

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Hearing Before The Judiciary Committee
On The Nomination Of Judge Terrence Boyle
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The Committee meets today for its second controversial nominations hearing in three days to consider a circuit court nomination that comes to us laden with questions and opposition and concern. Chairman Specter is holding this hearing today on the renomination of Judge Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit.

During the last four years the Republican majority bent or broke virtually every previous practice and rule to try to force through this President's divisive judicial nominees in a bid to transform the federal bench into an arm of the Republican Party. In contrast, the prior Republican leadership assiduously respected every Republican objection to President Clinton's moderate judicial nominees and prevented more than 60 from being considered, blocking them with pocket filibusters. Judge Boyle has the distinction of being so controversial that his was the only circuit court nomination of President Bush on which the former Republican leadership balked at a hearing.

Unlike the many anonymous Republican holds and pocket filibusters that kept scores of President Clinton's qualified judicial nominees from moving forward, Senator Edwards' opposition to the elevation of Judge Boyle to the Fourth Circuit was not kept secret. His reasons for openly opposing Judge Boyle remain as compelling today as they were when he resolutely represented the people of North Carolina on this Committee and in the Senate. He wrote to Senator Hatch in 2003:

As a North Carolina Senator, I am very familiar with this record. Judge Boyle's decisions have been reversed or vacated more than one hundred times. Two of these rulings were by the United States Supreme Court, one by a unanimous vote. Judge Boyle's record on civil rights is particularly troubling. In numerous cases he has inaccurately interpreted the law in a way that undercuts basic civil rights protections.

The history of filling vacancies on the Fourth Circuit has been a difficult one these last several years. Senator Helms blocked numerous qualified nominees from North Carolina and even from Virginia. Republicans would not cooperate in elevating any of the outstanding African-American nominees to the Fourth Circuit throughout President Clinton's two terms. Senator Edwards was mindful of that. He worked hard to find a way and due to his extraordinary efforts, he succeeded in having Judge Allyson Duncan appointed to the Fourth Circuit to fill one of the many seats from North Carolina that Republicans had intentionally kept vacant.

I also want to commend Senator Warner for his efforts and Senator Allen for his help in getting Judge Roger Gregory of Virginia confirmed to a lifetime appointment to the Fourth Circuit, the first African American to serve on that circuit. Judge Gregory had been nominated by President Clinton, but the Republican majority refused to consider his nomination and, instead, relied upon Senator Helms' objection. Senator Warner and Senator Robb both supported his nomination, and Senator Allen did as well during his campaign and after his election to the Senate. They deserve great credit for Judge Gregory becoming the first African American to be confirmed to a lifetime appointment to the Fourth Circuit. I know this nomination well. I chaired this Committee when Judge Gregory was finally given a hearing and when the Senate confirmed him in 2001.

During my 17 months as Chairman, we were able to break through the logjam on the Fourth Circuit that Republicans had constructed. The Senate confirmed two nominees of President Bush to the Fourth Circuit: Roger Gregory of

Virginia, and Dennis Shedd of South Carolina. It was when Democrats were in the Senate majority that we broke that pattern of Republican obstruction. In addition to Judge Gregory, I proceeded with the controversial nomination of Judge Shedd. He, too, was given a hearing, Committee consideration and Senate consideration and, although he was a divisive nominee with an uneven record, he was confirmed by the Senate. That effort at reconciliation, as with all of our Democratic efforts, was not reciprocated. Instead, Republicans chose to excoriate me for the timing of the process.

Democratic action stands in stark contrast to the way the Republican Senate obstructed President Clinton's nominees to this circuit, when six circuit court nominees were blocked by Republicans. Judge James Beaty did not get a hearing or a vote from the Judiciary Committee in 1995, 1996, 1997 or 1998. Judge James Wynn did not get a hearing or a vote in 1995 or 1996. Judge James Wynn did not get a hearing or a vote in 1999, 2000, or the beginning of 2001. Judge Roger Gregory did not get a hearing or a vote in 2000 or the beginning of 2001, when he was a Clinton nominee. Neither Judge Andre Davis nor Elizabeth Gibson got hearings or votes in 2000. Not one of these six circuit court nominees ever got a hearing or a vote in this Committee when the Republican majority stalled so many outstanding, qualified judicial nominees during the last six years of the Clinton Administration.

Others may recite partisan talking points seeking to rewrite Senate history on its treatment of judicial nominations, but these are the facts and the background that bring us to today's consideration of Judge Boyle's nomination. I hope we will not have to endure the erroneous claim that Judge Boyle has been denied a hearing for 14 years. Those who make the charge know full well that Republicans have been in charge of this Committee for the most recent years, and for a majority of those 14 years no nomination was pending for this controversial nominee.

Judge Boyle was nominated to the Fourth Circuit at the end of 1991, when the White House of President George H.W. Bush was refusing to give Senators access to nominees' FBI files, as Chairman Biden noted at the time. The process was restored in the spring of 1992. Despite the obstruction of the process by the Republican White House, the Senate confirmed 66 judicial nominees in 1992, including 11 circuit court nominees. A Democratic Senate majority proceeded in that presidential election year, when the Thurmond Rule was traditionally used by Republicans to shut down the confirmation process, to confirm more judicial nominees than the Republican Senate majority confirmed in any one of the six years it was responsible for reviewing President Clinton's judicial nominees. Any time the Senate confirms that many judges in a year it is working at an exceptionally fast pace. I know. When I chaired the Committee and the Senate confirmed 72 judges in 2002 and 100 in 17 months, we worked exceptionally hard. Chairman Biden did an exceptional job and acted in an extraordinarily bipartisan way. His efforts were not reciprocated when Republicans assumed control of the process and could have worked more cooperatively with a Democratic President.

In the early 1990s the Senate was working hard to fill judicial vacancies and to fill the scores of additional judgeships recently created. Under the Thurmond Rule, which was honored by Republicans until last year, only uncontroversial nominees or nominees with bipartisan consent were considered and confirmed in presidential election years. Judge Boyle was hardly uncontroversial. He was not among the historically high 66 judges confirmed in 1992. As The Los Angeles Times reported: "[D]uring his last months in office, the senior Bush nominated Judge Terrence Boyle, a protégé of Sen. Jesse Helms (R-N.C.), to the U.S. 4th Circuit Court of Appeals. But his nomination never got a hearing. In retaliation, (Senator) Helms vetoed all of Clinton's nominees from North Carolina to the 4th Circuit, including three African Americans." The Republican Chairman of the Judiciary Committee respected Senator Helms' objections to African Americans Judge Beaty and Judge Wynn as well as federal Bankruptcy Judge J. Rich Leonard of Raleigh, a former federal magistrate and clerk of court for the Eastern District of North Carolina, even though their records were beyond reproach.

Despite these actions by Senator Helms and by Senate Republicans, despite the change in position by Republicans, who used to argue that the D.C. Circuit and the Fourth Circuit and the Sixth Circuit did not need more judges when a Democratic President was doing the nominating, Democrats have worked with President Bush to confirm nominees to these vacancies, some of which were deliberately maintained for years by Republican obstruction. Democrats worked to break the Republican logjam of confirmations to the Fourth Circuit, the Sixth Circuit and the D.C. Circuit. The caseload of the Fourth Circuit is almost the same now as it was when it had five vacancies and Chief Judge J. Harvie Wilkinson opined against adding more judges to his court. Thanks to Democrats' bipartisan cooperation on President Bush's nominees to the Fourth Circuit, the court now has more judges than it did then.

President Bush spoke eloquently about the fundamental requirements of a democratic society when he met recently with President Putin of Russia. He acknowledged that we rely on the sharing of power, on checks and balances, on an independent court system, on the protection of minority rights, and on safeguarding human rights and human dignity. I agree with him. He recently promised the American people in a radio address that he would serve all Americans and would "work to promote the unity of our great nation." I commend that thought and hope that he will work to fulfill that promise. His renomination of controversial judicial nominees is inconsistent with that promise and undercuts the fundamentals that protect our democracy.

At the outset of this Congress, the Senate Democratic Leader reached out to the President, as I have for the last four years, and urged him to work with us on lifetime judicial appointments. Just this week, Senator Salazar wrote to the President urging him to work with us to find common ground and consensus nominees. He offered President Bush some wise counsel noting that "the decision to re-nominate these individuals will undoubtedly create the animosity and divisiveness between the President and the United States Senate as an institution that is not helpful to our Nation and will sidetrack our collective efforts to work on other crucial matters."

The confrontational approach of this Administration is unnecessary and unwise. Senate Republicans' insistence that this President be given carte blanche in his efforts to pack the federal courts and that the Senate become a rubber stamp and give up its distinctive protection of minority rights is shortsighted at best. It is most unfortunate that this White House persists in its single-minded effort to pack the federal courts. It is unfortunate that the Senate Republican leadership is acting as an arm of the Administration rather than on behalf of the Senate and providing the checks and balances on which our democracy and our freedoms depend.

That brings us to this difficult hearing on controversial nominations. Over the last several days we have heard from opponents of Judge Boyle's nomination that include groups and citizens from North Carolina concerned about his record on the District Court, and by people who have followed his career or been affected by his rulings. I have a numbers of letters from groups of police officers, for example -- many, from North Carolina -- who are emphatically opposed to Judge Boyle's confirmation to the Fourth Circuit. There is a letter from the North Carolina Police Benevolent Association, the North Carolina Troopers' Association, Police Benevolent Associations from South Carolina, Virginia and Alabama, the National Association of Police Organizations, and the Professional Fire Fighters and Paramedics of North Carolina. These are not the typical opponents of judicial nominees. They have come forward to oppose this nomination.

In addition, there is deep opposition from those interested in civil rights, disability rights, women's rights, the environment and many other issues. This home state opposition is something this Committee needs to consider. It signals to me that there may be serious problems with this nomination.