Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
June 16, 2005

Statement of U.S. Senator Russ Feingold
On the Nomination of Terrence Boyle
To the 4th Circuit Court of Appeals

April 28, 2005

Mr. Chairman, I will vote NO on the nomination of Judge Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit. I'd like to take a moment to explain my decision, and ask that my full statement be placed in the record.

Mr. Chairman, I believe that we as a Committee must give this nomination very careful consideration. 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 the scrutiny we give to District Court nominees.

I believe that in considering this nomination we should take notice of the recent history surrounding the Fourth Circuit. The Fourth Circuit, comprised of Virginia, West Virginia, North Carolina, South Carolina, and Maryland, has evolved into one of the most conservative benches in the country. According to several statistical studies, the court is the most restrictive federal appeals court in the nation in granting new hearings in death penalty cases. And it has blazed new trails in striking down laws that a majority of its judges say improperly enhance federal power at the expense of the states.

Even after eight years of a Democratic President, the Fourth Circuit maintained a significant majority of Republican appointees entering President Bush's first term in office. The court currently has 9 Republican appointees, and only 4 Democratic appointees. Why? Because during the Clinton administration, this Committee and the Senate failed to confirm even a single North Carolinian to the Fourth Circuit. And it confirmed only two of President Clinton's eight nominees to that circuit court. So far, in President Bush's term, we have already confirmed three Fourth Circuit Judges.

When President Clinton failed to renominate Judge Terrence Boyle to the Fourth Circuit after Boyle's nomination by the first President Bush was not successful, Senator Jesse Helms bore a grudge. Helms blocked every Clinton nominee from North Carolina, including two African-American judges. As a result, there is now only one judge from North Carolina on the Fourth Circuit, even though North Carolina has the largest population of any state in the Circuit.

So Mr. Chairman, there's a history here, and a special burden on President Bush to consult with our side of the aisle on nominees for this Circuit. Otherwise, we would simply be rewarding the obstructionism that Senator Helms and the Republicans engaged in during the Clinton Administration, when they essentially held open this seat on the Fourth Circuit for eight years, even when qualified nominees were advanced by President Clinton.

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

There is no doubt that Judge Boyle has had a successful legal career. He graduated from American University School of Law, worked as a legislative aide for Senator Jesse Helms, and then joined the North Carolina firm of LeRoy, Wells, Shaw, Hornthal & Riley. Since 1984 he has served as a federal judge in the Eastern District of North Carolina. These are significant accomplishments.

Judge Boyle's record as a district court judge leads me to conclude that he is not the right person for a position on the Fourth Circuit. Judge Boyle has been reversed 150 times, twice the reversal rate of other judges in the circuit, and higher than the average rate of district court judges around the county. In fact, he has been reversed twice as often as any other federal district court judge that President Bush has nominated to an appellate court. This reversal rate calls into question Judge Boyle's ability as a judge and makes it difficult for me to support his elevation to an appellate court, a court of last resort for most federal claims.

Judge Boyle's reversal rate is particularly troublesome because in many cases, he has blatantly disregarded well-established precedent and flaunted procedural rules.

For starters, there is a serious question about whether Judge Boyle gives plaintiffs a fair chance to have their day in court. For example, Judge Boyle has been repeatedly reversed for violating the same procedural rule by failing to give a party proper notice and an opportunity to respond when he converts a motion to dismiss into a motion for summary judgment.

In United States v. Wilson, a petition for habeas corpus relief, Judge Boyle converted a motion to dismiss into a motion for summary judgment. Then, without informing the plaintiff, as required by the federal rules of civil procedure when such a conversion is made, he granted summary judgment. On appeal, the Fourth Circuit reversed the grant of summary judgment. He repeated this mistake at least twice more, and each time he was reversed by a Fourth Circuit panel citing the same controlling precedent that the previous panel had cited in Wilson. This shows either a cavalier attitude towards precedent or a refusal to understand the law. Neither is a quality befitting a nomination to a federal Court of Appeals.

I also remain unconvinced that Judge Boyle will put aside his personal views and ensure that all litigants before him in the Fourth Circuit receive a fair hearing. His decisions in cases involving employment discrimination, voting rights, campaign finance reform and the Americans with Disabilities Act suggest that he would be unable to maintain an open mind and provide litigants a fair and impartial appellate hearing.

Judge Boyle's record reveals hostility towards individual and civil rights. Federal district court judges have enormous power in civil rights cases. In looking at some of Judge Boyle's opinions, I am troubled by his willingness to disregard precedent in ways that prevent minority plaintiffs from obtaining the relief to which they are entitled under the law.

For example, in United States v. North Carolina, North Carolina was sued for discriminating against women applying for jobs in the state's correctional facilities. The parties to that suit - the Justice Department and the state of North Carolina - came to Judge Boyle with an agreement to settle the discrimination claim. Such settlement agreements are virtually always accepted.

Instead, astoundingly, Judge Boyle threw out the case. He said there was no subject matter jurisdiction, even though the plain language of Title VII, as well as Supreme Court case law interpreting that plain language, clearly established jurisdiction. He found no jurisdiction because the government had not provided evidence of intentional discriminatory practice, an element of a test he apparently developed on his own, given that two decades of Supreme Court precedent provided that disparate impact cases brought under Title VII did not require such proof. He then criticized the federal government for attempting to force North Carolina to adhere to a national standard of equal opportunity. He wrote, "it is most emphatically not the purpose of federal law to impose uniformity of cultural outcome upon the individual states." A uniformity of cultural values? Is that what our federal anti-discrimination laws amount to in the opinion of Judge Boyle?

Mr. Chairman, Judge Boyle's blatant disregard for precedent in that case is simply shocking. In response to my questions about the case, Judge Boyle simply says that he recognizes the Supreme Court's prior holdings, with no

explanation for why he chose not to follow them. Either this Judge is attempting to blaze his own path or he is not capable of applying the law.

Judge Boyle has also demonstrated consistent hostility to the Americans with Disabilities Act. In Pierce v King, one of the Judge's earliest decisions involving the ADA, which was later vacated by the Supreme Court, he questioned what Fourteenth Amendment rights are vindicated by the Act. He stated that the ADA "has little to do with promoting the 'equal protection of the laws,'" and wrote, "although framed in terms of addressing discrimination, the Act's operative remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability." He has repeated this sentiment in later ADA cases.

In Williams v. Avnet, another ADA case, Judge Boyle made a number of errors criticized by the Fourth Circuit. Perhaps most egregious was his view of how a court should determine whether an employee's requested accommodation is reasonable. He wrote that the standard of reasonableness in the ADA accommodation context "is grounded in deference to an employer's expert business decision flowing from a presumption that people behave in an economically rational manner, and an understanding that the requirement of reason is a requirement of economic rationality." Under Judge Boyle's highly deferential and subjective standard, which the Fourth Circuit later rejected as contrary to its objective standard, the ADA would lose all force. In response to my written question about his decision in this case, Judge Boyle simply wrote, "The Fourth Circuit has set forth the applicable standard," and stated that he would follow it. Yet there is no explanation for why he chose to ignore it when he decided the Williams case. And, of course, when he is on the Circuit Court, he will have the opportunity to set the standard, and I do not have confidence that he would faithfully apply the statute in doing so.

Judge Boyle has also been reversed twice by the Supreme Court in the same voting rights case, Hunt v. Cromartie. On two separate occasions, Judge Boyle decided that North Carolina's Twelfth Congressional District violated the Constitution as a race-based gerrymander. The Supreme Court rejected both decisions.

In his first decision, Judge Boyle granted summary judgment for the plaintiffs without the parties having conducted discovery and without a single evidentiary hearing. The Supreme Court reversed, in a unanimous opinion written by Justice Thomas, finding the Judge had prematurely decided the case despite the existence of a key factual dispute: whether the primary motivation for the district was racial or political. On remand, Judge Boyle again found the district unconstitutional, disregarding Supreme Court direction and relying in large part on the evidence Justice Thomas had previously found insufficient. The Supreme Court again reversed, finding that Judge Boyle had committed clear error. It seems clear to me that Judge Boyle was attempting to fit the facts of the case to a predetermined outcome.

Judge Boyle also tried to undermine well-established campaign finance law, in a decision that obviously would have opened a significant loophole in our campaign finance system, when he held that certain non-profit organizations had a First Amendment right to contribute directly to political campaigns. The group at issue in the case, Beaumont v. FEC, was a pro-life organization that took donations from corporate funders. Judge Boyle stated that the government had no compelling interest in preventing corporate-funded non-profits from donating to political campaigns.

I find this astonishing. As we all know, corporations are banned from funneling donations to politicians through charities because of the threat that corporations will use their massive economic power to influence our political process. Nonetheless, Judge Boyle held that the corporation in question was no threat to the process "in light of its non-profit, ideological nature." But it seems obvious that even ideological groups can serve as conduits for corporate influence when they accept money from corporations, as the group in Beaumont did.

The decision turned aside a century of congressional efforts to curb corporate influence on federal elections, as well as consistent Supreme Court decisions upholding this principle. The Supreme Court reversed in a 7-2 decision, saying that upholding his opinion would require overturning the structure of our campaign finance law. Judge Boyle seems to have been willing to completely disregard legal precedent to find that a corporate-funded anti-abortion group has a right to donate directly to political candidates. This disregard of precedent makes me think the decision was an effort to impose his own personal views on a system with which he disagrees.

Mr. Chairman, again and again, Judge Boyle stated in his answers to my written questions that he recognizes Supreme Court precedent and well-established law. Yet, he has repeatedly ignored controlling precedent, either

because of a personal agenda, or because he simply does not care to apply the law. Neither attribute is suitable for a judge on the Court of Appeals. I sincerely believe that based on his judicial record, Judge Boyle is not the right choice for this position. I wish him well in his continued work on the district 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.