Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Statement of Senator Patrick Leahy
Executive Business Meeting, Senate Judiciary Committee
on the Nomination of Terrence Boyle to the
U.S. Court of Appeals for the Fourth Circuit
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Just weeks after a bipartisan agreement was forged to avert an unnecessary showdown in the Senate, I thought it timely to briefly update the progress we have made recently on judicial nominations. Democratic Senators who signed the Memorandum of Understanding on Judicial Nominations that averted the nuclear option have fulfilled their commitments with respect to invoking cloture on several controversial nominees. Sadly, with Republicans voting almost party-line on every one of these nominees, they have been confirmed.

In addition, as the Democratic leader had offered months ago, the Senate considered and voted upon two 6th Circuit nominees and an additional D.C. Circuit nominee.

What has yet to take place is the kind of consultation Republican and Democratic Senators called for in the Memorandum of Understanding. They "encouraged the Executive branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration." They called for a "return to the early practices of our government" that reduced conflict and led to consensus. We have not yet experienced a flowering of any such consultation, but I remain hopeful.

Since the White House will not acknowledge the record, I thought it worth noting that 214 of this President's judicial nominations have already been confirmed by the Senate. That includes 41 circuit court nominees, an almost 80 percent confirmation rate. In contrast, by June 15, 1997 during President Clinton's Administration when Republicans controlled the Senate, only 175 nominees were confirmed. They included only 31 circuit court nominees, which amounted to 66 percent of President Clinton's circuit court nominees confirmed to that date.

With all the recent talk about every nominee being entitled to an up or down vote, it is striking that such a standard was clearly not imposed when Republicans pocket filibustered more than 60 of President Clinton's judicial nominees. As I demonstrated during the time I served as Chairman and certainly also during this period of Senator Specter's chairmanship, President Bush's nominees have been treated far more fairly than were President Clinton's nominees.

Today we consider the nomination of Terrence Boyle to the Fourth Circuit Court of Appeals. The history of filling vacancies on the Fourth Circuit has been a difficult one these last several years. This circuit, which includes the states of Maryland, Virginia, West Virginia, South Carolina and North Carolina, has been the subject of so much controversy. Numerous qualified nominees from North Carolina and even from Virginia were blocked by the former Senator from North Carolina. Republican Senators would not cooperate in elevating any of the outstanding African-American nominees to the Fourth Circuit throughout President Clinton's two terms. Our former colleague, Senator John Edwards, was mindful of that as he tried to work with this White House to fill the North Carolina vacancies on the Fourth Circuit, working hard to bring diverse and qualified nominees such as Judge Allyson Duncan to fill one of the many seats from North Carolina that Republicans had intentionally kept vacant.

Senator Edwards' cooperation on the Duncan nomination was just one part of the Democrats' work to help fill the Fourth Circuit's vacancies. President Clinton tried hard to do so, and was thwarted at every turn. Not only did he have trouble with nominees to the Fourth Circuit from North Carolina, he also was unsuccessful in getting Roger Gregory appointed to the court from Virginia, even though he was supported by his home-state Senators, one of whom was the very well-respected Republican Senator John Warner. Fortunately, with the help of Senator Warner and Senator George Allen, we were able to get Judge Gregory confirmed to a lifetime appointment to the Fourth Circuit, the first African American to serve on that circuit.

During my 17 months as Chairman, we were able to break through some more of logjam on the Fourth Circuit that Republicans had constructed. In addition to Judge Gregory, I proceeded with the controversial nomination of Judge Dennis Shedd from South Carolina. 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.

Democratic progress on Fourth Circuit nominees stand in stark contrast to the way the Republican Senate obstructed President Clinton's nominees to this court. Six of his Fourth Circuit nominees were blocked by Republicans. That is six nominees to a single circuit. 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 rely on partisan talking points seeking to revise 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.

That brings us to this difficult and controversial nomination. Over the last several weeks 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 number of letters from groups representing police officers, firefighters and law enforcement personnel, 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. Just recently, North Carolina Congressman Mel Watt, together with Keith Sutton, President and Chief Executive of the Triangle Urban League in Raleigh, led a group of local and national African American leaders opposed to this nomination.

As I examined Judge Boyle's record, heard him at his hearing and read his answers to our written questions, I came to see why so many of these people and organizations joined Senator Edwards in his opposition to this nomination. Today, I join them too. As I look at cases he has decided, opinions he has written, and the way he has conducted himself as a district court judge, I cannot vote to approve his promotion to an even more powerful position on the Fourth Circuit Court of Appeals.

Judge Boyle's testimony before this Committee, both in person and in writing did not help improve my impression of him or his suitability for a higher court. His answers, particularly those in writing, were evasive and coy. He missed every opportunity to give straightforward answers to serious questions about his numerous inflammatory statements about sex discrimination law and the ADA, and he brushed off my inquiry about his service as a founding board member of a corporation found to have violated FEC rules during the time he was there. I understand that Judge

Boyle may feel confident in his eventual confirmation - I don't know if he will or won't be confirmed - but I still believe the questions of a U.S. Senator charged with approving his life-tenured position are due more respect than mine were given.

I also believe we are entitled to see a more complete picture of his record on the U.S. District Court by seeing more of the thousands of his opinions that are not readily available in official reporters and electronic databases. By his own count, he has decided between 10,000 and 12,000 cases over his career, but we have only seen hundreds of the decisions from those cases. District Court judges choose which of their opinions and orders will eventually be published, so a judge's unpublished opinions can tell as much or more about him as his public record. Judge Boyle had already produced some of his unpublished opinions, those that underlie reversals by the appellate court, and he later gave us about 300 or so more. But, by his own calculation there are over 2,500 more that we won't be receiving because it is too inconvenient to try and retrieve them. We should not play games with this request. We deserve better than we have gotten so far, and I believe my friends on the other side of the aisle know it.

Judge Boyle's Reversals

The reason we feel it is important to review his record in detail is because of what perhaps may be the most distinctive aspect of Judge Boyle's record as a district court judge -- the sheer number of times his decisions have been reversed by the Fourth Circuit. I know that the way the Administrative Office of the Courts counts reversals makes Judge Boyle's record look more reasonable, but a look at the actual cases that make up those counts tells another story. It shows a judge who has been reversed nearly eight times a year. This is more than twice as often as the next most reversed district court judge President Bush has presented for elevation to the appellate court. It shows a judge who in an effort to explain his large number of reversals tried to revise history, and report many fewer reversals than he first told us about. It shows numerous reversals for getting the sentencing laws wrong, numbers of times he made mistakes in procedure, and other simple mistakes he should not have made.

In trying to explain his high number of reversals, I found it curious that Judge Boyle could not simply take responsibility for his many errors. First he tried to change the list of reversals he had originally given the Senate in 2001, by shaving off about 80 cases. Then, when asked why he did not consider those cases -- each of which cites a legal error serious enough to be sent back for redecision -- to be other than affirmances by the circuit court, Judge Boyle could not give me a straight answer. Finally, he added to his written answers the curious assertion that "the statement by the appellate court of the standard of review in an opinion is simply that, and is not, standing alone, a substantial criticism." I think he means to say that when an appellate court reverses him for an "abuse of discretion" that is only a standard of review, not their thoughts about his opinion. But he is mistaken. Appellate judges must take the standard of review seriously and literally - abuse of discretion means abuse of discretion. A reversal for plain error means just that - the judge has committed a plain error. Language has meaning, and these precise legal terms are especially meaningful. Judge Boyle cannot strip them of their content just by denying they have any.

Judge Boyle Has Difficulty With Settled Law

Looking at the substance of the cases we have been able to examine, if there is a hallmark to Judge Boyle's record on the district court, it would be the difficulty he has with settled law, whether as written by the legislature or interpreted by higher courts. It is not clear to me whether he has difficulty accepting settled law, finding it or articulating it, but whatever the source of the problem, his failures ought to disqualify him for a promotion to the Fourth Circuit. We see his difficulty with settled law in the cases where he was reversed more than once on the same point of law. We see it where he was reversed 9-0 by the Supreme Court and then 5-4 in the same case for not following the Court's direction. We see it dramatically in his statements and poor judgment on the Americans with Disabilities Act. We see it in his outrageous opinion in an employment discrimination case where he has such difficulty accepting both federal anti-discrimination law and his role as a district court judge, that he ignored 25 years of precedent on the 11th Amendment. That ruling was reversed by the Fourth Circuit. Finally, while there may be differences in how we count and categorize Judge Boyle's reversals, I think by any measure his difficulty with following settled law reflected in those reversals, their sheer number and frequency demonstrating a problem on their face.

Reversed More Than Once on Same Point of Law

I want to be clear that I am not saying judges cannot make mistakes. Each of us is human, and the law can be difficult to determine sometimes, but once a circuit court reverses a trial judge, that judge should consider him or herself corrected and should not commit the same legal error twice, let alone three or four times. Judges who cannot absorb the rulings of a controlling court are not doing their jobs properly. Judge Boyle is that sort of judge. In a couple of different contexts he has been reversed more than once on the same point of law.

In 1993, the Fourth Circuit decided a case called U.S. v. Peak, which addressed the problem of a criminal defendant receiving ineffective assistance of counsel, and concluded that if a defendant's attorney fails to file an appeal as requested by his client, the defendant is deprived of his constitutional rights no matter what the likelihood of the success of that appeal is. U.S. v. Peak was not a case in which Judge Boyle was involved, but three years later, in U.S. v. Alston; eight years later in U.S. v. Robards; and nine years later in U.S. v. Privott, Judge Boyle=s rulings were vacated based on his failure to follow this Fourth Circuit precedent. In Alston, the Fourth Circuit remanded to Boyle to determine whether a convicted defendant had asked his attorney to file an appeal, since Aa criminal defense attorney=s failure to file a notice of appeal when requested by his client deprives the defendant of his Sixth Amendment right to the assistance of counsel, notwithstanding that the lost appeal may not have had a reasonable probability of success.@ In Robards, Boyle again denied an ineffective assistance of counsel claim by a defendant whose lawyer failed to file a notice of appeal, finding that claimant had failed to show prejudice. The Fourth Circuit vacated the ruling based on Peak. Not long thereafter, in Privott, Boyle again denied an ineffective assistance of counsel claim by another defendant whose lawyer failed to file a notice of appeal. Once again, the Fourth Circuit reversed, based on Peak. Three times, three errors, one precedent, and no explanation from Judge Boyle about how he could have missed this simple point of law so often.

Cromartie - Being Reversed By a Conservative Supreme Court

The Cromartie cases are another example of Judge Boyle having difficulty with settled law. Judge Boyle was twice reversed by the Supreme Court of the United States - once by a vote of 9-0 with an opinion written by Clarence Thomas, and the second time 5-4 -- for not doing what the first opinion told him to do. Judge Boyle has tried to hide behind having been part of a three-judge panel in the original cases, and while that is true, he can't escape the fact that he wrote the opinions. He was the author of the decisions in favor of white voters= constitutional challenges to North Carolina=s 1997 redistricting plan.

U.S. v. North Carolina - Rejecting Settled Anti-Discrimination Statute

Judge Boyle's holding against women alleging employment discrimination by the North Carolina Department of Corrections is a prime example of his discomfort with so much settled law that comes before him. In this case, United States v. North Carolina, he writes one of the most sarcastic opinions as has been written by a federal judge, and contains "states' rights" language more fitting for a defiant governor in the 1960's South than a neutral arbiter of fact and law.

Like the Cromartie cases, this case represents another example where Judge Boyle's blatant disregard for applicable precedent, had it been left to stand, would have resulted in the frustration of years of effort to achieve redress for serious past discrimination. As it is, redress was delayed for many years. His sympathy for states' rights at the expense of the vindication of civil rights is exactly the reason Senator Edwards refused to consent to his elevation for so many years, and is evidence of his trouble accepting the state of the law as he finds it.

Ellis

One of the most blatant examples of Judge Boyle's failure to even find proper precedent is a case called Ellis v. North Carolina. Here, an African-American woman named Betty Ellis worked at a state-run hospital, and sued the hospital, the state, and the state health agency after being dismissed from her job, alleging racial discrimination. As Judge Boyle stated in his order dismissing the case, "the underlying claims [were] for discriminatory treatment pursuant to Title VII of the Civil Rights Acts of 1964 and other constitutional and state law causes of action." In other words, this was a case brought under the federal civil rights law passed by Congress that prohibits discrimination in employment decisions because of race.

In a short, baffling opinion, Judge Boyle dismissed Ms. Ellis' claims, saying that the state and its agencies were entitled to sovereign immunity under the 11th Amendment to the Constitution, that they could not be sued in federal court under a federal anti-discrimination statute. Well, it is true that unless the Congress specifically waives the immunity given the states by the 11th Amendment, states cannot be sued in federal court. But in 1972 Congress specifically amended Title VII in order to waive that immunity and make states and their agencies, including state hospitals and health departments, liable to suit in federal court. It is easy black-letter law that any law student in a civil rights class would learn, and certainly that any district court judge should know. But Judge Boyle didn't know it. He didn't find the law, he didn't write the law, he didn't follow the law. It is really a breathtaking order he has written. It is brief, to the point, and it could not be more wrong.

Also brief and to the point was the Fourth Circuit opinion reversing him. In three paragraphs, the panel, which included Judge Michael Luttig, a well-known conservative, vacated Boyle's order, citing the primary case on point, a then-26 year old U.S. Supreme Court case called Fitzpatrick v. Bitzer. This was not a hard case.

Americans with Disabilities Act

Another area of great concern to me is Judge Boyle's attitude toward the Americans with Disabilities Act, as passed by the Congress by a clear, bipartisan majority. This was a case where Judge Boyle did not get precedent wrong, but he when the Supreme Court was faced with the same issue, decided so differently that Boyle's decision was vacated. In Pierce v. King, Judge Boyle ruled that the ADA could not constitutionally apply to state prisons, and questioned its general constitutionality. He made no effort to analyze the text of the statute, instead moving directly to his opinion that Congress could not regulate prison labor. The language he used in the course of his opinion evinced a clear disrespect for the intent of Congress in passing this legislation that has done so much to improve the lives of people with disabilities, and makes his conclusion against the disabled plaintiff no surprise. Discussing the ADA, Boyle wrote that A[a]lthough framed in terms of addressing discrimination, the Act=s operative remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability.@

Judge Boyle contrasted the ADA unfavorably with Title VII and other civil rights laws, saying, Aunlike traditional anti-discrimination laws, the ADA demands entitlement in order to achieve its goals.@ In addition, he wrote that it was an open question whether employers forced to make accommodations under the ADA were thereby entitled to compensation under the Takings Clause.

When I asked Judge Boyle about these statements on the ADA in my written questions, he answered only in platitudes, telling me that the "ADA demands equality of access for those who are disabled, it is the law of the land, and I do my best in every case to apply it properly." He did not address his previous statements head on, he did not explain how we could believe he understood the law and would apply it, or how any plaintiff with an ADA case in front of him could feel assured he would rule fairly.

Free Speech Cases

There are more cases where Judge Boyle's opinions make me think he has difficulty with settled law, where he displayed hostility to the free speech rights of public employees. In the case of Piver v. Pender County Board of Education, he ruled against a high school teacher who was retaliated against for voicing his support for tenure for the principal at his school.

A few years later in Edwards v. City of Goldsboro, he made a similar ruling, finding that a police officer who suspended for teaching a class on firearm safety had not stated a claim for the infringement of his free speech rights because his speech was not on a matter of public concern.

A year later, in Godon v. North Carolina, Judge Boyle did it again. In that case, an employee of a state-run boot camp for young people sued the state, saying she was fired for complaining about discriminatory treatment of the female and black young people at the boot camp.

Again, three cases, three reversals, one point of law, no sufficient explanation. Perhaps this is why the National Association of Police Organizations, a group made up of hundreds of law enforcement associations around the country, is worried what these sorts of cases say about his concern for civil liberties and free speech.

Unanswered Questions About the Educational Support Foundation

Another issue which Judge Boyle tried mightily to avoid in the written questions and answers that followed his hearing was his involvement in the Educational Support Foundation, Inc. In every version of his Judiciary Committee questionnaire responses Judge Boyle listed a membership on the board of directors of an organization called the "Educational Foundation, Inc.," a sort of booster club for some of the athletic teams at the University of North Carolina. It turns out that was an error, and he was not on the board of that organization. Instead he was a founding board member of something called the "Educational Support Foundation, Inc.," a partisan political group whose activities, including during his time on its board, were the subject of a investigation by the Federal Election Commission and were found to violate federal election law. The main complaint was that a political marketing firm owned entirely by the Educational Support Foundation was making illegal campaign contributions to political candidates and political organizations. I asked Judge Boyle to tell us what he knew about the Educational Support Foundation, its founding, its ownership of Jefferson Marketing, his activities as a Board Member, its improper campaign activities and his involvement in any improper activities. His answer, that he was, "listed as a director," but, "had nothing to do with its founding or activities," is hard to swallow. The organization had a total of three directors. One of the others was his father-in-law, the third another strong political ally of Senator Jesse Helms. Did Judge Boyle just wake up one day and find himself "listed" as a director of this organization with no idea how he it happened or what the group did? He was not aware that it was the sole owner of one of the notorious Congressional Club's direct mail companies? He didn't know there was no particular education being supported by this foundation other than the education of conservative Republican donors? Has he no knowledge of the organization's troubles with the FEC? He doesn't say that, and it is hard to believe. Just as we deserve a more complete picture of Judge Boyle's record on the district court through his unpublished opinions, this Committee deserves a better answer to the outstanding questions about his involvement in the Educational Support Foundation.

Conclusion

From the slice of his record that we have been allowed to see, it appears that Terrence Boyle is not a very good District Court judge. He has difficulty with settled law, he is frequently reversed, and he is hostile to some of the most important pieces of legislation that Congress has ever passed. His testimony before this Committee was incomplete and less than respectful of the duty each of us has to ensure that those we confirm to lifetime appointments deserve them. The Constitution gives the Senate a responsibility in the process of filling the federal bench equal to that of the President, and therefore each Senator has the obligation to vote his or her conscience on each nominee as he or she comes to us. As I look today at Judge Boyle, I cannot in good conscience vote to recommend that he be confirmed to the Fourth Circuit.

Statement of Senator Patrick Leahy
Ranking Member, Judiciary Committee
On the "Christopher Kangas Fallen Firefighter Apprentice Act," S. 491
Executive Business Meeting
June 16, 2005

I am pleased that we will consider today the bipartisan Christopher Kangas Fallen Firefighter Apprentice Act, S. 491, which I am pleased to cosponsor with Chairman Specter and Senator Santorum. This bill will expand the definition of firefighter to include apprentices and trainees, regardless of age or duty limitations, for the purposes of receiving Public Safety Officer Benefits.

Each year, hundreds of our nation's public safety officers lose their lives and thousands more are injured while performing duties that subject them to great physical risks. The PSOB Program gives our public safety officers the peace of mind that if they become permanently disabled or give their lives in the line of duty, their families will be provided for. And while we know that these benefits can never be a substitute for the loss of a loved one, the families of all our fallen heroes deserve to collect these funds.

In 2001, Congress improved the PSOB Program by streamlining the process for families of public safety officers killed or injured in connection with prevention, investigation, rescue or recovery efforts related to a terrorist attack. We also retroactively increased the total benefits available by $100,000 as part of the USA PATRIOT Act. The PSOB Program currently provides approximately $275,000 in benefits to the families of law enforcement officers, firemen, emergency response squad members, and ambulance crew members who are killed in the line of duty.

Senator Specter has been a leading partner of mine in ensuring that the Justice Department implements the guidelines set forth by the Leahy-Graham Hometown Heroes Survivors Benefits Act, which became law in December 2003. That law expanded PSOB by allowing survivors of officers who suffer fatal heart attacks or strokes while participating in non-routine stressful or strenuous physical activities to qualify for Federal survivor benefits. Over a year-and-a-half has passed, however, since President Bush signed the legislation into law and the Justice Department has failed to release a proposed rule for public comment. The Justice Department has a responsibility to our nation's first responders and their families to ensure that the Hometown Heroes Survivors Benefit Act is implemented without further delay.

We are considering the Christopher Kangas Fallen Firefighter Apprentice Act today because DOJ has determined that apprentice and trainee firefighters who die or are injured in the line of duty are not eligible for PSOB. Apparently, apprentice and trainee firefighters do not act within a narrow range of duties at the time of their deaths that are the measured criteria to be considered "firefighters," and therefore, are not "public safety officers" for purposes of the PSOB Act. Basically, the Justice Department has decided that qualifying firefighters are those who play the starring role of operating a hose on a ladder or entering a burning building. Those who play the essential supporting roles of directing traffic, performing first aid, or dispatching fire vehicles, such as junior firefighters, do not contribute to the act of suppressing the fire.
I hope that we can consider and pass this bipartisan Specter-Santorum-Leahy bill to clarify that all firefighters will be recognized as such regardless of age, status as an apprentice or trainee, or duty restrictions imposed because of age or status as an apprentice or trainee.