed.

At stake is the longstanding acceptance of the Constitution's Commerce Clause as the source of Congress' authority to enact safeguards to protect our air, water, and land. In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, Mr. Myers submitted an amicus brief arguing that the Commerce Clause does not support the United States Army Corps of Engineers' jurisdiction over isolated, intrastate waters on the basis that they are or have the potential to be migratory bird habitat. Mr. Myers' position raises concerns about whether his extremely narrow view of the scope of the Constitution's Commerce clause would undermine our nation's environmental, health, safety, labor, disability and civil rights laws.

At stake are environmental protections which can be struck down if taxpayers do not pay polluters, according to the extreme expansion of the takings clause that some judges have begun to adopt. Mr. Myers has taken this extreme view by arguing that property rights should receive the same level of constitutional scrutiny as free speech. His position raises concerns that he will interpret as "takings" the very laws implemented by Congress to protect our lands and our environment.

At stake is the true meaning of the Constitution's Eleventh Amendment and the right of citizens to sue to enforce environmental protections. In an era of ballooning government deficits and cuts in environmental enforcement budgets, there is much at stake if courts eliminate or minimize the critical role of "private attorneys general" who are needed to ensure that polluters are complying with federal mandates. Mr. Myers has argued that judges should take a more active role in reducing lawsuits brought by environmentalists by requiring non-profit environmental organizations to post a bond for payment of costs and damages that could be suffered by any opposing party. He wrote, "Environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity

wherever it may promote health, safety and welfare." These positions raise concerns that plaintiffs in his courtroom who are members of environmental organizations will not be treated fairly.

An Administration Bent On Weakening Environmental Laws

For the last three years, the Bush Administration has systematically and often stealthily set out to undermine the basic safeguards that have been used by administrations of both parties to protect the environment. One way the Bush Administration has demonstrated its contempt for our nation's environmental laws is in the court system. A Defenders of Wildlife study covering the Administration's first two years noted how its agencies argued in court. Amazingly, in cases where the Administration had a chance to defend the National Environmental Protection Act (NEPA), more than 50 percent of the time it presented arguments in court which would weaken NEPA. Similarly, the Administration argued to weaken the Endangered Species Act (ESA) more than 60 percent of the time.

Despite the Administration's arguments against the environmental laws it is entrusted with protecting, and despite the deference customarily paid to Executive agencies in federal court, the federal judiciary, thus far, has generally upheld our longstanding environmental laws. The courts ruled against the Administration's arguments to weaken NEPA 78 percent of the time, and ruled against the Administration's arguments to weaken the ESA an astounding 89 percent of the time. Further illustrating how important the judiciary has become for environmental protection, especially in the absence of a commitment to environmental protection by Executive agencies, the League of Conservation Voters for the first time included a vote on a judicial nominee on its 2003 scorecard of Senate votes. In the past year, our federal courts resisted efforts to weaken the Clean Water Act, the Clean Air Act, and the Endangered Species Act. The courts protected our National Monuments from challenges by extremist groups trying to strip them of their status, upheld air conditioning standards which save energy and money for consumers, and stopped Administration rollbacks that benefited industry at the expense of our forests. The result of these court decisions is that our vital wetlands and rivers are not decimated, diverse species are protected from extinction, and the standards for air quality are brought into compliance with the law.

Judicial Activists Doing The Administration's Bidding

There are, however, dark clouds on the horizon. There are cases pending where the outcomes could affect whether our air is threatened by toxic chemicals and whether our water and health are threatened by pollution and pesticides. There are cases pending over whether to allow snowmobiles in our National Parks, whether to allow the Administration to open up 8.8 million acres of important wildlife habitat and hunting and fishing grounds in Alaska for oil and gas leasing, whether pumping dirty water into the Everglades violates the Clean Water Act, and whether the Administration can open our nation's largest National Forest to logging.

How will these cases be decided? Will the federal courts continue to stand as a bulwark against the Administration's assault on environmental protection? Consider that in two recent cases, judges appointed by President Bush dissented, arguing against environmental protections. In one case, a Bush-appointed judge indicated that he might find the Endangered Species Act unconstitutional, and, in the other case, a Bush judge would have ruled to make it harder for public interest groups to prevent irreparable environmental harm through injunctive relief while claims are pending. What if President Bush succeeds in appointing more like-minded judges and these two judges find themselves in a majority next time, positioned to strike down vital environmental protections? Isn't this the type of judicial activism against established precedent that President Bush says he deplores?

The Bush Administration has already proposed more rollbacks to our environmental safeguards, aiming to benefit industry at the expense of the public's interest in clean air and water, our public lands, and some of our most fragile wildlife populations. While today we have a federal judiciary which has in many instances prevented this Administration's attempts to roll back important environmental laws and protections, in the future we may not be so fortunate. Today, the appellate courts in this country have tilted out of balance with Republican appointees controlling 10 of the 13 courts. A judge has a duty to enforce the protections imposed by environmental laws, and the Senate has a duty to make sure that we do not put judges on the bench whose activism and personal ideology would prevent fair and impartial adjudication and would circumvent environmental protections that Congress intended to benefit the American people and generations to come. The American people expect good stewardship of the nation's air, water and public lands, and the American people deserve that.

An editorial in The Boston Globe recognized that "When the White House is in the clutches of the oil, coal, mining, and timber companies, as it is now, the best defenders of laws to protect the environment are often federal judges." They went on to conclude that if the Senate confirms William Myers, "the judicial check in this administration's unbalanced policies will be weakened."

The 'Swoosh' Of The Revolving Door

For almost his entire 22-year legal career, Mr. Myers has worked in Washington - in political positions for Republican Administrations and as a lobbyist. He received a partial Not Qualified rating from the American Bar Association - the ABA's lowest passing grade. He has minimal courtroom experience - having never tried a jury case and having never served as counsel in any criminal litigation.

It seems clear that William Myers was nominated not for his fitness to serve as a member of the federal judiciary but rather as a reward for serving the political aims of this particular Administration.

When Mr. Myers was appointed to his legal post at the Department of the Interior, some described it as putting a fox in charge of the henhouse. Another metaphor that comes to mind is the revolving door that is emblematic of so many of this Administration's appointments, especially to sensitive environmental posts. Mr. Myers' Interior appointment was the first "swoosh" of the revolving door. His nomination by President Bush to one of the highest courts in the land completes the cycle.

Mr. Myers is one of several nominees who have come before us because they are being awarded lifetime appointments to the federal courts based not primarily on their qualifications for the office, but as part of a spoils system for those who are well connected and have served the political aims of the Bush Administration. So many of President Clinton's judicial nominees upon whom this Committee took no action seemed to have been penalized for their government service or for having supported the President. Elena Kagan, James Lyons, Kent Markus and so many others never received hearings, and their nominations were defeated through Republican inaction, without explanation.

Mr. Myers, despite his lack of qualifications for this lifetime position, was treated fairly. He was given a hearing and the opportunity to respond to our concerns. And we are here today, voting, with full disclosure of the reasons for our votes.

Exceptional Concern, Strong And Widespread Opposition

The list of those who are deeply concerned about, and who have felt compelled to oppose this nomination has been long and it continues to lengthen. More than 175 environmental, Native American, labor, civil rights, disability rights, women's rights and other organizations have signed a letter opposing Mr. Myers' confirmation to the Ninth Circuit Court of Appeals. The National Congress of American Indians, a coalition of more than 250 tribal governments, unanimously approved a resolution opposing Mr. Myers' nomination. The National Wildlife Federation, which has never opposed a judicial nomination by any president in its 68-year history, wrote, "Mr. Myers has so firmly established a public record of open hostility to environmental protections as to undermine any contention that he could bring an impartial perspective to the issues of wildlife and natural resource conservation that come before the court. Indeed, Mr. Myers is distinguished precisely by the ideological rigidity that marks his positions on these issues." More than 40 House members, many of whom represent districts in the Ninth Circuit, sent a letter opposing the nomination noting "Mr. Myers' ... record of marked hostility toward the vital role the federal government plays in safeguarding our environment - especially in California and the West - do not reflect the qualifications and values that a federal court should embody." A letter from the California Legislature, signed by the Senate President Pro Tem, the Chair of the Senate Natural Resources Committee, and the Chair of the Senate Environmental Quality Committee, strongly opposing Mr. Myers' nomination, tells the Committee, "Mr. Myers' record as Interior Solicitor of favoring the interests of the grazing and mining industries over the rights of Native Americans and the environment, coupled with his long history as an extreme advocate for those industries, cause serious doubts on his willingness or ability to put aside his personal views in performing his official duties."

For all of these reasons, I vote today in opposition to Mr. Myers' confirmation.

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Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Executive Business Meeting
Nomination of Peter Hall to the United State Court of Appeals
for the Second Circuit
April 1, 2004

I am pleased today to be able to vote favorably to report Peter Hall to the United States Senate for confirmation to the United States Court of Appeals for the Second Circuit. He currently serves as our United States Attorney in Vermont, and has the strong support of Governor Douglas and the entire Vermont delegation. I thank Chairman Hatch for holding a hearing on this nomination last month, and I believe it is one that has widespread support on the Committee.

By tradition, there has always been a Vermont seat on the Second Circuit. The reason it is vacant is because of the sudden and tragic death of the last judge to hold the seat, the late Fred Parker. Judge Parker was appointed to the United States District Court for Vermont in 1990 by the first President Bush on the strong recommendation of Senator Jeffords and with my support. He was a well-known Republican and had served as the Deputy Attorney General of the State of Vermont. After distinguished service on the District Court bench, he was appointed to the Second Circuit by President Clinton, again on my recommendation and with the strong support of Senator Jeffords. Over the years Senator Jeffords and I have tried to keep partisan politics out of judicial selection, and I think if you look at the quality of the people we have recommended, you will see we have been quite successful. Fred Parker was just such an example. Fred was a good man, a good lawyer, and a good judge. From the time we met in law school at Georgetown, until his untimely death last year, I knew Fred Parker to be a man of integrity and intelligence. He served the courts and the people of Vermont with dedication and fairness, and he will be missed.

Peter Hall has big shoes to fill, but from what I know about him, he is up to the job. Peter had the nerve to be born in Connecticut and to go all the way to North Carolina for college and to attend law school in New York. Fortunately he came to his senses as soon as he graduated from law school and came to Vermont to clerk for the well-respected Judge Albert Coffrin of the United States District Court for the District of Vermont. He has been in Vermont ever since.

His career and the exemplary way he has served the United States Government and the law are to be admired. After completing his clerkship with Judge Coffrin, Peter joined the United States Attorney's office in Vermont. He was a federal prosecutor for the next 18 years, rising to the position of First Assistant and then later being named United States Attorney. During those years he has gained invaluable trial experience so beneficial for any judge, and learned about federal criminal law. But his resume is not limited to government service. In 1986 he began a 15-year career in the private practice of law, focusing on civil practice, with a particular emphasis on mediation. He also used his time during that period to serve the bar, providing ethics training to Vermont State prosecutors, and holding the office of the President of the Vermont Bar Association, where he advocated for funding for public defenders and equal access to justice. He found time for pro bono work, getting involved in the Vermont family court system and serving as guardian ad litem for children caught up in disputes between their parents.

In 2001, President Bush nominated Peter Hall to be the United States Attorney for Vermont. His record in that office is one of a tough but fair prosecutor. I supported Peter's nomination to that position and support him now.

Let there be no misunderstanding about Peter's party affiliation. Peter Hall is a Republican. From 1986 to 1993 he was variously a member of the Town of Chittenden, Rutland County, and State of Vermont Republican Party Committees, and he is a member of the National Republican Party. He has helped run statewide Republican campaigns, and he was an elected Republican official for five years, holding one of the most important offices a citizen can hold in Vermont, as a Member of the Select Board of his town, the Town of Chittenden. He was recommended to the President by Vermont's Republican Governor. As Governor Douglas notes in his letter of

support for this nomination, Peter is "a dedicated public servant, a strong leader and will be an asset to the Second Circuit." I ask that the letter be included in the record.

Equally clear, however, is Peter's commitment to the law, to fair judging and to leaving any partisan label or interest at the courthouse door. Peter Hall is the type of nominee this President should send us more often. He is universally respected and is someone in the nature of a consensus selection. He has proven himself over long years of federal service and private practice to be the sort of straight-shooting, fair-minded person that any litigant in a federal courtroom can be confident will give him a fair hearing and a fair shake. I am pleased to support his confirmation.

One example of the fairness and lack of bias that litigants in the Second Circuit can expect is seen in his answer to one of the questions I asked him at his hearing last month. I asked him what his practice would be if a case came to the Second Circuit that had been in the U.S. Attorney's Office when he was there, even if he had not been the attorney handling the case. His answer, which I consider the model of fairness, was simple. He told me he would recuse himself from any case that had been before his office while he was there. No ifs, ands or buts.

Not all of President Bush's nominees have answered this question in so sensible and straightforward a manner. For example, when I asked Mr. Haynes if he would recuse himself from cases arising from terrorism-related policies he helped develop as the General Counsel at the Department of Defense, he would only pledge to "adhere strictly to all applicable statutes, court decisions, policies, and ethical rules." As we know from Justice Scalia's duck-hunting controversy, the applicable recusal rules are largely left to an individual judge's discretion and are difficult to enforce. Mr. Haynes' refusal to give as clear an answer as Mr. Hall will do nothing to clear away the doubt in the minds of many who have questions about his ability to be fair in the cases which rest on the interpretation of a policy he forged for this Administration. I wish more nominees, Mr. Haynes included, would follow Mr. Hall's fine example.

As I hope I made clear, Peter's qualifications, experience and support across the political spectrum makes him the kind of consensus nominee who proves that when there is thoughtful consideration and collaboration, this process can work as it should. I look forward to his swift confirmation.

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