

**THIRD BRANCH CONFERENCE**  
**July 25, 2006**

The Hon. John McCain  
The Honorable William H. Frist, M.D.  
The Honorable Mitch McConnell  
The Honorable Rick Santorum  
The Honorable Jon Kyl  
The Honorable Kay Bailey Hutchison  
The Honorable Elizabeth Dole  
The Honorable Richard Burr  
The Honorable Ben Nelson  
and copied to all Majority Senators.

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Dear Senators:

We write this unprecedented letter in support of Judge Terrence W. Boyle's confirmation to the Fourth Circuit Court of Appeals. This is the first time that a coalition of organizations has joined in one letter to request a vote for a single Bush circuit court nominee. Together we represent millions of members and constituents.

We ask that you join our members in supporting Judge Boyle's nomination and vote to confirm Judge Boyle immediately, without any further delay. While Judge Boyle is the longest waiting nominee of President George W. Bush, for no good reason in fact he has waited 14 years. He was first nominated by President George H.W. Bush and never given a hearing by Democrat Judiciary Committee Chairman Joe Biden.

Three Republican presidents have now nominated Judge Boyle repeatedly, beginning with Ronald Reagan.

Throughout the unprecedented delay in Judge Boyle's confirmation process, he and his family have no doubt endured much. Such treatment and delay by the Senate does great harm to the ability of any president to recruit good men and women to serve on the federal judiciary. This harms the criminal justice system.

We take this opportunity to address a particular aspect of the opposition mounted by Democrats against Judge Boyle.

Judge Boyle's opponents would make it seem that his nomination is opposed by the law enforcement community. It is not. Moreover, law enforcement employment unions do not speak for victims or citizens affiliated to support law enforcement.

Judge Boyle's detractors represent a small minority and the basis for opposition has more to do with employment trial lawyer cases than with law enforcement. This is not unusual for nominees

for the 4th Circuit, which produces more “civil rights” employment law cases than any other circuit.

You will recall that 4th Circuit Judge Dennis Shedd was blocked by opposition from employment trial lawyers, represented at the time by Senator John Edwards.

Whether they attack a nominee through environmental groups they fund, as with William G. Myers, or through the special interest groups that front for them, as with Judge Priscilla Owen and so many others, behind every obstruction of a Bush nominee we believe that you will mostly find the organized trial lawyer lobby, and the opposition to Judge Boyle is not the exception.

In fact, Judge Boyle has a remarkable record of making the safety of law enforcement and the American public one of his top priorities.

In his 22 years of service on the federal bench, Judge Boyle has developed a proven track record of respect for and protection of those in law enforcement, and it is for this reason that we strongly support his confirmation.[Footnote 1]

We believe that blocking a judicial nomination on political grounds, particularly utilizing the personal attack tactics now being employed, is an injustice. Moreover, it harms the criminal justice system because it makes the recruitment of sound judicial nominees more difficult.

We wish, therefore, to address the concerns raised about Judge Boyle regarding law enforcement.

As we have noted in the vast majority of cases relied upon by opponents, opposition groups implicate law enforcement officials on both sides. Moreover, the cases cited most often by Judge Boyle’s detractors are not cases that involve core law enforcement issues, but rather litigious issues stemming most often from an officer who has been reprimanded for inappropriate or impermissible behavior.

Law enforcement officials do not relinquish all of their rights as citizens when they enter the precinct station. However, the needs of maintaining good order and discipline and public confidence in the role of police officers in society is paramount. As a result, just as in any military unit, police officers are held to a different, more regimented standard of conduct than ordinary citizens. It is within this framework that the cases cited by Judge Boyle’s detractors must be viewed.

Below, we examine six cases that are uniformly cited by opponents as evidencing Judge Boyle’s purported hostility to law enforcement and first responders. We trust you will find, as we have, that the opposition, at best, miscomprehends and, at worse, intentionally mischaracterizes the holdings and/or posture of these cases.

1. Kirby v. City of Elizabeth City, No. 2:01-CV-BO(3) (E.D.N.C. August 8, 2003), aff’d 380 F.3d 777 (4th Cir. 2004)

Plaintiff Kirby, a police officer in Elizabeth City, NC, sued the City after being suspended and reprimanded by his employer for testifying at a fellow officer's disciplinary hearing, wherein he provided testimony that was critical of the police department. Among other things, Kirby testified about the "maintenance history of a single patrol car" and the "driving habits of a single officer." Judge Boyle dismissed Kirby's claims on summary judgment. This ruling has prompted Judge Boyle's critics to proclaim he is hostile to law enforcement and unable to apply established precedent. They go so far as to say that "Judge Boyle stands in the doorway of civil rights for police officers," that in Kirby, he "ruled that police officers can be disciplined for truthfully testifying against the police administration," and, most ludicrous, that he has "licensed police managers to retaliate against testifying officers." Not true.

First, the pivotal issue in this case was not a core law enforcement concern, but, rather, a question of whether Kirby's testimony touched on a matter of "public concern" and was, therefore, protected speech. Kirby was disciplined for disobeying a department directive. Judge Boyle applied established Fourth Circuit precedent in ruling that Kirby's testimony referenced above was not of "public concern" as that term is widely understood. Moreover, the Fourth Circuit Court of Appeals agreed, unanimously affirming the ruling. The Supreme Court saw no error in Judge Boyle's ruling and denied Kirby's Petition for Writ of Certiorari.[Footnote 2]

2. *Edwards v. City of Goldsboro*, No. 5:96-CV-448-BO(2) (E.D.N.C. October 20, 1997).

The plaintiff in *Edwards* was suspended and placed on probation after disobeying a lawful, direct order from his police chief prohibiting secondary employment teaching weapons training courses during off-duty hours. *Edwards* brought a lawsuit against the City, the Police Chief, and the City Manager containing seventeen (17) causes of action under federal and state law. *Edwards* alleged violations of his free speech rights, Second Amendment right to bear arms, right to privacy, procedural due process rights, substantive due process rights, equal protection rights, deprivation of occupational liberty interests, right to academic freedom and right to free association.

The defendants moved to dismiss all 17 claims, which Judge Boyle granted, holding that discipline in the workplace is not unlawful. On appeal, the Fourth Circuit affirmed Judge Boyle's dismissal on fifteen (15) of the claims contained in the lawsuit, including *Edwards*' Second Amendment claim.[Footnote 3] The Fourth Circuit did, however, permit *Edwards* to amend his poorly pleaded complaint to actually proffer facts supporting his claim that his free speech and associational rights were violated by the reprimand. Ultimately, the case settled out of court, but not before the Fourth Circuit substantially affirmed Judge Boyle's ruling.

3. *Godon v. North Carolina Crime Control & Pub. Safety*, 959 F. Supp. 284 (E.D.N.C. 1997)

In *Godon*, the plaintiff filed an action alleging federal and state law claims for free speech violations, sex discrimination and retaliation under Title VII, wrongful discharge and breach of contract. *Godon* was a contract employee of North Carolina's Department of Crime Control and Public Safety (the "Department") responsible for supervising the training of cadets in a state-run "boot camp" academy. She alleged her employment contract was terminated in retaliation for her complaining to supervisors about what she perceived to be discriminatory treatment of black and female cadets. Judge Boyle granted the government's motion to dismiss all claims. The

opposition claims that Judge Boyle ruled incorrectly and was “completely reversed on appeal twice.” Not true.

Actually, the Fourth Circuit affirmed the dismissal of the vast majority of plaintiff’s claims, including her sex discrimination and retaliation claims under Title VII. The Fourth Circuit remanded the case, in small part. It did so principally to allow for a fuller development of the facts. The opposition would have you believe that this signifies that Judge Boyle mishandled this case and denied a day in court to a claimant who “was fired for communicating about discrimination within a state police agency.” The facts belie such claims. In its opinion, the Fourth Circuit expressly cautioned against drawing any inferences from the fact that it had remanded the action. It made clear that “[i]n holding only that [plaintiff’s] complaint survives a motion to dismiss . . . we offer no opinion on whether the claim will ultimately prove to be meritorious or on whether it should proceed to trial.” On remand, Judge Boyle further developed the record and subsequently granted defendants’ motion for summary judgment to dismiss the claims against them in both their official and personal capacities.

On subsequent appeal, the Fourth Circuit agreed with Judge Boyle’s ruling, and affirmed the dismissal of plaintiff’s claims brought against the State defendants and individual defendants in their official capacity. It remanded, however, Judge Boyle’s dismissal of the claims against the defendants in their individual capacities, but not before expressly cautioning that it had “significant doubts about the ultimate viability of [plaintiff’s] claims” on remand. The Fourth Circuit went so far as to intimate that additional discovery at the district court level was likely to permit a dismissal of the remaining claims without ever proceeding to trial.

Thus, as in *Edwards*, this case holding is not as the opposition purports. *Godon* is a case in which the Judge’s holdings were vastly affirmed on appeal. It is, therefore, absurd to claim that Judge Boyle “erroneously dismiss[ed] a police expression case involving speech about discrimination.”[Footnote 4]

#### 4. *Burns v. Brinkley*, 933 F. Supp. 528 (E.D.N.C. 1996)

*Burns* involved a Deputy Sheriff who was terminated because he supported an unsuccessful candidate for Sheriff who had run against the incumbent Sheriff. The Deputy brought a cause of action alleging that his First Amendment and substantive due process rights had been violated by the incumbent Sheriff. Judge Boyle disagreed and dismissed the complaint on the government’s motion. Specifically regarding the First Amendment claim, Judge Boyle ruled that “where ‘party affiliation is an appropriate requirement for the effective performance of the public office involved,’ the First Amendment is not offended by a politically motivated dismissal.” *Burns*, 933 F. Supp. at 534 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). This holding was entirely consistent with Fourth Circuit precedent on its facts. See *Joyner v. Lancaster*, 553 F. Supp. 809, 818 (M.D.N.C. 1982), *aff’d*, 815 F.2d 20 (4th Cir. 1987).[Footnote 5] Rather than being the bombshell case against Judge Boyle the opposition purports, in reality, *Burns* remains good law today.

We also note that the opposition is patently disingenuous in its rendition of this case. It takes a portion of a sentence from *Burns* and quotes it entirely out of context (likely in an attempt to

portray Judge Boyle as callous to constitutional rights), to wit: “[t]he Constitution does not create rights.” In fact, the full quotation from Burns is: “[t]he Constitution does not create rights, but it does recognize rights and affords them protection.” Burns, 933 F. Supp. at 532 (emphasis added). Moreover, there is ample support for this statement of Judge Boyle, given his citation to *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532, 538 (1985), and the Supreme Court’s similar statement that “[p]roperty interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . .”. Following Supreme Court precedent is not only appropriate in this case, it is required. The law asks no more of a district court judge, and neither do we.

##### 5. *United States v. North Carolina*, 914 F. Supp. 1257 (E.D.N.C. 1996)

In *United States v. North Carolina*, the United States Attorney General brought a Title VII employment discrimination action against the State of North Carolina alleging that it engaged in a pattern or practice of sex discrimination in the hiring and promotion of female correctional officers in the State’s all-male prisons. In 1995, after nearly 18 months of discovery and settlement negotiations in an effort to avoid litigation, the parties agreed upon a settlement and presented a consent decree to the district court for entry. The terms of the consent decree required North Carolina to embark on extremely costly recruitment measures and promulgate a quota hiring system involving priority hiring and promotion for hundreds of women allegedly actually or constructively denied such opportunities. It also imposed monetary penalties on North Carolina to pay back pay for a period of three years to women who either applied for a position or for promotion and were denied, or who “but for the discrimination” would have applied for a position or promotion during that time period.

After provisionally entering the consent decree, Judge Boyle held a fairness hearing and received evidence from both sides. The evidence submitted by the United States turned principally on statistical modeling that was predicated on national averages rather than data specific to North Carolina. Judge Boyle ruled that this evidence did not establish that North Carolina had, in fact, engaged in any pattern or practice of discrimination. Given the costly measures and onerous hiring and promotion quotas being imposed on the State by virtue of this consent decree, as well as the evidence of questionable weight proffered by the United States, Judge Boyle held that:

A case based substantially on statistics and bolstered with anecdotal allegations of discrimination by claimants who have been recruited or solicited by [the United States], or who have come forward only after prospects of a large cash reward have been revealed, is merely a theoretical dispute about subjective notions of societal ideals. It does not have the constitutional requirement of a real controversy for subject matter jurisdiction in a federal court. *United States v. North Carolina*, 914 F. Supp. 1257, 1274 (E.D.N.C. 1996). Judge Boyle concluded that, based on the forecast of evidence then before the court, he lacked subject matter jurisdiction over the matter and vacated the court’s provisional entry of the order. Judge Boyle added that “[a] federal court should be circumspect before it would take custody of large segments of a state’s sovereign functions.” He intimated that the terms of the consent decree may, in fact, go so far as to violate the equal protection rights of male employees and prospective applicants.

After receiving more persuasive evidence establishing the court's subject matter jurisdiction, more than one year had elapsed. Upon subsequent hearing, however, Judge Boyle was informed of several significant developments: first, the State now adamantly opposed entry of the consent decree; and, second, the State proffered evidence that it had taken "an aggressive posture in the hiring, assignment and promotional practices" with the Department of Corrections. *United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999). In short, there was no longer a need nor was there an agreement by the State to enter the consent decree. And, not only did the State no longer agree to the terms of the vacated consent decree, it challenged the new evidence that had been proffered by the United States solely in its effort by the State to move to dismiss the action.

Judge Boyle denied the State's motion to dismiss but also declined to enter the consent decree on grounds that it was no longer reasonable or lawful to do so. In other words, he kept the controversy alive to enable the full discovery and litigation process to bring the case to a resolution. In support of his ruling, Judge Boyle observed that, in the intervening period, the North Carolina legislature had enacted legislation that required "prior legislative approval of the settlement" and a requirement that the State Attorney General provide written advisement on all such settlements that affect the public fisc over a certain threshold. For all of these reasons, along with the fact that Judge Boyle viewed the consent decree as an executory, rather than executed, contract, Judge Boyle declined to enter the consent decree. In his view, it would simply be unfair, unreasonable, and indeed, unlawful to do so given the circumstances.

Although the Fourth Circuit disagreed on appeal, it did so largely based on a different interpretation of what constitutes grounds for withdrawing from a settlement agreement. Judge Boyle, on the one hand, viewed that the substantial demonstrated strides by the State over the course of one year to increase female hiring and promotion rendered any forced corrective measures dictated by the federal government unnecessary and, thus, "substantially unfair." See generally *Petty v. Timken Corp*, 849 F.2d 130, 133 (4th Cir. 1988) (instructing that settlement agreement may not be set aside simply because party to it has second thoughts, but because it is or has become "substantially unfair."). The Fourth Circuit took a different view, ultimately holding under the circumstances that Judge Boyle was essentially required to enter the consent decree despite the State's withdrawal from and challenge to it.

This lengthy discussion, we hope, demonstrates that there was no easy answer to this case and that Judge Boyle did not take lightly his responsibility to weigh all facts and attempt to arrive at a fair and just resolution. It is a testament to his judicial temperament and attention to detail and in no way suggests that Judge Boyle is hostile to any group or unable to follow established precedent. Any suggestion to the contrary is simply not proven.

6. *Morrash v. Strobel*, 842 F.2d 64 (4th Cir. 1987)

Finally, Judge Boyle's opponents rely upon *Morrash v. Strobel*, an opinion authored by Judge Boyle while sitting by designation on a Fourth Circuit panel. The criticism alleges that Judge Boyle "moved to rule against the constitutional claims of several Virginia police officers" who were allegedly "whistleblowers who had exposed misconduct and were disciplined." The criticism goes on to say that Judge Boyle concluded "that the officers did not have any due process, free association or speech rights to protect them from exposing misconduct." These

charges are truly absurd for several reasons that are obvious to anyone who actually took the time to read the actual opinion he authored.

Judge Boyle was sitting by designation as an appellate judge in this case, not as the trial judge. As such, he did not “move to rule” against anything; he (along with the two other judges sitting on the three-judge panel) merely upheld the lower court’s dismissal of most of the claims and, as to the claims that went to trial, remanded to retry the due process and free association claims after determining the lower court erred in a critical ruling at trial. See *Morrash*, 842 F.2d at 67.

\* \* \* \* \*

We ask you to join us in supporting Judge Boyle’s nomination openly. Move his nomination forward and confirm him.

Very truly yours,

Manuel Miranda, Third Branch Conference  
Phyllis Schlafly, Eagle Forum  
Grover Glenn Norquist, Americans for Tax Reform  
Bill Brooks, North Carolina Family Policy Council  
Saulius “Saul” Anuzis, Michigan Republican Party  
**Michael Thielen, Republican National Lawyers Association**  
Sean Rushton, Committee for Justice  
Mathew D. Staver, Liberty Counsel and Liberty University School of Law  
Dr. John C. Eastman, Claremont Institute Center for Constitutional Jurisprudence  
Hon. Robert A. Destro, Catholic University, Columbus School of Law  
William L. Saunders, Family Research Council  
Stephen M. Crampton, AFA Center for Law & Policy  
Tom Fitton, Judicial Watch  
Carl Herbster, AdvanceUSA  
Connie Mackey, FRCAction  
William Lauderback, American Conservative Union  
Jan LaRue, Concerned Women for America  
Stephen A O’Connor, Eagle Publishing Inc., Human Events  
Ron Shuping, The Inspiration Television Networks  
Ambassador Alan Keyes, Declaration Alliance  
L. Brent Bozell III, Conservative Victory Committee  
Deal Hudson, Morley Institute for Church & Culture  
George Landrith, Frontiers of Freedom  
Rev. Rick Scarborough, Vision America  
Rev. Miguel Rivera, National Coalition of Latino Clergy & Christian Leaders  
Andrea Lafferty, Traditional Values Coalition  
Thomas A. Glessner, National Institute of Family and Life Advocates (NIFLA)  
Colin A. Hanna, Let Freedom Ring, Inc.  
Peggy Birchfield, Religious Freedom Action Coalition  
Dr. Gary Cass, The Center for Reclaiming America for Christ

Kay Daly, Coalition for a Fair Judiciary  
Tom Shields, Coalition for Marriage and Family  
Gary Marx, Judicial Confirmation Network  
Amy Ridenour, Americans for the Preservation of Liberty  
Dr. Patricia McEwen, Life Coalition International  
Michael Krempasky, ConfirmThem.com and RedState.com  
Joseph Cella, Fidelis  
Jim Boulet, Jr., English First  
Jeff Ballabon, Center for Jewish Values  
Rabbi Aryeh Spero, Caucus For America and host of “Talking Sense”  
Rev. Dave Kirby, †Fellowship of Associate Members and Local Pastors  
Dr. William Greene, RightMarch.com  
Chuck Muth, Citizen Outreach  
C. Preston Noell III, Tradition, Family, Property, Inc.  
Jason Wright, Institute for Liberty  
Steven Mosher, Population Research Institute  
Gary Palmer, Alabama Policy Institute  
Dr. Randy Brinson, Redeem the Vote  
Greg Jones, Foundation for Moral Law  
A.J. Keagle of Arkansas  
Rodolfo Milani of Florida  
James Hochberg of Hawaii  
Jill Stanek of Illinois  
Thomas Brejcha, Thomas More Society of Chicago  
Micah Clark, American Family Association of Indiana  
Kent Ostrander, The Family Foundation of Kentucky  
Kristian M. Mineau, Massachusetts Family Institute  
Don Feder, Don Feder Associates  
Mike Franco, Baystate Republican Assembly, Western Mass Republicans  
Douglas Reaume of Michigan  
Forest Thigpen, Mississippi Center for Public Policy  
Ed Holdgate, New Hampshire Right to Life PAC  
Carolee Adams, Eagle Forum of New Jersey  
Phil Burress, Citizens for Community Values  
Rev. Russell Johnson, Ohio Restoration Project  
Dr. John Denton of Ohio  
Diane Gramley, American Family Association of Pennsylvania  
Jeff Lord of Pennsylvania, author of The Borking Rebellion  
Robert R. Galbreath Jr., Citizens for a Constitutional Republic  
Dr. James H. Broussard, Citizens Against Higher Taxes  
Jerry Stevens, Draft Thomas Ravenel for SC Republican Primary, US Senate  
Bobbie Patray, Tennessee Eagle Forum  
Cathie Adams, Texas Eagle Forum  
Hon. Kenneth Whitehead, Falls Church Republican Committee (VA)  
Mark R. Levin of Virginia, author of Men In Black  
Dr. Theodore C. Brown, Jr., YRFV 3rd District

Julaine K. Appling, The Family Research Institute of Wisconsin  
Chris Dickson, radio host, "The Dickson/Chappell Report" (IN and OH)  
Martha Zoller, WDUN AM 550  
Scott Hennen, radio host, WDAY/KCNN

#### Organizations listed for identification purposes

[Footnote 1] We have reviewed all opposition letters. They say nothing about Judge Boyle's record of being tough on crime and of his true respect for the issues that are central to fulfilling law enforcement responsibilities.

[Footnote 2] Recently, the Supreme Court had occasion to revisit the issue of public concern speech protection in *Garcetti v. Ceballos*, No. 04-473 (U.S. May 30, 2006). In *Garcetti*, a deputy district attorney suffered adverse employment action after bringing to the attention of his superiors a warrant that contained what he described as serious misrepresentations by the affiant, a fellow deputy. Ceballos later testified for the defense in a hearing to have the charges dropped. The Court found that Ceballos was not speaking as a citizen on a matter of public concern when he spoke out on this issue, but rather squarely in his official capacity. It held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at p.9. In *Kirby*, Judge Boyle found that Kirby was not speaking on a matter of public concern, also a required component for First Amendment protection.

[Footnote 3] A recent April 2006 "Dear Colleague" letter by Senator Joseph Biden ("Biden letter") shows that labor union/trial lawyer opponents also misunderstand this holding, contending as follows: "In one of Judge Boyle's many anti-police rulings, *Edwards v. City of Goldsboro, N.C.*, 178 F.3d 231 (4th Cir. 1999), the National Rifle Association (NRA) filed a strong amicus brief challenging Judge Boyle's decision and reasoning. . . . The NRA was correct, and Judge Boyle was overturned on appeal again." Biden letter at 7, n5. This statement is inaccurate for two reasons. First, Senator Biden suggests this matter was appealed more than once. That is incorrect. It was appealed only once, and amicably resolved later between the two parties. Thus, there was no subsequent appeal as Senator Biden contends. Second, Judge Boyle's dismissal of the Second Amendment claims was upheld on appeal, not, as Senator Biden erroneously contends, overturned. Edwards claimed that his Second Amendment rights were violated when he was denied permission to teach a concealed handgun safety course while he was off-duty and by punishing him for doing so without permission. Indeed, as the Fourth Circuit observed, it is well-settled that "the Second Amendment does not apply to the States." *Edwards*, 178 F.3d at 252 (citing *Love v. Peppersack*, 47 F.3d 120, 123 (4th Cir. 1995)). Thus, Judge Boyle's ruling was entirely consistent with established precedent.

[Footnote 4] Biden letter at 24 (Letter from National Association of Police Organizations, Inc. to Senators Specter and Leahy, dated February 24, 2005).

[Footnote 5] In *Joyner*, a Deputy Sheriff was terminated after he supported an unsuccessful challenger to the incumbent Sheriff. In upholding the termination as lawful, the district court

likened the Deputy's actions to a public challenge to the Sheriff's fitness to hold office. It observed first that "[u]nder state law the sheriff has the exclusive right to fire any deputy in his office. Deputies work at the pleasure of the sheriff." Id at 816. The Court then held that this particular termination did not offend any protected rights of the Deputy, reasoning "[w]here differing political beliefs of a person have the potential to undermine the ability of that person to perform his duties fully or his ability to serve his employer to the employers legitimate satisfaction, then political affiliation becomes an appropriate requirement for the effective performance of the office.") Id. at 818.