

Statement of

The Honorable Dianne Feinstein

United States Senator
California
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Statement on the Nomination of Terrence Boyle
Judiciary Committee Executive Business Meeting
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Thank you Mr. Chairman. I appreciate your courtesy in holding the nomination over to this week. Given your flexibility, I will try to limit my remarks on the nomination of Judge Terrence Boyle.

Judge Boyle is a long-serving federal district court judge in North Carolina, and is in fact the Chief Judge of the Eastern District of North Carolina.

Looking at the decisions that Judge Boyle has rendered in the District Court, I cannot support elevating him to a lifetime appointment to the Fourth Circuit Court of Appeals. Judge Boyle's decisions and his frequent reversals by higher courts, including the court he is being nominated to, reveal that he is an activist judge whose strong "states' rights" views have made it difficult for many individuals to receive fair treatment when they seek to vindicate their civil rights in his courtroom.

In fact, many individuals never have their day in court because of Judge Boyle's tendency to dismiss civil rights cases before the facts are even presented.

Given Judge Boyle's willingness to substitute his personal beliefs for the law, I am concerned that Judge Boyle is particularly ill-suited to sit on the Fourth Circuit Court of Appeals.

The Fourth Circuit is the Court of last resort for most people whose cases come before it. And, the Fourth Circuit is home to a higher percentage of African-American and minority residents than any other Circuit Court. (Associated Press, "Despite Appointment Judge Still Not on 4th Circuit," September 21, 2000.) About 22% of Fourth Circuit residents are African-American. (Raleigh News & Observer, Boyle Unlikely to Get Easy Nod, May 10, 2001.)

People need to know that, regardless of their background, religion, race, or gender, when they enter a courtroom they will receive fair treatment and that the Judge will apply the law as it is written. Confirming a judge with Judge Boyle record on civil rights, particularly, in a Circuit where more of its citizens are likely to be disenfranchised by Judge Boyle's decisions, sends the wrong message.

Numerous organizations advocating minority rights and equal opportunity have called and written me to voice their strong opposition to Judge Boyle's nomination. The NAACP stated that "if Judge Boyle were confirmed his views would jeopardize the civil rights and liberties of African Americans and other racial and ethnic minorities." The Black Leadership Forum, a confederation of many of the nation's leading civil rights organizations, said that elevating Judge Boyle to the Fourth Circuit "would be a stinging insult to all Americans, and especially African Americans."

Looking at Judge Boyle's decisions, I appreciate these concerns.

I do not lightly conclude that Judge Boyle is a judicial activist hostile to the federal civil rights laws that protect Americans from discrimination. It is a conclusion reached after reading numerous decisions by Judge Boyle and reading numerous decisions reversing Judge Boyle that were written by appellate court judges on the Fourth Circuit and Supreme Court.

As a District Court Judge, Judge Boyle has had a strikingly high number of his decisions overturned by the Fourth Circuit - the Court to which he is now seeking confirmation. In fact, Judge Boyle's reversal rate is twice as high as any other District Court Judge nominated by President Bush to a Court of Appeals.

Many of these erroneous decisions are the direct result of Judge Boyle's tendency to decide the cases before him on the basis of his "States' Rights" philosophy - even when that philosophy directly conflicts with the law or the facts of the case. The "States' Rights" philosophy is the same legal theory that was for years used to prevent the federal government from stopping segregation. Today, Judge Boyle continues to use this theory to throw out lawsuits brought to remedy discrimination.

Standing alone, Judge Boyle's strong belief in "States' Rights" legal theory would be less of a concern. I have voted to confirm numerous judges whose political and legal views I disagree with. However, a judge must be able to set aside those views when they take the bench. A judge's job is to apply the law, not to make it. Unfortunately, as reflected by Judge Boyle's high reversal rate, Judge Boyle seems unable to avoid injecting his personal views into his legal decisions.

Civil Rights

For example, in *Ellis v. North Carolina*, Judge Boyle ignored binding Supreme Court precedent in order to dismiss a case brought by an African-American woman against her employer, the North Carolina Department of Health and Human Services, for discrimination under Title VII of the Civil Rights Act of 1964. Ignoring binding Supreme Court precedent that is directly on point, Judge Boyle applied his "states' rights" legal theory and decided that state employers enjoy sovereign immunity from equal employment opportunity lawsuits under Title VII.

Under Judge Boyle's reasoning, the Title VII federal anti-discrimination statute would not apply to any state employer, even if it were engaging in discrimination.

The Fourth Circuit reversed Judge Boyle in a brief decision that noted his failure to cite the Supreme Court's unambiguous precedent. The legal error was so clear that the Fourth Circuit did not even bother with the typical oral arguments of the parties.

Similarly, in *U.S. v. North Carolina*, Judge Boyle allowed his states' rights views to trump not only judicial precedent, but the agreement of the parties involved in the litigation. After the Department of Justice and the State of North Carolina reached an agreement to settle litigation involving allegations of gender discrimination in the hiring practices at a North Carolina state prison, Judge Boyle took the highly unusual step of rejecting the settlement.

Judge Boyle wrote that "Nothing is more offensive to the idea of federalism than the notion that the federal government will punish a state for having a non-conforming culture - for being different than the other states. . . It is most emphatically not the purpose of federal law to impose a uniformity of cultural outcome upon the individual states."

Incredibly, Boyle characterized possible discrimination as a part of a state's culture - and argued that the state therefore should not be subject to federal anti-discrimination laws. A panel of the Fourth Circuit Court of Appeals unanimously reversed Boyle, again criticizing him for not considering controlling precedent.

Following the law as set forth by higher courts is one of the most basic parts of a judge's job, yet Judge Boyle has repeatedly abandoned this responsibility when precedent conflicted with his States' Rights views.

Disability Discrimination and "States' Rights"

Just as Judge Boyle has ignored civil rights law because of his states' rights views, so has Judge Boyle ignored statutory language and precedent on the Americans with Disabilities Act ("ADA") in promoting his states' rights agenda.

In *Pierce v. King*, Judge Boyle aggressively applied his states' rights doctrine in dismissing a disabled inmate's legal claim for reasonable accommodations that would allow the inmate to participate in the prison work program that enabled inmates to reduce their sentences. Boyle ignored precedent and ruled that the federal government did not have jurisdiction to protect citizens from discriminatory acts by a state.

The Supreme Court reversed Judge Boyle, noting that an existing unanimous Supreme Court decision written by Justice Scalia, *Pennsylvania Dep't of Corrections v. Yeskey*, had already held that the ADA applied to state prisons.

At his Judiciary Committee hearing, in answering questions from Senator Kennedy, Judge Boyle attempted to justify this decision and others involving the ADA by saying that his decisions were consistent with the Supreme Court's 2004 decision in *Tennessee v. Lane*. Upon reading the transcript of the hearing, Professor Erwin Chemerinsky of Duke Law School wrote me to say that he "was very concerned that Judge Boyle's answers to Senator Kennedy's questions were simply wrong as to the law" and that his effort to distinguish *Lane* was "disingenuous." It is particularly disturbing that even after his decisions have been reversed by the Supreme Court he continues to defend them, rather than learning from his mistakes.

Law Enforcement Opposition

The diversity of opposition to Judge Boyle is notable. Not only are civil rights organizations against Judge Boyle, but he is strongly opposed by the law enforcement community. Numerous law enforcement organizations have urged that Judge Boyle not be confirmed for what they characterize as a record of incompetence, hostility toward police officers, and misleading answers to the Judiciary Committee.

John Midgette, Executive Director of the North Carolina Police Benevolence Association stated that "Judge Boyle represents a direct threat to the law enforcement profession and to our Constitutional and civil rights." He went on to say that the Police Benevolence Association had "never before taken a position in opposition to one of the President's judicial nominees. We are compelled to do so because of Judge Boyle's embarrassing record."

Similarly, the National Center for Women & Policing, which had never opposed a nominee to the federal judiciary found that "Judge Boyle's dismal record with respect to the constitutional rights of law enforcement officers, and in particular his rulings regarding gender discrimination claims in *United States v. North Carolina*, are so troubling that we urge the Senate Judiciary Committee to reject his nomination."

Conclusion

As a district court judge, Judge Boyle repeatedly placed his states' rights views above the law. This judicial activism has no place on a federal Court of Appeals, and particularly not on the Fourth Circuit. Accordingly, I will vote against Judge Boyle's nomination and urge the rest of the Committee to do the same.