Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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STATEMENT ON JANICE ROGERS BROWN

Mr. Chairman, first I want to mention that I agree with Sen. Leahy and others who have commented that we are moving too quickly on this nominee. Her hearing was held only two weeks ago, and we received answers to written questions only yesterday. The nomination should not have been listed on the agenda last week. By listing matters prematurely, you have essentially eliminated the usefulness of the longstanding committee rule that any matter can be held over for one week. I don't understand the haste here. Once again, we see the "forced march" on nominations that since the beginning of this year has cause so much unnecessary bad feeling on this Committee.

I will vote No on Justice Brown's nomination to the D.C. Circuit. Let me first remind my colleagues of the importance of this Circuit in our judicial system. The D.C. Circuit is widely regarded as the most important federal circuit. It has jurisdiction over the actions of most federal agencies. Many of the highest profile cases that have been decided in recent years by the Supreme Court concerning regulation of economic activity by federal agencies in areas such as the environment, health and safety regulation, labor law, went first to the D.C. Circuit. In the area of administrative law and the interpretation of the major regulatory statutes such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the National Labor Relations Act, the D.C. Circuit is the last word, as the Supreme Court reviews only a tiny minority of Circuit Court decisions.

The D.C. Circuit is now almost evenly split, and has been for some time, between nominees of Democratic and Republican Presidents. There are five judges who were appointed by Republicans, including John Roberts who the Senate confirmed earlier this year, and four by Democrats, and there are three vacancies. President Clinton made two excellent nominations that were never acted upon by the Senate Judiciary Committee. In one case, the Committee held a hearing but never scheduled a vote, and in another, now-Harvard Law School Dean Elena Kagan, the Clinton nominee wasn't even given the courtesy of a hearing.

I am disappointed that the Bush Administration has not been willing to extend an olive branch on this Circuit in particular. At the beginning of his term, there were enough vacancies to accommodate the two nominations by President Clinton who were treated so badly in the 106th Congress and allow President Bush to nominate additional judges to the Circuit. The Administration squandered an opportunity to change the tone and repair some of the damage done to the nomination process by previous Congresses.

In light of the situation on this Circuit, I believe it is my duty to give this nomination very close scrutiny. Mr. Chairman, after reviewing this nominee's record and her testimony at the hearing two weeks ago, I will vote No. I do not believe she is the right person at this time to be given a lifetime appointment to this important court.

At her hearing, I asked Justice Brown about a case on age discrimination called Stevenson v. Superior Court. The majority in that case said that Ms. Stevenson's wrongful discharge violated a fundamental public policy against age discrimination. Justice Brown dissented, saying that the plaintiff had "failed to establish that public policy against age discrimination...is fundamental and substantial." She went on: "Discrimination based on age does not mark its victim with a stigma of inferiority and second class citizenship."

These statements looked shocking when I read them, but I wanted to make sure I understood Justice Brown's views, so I questioned her about the case, and concluded by asking if it was fair to say she believed age discrimination does not stigmatize senior citizens. She agreed that it was. I appreciate her candor, but I have to say I found that testimony very troubling. Senior citizens in this country live every day with the stigma of age discrimination; it is a real problem, and I think everyone here takes it very seriously. Just because we all will be old someday, and therefore perhaps will be subject to prejudice and discrimination of this type, doesn't make it any less reprehensible. I haven't heard anyone on the Committee trying to defend Justice Brown's view on this issue; nor do I expect to, because it is essentially indefensible.

Mr. President, I was also concerned by a comment Justice Brown made in 2000 about senior citizens. She said: "Today senior citizens blithely cannibalize their grandchildren because they have a right to get as much free stuff as the political system will permit them to exact." When I asked her about this statement at her hearing, she made no effort to distance herself from it.

Justice Brown seemed to suggest at her hearing that we should ignore her speeches because she was just trying to be provocative in talking to audiences of youthful lawyers. She said that in her judging she is non-ideological. The problem with that position is that the caustic style and even some of the extreme language she used in her speeches makes its way into her opinions. For example, in a 2000 speech entitled "50 Ways to You're your Freedom" in which Justice Brown suggests there may be some validity to the substantive due process theory of the Lochner case, she says the following: "[I]f we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a Kleptocracy - a license to steal, a warrant for oppression."

In 2002, Justice Brown dissented in a zoning case called San Remo Hotel v. San Francisco. In that case, San Francisco had a requirement that when residential hotels were converted into daily hotels, the owners pay a fee to help the government pay for affordable housing that would make up for the housing that was lost in the conversion. This seems like a fairly mild requirement to me, and the majority of the court saw nothing wrong with it. But her dissent used very strong language to criticize the requirement. She said, in words that sounds an awful lot like her speech, that San Francisco was "[t]urning a democracy into a kleptocracy." In case that wasn't strong enough, she added that the government had imposed a "neo-feudal regime." Frankly, I had a hard time imagining a more extreme statement than that, but Justice Brown came up with one: "Private property...is now entirely extinct in San Francisco."

It is comments like these in her opinions and speeches, and there are many, many such quotations that were discussed at her hearing, that lead me to question whether Justice Brown has the temperament to be a fair judge. Despite her testimony at the hearing that "I am not an ideologue of any stripe," much of her record demonstrates the contrary. She seems to view the world through an ideological prism, and she expresses her views in the most divisive and striking language of any nominee we have seen thus far.

Referring to cases upholding President Franklin Roosevelt's New Deal legislation, for example, Justice Brown has said that "1937...marks the triumph of our own socialist revolution." She went on to say that "In the New Deal/Great Society Era, a rule that was the polar opposite of American law reigned." At her hearing, Senator Durbin asked her about another speech, where she said that "Protection of private property was a major casualty of the revolution of 1937." She said, "I don't think that's at all controversial." Mr. Chairman, the court to which Justice Brown has been nominated has a docket that is laden with challenges to government regulations and interpretations of federal statutes dealing with economic regulation. I am not confident that Justice Brown will follow the law, and not her personal views on the law, in hearing those cases.

Mr. Chairman, I have heard my colleagues argue that Justice Brown will follow the law faithfully on the court, that she will be constrained by precedent. I simply don't find these assurances reassuring. As Justice Brown herself acknowledged in the Hughes Aircraft case, "all judges 'make law'." When they are faced with questions of first impression, they have no choice. And when they sit on a court of last resort, as Justice Brown does now, there is no one to stop them. Federal Courts of Appeals also often hear questions of first impression. And for all practical purposes, they are often courts of last resort, because the Supreme Court reviews only a tiny percentage of their cases. So we must to ask ourselves: How will Justice Brown use her enormous power as a federal appellate judge when she has the opportunity to make new law? I

Justice Brown's record does not give me comfort in answering that question. Too often, she seems to adopt contrary theories of judging and even statutory interpretation depending on which outcome she favors.

When the plaintiffs were victims of employment discrimination, she supported limits on punitive damages. [Lane v. Hughes Aircraft, 22 Cal. 4th 405 (2000). But when the plaintiffs were property owners prohibited from increasing rent in a mobile home park, she opposed any limit on damages. [Galland v. City of Clovis, 24 Cal. 4th 1003.]

When the California Supreme Court ruled that juries must be given a certain instruction to protect criminal defendants, Justice Brown dissented because of her faith in juries: "I would presume, as we do in virtually every other context, that jurors are 'intelligent, capable of understanding instructions and applying them to the facts of the case.'" [People v. Guiuan, 18 Cal. 4th 558 (1998).]

But she suddenly stopped trusting juries when faced with the possibility that they might award punitive damages to employers found liable for racial discrimination, writing: "When setting punitive damages, a jury does not have the perspective, and the resulting proportionality, that a court has after observing many trials." [Lane v. Hughes Aircraft, 22 Cal. 4th 405 (2000).]

When property owners would benefit from a literal interpretation of a voter initiative, Justice Brown wrote: "In my view the voters did not intend the courts to look any further than a standard dictionary in applying the terms. . . . " [Apt. Ass'n of Los Angeles Cty. v. City of Los Angeles, 24 Cal. 4th 830 (Jan. 2000). But only 11 months later, when those challenging an affirmative action program advocated a broad interpretation of a voter initiative, she had a different view. She said: "We can discern and thereby effectuate the voters' intention only by interpreting this language in a historical context." [Hi-Voltage v. City of San Jose, 24 Cal. 4th 537 (Nov. 2000).

When she wanted to limit the explicit right to privacy in the California's Constitution, she argued: " Where, as here, a state constitutional protection was modeled on a federal constitutional right, we should be extremely reticent to disregard U.S. Supreme Court precedent delineating the scope and contours of that right." [American Academy of Pediatricians v. Lungren, 16 Cal. 4th 307 (Aug. 1997)].

But when the majority of her court relied on analysis from the United States Supreme Court on the question of remedies for a violation of constitutional rights, she said: "Defaulting to the high court fundamentally disserves the independent force and effect of our Constitution. Rather than enrich the texture of our law, this reliance on federal precedent shortchanges future generations." [Katzburg v. Regents, 29 Cal 4th 300 (Nov. 2002)].

These examples lead me to conclude that the jurisprudence of Justice Brown is a Jurisprudence of Convenience. She is skilled at finding a legal theory to support a desired result. I do not think that kind of approach to judging should be rewarded with an appointment to the second highest court in the land.

Mr. Chairman, this nominee has complained about "militant judges" while herself openly defying precedent when it suits her; she believes that the New Deal was a "socialist revolution" and that America's elderly "cannibalize" their grandchildren for handouts; she has expressed doubts about the application of the Bill of Rights to the states through the incorporation and has suggested a return to an era when the courts regularly overturned the judgment of legislatures on questions of economic regulation. Mr. Chairman, I cannot support this nominee. I will vote No.