



June 8, 2005

Hon. Arlen Specter, Chairman
Senate Judiciary Committee
711 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Hon. Patrick Leahy, Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Specter and Senator Leahy:

I am writing on behalf of People For the American Way and our more than 600,000 members and activists to express our continued opposition to the confirmation of North Carolina District Court judge Terrence Boyle to the United States Court of Appeals for the Fourth Circuit. We understand that a Committee vote on his nomination is scheduled for Thursday of this week. Our careful review of Judge Boyle's available record reveals, however, that he should not be promoted to the appellate bench, because of his dismal record in civil rights and liberties cases, his unusually high number of troubling reversals, and the fact that the failure to carry out his pledge to release his unpublished opinions has left the Committee unable to even fully examine his record. At the very least, the failure to produce so many thousands of his unpublished opinions should preclude a vote at this time sending his nomination to the Senate floor.

One of the most troubling aspects of Judge Boyle's record is his extreme disregard for the civil rights and civil liberties of racial minorities, women, the disabled, and many other Americans. In fact, Boyle's disregard of the First Amendment rights of off-duty police officers and other public employees has earned him the opposition of eight different national and other law enforcement and emergency services organizations, including several from his home state.

One example of Boyle using his position on the bench to issue civil rights opinions damaging to ordinary Americans can be found in his treatment of redistricting cases. In *Cromartie v. Hunt*,¹ Boyle was twice reversed by the Supreme Court, once in a unanimous opinion authored by Justice Clarence Thomas, after siding with white plaintiff voters who claimed that their congressional district had been drawn with the unconstitutional goal of

¹ *Cromartie I*, 34 F.Supp. 2d 1029 (E.D.N.C. 1998), *rev'd* 526 U.S. 541 (1999). *Cromartie II*, 133 F.Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom Easley v. Cromartie*, 532 U.S. 234 (2001).

creating a black-majority district. In another case, Judge Boyle, for unknown reasons, issued an opinion in favor of white plaintiff voters in a case that had been assigned to another judge – the reasoning of which was later rejected by both his colleague and the Fourth Circuit – before the case could even be heard by the judge to whom it was assigned.²

Boyle also has a long and troubling record of rejecting claims of sex and race discrimination. In the case of *United States v. North Carolina*,³ he refused even to approve a settlement agreement reached after the United States charged North Carolina with discriminating against women employed or seeking employment as correctional officers in men’s prisons – a refusal the appellate court ultimately found to constitute an abuse of discretion. And in *Ellis v. North Carolina*,⁴ Boyle inexplicably dismissed a plaintiff’s claims of discrimination under the 1964 Civil Rights Act, holding that the Eleventh Amendment made North Carolina immune from the suit. The Fourth Circuit reversed in a brief *per curiam* opinion that cited several Supreme Court precedents to illustrate the basic principle that in enacting Title VII, Congress properly abrogated the states’ Eleventh Amendment immunity.⁵

Boyle has also frequently demonstrated hostility toward the Americans with Disabilities Act, and has taken several opportunities to find that Congress exceeded its powers in making the ADA applicable to states, contrary to Supreme Court precedent. For example, in both *Pierce v. King*⁶ and *Brown v. North Carolina Division of Motor Vehicles*,⁷ Boyle argued that because the ADA seeks what he called “special treatment” for people with disabilities, rather than mere “equal treatment,” the Fourteenth Amendment provides no authority to Congress for abrogating states’ sovereign immunity. In another disability case, Boyle was sharply criticized by the appellate court for holding that working was not a “major life activity.”⁸ Again and again, Boyle has issued decisions that diminish the rights and liberties of ordinary Americans and seek to limit the federal government’s ability to protect the same.

Another disturbing and unusual aspect of Judge Boyle’s record is his high rate of reversal as a district court judge. Despite attempts to mitigate his reversal record, none of the excuses offered by Boyle or his defenders has responded to the fact that he has been reversed far more than any other federal district court judge President Bush has nominated to the

² Cannon v. North Carolina State Board of Education, 917 F.Supp. 387 (E.D.N.C. 1996).

³ 914 F.Supp. 1257 (E.D.N.C. 1996), *rev’d* 180 F.3d 574 (4th Cir. 1999).

⁴ Order No. 5:01-CV-699-BO(2), *rev’d* 2002 U.S. App. LEXIS 23717 (4th Cir. 2002).

⁵ At his hearing before the Senate Judiciary Committee, Boyle claimed that the Fourth Circuit misconstrued his opinion, although he has been unable to produce any specific evidence that this is the case. For further discussion of this issue, see the People for the American Way’s April 20, 2005 report “Committee Hearing Reinforces Case that Terrence Boyle is Unfit for Promotion to the Fourth Circuit Court of Appeals,” available at http://www.pfaw.org/pfaw/dfiles/file_525.pdf

⁶ 918 F.Supp. 932 (E.D.N.C.), *aff’d*, 131 F.3d 136 (4th Cir. 1997), *rev’d* 525 U.S. 802 (1998).

⁷ 987 F.Supp. 451 (E.D.N.C.), *aff’d* 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001).

⁸ Williams v. Avent, 910 F.Supp. 1124 (E.D.N.C. 1995), *aff’d*, by *Williams v. Channel Master Satellite Sys.*, 101 F.3d 346 (4th Cir. 1996).

appellate bench.⁹ As was noted during his hearing, the questionnaire Boyle submitted after his 2005 nomination claimed a mere 68 decisions that were reversed or significantly criticized¹⁰ – far fewer than the 139 he claimed in his 2003 questionnaire.¹¹ Boyle attempted to explain the discrepancy by claiming that, upon re-reading the Senate Judiciary Questionnaire in 2005, he concluded that he had been too generous in his previous answer since, he claims, the question did not require him to list cases that did not contain “significant criticism,”¹² of his opinion, “significant comment on law or procedure,”¹³ or did not have “precedential effect.”¹⁴

In addition to the fact that there is absolutely no basis for Boyle’s clearly erroneous interpretation of the plain language of the Senate Judiciary Committee questionnaire, his attempts to explain why he left out the cases he did is extremely troubling. For example, Boyle left out a number of cases in which the Fourth Circuit found he had committed an “abuse of discretion” or a “plain error” of law, claiming that because these phrases refer to legal standards of review, they do not constitute significant criticism of his opinion.¹⁵ While it is true these are standards of review, Boyle’s claim inexplicably ignores the clear fact that the appellate court found in each of these cases that he violated those legal standards, which obviously constitutes significant criticism of his opinions. The result is to make even more disturbing his extraordinary record of reversals, suggesting an unwillingness to acknowledge past errors and an attempt to minimize his troubling record before the Committee.

Finally, it is deeply troubling that Judge Boyle’s pledge to produce his numerous unpublished opinions to the Committee has not been carried out. According to Boyle’s own estimates, he has written between 11,000 and 12,000 opinions in his more than twenty years on the federal bench. Yet, only approximately 400 – or less than 4% -- of these opinions have been published. Despite repeated requests by Committee members, and his agreement to cooperate at his hearing, only a few hundred of Boyle’s unpublished opinions have been released, leaving at least 10,000 of his cases unavailable for review. This is even more egregious in light of the fact that, when asked to name the ten most important cases he had decided during his career, two of the opinions listed were unpublished, making it clear, by Boyle’s own admission, that many of his unpublished opinions contained highly significant rulings.¹⁶ Unpublished opinions by other nominees considered by the Committee have been made available for review, and Boyle’s troubling record makes the failure to do so here all the more disturbing. The refusal to release Boyle’s unpublished opinions leaves his record before the Committee woefully incomplete, and he should be required to complete the record

⁹ For further discussion of the discrepancies in Boyle’s claimed number of reversals, see People For the American Way’s February 23, 2005 report “Federal Judge Terrence Boyle Unfit for Promotion to Appeals Court,” available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=17979>

¹⁰ Boyle’s Judiciary Committee Questionnaire, 109th Congress.

¹¹ Boyle’s Judiciary Committee Questionnaire, 108th Congress. People For the American Way has calculated that Boyle’s total number of reversals as of February 18, 2005 is actually at least 157. For further discussion, see People For the American Way’s February 23, 2005 report “Federal Judge Terrence Boyle Unfit for Promotion to Appeals Court,” available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=17979>

¹² Answers to Written Questions of Senator Feingold, at 12.

¹³ Answers to the Written Questions of Senator Leahy, at 1.

¹⁴ Answers to the Written Questions of Senator Leahy, at 9.

¹⁵ Answers to the Written Questions of Senator Feingold, at 12.

¹⁶ Boyle’s Judiciary Committee Questionnaire, 109th Congress.

by producing all of his unpublished opinions before the Committee votes on his fitness to serve on the federal appellate bench. Based on the current record, however, Judge Boyle should not be elevated to the Fourth Circuit bench.

Sincerely,



Ralph G. Neas
President

Cc: all Committee members