



**July 9, 2003**

**To: Journalists**

**Fr: Ralph G. Neas**

**Re: Bill Pryor's Confirmation Hearing Confirms His Extremism**

*Opposition party senators should not expect a president to nominate judges who reflect their views more than the president's. But neither should the president attempt to install on the federal bench nominees such as William H. Pryor Jr., the Alabama attorney general who is so openly contemptuous of long-established federal law as well as contemporary social standards that his ability to put those views aside and decide cases on their merits is gravely in doubt.*

*The Baltimore Sun, July 6, 2003*

On July 10, the Senate Judiciary Committee is scheduled to vote on the nomination of Alabama Attorney General Bill Pryor to the United States Court of Appeal for the Eleventh Circuit. The June 11 confirmation hearing for 11<sup>th</sup> Circuit nominee Bill Pryor did not shed much new light on Pryor's already well-documented ideological extremism, but it did underscore that he is unfit for a lifetime seat on the federal appeals court. Senators must reject his confirmation.

Pryor and some of his allies attempted to use the hearing to moderate Pryor's record, but their sometimes disingenuous efforts failed. The hearing did, however, permit senators to hear Pryor reaffirm some of his disturbing legal views. Indeed, Pryor's confirmation hearing and his written responses to senators' post-hearing questions confirm what was already evident in advance of the hearing. Pryor has been an aggressive advocate for using the law and the courts to turn back the clock on civil rights enforcement, privacy and reproductive choice, and the protection of individual liberties. *For more detail on Pryor's full record, see People For the American Way's report in opposition to his confirmation at [www.pfaw.org/independent\\_judiciary](http://www.pfaw.org/independent_judiciary).*

### **States' Rights**

Pryor is widely recognized as one of the nation's most aggressive advocates for a "states' rights" approach to the Constitution, and in recent years some of his arguments in favor of restricting Congress' authority to pass laws protecting Americans' rights and liberties have been accepted by a narrow 5-4 majority on the Supreme Court.

But Pryor's views on states' rights are so extreme that they have been rejected even by the conservative Supreme Court majority on a number of occasions. During 2002-2003 alone, the Court specifically rejected Pryor's arguments in three important cases. In the Court's unanimous ruling in *Jinks v. Richland County*, the Court rejected Pryor's argument that counties should receive the same "sovereign immunity" from lawsuits that states do. The Court also rebuffed Pryor's extreme states' rights views in *Nevada Dept. of Human Resources v. Hibbs*, holding that states can be sued for money damages for violating the rights of their employees under the Family and Medical Leave Act, and in *Lawrence v. Texas*, in which Pryor had argued that state legislatures should be able to criminalize private sexual conduct between consenting adults.

## **Privacy and Reproductive Rights**

At his confirmation hearing, Pryor testified that he still believes, as he has said previously, that *Roe v. Wade* was "the worst abomination of constitutional law in our history." He repeatedly reaffirmed that stance even after Sen. Charles Schumer observed that such a statement would mean that *Roe* was worse than the Supreme Court's decisions in *Dred Scott*, which declared slaves to be property with no rights, *Plessy v. Ferguson*, which upheld legally forced segregation, and *Korematsu v. United States*, which upheld the internment of American citizens of Japanese descent during World War II.

Pryor's defenders have tried to use his supposed "narrowing" of Alabama's ban on so-called "partial birth" abortion as an example of his willingness to enforce Supreme Court decisions he disagrees with, because he instructed district attorneys to enforce the law only in post-viability situations. In fact, the law he was trying to salvage had an additional constitutional flaw because it contained no exception to protect a woman's health.

In response to a written question from Sen. Schumer, Pryor said that he would have to acknowledge, after the Court's *Stenberg* ruling overturning a similar Nebraska "partial birth" ban, that the Alabama law was unconstitutional without a health exception. But it is clear as a matter of law that the Alabama law was unconstitutional even before that ruling. *Stenberg* made no new law regarding a health exception; the Court majority reaffirmed what it had clearly established in its *Roe* and *Casey* rulings.

Pryor's actions regarding the Alabama law, far from demonstrating a commitment to enforcing laws and Supreme Court rulings he disagrees with, actually demonstrated his willingness as attorney general to try to enforce a law that was clearly unconstitutional. This severely undermines the assertions of Pryor and his supporters that he could be counted on to separate his personal views from his responsibilities as a judge. In any event, there is a vast difference between the job of an attorney general, enforcing laws that others have created, and that of a judge, charged with interpreting the law in nuanced and complex situations.

## **Privacy, Equality Under the Law, and the Texas Sodomy Case**

On behalf of Alabama, Pryor filed an *amicus curiae* brief in *Lawrence v. Texas*, joined only by Utah and South Carolina, urging the Supreme Court to uphold the Texas "Homosexual Conduct" law, which criminalized private consensual sex between adults of the same gender. Pryor's *amicus* brief equated for purposes of legal analysis sex between two adults of the same gender with "activities like prostitution, adultery, necrophilia, bestiality, possession of child

pornography, and even incest and pedophilia.” Pryor’s arguments were rejected by the Court in a landmark 6-3 ruling overturning the Texas law. A 5-4 majority overturned the Court’s infamous *Bowers v. Hardwick* ruling, which Pryor’s brief extolled.

In a written response to a question from Sen. Dick Durbin about the arguments in his *amicus* brief, Pryor wrote, “Of course, gays and lesbians are entitled to the same protections as any other Americans under the Constitution....” This statement is outrageously disingenuous, since Pryor had contended in his brief that the Court should reject the petitioners’ arguments that the Texas law, by singling out gay men and lesbians for discriminatory treatment, violated the Equal Protection Clause. In fact, Pryor’s brief needlessly addressed the equal protection question, since Alabama’s sodomy law, unlike the Texas law, applies to everyone. If Pryor really believed that “gays and lesbians are entitled to the same protections as other Americans under the Constitution,” he could have refrained from filing an *amicus* brief at all (as did most states with sodomy laws), or he could have confined his brief to the due process and privacy questions and taken no position on equal protection. The fact that Pryor stretched to address the equal protection question calls into serious question his post-nomination assertion that he believes gay men and lesbians are entitled to the equal protection of the law.

In a written response to a question by Sen. Schumer, Pryor cited the Tenth Amendment (which refers to powers reserved to the states) as the basis for his claim that the state can prohibit sex between same-sex couples because such conduct may have “spiritual consequences.” Fortunately, the Supreme Court did not embrace this dangerous view of the Tenth Amendment, which would grant states tremendous power to curtail individual rights based on majority views about what actions could have negative “spiritual consequences.”

### **Religious Liberty and Separation of Church and State**

Bill Pryor has been a fervent supporter of Alabama Chief Justice Roy Moore and his Ten Commandments crusade. This month, a three-judge panel of the U.S. Court of Appeals for the 11<sup>th</sup> Circuit, to which Pryor has been nominated, unanimously ruled against Moore for using the power of his office to turn the Alabama state judicial building into a forum for proselytizing his religious views. Moore had installed a massive monument of the Ten Commandments in the rotunda of the state courthouse after being elected on a campaign emphasizing his insistence on displaying the Ten Commandments in his state trial courtroom, a display that Pryor had supported. (Pryor also supported Moore’s sponsorship of sectarian prayers before juries.)

At his hearing and in his written answers, Pryor tried to put some distance between himself and Moore, an effort that finds no support in the public record.

Both Pryor and Sen. Sessions have suggested that because of Pryor’s alleged disagreements with Moore on church-state questions, Moore “eventually,” in Sessions’ words, had his own lawyers make the case for his Ten Commandments monument. But contemporary records show that Pryor appointed three private lawyers as Deputy Attorneys General of Alabama to represent Moore just four days after the lawsuit challenging the Ten Commandments monument was filed. At the time, Pryor said, “I look forward to providing a vigorous defense of the Ten Commandments and feel strongly that the display of the Ten Commandments in the rotunda of the judicial building does not violate the First Amendment.”

The recent ruling by the 11<sup>th</sup> Circuit rejecting that display recognized the extremist point of view argued by Deputy Attorney General Herbert Titus in this case. In its ruling, the appeals

court wrote, “If we adopted [Moore’s] position, the chief justice would be free to adorn the walls of the Alabama Supreme Court’s courtroom with sectarian religious murals and have decidedly religious quotations painted above the bench. Every government building could be topped with a cross, or a menorah, or a statue of Buddha, depending upon the views of the officials with authority over the premises.”

Pryor has refused the opportunity to clarify his supposed disagreement with the legal positions advanced by Herbert Titus on behalf of Moore in his capacity as a Deputy Attorney General of Alabama.

## **Other Issues**

At his hearing or in written answers to senators’ questions, Pryor:

- affirmed that he still disagrees with the Supreme Court’s ruling that handcuffing an Alabama prison inmate to a hitching post for hours in the hot sun without bathroom breaks or sufficient water violated the 8<sup>th</sup> Amendment’s prohibition on cruel and unusual punishment.
- said he believes that the Supreme Court should not be “the arbiter of the method of capital punishment in Alabama,” an example of Pryor’s dangerous view that the Constitution should not apply to certain matters regarding individual rights guaranteed by the Bill of Rights and the 14<sup>th</sup> Amendment.
- said that he still believes that Virginia Military Institute’s denial of admission to women in the late 20<sup>th</sup> Century was constitutional because military academies had denied admission to women for more than a century after the 14<sup>th</sup> Amendment had been adopted. (This ignores the fact that the nation’s military academies had been co-ed for nearly a quarter-century by the time of the VMI ruling or that there are a number of practices that took place after the 14<sup>th</sup> Amendment was ratified that we would not even attempt to justify today, such as school segregation.)
- ducked questions about his public statements that he was happy that the *Bush v. Gore* decision ending ballot counting in Florida was 5-4 because it would demonstrate to President Bush the importance of “the judiciary and judicial selection, so we can have no more appointments like Justice Souter.” Pryor’s comment reflects an apparent belief in a judiciary that is selected for adherence to a particular political ideology.

## **Diversions and Deceptions by Pryor Supporters**

Pryor’s supporters have made much of the fact that Pryor supported the repeal of Alabama’s constitutional ban on interracial marriage in 2000. But that provision had been rendered unenforceable by the U.S. Supreme Court more than 30 years earlier. While Pryor’s position was praiseworthy, Pryor’s public support for repeal of an unenforceable measure does nothing to offset the potential consequences of his states’ rights extremism and his support for efforts to weaken or eliminate key enforcement mechanisms of the federal Voting Rights Act.

Pryor’s supporters, including Sen. Orrin Hatch and a number of Religious Right political leaders, have tried to suggest that opposition to Pryor’s confirmation is a reflection of religious bias against Catholic nominees. In fact, it was Hatch who introduced the question of Pryor’s religious beliefs into the confirmation hearing over the strenuous objections of Sen. Patrick Leahy. Opposition to Pryor’s confirmation is grounded firmly in his clear public record and his far-right legal and judicial philosophy, not his religious beliefs. Hatch seems to be trying to

stake out an entirely unreasonable position that it is a reflection of bias to criticize a nominee's judicial philosophy if it can be claimed that the nominee's legal views are related to his or her religious beliefs. It is a long and disreputable tradition for Religious Right leaders to cry religious bigotry in response to any criticism of their political agenda or tactics. It is repugnant for Sen. Hatch to adopt the same divisive tactics regarding judicial nominees and criticism of their legal and judicial philosophies.

### **The Senate's Responsibility**

In testimony before a subcommittee of the Senate Judiciary Committee in 1997, Pryor himself told senators that "your role of advice and consent in judicial nominations cannot be overstated." Given the tremendous power that lifetime judges on the federal appeals courts wield over Americans' lives and liberties, senators must carry out their constitutional responsibility to play an independent role in evaluating judicial nominees. Senators must reject those nominees who are not committed to preserving Americans' rights, liberties, and legal protections. Bill Pryor's record is disturbingly clear. The Senate Judiciary Committee should reject his confirmation.