Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 17, 2005

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee,
On the Nomination of William Myers
Executive Business Meeting
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As far as the nomination of William Myers to the Ninth Circuit is concerned, last week it was listed prematurely. This week I will not ask that it be held over. I will not ask that Committee consideration on this nominee be delayed. I have only asked that it be considered in the regular course.

I note that a key difference between the way Republicans prevented votes on more than 60 of President Clinton's moderate and qualified nominees and the manner in which we have opposed a handful of President Bush's most extreme nominees is that we say publicly why we oppose the nomination and are withholding consent.

Little has changed in connection with this controversial nomination since last year. I explained then, and I will again today, that William Myers is perhaps the most anti-environmental judicial nominee we have seen nominated to the Senate. This nomination is an example of how this President seeks to misuse his power of appointment to the federal bench. Mr. Myers is neither qualified nor independent enough to receive confirmation for a lifetime appointment to this federal circuit court. His nomination is the epitome of the anti-environmental tilt of so many of President Bush's nominees and policies. This nomination should be rejected.

Chairman Specter afforded Mr. Myers an opportunity to provide the Committee and the Senate with additional information to show that he now merits the consent of the Senate to his lifetime appointment as a judicial custodial of the rights of all Americans. I found him less candid and forthcoming in his recent appearance before the Committee than before. I urge all Senators to review his answers, in particular, his exchange with me over his role in the career of Robert Comer and his failure to answer Senator Feingold's questions.

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." 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.

I have reviewed the record that Mr. Myers has logged in private practice and in the Bush Administration. We have given Mr. Myers ample opportunity to be heard and to make his case. I am not persuaded that he would be a fair and impartial adjudicator if confirmed to the federal bench. Unfortunately, the conclusion I arrived at is that, if confirmed, Mr. Myers would be an anti-environmental activist on the bench. 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, though legally insupportable, would have had a devastating impact on the environment." He has a consistent record of using whatever position and authority he has had to benefit corporate interests at the expense of the environment and at the expense of the interests of the American people in environmental protections. That record has not changed in the last year.

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.

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. 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 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.

I have no assurance that Mr. Myers would uphold congressional power under the Constitution's Commerce Clause to protect our air, water, and land. Mr. Myers' brief in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers takes an extremely narrow view that would undermine our nation's environmental, health, safety, labor, disability and civil rights laws.

I am concerned that Mr. Myers will ignore the true meaning of the Eleventh Amendment and undercut 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 argues that judges should be activist and require non-profit environmental organizations to post a bond for payment of costs and damages if they wish to sue to enforce environmental protections. 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 receive fair, unbiased treatment. I wonder if he would have the same opinion of the groups that will surely turn to the courts to block the Administration's new mercury regulation? Would he have the same view of the many state attorney's general that have filed lawsuits to stop the Bush Administration's assault on the Clean Air Act?

If anything, over the last month or so we have learned more about Mr. Myers' poor judgment and decisions that harm the interests of the land he was empowered to protect.
He has been amply rewarded both monetarily and by positions in the Bush Administration for his service to business interests. He is not entitled, however, to a lifetime appointment on the federal courts. The revolving door should not swing that far.

We know that while Mr. Myers was Solicitor of the Interior, private landowners were treated more than fairly. One example that stands out is the one-sided settlement given to a politically-connected Wyoming rancher by a lawyer who was recruited, directly supervised and promoted by Mr. Myers. Robert Comer was the lawyer who gave a deal so unbalanced that it was criticized by the U.S. Attorney's Office in Wyoming and investigated by the Department of Interior's Inspector General, who concluded that the case "cried out for . . . action." Although he tried mightily not to tell us, Mr. Myers finally admitted at his hearing and in written answers that he had already known Comer when he chose to hire him from among the names offered by the Bush White House. Although he tried hard to obscure the fact, Mr. Myers finally told us that the situation of an Associate Solicitor like Comer taking on the settlement of a local matter like he did was unique in his tenure at Interior. And although he may now be ashamed to admit it publicly, he eventually owned up to having chosen then-political appointee Comer from among others recommended more highly

for a coveted, and more secure, career job in the Interior Department. Was Mr. Myers aware of how politically connected the rancher was? Did his superiors order him to make the rancher happy or did he just not ask the hard questions when he gave his political subordinate authority to make the case go away? Whatever the real story, it does not reflect well on Mr. Myers' independence, his management skills or his judgment.

An Administration Bent On Weakening Environmental Laws

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. 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 yet decimated, diverse species are protected from extinction, and the standards for air quality are still in compliance with the law.

The Bush Administration has not abandoned its attacks on the environment as its recent rules on mercury serve to remind us. Without an independent judiciary, the destruction of our environmental protections is an inevitable consequence we face. 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, whether to cut old growth forests in Oregon and California, and whether the Administration can open our nation's largest National Forest to logging. After this week's budget vote there may even be cases on how to open the Arctic Refuge to oil drilling.

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 already in control of 10 of the 13 circuit courts. 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.

Will the federal courts continue to stand as a bulwark against the Administration's assault on environmental protection? Not if people like Mr. Myers are confirmed to the federal courts. I have reason to fear that he will engage in wholesale judicial activism to serve the corporate interests he has been serving his entire career. 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."

The American people have the right to expect their federal courts to vigorously uphold their federal laws that protect their air and water and the laws that ensure good stewardship of our parks, recreation areas and conserved lands. This nomination runs counter to what the American people want and expect of their government and their courts.

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."

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 served 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 cannot. I must oppose Mr. Myers' confirmation.

Statement of Senator Patrick Leahy
Ranking Member, Judiciary Committee
On the "Faster FOIA Act of 2005"
Executive Business Meeting
March 17, 2005

We are drawing near the end of Sunshine Week, the first time this commemoration of open government has been celebrated at the national level. Two days ago, the Committee held its first hearing on the Freedom of Information Act since 1992. I can think of no better way to wrap up Sunshine Week than to report a simple bipartisan bill to help improve the implementation of FOIA.

The "Faster FOIA Act of 2005," S.589, responds to commonly voiced concerns of FOIA requestors over agency delay in processing requests.

Some FOIA requests are processed within a few days, while others can take time for declassification, redaction, or release, as appropriate. There are, nonetheless, significant delays at many agencies. In Tuesday's hearing, I spoke about the oldest pending FOIA request of which we know. It dates back to the late 1980s, before the collapse of the Soviet Union.

As you know, Senator Cornyn and I have also introduced a bill, S.394, the Open Government Act, that would make a number of commonsense procedural modifications to FOIA. That is not the bill on today's agenda. We recognize that

many of you would like more time to study that bill, and so we have not yet asked for its inclusion on a markup agenda.

Today's bill is simple and straightforward. We propose to establish a commission to review agency delay in processing FOIA requests. The Commission would make recommendations for increasing agency efficiency. It would also examine whether the system for charging fees and granting waivers under FOIA should be modified.

The Commission would be made up of government and non-governmental representatives with a broad range of experience in both submitting and handling FOIA requests. They would bring experience in information science and the development of government information policy. This Commission structure is balanced and fair, and will bring extraordinary expertise to solving these nettlesome problems.

I hope that all members of the Committee will support the Faster FOIA Act today.

Opening Statement of Senator Patrick Leahy
Judiciary Executive Business Meeting
March 17, 2005

We continue to work to try to find a consensus on legislation fairly to compensate asbestos victims. Today we may be able to make progress on other bipartisan legislative matters. We have also involved Members on both sides of the aisle in reformulating our subcommittees and are able to announce and seek unanimous approval of those subcommittees, their chairs, ranking members and memberships.

I thank the Chairman for including the "Faster FOIA" bill that Senator Cornyn and I introduced recently to establish a commission to review agency delays in processing FOIA requests and also examine the fee system. We are coming to the conclusion of Sunshine Week. Two days ago the Committee held its first hearing on the Freedom of Information Act since 1992 and focused on the Cornyn-Leahy Open Government Act. It is appropriate that we act today and this week to improve FOIA implementation. As we continue to work together I look forward to our considering the Open Government Act and the RESTORE FOIA bill.

We have on the agenda Senator Feinstein's bill on unaccompanied alien children that has strong bipartisan support and has previously been reported by this Committee. I hope we will act on that matter today, as well.

We also have on the agenda a bill to authorize federal funding for the State Criminal Alien Assistance Program that the President has again zeroed out in his budget and an important bill that Senator Biden and the Chairman have worked on better to protect our seaports from terrorism and crime. I have been glad to work with them, as well, and thank them for their courtesies in connection with some of my concerns.

I hope that when we next meet we can promptly turn to consideration of the Mikulski-Gregg bill on H-2B visas, S.352. Last year the Congress did not act on this important matter and our constituents had to suffer the consequences. This has to be enacted without further delay for it to help this summer. I know that the Lake Champlain Chamber of Commerce, the Vermont Lodging & Restaurant Association and many small businesses in Vermont are vitally concerned and expect that similar associations and businesses in other States are, as well.

With respect to the judicial nominations on today's agenda, I thank the Chairman for listing Mr. Crotty and Mr. Seabright. As my statement made clear last week, there is no reason for not having favorably reported these consensus Republican nominees long ago. All Democrats on the Committee have been prepared to vote favorably on these nominations for some time. We were prepared to report them last year but they were not listed by the then-Chairman on a Committee agenda. Let there be no misunderstanding: As far as Senate Democrats are concerned these nominees can be reported favorably today and confirmed as soon as Senate Rules allow. They would be the first two judges confirmed this year and would join the ranks of 204 lifetime judicial appointments nominated by this President that the Senate has already confirmed.

I will have a separate statement in connection with the Myers nomination when we take that matter up for consideration. I have not seen Mr. Griffith's responses to written questions following his hearing either. The other nominations just had their hearing and just submitted answers to questions. They are being rushed and will be held over to be considered some time after the recess.

As Senator Reid has recently suggested, if the Bush Administration would work with us, we could reach consensus on nominees to fill the current judicial vacancies. There are currently 25 judicial vacancies without nominees, including six for circuit courts around the country. Of these more than two dozen vacancies without a nominee, the President has already missed his own self-imposed deadline on at least 10, because he has failed to nominate within 180 days of the vacancy.

In addition there are another eight to 12 vacancies we have been notified will soon be occurring. For example, before the end of this month, there will be another vacancy in Alabama and another in Florida, in May there will be another in Kentucky, in June there will be another in Georgia and another in Puerto Rico. Obviously, there are also more than a dozen vacancies on which we could be working together to find consensus rather than continuing to consider the divisive nominees renominated. I wish the Republican Administration and the Republican Leadership in the Senate would work with us to find consensus nominees, experienced, qualified, fair men and women who could garner virtually unanimous support.