Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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On The Nomination of William Myers
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Last week, Chairman Specter held a news conference and demonstrated his determination, his statesmanship and his ambitious agenda for this Committee in the months ahead. Democrats and Republicans on the Judiciary Committee are delighted to see him back so soon in such fine form and good humor.

He outlined the bipartisan progress that we are making together on several efforts, including asbestos legislation and hearings the committee will hold on privacy and identity theft issues. He also talked about the conflict between the White House and the Senate over controversial judicial nominees.

I welcome the improved tone he has brought to this last topic, and I think he and I agree that this conflict is unnecessary. I think we agree that it would serve the country far better to have nominees who do not divide the Senate and the American people, and that the President should -- as I have been urging him to for some time -- work more closely with the Senate to avoid problems before they arise here. The Chairman was correct to recognize the role the Constitution envisions for the Senate in the lifetime appointment of federal judges, and to defend the right of the minority to express itself in a democracy. As Senator Isakson explained just a few weeks ago in remarks on the Senate floor, those minority rights in general, and the filibuster in particular, are crucial to maintaining a democratic government and fair society.

Since the President began his first term, in 2001, Democrats in the Judiciary Committee and in the Senate have been cooperating to a remarkable degree in confirming the President's judicial nominees. In his first term 204 judges were confirmed to lifetime appointments on the federal circuit and district courts. That is more than were confirmed in his father's term, more than in either of Ronald Reagan's terms, and more than in President Clinton's second term. When I became Chairman in June of 2001 and held the first judicial nomination hearing of the term, there were 110 vacancies on the federal courts, most due to the delay and inaction on President Clinton's nominees. Through hard work and cooperation over the last four years, that number has plummeted, and at the end of the last Congress had reached a 14-year low of 27. There no longer is a vacancy crisis in the federal courts, and each of us on this Committee ought to be proud of our part in solving it.

However, much as we have worked together on both sides of the aisle to fill an impressive number of vacancies by any measure, President Bush continues to insist on a handful of extreme, activist nominees to key positions on some circuit courts. Even after the Senate, through the use of long-standing rules, has denied confirmation to these nominees and has made clear that they are highly controversial within the Senate and to the American people, the President has continued to support them and send them back time and again to the Senate. He did it again just a few weeks ago, when he renominated 20 candidates for federal judgeships, seven of whom have already been considered by the Senate, and others about whom he knows there is great controversy and disagreement. By sending these nominations back to the Senate he is choosing partisan politics over good policy and obstructing our ability to fill the few remaining vacancies.

The nominee before us today, William Myers, is among those already examined, and the Senate has withheld its consent to his lifetime appointment. This nomination was rejected for its partisanship and lack of distinguished qualifications. Instead of trying to change the vote on this nomination, the President would be well advised to work with the Senate to find a consensus nominee to fill the vacancy on the Ninth Circuit. That would go a long way toward

avoiding the kind of debacle the Chairman so rightly predicts could ensue if we continue on the path this nomination represents.

I agree with what the Democratic Leader has said about the already-considered judicial nominees, and I too expect that the outcome of this nomination will not change if we are pushed to consider it again in Committee and on the Senate Floor. I still oppose the confirmation of Mr. Myers to the Ninth Circuit for all of the reasons I laid out last July. I still believe Mr. Myers to be perhaps the most anti-environmental judicial nominee sent to the Senate in my 30 years in representing Vermont in the U.S. Senate. I still believe that the nomination of William Myers to the United States Court of Appeals for the Ninth Circuit is an example of how this President has misused his power of appointments to the federal bench. I still believe Mr. Myers is not independent enough to receive confirmation for a lifetime appointment to this federal circuit court. Nothing has changed.

To the contrary, since we last had the opportunity to talk about Mr. Myers' nomination, more questions have arisen. Today the nominee will be given another opportunity to make his case and explain why he is entitled to a lifetime appointment to the federal court. Today we will resume the process of seeking answers to questions about this nomination. The Committee is right to follow regular order through this hearing.

In particular, I have questions about Mr. Myers' relationship with and role in rewarding a lawyer who worked for him, and who was recently found by the Department of Interior's Inspector General to have been responsible for arranging a sweetheart deal to a politically well-connected rancher. I was not satisfied with his answers to our previous questions about his total disregard for the concerns of the Native Americans of the Quechen Tribe in the Glamis Mine case, and I have some questions for him about recent developments in the Oil-Dri case where a state court has just rejected his legal arguments that would have protected big business over the objections of another Native American tribe.

Let me remind those listening of the basis for my opposition to this nomination. Mr. Myers' hometown newspaper warned that as Solicitor at the Department of the Interior: "(Mr.) Myers sounds less like an attorney, and more like an apologist for his old friends in the cattle industry." He has a record of extremism when it comes to his opposition 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.

Anti-Environmental Activism

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 last February and later in writing, after that hearing. Last year we afforded 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. Based on the record, the only conclusion I was able to reach was that, if confirmed, Mr. Myers would be an anti-environmental activist on the bench, despite President Bush's claim that the President opposes judicial activism. Apparently not, it seems, when the judicial activism is aimed against the environment or is tinged with ideology that this Administration favors. Today's hearing gives Mr. Myers an additional opportunity to be heard and to make his case. He should explain his consistent record of using whatever position and authority he has had to fight for corporate interests at the expense of the environment and at the expense of the interests of the American people in environmental protections.

For 22 years, Mr. Myers has been an outspoken antagonist of long-established environmental protections, usually wearing the hat of a paid lobbyist for industry. This is not a case of a representation of a defendant in a single case. He has chosen this career for which he has been amply rewarded both monetarily and by positions in the Bush Administration.

An attorney also has a duty to follow the law and, on more than one occasion, Mr. Myers' advocacy has pushed the limits of the law. As The New York Times editorialized, Mr. Myers "regularly took positions that. . .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. He interpreted the mining law in a way that would have allowed the reversal of Secretary Babbitt's rejection of a permit for Glamis Mining Co. on land in the Southeastern California desert. Fortunately, an independent review by a federal court concluded that Mr. Myers' interpretation was wrong. The court 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 jurisdiction 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. Judges on the Ninth Circuit 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 plays an enormous and pivotal role in interpreting and applying a broad range of environmental rules and protections that are important to millions of Americans, and to future generations of Americans.

At stake is the longstanding acceptance of the Constitution's commerce clause as the source of congressional 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 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 gone so far as to argue 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.

Systematic Use Of Courts To Undermine Environmental Protection

For the last four 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 independent 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 -- particularly 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 few years, 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.

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 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 Bush judges become the majority next time, positioned to strike down vital environmental protections? This is the type of judicial activism against established precedent that President Bush says he deplores, yet he nominates and appoints judges who engage in wholesale judicial activism.

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. The American people expect good stewardship of the nation's air, water and public lands, and the American people deserve that. Judges have a duty to enforce the protections imposed by environmental laws. 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.

An editorial in The Boston Globe recognized: "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." The editorial concludes that if the Senate confirms William Myers, "the judicial check in this administration's unbalanced policies will be weakened."

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 lifetime member of the federal judiciary but rather as a reward for serving the political aims of the Administration.

The 'Swoosh' Of The Revolving Door

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 the Senate 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 and obstruction, without explanation. With a Republican President, Senate Republicans have reversed their field and position. We have already confirmed to lifetime appointments a number of Administration and Republican-connected candidates, including Judge Prost, Judge McConnell, Judge Cassell, Judge Shedd, Judge Wooten, Judge Chertoff, Judge Hudson, Judge Clark, and Judge Bybee. On that last nomination, it is clear we moved too hastily and without knowing enough about his involvement in devising legal interpretations governing detention and interrogation that have led to a national and international scandal.

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 172 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."

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, told the Judiciary 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."

I have great regard for the Senators from Idaho. I have affection for the former Senator from Wyoming, who was my colleague on the Judiciary Committee for many years and who I consider a friend. In deference to them, I have examined Mr. Myers' record and asked myself whether I could support this nomination. I could not last year, and I cannot now.