

Testimony of
The Honorable

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Statement of Senator Patrick Leahy

Ranking Member, Senate Judiciary Committee

Hearing on Judicial Nominations

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Today, for the third straight week since the Senate returned from August recess, the Committee will hear from four candidates for lifetime appointments to the Nation's federal courts. With the work of Senators Levin and Stabenow, we are expediting consideration of three nominees for the Western District of Michigan, Paul Lewis Maloney, Robert James Jonker, and Janet Theresa Neff. Had the President tried sooner than July to provide nominations for many of these vacancies still outstanding, we could have been more productive this year. From the beginning I have urged the President to work with us on consensus nominations and I have worked hard to proceed. I do so now, even at this late date in the session, and in spite of the pocket filibusters employed by Republicans to stall more than 60 of President Clinton's qualified judicial nominees.

I worry that, like so much of the Nation's pressing business over the last two years, they 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.

Instead, today we will spend hours on the Senate floor debating the nomination of Alice S. Fisher for a position at the Department of Justice for which there remain significant outstanding questions and be forced to debate controversial nominees in Committee.

I had hoped that we could join together to change course from the failed policies that have stretched from the Persian Gulf to the Gulf Coast and left America less secure and set us back as

a Nation. Regrettably, rather than learn lessons from these failures, it appears that the President and his political allies in the Senate are intent on staying the course.

As I have noted the last few weeks, the Administration has also chosen to stay the disastrous course on judicial nominations by choosing to renominate five extremely controversial choices for lifetime positions on the Nation's highest courts. These five nominations represent a troubling group. This Administration seems intent on heeding the marching orders of the narrow, special interest groups on the right and picking fights. While I have urged the Senate Republican leadership to join with us in the waning days of this Congress to do the work of the American people, it appears these last weeks they will take the Administration's bait and waste valuable time and resources on these troubling nominations.

Squandered Opportunities

An editorial in last Wednesday's Richmond Times-Dispatch entitled, "No Vacancies," highlights the Administration's bankrupt approach to judicial nominations, such as that of William James Haynes II to the Fourth Circuit. The editorial criticizes the Administration for its failure to turn vacancies into judges by pursuing political fights. According to the Richmond Times-Dispatch:

"The president erred by renominating Haynes, and may be squandering his opportunity to fill numerous other vacancies with judges of right reason.

This marks the third time Bush has nominated Haynes, and likely will present Senate detractors a third opportunity to deny him a seat on the bench. Much of the opposition focuses on opinions Haynes issued in his current position as general counsel to the Department of Defense. Critics say the policies Haynes helped develop led to torture, such as the abuse of prisoners at Abu Ghraib prison.

As elections draw near (and as the 2008 presidential campaign approaches) the window to confirm Bush judges begins to close. At this point in his tenure it is vital that Bush forward the

names of good nominees who can win the consent of the Senate. By now it is obvious Haynes is not of that stock.

Indeed the administration has been derelict in sending a full slate of nominees to the Senate. Of the 14 vacancies on the federal courts of appeals, only eight have candidates up for Senate consideration -- the list includes Haynes and another 4th Circuit nominee with little hope of confirmation. On the district court level, the president and Republican senators who work cooperatively to fill these openings -- have an equally abysmal record. They have forwarded only 19 names for 32 vacancies."

Indeed, the Bush Administration has continued to push Mr. Haynes' nomination despite bipartisan concern about Mr. Haynes' role in developing and 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' 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.

The Richmond Times-Dispatch editorial could just as easily have been written about Judge Terrence Boyle, whom the President also re-nominated to a seat on the Fourth Circuit. He did so 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 re-nominate 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 squandered an opportunity to fill Idaho's vacancy on the Ninth Circuit by re-nominating William Gerry Myers III for that seat. 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' record as Solicitor General for the Department of the Interior suggests that he was part of a culture of corruption documented last week in the testimony of the Interior Department's Inspector General, Earl E. Devaney, at a hearing of the House Government Reform Subcommittee on Energy. Mr. Devaney testified about a "culture of managerial irresponsibility and lack of accountability" at the upper levels of the Interior Department in which, "[s]imply stated, short of a crime, anything goes at the highest levels of the Department of the Interior." He also testified, "I have observed one instance after another when the good work of my office has been disregarded by the department. ... Ethics failures on the part of senior department officials--taking the form of appearances of impropriety, favoritism and bias--have been routinely dismissed with a promise 'not to do it again.'"

While Mr. Myers' anti-environmental record is reason enough to oppose his confirmation, his connection to the "culture of managerial responsibility and lack of accountability" raise further concerns. In particular, questions remain about his role in authorizing a lawyer who worked for him, Bob Comer, to arrange a sweetheart settlement agreement for a politically well-connected rancher, Frank Robbins. Mr. Comer was found in an investigation by the Department of Interior's Inspector General to have been responsible for arranging the deal. Documents have come to light recently showing that Mr. Myers had been given materials about the deal, undermining his assertions that he was merely misled by Mr. Comer. If anyone sought to proceed to this nomination, we would need to know more about these new documents and we would need to

explore any connections to the lobbying scandals associated with the Interior Department and Republican lobbyist Jack Abramoff.

It is particularly troubling to see Mr. Myers re-nominated because the President squandered yet another opportunity to fill a vacancy. 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.

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.

This is not the first time this Administration and this Republican-led Congress has diverted resources and attention from America's needs. A steady course of misguided priorities including weeks spent on constitutional amendments to restrict Americans' rights and the misuse of Congress's time and authority to interfere in a court battle over the medical treatment of Terri Schiavo has cost Americans progress on real issues that matter most.

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.

As we commemorated the first anniversary of Hurricane Katrina last month, 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.

As we commemorate the fifth anniversary of the deadliest foreign terrorist attack on American soil last week, we should refocus our efforts and our resources there they belong; on the real terrorists and providing real security. More than five years after 9/11, Osama bin Laden remains at large, taunting us and threatening us-- this despite the bipartisan efforts by the Senate to authorize the President to use the most powerful military force in the world to bring him to justice. Had the President not diverted our forces from Afghanistan to Iraq, we would be much more successful in the war on terrorism.

Americans would be better served if we used our remaining time in this Congress to address these vital issues than to focus on 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.