

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
February 5, 2004

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Opening Statement
Nomination of William Myers to the Ninth Circuit Court of Appeals
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After the attacks of September 11 and the anthrax letters in October 2001, this Committee continued to work. I recall the nomination and oversight hearings we held. One of our Mississippi nominees had to drive to his hearing because in the aftermath of the terrorist attacks, air traffic had not been restored. When the Senate office buildings were closed by the anthrax letters sent to Senator Daschle and to me, we met in the Capitol itself. This week the Senate is, again, taking security precautions by closing Senate buildings and this Committee is, nonetheless, endeavoring to proceed. I commend the Members of the Committee for their cooperation.

We are here today to consider the nomination of William Myers to the Ninth Circuit Court of Appeals. I look forward to hearing his testimony today. As we consider this nominee's qualifications and record, I hope everyone recognizes what is at stake for the country and why the Senate's advice and consent role is so critical.

It is important to recognize that the Senate has already confirmed 171 of President Bush's judicial nominees. One hundred were confirmed in the 17 months of a Democratic Senate majority and the other 71 during the other 20 months. The Senate Judiciary Committee has considered this President's judicial nominees in record numbers and in sharp contrast to the way President Clinton's nominees were delayed and defeated through inaction and anonymous holds. Every judge on the federal bench will have an enormous impact on the lives of individuals, on communities and possibly on the Nation. That is why it is so important that each nominee's record be considered fully and carefully before they are given a lifetime appointment on the federal bench.

William Myers has been nominated to a circuit court with an expansive reach. The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. In addition to the tens of millions of people within those States, the jurisdiction of that circuit extends over an area of the country which contains hundreds of millions of acres of public lands. This court plays an enormous role in interpreting and applying a broad range of environmental rules and protections. Those environmental protections are important to me and to millions of Americans, as well as to future generations. They have come under increasing attack

during the Bush Administration. We will want to know how Mr. Myers' nomination fits into the pattern of actions by this President to roll back and erode our environmental laws.

What is at stake today is the longstanding acceptance of the Constitution's Commerce Clause as the source of Congress' authority to enact safeguards to protect our air, water, and land. What are at stake are environmental protections which can be struck down if taxpayers do not pay polluters according to the extreme expansion of the takings clause that some judges have begun to adopt. We will want to know what Mr. Myers' understanding of the takings clause is and whether he intends to force taxpayers to pay whenever a regulation affects land use in some way. What standards will he use to decide these matters?

What is at stake is the true meaning of the Constitution's Eleventh Amendment. We will want to know whether he endorses an interpretation of the Constitution that prevents citizens from suing their own States for environmental violations. And, what is at stake is 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.

A judge has a duty to enforce the protections imposed by environmental laws and the Senate has a duty to make sure that we do not put judges on the bench whose activism and personal ideology will prevent fair and impartial adjudication and the protection of the environment that we intended and that the American people and generations to come deserve.

This President has sent the Senate an unusually large number of judicial nominees who seem to be ends-oriented in their approach to the law. After we examined the nominations, some appeared too extreme and to have been nominated for the purpose of packing the courts to achieve ideological ends in their reading, interpretation and application of our laws. We are now seeing nominees who are being awarded lifetime appointments to the federal courts as part of a spoils system for those who are well connected and have served the political aims of this particular Administration. So many of President Clinton's judicial nominees upon whom this Committee took no action seemed to have been penalized for their government service or for having supported the President. Elena Kagan, James Lyons, Kent Markus and so many others never received hearings and their nominations were defeated through Republican inaction, without explanation.

I am sad to report that many of our concerns about President Bush's nominees have already been borne out in the short time those judges have been on the bench. They have shown themselves to be judicial activists and ends-oriented, as some of us had feared. A number of appellate judges appointed by this Administration have issued troubling opinions on civil rights, constitutional liberties, and environmental protections. For example, a Bush-appointed Judge dissented from the Ninth Circuit's decision to enjoin logging while a lawsuit by environmental groups challenging the implementation of a U.S. Forest Service restoration project involving timber sales in the Sierra Nevada Mountains was pending. Had one other judge on the panel joined the dissent by the Bush-appointed judge, the Ninth Circuit would have made it impossible for plaintiffs in lawsuits to preserve the status quo and prevent irreparable harm while their claims are being decided. Another example is a district court appointee of this President to the District

of Utah who, in only his first year on the bench, issued three major opinions denying NEPA claims on public lands and national forest issues.

A review of Mr. Myers' record -- in private practice and in the Bush Administration -- raises some initial concerns that he will be an anti-environmental activist on the bench. We need to explore with him his actions and duties at the Interior Department. As we fulfill our duty as members of this Committee to maintain an independent judiciary, I have questions about what appears to be Mr. Myers' consistent record of using whatever position he has had to fight for corporate interests at the expense of the environment and environmental protections. Mr. Myers' hometown newspaper opined that as solicitor at the Department of Interior: "Myers sounds less like an attorney, and more like an apologist for his old friends in the cattle industry." These are matters we need to explore.

Concerns about Mr. Myers' record have also been expressed in letters of opposition by more than 90 groups who are advocates for civil rights, disability rights, senior citizens, women's rights, human rights, Native Americans, and the environment. And, taking an unprecedented step of issuing a resolution opposing a judicial nominee, the National Congress of American Indians, which represents more than 250 tribal governments, has come out in opposition to this nominee. I will submit the resolution and the letter for the record as well as other statements in opposition when we are allowed to return to our offices, receive mail, and have access to them.

Mr. Myers' lack of court experience is also a concern. He has never tried a jury case nor served as counsel in any criminal litigation as far as I know. The American Bar Association gave him its lowest passing grade. This is also a factor the Senate will want to consider and that we need to explore.

I do not mean to indicate that Mr. Myers does not have friends and supporters. A number of his clients and political friends and fellow lawyers say nice things about him. We look forward to the opportunity to hear from Mr. Myers and to give him the opportunity to respond to concerns that have been raised.

We are operating under unusual circumstances at this hearing. I do not believe we ever held a Senate confirmation hearing in the House Judiciary hearing room before. We, of course, thank Chairman Sensenbrenner, Mr. Conyers and all the Members of the House Judiciary Committee for their hospitality. More important is the fact that we have not been able to prepare for this hearing as we would have liked. For the last several days, we have not had access to our files and computers. Senators have had to abandon their offices and staff has had no place to work. Some Senators, who had planned to attend the hearing as initially noticed and in the regular course of proceeding, have not been able to participate at this different time and place. For our part, we will continue to operate in good faith and see how much progress can be achieved under these unusual conditions today.

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