Testimony of

The Honorable Russ Feingold

September 5, 2002

Senate Judiciary Committee

Statement of U.S. Senator Russell D. Feingold
on the Nomination of Priscilla Owen

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Mr. Chairman, I will vote NO on the nomination of Priscilla Owen to be a judge on the U.S. Court of Appeals for the Fifth Circuit. I'd like to take a moment to explain my decision.

I first want to commend the Chairman for the way that he has handled this nomination. It is my view that a process that gives a nominee a hearing, and then a vote in this Committee is a fair process. It is the way that this Committee is supposed to work. Too often in the past, as all of us know, the Committee did not work that way. The Chairman has worked hard to be fair, and I think that he has succeeded.

After this vote, this Committee will have considered 80 judicial nominations in this Congress, and I will have voted against only four. Justice Owen will be only the third Court of Appeals nominee I have opposed in Committee, while I have voted in favor of 13 Circuit Court nominees.

Mr. Chairman, there are a number of factors that I believe require us as a Committee to give this nomination very careful consideration. First, we should consider that judges on our Courts of Appeals have an enormous influence on the law. Whereas decisions of the District Courts are always subject to appellate review, the decisions of the Courts of Appeals are subject only to discretionary review by the Supreme Court. The decisions of the Courts of Appeals are in almost all cases final, as the Supreme Court agrees to hear only a very small percentage of the cases on which its views are sought. That means that the scrutiny that we give to Circuit Court nominees must be greater than that we give to District Court nominees.

Another important consideration for this Committee is the ideological balance of the Fifth Circuit. The Fifth Circuit is comprised of Texas, Louisiana, and Mississippi. The Fifth Circuit contains the highest percentage of minority residents - over 40 percent - of any circuit other than the D.C. Circuit. It is a court that during the civil rights era issued some of the most significant decisions supporting the rights of African American citizens to participate as full members of our society. As someone who believes strongly in freedom, liberty, and equal justice under law, and the important role of the federal courts to defend these fundamental American principles, I am especially concerned about the make-up of our circuit courts and their approaches to civil rights issues.

Even after eight years of a Democratic President, the Fifth Circuit currently has a 10-to-5 majority of Republican appointees. That is because during the last six years of the Clinton Administration, this Committee did not report out a single judge to the Fifth Circuit. And as we all know, that was not for lack of nominees to consider. President Clinton nominated three well-qualified lawyers to the Fifth Circuit - Jorge Rangel, Enrique Moreno, and Alston Johnson. None of these nominees even received a hearing before this Committee. When the current Chairman held a hearing in July 2001 on the nomination of Judge Clement for a seat on the Fifth Circuit, only a few months after she was nominated, and less than two months after Democrats took control of the Senate, it was the first hearing in this Committee for a Fifth Circuit nominee since September 1994. Judge Clement, of course, was confirmed later in the year.

So, Mr. Chairman, there's a history here, and a special burden on President Bush to consult with our side on nominees for this Circuit. Otherwise, we would simply be rewarding the obstructionism that the President's party engaged in over the last six years by allowing him to fill with his choices seats that his party held open for years, even when qualified nominees were advanced by President Clinton. And I say once again, my colleagues on the Republican side bear some responsibility for this situation, and they can help resolve it by urging the Administration to address the injustices suffered by so many Clinton nominees. One step in the right direction would be for my Republican colleagues to urge the President to re-nominate some of those Clinton nominees that never received a hearing or vote in this Committee. That includes Clinton nominees to the Fifth Circuit.

With that background, let me outline the concerns that have caused me to reach the conclusion that Justice Owen should not be confirmed.

Justice Owen has had a successful legal career. She graduated at the top of her class from Baylor University Law School, worked as an associate and partner at the law firm of Andrews & Kurth in Houston, and has served on the Texas Supreme Court since January 1995. These are great accomplishments.

But Justice Owen's record as a member of the Texas Supreme Court leads me to conclude that she is not the right person for a position on the Fifth Circuit. I am not convinced that Justice Owen will put aside her personal views and ensure that all litigants before her on the Fifth Circuit receive a fair hearing. Her decisions in cases involving consumers' rights, workers' rights, and reproductive rights suggest to me that she would be a judge who would be unable to maintain an open mind and provide all litigants a fair and impartial hearing.

Justice Owen has a disturbing record of siding against consumers or victims of personal injury and in favor of business and insurance companies. When the Texas Supreme Court, which is a very conservative and pro-business court, rules in favor of consumers or victims of personal injury, Justice Owen frequently dissents. According to Texas Watch, during the period 1999-2002, Justice Owen dissented almost 40% of the time in cases in which a consumer prevailed. But in cases where the consumer position has not succeeded, Justice Owen never dissented.

At her hearing, Senator Kennedy and Senator Edwards asked Justice Owen to cite cases in which she dissented from the majority and sided in favor of consumers. Justice Owen could cite only

one case, Saenz v. Fidelity Guaranty Ins. Underwriters, 925 S.W. 2d 607 (Tex. 1996). But Justice Owen's opinion in this case hardly took a pro-consumer position since it still would have deprived the plaintiff of the entire jury verdict. She did not join Justice Spector's dissent, which would have upheld the jury verdict in favor of Ms. Saenz.

Also during the hearing, Senators Feinstein and Durbin questioned Justice Owen about Provident American Ins. Co. v. Castaneda, 988 S.W. 2d 189 (Tex. 1998). In that case, the plaintiff sought damages against a health insurer for denying health care benefits, after the insurer had already provided pre-operative approval for the surgery. Justice Owen, writing for the majority, reversed the jury's verdict in favor of the plaintiff and rejected the plaintiff's claim that the health insurer violated the Texas Insurance Code and the Deceptive Trade Practices Act. At the hearing, Justice Owen defended her opinion by saying that she believed that the plaintiff was seeking extra-contractual damages and that the plaintiff had already received full coverage under the policy and statutory penalties. But, in the words of her colleague, Justice Raul Gonzalez, who wrote a dissent, Justice Owen's opinion "may very well eviscerate the bad-faith tort as a viable case of action in Texas." Id. at 212 (Gonzalez, J., joined by Spector, J., dissenting). The cause of action for bad faith is designed to deter insurers from engaging in bad faith practices like denying coverage in the first place.

In addition, with respect to several decisions involving interpretation and application of the Texas parental notification law, I am deeply troubled by Justice Owen's apparently ignoring the plain meaning of the statute and injecting her personal beliefs concerning abortion that have no basis in Texas or U.S. Supreme Court law. In 2000, the Texas legislature enacted a parental notification law that allows a minor to obtain an abortion without notification of her parents if she demonstrates to a court that she has complied with one of three "judicial bypass" provisions: (1) that she is "mature and sufficiently well informed" to make the decision without notification to either of her parents, (2) that notification would not be in her best interest, or (3) that notification may lead to her physical, sexual, or emotional abuse. Tex. Fam. Code § 33.003(i).

During Justice Owen's confirmation hearing, Senator Cantwell questioned Justice Owen about her positions in cases interpreting this law, focusing on Justice Owen's insistence in In re Jane Doe, 19 S.W. 3d 249, 264-65 (2000) (Owen, J., concurring) (Doe 1 (I)), that teenagers be required to consider "philosophic, social, moral, and religious" arguments before seeking an abortion. In her opinion, Justice Owen cited the Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), to support her contention that states can require minors to consider religious views in their decision to have an abortion. But, as Senator Cantwell noted, Casey in no way authorizes states to require minors to consider religious arguments in their decision on whether to have an abortion. Upon this further questioning, Justice Owen then said that she was referring to another Supreme Court case, H.L. v. Matheson, 450 U.S. 398 (1981), even though her opinion only cited Casey for this proposition. And even Matheson does not say that minors can be required by state law to consider religious arguments. It is my view that Justice Owen was going beyond not only a plain reading of the Texas statute, but Supreme Court case law, and inappropriately injecting her own personal views to make it more difficult for a minor to comply with the statute and obtain an abortion.

Finally, Mr. Chairman, I was not satisfied with Justice Owen's responses to my questions about bonuses to Texas Supreme Court law clerks. I asked her at the hearing whether she saw any ethical concerns with allowing law clerks to receive bonuses from their prospective employers during their clerkships. I also explored the topic further with her in followup written questions. Justice Owen states repeatedly in her written responses to my questions that she is not aware of law clerks actually receiving bonuses while they were employed by the Court. This seems implausible given the great amount of publicity given to an investigation pursued by the Travis County Attorney of exactly that practice and the well publicized modifications to the Texas Supreme Court's rules that resulted from that investigation and the accompanying controversy.

Even more disturbing, Justice Owen took the position, both at the hearing and in her responses to written questions, that because the Texas Supreme Court Code of Conduct requires law clerks to recuse themselves from matters involving their prospective employers, there really is no ethical concern raised by law clerks accepting bonuses while employed with the Court. I disagree. It is not sufficient for law clerks to recuse themselves from matters involving their prospective employers if they have received thousands of dollars in bonuses while they are working for the court. The appearance of impropriety and unfairness that such a situation creates is untenable. As I understand it, the federal courts have long prohibited federal law clerks both from receiving bonuses during their clerkships and from working on cases involving their prospective employers. I'm pleased that the Texas Supreme Court finally recognized this ethical problem and changed its code of conduct for clerks. Justice Owen, in contrast, seems intent on defending the prior, indefensible, practice.

Mr. Chairman, I believe Justice Owen is bright and accomplished. But I sincerely believe that based on her judicial record, Justice Owen is not the right choice for this position. I wish her well in her continued work on the Texas Supreme Court, and I hope the President will put forward a nominee for this Circuit who the Committee can have confidence will enforce the law fairly and impartially to all litigants.

Thank you Mr. Chairman.