

Testimony of
The Honorable

September 6, 2006

Statement of Senator Patrick Leahy

Ranking Member, Senate Judiciary Committee

Hearing on Judicial Nominations

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Today, with less than four weeks left in this legislative session, the Committee will hear from four candidates for lifetime appointments to the Nation's federal courts. They are: Kent A. Jordan, nominated for a vacancy on the U.S. Court of Appeals for the Third Circuit; and three district court nominee, Sara Elizabeth Lioi for the Northern District of Ohio; Marcia Morales Howard for the Middle District of Florida; and John A. Jarvey for the Southern District of Iowa.

I am concerned that these nominations, like so much of the Nation's pressing business over the last two years, could be derailed by the misguided priorities of the Bush-Cheney Administration and the Republican leadership. With so little time remaining in this Congress, I would have hoped that the Administration and the Republican leadership would be anxious to make up for lost time by trying, at last, to address the many urgent and unresolved needs of Americans. I hoped that we could joint together to change the course of failed policies from the Persian Gulf to the Gulf Coast that have left America less secure and set us back as a Nation. Regrettably, rather than learn lessons from these failures, it appears that they are intent on staying the course in all things. The President and his political advisors have stayed the disastrous course on judicial nominations by choosing to renominate five extremely controversial choices for lifetime positions on the Nation's highest courts. This Administration seems intent on heeding the siren call from the narrow, special interest groups on the right and picking fights. I urge the Senate Republican leadership not to take the bait and, instead, join with us in the waning days of this Congress to do the work of the American people.

Re-Nominations of Controversial Nominees

The five nominations the President has sent back to the Senate represent a troubling group. The President re-nominated Judge Terrence Boyle to the Fourth Circuit despite the fact that as a sitting United States District Judge and while a Circuit Court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. The President should have heeded the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and Paramedics of North Carolina, as well as the advice of our former colleague, Senator John Edwards, to withdraw this ill-advised nomination and not renominated him. Law enforcement officers from North Carolina and across the country oppose the nomination. Civil rights groups oppose the nomination. Those knowledgeable and respectful of judicial ethics oppose this nomination. This nomination had been pending on the floor calendar in the Republican-controlled Senate since June of last year when it was forced out of the Committee on a party-line vote. The Senate did the President a favor by returning this nomination to the White House before the summer recess. The President should not have re-nominated Judge Boyle.

The President also re-nominated William Gerry Myers III to the Ninth Circuit. This is another Administration insider and lobbyist whose record has raised serious questions about his ability to be a fair and impartial judge. I opposed this nomination when it was considered by the Judiciary Committee in March 2005. This was a nomination that the so-called "Gang of 14" expressly listed as someone for whom they made no commitment to vote for cloture, and with good reason.

Mr. Myers' anti-environmental record is reason enough to oppose his confirmation. His lack of independence is another. If anyone sought to proceed to this nomination, there would be a need to explore any connections to the lobbying scandals associated with the Interior Department and Republican lobbyist Jack Abramoff.

It is particular troubling to see Mr. Myers re-nominated because the President missed an opportunity to be a uniter. I had suggested that he re-nominate Norman Randy Smith for the vacancy created by the retirement of Judge Thomas G. Nelson from Idaho. Instead, the President has again nominated Judge Smith to a California seat on the Ninth Circuit, effectively stealing California's seat. That is wrong. I support Senators Feinstein and Boxer in their opposition to this tactic. I again urge President Bush to resolve this impasse and turn Idaho's vacancy into a judge by withdrawing the controversial Myers nomination and nominating Judge Smith for the Idaho vacancy to which he could be easily confirmed.

It is distressing that the President chose to re-nominate William James Haynes II to the Fourth Circuit despite bipartisan concern about this nomination. As General Counsel at the Defense Department, Mr. Haynes has been deeply involved in seeking to excuse this Administration's now discredited policies on the treatment of enemy combatants, the interrogation and torture of detainees, and the creation of military commissions. In two hearings, Mr. Haynes has refused to

answer questions from Senators about these policies, despite disturbing developments that have come to light that relate to those policies, including the Abu Ghraib scandal and scores of other incidents of detainee abuse in Afghanistan, Iraq, and Guantanamo Bay. In addition, new press reports, declassified memoranda and letters from former high-ranking military officials have detailed Mr. Haynes's disregard for legal concerns raised by senior military and civilian lawyers within the Armed Services about these policies and his efforts to subvert their advice. It seems that Mr. Haynes ignored the policy concerns raised by military officers about the effect of his policies on the safety of American troops and American credibility around the world.

I have found inconsistencies between Mr. Haynes' testimony and that of the uniformed JAGs relating to their involvement in the development of detainee interrogation policies to be particularly troubling. Although Mr. Haynes sought at his hearing in July to allay some of these concerns regarding his disregard of the advice of uniformed JAGs, his statements were contradicted by several JAGs who testified before the Senate Armed Services Committee. Subsequently,

Mr. Haynes sought to reconcile his testimony with that of the JAGs in a letter to the Committee. Unfortunately, even this letter turned out to be inaccurate, as set forth in a subsequent letter from Daniel Dell'Orto, Mr. Haynes' deputy at the Defense Department. The President had an opportunity to move beyond this controversy by sending the Senate a more qualified, consensus nominee. Unfortunately, he squandered that opportunity with this re-nomination.

Finally, the President has re-nominated Michael Wallace to a vacancy on the Fifth Circuit even though he received the first ABA rating of unanimously "not qualified" that I have seen for a circuit court nominee in 25 years. The hearing on his nomination scheduled for July 19 was cancelled, though not before the Committee received written testimony from the ABA regarding his rating. This testimony, which was confidential until leaked to a conservative website, details the significant concerns raised by numerous jurists around the country regarding Mr. Wallace's judicial temperament, lack of commitment to equal justice for the poor and minorities, lack of tolerance, and open-mindedness. It details concerns from judges and lawyers that Mr. Wallace "may not follow the law" and is driven by his "personal agenda." Of course, the troubling issues raised in the ABA's testimony echo significant concerns about Mr. Wallace's record on civil rights, his opposition to the Voting Rights Act, his support for tax exemptions for Bob Jones University, his opposition to prison safety regulations, and his attempt as President Reagan's director of the board of the Legal Services Corporation to undermine efforts to provide legal services to low-income clients.

Continuation of Misguided Priorities

I wish that this were the first time this Administration and this Republican-led Congress had diverted resources and attention from America's needs. Unfortunately, President Bush's re-nomination of these controversial nominees is a continuation of a pattern of misguided priorities that has plagued the Administration and the Senate's Republican leadership since the beginning of this Congress. Instead of urging his party to take early and decisive action to pass comprehensive immigration reform, as he signaled he would in February 2001, the President began his second term campaigning to undercut the protections of our Social Security system. As a result, at the start of this Congress in 2005, the Administration's top priority was not increasing national security or the economic security of working Americans who are sharing in a smaller piece of the country's wealth than they have in decades. Had the Administration been successful at privatizing Social Security, it would have gutted the program that ensures for all Americans that growing old does not mean growing poor. Thankfully, Americans rejected this effort.

Like the Administration, the Senate's Republican leadership turned away last spring and summer from addressing the priorities of most Americans. They focused instead on the fierce legal battle over the medical treatment of Terri Schiavo, who was in a persistent vegetative state for more than a decade. Politicians engaged in extraordinary measures to override what state courts determined to be her personal wishes. The power of the Federal Government was wielded by some to determine deeply personal choices. The Republican leader even made a medical diagnosis on the floor of the Senate, and the President cut short one of his vacations to back to Washington to sign legislation to override the precise wishes of this one patient. The American people recoiled from this misuse of the Government's time and authority.

The President's re-nomination of divisive nominees is a repeat of last Congress and last year, when the Administration and the rubberstamp Republican Senate created a massive confrontation over controversial nominees. The Senate narrowly averted the so-called "nuclear option," a bid to achieve one-party rule by thwarting the Senate rules. They were willing to destroy a fundamental check and balance in order to be a more efficient rubberstamp for this President. Thankfully, this attempt failed, but not before the Senate expended much energy and lost precious time.

This summer the Republican leadership determined, despite the many pressing issues facing the country and affecting Americans, to turn away from the legislative agenda to focus on two constitutional amendments that would result in restricting the rights of the American people. Although not among our Nation's most pressing priorities, the constitutional amendments were considered and rejected. The marriage amendment and the flag amendment would have artificially created division among the American people.

With more Americans in poverty and extreme poverty and more children without health care, we must do better. With rising interest rates, rising mortgage rates, rising health care costs, rising

insurance costs, we must do better for America's working families. While corporate profits are taking a greater and greater share of our GNP, wages are stagnant and those in charge refuse to allow a long overdue raise to the minimum wage. We have just come through a summer of record high gas prices, and for many families, the threat of record high home heating prices this winter looms around the corner.

The full agenda before us as we enter the final weeks of this legislative session reflects how little the Republican leadership has accomplished, even with control of the White House and both Houses of Congress. A steady course of misguided priorities have cost Americans progress on real issues that matter most. And these failures to focus on our real priorities have left America less secure.

The Republican-controlled Congress has yet to enact a federal budget. We are in violation of the statutory deadline of April 15. We have passed but one appropriations bill, and we are required by law to pass 13. We have yet to reconcile and enact lobbying reform and ethics legislation. We have yet to deal with the skyrocketing cost of gasoline and health care. We have yet to reconcile and enact a bipartisan and comprehensive immigration reform bill. And for the second year in a row the Republican-led Senate will not even take up the annual intelligence authorization bill.

As we commemorated the one-year anniversary of Hurricane Katrina last week, we were reminded that the situation in the Gulf Coast remains a tragedy with serious human consequences. We need to commit ourselves and our resources to helping our fellow citizens who are still in need after the appalling lack of responsiveness by this Administration. We need to provide the assistance to that region of our country where rubble remains a fixture of the landscape one year later. Many residents still do not have homes to return to or jobs waiting for them when they get there.

Americans would be better served if we used our remaining time in this Congress to address these vital issues than to focus on political fights over a handful of divisive and failed nominations.

I look forward to hearing from the four nominees before the Committee today and I hope that I will be convinced that they are the kind of nominees who understand that the role of the judge is to act as a check and balance to protect the rights and liberties of all Americans. I welcome the nominees and their friends and families to the Committee today.