



NATIONAL BAR ASSOCIATION

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March 2, 2005

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The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
224 Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Specter:

I am Kim Keenan, President of the National Bar Association (NBA). On behalf of the NBA, I write to strongly oppose the nomination of United States District Court Judge Terrence Boyle (E.D. N.C.) to the U.S. Court of Appeals for the Fourth Circuit. With a network of more than 30,000 members, the NBA is the oldest and largest association of African American and minority attorneys, jurists, legal scholars, and law students in this country. It is not often that we oppose a judicial nominee. Nevertheless, the NBA is compelled to oppose Judge Boyle.

With more than 150 reversals, often in significant civil rights cases, Judge Boyle's judicial record has led the NBA to join in the opposition of many diverse groups, including the NAACP Legal Defense Fund and law enforcement associations. The NBA ranks Judge Boyle as **NOT QUALIFIED** for appointment to the Fourth Circuit. Judge Boyle's judicial record raises serious questions about his professional competence and judicial temperament, including commitment to equal justice under the law and cultural sensitivity. Judge Boyle has not reigned in his judicial activism to apply an appropriate judicial balance. As the U.S. Supreme Court has stated, district court judges should consider the sensitive nature of certain political/civil rights issues, accord a presumption of good faith to legislative enactments, and recognize the intrusive potential of judicial intervention into the legislative realm. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This, Judge Boyle, has failed to do. We note that Judge Boyle has received probably the lowest American Bar Association rating of any district court judge nominated to the circuit court by President Bush. For these and other reasons set forth below, it is imperative that the U.S. Senate reject this nominee.

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Over the last several years, the NBA has been troubled tremendously about the Fourth Circuit U.S. Court of Appeals, which was a racially segregated institution until the year 2000. This court is widely regarded as the most conservative circuit court in the country. The NBA is particularly opposed to the appointment of an unqualified jurist to the country's most conservative circuit court, a circuit that virtually is the final arbiter of the civil rights of more African Americans than any other circuit court in the country. Judge Boyle's nomination is a poor reflection on the nation's commitment to equal justice with enormous consequences.

Judge Boyle was recommended to the White House by former Senator Jesse Helms. The NBA is all too familiar with the treatment Senator Helms meted out to African American nominees to the very same circuit. During his two terms, former President Clinton tried unsuccessfully to desegregate the Fourth Circuit, the last all-white circuit court in the country. Beginning in 1995, President Clinton nominated no fewer than four African Americans to this court, including two moderate African American candidates from North Carolina. Throughout this period, former Senator Helms blocked the desegregation of the Fourth Circuit. Former Senator Helms refused to consent to the nominees, which consent was then required of home-State Senators by the Senate Judiciary Committee. In deference to former Senator Helms, the Senate Judiciary Committee refused to consider the African American nominees from North Carolina.

In 1995, Federal District Court Judge James Beaty was nominated to the Fourth Circuit. Judge Beaty had been confirmed unanimously by the Senate to the district court. Yet former Senator Helms withheld his approval of Judge Beaty for a seat on the Fourth Circuit. Therefore, the Senate Judiciary Committee refused to consider Judge Beaty for appointment to the Fourth Circuit. When Judge Beaty was re-nominated by former President Clinton in 1997, former Senator Helms objected again. Once more, the Senate Judiciary Committee deferred to former Senator Helms and the nomination did not proceed. The nomination was returned to former President Clinton in 1998. Former President Clinton then nominated North Carolina Appellate Court Judge James Wynn in 1999. As in the past, former Senator Helms objected and the Senate Judiciary Committee refused to act on Judge Wynn's nomination. The nomination was returned in 2000. In early January, 2001, former President Clinton nominated Judge Wynn again for a seat on the Fourth Circuit. The Senate Judiciary Committee did not act on this nomination. Subsequently, President George W. Bush withdrew the nomination. Former President Clinton nominated two other African Americans to the Fourth Circuit from states other than North Carolina. In 2000, former President Clinton nominated Andre Davis, a federal district court judge from Maryland. The Senate Judiciary Committee refused to act on Judge Davis's nomination and it, too, was returned. Former President Clinton nominated Roger Gregory from Virginia in 2000. The NBA led a national appeal to confirm this nominee. Nevertheless, the Senate failed to do so. This led former President Clinton to make the historic recess appointment of Judge Roger Gregory to the court. Without this recess appointment, Judge Roger Gregory would have never been confirmed by the Senate. Against this unconscionable history, the Senate is

prepared to consider Judge Boyle, who brings a judicial philosophy that is even more extreme than that of the Fourth Circuit's most conservative members.

More than 150 of Judge Boyle's seriously flawed rulings have been reversed or vacated by this very same U.S. Court of Appeals for the Fourth Circuit, often due to his refusal to follow longstanding precedent in interpreting civil rights laws. This nominee is not a jurist who should be promoted and elevated to a higher court.

As a national organization composed primarily of minority attorneys, we direct your attention to the following specific troubling observations about Judge Boyle's judicial record on the district court:

- *Judge Boyle prematurely dismisses civil rights complaints at the pretrial stage.*
- *He has been reversed in a number of cases for finding complaints inadequately pled.*
- *Judge Boyle fails to proceed with the "extraordinary caution," that district courts must show to avoid treading upon legislative prerogatives.*
- *His rulings to impose a higher standard than mere notice pleading required under the Federal Rules of Civil Procedure.*
- *Judge Boyle appears unwilling to allow plaintiffs to amend pleadings, which is liberally permitted even by very conservative judges.*
- *Judge Boyle has granted numerous summary judgment motions, concluding improperly that there are no genuine issues of material fact to be tried.*

One very disturbing example of Judge Boyle's poor judicial record is *McCauley v. City of Jacksonville*, 829 F.2d 36 (4th Cir. 1987), 1987 WL 44775 (4th Cir. Sept. 8, 1987). In *McCauley*, Judge Boyle dismissed a fair housing complaint for failure to state a claim. A panel of judges, which included Judge J. Harvie Wilkinson, reversed and remanded, citing a number of precedents that supported plaintiff's pleading. The Fourth Circuit held that the motion to dismiss should not have been granted. The court of appeals found that McCauley primarily contends that the city revoked his building permit, denied sewer service, and re-zoned (sic) his property to prevent racial integration of his apartment project. The city, asserting that its policy was racially neutral, contends that McCauley's allegations are insufficient to support this claim and that he lacks standing to press it. We are not persuaded by the city's stand.

McCauley alleged the city suffers a housing shortage, that his project would offer low to moderate income housing, and that it would be racially integrated, alleviating to some extent residential racial segregation in the city. He alleged that the city's acts and omissions have perpetuated existing residential segregation. McCauley specifically charged that the city's actions in blocking construction of his project 'had the purpose and effect of denying housing opportunities on the basis of race or color.' Our precedents have rejected arguments similar to the city's. McCauley need not allege that he is a member of a minority race, nor need he with certainty allege that potential tenants would be black. (See *Scott v. Greenville County*), 716 F.2d 1409, 1414 (4th Cir. 1983). McCauley's allegation about the 'purpose and effect' of the city's action is sufficient to state a claim of intentional discrimination under the fourteenth amendment and the Civil Rights Acts of 1866 and 1871. His allegation of 'effect' of the city's action is sufficient to state a claim based on the Fair Housing Act. *Id.* at 2. The *McCauley* decision demonstrates clearly that the Senate must question Judge Boyle's professional competence and commitment to equal justice under the law.

Another illustration of Judge Boyle's flawed rulings is *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002), 293 F. Supp. 2d (E.D. N.C.). Relying upon federal civil rights laws, a local environmental justice center sued Wake County and the North Carolina Department of Environmental and Natural Resources to halt construction of a landfill in the town within Wake County with the highest number of African American residents. Judge Boyle dismissed the complaint. The Fourth Circuit reversed Judge Boyle's ruling in part, citing several grounds. First, the court of appeals found that Judge Boyle abused his discretion in denying plaintiff's leave to file a second amended complaint based on a decision regarding the issuance of a local permit. Judge Boyle had concluded improperly that the defendants would be prejudiced because plaintiffs had waited seven months after the local permit decision before amending their complaint. But the circuit court found that Judge Boyle made a clearly erroneous finding of material fact because the plaintiffs had moved to amend the complaint within three months of the decision. *Id.* at 193. The court found that Judge Boyle also erred in concluding erroneously that the statute of limitations began to run when Wake County made its initial decision regarding the landfill, rather than when the state agency finally approved the landfill plan, which the circuit court considered the final step of the [permitting] process. *Id.* at 195. Finally, the circuit court faulted Judge Boyle for dismissing the state agency defendants on the ground of sovereign immunity. The Fourth Circuit held that the longstanding doctrine of *Ex Parte Young* - permitting state officials to be enjoined from future violations of federal law - applied to the case. The second amended complaint sought prospective relief against the State defendants. *Id.* at 197.

Similarly, Judge Boyle's flawed analysis is evident in *Whiting v. Ski's Auto World*, 194 F.3d 1307 (4th Cir. 1999), 1999 WL 753997 (4th Cir. Sept. 23, 1999). An African American male sued for race discrimination after failing to receive a promotion. Judge Boyle granted summary judgment to the employer. He was

reversed by Fourth Circuit Judges William Wilkins, Paul Niemeyer and Karen Williams, all of whom are Reagan/Bush appointees. The panel unanimously concluded that Judge Boyle improperly ruled that the discrimination charge was filed untimely and that the plaintiff failed to establish racial discrimination. The Fourth Circuit stated, "(t)he district court's dismissal of Whiting's §1981 discrimination claim for failure to promote must also be vacated. . . . Because the totality of these facts, as alleged by Whiting, and when considered in a light most favorable to him, established a prima facie claim of §1981 discrimination for failure to promote, we vacate that portion of the district court's order that dismissed this claim and remand for further proceedings." *Id.* at 1 -2.

I direct your attention as well to *Clemonts v. West*, 1996 WL 285634 (4th Cir. May 29, 1996), where a prison inmate challenged race discrimination in job assignments at a correctional facility. The prisoner alleged that his supervisor gave more favorable assignments to white inmates than to African American inmates and provided pay raises to white inmates only. Judge Boyle dismissed the action, *inter alia*, for failing to establish a prima facie showing of a constitutional tort. A panel of the Fourth Circuit, which included Chief Judge J. Harvie Wilkinson and Judge Paul Niemeyer, vacated the ruling in a *per curiam* opinion. The court wrote:

Clemonts claimed that West gave whites more desirable job assignments than blacks. He also claimed discrimination in giving pay raises. Further, Clemonts claimed that West had made derogatory slurs against blacks. The lawsuit has an arguable basis in law and in fact. Accordingly, we conclude that the district court abused its discretion in dismissing the complaint pursuant to § 1915(d). *Id.* at 1.

Significantly, Judge Boyle's major civil rights rulings have been rejected by the United States Supreme Court as well. In *Cromartie v. Hunt*, North Carolina residents brought an action against various state officials challenging North Carolina's congressional redistricting plan as racially motivated in violation of the Equal Protection Clause. The district court granted summary judgment in favor of the residents and State officials appealed. In an opinion written by Justice Thomas for the Court, the Supreme Court reversed and remanded, holding that triable issues regarding the primary motivation for the redistricting plan made summary disposition in favor of the moving parties improper. Justice Thomas stated:

(a)nd even if the question whether appellants had created a material dispute of fact were a close one, we think that 'the **sensitive** nature of redistricting and the presumption of **good faith that must be accorded legislative enactments** ... would tip the balance in favor of the District Court making findings of fact ('Courts must also recognize ... the **intrusive potential of judicial intervention into the legislative realm**, when assessing ... the adequacy of plaintiff's

showing at the various stages of litigation and determining whether to permit discovery or trial to proceed.) *Id.* at 553 (emphasis added).

Judge Boyle failed to heed Justice Thomas' admonition to deliberate with sensitivity and extraordinary caution to avoid intrusion in legislative prerogatives. Instead on remand, a three judge panel of the District Court again held - with Judge Boyle writing the opinion of the court - that the redistricting plan was racially motivated. State officials appealed as before. The U.S. Supreme Court held that the district court's finding was clearly erroneous. *Id.* at 258. The Court held:

The evidence taken together, however, does not show that racial considerations predominated in the drawing of District 12's boundaries. That is because race in this case correlates closely with political behavior. The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations). And given the fact that the party attacking the legislature's decision bears the burden of proving that racial considerations are "dominant and controlling," ... "given the "demanding" nature of that burden of proof, ... and given the **sensitivity**, the "**extraordinary caution**," **that district courts must show to avoid treading upon legislative prerogatives**, ... the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result. The record leaves us with the "definite and firm conviction," ... that the District Court erred in finding to the contrary. ... We conclude that the District Court's contrary findings are clearly erroneous. *Id.* at 257-258 (emphasis added).

Furthermore, Judge Boyle's judicial record includes troubling cases evidencing a willful failure to apply - or lack of knowledge of - well established precedent, leading to an improper preclusion of civil rights lawsuits against States as barred by the Eleventh Amendment. For example, in *Ellis v. State of North Carolina*, 2002 WL 31546000 (4th Cir. Nov. 18, 2002), Judge Boyle defied thirty years of Supreme Court precedent and ruled erroneously that the State of North Carolina was immune from an employment discrimination suit by an African American female under the Civil Rights Act of 1964. Judge Michael Luttig, appointed by George H. W. Bush, ruled that Judge Boyle erred in dismissing the case. The U.S. Supreme Court had held that in enacting Title VII, Congress properly abrogated the States' Eleventh Amendment immunity from such suits. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976). Thus, the Fourth Circuit held that Judge Boyle erred by granting the defendants' motion to dismiss on this ground. Accordingly, the Fourth Circuit vacated and remanded the case to the district court to conduct proceedings consistent with three-decades old precedent.

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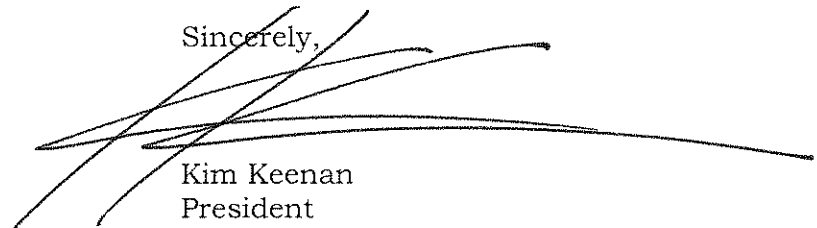
Furthermore, Judge Boyle was one of the first judges in the country to protect States from suits filed by employees under the Americans with Disabilities Act (ADA). In *Pierce v. King*, 918 F. Supp. 932 (E.D. N.C.1996), Judge Boyle held that Congress lacked the power to apply the ADA to State prisons. This interpretation of ADA was ultimately rejected by the U.S. Supreme Court in a unanimous opinion written by Justice Antonin Scalia in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). In *Pennsylvania Dep't of Corrections v. Yeskey*, the Supreme Court held that Title II of the ADA, prohibits a "public entity" from discriminating against qualified individuals with a disability on account of that individual's disability, and applies to inmates in State prisons. *Id.* at 213.

In the context of the circuit, the history and the record, the nomination of Judge Terrence Boyle should be rejected. A Jesse Helms' protege is simply not the best North Carolina has to offer the Fourth Circuit in the 21st Century. Judge Boyle has disregarded the role of federal courts in enforcing the civil rights legislation passed by Congress. His extraordinary and troubling reversal rate demonstrates a fundamental unwillingness and/or inability to comprehend facts and law, as well as to follow well settled precedent.

For these reasons, the NBA is urging you and each member of the Judiciary Committee to reject Judge Boyle's promotion to a higher court.

If you have any questions, please contact Alfreda Robinson, NBA Chair, Judicial Selection Standing Committee at (202) 994-8162 (w) or arobinson@law.gwu.edu. She is an associate dean at The George Washington University Law School.

Sincerely,



Kim Keenan
President

KMK:bms

cc: Senate Judiciary Committee

Hon. Patrick Leahy

Hon. Mel Watt, Chair, Congressional Black Caucus

John Crump, Executive Director