

Coalition for a Fair and Independent Judiciary

February 23, 2005

The Honorable Arlen Specter
Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

On behalf of the undersigned civil rights, human rights, women's rights, and labor organizations, we write to express our deep concern about the level of review about to be undertaken by the Senate Judiciary Committee regarding the nomination of Terrence Boyle to the Court of Appeals for the Fourth Circuit.

Judge Boyle's hearing before the Senate Judiciary Committee is scheduled to take place in less than one week. However, Judge Boyle has a vast number of unpublished opinions from his time as a district court judge that have not been produced to the Judiciary Committee. We are gravely concerned that, without the benefit of a review of all of the opinions reflecting Judge Boyle's decision-making, the Senate's ability to fully discharge its Constitutional obligation of "advice and consent" on this nomination will be severely curtailed. We urge the Committee to postpone its proceedings on the nomination until these unpublished opinions have been obtained and reviewed.

On the publicly available record, Judge Boyle's tenure on the district court reveals a sustained hostility to civil rights claimants appearing before him. On numerous occasions, he has dismissed claims of discrimination based on race, gender, disability, or age. Additionally, Judge Boyle has been reversed by the Fourth Circuit – often characterized as the most conservative appellate court in the country – in more than 150 cases. In many instances, the Fourth Circuit found that Judge Boyle misapplied, misinterpreted, or simply ignored controlling Fourth Circuit or Supreme Court precedent.¹ For these and other reasons, many of the undersigned organizations are opposed to his elevation. Given the criticism of Judge Boyle's record, it is imperative that his full record be made available to the Senate and to those persons with an interest in the nomination.

Federal judges retain a great deal of discretion as to whether to publish a particular ruling. Unpublished opinions have just as much legal impact as published opinions on the parties involved in particular cases. Summary judgment opinions, for example, are dispositive rulings which result in the dismissal of a case. The Court must explain in writing its reasons for granting summary judgment before trial. These opinions

¹ Judge Boyle's unpublished opinions, on which these reversals are based, have not all been produced to the Judiciary Committee.

can provide insight into a nominee's views of federal laws and their application. They are no less revealing about a nominee's judicial philosophy and decision-making process than published opinions. In a 2002 editorial, the *New York Times* called for a full accounting of a judicial nominee's past rulings: "Cases that do not result in a formal opinion can be just as important in evaluating a judge's record as ones that do."²

It is clear that Judge Boyle has thousands of unpublished opinions. Judge Boyle has been on the United States District Court for the Eastern District of North Carolina for more than twenty years. In his latest Judiciary Committee Questionnaire, dated January 2003, Judge Boyle estimates that he has decided approximately 11,000 to 12,000 cases on the district court. However, a review of the official and unofficial legal reporters including the Federal Supplement, LEXIS, WESTLAW, and others reveals fewer than 400 published opinions.³ That means that, as of two years ago, Judge Boyle had more than 10,500 unpublished opinions.

Unquestionably, Judge Boyle's civil rights record has not been fully disclosed. For example, Judge Boyle has fewer than thirty published opinions relating to employment discrimination. Over the course of twenty years, Judge Boyle likely has presided over hundreds of cases in this area. Accordingly, there are likely dozens if not hundreds of dispositive rulings, such as orders granting motions to dismiss and motions for summary judgment, which have not been published. Judge Boyle would have necessarily explained his reasoning for granting dismissals and summary judgments in these written opinions. In addition, Judge Boyle served as a federal judge for several years prior to the passage of the Civil Rights Act of 1991. During this period, plaintiffs were not provided jury trials under Title VII of the Civil Rights Act of 1964. Therefore, even if a case proceeded beyond summary judgment to a trial, Judge Boyle – rather than a jury – would have ruled on the merits of such claims. Accordingly, Judge Boyle should have bench opinions that have not been published.

Precedent exists from the first term of the Bush Administration for disclosing unpublished opinions of nominees whose civil rights records were particularly troubling. Both Charles Pickering and Dennis Shedd were federal district court judges whom President Bush nominated to appellate courts, the Fifth and Fourth Circuits respectively. Both nominees had numerous published opinions that raised serious concerns about their treatment of civil rights cases coming before them. In both instances, the nominees were asked by the Senate Judiciary Committee to produce their civil rights opinions that were not published in any legal reporter. In both instances, the nominees complied and produced their unpublished opinions. The Judiciary Committee also requested and received the unpublished California state court of appeals opinions of Janice Rogers Brown, who was nominated to the DC Circuit.

Production of Judge Boyle's unpublished opinions simply must occur if Judge Boyle's record on civil rights and other issues can be thoroughly explored by the entire Senate in its review of the nomination. Supporters of Judge Boyle should not be permitted to "cherry pick" selected opinions from his record of unpublished opinions in order to highlight portions of his record in an attempt to portray Judge Boyle in a positive light. Only with full disclosure of the entire record can all parties have a full and fair debate on the merits of Judge Boyle's nomination.

The refusal to produce Judge Boyle's unpublished opinions appears to be the continuation of an ongoing pattern by this Administration of refusing to disclose fully the records of its judicial and executive nominees. Perhaps the most glaring example is the Administration's failure to produce, during the Senate's consideration of Ninth Circuit nominee Jay Bybee, any of the non-public memoranda Bybee wrote while heading the Justice Department's Office of Legal Counsel. If the Administration had produced the

² Editorial, "The Secret History of Judges," *The New York Times*, July 28, 2002.

³ Judge Boyle also indicates that he has participated in nearly 200 cases while sitting by designation on the Fourth Circuit. Only approximately 100 cases of these are published.

documents requested by Senators, the documents would have included a 2002 memorandum that provided legal advice on the use of force during interrogations conducted abroad, concluding that U.S. interrogators could inflict physical pain up to that which accompanies “serious physical injury such as death or organ failure,” and that U.S. anti-torture laws could be overridden by the president under his commander-in-chief power. The memorandum became public only after the Senate had confirmed Judge Bybee to a lifetime appointment to the appellate court.

There are other examples of this Administration’s failure to disclose the complete records of nominees. During the Senate’s consideration of Miguel Estrada’s nomination to the D.C. Circuit, the Administration refused to produce portions of Mr. Estrada’s legal record which would have revealed the level of his commitment to continued vigorous enforcement of critical constitutional and statutory rights in the area of civil rights and civil liberties. More recently, the Administration, despite repeated requests, refused to provide the Senate with numerous documents that would have revealed the role of Attorney General Alberto R. Gonzales in the shaping of United States policies relating to the definition, and use, of torture.

We strongly believe that the Senate cannot meet its Constitutional obligations to review the nomination of Judge Boyle without full disclosure and review of the entirety of Judge Boyle’s record on the district court bench. We urge the Judiciary Committee to take steps to complete the record on this nominee. In the absence of a complete record, there is simply no way that either the Judiciary Committee or the full Senate can adequately fulfill their “advice and consent” responsibilities on Judge Boyle’s nomination for a lifetime appointment to the appellate court.

Thank you.

Sincerely,
AFL-CIO

Alliance for Justice
Americans for Democratic Action
American Association of People with Disabilities
American Federation of State, County and Municipal Employees (AFSCME)
Bazelon Center for Mental Health Law
Feminist Majority
Human Rights Campaign
Leadership Conference on Civil Rights
NAACP Legal Defense & Educational Fund, Inc.
NARAL Pro-Choice America
National Abortion Federation
National Employment Lawyers Association
National Organization for Women
National Partnership for Women & Families
National Senior Citizens Law Center
National Urban League
National Women’s Law Center
People For the American Way
Service Employees International Union
Sierra Club
YWCA USA