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SETTING THE RECORD STRAIGHT: THE NOMINATION OF JUSTICE PRISCILLA OWEN

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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SETTING THE RECORD STRAIGHT: THE NOMINATION OF JUSTICE PRISCILLA OWEN

THURSDAY, MARCH 13, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:33 a.m., in room SD–106, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Chambliss, Cornyn, Leahy, Kennedy, Feinstein, Feingold, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We will begin. I just want to begin by speaking for all of my fellow Utahns. If you don't believe in miracles, then look at Elizabeth Smart. Everybody in that State was praying for Elizabeth Smart, and the family has worked so hard to try and find her, and we are just so grateful today that she is now back with her family. And I just want to thank God publicly for the miracle that has occurred. We will certainly do everything in our power to make sure that our children are protected in this country, and this committee has done a pretty good job so far this year with the Amber Alert and the PROTECT Act that both Senator Leahy and I have worked very closely together on, as have other members of this committee.

I just want to express my gratitude for this wonderful miracle and the answer to prayers of not just Utahns. I know there are people all over this country praying for these little girls that are abducted.

Senator LEAHY. Mr. Chairman, would you yield on that?

Chairman HATCH. I would be happy to yield.

Senator LEAHY. I want to join you in that. I know you and I had a lot of private discussions during that time. You were keeping me posted on everything from the discussion of the neighborhood and the people. I know how deeply you felt that, both as a person and as a Utahn. My former colleague who was elected the same year as I was, Jake Garn, talked to me about it. And as you know, I told you that we Vermonters half a continent away joined in your prayers for her safety. The thrill that everybody in my family felt in seeing something, and I must admit that I had this terrible fear that we would never see her alive. It is wonderful. I know Senator Hutchison is coming here, and she and Senator Feinstein and you and I worked—we passed, in record time, the Amber Alert bill last

year. The House leadership decided not to bring it up. We passed it again this year. I hope they will bring it up. I know you and I will work with them.

But I just want to join in saying what a wonderful day it is for your State and for the Smart family, and the prayers of, I think, every single Member of the Congress but many millions of Americans have been answered. And in my faith, we do believe in miracles, and this has to be one.

Chairman HATCH. Well, thank you, and I just want to compliment the Smart family for their never giving up. They always believed she was alive. They did everything they possibly could, and more. I think they set an example for all of us in this country, and that family deserves a lot of credit. And I just am so grateful this morning, I just had to express that.

Well, we will begin our hearing. Good morning. Welcome to the hearing on the nomination of Justice Priscilla Owen of Texas to the U.S. Court of Appeals for the Fifth Circuit.

Justice Owen, we want to welcome you again before the committee. A lot of people have been looking forward to this committee's reconsideration of your nomination. People in my home State of Utah have flooded my office with phone calls and letters and e-mails in support, and I have heard from quite a few folks from Texas and elsewhere across the country as well.

Now, I called this hearing because I believe Justice Owen's treatment in this committee last September was unfair, unfounded, and, frankly, in my opinion, a disgrace to the Senate. As several of the members who voted against her admitted, Justice Owen is a tremendously intelligent, talented, and well-credentialed nominee. She earned the American Bar Association's highest rating, unanimously well qualified, and was the first person with that rating ever voted down by this committee. She is also an honest, decent, fair, principled, and compassionate human being and jurist whose service on the Fifth Circuit would be a great benefit to that court and our country. I believe she should have been confirmed last year, and she hopefully will be confirmed this year.

I have made these views clear several times, so it should come as no surprise that after the American voters returned the Senate to the Republicans, and, therefore, the chairmanship of this committee to me, that this committee will now begin setting straight what we consider to be the mistake it made by halting this nomination in the committee last fall.

Now, we will have a hearing, we will have a vote in committee, and we will give the full Senate an opportunity to vote on this nominee. It is important to note that the committee vote last year was a straight party-line vote which denied the rest of the Senators an ability to vote on Justice Owen.

Let me be clear about one other thing: I personally do not believe that Justice Owen needs another hearing. Justice Owen gave complete and appropriate answers to all questions last time. Senator Feinstein, who presided at last year's hearing, was entirely fair and appropriate in that role. As Senator Leahy said before the committee vote, "Those who have had concerns have raised them and have heard the nominee's responses. To her credit, she has met pri-

vately with those who have had concerns, as well as her public testimony, and has answered the followup questions."

I agree that Justice Owen has answered all relevant questions, and then some, and has provided this committee with all the information it needs. She is a model witness, in my opinion, one of the very best this committee has ever had the honor of considering. Now, this hearing is certainly not a do-over for Justice Owen. It is an encore.

For the committee, this hearing is about remedying the wrongful treatment provided to Justice Owen. I don't say this to offend any member of this committee. My colleagues, I think they all know that I have deep personal respect and friendship for each one of them. And I know they voted according to their best judgment at the time. Nevertheless, as I reviewed the transcript of Justice Owen's last hearing and read her answers to written followup questions, and then reviewed the comments made at the markup debate, I was struck at the pervasive way in which Justice Owen's answers were almost totally ignored. The same accusations made by members at her hearing were repeated at the markup as if Justice Owen's answers did not even exist, as if she was never even before the committee.

Let me just give a couple of examples. There are too many to cover them all.

At the hearing, Justice Owen was accused of needlessly delaying an opinion in the case of *Ford* v. *Miles*, the Willie Searcy case, and it was alleged that the young man died waiting for Justice Owen's opinion. Justice Owen clarified that Mr. Searcy passed away 3 years after the Texas Supreme Court's decision. But the same false allegation was raised and repeated at the markup as if Justice Owen had never given this committee the correct facts.

At the hearing, Justice Owen was accused of ruling against abortion rights in cases involving Texas' parental notification law. Justice Owen clarified that the notification statute, and, therefore, her written opinions, concerned only the law that girls younger than 18 tell one of their parents. The right of those girls to obtain abortions was never questioned by the law or by Justice Owen. Yet, as if she had never appeared before the committee, one member of the committee stated during the markup debate that Justice Owen is "frequently in dissent from rulings of the Texas Court majority sustaining a young woman's right to have an abortion." That is simply a misstatement of the facts.

Also at the hearing, Justice Owen was accused of not finding in favor of any plaintiffs or consumers, as if a good judge would simply hand out half of her decisions to plaintiffs and half to defendants in a display of ends-oriented activism, rather than look to the law upon which both sides based their arguments. Justice Owen listed a number of cases in which, based on the law, she had ruled on the side of individual plaintiffs, including *GTE* v. *Bruce*, a case affirming a $275,000 jury verdict in favor of female victims of sexual harassment. But at the markup, several members repeated the allegation as though her testimony and answers to followup questions had been written in invisible ink.

In her written questions, Justice Owen was asked about her dissent in the case of *Weiner* v. *Wasson*, the charge being made that

the majority opinion has "lectured" Justice Owen about the importance of following precedent. Justice Owen pointed out in a cogent written response that the majority was, in fact, responding to an argument made by the defendant that a prior Texas Supreme Court decision should be overturned. At the markup, the very same charge was repeated, as though Justice Owen had entered a guilty plea previously.

There are several other examples, including the fact that Judge Gonzales' oft-repeated comment was not directed at Justice Owen, that I just do not want to take the time to get into. But this pattern of ignoring answers is exactly what happened to Justice Owen.

So although we are not beginning anew to review this nomination, and there is no reason simply to rehash old and answered allegations, I nevertheless hope and expect committee members, and especially those who voted against her, to come to this hearing with a fresh mind and with a genuine willingness to listen, to consider, and to think again on this matter.

We are quite fortunate to have with us today Senator Cornyn, and I understand that Senator Hutchison, who is at the Commerce Committee right now, will come very soon, whose support for Justice Owen's nomination is as well known as it is well deserved. Texas could not have two finer and more effective publici servants in the Senate. Senator Hutchison has worked tirelessly over the past 2 years to make sure our colleagues know the facts about Justice Owen's distinguished career, service to Texas, and perhaps most importantly, Justice Owen's high personal integrity, fairness, and commitment to equal justice under the law.

Senator Cornyn, although new to the Senate, is certainly not a newcomer to this nomination. He is certainly a member of this committee. He is not a newcomer to Justice Owen or to several of the issues that were misunderstood or misconstrued as part of the effort to halt this nomination in committee last fall. Indeed, Senator Cornyn knows many of these issues better than any member of this committee ever could. Senator Cornyn brings a unique and compelling perspective on Justice Owen's nomination, having served side by side with Justice Owen as a colleague on the Texas Supreme Court. He examined many of the same legal issues and knows how she approached them. He knows how judges go about their work. Senator Cornyn understands that judges are called upon to render their very best judgment in frequently difficult and close cases and that sometimes judges will have legitimate differences of opinion among themselves and express themselves accordingly.

I find it particularly significant that Senator Cornyn supports Justice Owen, even though they did not always agree on the bench. His support is based on how Justice Owen goes about the job of being a judge, not on whether she reaches the same outcome that he would.

Now, I urge all of my colleagues to think this way. Any attempt to emphasize the points on which Senator Cornyn and Justice Owen disagree I think will backfire. It only proves the point better. So Senator Cornyn's endorsement of Justice Owen has extraordinary credibility to me and should, by itself, provide members of this committee with a fresh view of this nomination.

So I am looking forward to hearing from the Texas Senators and from Justice Owen. And I am optimistically looking forward to evidence of renewed open-mindedness from my colleagues. With that hope, I will turn to our ranking member for any statement he would like to make at this point. Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I do have an opening statement.

I welcome the nominee and Senator Cornyn here. We are meeting in an unprecedented session to consider the renomination of Priscilla Owen to the U.S. Court of Appeals to the Fifth Circuit. Never before—i say it is unprecedented because never before has a President resubmitted a circuit court nominee already rejected by the Senate Judiciary Committee for the same vacancy. So we proceed to grant Justice Owen a second hearing even though we did not allow either Enrique Moreno or Judge Jorge Rangel, both distinguished Texans nominated to the Fifth Circuit, any hearings at all when they were nominated by President Clinton to the same Fifth circuit vacancy.

I would just mention two Texans nominated to that by President Clinton, they weren't even given a hearing. So, Justice Owen, you are getting two hearings, maybe one for each of the ones who were never allowed to have a hearing by the Republicans.

This nominee was fairly and thoroughly considered after a hearing only 8 months ago. It was an extended session that was chaired very ably and fairly by Senator Feinstein. Justice Owen's earlier nomination was fairly and thoroughly debated in an extended business meeting of the committee, during which every Senator serving on this committee had the opportunity to discuss his or her views of the nominee's fitness for the bench.

Incidentally, that meeting was delayed. I had set the hearing at a date requested by the President. I assumed he meant June, and then earlier in that week, he said he wanted his good friend, Patricia Owen, to have a hearing. I assumed he meant Priscilla Owen because he was speaking of the Texas thing, and I put you on for a hearing—I mean for a vote that Thursday. The White House, however, decided that wasn't a good idea and wanted, notwithstanding the request of the President, to put it off for 5 or 6 weeks, and so we did, following the rules of the committee.

Now, unlike the scores of Clinton nominations on which Republicans were not willing to hold a hearing or committee vote or explain why they were being opposed, Justice Owen's earlier nomination was treated fairly in a process that resulted in a committee vote in accordance with committee rules that resulted in the nomination's defeat last year.

Unfortunately, the chairman has not scheduled a second hearing for Judge Deborah Cook or John Roberts, two nominees whose hearings did not give Senators an adequate opportunity to question them. These were controversial nominees who were shoe-horned into a hearing earlier this year that was plainly too crowded to be a genuine forum for determining their fitness for lifetime appointments to Federal appellate courts. Democratic members have asked

many times that the incomplete hearing record for those nominees be completed, but those requests have been rebuffed. And that is a shame. But that error I believe was compounded by truncated committee consideration when the chairman insisted on proceeding in total and complete violation of Rule IV of this committee and before there was bipartisan agreement to conclude debate on the nominations, something that—a rule followed by every chairman I have known here—Senator Kennedy, Senator Thurmond, Senator Biden—but it was violated starting this year.

Now, for Justice Priscilla Owen, there will be a second hearing. I emphasize the various procedural steps followed by the committee on Justice Owen's nomination in the Democratic-led 107th Senate to contrast them with the treatment of President Clinton's nominees to this very seat during the previous period of Republican control of the Senate. During that time, two very talented, very deserving nominees were shabbily treated by the Senate. Judge Jorge Rangel, a distinguished Hispanic attorney from Corpus Christi, was the first to be nominated to fill that vacancy. Despite his qualifications, and his highest rating by the ABA, Judge Rangel never even had a hearing. It wasn't a case of voting him down. He was never even given a hearing from the committee. And after he had waited for 15 months and it was obvious that the Republicans weren't even going to allow him to have a hearing, to say nothing about a vote, he withdrew his candidacy.

And so then President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, a Harvard graduate, and a recipient of the highest rating, in fact, unanimous rating by the ABA to fill the same vacancy. He probably should have saved his time because Mr. Moreno did not receive a hearing on his nomination from a Republican-controlled Senate during the 17 months. He waited and waited and waited. It wasn't a case he was voted down by the committee. He wasn't even allowed to have a hearing. And, finally, President Bush withdrew the nomination of Enrique Moreno and substituted Justice Owen's name in its place.

Actually, it was not until May of last year, at a hearing chaired by Senator Schumer, that this committee heard from any of President Clinton's Texas nominees to the Fifth Circuit, when Mr. Moreno and Judge Rangel testified, along with a number of other Clinton nominees, about their treatment by the Republican majority and disclosed some of the machinations that went on at that time. Thus, Justice Owen is the third nominee to the vacancy created when judge William Garwood took senior status so many years ago, but even though she is the third nominee, she is the only that has been allowed a hearing.

So let me remind the committee, the Senate, and the American people how this committee came to have a hearing last year on this controversial nomination. Democratic leadership of the committee began in the summer of 2001. Within 10 minutes after taking the leadership, I announced hearings on President Bush's judicial nominations. We made some significant progress in helping fill vacancies during those difficult months in 2001, and we proceeded at a rate about twice as productive as that averaged by Republicans in the prior 6 and a half years. As we began 2002, I went before the Senate to offer a formula for continued progress so long as it

was balanced bipartisan progress. I made some modest suggestions to the Bush administration, none of which were adopted. But even though they didn't, to demonstrate good faith I committed to hold hearings on a group of President Bush's most controversial circuit court nominees that year. I did this even though our offers were totally ignored by the White House, offers made in good faith, not really even responded to. We continued forward.

I not only fulfilled that pledge to hold hearings on Justice Owen, among others; by the end of the year I had made sure that the Senate Judiciary Committee had held hearings on more than twice as many controversial circuit nominees as I had originally announced, notwithstanding the silence from the White House. We proceeded with hearings and votes on Judge Charles Pickering at the request of Senator Lott, Judge D. Brooks Smith at the request of Senator Specter, and Judge Dennis Shedd at the request of Senator Thurmond. These were in addition to my January announcement with respect to Justice Owen, Professor McConnell, and Mr. Estrada. During my 17 months as chairman, we proceeded expeditiously but fairly to consider more than 100 of President Bush's judicial nominees despite what was an increasing lack of comity and cooperation from the White House.

But fairness and fair consideration apparently are not enough. Proceeding almost twice as productively as Republicans did for President Clinton, and even though we did it without White House cooperation, this counted for nothing. The President remains intent on packing the Federal courts and Senate Republicans equally intent on making sure that this scheme succeeds no matter what Senate rules and traditions and precedents need to be overruled or ignore.

In examining Justice Owen's record in preparation for her first hearing and now again in preparation for today, I remain convinced that her record shows that in case after case involving a variety of legal issues, she is a judicial activist, willing to make law from the bench rather than follow the language and intent of the legislature. Her record of activism shows she is willing to adapt the law to her results-oriented ideological agenda.

I expect that Senators on the other side will try to recast and rehabilitate Justice Owen's record. I assume that is what the chairman meant by the title of this hearing. I hope he did not mean to suggest that Senator Feinstein was unfair or that Senators on this committee did not proceed fairly to debate and vote on the nomination last year. We did see a recent occasion when a judicial nominee was ambushed on issues on which there was not notice or thorough information or debate, and that nomination was defeated by a party-line vote on the floor of the Senate, even voted against by Senators who had voted for him in this committee. I am referring, of course, not to Justice Owen but of the first African American to serve on the Missouri Supreme Court, Justice Ronnie White.

Now, I hope the hearing is not a setting for some to read talking points off the Department of Justice website or argue there is some grand conspiracy to block all of President Bush's judicial nominees. I believe we just voted on one of his nominees on the floor. The consensus nominees are considered expeditiously and confirmed with near unanimity. The nominees selected to impose a narrow ide-

ology on the Federal courts remain controversial and some are being opposed. Were the administration and the Republican leadership to observe our traditional practices and protocols and not break our rules and seek every advantage from the obstruction of Clinton nominees to circuit courts over the last several years, we would be making a lot more progress.

Facts are stubborn. They don't change. Written opinions and prior testimony under oath are difficult to overcome. This nominee was examined very carefully a few months ago and rejected by this committee. To force it through the committee now based only on the shift in the majority would not establish that the committee reached the wrong determination last year, but that the process has been taken over by partisanship this year.

No one can change the facts that emerge from a careful reading of Justice Owen's dissents in cases involving a Texas law providing for a judicial bypass of parental notification requirements for minors seeking abortions. Those who suggest that she was just showing deference to the U.S. Supreme Court cannot change the fact that what she purported to rely on in those cases just is not there. The Supreme Court did not say what she claims it said.

Neither will they change the facts about her activism in a variety of other cases where he record shows a bias in favor of government secrecy and business interests, and against the environment, victims of discrimination, and medical malpractice. In these cases she ruled or voted against individual plaintiffs time and time again, earning deserve criticism from her colleagues on what is a very conservative Texas Supreme Court.

To give a sampling of that criticism that no amount of argument can change, members of the Texas Supreme Court majority: One, have called Justice Owen's views "nothing more than inflammatory rhetoric." They have lectured dissents she was part of on the importance of stare decisis. They have said that her "dissenting opinion's misconception...stems from its disregard of the procedural elements the Legislature established," and that her "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for" by the appellant. And then they said that to construe the law as she did "would be an unconscionable act of judicial activism."

Now, as I said, despite the mistreatment of President Clinton's judicial nominees, including two in this circuit—actually, several in this circuit—the Democratic-led Senate of the 107th Congress showed good faith in fairly and promptly acting to confirm 100 of President Bush's judicial nominees. The Senate is now contending over several of President Bush's controversial nominations. At the same time we are continuing to vote nearly unanimously for consensus nominees that President Bush has sent up here. The process starts with the President. He can sow contention or end it. He said he wanted to be a uniter and not a divider, something I would like to see in this country, and I hope someday he will be. But so far he has sent this nomination to the Senate, which divides the Senate, which divides the American people, and which even divides Texans, according to letters I have received.

The President has said he does not want what he calls activist judges. I don't want any President, Democratic or Republican, to

have activist judges. But then, Justice Owen, by the President's own definition, is an activist judge whose record shows her to be out of the mainstream even of the conservative Texas Supreme Court.

In my opening statement at Justice Owen's original hearing last July, I said that the question each Senator on this committee would be asking himself or herself as we proceeded was whether this judicial nominee met the standards we require for any lifetime appointment to the Federal course. I believe that question has been answers.

Thank you, Mr. Chairman. Always good to be here with you.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Hutchison. Welcome to the committee. We are glad to have you here and we look forward to hearing what you have to say.

STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman. I am very pleased to be here again to introduce our Supreme Court Justice Priscilla Owen, an 8-year veteran on our Texas Supreme Court.

Justice Owen's career started when she graduated cum laude from Baylor Law School in 1977 and made the highest grade on the State bar exam that year. Before her election to the Texas Supreme Court in 1994, she was a partner in a Texas law firm, a major one, where she practiced commercial litigation for 17 years.

In 2000, Justice Owen was re-elected to the Supreme Court with an 84-percent vote. In fact, she was endorsed by every major newspaper in Texas during her successful re-election bid. We have a supremely qualified judge.

Justice Owen enjoys bipartisan support. The ABA Standing Committee on the Federal Judiciary voted her unanimously well qualified. To merit this ranking, the ABA requires that the nominee be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity, and either have demonstrated or exhibited the capacity for judicial temperament.

The Dallas Morning News called her record one of accomplishment and integrity. The Houston Chronicle wrote that she has the proper balance of judicial experience, solid legal scholarship, and real-world know-how.

But despite the fact that she is a well-respected judge who has received high praise, her nomination has been targeted by special interest groups. Justice Owen's views have been mischaracterized and her opinions have been distorted. Today, this committee and Justice Owen once again have an opportunity to set the record straight.

In Texas, we have statewide elections for judges. Whether we approve of that system or not, it is the current law in Texas. Priscilla Owen has been a leader trying to reform the way judges are elected in our State. During her 2000 campaign, Priscilla Owen set a new standard, imposing voluntary limits on herself, which included taking no more than $5,000 per individual and spouse and not more than $30,000 per law firm. Over half of her total contributions

were from non-lawyers. After not facing a major opponent in 2000, she returned over a third of her remaining contributions to her contributors.

Let me read the words of former Texas Supreme Court Justice, Chief Justice John Hill, a Democrat, denouncing the mischaracterization of Priscilla Owen's record by outside special interest groups. "Their attacks on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups made no effort to assess whether her decisions are legally sound."

Justice Hill goes on to say, "I know Texas politics and can clearly say these assaults on Justice Owen's record are false, misleading, and deliberate distortions."

Justice Hill also was elected Attorney General of Texas as a Democrat.

Priscilla Owen is an exemplary judge. One issue that has already been mentioned here and will come up again, I am sure, involves the Texas parental notification statute. I believe Justice Owen has demonstrated that she is a judge who follows the law, and in this line of cases, she has consistently applied Supreme Court precedent to help interpret uncertainty in the statute. I hope my colleagues will see that her methods of statutory interpretation are sound.

Mr. Chairman, I also just want to say on a personal note that Priscilla Owen has had one of the roughest rides that I have seen for a nominee to a circuit court bench or a district court bench. And I think you have seen her judicial temperament in the way she has handled the attacks, the very strong and tough questioning. She has handled herself with aplomb. She has always given very sound, detailed answers. In fact, several people have mentioned to me, after hearing her last performance before this committee, that they have never seen in any nominee such an outstanding performance by a nominee.

I think the way she has handled the wait since May the 9th of 2001 and the handling of this nomination by this committee show her even more so to be the outstanding qualified judge that should receive confirmation today in this committee and in a very short order by the U.S. Senate. And I truly hope that people will give her a fresh look if they were against her in this committee before, and I truly hope that they will see her outstanding qualities and give her a chance. I hope her nomination will not be filibustered. She deserves a vote, and she deserves a positive vote. And I am proud to be here to support Justice Priscilla Owen of Texas for the Fifth Circuit.

Thank you.

Chairman HATCH. Thank you, Senator. We sure appreciate your being here, and I appreciate your testimony.

Senator LEAHY. Mr. Chairman, just at that point while Senator Hutchison is here, before Senator Hutchison came, I noted two things. One, she has been a strong and consistent and even passionate supporter of Justice Owen. You should know that even talking about those who have supported you and those who have opposed you, there is a great respect we have for Senator Hutchison and we have listened. But also I just wanted—we were praising you and Senator Feinstein and Senator Hatch for work on

the Amber Alert. As you know, when I was chairing the committee, we whipped it through last year, got it passed in the Senate, and unfortunately the leadership in the other body decided not to bring it up, and this year Senator Hatch as chairman and with my support put it through. And, again, you got a unanimous vote. Every single Senator who was on the floor that day—there were a few absent because of illness or whatever. But every Senator who was on the floor voted with him and we sent it over. And I just hope now that the leadership on the other side will allow it to go forward, but you deserve an enormous amount of credit for that.

Senator HUTCHISON. Mr. Chairman, if I could just respond and say that Senator Feinstein and I, of course, introduced the Amber Alert bill because of several high-profile abductions in Senator Feinstein's State and the abduction of Elizabeth Smart from the chairman's home State. And I couldn't ask for a better record of the Judiciary Committee under both you, Senator Leahy, and you, Senator Hatch, in moving that bill through. It is without a doubt the most easy bill that should ever pass our Congress, and I hope so much that it will be passed very soon.

And I want to say that I talked to Ed Smart this morning, and the passion in him for passing Amber Alert, I mean, that man is the happiest man on Earth today. But he also is passionate to try to help other parents that might ever go through the ordeal that he and Lois Smart have to keep them from having to do that. And he knows the Amber Alert is the very best tool we have to help find an abducted child quickly.

So I just want to thank you, thank you, Senator Hatch, and Senator Feinstein, for all that the three of you have done on the Amber Alert bill. And it is my hope and Ed Smart's fervent wish that that bill will pass the House very shortly and go to the President, when we can have a wonderful celebration that every parent will have the best chance.

Thank you.

Chairman HATCH. Thank you so much. We appreciate that, and I personally appreciate both you and Senator Feinstein. Without the two of you, that would not have gone through the Senate as quickly as it did, and I sure appreciate my colleague and the work that he did when he was chairman. We are just really happy to get that going. And I did chat with our chairman in the House, and they fully intend to see that that is passed. They are trying to put it with other children's bills to get them all passed at one time. But he does realize the importance of this, and it is because of the work of you two great women Senators that this bill is going to become law. So I am personally appreciative.

Senator Cornyn, we will turn to you now.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman. It is my——

Chairman HATCH. And, Senator, I just want to say I am personally looking forward to your testimony because you served on the Supreme Court with Justice Owen, and I can't imagine a better authority on Justice Owen's capabilities and qualifications.

Senator CORNYN. Well, thank you, Mr. Chairman. It is my pleasure to be here and to join my colleague, Senator Hutchison, in introducing a find and exceptional nominee to the Fifth Circuit Court of Appeals, Justice Priscilla Owen.

Senator Hutchison has done a great job of talking about Justice Owen's background and experiences and her exceptional credentials for the Federal bench, and I, needless to say, wholeheartedly agree with those fine comments.

I discussed Justice Owen's qualifications for the Federal bench in an op-ed that was published this morning in the Austin American-Statesman, and, Mr. Chairman, I would ask the committee for unanimous consent that that op-ed be included as part of the record and my remarks.

Chairman HATCH. Without objection, we will put it in the record.

[The article appears as a submission for the record.]

Senator CORNYN. Thank you.

I would like to spend a few moments, though, talking, as you suggested, from a different point of view, a personal perspective, as somebody who has served on the Texas Supreme Court with Justice Owen, because I think that perhaps will provide a fresh look and a different point of view that may be of some assistance to those Senators who previously had decided to vote against Justice Owen.

Having been a judge for 13 years, I know as a judge or as a Senator, all of us are reluctant to revisit our earlier decisions. But, in fact, in the judicial process, as you know, there is an opportunity to seek a rehearing or reconsideration in those rare instances where perhaps a mistake was made. And I am not suggesting a mistake by the Senators in their vote, but a mistake in the characterization of this fine individual who I believe is highly qualified by virtue of her training and experience and temperament to serve in this very important judicial position.

As you said, Senator, Justice Owen and I served together for 3 years on the Texas Supreme Court. I had been on the court for about 4 years when she joined the court in January 1995. And then I resigned from the court in October 1997 to run for Attorney General. But during those 3 years, I had the privilege of working closely with Justice Owen. During those 3 years, I had the opportunity to observe on a daily basis precisely how she works, how she thinks, how she addresses the challenge and the job of judging in literally hundreds, if not thousands of cases. And during those 3 years, I spoke with Justice Owen on countless occasions and debated with her, and, yes, even disagreed with her on how to interpret statutes and how to try our very best to uphold the oath that we take when we assume the robe as a judge, and that is to read statutes faithfully and carefully and to decide cases based on what the law says and not on how we personally would like to see the case come out.

One of the most important elements, I think, that goes into considering whether somebody is qualified to be a judge is how they—their integrity and their fidelity to the role of a judge, because, of course, it is so much different, it is fundamentally different from the role that we as Senators have, which is to make decisions based on the results we would like to see happen. But judges, of

course, have a different role, and it is their integrity and fidelity to the role of judge, not to results, that I think distinguishes a good judge and distinguished Justice Owen.

I saw her take careful not and literally pull down the law books herself and study them very, very closely. And I saw how hard she works to faithfully interpret and apply the law that the Texas Legislature has written and the precedents that had been handed down by higher courts or at earlier times by that same court. And I can tell you from my personal experience as her colleague and a fellow Justice that Justice Owen is an exceptional judge. She is a judge who works hard to follow the law and to enforce the will of the legislature—not her will, the will of a lawmaker.

Not once did I see her try to pursue a political or some personal agenda at the expense of faithful adherence to the rule of law. To the contrary, I can testify that Justice Owen feels very strongly, as do I, that judges are called upon not to be a legislator or a politicians but as judges to faithfully read statutes and interpret and apply them faithfully in the cases that come before the court.

One of the things I just have to say is that judges, unlike members of the legislature, don't have a choice. When a case comes before the court, when the courts assume jurisdiction of the case, you can't run, you can't hide. You have got to decide the case. And it may not have come to you in the posture that you would have liked. That may be because of the standards of judicial review or the deference that we pay to jury determinations of facts that the judge is left with the bare application of a statute or some precedent, to a record that that judge cannot change, even if they might like to. And so that is why I say that it is not results-oriented judging that we ought to applaud, but the kind of judging that Justice Owen engaged in day in and day out on that court, which was faithful adherence to the rule of law.

I want to also take just a moment to reflect on my own experiences on the Texas Supreme Court and to talk just a moment more about what I believe it means to be a judge.

I believe that people change when they put their hand on the Bible and they take an oath to perform the job that our Constitution gives judges. I believe that with all my heart and soul because I saw it in myself and I see it in people who leave the private practice of law, like Justice Owen did after 17 years as an advocate, but then assume that solemn responsibility and take an oath, so help me God, to discharge the duty of a judge—a far different role from that of an advocate in court, but a solemn responsibility and a solemn oath that I know that she takes, as all good judges do, very seriously.

Of course, being a Senator, like being an advocate, means you are free to express your personal views or the views of your client on a whole range of subjects and controversial issues. That is what we do. One Senator yesterday said you can't serve in the Senate without casting controversial votes, unless you want to hide under your desk. But then, of course, you would not be doing what the people of our States have sent us here to do. But, of course, being a judge is exactly the opposite, and I know Senator Feinstein has mentioned to me of her own watching—I believe it is her daughter who has become a judge and the transformation that she saw in

her own daughter and how she approached that awesome responsibility.

Of course, a judge's personal political beliefs must have no bearing on the job of a judge. Of course, that is in a way the same role we ask jurors to play. I can tell you, during the 6 years that I was a trial judge, I read charges to the jury that said you have got to be able to set aside your preconceived notions and opinions and decide this case based only on the facts as you hear them in this court. And so we ask lay jurors to do that, and we ask judges to do the same thing when it comes to faithfully applying the rule of law.

And, of course, that is why, one reason why Justices who come to the Congress to listen to the President's State of the Union address don't applaud. They don't show approval. They don't boo. They don't show disagreement. They make no expression whatsoever because their job, of course, is not to advocate politics or personal agendas. Instead, their job is to neutrally and faithfully interpret the law as written by others—and it is not always easy—by those who have stated their political views through the process of enacting laws.

It has been pointed out that other judges sometimes disagreed with Justice Owen, and that is perfectly normal and, indeed, it's healthy. And, yes, I disagreed with Justice Owen on occasion, and she with me. That is precisely why we have established throughout this country State Supreme Courts and Federal courts of appeals with more than one judge, so we can have the free exchange and the lively debate and the intellectual exchange on important issues that come before the court. And, yes, then we have to have a vote and then a final resolution of the matter.

When judges disagree, that is no badge of dishonor. That is simply what the job of judging is.

And, Mr. Chairman, I hate to see people like Justice Owen who have diligently and faithfully not imposed their views about what the result should be, but faithfully interpreted and enforced the law as written, criticized and basically disadvantaged in the public eye because they are just doing the job that they took an oath to do.

Some have suggested that when judges disagree that is a sign that at least one of the judges are behaving politically. That is nonsense. A State's highest court, like the Texas Supreme Court, like the U.S. Supreme Court, any court of last resort, gets the most challenging and the most difficult cases in our legal system. The vast majority of the cases in our legal system are pretty easy, pretty easily decided on the law, and those cases, of course, are handled by lower courts. But in some cases, a statute is not clear, the case is so hard, that we ask judges at our highest level of our judiciary to try to interpret them faithfully.

And let me just say here that I know there have been instances that different members of this committee have mentioned today and at other times at previous hearings where they feel that they disagree with Justice Owen's decision in that case. But I just think it is fair—fairness dictates that this one or two or three or handful of cases be put in context. Justice Owen knows, as I do, that the number of cases that the Texas Supreme Court decides is just a

fraction of the cases that go to court in Texas each year. It is a court of discretionary jurisdiction, and last time I looked at it, it was only about 10 percent of the cases that go to the court of appeals actually are considered and determined by the Texas Supreme Court. So fairness dictates that these few cases where I think there is a perfectly good explanation for her position on those cases, but, nevertheless, I believe it is important that those be put in context. They represent just a thimble-full compared to the ocean of cases that she has decided as a judge and that are litigated on a daily basis in our courts.

Let me just mention one case where a statute was not clear and where judges had to work hard to try to figure out how best to read the statute and to faithfully apply the law, and that is a case that is frequently taught in law schools to demonstrate the difficulties of construing complex statutes and laws. It is a famous U.S. Supreme Court case which, believe it or not, required Justices to determine whether a tomato is a fruit or a vegetable. A hotly contested political issue, I assume, to some observers. But, in fact, it was an important question to be decided for purposes of applying Federal tariff law.

Now, I suppose as a matter of science that, botanically speaking, a tomato is a fruit. But in common parlance, a tomato is a vegetable. Yet it was unclear based on the text of the Federal tariff law what meaning was intended by the legislature when it used the terms "fruit" and "vegetable."

Now, believe it or not, judges have to debate these issues. They have to figure out what the legislature actually meant when they used the term in order to do their job. Not surprisingly, in difficult cases judges disagree.

Now, that doesn't mean that judges are being political when they disagree. Indeed, there is nothing political about whether a tomato is a fruit or a vegetable. But it just good-faith judging and a good-faith interpretation of law, and that is precisely why we need good judges who will make those decisions, who will apply the law as written by the legislatures, as Justice Owen in my experience did and does.

I mention this tomato case in particular because it has a direct bearing, believe it or not, on our discussion of Justice Owen. In a previous hearing, a number of Senators brought up the fact that Justice Owen and I disagreed about one particular case. I had just about forgotten about it until I was refreshed by reading *Sonnier* v. *Chisholm-Ryder Company*, and I hope I pronounced that correctly. I do not think it would be fair to attack either Justice Owen or me about how we decided the case, even though we disagreed on how best to read the law in that case. The case essentially involved whether a tomato-chopping machine is real property or personal property. We disagreed, but that doesn't mean that either one of us was guilty of somehow pursuing a political or other agenda in court.

Many cases present genuinely difficult legal issues, and judges have good-faith disagreements about them. Perhaps under the best reading of the statute, a tomato is a fruit. Perhaps it is a vegetable. Perhaps the legislature meant that a tomato-chopping machine is real property or perhaps it is personal property. Good judges, my

point is, Mr. Chairman, can simply disagree and still be good judges.

That is why I was so profoundly troubled by what happened to Justice Owen last year. Senators who opposed her, almost without regard to who she is or the record that she has worked hard to establish as a good judge, mentioned that other judges would sometimes criticize her for doing things like rewriting statutes. Mr. Chairman, as a former judge, I can tell you that judges say that all the time. That happens all the time. It is frequently part of the robust legal debate and exchange that judges have with one another every single day in this country, and there is nothing extraordinary about it at all.

Good judges struggle to read statutes carefully. It is only natural, then, when judges of good faith disagree, frequently a judge will claim that another judge is rewriting the statute. It is just simply the way judges talk and the way judges do their job.

I asked my staff to look at some of the cases cited against Justice Owen last year, and do you know what they found? Well, in just 20 minutes of , they were able to determine that every single Justice of the Texas State Supreme Court at one time or another had been criticized for rewriting a statute.

Looking at just a few of the cases cited by Justice Owen's opponents, in one case, for example, Justices Gonzales, Hecht, Enoch, Abbott, and O'Neill, who comprised the majority of a particular case, were criticized with the following statement: "The court substitutes what it thinks the statute should accomplish for what the statute actually says." In other words, those five Justices were accused of rewriting the statute.

In another case, Chief Justice Phillips, Gonzales, Enoch, Baker, Hankinson, and O'Neill were challenged with the following statement: "The court does not base its statutory interpretation on the ordinary meaning of those words or on the purposes the legislature intended them to achieve, but on its own predilections."

In just those two cases, we have every single colleague of Justice Owen criticized for allegedly rewriting a Texas statute. Again, that is just the way judges talk.

Are we really saying that every Justice on the court——

Senator LEAHY. Excuse me. Mr. Chairman, I—and I would ask that this interruption not interrupt in the record.

Chairman HATCH. Without objection.

Senator LEAHY. As you know, I am required to be on the floor on a Judiciary Committee matter. Senator Kennedy and Senator Feinstein and Senator Durbin are here. I have to be there at 11:30, and in leaving, I didn't want that to be reflected that I am leaving for any reason other than that. I know we started a half-hour late, and that has thrown everything else off.

Senator CORNYN. Thank you, Senator Leahy.

Are we really saying that every Justice on that court or any court that is criticized for rewriting or misconstruing a statute is a bad judge, undeserving of confirmation? That would be, of course—I think it is apparent—nonsense and I hope that is not what anyone is saying here today. Judges are supposed to read the law carefully and rule how they think the law is most accurately

read and to vigorously defend and argue their position when disagreements occur, as they invariably do.

It is terribly unfair and, I submit, Mr. Chairman, even dangerous to our justice system for Senators to sit in judgment on those judges and to criticize them simply because they are trying their very best to do their job, as judges do.

Now, I was reminded of the scene, believe it or not, from the movie "Jerry Maguire" when I read the transcript and heard this discussion, the scene when Cuba Gooding, Jr. tells Tom Cruise, he said, "See, man, that's the difference between us. You think we're fighting, and I think we're just finally talking."

Well, Mr. Chairman, what Justice Owen has been criticized for is not fighting among judges; it is the way judges talk in deciding how to best interpret the statute and discharge the duty.

Those who have emphasized critical quotes about Justice Owen from other Justices on the Texas Supreme Court think they are fighting, but as I say, they are just actually talking, doing what judges are supposed to do.

I could go on and on, but I won't. Let me just close by saying that I served with Justice Owen on the Texas Supreme Court for 3 years. Based on those 3 years of working closely with her, I know her well. And I know she is a good judge who always tries to faithfully read and apply the law. That is simply what good judges do, and we can ask for nothing more.

Judges disagree from time to time, but, again, that is what judges do, and that is what we want them to do. And we certainly do not want to chill that intellectual exchange and dialog, chilling it by criticizing them and actually perhaps challenging a nomination to a Federal court because they are doing what they should be doing. We should not condemn them because they sometimes criticize each other's reasoning. Instead, I believe we should send Justice Owen's nomination to the floor of the Senate with a positive vote and that we should confirm her quickly.

Thank you, Mr. Chairman, for the opportunity to speak on behalf of Justice Owen today.

Chairman HATCH. Thank you, Senator. We appreciate your explanation because you served with Justice Owen and you have served in a wide variety of positions in Texas, including Attorney General and on the Supreme Court, as well as being a trial judge. And we appreciate having you on the committee and having those remarks.

I appreciate both Texas Senators taking time from busy schedules to be here today in support of Justice Owen, and we will be happy to let you go, Senator Hutchison. We know you are busy. And, Senator, I hope you will come up here and sit beside me. And I may ask you to chair part of this hearing since I have to go to the floor as well.

Justice Owen, let me turn to you. Do you have a statement you would care to make at this time?

STATEMENT OF PRISCILLA RICHMOND OWEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Justice OWEN. Just very briefly, Senator. I want to thank you for the opportunity to appear today and answer any questions that any of the members of the committee might have.

I want to introduce my sister, Nancy Lacy, who is with me here today.

Chairman HATCH. Glad to have you here.

Justice OWEN. Among others, and my pastor, Jeff Black, that has come again. And Pat Mizell, a former judge from Houston, Harris County, Texas, is here with us today. Thank you, Pat, for coming.

Chairman HATCH. Good to have all of you here. Thank you.

Do you care to say anything else?

Justice OWEN. No, Senator. Thank you.

Chairman HATCH. All right. There have been some, I think, misunderstandings on some of the questions that were asked last time. Let me just see what I can do. We will have 15-minute rounds, if that is OK with my colleagues.

Let me just ask you a few questions about the *Doe I* case, where I think there were some misunderstandings. The language of the Texas Parental Notification Act follows language in previous Supreme Court cases, does it not?

Justice OWEN. Yes, Senator, it does.

Chairman HATCH. And a majority of the court in the *Doe I* case agreed on that point. Is that correct?

Justice OWEN. Everybody on the court agreed that the words, the specific words in the bypass provision were taken essentially out of cases from the U.S. Supreme Court, had looked at other statutes and language that the Court itself had used.

Chairman HATCH. The majority wrote in this regard, "The Texas parental notification statute was enacted against a backdrop of over two decades of decisions from the U.S. Supreme Court." Now, even so, the Texas Legislature did not define key terms in the statute such as "sufficiently well informed," did it?

Justice OWEN. It did not.

Chairman HATCH. OK. In other words, it did not set forth the information that the minor must obtain before the standard is met. Am I right about that?

Justice OWEN. That's correct.

Chairman HATCH. The statute was silent on that point.

The Texas Legislature did not define the term "mature" either. Is that right?

Justice OWEN. That's correct, Senator.

Chairman HATCH. Now, the majority—I guess I better swear you in. I have just been informed by staff that I haven't sworn you in. So would you mind standing? I will do that.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Justice OWEN. I do.

Chairman HATCH. I would ask unanimous consent that that be placed at the beginning of our discussion.

Now, I just said the Texas Legislature did not define the term "mature," and the majority recognized that fact; is that not right, and these other facts?

Justice OWEN. Yes, Mr. Chair.

Chairman HATCH. Now, in fact, the majority opinion noted that notification statutes found in states across the country were silent as to the particular information the minor needed to have to be, quote, "sufficiently well informed," unquote. Now, these include notification statutes in Arkansas, Colorado, Florida, Georgia, Illinois, Kansas, Maryland, Minnesota, Montana, New Jersey, South Dakota and West Virginia. In fact, due to a lack of guidance from the Texas Legislature, the majority had to look outside the words of the statute and turn to other sources for guidance in interpreting the terms, quote, "sufficiently well informed," unquote, and quote, "mature," unquote. Is that correct?

Justice OWEN. That's correct.

Chairman HATCH. They looked to case law outside of Texas is my understanding.

Justice OWEN. They did.

Chairman HATCH. For guidance on what the statute means. They had to look outside the statute in determining what medical information the minor is required to receive. They had to look outside the statute in determining the minor must show an understanding of the alternatives to abortion, and emotional and psychological aspects. None of these showings were outlined in the statute itself, right?

Justice OWEN. That's correct.

Chairman HATCH. So any argument that you or any other member of the court went outside the, quote, "plain meaning of the law," unquote, is just incorrect and misses the point; is that right?

Justice OWEN. That was my view.

Chairman HATCH. OK. Now, as I understand it, in the cases that you have been criticized for, you were in the dissent, you were in the minority, right?

Justice OWEN. Well, sometimes I was in a concurring opinion. I concurred in the judgment, but I did not totally—the court and I did not totally agree on every aspect of the proper construction of the statute.

Chairman HATCH. How many judicial bypass cases have there been affecting the Supreme Court?

Justice OWEN. Well, there have been 10 minors who have come before the court, and I understand from listening to voice mail last night that we've had another one filed yesterday. But setting that one aside, that's pending, there have been 10 minors, I believe, that have come before the court. Two of them came back a second time. The court had initially remanded the proceeding back to the trial court. The trial court again denied the bypass. The court of appeals again affirmed the trial court, denied the bypass, so they came to the court a second time. So we had 12 cases if you will involving 10 minors.

Chairman HATCH. And out of how many total cases?

Justice OWEN. Well, this summer I believe—I tried to explain we don't know the exact number precisely.

Chairman HATCH. Approximately the number.

Justice OWEN. We know there have been at least 650 as of this summer, and the information, updated information I've been given says there have been at least 775 now.

Chairman HATCH. So approximately 775 cases where young girls or their counsel have asked for a judicial bypass so they did not have to notify the parents; is that right?

Justice OWEN. That's correct.

Chairman HATCH. How many of those cases—you are saying only 10 young ladies' cases——

Justice OWEN. Now 11.

The CHAIRMAN [continuing]. Came to the Supreme Court or in other words were decided by the Supreme Court. So all of the rest of them were able to go ahead and get the abortions; is that correct?

Justice OWEN. We don't know the exact—exactly the outcome in the trial court. That's confidential, but they cannot come to the Court of Appeals and they cannot come to my court unless the bypass is denied. In other words, if the trial court denies the bypass, that's the end of it. No one has the right of appeal.

Chairman HATCH. So in these cases that you have mentioned with these 10 young women, the courts down there denied, the lower court, the trier of fact, the court that actually talked to the young women and their counsel, denied the bypass?

Justice OWEN. That's correct.

Chairman HATCH. In other words denied them the right to go to an abortion without parental notification.

Justice OWEN. Well, they certainly had the right to get the abortion, but you're correct, they did have to give notice. It was not a prohibition against the abortion taking place, but the physician had to give at least 48 hours notice to one parent.

Chairman HATCH. Now, in how many cases did you differ with your colleagues on the Supreme Court?

Justice OWEN. Again, it's difficult to just categorize the numbers, but in the counting the 12 times that the different cases came up, I think I disagreed with them 3 or 4 times. Let me get my notes here and make sure that's right, but I think 4 times.

Chairman HATCH. OK, 4 times. So you agreed with the majority and the court for the other remaining——

Justice OWEN. Actually it was 3. I'm sorry. I agreed with——

Chairman HATCH. So you agreed with the court in all but 3 cases and that means that in the vast majority of those cases that appeared before the State Supreme Court you agreed with the majority.

Justice OWEN. I agreed with the judgment. In *Doe I* there were differences between my interpretation of the statute and the court's, but I did agree with the judgment in remanding the case back to the trial court. I thought that the minor deserved another opportunity to present her case to the trial court and see if the trial court would grant the bypass.

Chairman HATCH. Now, in the other cases where you disagreed, you basically upheld the trial court decision.

Justice OWEN. That's correct.

Chairman HATCH. That is hardly being outside of the judicial mainstream, or outside of the mainstream of American jurisprudence, is it?

Justice OWEN. I didn't think so.

Chairman HATCH. I do not think anybody else would think so. I mean you can legitimately disagree on what the interpretations of the statute are.

Justice OWEN. Well, we did—a number of cases we did disagree and there was—I was not the only judge that disagreed. In some cases we were very split up over what the statute meant.

Chairman HATCH. I see. Well, in the cases where you disagreed you upheld the lower court decision.

Justice OWEN. That's correct.

Chairman HATCH. It is true that the lower court judge was the trial judge, right?

Justice OWEN. That's correct.

Chairman HATCH. It is true that that lower court judge was the determiner of the facts, right?

Justice OWEN. Yes, Mr. Chairman.

Chairman HATCH. It is true that that lower court judge was the judge who at least had some experience with the young woman involved; is that correct?

Justice OWEN. That's right. The trial judge actually sees the minor and talks to her, listens to the questions that are posed by her counsel, by her guardian ad litem, has an opportunity to actually view her. All we get is the cold printed record.

Chairman HATCH. And isn't it generally the rule that the trial judge is the determiner of the facts of the case?

Justice OWEN. Generally speaking, the trial court is of course the trier of fact, and the trial court's determination of the facts are binding on my court.

Chairman HATCH. And is it not true that good judges on the Supreme Court generally give great deference to the findings of fact by the lower court judge?

Justice OWEN. That's correct. That's a well-established principle.

Chairman HATCH. So the fact that you differed with some of your colleagues on the bench does not necessarily mean that you were outside of the mainstream of American jurisprudence or that you acted in a radical fashion, because you were upholding the lower court judge who had all the facts.

Justice OWEN. I agreed—I think I said in some of these cases that it was a close call, but that based on the record I thought there was enough evidence that I was compelled to affirm the trial court.

Chairman HATCH. Now, as I understand it, some have criticized you because of Judge Gonzales' language. Could you tell us what really is involved there?

Justice OWEN. Well, that was the case when the first *Jane Doe*, the first *Jane Doe* had come to the court, and as I might explain, the court, including me, agreed to remand the case back to the trial court. This was the first time the statute had ever been construed by my court, and neither she nor her counsel really had any idea of what the words "mature and sufficiently well informed" meant. So once the court had put some parameters on that, I agreed that it should go back to the trial court. And it did, and there was another hearing, another lengthy transcript. The minor again testified, talked to the trial court. Her counsel, her guardian ad litem were there. And the trial court again made the determination that

the minor was not entitled to the bypass under the mature and sufficiently well informed prong of the statute.

The Court of Appeals looked at that record. They again affirmed what the trial court did, denying the bypass, so for a second time, after the trial court had looked at it twice and the court of appeals looked at it twice, we got *Jane Doe* back for a second time. And in that case, again, I said it was a close call, but that I thought there was some evidence to support what the trial court found, and under those circumstances, even if I might have made a different decision had I been the trial judge, I felt like under appellate principles I had to affirm what that trial court did because there was some basis in the record to do so. There were several dissents in that case, and I think it's fair to say that some of our opinions were contentious on their face at least, that there was some—as Judge Cornyn, former Judge Cornyn, Senator Cornyn now, described it, there's certainly robust debate in those decisions.

And in one of the dissents—there were three separate dissents—I was one of the dissenters, but there were two others who wrote two separate opinions. One of the dissenters said that the majority said, "We are not judicial activists," say the judges today. And I think that what Justice Gonzales was doing was responding to some of the judicial activism language that was in that opinion as well as a concurring opinion by another judge. There were lots of opinions in this case. And he went on to say that—let me get the exact language because I don't want to misquote it here. He said that, "If you were to"—let me again find the exact language.

[Pause.]

Justice OWEN. He was talking about that he as a judge has to do what the law says, not what he might want to do as a citizen or a parent. And then he says, "But I cannot rewrite the statute to make parental rights absolute or virtually absolute, particularly whereas here the legislature had elected not to do so."

And he had also said previously that, "Thus, to construe the Parental Notification Act so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the word of the statute, would be an unconscionable act of judicial activism." He didn't say that the dissents had engaged in that. He said if anybody, including himself, were to do that, would do that, that would be judicial activism, and I agree with that.

Chairman HATCH. In other words, if they were to eliminate judicial bypasses——

Justice OWEN. Yes.

Chairman HATCH. I mean the point here is, is that the vast majority of bypasses were upheld.

Justice OWEN. That's correct. And then he goes on to say just in the next paragraph, he's discussing one of the other dissents, and he names the dissent by name——

Chairman HATCH. Let me just interrupt you for a second. You were never taking the position that you were going to eliminate judicial bypasses?

Justice OWEN. Of course not, no. And I don't think that he fairly read that he can be said as saying that I or any other judge on the court was doing that, or that we were erecting hurdles that would prevent its applicability. And the reason I go on—I've got several

reasons why I say that. Let me explain his opinion. Let me kind of put this into context.

In the very next paragraph he addresses one of the dissenting opinions directly, and he says that that dissent charges our decision—that our decision demonstrates the court's determination to construe the Parental Notification Act as the court believes the act should be construed, and not as the legislature intended. And he says, "I respectfully disagree." He doesn't say that you have engaged in judicial activism. He says, "I respectfully disagree." Now, this is the point where he's talking about what the dissenters, or at least this dissent actually did. And to put this in context, first of all, let me say categorically that Al Gonzales, former Justice Al Gonzales on my court, is an honorable man, and there is no way that I believe in my heart that he would support me for this position, this nomination if he believed that I were a judicial activist. He would not have recommended me. He would not have supported me publicly like he has.

And so the other thing is I remember when these opinions came out. I remember the debates that went on, the discussions we had, and I certainly don't recall ever thinking that this language was directed at me. I remember when my nomination started to get a lot of attention from some of the special interest groups, and I read a blurb that said Justice Gonzales had accused me of being a judicial activist, I was—I thought, "Well, that's ridiculous. I would remember that. He never said any such thing." And I went back and ran a word search through the opinions and found this language, and yes, I recall this case. But if this—if I had thought then for a moment that he was accusing me of being a judicial activist, we certainly would have had a discussion about that and I would have remembered it. It would have been something that would have been seriously talked about. And that just was—you know, let me say then as I did now, I do not believe that he was attacking me, or for that matter any other dissent on the court.

Chairman HATCH. Well, thank you. My time is up.

Senator Kennedy, we will turn to you.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman. I take just a moment here before asking our witness some questions, just to pay a tribute to you and to other colleagues of the committee, Senator Leahy, Senator Feinstein, Senator Hutchison, for their work on the Amber Alert Bill. I saw you last night, Mr. Chairman, just after Elizabeth Smart was found and we all, as others have pointed out, know of your deep involvement in a very personal way in this case, and also in strong support of the Amber legislation.

We have had a tragic situation in our own State, the Bish family from Warren, Massachusetts, just a year ago. And many of us have been trying to have our own State, Massachusetts, develop a similar kind of a case for the heartbreaking reasons that have surrounded the situation and the circumstance in the Elizabeth Smart case. So we will work on that legislation. It is a pretty good indication that the committee can work and do some good work at a time and achieve a good objective.

Chairman HATCH. Well, thank you, Senator.

Senator KENNEDY. I appreciate the fact that you brought that up at the start of this hearing.

Chairman HATCH. Well, that means a lot to me, and as usual, your compassion comes through, and our friendship is intact in spite of the fact that we occasionally disagree.

Senator KENNEDY. Well, don't want to go too far at the opening of this hearing.

[Laughter.]

Senator KENNEDY. Judge Owens, I want to welcome you back.

Justice OWEN. Thank you.

Senator KENNEDY. Owen, Owen—excuse me—to the committee and thank you for the willingness to take on the responsibility for service on the courts, and thank you for your willingness to respond to these questions. I think as you well understand, all of us have a responsibility in these considerations, and we want to try and ensure, as I am sure you do, that we are going to have people, men and women on the courts, that are going to insist that the courts are going to be available and accessible to listen to all sides and to evaluate all of the information that comes before the courts and give a fair and balanced judgment on these cases.

And my concerns, as I think you remember from the last time, is to what kind of—whether the plaintiffs are representing workers, the disadvantaged, those that are left out and left behind, individuals that have been injured or hurt in circumstances, whether they will be able to get a fair hearing in the courts. And so we look at your background in these areas to try and draw some conclusions. And I want to just again sort of mention these and hear you out once more on this.

As I mentioned, one of my major concerns is the way that you reinterpret the law to achieve currently the result that you want. Your decision consist of support for the businesses and employers over the rights of the plaintiffs, and I believe often stretch the law to do so. You are among the most frequent dissenters on the Texas Supreme Court with more than 20 dissents in cases involving the rights of employees, consumers and many others in the last 5 years.

The Texas Supreme Court is notoriously business oriented, but you stand out as being to the right of most of the judges on the court. You have repeatedly been criticized your colleagues in the majority for putting your own views above the law. In the *Jane Doe* cases you were criticized by your colleagues, including Alberto Gonzales, who is now President Bush's counsel in the White House, for insisting on reading your own views into the Parental Notification Statute on abortion. Judge Gonzales called your interpretation "an unconscionable act of judicial activism."

Numerous examples occur in other cases involving labor protections, consumer protections and environmental protections. In one case the private landowners tried to obtain an exemption from the environmental regulations, and the court majority specifically criticized your harsh dissent, saying it was nothing more than inflammatory rhetoric which merits no response.

In a case involving whether an insurance company had acted in bad faith, you joined a partial dissent that would have limited the

rights of jury trials for litigants, and this dissent was criticized by other judges as a judicial slight of hand to circumvent the constraints of the Texas Constitution.

In another case a worker's arm had been partially amputated as he inspected a chopping machine. Your dissent would have severely limited the ability of injured individuals to obtain compensation from product manufacturers. The majority criticized your dissent for imposing a test more broad than any holding in this area so far.

And even when you have joined the majority in favor of a plaintiff, you have announced views hostile to workers' rights, the *GTE Southwest* v. *Bruce*. You concurred with an otherwise unanimous court decision in favor of the three female employees, but you went out of your way to make it clear that in your view not all of the supervisor's behaviors amounted to intentional infliction of emotional distress. The supervisor's behavior included yelling, cursing, frequently at the employees, repeatedly threatening employees verbally, assaulting employees by physically charging and lunging at them, and ordering a female employee to scrub a carpet on her hands and knees.

Because of such cases—and these are just a few examples—how we can have confidence that you will fairly interpret the law and fairly consider the claims of workers, victims of discrimination or other injured individuals, and how can we have the confidence that you will review the cases with an open mind?

In the hearing last fall I asked you whether with all your dissents in favor of businesses, insurance companies and employers, you had dissented in any case where the majority of the court favored those interests. You mentioned a single case, 1996, the *Saenz* v. *Fidelity Guaranty Insurance Underwriters*. After reviewing that case—and I hardly think it offsets your anti-plaintiff record—you did not write a dissent in the case. You joined an opinion written by another justice, concurring in part and dissenting in part. You actually agreed with the majority that a jury verdict for the plaintiff should be overturned. In fact, another dissent in the case would have upheld the jury verdict.

So while you agree that there was a claim in that case that you would have allowed the plaintiff to pursue, but your long record of ruling against the plaintiffs. Is that the only case in which you dissented in favor of the plaintiffs in a workers' rights, consumer rights or a civil rights case?

Justice OWEN. Senator Kennedy, there's a lot in your question, so let me try to go back and parse through some of the things that are in that question and that proceeded it in some of your statements.

Senator KENNEDY. OK.

Justice OWEN. First of all, Senator Kennedy, I can assure you that I do not ever try to achieve a result, and I don't look at whether I want one side to win or the other side or one segment of our population to be favored over another. That is not my job. And I certainly don't keep score and say, "OK, you know, 50 percent of—this side has to win 50 percent of the time and this side has to win 50 percent of the time, and every 6 months or so we've got to even the score here." I mean that is not what judging is about. That is not what I do.

And you mentioned that—I think you said in 20 cases I have dissented. Well, I have participated in over 900 written opinions for my court, and we have also denied writs—petitions and writs of error in my court. We get about 1,400 of them a year, and we look at every single one of them. And when we only take about 10 percent and write an opinion in. So in all of those thousands and thousands of cases, we have voted—I, as part of the court, have voted to let the lower court judgment stand, and there are untold hundreds and hundreds of verdicts in those cases that we don't touch, that we do not set aside.

And the cases that do come to us, as Senator Cornyn explained, my former colleague, we get the tough ones, and we don't—you know, the cases that come to us are generally not the easy cases. And what I try to do as a judge is to put aside personal feelings or put aside sympathetic or sympathy, and put aside the fact that, yes, in some of these cases people are, are very injured. And the question is, do they—what does the law say? What does the law require under these circumstances? And, Senator Kennedy, I tell you again that I judge cases by what is right. I do not judge cases by what is politically correct. I apply the law and the law has to be predictable. It has to be fair. And that's what I do in these cases. Sometimes workers win, sometimes big companies win. The outcome is determined by the law applied to the facts, not my favoring one side or the other.

And I did submit, I believe in response to written questions this summer, a partial listing of the significant cases where workers or consumers, plaintiffs had won significant victories in my court, and I can cite you others. In terms of being criticized by my colleagues, I think as Senator Cornyn very ably pointed out today, the culture of Supreme Courts, State Courts, is often, and certainly as my case, is we do criticize one another in opinions. That's frequent. That is certainly not out of the norm. Every single member of my court has been criticized by every other member of the court I'm certain at one time or another, and sometimes in strong terms. That does not mean that I think any of my colleagues have ill motives, have political motives, or unfair, or unfit as judges. As Judge Cornyn, now Senator Cornyn, I think explained, that is the way judges speak in their written opinions.

I won't go through too much more explanation unless you'd like me to on the *Doe* case, where Justice Gonzales, former Justice Gonzales actually used the words that you quoted. You mentioned the *FM Properties* case. You characterized that in a certain way, but my position in that case was to uphold what the legislature had done, and I felt like the legislature had made a good faith effort. It was not unconstitutional. The Democrat Attorney General in the State at the time, Dan Morales, filed a lengthy brief in support of the State, in support of the position I ultimately took. You mentioned the *Sonnier* case. That was the decision that Senator Cornyn was describing earlier that involved the tomato chopper, and the issue in that case was, it was in a prison system, and it was a very large chopping machine, and the only issue in the case involved the so-called statute of repose, and the question was, is it affixed to the property in such a way that it's a part of the real property or is it just a fixture?

And nothing I said in that opinion had anything to do with expanding products liability law in the least. I said, in my dissent in that case, that this was, I couldn't tell from the facts. This is a fact question that should go to the jury and let the jury decide. Sometimes the facts are very clear and a court can tell, but I said, here, you know, I don't know whether this tomato chopper is sufficiently affixed. Let the jury decide. That was my position in that case.

GTE, I thoroughly agreed with the court in that case, that what the supervisor in this case did was way out of bounds. The plaintiffs in this case were certainly entitled to recover for intentional infliction of emotional distress. I voted to uphold that verdict. The only thing I said in that case in terms of—and this is a term of art—I said that some of the evidence that the court cited was legally insufficient. That does not mean it's not admissible, certainly. It's admissible. But the question is if you just had isolated instances that I cited by themselves, that would not be sufficient to constitute intentional infliction of emotional distress, as has been defined by the restatement of the law of torts, which is a nationally recognized 50-state treatise that our court had adopted, and I cited the specific examples and said, "This is the kind of thing precisely that the restatement was talking about," and I was trying to square what we said in *GTE* with two very recent cases that the court had decided.

I can tell you that I have upheld decisions for workers where I have been criticized by my colleagues. One case was the *Ethyl* case. It involved asbestos workers. There were several hundred asbestos workers sitting—a number of defendants, and the trial court chose 22 of those cases against, I believe it was 5 defendants, to try sort of all in one trial as an efficiency means to do it faster than one case at a time. And the defendant came up on mandamus and asked us to stop the trial and say, you know, this is too many plaintiffs to try at once. And I wrote the opinion for the court. I said, no, the defendant has not established that the court abused his discretion and this trial should go forward.

I did the same thing in a breast implant litigation case, and I was criticized for it by the dissent. I can go on and on. I dissented in *S.V.* v. *R.V.* and I was criticized for my dissent, where I would have let a girl who said she was sexually molested by her father, go to—I would have tolled the statute of limitations because she asserted at the pleading stage that she repressed her memories of that until she got away from her home and was in college. So I can go on and on about cases where I have either written or joined opinions, significant decisions, that upholds verdicts or established rights for injured parties, injured workers, plaintiffs, consumers. So I think when you're looking at my record, you have to look at the entire record, and that's a whole lot of opinions, Senator.

Senator KENNEDY. Well, I am looking at the whole entire record, but I am looking at the particular kinds of actions that have been taken with regards to workers' rights, civil rights, environmental rights, women's rights, and those are areas that I was particularly interested in. When we were talking about the dissents, not 20 dissents. Obviously you have dissented more, but on particular cases involving those rights, I think in a fair kind of review of your record in terms of workers' rights, environmental rights, people's

rights, civil rights, you would not find the kind of balance that you have just stated or claimed. That is why I asked in the last time whether there was any time that you stood up for the plaintiff, any single time over the—differing with the other members of the court, and you gave only this one case, which really does not really say that. There was a dissent, but you were not a part of it, that would have upheld the jury verdict.

So my point is here, I am not saying that you have never supported a plaintiff. I know that you have sometimes joined pro-plaintiff's majority. The point is that you are extremely active in anti-plaintiff dissent on an already conservative court. And we are not simply discussing a few cases, but I think an extensive record. And the question is, is whether you have shown the same kind of dedication in the protecting the rights of individuals that you have showed to protecting businesses, insurance companies and other employers, when they harm individuals and violate the law. That is the area. And if you have—if you do not feel that I have been fair in that, and you think that there are other parts of your record that would reflect that, and show that, and give that kind of balance, I welcome that submission for the record.

Just a final point. I had inquired of you—I know we have gone over the *Ford* v. *Mills* case. In your response to me you said with regard to the motion to expedite the court considered the *Ford* v. *Mills* case an important one, but we did not give it precedence. Do you know any reason why you did not give it precedence?

Justice OWEN. Senator Kennedy, I hope you appreciate that I do operate under a code of conduct in Texas, which means I can't disclose the deliberations entirely, but I can say this, that a motion like that would have taken a majority of the court, 5 members to agree to put it ahead, and 5 members didn't do that. And we in hindsight said——

Senator KENNEDY. Well, I do not want you to violate the code. If there was some indication that in the 5 that you tried to do it and the others would not do it, it would be something that would be noteworthy.

Justice OWEN. We all agreed, including me, after the fact, that we should have granted those motions. I'm not sure it would have made any difference, but we should have.

Senator KENNEDY. Thank you very much for your appearance here. You come very warmly endorsed by our colleagues, which we are grateful for, and thank you for coming back.

Justice OWEN. Thank you, Senator.

Senator CHAMBLISS. [Presiding.] Judge——

Senator FEINSTEIN. Mr. Chairman, may I ask one question? I am going to have to leave because I have got an appointment with a foreign diplomat that I must keep. And I wonder, you know, my presence and the reason I wanted to be here was because I wanted to have a second chance to ask some questions, and apparently I am not.

Senator CHAMBLISS. If your question is can you go now, the answer is yes.

Senator FEINSTEIN. No. I was just going to say what I would like to do is——

Senator CHAMBLISS. Seriously, I am happy for you to go if you would like to.

Senator FEINSTEIN. Well, thank you very much, and I will just take a couple of minutes. I will not use my time.

But first of all, believe it or not, welcome back.

Justice OWEN. Well, thank you, Senator. It's good to see you again.

Senator FEINSTEIN. It is good to see you, and I know this is tough.

Justice OWEN. I'm under oath, so I won't respond to that.

Senator FEINSTEIN. No, do not respond to it.

Justice OWEN. I'm just teasing.

Senator FEINSTEIN. What I would like to do, if I may, is send to you a memoranda that was prepared by NARAL, also entitled, "Setting the Record Straight," that essentially took your comments and juxtaposed them against the law, and ask you if you would respond in writing as quickly as you could?

Justice OWEN. Certainly, certainly, Senator.

Senator FEINSTEIN. And that might be the easiest way to approach this. My interest is really to see that as an appellate court judge you would be willing to put whatever opinions you might hold or views you might hold aside and really work to see that the law is carried out. And I think in the Parental Notification issue, particularly in those first *Doe* cases, where the prongs of the Texas law were being established with some precedent, that there was a very strong feeling that you reached out, particularly into Casey, where Casey really did not apply because the Texas law, the belief was it was very specific and very precise in the level of consent that it implied. So I think this is set forward in this memorandum, and perhaps you could just respond.

Justice OWEN. Senator Feinstein, I would welcome the opportunity, because I feel like I have not adequately communicated with you on this particular issue, and I would welcome the opportunity to do that, to try to do that in writing.

Senator FEINSTEIN. And then perhaps you would also take the statements that have been in part relayed here. And I think Senator Cornyn was very helpful in putting that in some perspective, but for example, there is a sentence here by Justice Hecht, "charges that our decision demonstrate the court's determination to construe the Parental Notification Act as the court believes the act should be construed and not as the legislature intended."

And I think that well states what the contention is by some, and that is, that the legislature said one thing, and yet there was an attempt by the court to construe it to be different. So perhaps you could respond in writing, and I will pay special attention to it.

Justice OWEN. I appreciate that. Thank you.

Senator FEINSTEIN. Thanks very much.

Justice OWEN. Thank you.

Senator FEINSTEIN. Thank you very much, Senator.

Senator CHAMBLISS. Thank you, Senator.

Justice Owen, I would like to note two things. First of all, it is kind of nice to have somebody here that talks like I do. We do not need to have an interpreter between you and me.

[Laughter.]

Senator CHAMBLISS. And second, I notice you are an Episcopalian. There are not that many of us around. So I am particularly pleased to see that.

There has been some indication this morning, as I read the transcript of the previous hearing, there are some accusations against you that you are pro-business, you are pro-corporate entities, and basically against the guy on the street out there. And you have had somewhat of an opportunity to respond to that, but some specific questions have not been asked of you about certain cases, and I would like to give you an opportunity to kind of set the record straight, if you will, about the decisions that you have made against the corporations. And if you would, could you please delineate some of those cases where you issued rulings that actually favored individuals versus against corporations or that might be perceived to be anti-business?

Justice OWEN. Senator, there is—I'm not sure that I've captured every single one of them in the last 8 years. I do have a list, and it's quite lengthy. I would say there are quite a few cases on here. But just *Polaris* Management Company denied—a corporation was requesting certain discovery—or certain discovery from the plaintiff be quashed, and I joined the majority in saying that that was not appropriate.

And also it involved—now my memory is coming back to me. *Polaris* was a large, large class action lawsuit involving alleged securities frauds, and thousands of plaintiffs had been gathered up in this class action. I believe it was in Maverick County, Texas. And the defendant was asking this court to—the trial court had selected a certain select group of plaintiffs to proceed to trial. The defendant was saying, you know, we're getting a raw deal down here, and would you please say that this is improper to do this? And I agreed with the majority of the court that that trial should go forward and we should not intervene.

Perhaps—I hate to spend the time going through all of these, but let me give you some of the larger cases I think, that are pretty much landmark decisions I think for our court. I already mentioned the *Ethyl* case and the *Bristol Myers* case. Those both involved mass torts. One was the asbestos litigation. The other was the breast implant litigation, and that again involved the defendant's claims that the trial court should not allow plaintiffs to proceed in these groups as they did. And we laid out the parameters that most of the courts across the country have looked at in deciding when it's appropriate to aggregate cases and when it's appropriate to sever. And we applied those principles in this case, and concluded that the trial court had correctly discharged his duties.

We also held in sort of a series of cases, and we ultimately—when workers can sue for these latent diseases such as asbestosis. And we held that a worker who gets a disease, one kind of disease from asbestos and sues defendants, and then settles that case, and many years later develops a different asbestos disease—in this case I believe the plaintiff developed mesothelioma—that plaintiff is not barred by limitations and that plaintiff is not barred by the fact they already sued someone for another asbestos related disease from proceeding against other defendants when the second disease

many years later manifested itself. So we—I think that's a significant decision in favor of workers and plaintiffs.

And the *Owens-Corning* case, I concurred with the court that workers who had been exposed to asbestos should be allowed to collect punitive damages from their employer, and *Owens-Corning* in that case, as I recall it, was arguing that there should be a constitutional limit or restraint on the damages in that particular case, and I disagreed under the facts of that case.

There's a long list. A manufacturer of a lighter, one of those Bic—I don't know if it was a Bic lighter. It was the Tokai Company apparently manufactured it and it was not childproof, and the grandmother had purchased the cigarette lighter and had put it in a closet, and her grandchildren who I think were like 3-years-old and maybe 2, that both of them got a hold of the lighter and ignited a blanket with it and were terribly injured. And this actually came to us on a certified question from the Fifth Circuit, and we rejected the manufacturer's argument that it had no duty to make these lighters child resistant. We said that you have to go through the risk balancing analysis that you typically would do in a products liability case.

Again, there are quite a few, but that should give you some flavor for some of the decisions that I've been a part of.

Senator CHAMBLISS. Well, I am going to ask that the list that you have there be appropriately identified and inserted in the record.

Justice OWEN. I hope you let me clean it up a little bit.

Senator CHAMBLISS. All right, we will let you do that. But if you will, at the same time you respond to Senator Feinstein's question, if you would just send us that list, and mark it as to what it is. I would like to have that inserted in the record.

Justice OWEN. I'd be happy to do that.

Senator CHAMBLISS. Again, as I looked at the transcript of the previous hearing, since I was not a member of this body at that point in time, I noticed that there was a rather detailed question asked of you about a case in which you wrote the majority opinion, and that was *Ford Motor Company* v. *Miles*. I think there were some very significant misunderstandings about your involvement in that case, and I want to see if we cannot straighten some of that out.

For those who do not recognize this case, this case involved an automobile accident victim named Mr. Searcy, who tragically passed away years after his accident, but before the litigation was resolved.

First of all, let me ask you whether there is any truth to the accusation made during the course of your previous hearing, that the victim passed away before the Texas Supreme Court ruled on his appeal?

Justice OWEN. I think that there was a misunderstanding about that. Certainly the Supreme Court of Texas—and I wrote the opinion for the majority—handed down that opinion. And it's my understanding it was 3 years after that or more than 3 years after that that Mr. Searcy passed away.

Senator CHAMBLISS. There was also an accusation made during the course of your hearing that your opinion was improperly based on the issue of venue. In other words, there was a question of

whether the plaintiff's lawyers filed the case in a county that did not have jurisdiction over the dispute. Was there anything improper about the Texas Supreme Court's consideration of arguments concerning the venue in that case?

Justice OWEN. Senator, there's a statute on the books in Texas that the legislature has passed that says if venue is improper, the case must be reversed and remanded to the proper court for trial, unless of course there are dispositive issues that brings an end to the litigation entirely.

And so in this case when the venue was improper—and it was in this case—we had no choice. We had no discretion whatsoever. We were required under the statute to reverse the case and send it to the proper county.

Senator CHAMBLISS. And in fact is it not the case that both the majority and the dissent in this case agreed that it was appropriate for the court to resolve the venue issue, and that no member of the court argued otherwise?

Justice OWEN. No, sir. Some members of the court thought venue was proper, but a majority of the court did not. And just to give you a flavor of this, what happened here, the plaintiffs in this case bought a Ford Truck in Dallas, Texas, and they lived in Dallas, Texas. The dealer that they bought the truck from was in Dallas, Texas. The accident occurred in Dallas, Texas. And all of the operative facts occurred in Dallas. But the plaintiff's lawyer for some reason—and I think it was pretty clearly forum shopping—chose to file this lawsuit in Rusk County in Texarcana, which had absolutely no relationship whatsoever to any of the operative facts, and tried to hold venue in Rusk County, which is about 180 or 200 miles away from Dallas, by saying that, well, anywhere there's a Ford dealership, we ought to be able to sue Ford Motor Company. And my court said no, that's not the law in Texas.

Senator CHAMBLISS. So what you are actually saying, is that it was pretty clear that Dallas County, was the proper place to bring the suit. I think that is a basic constitutional law issue that all of us learned during our first year in law school, and I do not know of any law school that teaches otherwise.

It was also implied by some members during your last hearing that your decision to reverse the verdict in that case, a decision that caused a legal setback for a young man who had been rendered a quadriplegic in an accident, means that you did not have any sympathy or compassion for people. Is that a fair accusation about you, Judge Owen?

Justice OWEN. Senator, it's not. Again, as I tried to explain to Senator Kennedy, a lot of these cases, the plaintiffs are very—your heart does go out to them. They have been injured and certainly in this case. This was a teenage boy who was a passenger in the truck. He was totally innocent. But I can't let that cloud my view or my duty to apply the law clearly and fairly in these cases. I can't rule for someone simply because they have had—they've been subject to an injury and they're an innocent party. We have to apply the rule of law in every case.

Senator CHAMBLISS. And I want to make it clear that your decision was by no means a termination of the plaintiff's ability to sue for injuries. What your decision basically said was that, instead of

suing in Rusk County in Texarkana, the plaintiff must go to Dallas County to file suit, and try the case there. If you have a cause of action, that is where it needs to be determined.

Justice OWEN. There were some other aspects to the case. His stepfather had sued for loss of consortium and companionship in that case. And we looked at that issue, the court did. And I don't think anybody dissented from this, and said, no, that a stepparent cannot recover for the loss of consortium for a severely injured stepchild. We looked at law in other jurisdictions. We looked at our precedent. So there were some other aspects of the case, but the main issue, the first issue that we addressed is the first issue the Court of Appeals addresses, where was this case tried? Was it tried in the proper venue? And we said, we concluded, based on the law, that no, it wasn't.

Senator CHAMBLISS. And finally I want to ask you about the issue of delay in the Texas Supreme Court's decision in that case. Although as you have said, Willie Searcy passed away 3 years after the Court's decision, I also understand that the court did take quite a while to decide the case. Is that correct?

Justice OWEN. That's correct. I went back and looked at all of the disposition rights surrounding that case, and unfortunately that was a year in which our court was way behind. If you look at the average days it took to decide cases in general, this case was well within the average, and it's an average I'm not proud of as a member of the court. The court's not proud of it, that we had a bad year, frankly, in terms of disposition time. But this case was no more—it was in the average for that year. And we did better in previous years and we've done better since then, but it did take us longer than I think all of us wish that it should, and we publicly said so. We're sorry we didn't get it resolved sooner.

Senator CHAMBLISS. Last, I have heard a comment here this morning that Justice Gonzales extended some criticism to you in an article and I guess maybe by some other means. Now, I read the article. I did not see any criticism in there. Is there any instance where Justice Gonzales extended some criticism to you for any decision you rendered, or your way in rendering it, or your exhibition of any right-wing views in making a decision?

Justice OWEN. The only thing that I'm aware of that has been said over and over and over again is that statement in the *Doe* case, that Judge Gonzales in a concurring opinion—and he said that to—let me again quote it. "To construe the Parental Notification Act so narrowly as to eliminate bypasses or to create hurdles that simply are not to be found in the words of the statute would be an unconscionable act of judicial activism."

And again let me explain it. He said "would." He did not say that's what had happened with any of three different dissents. I was a dissenter. And again, I remember that time very well. I remember what was going on, and I did not think then and I do not think now that Justice Gonzales was saying that I had engaged in judicial activism or for that matter any of my colleagues had done so. As I tried to explain earlier, the words "judicial activism" had been used in another dissent. It had been used in Justice Enoch's concurring opinion. And he was saying—and Justice Gonzales was also saying in that paragraph, that I can't rewrite the statute

based on my personal views, and to do would be judicial activism. And then he later said in another paragraph, referring to one of the dissents, that he respectfully disagreed with the dissent when he started actually talking about that dissent. And to me that was not an indication that he thought any of us were judicial activists.

Senator CHAMBLISS. Speaking of judicial activists on the bench, I would like to ask you if my classmate and my now dear and good friend, John Cornyn, was a judicial right-wing activist on that court. But you are under oath, and you would have to tell the truth, so I am not going to ask you that.

Justice OWEN. Well, when he voted with me, apparently.

[Laughter.]

Senator CHAMBLISS. Senator Durbin.

Justice OWEN. Which was a big percentage of the time, I might add.

STATEMENT OF RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Justice Owen for returning. I am sorry that you have to come back in this contentious environment, but I appreciate you being here today.

I want to make a point for the record, that two of the nominees President Clinton, to fill vacancies on the same circuit, the Fifth Circuit, were denied even a single hearing or a vote. Jorge Rangel, an extremely talented Hispanic lawyer from Corpus Christi waited 15 months. Enrique Moreno, another superb Hispanic lawyer, waited over 17 months. And Alston Johnson, a distinguished Louisiana attorney waited a futile 23 months. They were denied a hearing before this committee when the other party was in charge. And I think the fact that you are being given, I am told, an historic second chance before this committee should be put in the context of the fact that others never had one chance to come before this committee in the past. That is not your creation. That is not your doing, but I want to make that a matter of record.

I would also like to address an issue which I find interesting, brought up many, many times before this committee, and that is the suggestion that the judges that we appoint, if they will follow the rule of law, really have very little flexibility, very little leeway, very little discretion. It has been said by Senator Cornyn and others that a judge cannot change the statute, the facts or the record. They are bound by, in his words, faithful adherence to the rule of law, and that of course is a good hornbook principle, but it almost diminishes the role of a judge to the point of following a formula of perhaps being part of some computer software that is going to have a totally predictable results. I think we know better. I think human experience tells us that is not the case.

And then we come down to a question about whether or not judges are strict constructionists in applying the law or judicial activists, two phrases which are becoming almost meaningless because both liberals and conservatives have their view on what they mean.

I would like to start off by asking you to comment on that, and to give me, without the bluebook answer here, to give me where

you would place yourself on the spectrum between judicial activism and strict construction?

Justice OWEN. I think you're right that those terms are becoming somewhat meaningless. You know, I do believe that words have meaning, Senator. When you work very hard with your colleagues, you use, you pick and choose words carefully when you craft legislation, so I do think—I know you do—I think words have meaning, and I think that is the starting point when you look at a piece of legislation. You try to look at what words were hammered out during the legislative process. And sometimes that is not as clear as we would like it to be, and I think those are the hard cases that the courts, a court like mine particularly gets.

And so when you get that, again, I think the first place you start is with the words that the legislators have chosen, whether it was Congress or a State legislature. And then if the words really aren't that clear—and I don't look at just the—that sentence or that phrase. I look at it in the context of the entire section and the entire act. I look at how it interplays with other pieces of the act. And sometimes you can see that the statute was—if you look in broader context in a larger section of that act, you can see that in context it becomes more clear. Sometimes it's necessary to go look at the legislative history to see what the bill analyses were, what were the framers of or the draftsmen or the sponsors of this bill, what did they say at the time that they were sponsoring it? That's usually sometimes an important source. So these are all things—of course if there's already a court—a decision on it, it's important I think for stare decisis. I think all the courts agree on this, that it's particularly important in construing statutes that you follow stare decisis because once the courts construed it and the legislative body has convened one or more times and hasn't changed it, that means that they've more or less adopted a view or decided to let stand that court decision. The court shouldn't go behind that and try to change it. So——

Senator DURBIN. Well, let me just followup. And I am not trying to set a trap for you, but I believe this is a legitimate line of inquiry for every nominee, and certainly those who are seeking the high position that you are seeking.

We have a nominee pending before this committee, a justice from the Ohio Supreme Court, and I asked her in written questions about her view of strict construction of a statute, and she gave me what I have described as a painful answer because I think it is a candid and honest appraisal of strict construction, but I think it was painfully honest. And I want to tell you what she said. I asked her the following question: do you think the Supreme Court's most important decisions in the last century, *Brown* v. *Board of Education*, which of course struck down segregation; *Miranda* v. *Arizona*, which codified the rights of criminal defendants; *Roe* v. *Wade*, which addressed the issue of a woman's right of privacy; do you believe those decision are consistent with strict constructionism?

Here is here answer. This is Deborah Cook, nominee before our committee now. And I quote, "If strict constructionism means that rights do not exist unless explicitly mentioned in the Constitution, then the cases you mentioned likely would not be consistent with that label." End of her quote.

I think that is an honest answer from a conservative, strict construction point of view, but it also leads us to a harder question. Had our judiciary been filled with men and women, strict constructionists, when civil rights were established in America, we might not have seen that occur, or we might have seen it delayed. Same thing may be true when it comes to questions of privacy. So I ask you in that context if you would agree with her conclusion, and if not, how you would say or how you would answer that question.

Justice OWEN. Well, Senator, you catch me a little bit cold, having to listen to something read back to me. But again, I think those terms have become so politically charged, frankly, on strict construction, judicial activism, the terms that you've used. But again I think you have to, in a constitutional context and as opposed to a statute, I think my court, at least the State court's history has been we start with the language. Again, words mean something, and they were chosen for a reason. But we also have to look at it in context.

For example, some parts of the Texas Constitution are very, very clear, you shall not do so and so. Other parts of the Constitution it takes judicial decision to put some context on that and to flesh out the full meaning of it, just as the U.S. Supreme Court has done, for example, with the due process and equal protection clauses. So I don't think it's all that simple.

Senator DURBIN. Let me just give you an illustration, and I have referred to it in another committee hearing. I last week went to Alabama with a bipartisan group of Congressmen and senators to go back to Selma and Montgomery and Birmingham with Congressman John Lewis and take a look at the civil rights struggle 38 years later. And it was a profound experience for me to stand at the foot of Edmund Pettis Bridge, where Congressman John Lewis was beaten and suffered a concussion as he tried to march to Montgomery. And it was interesting, as I spoke to Congressman Lewis at one point, he said, "You know, there never would have been a march from Selma to Montgomery were it not for a Federal District Court Judge named Frank Johnson. Frank Johnson from Alabama, a Republican appointee under President Eisenhower, had the courage to stand up and give us a chance to match from Selma to Montgomery."

He was the one who during his tenure as a Federal judge struck down Montgomery's bus segregation law that led to the arrest of Rosa Parks. He issued the first court voting rights order in the Nation, based on one person, one vote. Of course, he was harassed. His mother's home was threatened and firebombed, and he went through a complete ostracism by the establishment of his community because he stood up for civil rights. And by most every classic definition, Frank Johnson was a judicial activist, and were it not for his courage in decisions, like I said, I am not sure where the cause of civil rights would be today.

In looking back at the cases that you have written as a State Supreme Court Justice during your decade on the court, have you ever ruled on a case which you believe helped to advance an important civil rights principle?

Justice OWEN. Well, yes. Let me back up and say we do not get many civil rights cases in the State Supreme Court, as you might

imagine. Most of the civil rights cases go in the Federal courts. They're not filed in the State courts. And I'm trying to think of a case that has really squarely come up that you would really call a civil rights case.

Senator DURBIN. Perhaps a case on age discrimination?

Justice OWEN. I'm trying to remember. Do you have a particular case in mind?

Senator DURBIN. *Quantum Chemical* v. *Toennies*?

Justice OWEN. Oh, yes. Yes, I do remember that.

Senator DURBIN. In that case, there was a question about whether a plaintiff could prove age discrimination by showing that it was a motivating factor in the employee's termination, and you joined with Justice Hecht in a dissent in restricting the plaintiff's right to recover under age discrimination, saying it wasn't sufficient, as the majority of the court found, that age was a motivating factor in the termination. You said it had to be the determinative factor.

It seems to me that you were moving in the opposite direction of civil rights in that minority position that you took on the court. But I want to give you fair opportunity, if there are other cases you would like to point to where you think you advanced a civil rights principle.

Justice OWEN. Let me—I would like to address that particular case because—and I have done so, and I also want you to know that I have done this in writing. So if I don't do a very good job of it today, I will ask you to please also look at the written response. I am trying to find it here, because that's a very complicated case. And what I was trying to do in that case is, again, follow the law that the U.S. Supreme Court has laid down, and they have not been very clear in this area.

What it—my recollection is this dealt with Subsection (m), I believe it was—I would really like to find my answer so I don't misstate here. But the question in the case was: Do you have a different causation standard in a pretext case as opposed to a mixed-motive case? And the U.S. Supreme Court had handed down a decision that Congress disagreed with, and I think it was Pricewaterhouse—if you'll take a minute—if you'll let me take a minute and find it, find my writing, because I want to be precise about this.

Senator DURBIN. If you would like to respond in written form, too, and explain your position on that, I would appreciate that.

Justice OWEN. Yes, because there were two circuit——

Senator DURBIN. That is only fair.

Justice OWEN. Two Federal circuit judge—courts had gone one way, and then there was Watson and that had gone another, and I found the rationale and actually the text of the Civil Rights Act to support what the Third Circuit and I believe it was—I don't remember what the other circuit had done.

Senator DURBIN. Let me ask you—I would like you, if you wouldn't mind, if you would give a written response.

Justice OWEN. I would be happy to.

Senator DURBIN. Now, prior to being elected to the Texas Supreme Court, you practiced law for 16 years, and in your questionnaire you were asked to describe the ten most significant litigated cases that you handled.

Now, none of the cases that you listed involved public interest matters or civil rights. Is that because you didn't handle that type of case or because the ones you handled you did not consider to be significant in your practice?

Justice OWEN. My law firm didn't handle those types of cases. We just weren't hired by anybody that—well, I say that. Our labor department may have, but I was not in that section, and that was not my specialty, and that's just not what I was hired to do.

Senator DURBIN. Justice Raul Gonzalez, who served with you for a period of time on the Texas Supreme Court, was certainly a model in many respects in terms of his public commitment to pro bono work, particularly when it came to volunteer legal services. Have you had any experience in volunteering your legal services?

Justice OWEN. I have had some.

Senator DURBIN. Can you tell me the nature of that kind of work?

Justice OWEN. They were domestic relations cases.

Senator DURBIN. And how many or how long ago? Could you just put it in context?

Justice OWEN. Well, I've been on the bench a little over 8 years, so it was before—it was before then. And there were—I know I represented a woman in a case where she—she and the father of her child were not married, and they had had—he had sued her to establish paternity and that had occurred. And then they had gotten in a dispute about whether she was allowing adequate access to the child, and then she was—found herself in a position that she was about to be held in contempt of court, and he was seeking to get sole custody of the child. And I got involved at that point through the legal services, local legal services group, and represented her and got the contempt resolved. She was not held in contempt of court, and I worked with her and gave her a calendar. She really didn't understand the terms of the order, and I went and bought her a calendar, and we went through day by day and marked times and dates that would comply with the order. And we also talked about some things I won't go into for confidentiality reasons, but to help her avoid those types of situations.

And I was involved in another——

Senator DURBIN. I will give you an opportunity in written questions to come back, if you would like, to give me some other examples of such work that you were engaged in before you went on the court.

I also mentioned in Judge Johnson's situation that he took—showed a great deal of courage as a judicial activist in civil rights and was extremely unpopular in his own community as a result of that. Can you think of an example of an opinion that you have written on the Texas Supreme Court that was politically unpopular with the established power structure in Texas or in a community but that you felt was the right thing to do.

Justice OWEN. Well, first of all, let me say, I don't want to, by answering that question label the judge you described or any other judge as a judicial activist. I'm not saying that I don't applaud what he did or think that he did the wrong thing. I just—I hate to apply that label to any judge, particularly, as it sounds like to me, he was applying the Civil Rights Act. But, in any event——

Senator DURBIN. This is before the Civil Rights Act.

Justice OWEN. I'm certain I've written unpopular decisions. Sitting here at the moment, let me kind of go through those in my mind. Again, if you would give me some time to respond to that.

Senator DURBIN. I will give you the time to do it. I don't want to trap you here. I want you to have the time.

We have also asked Miguel Estrada a question—,

Justice OWEN. Can I ask for some clarification?

Senator DURBIN. Sure.

Justice OWEN. When you say the establishment, can you give me a more precise question so that I will have something clearer?

Senator DURBIN. Well, I think having practiced law myself, I can recall that most of my clients, paying clients, particularly when I was a defense attorney, were—represented businesses, represented people of wealth and stature, and occasionally in came a client who had none of those things and needed a lawyer who would stand up and fight for them. My question is whether you can recall a case where you ended up ruling thinking this is not going to be popular with the establishment in this community because it really is to protect or promote the rights of an individual against the establishment, the status quo, the power structure. So I will give you a chance to review your cases.

We asked this question—and you may have already been asked this, and if you have, please forgive me because I didn't catch it. We asked Mr. Estrada to list three cases before the Supreme Court that he would disagree with now today, and he declined to answer. I hope that you will take this opportunity to hand us—give us a written answer to that question, a question that has been asked over and over again by Senator Sessions of Democratic nominees. I hope you will be kind enough to give me an example of some of those cases; and also, in terms of judicial philosophy, to name several Federal judges, preferably Supreme Court Justices whom you might be familiar with, but perhaps others, living or dead, whom you admire and would like to emulate on the bench.

Now, I am not asking you to find the perfect match for yourself. I couldn't do that if you asked me for a Senator that I would want to be a clone of, though there are some that are close. But if you could just pick out a few whom you admire and——

Justice OWEN. Well, I admire every member on the current Supreme Court.

Senator DURBIN. That is safe.

Justice OWEN. For various reasons.

Senator DURBIN. But if you could pick out maybe those that have made an impression on your because of their temperament, their legal skill, or some other aspect of their career that you would like to emulate on the bench. And, again, I am not putting you on the spot here. My time has expired. And if you would be kind enough to submit that in writing, I would appreciate it.

Thank you, Mr. Chairman.

Senator CORNYN. [Presiding.] Thank you, Senator Durbin.

Justice Owen, let me take up where at least a moment ago Senator Durbin left off, the *Quantum Chemical Corporation* case, and you joined a dissent, it is claimed, that would have increased the plaintiff's burden in a discrimination case. Now, isn't it true that

frequently you will see where the Federal Congress passes a statute and then the State legislature will pass a statute that looks like they are basically trying to provide a State remedy parallel to the Federal statute? Does that happen frequently?

Justice OWEN. Yes, Senator, it does. At least in Texas.

Senator CORNYN. It is true, is it not, that the Texas human rights statute at issue in that case is modeled on Title VII and, in fact, provides expressly to provide for the execution of the policies of Title VII and its subsequent amendments. So in construing that statute, you looked at how the Federal courts had construed a nearly identical statute with the same words as the State statute?

Justice OWEN. Yes, I did.

Senator CORNYN. And so in this instance, was the principal difference between the majority and the dissenting opinions which Federal court's decisions you ought to choose from in deciding—in light of the express language of the Federal law and the history of the 1991 amendment to the Federal Civil Rights Act?

Justice OWEN. I think that it's sort of more or less boiled down to that. The majority of the court looked at two circuit court decisions that I didn't think were as well reasoned and not necessarily as on point as two other Federal circuit decisions, and there was also language in two U.S. Supreme Court decisions that gave me some pause, that did not clearly decide the issue but that certainly gave me some pause.

And also I looked at the history of how the Act came to be and the actual words of it, and I was persuaded to go the way that I did.

Senator CORNYN. And the dissenting opinion that you joined happened to find a couple of opinions from the Third and Fourth Circuit and two Supreme Court opinions which you viewed as dispositive or more convincing than the ones cited by the majority. Is that right?

Justice OWEN. I thought they were well—better reasoned and were more compelling on the law to me.

Senator CORNYN. I know we are asking you to stretch your memory here, and actually, as you talk about these cases, it brings back a flood of memories.

Justice OWEN. I'm sure it does.

Senator CORNYN. But do you happen to recall that one of the judges in the case that you cited or that was cited in the dissent for the Fourth Circuit was Judge Diana Motz? Does that ring a bell?

Justice OWEN. I'm sorry, Senator Cornyn, it doesn't. Even when I read U.S. Supreme Court cases, I must admit I don't remember who wrote a lot of them.

Senator CORNYN. Well, that is only fair, really, that you would not necessarily remember that. But I think the record will reflect that Judge Motz authored that opinion for the Fourth Circuit and, in fact, had been a Clinton nominee.

So do you think it is fair to criticize you as being somehow anti-employee or anti-civil rights from the decision that you made in that case?

Justice OWEN. I would hope no one would criticize me or any other judge who really does dig into the case law and makes a very

studied, hard effort to do the best they can to apply the law. We are certainly going to disagree. People on my court do. People on all courts disagree from time to time. But I certainly hope that when people disagree that they are not labeled as anti one side or the other based on how they came down in that particular case.

Senator CORNYN. I have been corrected. Judge Motz apparently joined the opinion but didn't author it. But that just shows how poor memory can serve us.

Let me ask you about the role of discretion. Senator Durbin I think made a good point. Judges aren't computers. How would you compare the discretion that judges exercise with the discretionary, say, exercised by the executive branch, either a Governor or a President, or by the legislative branch? Because what we are really talking about is a continuum, not an absolute, where you administer some formula and spit out a result based on a formula.

Justice OWEN. The appellate courts, of course, have very little discretion, by and large. When you are talking about construing a statute, when you are talking about applying statutory principles, constitutional principles, prior precedent to the facts, we certainly don't have discretion to weigh the evidence that comes before us. By the time it gets to my court, Senator Cornyn, as I know you well know, the facts are set in stone. They are what they are. We may have found the facts to be otherwise had we been the jury or the judge in the case as fact finder. But the facts are set in concrete, and our job is simply to apply the law to the facts.

Senator CORNYN. Was there anything about—anything political or did it represent an exercise in discretion on your part in the *Sonnier* case involving whether a tomato-chopping machine was personal or real property that you have been criticized about?

Justice OWEN. I certainly didn't see any kind of political issue in the tomato-chopping case. No, Senator, I did not.

Senator CORNYN. Well, I know that Senator Feingold has joined us, and just so you know, Senator Feingold and I are actually both on the Budget Committee, and we are having a number of critical votes. So that is one reason why a number of members are not physically present here but will be coming in and out. And I am glad that he could join us after that vote, and at this point I would like to go ahead and reserve the rest of my time and yield to him for any questions he might have.

Senator FEINGOLD. Thank you, Mr. Chairman, and thank you for mentioning the budget proceeding.

Welcome, Justice Owen.

Justice OWEN. Good to see you again, Senator.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I again want to express my concern about how this committee is dealing with judicial nominees. Back at the end of January, we held a hearing on three circuit court nominees at once: Jeffrey Sutton, Justice Deborah Cook, and John Roberts. Questioning at that all-day hearing was largely directed to Mr. Sutton. Many of us requested repeatedly, both that day and subsequently, that Justice Cook and Mr. Roberts be brought back for another hearing so that this committee could ful-

fill its duty as part of the Senate's constitutional role in the nominations process.

Over and over again, we were refused a second hearing, and then the two nominees were pushed over to a vote over the objection of every Democrat on the committee, which was a clear violation, Mr. Chairman, a clear violation of the committee rule, Rule IV, which I had never seen violated in my 8 or 9 years on this committee.

We have still not resolved how this committee is going to move forward in a collegial way when those in the minority and even its rules are not given the respect and fair treatment they deserves.

Yesterday we had another nominations hearing on eight lower court and executive branch appointments, including a very controversial nominee to the Court of Federal Claims. Today we have yet another hearing on a circuit court nominee, the sixth already this year. And no one has explained to me why we are having a second hearing Justice Owen, who was actually thoroughly questioned last year in an all-day hearing chaired by Senator Feinstein, but we could not have a second hearing on Justice Cook and Mr. Roberts who were hardly questioned at all on January 29th. I see a lack of consistency here and a willingness to exercise what at least looks like raw partisan power in order to pursue this forced march on nominations. Rather than trying to heal wounds caused by our disagreements, the majority almost seems like it wants to pour a little salt in them, and I think that is very unfortunate.

Justice Owen, I appreciate your willingness to appear here again. I do not have many questions for you. I just want to followup on one issue that we actually discussed during your hearing and then elaborated on in an exchange in writing, and that is the issue of what some call clerk perks. I asked you about the practice in the Texas Supreme Court of law clerks receiving cash bonuses from law firms for which they were going to work upon completion of their clerkships. Do you remember that discussion?

Justice OWEN. I do.

Senator FEINGOLD. When you testified in the hearing, you suggested that the practice in Texas was no different from what occurred in Federal courts and even the Supreme Court, and that was why you felt that the attacks in the Texas courts by certain interest groups in Texas were unfair.

In answer to my written questions, you indicated that you might have misunderstood my questions at the hearing. You said, "I do not think that when you said that the Supreme Court of Texas had been criticized for allowing its law clerks to accept large bonuses you meant bonuses that were actually paid to a law clerk while he or she was working for the court. And I do not know whether any law clerk for the Supreme Court of Texas was actually paid a clerkship bonus while clerking for the court."

Your hearing was on July 24, 2002, and you submitted your written answers to my followup questions on August 12, 2002.

Do you still, sitting here today, not know whether any law clerk for the Supreme Court of Texas was actually paid a clerkship bonus while clerking for the court?

Justice OWEN. Senator, I still don't know.

Senator FEINGOLD. Well, I have got to say I find that a little surprising in light of all the controversy that surrounded this issue

and the fact that the Supreme Court of Texas changed its policy concerning clerkship bonuses as a result of the investigation.

There was a National Law Journal report on February 26, 2001, just 2 weeks after the story broke of the Travis County attorney's investigation. "The Texas Supreme Court has prohibited its law clerks from accepting bonuses as reimbursement for bar exam fees or moving expenses from law firms during their clerkships."

Mr. Chairman, I would ask consent to put in the record that article and a series of newspaper articles that make clear that there was a practice of paying bonuses to clerks during their clerkships. Mr. Chairman, is that acceptable to the committee that those be included in the record?

Senator CORNYN. Without objection.

Senator FEINGOLD. Thank you.

An editorial in the Austin American-Statesman on September 8, 2001, for example, states, "Law firms have given the bonuses before, during, and after graduates go to work as briefing attorneys for the courts." So I would ask, Justice Owen, if you have anything further you want to add on this topic?

Justice OWEN. Yes, Senator Feingold. I would like to address that. The controversy over the law clerk bonus program that the employers or future employers of law clerks were paying to me, in the best of my recollection, the controversy was not over the timing of the bonus. It was over the fact that there was a bonus ever given at any point in time. And it didn't seem to matter to those critics of law clerk bonuses whether the law clerk accepted it before, during, or after their tenure on the court, whether it was my court or any other court.

I was trying to clarify in my written responses that I do not know whether a law clerk, while they were employed by the court, actually accepted a law clerk bonus. I don't know. I do know certainly that they received law clerk bonuses after they left our employ and went to work for their employer. I am certain of that. I know that that occurred. But I was not certain about the timing, that the timing did not seem to be the determinative or really that much of a factor at all in the criticism. The criticism was that they were given at all.

And so what the law firms did and what we, the court, put in its rules is what, in my understanding, the county attorney said this is certainly acceptable, but you can't accept a lump sum payment after you leave. It needs to be spread out over a year.

Senator FEINGOLD. I thank the witness and I thank the Chair.

Senator CORNYN. Thank you, Senator Feingold.

Justice Owen, let me just ask you a little bit about the so-called clerk perks, but first I want to say to Senator Feingold, before I know he has to leave for other commitments, that he and I have actually had a discussion about the process of judicial confirmation, and I think I have expressed to him and I think he has expressed here today and at other times his frustration at how broken this process has become. And I guess a lot has happened over the last years, including and even since I have been in the Senate, but mainly this has happened before I got here and before 11 Senators who comprise the freshman class of Senators for the 108th Congress have gotten here. And I have heard a number of Senators

who I respect very much who have expressed concerns, people like Senator Feingold, Senator Specter, and others, about how broken the process is and how much the sort of finger-pointing that even we heard during some of the statements today about, well, this is OK we treat you this way because of the way that other nominees were treated; or you shouldn't get a vote in the Senate because others didn't even get a vote at all, they didn't even get to come before the committee.

So, you know, there is nothing any of us can do to rewrite history, but I would just say here with this opportunity that I share some of the frustrations. And what I would hope is that at some point—and I don't really know whether it is with your nomination or Miguel Estrada's, but hopefully sometime soon we can bring together some Senators who are frustrated, maybe for different reasons, about the process and try to come up with some kind of process where we can get the nominees of the President, no matter who happens to hold that office, an opportunity for a timely hearing and then an up-or-down vote on the Senate floor.

I know Senator Durbin mentioned Jorge Rangel, for example, who I happen to know very well, a Corpus Christi lawyer who I would have, if I had been on this panel, said is a good nominee. He happened to be nominated by President Clinton. But for some reasons that I may not be aware of, he didn't get a vote.

So that is just one example I would point to and say I hope we don't get so bogged down in recrimination and finger-pointing and tit-for-tat in this body that we forget why it is we were sent here, that is, we in the Senate, and that is to discharge our duty, to represent the people who sent us here, and to vote, and that some of the game-playing and that sort of thing, which I think has really sunk to a level that is beneath the dignity of this institution, that we get a clean break and a fresh start.

Senator Feingold?

Senator FEINGOLD. Mr. Chairman, I think what you are saying is so important that I would just like to respond. I really appreciate that sentiment, and, you know, I had some of the same feeling. I have been on the committee for 8 or 9 years, but I had the same feeling. An awful lot of this had started before I got here. And I just want to say that I would love to figure out a way to break this logjam, this type of logjam. I want to say specifically that I totally reject the idea of tit-for-tat or recrimination. I don't believe in it. And any opposition that I have with regard to any nominee is not about that. It just could never work that way. And it is a disservice and an insult to our judiciary.

On the other hand, I also know that the answer can't be that one party gets to have the judges and the other party doesn't.

So whatever solution there is has to take into account what I witnessed on this committee. And what I did witness was a systematic attempt to prevent President Clinton's nominees from getting a hearing. You know, I like to think I have a reputation as a fair guy. A lot of people were very unhappy that I voted for John Ashcroft for Attorney General. I thought it was the right thing to do. But at the same time, I indicated that what was going on with judges at that time was just wrong.

So, yes, there has to be a change. We have to break this logjam. But it somehow has to take into account what happened to President Clinton's nominees so that both sides could go forward with a whole different attitude in the future. So I am eager to find a solution, and, Mr. Chairman, I appreciate the sentiments that you indicated.

Senator CORNYN. Thank you, Senator Feingold. And I appreciate your reputation for being fair-minded and even-handed, and, you know, that is what happens when you try to do your job in an impartial, dutiful sort of way. Sometimes you are going to make a vote that somebody says, well, how could you do that? It doesn't necessary serve your political interests. But, in fairness, it is a judgment you have to make and I think that is no different, really, from Senators and judges.

Let me ask you, just so the record is clear and those perhaps who may be watching these proceedings on closed-circuit television or otherwise will know, Senator Feingold raises the issue of clerk perks, and I know, because when I was serving with you on the Supreme Court, we could not pay law clerks—"briefing attorneys," we called them—very much money. I seem to recall that it was somewhere on the order of $30,000 a year while their peers, people who decided to go immediately to a large law firm and people who they were competitive with in law school would be making $100,000 or more. Is my memory roughly correct?

Justice OWEN. Yes, Senator. I think the gap may have widened over time.

Senator CORNYN. And there was a concern about how the judiciary, whether it is the Supreme Court or the Federal courts, can compete in getting good, high-quality candidates to serve in those important positions. And I recall the discussion of bonuses came up, but if you will just confirm my memory, if it is right, and if it is wrong, correct it. But my memory is that any bonuses that were ever paid to briefing attorneys or, for that matter, any briefing attorney who had accepted a job after the time they worked at the Supreme Court was entirely walled off and precluded from doing any work on any matters that may come before the court involving that law firm. Is that correct?

Justice OWEN. Absolutely. Absolutely. They were not—they're not allowed to touch the file, to sit in on any discussion of it, to work on any memos. They are completely isolated from all matters that that law firm is involved in, or law firms.

Senator CORNYN. In a moment, I want to—we are going to recess this hearing subject to the call of the Chair. The main reason for this hearing is, as you know, Justice Owen, to give any Senator who has questions an opportunity to ask you those questions, whether in person or in writing. And we appreciate your coming back for that purpose.

Since I have been in the Senate, I have heard it alleged that for some candidates Senators have not been able to get all the questions answered that they have, and we don't want that criticism to be applied in your case. We want to make sure that any Senator who has a question can ask questions, and that is why I believe Chairman Hatch has asked you to come back, not to create some sort of new precedent in your case or any other sort of nefarious

reason, but strictly to give Senators an opportunity to ask every question they may have.

Senator Schumer has asked to submit his statement for the record, and without objection, that will be accepted, his written statement.

And so, with that, we are going to stand in recess until 2:30 p.m., subject to the call of the Chair.

We are not going to do it for a time certain, but subject to the call of the Chair, so I will make that correction for the record.

Justice OWEN. Thank you, Senator.

Senator CORNYN. Thank you very much.

Justice OWEN. Thank you.

[Whereupon, at 1:02 p.m., the committee recessed, subject to the call of the Chair.]

[The committee reconvened at 2:40 p.m., Hon. Orrin G. Hatch presiding.]

Chairman HATCH. We are happy to begin these hearings again this afternoon, and I welcome you back to the committee, Justice Owen.

Justice OWEN. Thank you.

Chairman HATCH. We have had an interesting morning, and I apologize that I have been running back and forth between the floor and here, but we had Mr. Bybee up on the floor and I wanted to make it clear to invite every Senator who has any questions of you to come over. So I did that. I also a wrote a letter to every Senator in the U.S. Senate explaining that you were not treated very fairly in the last hearing. You were treated fairly by the chairman, but you were not treated very fairly by some—let me rephrase that. You were not treated very fairly in the markup, because many statements that were made were absolutely not right and I don't know how in the world my colleagues got them so wrong.

So one of the reasons why I am happy to have this opportunity to hear you again is to clarify some of those areas that really were very badly misspoken during our markup. I do believe that if our colleagues really look at the record carefully and clearly, they will see that you have not only answered the questions, but you have answered them well, and I think they will see why you got the unanimous "well qualified" rating, the highest rating the American Bar Association can give.

So this is a very, very important hearing and it is important to you. You deserve to be treated fairly. You deserve to have your excellent record explained. I am not the only person who feels—there were many who watched that hearing last time who felt you were one of the most qualified nominees we have ever had before the committee, and I personally believe that.

I have seen a lot of people and I have sat in on a lot of these hearings and I have conducted a lot of them and I have asked questions at many, many hearings, and I have to say you were at the top of the list of people who have appeared before the committee who were honorable and decent, great lawyers, and in your case a great justice, a great judge.

Let me just go over a few things and then see if any of our colleagues have any more questions. I would be happy to keep this hearing going as long as it takes to have them ask their questions.

But while we wait for some of them to show up and give them some time, because there is a vote on the floor, let me ask you this question.

Justice Owen, you have been criticized for your legal interpretation of the parental notification statute's use of the term, quote, "mature and sufficiently well-informed," unquote. I just want to clarify why you went about interpreting the statute the way you did so everybody will realize that you did it as it should have been done.

There are a number of rules of construction that courts apply when interpreting a statute, and isn't it true that one of those rules is that a legislature is presumed to be aware of the U.S. Supreme Court precedent in an area in which it has passed a statute? Is that right?

Justice OWEN. Yes, Mr. Chairman, that is one of the rules of construction.

Chairman HATCH. That is a basic rule of construction that the courts will follow?

Justice OWEN. Yes, Mr. Chairman.

Chairman HATCH. That is your basic rule of construction, as well?

Justice OWEN. It is.

Chairman HATCH. OK. Now, when you looked at the Texas parental notification statute, did you follow that basic rule of construction, in that your presumption would be that the Texas Legislature was, in fact, aware of Supreme Court precedent when it crafted its judicial bypass process?

Justice OWEN. Certainly, I think it was obvious to every member on my court that this statute was not written in a vacuum and that it was written against the context of Supreme Court decisions over a period of 20, now 30 years.

Chairman HATCH. Well, when you looked at the Texas parental notification statute, you followed that basic rule of construction, I know, but now all of your colleagues agreed with you on that point, as well.

Justice OWEN. They did.

Chairman HATCH. On page 254 of the text of the Supreme Court majority opinion in the first *Jane Doe* case, your court's majority is discussing a line of U.S. Supreme Court cases on parental bypass, starting with the Bellotti case. Your court majority concludes, and I quote, "Our legislature was obviously aware of this jurisprudence when it drafted the statute before us," unquote.

So you weren't alone in your conclusion that the Texas Legislature drafted the parental notification statute with the Supreme Court cases in this area in mind, were you?

Justice OWEN. No, I was not alone.

Chairman HATCH. You went and looked at all of the Supreme Court cases in this area?

Justice OWEN. I did. I read them and re-read them.

Chairman HATCH. And you pulled from them the things they said that a court could take into account in determining whether a young girl is mature and sufficiently well-informed. Is that an accurate appraisal?

Justice OWEN. That is, and some of the cases not only involved minors, but involved more broadly the whole issue of choice and what States may and may not encourage someone who is making the decision. So some of it was drawn from cases that were not exclusively related to minors.

Chairman HATCH. I would like to go back over this quickly and make sure I understand all this correctly, and I want the committee to understand it correctly because there was some, I think, mis-construction of your earlier testimony when you appeared before the committee before and I want to make sure that there is no mis-construction the second time around.

Because it is a rule of statutory construction that your court should presume that the legislature was aware of U.S. Supreme Court precedent in this area, you did look to what the Supreme Court had said. And instead of picking and choosing among the things the Supreme Court had said were permissible for a State to consider in whether a minor was, quote, "mature and sufficiently well-informed," unquote, you would have defined those words in light of everything the Supreme Court had said up to that point. Is that an accurate appraisal?

Justice OWEN. That is correct, Senator. I didn't see any basis or any indication from the legislature that we were supposed to pick some aspects of that and not others.

Chairman HATCH. The Texas Legislature did not define, quote, "mature and sufficiently well-informed," unquote, anywhere in the statute, did they ?

Justice OWEN. No, Mr. Chairman, they did not.

Chairman HATCH. And again they are presumed to be aware of Supreme Court precedent in that area. Now, it seems to me that if they did not define those terms, they would expect the words to be defined by Supreme Court precedent. Would that be a fair appraisal?

Justice OWEN. I think they certainly chose those words in the context of all of those decisions and what they have said.

Chairman HATCH. In other words, if you didn't include everything the Supreme Court had said, you would have been substituting your own judgment for that of the legislature. Is that correct?

Justice OWEN. That is what I thought, yes, Mr. Chairman.

Chairman HATCH. In fact, this committee received a letter from one of the sponsors of the Texas Parental Notification Act, Senator Florence Shapiro, and she had this to say, quote, "I appreciated that Justice Owen's opinions throughout this series of cases looked carefully at the new statute and looked carefully at the governing U.S. Supreme Court precedent upon which the language was based to determine what the legislature intended to do," unquote.

She added, quote, "Along with many of my colleagues, Democrats and Republicans alike, I filed a bipartisan amicus curiae brief with the Texas Supreme Court explaining that the language of the Act was crafted in order to promote, except in very limited circumstances, parental involvement," unquote.

Now, it sounds to me that you did what a good judge would do. You followed the rules of statutory construction. You went back and looked at what the Supreme Court had pronounced on this

matter and the precedents that the Supreme Court had set, and you did what the legislature intended, as Senator Shapiro attested to. Am I right?

Justice OWEN. I tried my best.

Chairman HATCH. The fact is you did that, didn't you?

Justice OWEN. Yes, sir, I believe I did.

Chairman HATCH. Well, that is important. I hope that clarifies something that I think was distorted during our markup. And I am going to, with your permission, continue to clarify a few things because I think we want to make sure that the second time around you are treated a little more fairly than you were the first time around.

I think if people will look at this record and look at what you have said, I don't see how anybody could possibly vote against you, to be honest with you. Now, we do misunderstand some things around here. There is no question about it, and a lot of very sincere people do some very sincerely dumb things around this place. That doesn't necessarily mean that my colleagues are doing that, but I felt that they did in this markup that we had.

Now, let me go to the question of *FM Properties Operating Company* v. *City of Austin* because this came up as well. I would like to clarify some points about the *FM Properties* case.

This was case was not a case about big business interests or polluters of the environment. What this case came down to was State versus local regulation. Am I correct in that?

Justice OWEN. That is correct, Senator, Mr. Chairman. We had a statute in front of the court and the constitutionality of a statutory scheme that had been passed by the Texas Legislature was being challenged. So it was a question of whether the legislature's will, as spoken through that statute, was constitutional or not.

Chairman HATCH. As I understand it, both the city of Austin and the State of Texas wanted its law to control in an area known as an, quote, "extraterritorial jurisdiction," unquote. So it was an area outside the city, right?

Justice OWEN. That is correct. It was outside the city's set limits. But under Texas law, depending on the size of a city, they can encircle an area called their extraterritorial jurisdiction and enforce some ordinances before they annex it.

Chairman HATCH. OK. Now, after some back-and-forth, the State legislature passed a provision that was included in the Texas Water Code that basically took away the city of Austin's authority to regulate within this extraterritorial jurisdiction. Is that a correct statement?

Justice OWEN. That is correct. The statute essentially said—and again I am a little bit cold on the exact provisions, but I believe it said that if the city changes the rules of the game, basically, within this ETJ more than three times within a period of time, then the State scheme kicks in. And it was a regulatory scheme of the State; it wasn't simply abrogating the city of Austin's ordinances. It imposed its own set of regulations.

Chairman HATCH. I think anybody listening can see that these aren't easy cases.

Justice OWEN. It was not an easy case.

Chairman HATCH. Well, now, to be clear, although the city of Austin couldn't regulate within the extraterritorial jurisdiction, that land remained subject to all of the State environmental regulations, isn't that correct?

Justice OWEN. That is correct, and there was another layer of regulation added under this statute. These water quality plans that would be developed in these areas were also subject to review by the Texas Natural Resources Commission. So there was another layer of regulation on top of that that would be applicable to every other land outside a city limits across Texas.

Chairman HATCH. And that would include any State laws on water quality standards. Is that accurate, as well?

Justice OWEN. That is accurate, Mr. Chairman. It had to meet all the State——

Chairman HATCH. There was no action by the court to interfere with State environmental regulations?

Justice OWEN. No, I didn't view it that way.

Chairman HATCH. Or even water quality regulations?

Justice OWEN. Again, the question in front of us was did the legislature have the constitutional authority to pass this statute, and I believed that they did.

Chairman HATCH. OK. Now, it is also my understanding that the then-state attorney general, a Democrat, intervened in that case on the side of the State of Texas.

Justice OWEN. That is correct.

Chairman HATCH. And took the position, as I understand it, that the State of Texas had entered into this area and its law predominated over the local ordinances. Is that your understanding?

Justice OWEN. That is correct. The State attorney general argued in a lengthy brief filed with us after they intervened saying that this statute was constitutional and should be upheld.

Chairman HATCH. Now, it would seem to me that the city of Austin had authority to regulate within its own extraterritorial jurisdiction only because the legislature had granted it that authority in the first place. I think that you even mentioned this in your opinion, but what the legislature grants it should be able to take away from its own subdivisions. Is that correct?

Justice OWEN. That was my view that certainly if the legislature could allow, permit a city to expand an ETJ, it could certainly contract that. To me, the State trumps the city.

Chairman HATCH. Then it would appear to me that this opinion was a completely reasonable opinion and a reasonable position to be taken on these facts.

Justice OWEN. I believed so at the time. I still do, Senator.

Chairman HATCH. You wouldn't have done——

Justice OWEN. No, I wouldn't have written it had I not.

Chairman HATCH. Well, that is right. I think if people understand the facts, it is pretty hard to find fault with the decision that was made. It was what a good judge would do.

Now, I don't mean to wear you out with these things, but I think it is important because some of our colleagues seem to have misunderstood some of these things or used them as a justification for voting against you when, in fact, they should be a justification for voting for you. Anybody who is reasonable and fair would have to

say, my gosh, she was right, she did what she should have done, she was a great justice, she was somebody who cared about the law, she is somebody who followed precedent, she is somebody who lived within the confines of the legislation that was enacted by the duly elected officials, she didn't try to make law, she basically interpreted the law, and she did a pretty good job. I think any decent person would conclude that. So I just want to make sure our colleagues don't have that misconstrued anymore.

Justice OWEN. Thank you.

Chairman HATCH. Now, let me move ahead to the *City of Garland* v. *Dallas Morning News*. You have been criticized by some on this committee for disagreeing with your court on the correct interpretation of the Texas Public Information Act.

Now, am I correct that this statute is modeled on the Federal statute known as the Freedom of Information Act, or what we call FOIA?

Justice OWEN. Certainly, parts of it are, yes, Senator, that is correct.

Chairman HATCH. Now, I just want to try to simplify what was going on in that case so that we can clarify and make sure that nobody on this committee will have a right to distort your opinions again.

As I recall, it was about newspaper trying to get a draft memo written by someone working for the city about firing someone else who worked for the city and the memo was prepared so that the city council could discuss the situation. Did I state that pretty well?

Justice OWEN. That is correct.

Chairman HATCH. OK. Now, under the Texas statute that you were asked to interpret, just like the Federal statute, certain documents are exempt, meaning that the city does not have to produce them. Am I correct on that?

Justice OWEN. Yes, Senator. There was a provision in the Texas Act that basically codified what is known as the deliberative process privilege and our court recognized—we all agreed on that. Everybody on my court agreed that this was modeled after the Federal counterpart of the deliberative process privilege.

Chairman HATCH. As I read the opinion, one of the exemptions that your whole court agreed upon was that the documents covered under the deliberative process privilege were exempt.

Justice OWEN. That is correct.

Chairman HATCH. Everybody agreed on that, didn't they?

Justice OWEN. We all agreed that we were trying to figure out where the bounds of this deliberative process privilege applied to this document.

Chairman HATCH. If they fell within that deliberative process privilege, then they were exempt?

Justice OWEN. That is correct.

Chairman HATCH. OK. The question you faced was whether documents used in making personnel decisions, like this memo we are talking about, fell under the deliberative process privilege. Is that accurate?

Justice OWEN. That is correct.

Chairman HATCH. So the only dispute involved here was whether the scope of that privilege extended to personnel decision documents. Am I right?

Justice OWEN. That is correct. Clearly, the deliberative process privilege would not shield the ultimate decisions and the reasons that were publicly given, but it would shield the deliberations of the governmental body over what personnel action to take.

Chairman HATCH. As I understand it, this dispute was a matter of first impression, right?

Justice OWEN. Certainly, for our court.

Chairman HATCH. Well, it was never decided before by your court. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. OK, so there was no precedent on point that the court was bound to follow. Is that right?

Justice OWEN. That is right.

Chairman HATCH. Certainly, they weren't bound to follow it under a principle of stare decisis. That is correct?

Justice OWEN. No. That is correct.

Chairman HATCH. Now, we discussed that the Texas Public Information Act was modeled on FOIA, the Freedom of Information Act.

Justice OWEN. Certainly, this provision.

Chairman HATCH. The Federal Act.

Justice OWEN. Yes, certainly, this part and others, but this part, yes.

Chairman HATCH. Am I correct in assuming that because the TPIA, or the Texas Act, was modeled on FOIA that that is why you looked to Federal case law for guidance in considering whether the privilege extended to personnel decisions? Is that right?

Justice OWEN. That is right, Senator, and again I don't think we materially disagreed over that on the court. The majority of the court looked, as well, at Federal decisions to try to find out what are the parameters of the deliberative process privilege.

Chairman HATCH. OK. Is it fair to say that under Federal law, documents used to make personnel decisions are included within the deliberative process privilege?

Justice OWEN. Certainly, the cases that I cited seemed to me to say that.

Chairman HATCH. You are pretty sure of that?

Justice OWEN. I was or I wouldn't have said so, yes.

Chairman HATCH. That is right. In other words, you do what you think is right, right?

Justice OWEN. Yes, Senator. I mean, I had no idea what the deliberative process privilege was going into this. I had a completely open mind. It was my job to sit down and read the authorities that the legislature was presumed to have known about it when they passed this statute.

So I was looking at how the Federal courts—again, there was a lot of indication that we should be looking at Federal precedent to see what the U.S. Supreme Court and the other Federal courts had said about this. And to the best of my ability, I tried to apply it to the facts before us.

Chairman HATCH. Well, in fact, the liberal luminary Judge Patricia Wald, who recently retired from the Circuit Court of Appeals for the District of Columbia, held that the deliberative process privilege extends to similar personnel documents. She joined the court's unanimous opinion so holding in the *American Federal of Government Employees Local 2782* v. *U.S. Department of Commerce*.

So if I understand correctly, you were urging your court to follow Federal case law.

Justice OWEN. That is correct. There were several cases, including the one that you cited, on point.

Chairman HATCH. Such as the opinion joined by Judge Wald?

Justice OWEN. That is correct.

Chairman HATCH. And to find that the deliberative process privilege incorporates personnel documents. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. It seems to me that that is within the judicial mainstream, within the——

Justice OWEN. I certainly thought it was and think it is, and I don't think my colleagues thought otherwise.

Chairman HATCH. I think you can go further than that. You know it is.

Justice OWEN. I know it is, it is, and we just had a disagreement again on the court as to how the statute should be construed. But no one thought then, and I certainly don't think now that I was out of the mainstream for taking the position that I did in that case and relying on Federal authorities.

Chairman HATCH. I thought Senator Cornyn's opening remarks introducing you really make it very clear how judges operate. You do differ from time to time. You write different opinions from time to time and you criticize each other from time to time, mainly because that is the way judges talk. That is what they do.

One final point on that case, Justice Owen. Your dissent noted that the Texas Open Meetings Act specifically allows employment matters to be discussed in closed meetings. You argued that a document that might otherwise be made public could not be brought within the deliberative process exemption by discussing it at a closed session, right?

Justice OWEN. That is correct. You can't shield a document simply by taking it into a closed meeting.

Chairman HATCH. OK. Does it seem utterly inconsistent to you to read the Open Meetings Act to exempt personnel discussions from coverage, but to then turn around and read the TPIA not to cover the documents used at those very same meetings to discuss personnel decisions?

Justice OWEN. It seemed to me that the legislature did not intend to shield the give-and-take, the oral give-and-take. If someone had said exactly what was in that memo at an open meeting, that would—I am sorry—at a closed meeting, that would be shielded under the Information Act. But had they written it down on a piece of paper, then it would have to be provided.

And, again, the rationale behind this is the protection of the employee. That is what the deliberative process privilege—one of the things it wants to protect is that when an employee's future is

being discussed and when perhaps allegations against them are being discussed that that is not publicly disseminated unless and until a decision is made. And even then the give and the take is not disseminated, only the personnel decision and the stated reasons for it. But that is the logic behind that.

Chairman HATCH. Now, some of my colleagues have accused you of ruling against consumers. I have heard some of them really complain that you are not consumer-oriented, but I believe you have joined or authored a number of opinions which have advanced the interests of consumers.

To take only a few examples, you have supported the right to medical malpractice victims to recover from the physicians who injured them. You have upheld the right of policy-holders to recover from insurance companies that refuse to pay meritorious claims.

I think, by your judicial responsibility to treat all litigants equally and to resolve each of those individual cases according to its individual merits, you have done that as well.

Justice OWEN. That is correct.

Chairman HATCH. Is that right?

Justice OWEN. That is right.

Chairman HATCH. Therefore, in any given case, is it true that you do not determine from the outset which party should prevail, whether it be the consumer or some other interest?

Justice OWEN. No, Senator. That would be the complete antithesis of judging.

Chairman HATCH. Well, I am going to list some cases that undermine any assertion that you invariably rule against a particular type of party and I am going to give you a chance to comment on these, because I found some of those criticisms to be particularly wrong. In fact, all of these have been wrong, the ones who have criticized you.

Let's take *Crown Life Insurance Company* v. *Casteel*. William Casteel, an independent agent, sold insurance policies of Crown Life Insurance Company. Ruling on a novel issue, you joined the opinion that an insurance agent has standing to sue his insurance company for its deceptive or unfair acts or practices in the business of insurance. Am I right on that?

Justice OWEN. That is correct.

Chairman HATCH. In *Chilkewitz* v. *Hyson*, you held that a physician accused of medical malpractice was subject to a lawsuit even though the plaintiff named him individually and not the medical association with which he was affiliated. You thus rejected the view that formalism should stand in the way of deserving plaintiffs' ability to recover for injuries that they have suffered. Am I right about that?

Justice OWEN. That is right. The doctor—he had formed a professional corporation, of which he was the only shareholder, and he had his name listed with his name and "P.C." after it and the patient didn't know when they sued him whether they were suing an individual or corporate capacity. And after limitations had run, he made the argument, well, you sued the wrong entity. And I held—wrote for the court that, no, that is not right; you cannot lie behind the log like that and——

Chairman HATCH. Nor can you hide behind——

Justice OWEN. A technicality like that. And we had a specific rule that said you may be sued in your assumed name, and he had held himself out as that assumed name. And we said, of course, limitations has not run; the lawsuit can proceed.

Chairman HATCH. In *Hernandez* v. *Tokai Corporation*, you held that a manufacturer of cigarette lighters has a duty to make certain that its products are child-resistant even though the lighters were only meant to be used by adults. Is that right?

Justice OWEN. Yes. We said that—the manufacturer was arguing that since they only made these lighters for a specific category of customer—for example, people who said that they had difficulty using lighters with the child-resistant buttons—they said we should not be liable as a matter of law; we have no duty. And our court said, no, that the traditional risk balancing, risk/utility balancing must take place. You are not absolutely shielded and do have a duty.

Chairman HATCH. In *Mid-Century Insurance Company* v. *Lindsey*, you held that an insurance company was obligated to pay $50,000 in uninsured motorist coverage. You concluded that the policy-holder's policy which applied to, quote, "accidents," unquote, extended to inadvertent acts committed by a child. Is that right?

Justice OWEN. That is correct. The child, I believe the facts were, was in a pickup and it had a run rack on it. And I believe the child was climbing out of the back window into the pickup bed, or vice versa, and the gun went off. And we held that that was an accident within the meaning of the standard policy, auto policy.

Chairman HATCH. Well, let me just mention one more. In *Lofton* v. *Allstate Insurance Company*, a consumer in that case prevailed against his insurance company in a jury trial for failing to provide insurance benefits that had been promised. Siding with the insured—in other words, the person who was insured—you joined the opinion that allowed the consumer's appeal to the trial court's reduction of the jury award against the insurer to go forward.

Justice OWEN. I missed the name of the case. I am sorry, Senator.

Chairman HATCH. It was *Lofton* v. *Allstate Insurance*.

Justice OWEN. That is correct, that is correct.

Chairman HATCH. Well, it sounds to me like you have had plenty of cases—these were more than a few, but you had plenty of cases where you found on behalf of the consumer.

Well, let me ask you this. Do you have a feeling or a compulsion to find for corporations just because they are corporations?

Justice OWEN. Certainly not, certainly not.

Chairman HATCH. Do you have a propensity to find for consumers just because they are consumers?

Justice OWEN. No, Senator. That would not be my job to find for either side just because of who they are or what position they hold.

Chairman HATCH. Are corporations always wrong, as some of my colleagues have seemed to imply with some of their questions?

Justice OWEN. No, Senator, they are not.

Chairman HATCH. Sometimes, they are actually right, aren't they?

Justice OWEN. Sometimes they are wrong, sometimes they are right.

Chairman HATCH. And what should be done?

Justice OWEN. Again, as I was trying to explain to some of your colleagues earlier this morning, I can't keep score and say, well, it has got to all even up at some point and I must at least rule half the time for this side or that side.

I mean, we have to take each case as it comes, on its merits, and we have to apply the law impartially, regardless of which side comes out the winner or the loser. The law has to be applied indiscriminately.

Chairman HATCH. And sometimes the worker is right?

Justice OWEN. Sometimes, the worker is right.

Chairman HATCH. Sometimes, the employer is right?

Justice OWEN. Sometimes, the employer is right.

Chairman HATCH. Sometimes, the consumer is right, right?

Justice OWEN. That is correct.

Chairman HATCH. And sometimes the corporation is right?

Justice OWEN. That is correct.

Chairman HATCH. What you seem to be saying to me is that you do what you think is right under the law.

Justice OWEN. Yes, Senator. I have taken a solemn oath to do that and I have done—to the very best of my ability, applied the law in every case, as I have perceived and as I have researched it and studied it and applied it.

Chairman HATCH. I thought Senator Cornyn's remarks today, since he served with you for 3 years, were pretty persuasive in that regard that he thinks you are a great justice.

Justice OWEN. Well, he was a great judge on our court. I enjoyed the opportunity and the honor of serving with him.

Chairman HATCH. We are honored to have him on the committee now.

Now, let me just go into the area of employment cases just for a minute. I don't mean to keep you. I am just trying to make sure that our colleagues have every opportunity to come here and ask any questions they want. We have been in hearing now since basically ten o'clock this morning and I would like to make sure that anybody who has any questions can come.

I invited the whole Senate, if they want to——

Justice OWEN. OK.

Chairman HATCH [continuing]. Because we have had some people claim that we are rushing these judges through. Well, I hardly think so. You have been sitting there for how long now?

Justice OWEN. I think we got started about ten-thirty, I think.

Chairman HATCH. Yes, but I mean how long have you been sitting as a nominee?

Justice OWEN. Oh. I was nominated in May of 2001.

Chairman HATCH. So almost 2 years. Well, I think our colleagues have had plenty of time to look at your record, but what I want to do here in this few minutes that we have together is not wear you out with all this, but I just think it is important for us to show how there were some misconceptions that I believe caused some of my colleagues perhaps sincerely to vote against you. I just want to make sure that there are no misconceptions the second time around.

Let me just take a few minutes in the area of employment cases. In those cases, there has been an effort to cast you as pro-employer, but you have ruled favorably for employees by rejecting employers' attempts to evade responsibilities for injuries suffered by their employees.

It is clear that you do not set out in a given case with the intention of issuing a ruling that will benefit one side or the other without listening to the facts. You are not going to do that.

Justice OWEN. That is correct.

Chairman HATCH. You resolve legal disputes according to the governing law. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. And you resolve them in a way that does justice, at least in your eyes, right?

Justice OWEN. That is my obligation.

Chairman HATCH. OK. You defer to the stated intentions of the people's elected representatives in the legislature. You have made that clear time and time again, and you faithfully enforce the case law of the U.S. Supreme Court, regardless of what results those authorities will yield. I think that is all true, isn't it?

Justice OWEN. It is.

Chairman HATCH. In *Lee Lewis Construction, Inc.* v. *Harrison*, you joined the concurring opinion that upheld a $12.9 million jury verdict, $5 million of which was for punitive damages, involving the death of a worker on a constructionsite where the general contractor had knowledge of, but did not stop, the use of an extremely dangerous device. Am I right on that?

Justice OWEN. That is correct.

Chairman HATCH. In *Pustejovksy*—I don't know how you pronounce it—v. *Rapid-American Corporation*, you allowed an employee who had developed cancer due to his exposure to asbestos to sue an asbestos supplier, despite the fact that in the past he had agreed to settle his claims against another asbestos supplier. You refused to allow one settlement to interfere with the injured worker's ability to recover from another party partially responsible for his injuries. Is that right?

Justice OWEN. That is right, and I also believe in that case that he had developed one kind of asbestos disease early on and then developed a second kind of asbestos-related disease later in life. And so he didn't know at the time that he settled with the original defendants that he down the line would develop this other asbestos-related disease that was different. And we held that—I as part of the court held that that did not bar his subsequent suit for the later-developing disease.

Chairman HATCH. In *Kroger Company* v. *Keng*, you held that employers who declined to join the State's worker's compensation insurance scheme may not raise the defense of, quote, "comparative negligence," unquote. If employers could raise that defense, employees who were injured on the job would have seen their compensation shrink or even disappear. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. So you found for the employees?

Justice OWEN. I did.

Chairman HATCH. Because they deserved it, right?

Justice OWEN. We looked at the statute and I thought it was pretty clear that they were not entitled——

Chairman HATCH. Has it been your experience that most of the employee cases that are brought, the ones that are worthwhile, good cases, are generally settled before they ever go to trial?

Justice OWEN. I think that is a fair assessment that it is only the cases where there is really a legitimate argument, a pretty solid argument, that get to our court.

Chairman HATCH. So most of the cases in employment law that get there are cases where maybe both sides have arguments and they have to be resolved, right?

Justice OWEN. That is correct.

Chairman HATCH. And sometimes the business is right, sometimes the employee is right.

Justice OWEN. That is correct.

Chairman HATCH. In that case, you ruled for the employee?

Justice OWEN. Yes, Senator.

Chairman HATCH. In other cases where you believe they are right and the law is on their side, you have ruled for the business?

Justice OWEN. That is correct.

Chairman HATCH. Isn't that what a judge should do?

Justice OWEN. That is my understanding of what——

Chairman HATCH. Don't businesses have a right to be treated fairly in the courts just like employees do?

Justice OWEN. Absolutely.

Chairman HATCH. Well, don't employees have a right to be treated fairly in the courts just like businesses do?

Justice OWEN. Absolutely.

Chairman HATCH. OK. Well, I think anybody in their right mind would agree with that, and yet we have had wild-eyed statements made in the past on this committee that you rule for corporations and not for employees.

Well, let me just cite another one, *NME Hospitals* v. *Rennells*. You joined the opinion that ensured court access for a sex discrimination claim of a female medical provider. The plaintiff sued the client of her employer alleging an unlawful employment practice under the Texas Commission on Human Rights Act. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. OK.

Justice OWEN. The issue there was standing. She was not directly an employee and we held in this case that that didn't matter; she still was entitled to sue.

Chairman HATCH. So you found for the little person, to use some of my colleagues' opinions. But if the common man was wrong, would you find for him just because he is not the owner of a business?

Justice OWEN. No, I would not.

Chairman HATCH. Well, let me ask this. Because you at one time were a corporate lawyer, as well, and a very highly respected one with the highest ethical and legal ability ratings, would you find for a corporation just because you used to represent some corporations?

Justice OWEN. No, no, Senator, I would not.

Chairman HATCH. Not even a former client?

Justice OWEN. No, no.

Chairman HATCH. In *Clark* v. *Texas Home Health*, an employer sought to avoid liability for retaliating against nurses who sought to make a report of a fatal medical errors with the Board of Examiners by demoting them. The trial court had granted summary judgment in favor of the employer.

You joined the court's unanimous opinion that the plaintiff nurses had a cause of action under Texas law for the retaliatory employment decision taken in response to their expressed intent to report the unprofessional conduct of another licensed health care practitioner. Is that right?

Justice OWEN. That is correct. I believe in that case the employer knew that the nurses were about to take the action and demoted them before they could whistle-blow, essentially. And we said, no, that is not what the Act contemplates, that you can't cut them off like that.

Chairman HATCH. So again you found for the employees?

Justice OWEN. Yes.

Chairman HATCH. In *Franks* v. *Sematch, Inc.*, you joined a per curiam opinion of the Texas Supreme Court ruling that an employee injured by a manufacturer's gate is not barred by the statute of limitations from intervening in a subrogation action against the manufacturer and employer when the underlying claim was timely filed. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. Again, you ruled for the employee.

Justice OWEN. That is correct.

Chairman HATCH. In *Sanchez* v. *Hastings*, Ms. Sanchez filed a legal malpractice suit against her law firm and three of its lawyers, alleging failure to sue the employer of her husband who was killed in an on-the-job accident. The trial court and the court of appeals—that is the intermediate court before the supreme court—held that the statute of limitations had run on Ms. Sanchez' legal malpractice action.

You joined in the opinion that concluded that the pendency of the underlying wrongful death litigation tolled the statute of limitations until the litigation concluded. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. Again, for the employee.

Justice OWEN. That is correct.

Chairman HATCH. It is hard for me to understand how staff can prepare Senators on this committee to believe that you are somehow stilted in favor of just the employer, when it is very clear that you have not been and that you have done what is right within the law.

In *Farmer* v. *Ben E. Keith Company*—I don't want to do too much of this because there are a lot of cases you have been through in your lifetime on the court, but I do want to cover some of these just to make it clear that these accusations are ridiculous.]

In *Farmer* v. *Ben E. Keith Company*, Ms. Farmer sued her employer for breach of contract related to her injuries that she contended were received on the job. She was injured on the job, according to her. The trial court granted summary judgment to the employer and the court appeals dismissed her appeal as untimely.

You joined a per curiam opinion that set forth the appropriate appellate timetable and held that Ms. Farmer's appeal was timely, right?

Justice OWEN. Well, let me say this about per curiam opinions. They are not signed opinions of the court.

Chairman HATCH. right.

Justice OWEN. It takes at least six judges to put them out, but my policy has been since I have been at the court that if I disagreed with a per curiam opinion, I would dissent, so that we would all have to line up and I would have a signed dissent. So I can't think of an exception; that if it is a per curiam opinion, either I was for it or I would have dissented.

Chairman HATCH. So you actually joined in it, then?

Justice OWEN. As a practical—I can't say that—I cannot disclose and say that particular opinion, but that has been my personal practice.

Chairman HATCH. Now, I will ask about legal protections for children. Through your rulings in several cases, you have enhanced the legal protections available to children who find themselves caught up in the legal system. Young children are some of the most vulnerable members of our society, and for them litigation must be even more confusing and disorienting than it is for seasoned adults. And it is bad enough for adults. Your rulings in the following notable cases affirmed the right of children to be represented by attorneys, and also preserve children's rights of privacy.

S.V. v. *R.V.* In that case, you authored a lone dissent arguing that the statute of limitations should be tolled when a child represses the memory of a parent's sexual abuse. Is that right?

Justice OWEN. That is correct. She alleged that her father had sexually molested her repeatedly when she was a child.

Chairman HATCH. Well, according to you, the court had tolled the statute of limitations in fraud and fiduciary cases, and since sexual abuse is more reprehensible than fraud and the parent-child relationship happens to be a fiduciary one, you argued the limitations period should be tolled here as well.

Justice OWEN. I thought that best squared with our prior precedent; I certainly did.

Chairman HATCH. But you did that in dissent, right?

Justice OWEN. In dissent.

Chairman HATCH. You did not prevail in that case?

Justice OWEN. I did not prevail.

Chairman HATCH. The other majority went against you in that case?

Justice OWEN. That is correct.

Chairman HATCH. I wonder if our colleagues gave any consideration to that. Well, I am going to suggest that they do. That is why I am asking you this question.

In *In re D.A.S.*, you held that the right of indigent juveniles to be assisted by a lawyer also extends to proceedings on appeal. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. Prior to the *In re D.A.S.* case, the scope of a juvenile's right to counsel was unclear in Texas. Is that right?

Justice OWEN. I want to make this clear that this is in the context of a quasi-criminal case, that this is a juvenile delinquency proceeding where the juvenile may face being detained as a delinquent for crimes. They are not tried for the crime, but——

Chairman HATCH. But you did that?

Justice OWEN. Right. It was a quasi-criminal—yes, it was a quasi-criminal proceeding.

Chairman HATCH. OK. In *Abrams* v. *Jones*, there was an acrimonious dispute over who should have custody of a child. You refused to allow access to records about the child's mental health because you concluded, if I read it correctly, that releasing them would have harmed the child physically, mentally and emotionally. Is that right?

Justice OWEN. Well, there was a statute in place and the question was how does the statute apply under these circumstances. And I held—wrote the opinion for the court that the statute precluded letting one parent get the mental health records of that child when the child was seeing the mental health provider because they were upset and disturbed by the divorce proceedings.

Chairman HATCH. Now, I know that I am causing you to sit in that seat far too long. If you need a break or anything, just let me know.

Justice OWEN. Thank you. I appreciate that.

Chairman HATCH. But I think it is important that we blow away some of these, I think, unfair comments that have been made because, boy, anybody who looks at your record has got say she is one heck of a justice.

Justice OWEN. Thank you.

Chairman HATCH. I think most people know that I know what a good justice is, and I can tell you you are one of the best I have seen and I have been on this committee for 27 years.

Let me ask you just a basic question, and it is embarrassing for you to answer, perhaps, but I think you ought to answer it.

Justice OWEN. I am sorry?

Chairman HATCH. I am going to ask you a question that might be embarrassing to you and I think you ought to answer it. Do you think that you were treated fairly last year? I am not saying that your hearing wasn't conducted fairly, because I was there and it was, and I know you believe it was.

But do you think you have been treated fairly by some of the comments made by those who voted against you on this committee?

Justice OWEN. Senator, let me say this. I think there are a lot of allegations out there that are unfounded that seem to continue to resonate. And from that standpoint, I am not sure that people are—that the allegations that were leveled against me have been adequately addressed.

Chairman HATCH. Well, you are being very diplomatic, as any justice should be, but I am asking you a real question. Do you think you have been treated fairly in this process?

Justice OWEN. It was a difficult process to go through; it was very difficult.

Chairman HATCH. Again, I am going to ask the question, do you think you were treated fairly or unfairly?

Justice OWEN. I would rather let other people judge that. It was hard for me. It was hard because——

Chairman HATCH. What was hard about it?

Justice OWEN. Because I felt that what I have done and the decisions I have written and what has been written by my colleagues about me was not accurately characterized.

Chairman HATCH. By members of the committee?

Justice OWEN. Well, or by people who gave members of the committee information.

Chairman HATCH. You mean you are criticizing our staff on this committee?

Justice OWEN. No. I am not sure who gave whom what, but the questions——

Chairman HATCH. I am being deliberately tough on you, but the answer is probably so.

Justice OWEN. A lot of the questions that I was asked had embedded in them premises or statements that were not factually correct.

Chairman HATCH. Do you think some of the press releases that have been issued have been fair, have fairly characterized your service on the court?

Justice OWEN. No, I do not.

Chairman HATCH. Do you think that some of the public statements that have been made have fairly characterized your work on your court?

Justice OWEN. Certainly not all of them.

Chairman HATCH. Do you think some of the statements that have been made by some of my colleagues who have been opposed to you have fairly characterized your service as a justice on the Texas Supreme Court? I said some of them.

Justice OWEN. I am sort of in somewhat of an awkward position.

Chairman HATCH. I know you are. I am deliberately putting you there. My colleagues can be mad at me, but I think you ought to say yes or no.

Justice OWEN. Well, again I think that my record has been given short shrift and that there continue to be characterizations of what I have written and how I have ruled that I don't think are accurate.

Chairman HATCH. My gosh, you graduated No. 1 in your class at Baylor Law School. You had the highest score on the bar examination. You have the highest rating by the American Bar Association. Your colleagues all respect you. We had one of the Democrat Supreme Court Justices here throughout your whole hearing last time who was outraged by the way you were treated.

Do you remember all that?

Justice OWEN. I do, I do.

Chairman HATCH. Well, I will get off that because I know that you are uncomfortable, but I think it is important for the public to understand that we have an obligation as Senators to do what is right around here. We have an obligation to be fair, if not to the President, at least to you.

Justice OWEN. Thank you, Senator.

Chairman HATCH. Well, let me just go through a few other things because it is important that we clarify some—I promise you

I won't keep this going too much longer, but it is important because some of our colleagues, I think, sincerely have distorted your record because they have gotten the wrong information, information that is not accurate, that is unfair to you. That is why I am taking a little bit of time.

And I am busy. I mean, there is a judgeship up on the floor right now and I have already spoken. I have been back and forth so many times, I feel like I am going to need a rest tonight.

Let me ask about legal services for the poor because we keep getting these comments that are, I think, out of left field that you don't care for the poor, you don't care for employees, you don't care for the underdog. The fact of the matter is, when I look at these cases, you sure as heck do. You care for all these people and you care for doing what is right in the law.

Let me just ask about legal services for the poor. It seems to me that you have used your position as a public figure to advocate higher-quality and more effective legal representation for the poorest citizens of Texas.

As you explained in *Griffin Industries* v. *Honorable Thirteenth Court of Appeals*, quote, "Our State constitution and our rules of procedure recognize that our courts must be open to all with legitimate disputes, not just those who can afford to pay the fees to get in," unquote.

Is that a fair characterization of what you said?

Justice OWEN. I did say that, yes.

Chairman HATCH. You also persuaded the Texas Legislature to enact a law that provided additional funding to organizations that represent the poor.

Justice OWEN. I must say I didn't do that single-handedly.

Chairman HATCH. No, but you did.

Justice OWEN. I was part of the effort, certainly.

Chairman HATCH. Well, you certainly helped persuade them. You didn't do it all by yourself, no, but you were there and you helped.

Justice OWEN. I did.

Chairman HATCH. OK. As a result, these groups have received millions of extra dollars every year since then, right?

Justice OWEN. That is correct.

Chairman HATCH. You have also been a member of the Mediation Task Force established by the Texas Supreme Court, as well as a number of statewide committees, and each of these organizations aim to improve the availability and quality of legal services for the poor. Is that right?

Justice OWEN. Yes. The mediating committee was not totally focused on so much legal services to the poor, but there certainly were dispute resolution centers represented in that process who do free mediations for people who cannot afford to pay.

Chairman HATCH. I have to step out for just a minute, so we are going to recess for about three or 4 minutes and I will come right back. Is that OK?

Justice OWEN. Certainly.

Chairman HATCH. I want to continue this just to make sure that everybody understands that we have got to treat you fairly here, and that these matters are really important and that they shouldn't be distorted, OK?

Justice OWEN. All right.

Chairman HATCH. Will you allow me that 3 minutes and I will be right back?

Justice OWEN. Certainly. Thank you.

[The committee stood in adjournment from 3:31 p.m. to 3:35 p.m.]

Chairman HATCH. I know we are wearing you out, but I think it is important because I think it is time for people to realize that we need to treat nominees of any President decently. And I have always tried, and I think people who really know the real story around here know that I have. But in your case, I don't think you have been treated fairly and that is why I asked those very tough questions of you. I know it put you on the spot and I apologize.

You handled that so deftly and so well, I can see why you are a great justice. You handled it in a way that I don't think anybody should be offended, but you were not treated fairly and I just wanted to make sure everybody in the country knows that.

The immediate past president of Legal Aid of Central Texas sent a letter to the Senate Judiciary Committee for your longstanding commitment to assisting society's least fortunate. According to the letter, quote, "Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit," unquote. That is pretty high praise.

In *In Re Jones*, you joined the per curiam opinion that a pro se litigant satisfied the notice requirements for filing an affidavit asserting her inability to give security for costs of appeal. Is that right?

Justice OWEN. That is correct.

Chairman HATCH. That was helping somebody who couldn't help herself, right?

Justice OWEN. That is correct.

Chairman HATCH. I also understand that you are involved in training service dogs.

Justice OWEN. I don't personally train them, but I serve on the board of the Texas Hearing and Service Dogs.

Chairman HATCH. So you help in that cause, and those dogs are very, very important——

Justice OWEN. They are.

Chairman HATCH [continuing]. For people with disabilities, the blind and others, et cetera, right?

Justice OWEN. They certainly are. They give people a lot more independence and a lot more mobility and freedom than they would otherwise have.

Chairman HATCH. Well, finally, in two landmark rulings you voted to reaffirm strong protections for a cleaner environment and positive stewardship of natural resources. Let me just mention these.

In *Quick* v. *City of Austin*, you joined the majority opinion upholding the enforcement of a city ordinance protecting water quality and controlling pollution in the face of challenges by landowners, right?

Justice OWEN. That is correct.

Chairman HATCH. In *Barshop* v. *Medina County Underground Water Conservation District*, large landowners sought to challenge the constitutionality of the Edwards Aquifer Act, which regulates withdrawals of water from wells drawn in the aquifer and limits the drilling of future wells. The landowners contended that the Act deprived them of vested property rights. You joined the unanimous Supreme Court holding that the State of Texas has the authority to regulate and conserve groundwater usage. Is that right?

Justice OWEN. Yes, that is right.

Chairman HATCH. Let me just ask you about the *Sonnier* v. *Chisholm*——

Justice OWEN. The tomato chopper case?

Chairman HATCH. Yes, the *Chisholm-Ryder* case. This is an employee who had been injured by a tomato chopper installed by the Texas Department of Corrections who sued the chopper's manufacturer some 25 years after the manufacturer constructed the machine. You joined a dissent that would have precluded recovery from manufacturers or suppliers who products constitute an improvement to the property.

Did I get that right?

Justice OWEN. I am not sure I got all the words—I actually wrote the dissent, and you couldn't be a component part supplier, but if you actually manufactured a piece of equipment that became permanently affixed to the land, then you would come within the statute of repose.

Chairman HATCH. The majority said in its reading of the statute—or said its reading of the statute is the only one consistent with the plain language of the statute, the legislative history and the statutory purpose, and criticized the dissent for advocating a test that is significantly more broad than any holding in the area up until that time.

Now, isn't it true that this case turned on the interpretation of Section 16.009 of the Texas Civil Practice and Remedies Code which stated that, quote, "A claimant must bring suit for damages against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement," unquote?

Justice OWEN. That is correct. That is what the statute said, and let me also point out in that case, with all due respect to the language that one of my colleagues wrote in that opinion, this case came to us on a certified question from the Fifth Circuit.

The Fifth Circuit thought that the law in Texas was not well settled enough. They couldn't tell what the statute meant. It took three judges to certify the question to us. One judge on the Fifth Circuit dissented and said it is clear to me, I think it means "x." And my dissent basically agreed with the dissent of the referring panel member. And the point of all that is there was certainly room for reasonably disagreement over that statute.

Chairman HATCH. Didn't the dissenting opinion you joined hold that in deciding whether a manufacturer, quote, "constructs an improvement to real property," unquote, the, quote, "inquiry should include the intent of the parties at the time the item at issue was constructed, the manner in which it is used in conjunction with the

property, and the manner in which it is attached or connected in some way to the real property," unquote?

Justice OWEN. That is correct.

Chairman HATCH. OK.

Justice OWEN. And I thought in this case that it was too close for the court to say one way or the other and the jury should decide. I thought this should have been submitted to the jury and the court shouldn't just decide.

Chairman HATCH. Well, isn't it true that the dissenting opinion was consistent with prior decisions in seven prior courts of appeals decisions in Texas and two decisions of the Fifth Circuit applying Texas law?

Justice OWEN. Yes, it was.

Chairman HATCH. Now, Senator Kennedy mentioned this case this morning, a case in which you and then-Justice Cornyn, and now-Senator Cornyn, disagreed. Now, Senator Kennedy tried to make that disagreement seem political in nature.

Wasn't the issue in that case simply whether a tomato chopper machine is real property or personal property?

Justice OWEN. That is really what it boiled down to. Was it so big and was it so affixed and built into the building that it had become real property as opposed to personal property?

Chairman HATCH. Well, did you have political or ideological ends in mind when you decided that case?

Justice OWEN. Certainly not.

Chairman HATCH. Do you find anything political about whether a tomato chopping machine is real property or not?

Justice OWEN. I certainly didn't then and don't now.

Chairman HATCH. My gosh, how far can you stretch things—not you, but some of our colleagues?

Now, Justice Owen, do you pledge to follow the law, regardless of your personal beliefs and feelings, in matters?

Justice OWEN. Well, Senator, I am a sitting judge and I have taken an oath to do exactly that.

Chairman HATCH. And you will take the same oath or a similar oath to follow the law, regardless of personal feelings, when you take your seat on the Fifth Circuit Court of Appeals?

Justice OWEN. That is correct. Feelings really should not play a part in a judge applying the law to the facts.

Chairman HATCH. Now, do you pledge to follow *Roe* v. *Wade*?

Justice OWEN. Yes, Senator. I have followed it, I have cited it, I have been faithful to it, and I would continue to do so were I confirmed to the Fifth Circuit Court of Appeals.

Chairman HATCH. So you pledge to follow *Roe* v. *Wade* as well-established and settled law, regardless of personal beliefs and without regard to any personal ideological views?

Justice OWEN. That is correct.

Chairman HATCH. There are some who would say that it is not well-settled law because there is such a split of opinion in this country.

Justice OWEN. Well, that decision was handed down 30 years ago. It was largely reaffirmed, with some modification, in *Casey*. The Court reconsidered and said, based on stare decisis, this remains the law, and it is still the law and has been.

Chairman HATCH. Well, let me just say that you are making it very clear that some of the criticisms that you have had to undergo in this process have not been accurate; they have not been fair. In fact, some of them have been distortions of your viewpoints and of your decisions. Am I correct in that?

Justice OWEN. I think it is correct to say that some of the characterizations of the opinions that I have either written or joined have not been accurate and they have been distorted.

Chairman HATCH. Well, I think you deserve to have accuracy and I think you deserve to not have things be distorted. I just want to personally thank you. You know, I think we have covered enough here because I think we have covered almost everything that has been a criticism.

I want to thank you for being here today and for making yourself available to all members of this committee for questioning. I know this has not been exactly fun for you, but it is important for this committee to set the record straight and I think you have done an excellent job of doing exactly that.

Justice OWEN. Well, thank you, Senator. I appreciate that.

Chairman HATCH. As I said at the opening, I called this hearing because I believe the committee treated your nomination unfairly last fall, especially at the markup. Members of this committee made unfounded comments that were directly contradicted by the facts and your testimony at that time, but certainly today again.

I think we have corrected that record by and large. We could correct every aspect of it if we wanted to take time. We have corrected the record about *Ford* v. *Miles*, the Willie Searcy case, and made clear that, contrary to accusations, Mr. Searcy passed away 3 years after the Texas Supreme Court's decision.

We also clarified that Justice Owen's opinions in the cases involving the Texas parental notification statute did not touch upon in any way the right of those girls to obtain abortions. They were a good-faith and legitimate attempt to understand what the legislature meant and to give customary deference to the trial courts that actually had the facts and the witnesses, meaning the young girls, before them.

Great deference has to be given to the trier of fact or I think you would be outside of the mainstream. Am I wrong on that?

Justice OWEN. I certainly felt in that case that it was a close case, but there was some evidence to support what the trial court did, and therefore I had to uphold what the trial court ruled.

Chairman HATCH. That is certainly not outside of the judicial mainstream.

Justice OWEN. No, Senator, it is not.

Chairman HATCH. Now, we have also re-heard how totally unjustified it would be to accuse you of favoring defendants or plaintiffs, or vice versa, and yet you have been accused of that.

Justice OWEN. I have been accused of that.

Chairman HATCH. Fairly?

Justice OWEN. I think wrongly.

Chairman HATCH. We know more about how the Texas Supreme Court takes cases and more about how Justice Owen—how you decide them. We also know beyond doubt that Justice Owen was not lectured by her colleagues in the case of *Weiner* v. *Wasson*. Your

detractors, I think, had confused you with the defendant in that case. Am I right on that?

Justice OWEN. I think that is correct. I think Senator Hutchison——

Chairman HATCH. We have also clarified once again that Judge Gonzales' often-repeated comment about judicial activism was not directed at you at all. In fact, if you read the language carefully, he was saying if he had done some of these things, he would feel like he was a judicial activist. Am I right?

Justice OWEN. Well, yes. He said if someone were to do this, if someone were to or would, that would be. And then when he directly addressed—in the following paragraph he said, I respectfully disagree.

Chairman HATCH. I have to admit Judge Gonzales is against judicial activism. If there is anything he is against in the law, it is judicial activism.

Justice OWEN. I agree with that.

Chairman HATCH. I agree with you that he would not be—I would call him your strongest, if not the strongest supporter. Am I correct on that?

Justice OWEN. He has certainly come out very publicly in support of me and he is a friend of mine.

Chairman HATCH. And Senator Cornyn is one of your strongest supporters, as well, and he sat there right near you on the Texas Supreme Court. Am I correct?

Justice OWEN. That is correct.

Chairman HATCH. He saw you operate, he saw what you did, he saw your reasoning, he saw your writing, he saw your deliberations. He was part of it, right?

Justice OWEN. For 3 years, I had the privilege of serving with then-Justice Cornyn on the court.

Chairman HATCH. He certainly gave very strong testimony in your behalf here this morning and I think that testimony ought to be looked at very carefully by my colleagues.

There are other issues and I am not going to go through them all. Suffice it to say that I believe any member who reads the complete record regarding your nomination this year and last will not come up with any legitimate reason to vote no in committee to letting the full Senate weigh in on this nomination. In fact, I think you have made an extraordinary case for confirmation.

Now, let me just say this. We are not at ten to four. We have been here since ten o'clock this morning. I have kept this record open all day for any of my colleagues to come and ask questions, certainly the colleagues on the committee. And I also spoke on the floor, sent letters out and requested colleagues to come here and listen to you if they had any questions about your qualifications to serve.

So I am going to keep the record open for 1 week, and 1 week only, for written questions. I intend to put you on the markup for next week, so we will put you on that markup. Any members who wish to submit followup questions will have to do so by—I will keep it open until 5 p.m. next Wednesday. That would be March 19, if I recall it correctly. There are going to be no exceptions, un-

less pre-approved for good reason, and I have always been flexible with my colleagues.

Now, what I am going to do, just in case somebody still wants to ask questions of you—I hate to ask you to do this because I know it is inconvenient to you, but this is important that we give our colleagues every opportunity. I am going to recess until seven o'clock tonight, subject to the call of the Chair, and if any of my colleagues come to me and want to ask further questions of you, they are going to have that right.

I will have to have you come back at a moment's notice, so you have got to—I know this is a painful experience and I know that it is inconvenient for you. I know that you shouldn't have had to go through this, but I just want to make sure that no colleague has a right to say that they haven't been given every opportunity to question you, to ask you the most detailed questions to clarify, to find out the questions on their own mind. I just want to make sure that those complaints in the future are not going to be fair complaints. I have been using the words "fair" and "unfair" here today and I think I have used them correctly in all cases.

With that, we are going to recess until I adjourn formally at seven o'clock tonight, and if any of my colleagues call me and they do want to ask you some further questions, I would like to have you be able to get here within 10 or 15 minutes at the latest.

Justice OWEN. OK.

Chairman HATCH. So we are going to need to have you stick around.

Justice OWEN. All right.

Chairman HATCH. I hate to do that to you, but it is about 3 hours from now and we will leave that time open for our colleagues. Is that OK?

Justice OWEN. Thank you.

Chairman HATCH. Well, I want to thank you. You have been very deliberative, you have been forthright, as I expected you to be, as everybody does. I think you have been impressive—I don't think you have, I know you have. But I thought you were last time. I don't know that I have ever had a nominee for any court, including the Supreme Court, who has been any more impressive than you.

And I am not just saying that. I felt that way last time, but I feel it even more today. You have been gracious, you have been diplomatic, you have answered the questions. You have tried to be as forthright and open as you can as a Supreme Court Justice, and I think that all weighs very heavily in your favor. I am hopeful that when we have your markup, hopefully next Thursday, that you will be approved by the committee, and I hope by my colleagues on the other side as well.

Now, this means that if they submit questions as late as five o'clock on next Wednesday, I would like to have those questions answered, if it takes all night to get them done.

Justice OWEN. I can do that.

Chairman HATCH. Can you live with that?

Justice OWEN. I can do my dead-level best.

Chairman HATCH. Well, with that, then, we will recess until the further call of the Chair, and if nobody calls me and asks for fur-

ther questions, then we will recess at seven o'clock and put you over for the markup.

Justice OWEN. Thank you, Senator.

Chairman HATCH. Thank you for your kindness and your perseverance, and thanks for being the great person you are.

Justice OWEN. Thank you, Senator.

Chairman HATCH. With that, we will recess.

[The committee stood in recess from 3:53 p.m. to 7:24 p.m. The committee reconvened at 7:24 p.m., Hon. John Cornyn presiding.]

Senator CORNYN. This afternoon at approximately 3:30 p.m., Senator Hatch recess this hearing, subject to the call of the Chair. He indicated at the time that he would resume the hearing at any time prior to 7 p.m., in case any member of the Senate wanted to ask Justice Owen any questions, not just any member of the Judiciary Committee, but any member of the Senate.

Since the hour of 7 p.m. has now arrived and passed, this hearing is now adjourned.

[The questionnaire of Justice Owen follows.]

[Whereupon, at 7:25 p.m., the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

Full name (include any former names used.)

Priscilla Richman Owen; prior to marriage, I used my maiden name Priscilla Richman

Address: List current place of residence and office address(es).

Residence:
Austin, Texas

Office:
Supreme Court of Texas
201 West 14th Street
Austin, Texas 78701

Date and place of birth.

October 4, 1954
Palacios, Matagorda County, Texas

Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Divorced.

Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Texas at Austin
Fall 1972-Spring 1973

Baylor University
Summer 1973-Summer 1975
Bachelor of Arts, cum laude, awarded May 14, 1976 (pursuant to a three-year plan with the Baylor University School of Law)

Baylor University School of Law
Fall 1975-November 1977
Juris Doctor, cum laude, awarded November 11, 1977

Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employment:

1976-1977
Sheehy, Lovelace & Mayfield
Waco, Texas
Law clerk

1978-1994
Andrews, Kurth, Campbell & Jones, subsequently Andrews & Kurth L.L.P.
Associate; became a Partner in January 1985

1995-present
Justice, Supreme Court of Texas

Board Memberships:

1995-present
Texas Hearing & Service Dogs, Member of the Board

1996-present
Litigation Section of the State Bar of Texas, Ex Officio Member of the Council

1997-present
A. A. White Dispute Resolution Institute, Member of the Board

1998-present
Federalist Society, Houston Chapter, Member of the Board

1999- present
Baylor University Alumni Association, Member of the Board and Executive Committee
1999-2000 Member of the Budget and Finance Committee

2000-present
Federalist Society, Austin Chapter, Member of the Board

7. Military service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Gibson, Dennison, Ross, Williams Memorial Scholarship
(awarded while attending Baylor University School of Law)

Baylor Law Review
Baylor University Outstanding Young Alumna, 1995
Baylor Young Lawyer of the Year, 1995
Waco Independent School District Distinguished Alumni, 1998

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Law Institute
American Bar Association
State Bar of Texas
American Judicature Society
American Bar Foundation, Fellow
Houston Bar Foundation, Fellow
Houston Bar Association
Supreme Court of Texas liaison to Judicial Section Long Range Planning Committee 1999 to present
Supreme Court of Texas liaison to Family Law 2000-1995 to present
Supreme Court of Texas liaison to Court-Annexed Mediation Task Force-1995 to present
Supreme Court of Texas liaison to statewide committees regarding legal services to the poor and pro bono legal services-1996 to present
Supreme Court of Texas liaison to Gender Bias Reform Implementation Committee-1995 to 1998
Supreme Court of Texas liaison to Judicial Evaluation and Performance Standards-1995 to 1996
Supreme Court of Texas liaison to Judicial Efficiency Committee Task Force on Staff Diversity-1996 to 1997

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organization that is active in lobbying.

I am a member of St. Barnabas Episcopal Mission in Austin, Texas.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All state courts in Texas by virtue of my admission to the State Bar of Texas
admitted February 3, 1978
United States Court of Appeals for the Fourth Circuit
admitted September 20, 1990 to present

United States Court of Appeals for the Fifth Circuit
admitted December 21, 1981 to present
United States Court of Appeals for the Eighth Circuit
admitted June 10, 1986; I paid a $10 fee March 26, 2001 to become current
United States Court of Appeals for the Eleventh Circuit
admitted December 21, 1981; expired because of nonrenewal; the Clerk of the court does not have a record of when
United States District Court for the Southern District of Texas
admitted March 8, 1982; expired December 31, 2000 because of non-renewal
United States District Court for the Western District of Texas
admitted November 8, 1988 to present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None of the papers that I have prepared have been formally published. I have prepared a number of papers on issues that relate to natural gas litigation for various seminars that were included in course materials for those seminars. (I have found a copy of only two of those papers.) I have also prepared and presented many iterations of the Supreme Court of Texas Update, which summarizes decisions and cases pending before my court and has been included in continuing legal education course materials. (A representative copy is attached.) I have also prepared papers on interlocutory appeals in Texas and on appellate procedures that have been included in continuing legal education course materials and local bar newsletters. (I do not have a copy of some of these papers.) I also prepared an article on judicial selection in Texas for the Denton County Bar Association Newsletter.

I have not given a speech on issues involving constitutional law, other than to summarize cases decided by the Supreme Court of Texas while presenting Supreme Court of Texas Updates. The only speeches that I have given on legal policy were extemporaneous, and there were no press reports.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is good. My last physical was on April 2, 2001.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was elected as a Justice on the Supreme Court of Texas in November 1994, and have served from January 1, 1995 to the present.
The Supreme Court of Texas is the state court of last resort in Texas on civil matters, and it

has discretionary jurisdiction.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Ten significant opinions that I have written:

1) *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997)
2) *In re City of Georgetown*, 2001 WL 123933 (Tex., February 15, 2001)
3) *Houston Lighting & Power Co. v. Auchan*, 995 S.W.2d 668 (Tex. 1999)
4) *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423 (Tex. 1999)
5) *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1999)
6) *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998)
7) *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601 (Tex. 1998)
8) *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1 (Tex. 1998) (Owen, J., dissenting)
9) *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400 (Tex. 1998)
10) *Board of Trustees v. Toungate*, 958 S.W.2d 365 (Tex. 1997)

2) None of my decisions have been reversed or criticized by the United States Supreme Court.

3) Opinions that I have authored on state or federal constitutional issues include:

FM Properties Operating Co. v. City of Austin, 22 S.W.2d 868 (Tex. 2000) (Owen, J., dissenting)
Stier v. Reading & Bates Corp., 992 S.W.2d 423 (Tex. 1999)
Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1 (Tex. 1998) (Owen, J., dissenting)
In re D.A.S., 973 S.W.2d 296 (Tex.1998)
Board of Trustees v. Toungate, 958 S.W.2d 365 (Tex. 1997)
Goode v. Shoukfeh, 943 S.W.2d 441 (Tex. 1997)
Enron Corp. v. Spring Indep. Sch. Dist., 922 S.W.2d 931 (Tex. 1996)
Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995) (Owen, J., dissenting)

I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) (Hecht, J., concurring and dissenting)
Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362 (Tex. 2000)

Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849 (Tex. 2000) (Hecht, J., dissenting)
State v. $217,590, 18 S.W.3d 631 (Tex. 2000)
Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000)
Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999)
In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371 (Tex. 1998)
Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998) (Enoch, J., concurring and dissenting)
WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998)
Operation Rescue-National v. Planned Parenthood of Houston, 975 S.W.2d 546 (Tex. 1998)
Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998)
Appraisal Review Bd. of Galveston County v. Tex-Air Helicopter, Inc., 970 S.W.2d 530 (Tex. 1998)
Dawson-Austin v. Austin, 968 S.W.2d 319 (Tex. 1998)
Worthy v. Collagen Corp., 967 S.W.2d 360 (Tex. 1998)
Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (1998)
Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen, 952 S.W.2d 454 (1997)
Vinmar, Inc. v. Harris County Appraisal Dist., 947 S.W.2d 554 (Tex. 1997) (Hecht, J., dissenting)
Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997)
CMMC v. Salinas, 929 S.W.2d 435 (Tex. 1996)
Romero v. State, 927 S.W.2d 632 (Tex. 1996)
Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996)
Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996)
CSR Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996)
Central Appraisal Dist. v. W. V. Grant Evangelistic Ass'n, Inc., 924 S.W.2d 686 (Tex. 1996)
Buys v. Buys, 924 S.W.2d 369 (Tex. 1996)
Ex parte Swate, 922 S.W.2d 122 (Tex. 1996) (Gonzalez, J., concurring)
Continental Airlines v. Kiefer, 920 S.W.2d 274 (Tex. 1996)
Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995) (Hecht, J., dissenting)
Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995) (Hecht, J., concurring and dissenting)
University of Texas Medical Sch. v. Than, 901 S.W.2d 926 (Tex. 1995)
Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447 (Tex. 1995)
National Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769 (Tex. 1995)
Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504 (Tex. 1995)

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Response:
I did not serve as a clerk to a judge or court.

2. whether you practiced alone, and if so, the addresses and dates;

Response:
I did not practice alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Response:

Upon graduation from law school in November 1977, I practiced with Andrews, Kurth, Campbell & Jones, commencing January 2, 1978. At that time the firm was located in the Exxon Building in downtown Houston. The firm moved to 600 Travis, Suite 4200, Houston, Texas in approximately January 1981.

I was an associate until January 1985, when I became a partner. At some point, the firm changed its name to Andrews & Kurth L.L.P. I remained with Andrews & Kurth until December 31, 1994, when I became a Justice on the Supreme Court of Texas on January 1, 1995.

The current address of Andrews & Kurth L.L.P. is
600 Travis
Suite 4200
Houston, Texas 77002
(713) 220-4200

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Response:

My private practice was primarily commercial litigation. It included

appearances in state and federal courts in Texas and other jurisdictions at the trial and appellate levels. I also represented clients in a few arbitrations. Most of the cases in which I was involved were complex matters, although I did handle a number of small cases and represented some individuals.

I handled only a few personal injury matters.

I practiced before the Federal Energy Regulatory Commission in connection with several matters, and I had limited involvement in proceedings before the Texas Railroad Commission.

From time to time throughout my practice, I assisted corporate securities attorneys in drafting SEC filings for a client that I represented. I also represented a client and some of its former officers in a non-public SEC insider trading investigation.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I was involved in oil and gas litigation throughout my practice. The majority of my clients were companies that were involved in the oil and gas industry in some way including interstate and intrastate natural gas pipeline companies, utilities, natural gas and oil producers, and an oil trader. Other clients included banks, a national accounting firm, construction companies, a hospital, a manufacturer, and some individuals.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court frequently.

2. What percentage of these appearances was in:

(a) federal courts;

Approximately 50% or more

(b) state courts of record;

Approximately 50% or less

(c) other courts.

None.

3. What percentage of your litigation was:

   (a) civil;

   My practice was devoted solely to civil law.

   (b) criminal.

   None.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   Not including final summary judgments and temporary injunction proceedings that essentially resolved the merits, I participated in at least nine cases that were tried to a verdict. I was sole counsel in four of those matters, co-counsel in one, and associate counsel in four.

5. What percentage of these trials was:

   (a) jury;

   33%

   (b) non-jury.

   67%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) *Valero Interstate Transmission Company v. Transcontinental Gas Pipe Line Corporation*, Civil Action No. H-90-3939 in United States District Court for the Southern District of Texas, Houston Division

I was lead counsel for Transco, an interstate natural gas pipeline. The FERC had granted Transco authority to abandon purchases of gas from Valero, another interstate pipeline, after the parties' contract expired. The contract contained a minimum bill provision, and Valero sued Transco seeking to recover substantial sums (I believe it was in excess of $2,000,000, but I am not certain) for the fixed-cost portion of its minimum bill for periods of time both before and after the abandonment authorization. Transco asserted that it had no liability since the FERC granted abandonment retroactive to the date of contract expiration, and the Fifth Circuit had upheld the retroactive aspect of the abandonment. (I had input in the briefing before the Fifth Circuit on that issue.) Transco also asserted that a letter agreement with Valero resolved the dispute.

The case was originally filed in San Antonio in 1988. I represented Transco from the outset, and filed a motion to transfer which was ultimately granted. I drafted all pleadings and briefs, and represented Transco at all hearings.

Summary judgment in favor of Transco was granted on June 10, 1993, and the court issued an unpublished memorandum opinion on the same date. There was no appeal.

District Court:

Hon. Ewing Werlein, Jr.

Co-Counsel:

The pleadings list Ross Spence and Anne Hamman of Andrews & Kurth as my co-counsel, but to the best of my recollection, they did not participate in the case. Ms. Hamman no longer practices law. Mr. Spence's current address is:

W. Ross Spence
Crady, Jewett & McCulley, L.L.P.
Suite 1400, Two Houston Center
909 Fannin
Houston, Texas 77010
(713) 739-7007

Opposing Counsel:

R. Doak Bishop
(Fomerly of Hughes & Luce)
King & Spalding
1100 Louisiana, Suite 3300
Houston, Texas 77002-5219
(713)751-3200

2) *Lively Energy & Development Corp. v. Lone Star Gas Company, A Division of Enserch Corp.*, No. 3096 in 112th District Court, Sutton County Texas

Lively, a natural gas producer, sued my client Lone Star, an intrastate pipeline company, for breach of contract contending that Lone Star had failed to take or to pay for a minimum quantity of gas under so-called "take-or-pay" provisions of the parties' agreement. Lively sought several million dollars plus interest and attorney's fees. Suit was filed on April 9, 1985, and I represented Lone Star until all appeals were exhausted on December 12, 1990

Alfred H. Ebert, Jr. of Andrews & Kurth was designated lead counsel. I conducted most of the discovery and prepared virtually all pleadings, motions, and briefs. At trial, I presented and cross-examined witnesses, including Lively's chief expert witness. The case began as a jury trial, but about a week into the trial, the parties agreed to dismiss the jury and continue the case as a nonjury trial.

The trial court rendered a judgment against Lone Star on February 5, 1987 for in excess of $4,000,000 plus interest and attorney's fees. I prepared and presented all post-verdict motions and requests for findings of fact and conclusions of law and represented Lone Star at all post-verdict hearings. Lone Star successfully appealed:

Lone Star Gas Company v. Lively Energy & Development Corp., No. 04-87-00261-CV in the Fourth District of Texas at San Antonio (unpublished opinion dated October 11, 1989):

I drafted all appellate briefs. I was to argue the case but did not because I was slated to and did argue another case for another client before the United States Court of Appeals for the District of Columbia Circuit.

The court of appeals reversed the trial court and rendered judgment for Lone Star.

Lively filed an application for writ of error in the Supreme Court of Texas, and I authored all briefs on behalf of Lone Star in that court. The Supreme Court of Texas denied the writ on December 12, 1990.

Trial Court:	Court of Appeals Justices:
Hon. Brock Jones	Justice David Peeples (I have been unable to locate a copy of the opinion to determine who the other two justices were)

Co-Counsel:

Alfred H. Ebert, Jr.
Andrews & Kurth L.L.P.
600 Travis
Suite 4200
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3) *Felmont Oil Corporation and Essex Offshore, Inc.*, Opinion Nos. 245, 245-A, Docket No. CI84-10-000 before the Federal Energy Regulatory Commission; 33 F.E.R.C. ¶ 61,333 (1985), 34 F.E.R.C. ¶ 61,296 (1986)

I represented Transcontinental Gas Pipe Line Corporation, an interstate natural gas pipeline company, who purchased gas from Felmont and Essex (collectively Felmont). Some of Felmont's gas was price-regulated under the Natural Gas Act, and that price was substantially lower than then-prevailing market prices and Transcol's weighted average cost of gas. Transco's contract to purchase this gas had expired, but under the Natural Gas Act, Felmont could not discontinue sales of regulated gas unless it obtained abandonment authority from the FERC. Felmont filed for abandonment on October 7, 1983, and Transco opposed that request. I represented Transco from the beginning of this proceeding until its conclusion in approximately 1986.

I prepared all the briefing and other submissions in this matter, both to the presiding administrative law judge and the Commission. I prepared and presented witnesses at the hearing and cross-examined Felmont's witnesses. The FERC granted limited abandonment. It held that Transco had the right to purchase up to the full quantities available from Felmont, but that Felmont could market to others gas that Transco did not nominate.

The Commission's initial decision, Opinion No. 245, was issued on December 9, 1985. Its opinion on rehearing, Opinion No. 245-A, was issued February 28, 1986.

Some of the intervenors in this proceeding appealed to the United States District Court for

the District of Columbia Circuit. Transco did not take an active role in that appeal. The D.C. Circuit reversed and remanded, directing the FERC to provide a clearer explanation of its reasoning. *Consolidated Edison Co. of New York v. FERC*, 823 F.2d 630 (D.C. Cir. 1987).

FERC Commissioners:

Raymond J. O'Connor, Chairman
A. G. Sousa
Charles G. Stalon
Charles A. Trabandt
C. M. Naeve

Co-Counsel:

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Intervenor's Counsel:

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Philadelphia Electric
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(No current information)

4) *United States of America v. Great Plains Gasification Associates, et al.*, No. A1-85-237 in the United States District Court for the District of North Dakota, Southwestern Division

I was lead counsel for Transco Coal Gas Company and Transcontinental Gas Pipe Line Corporation, two of the defendants in this case. This matter arose in connection with the Great Plains Coal Gasification project, which was constructed under the Syn-Fuels Act. Transco Coal Gas and its partners built the coal gas plant and entered into agreements to sell the output to the four parent companies of the partners, which included Transcontinental. The partners in the coal gas plant defaulted on their federally guaranteed, non-recourse loan and terminated their participation in the project. The United States took over the project. Litigation between the United States and the pipeline purchasers, including Transcontinental, ensued over a number of issues. The principle issue was whether the pipelines were entitled to assurance under the UCC from the United States that it would operate the coal gas plant for the full twenty-five year terms of the gas contracts. The coal gas was priced well above market prices for natural gas, and the economic significance of this matter to the pipelines and their customers was substantial. The United States filed suit on August 29, 1985, and I represented the Transco entities until this case was concluded in 1987.

I conducted all discovery on behalf of Transco, prepared all pleadings and briefs, and appeared and presented argument at a lengthy hearing on the United States' motion for summary judgment.

The district court rendered summary judgment against the defendants, including

Transcontinental, on June 30, 1986 after issuing an unpublished memorandum and order on January 14, 1986. The defendants appealed, unsuccessfully:

United States of America v. Great Plains Gasification Associates, 819 F.2d 831 (8th Cir. 1987)

The Eighth Circuit affirmed the district court's judgment. I participated with counsel for the other defendants in drafting all appellate briefs, and filed a separate motion for rehearing on behalf of Transcontinental.

District Court:

Hon. Patrick A. Conmy

Co-Counsel:

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The Warner
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5) *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, United States District Court for the Western District of North Carolina

This suit was filed in May 1977 by CF Industries, Inc. against my client Transco. I began representing Transco in January 1978 as one of the first cases that I worked on upon graduation from law school. The case was about the natural gas shortage that occurred in the 1970's on interstate pipelines, and specifically, the curtailment of gas supplies to a fertilizer plant owned or operated by CF. CF alleged that it was a third party beneficiary of a contract Transco had with its gas distributor, promissory estoppel, negligent performance of contract, and fraud.

The case was tried to a jury in the fall of 1978. I assisted lead counsel in the courtroom throughout the trial, but did not take an active role in front of the jury. I was involved in drafting pleadings and in briefing.

The district court rendered a judgment on the jury's verdict on April 25, 1979, awarding CF in excess of $23,000,000, prejudgment interest of about $2,000,000, and postjudgment interest.

I played a significant role in the post-verdict pleadings and briefing in the district court. Transco and CF appealed the district court's judgment to the Fourth Circuit. Transco also instituted proceedings before the FERC, which are described in paragraph 6) below.

CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp., Nos. 79-1359 and 79-1366 in the United States Court of Appeals for the Fourth Circuit

I assisted in drafting the briefs on the merits of the appeal, and I was the principle author of the section on federal preemption and the effect of Transco's certificates of public convenience and necessity and its FERC-approved tariffs on curtailment liability.

In the Fourth Circuit, Transco filed a motion to refer issues to the FERC under the doctrine of primary jurisdiction. I was one of the principle authors of the briefs on this issue. The motion to refer was argued before the Fourth Circuit, and that motion was granted in a published opinion, *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33 (4th Cir. 1980) (before Butzner, J.; Field, J.; Widener, J.)

After lengthy proceedings in the FERC and the United States Circuit Court for the District of Columbia, described in paragraph 6 below, the case was settled on terms favorable to Transco.

District Court:

Hon. James B. McMillan, Jr.

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6) *Transcontinental Gas Pipe Line Corporation*, Docket No. TC79-8 before the Federal Energy Regulatory Commission, Opinion Nos. 248 and 248-A, 35 F.E.R.C. ¶ 61,043 (1986), 35 F.E.R.C. ¶ 61,340 (1986)

At about the same time that Transco and CF Industries appealed a federal district court's judgment to the Fourth Circuit (*see* paragraph 5 above), Transco initiated proceedings before the FERC, requesting it to determine, among other things, the effect of Transco's tariffs and certificates of public convenience and necessity on claims for damages arising out of the natural gas shortage. The FERC proceedings were initiated in 1979, and I represented Transco, along with Al Ebert and Tom Brosnan, in that proceeding from its inception. Subsequently, the Fourth Circuit referred issues to the FERC under the doctrine of primary jurisdiction, and those issues became a part of the FERC proceeding.

I was one of the two principal authors of the submissions and briefing to the FERC, and met with witnesses to obtain their prepared, written testimony that was submitted prior to the hearing at the FERC.

The FERC issued Opinion Nos. 248 and 248-A in which it decided some but not all of the referred issues.

Transco sought review of the FERC's orders in the United States Court of Appeals for the District of Columbia Circuit in 1987. I was lead counsel in that appeal and drafted the briefs and argued the merits of the case to the D.C. Circuit in 1988 before a panel that included then Judge Ruth Bader Ginsburg. The D.C. Circuit did not decide the merits, but instead transferred the case to the Fourth Circuit. (I have been unable to locate a copy of this order.) This appeal subsequently settled as part of the settlement of the underlying *CF Industries*

suit.

Presiding Administrative Law Judge:

Steven M. Charno

FERC Commissioners:

Anthony G. Sousa, Acting Chairman
Charles G. Stalon
Charles A. Trabandt
C. M. Naeve

Co-Counsel:

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Counsel for Intervenor Pennsylvania Gas and Water Company

James R. Lacey
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Counsel for Intervenor Public Service Electric & Gas Co.

Gregory Grady
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Counsel for Intervenors North Carolina Public Service Company of North Carolina, Inc. and North Carolina Natural Gas Corporation

Morton L. Simons
Simons & Simons
Washington, D.C.
Counsel for Intervenor North Carolina Utilities Commission

7) *IP Petroleum, Inc. v. Exxon San Joacquin Production Co.*, No. 90-05314 in the 164th District Court of Harris County, Texas

I represented IP Petroleum who had acquired certain assets, including oil and gas properties and over $1,000,000 in seismic data. IP sued the seller for damages in connection with this transaction. I was co-counsel with John Lee of Andrews & Kurth. In a bench trial that lasted about two weeks, I presented witnesses, including all expert witnesses on the seismic data. The trial court entered findings generally favorable to IP at the conclusion of trial. The parties then entered an agreed judgment awarding IP in excess of $1,000,000 plus attorney's fees, and extinguishing a $2,000,000 counterclaim against IP.

Trial Court:

Hon. Bradley Smith

Co-Counsel:

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Opposing Counsel:

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8) *Sherman v. Richardson*, No. 81-59022 in the 164th District Court of Harris County, Texas

I was sole counsel for Robert & Michele Sherman in a boundary dispute with their neighbors. Ms. Sherman was pregnant with when their next-door neighbors began blocking the driveway. I filed suit and by agreement, a trial on a temporary injunction was converted to a trial on the merits. After a jury trial in which the jury rendered a verdict for my clients, an agreed judgment was entered in favor of the Shermans, and the matter was not appealed. (Suit was filed in 1981 and the matter was resolved within a few months after that.)

I represented the Sherman's at a substantially reduced fee, although this would not qualify as legal services to the poor.

Trial Court:

Hon. Pete Solito

Opposing Counsel:

William W. Byrd
1900 Yorktown
Houston, Texas
(No current phone number)

9) *Vecchio v. Williams*, No. 84-21461 in the 125th District Court of Harris County, Texas

I was sole counsel for O'Banion Williams, Jr. and his wife in a suit that their next-door neighbor filed against them to enjoin certain improvements to their water-front property. There was a non-jury trial at which fact and expert witnesses were called. The trial court rendered judgment for my clients at the conclusion of trial in 1984, the same year that the case was filed.

Trial Court:

Hon. Michael L. O'Brien

Opposing Counsel:

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Pasadena, Texas 77504
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10) *Lone Star Gas Company of Texas, Inc. v. F.F.F. Corp.*, No. 2-90-284-CV in the Court of Appeals for the Second District of Texas at Fort Worth

I was retained as lead counsel on appeal to represent Lone Star in connection with an explosion that occurred after one of its gas pipelines was ruptured during highway construction. Counsel other than Andrews & Kurth tried the case, and a judgment of approximately $2,000,000 had been rendered against Lone Star. I did all of the legal research and briefing on appeal and argued the case. The court of appeals affirmed the trial court's judgment in an unpublished opinion on April 6, 1994. I thereafter withdrew from this matter with the client's consent because I had filed as a candidate for the Supreme Court of Texas. Other counsel pursued an application for writ of error to the Supreme Court of Texas, which was denied.

Members of the Court of Appeals Panel:

Hon. Tod Weaver
Hon. Farris
Hon. Meyers

Opposing Counsel:

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Melody McDonald Wilkinson
Cantey & Hanger, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102-6899
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19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

These are a few of the cases on which I spent a substantial amount of time:

Texas Eastern Transmission Corporation v. Amerada Hess Corporation, et al., Civil Action No. CV892036, Section "L", Western District of Louisiana, Lafayette-Opelousas Division

I was lead counsel for Amerada Hess. Suit was filed in 1989 and was concluded in 1991. I supervised several attorneys from my firm and coordinated with counsel for co-defendants Marathon Oil Company and OKC Partnership in extensive discovery and pre-trial preparation. The issues involved primarily breach of contract and fraud. Texas Eastern was seeking to terminate its contracts with Amerada Hess and the other defendants. The amount at issue was several hundred million dollars. Just before we were to pick a jury, the claims against Amerada Hess and Marathon settled on terms that were very favorable to them, and OKC settled shortly after trial began.

District Court:
Hon. Putnam

Artoc Bank and Trust Limited v. Apex Oil Corp., et al., Civil Action No. H-81-3247 in the United States District Court for the Southern District of Texas, Houston Division

I was lead counsel for Saber Refining in this suit by Artoc from 1981 to 1985. The primary claim was that Artoc had received from Uni Refining an assignment of all its future accounts receivable and proceeds. Artoc contended that stamped notices on Uni's invoices were adequate notice to Saber and others who dealt with Uni of the assignment. Artoc sued to recover over $2,000,000 in payments Saber made directly to Uni rather than to a lock-box and for offsets between Saber and Uni. There was extensive discovery, which I conducted on behalf of Saber. I also represented Saber as a contingent creditor in Uni's bankruptcy proceeding, and Saber reached a favorable settlement with Artoc as part of the bankruptcy case after I filed a motion to subordinate Artoc's security interests in Uni's assets. In the district court case, the district court partially granted Saber's motion for summary judgment on the merits in an unpublished memorandum decision (November 5, 1984), which effectively resolved the case in favor of Saber. Artoc subsequently settled all issues with Saber.

District Court:
Hon. Gabrielle McDonald

Brumark Corporation v. Palo Duro Pipeline Company, Civ. No. 82-1414-K(H) in the United States District Court for the Southern District of California

Taylor Hicks, formerly of Andrews & Kurth, was lead counsel in this breach of contract case in which we represented Palo Duro. Brumark sued to recover in excess of $20,000,000. I conducted extensive discovery and represented officers of the client and other fact witnesses in their depositions. I worked with approximately six expert witnesses in connection with

their preparation for trial and defended their depositions. I was also responsible for much of the briefing. The case was filed in 1982 and ultimately settled.

Middleton v. Lone Star Gas Company, No. 37,196 In the District Court of Webb County, Texas 49th Judicial District

I was co-counsel with Al Ebert representing Lone Star in a gas contract dispute. Middleton sought approximately $2,000,000 in damages. Suit was filed in 1986. I conducted most of the discovery and began examination of Middleton's witnesses in a jury trial. The case settled during trial in 1988.

Trial Court:
Hon. Solomon Casseb, Jr.

I represented Transcontinental Gas Pipe Line Corporation, Lone Star Gas Company, United Texas Transmission Company and other clients in a many complex litigation matters other than those listed above.

I represented a client in a non-public Securities and Exchange Commission investigation into possible insider trading in that client's securities. My client was not involved in any wrongdoing. It is my understanding based on press accounts that a lawyer who represented a potential buyer of my client was indicted for insider trading.

I participated in preparing SEC filings for Transco Energy Company and some of its subsidiaries, including Form 10 K's, Form 10-Q's, and S-1's, and I participated in preparing annual reports to its shareholders.

As part of my responsibilities on the Supreme Court of Texas, I have been involved in attempting to improve civil legal services to the poor in Texas and access to our civil courts. I was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in additional funds for providers of legal services to the poor of about $3,000,000 to $5,000,000 per year. I and other members of the Court have been active in attempting to restructure how legal services are delivered to the poor in Texas and have been instrumental in facilitating coordination among providers of legal and other services to those who are economically disadvantaged. From 1996 to the present, I have served as the Court's liaison to statewide committees regarding legal services to the poor and pro bono legal services.

In 1995, I helped to form and have since been a member of an informal group called Family Law 2000. It is comprised of judges, attorneys, and mental health professionals. We have explored ways of improving the family law system and the laws themselves in Texas with the goal of making child custody matters less adversarial.

Since 1995, I have served as the liaison for the Supreme Court of Texas to a task force studying court-annexed mediation. That task force met frequently over a period of years to

draft ethical rules for mediators in court-annexed mediations in Texas. The task force also drafted proposals for minimum training, certification of training programs, continuing education for mediators, and a grievance process.

During the 1995 legislative session, the Texas Legislature created the Judicial Efficiency Commission. One of that commission's charges was to study and make recommendations regarding staff diversity in the judicial system. I served as the Supreme Court of Texas' liaison to a committee that was assigned that task. We increased efforts to recruit and hire minority law clerks in the appellate courts. One of the recommendations of the committee to the Texas Legislature was that it establish a student loan repayment program for law clerks. Legislation was passed to implement that recommendation.

I have been a frequent presenter at continuing legal education courses in Texas. Those presentations have primarily involved decisions of the Supreme Court of Texas and appellate procedure.

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Supplement as of July 2, 2001

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) The ten most significant decisions that I have written should probably include:

City of Corpus Christi v. PUC of Texas, 2001 Tex. Lexis 55; 2001 WL 617826 (Tex. June 6, 2001)

(3) Opinions that I have authored on state or federal constitutional issues include:

City of Corpus Christi v. PUC of Texas, 2001 Tex. Lexis; 55 2001 WL 617826; (Tex. June 6, 2001)
M.D. Anderson Cancer Center v. Novak, 2001 Tex. Lexis 57; 2001 WL 660686 (Tex. June 14, 2001)

I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

Williams v. Huff, 2001 Tex. Lexis 74; 2001 WL 721076 (Tex. June 28, 2001)
Brown v. Todd, 2001 Tex. Lexis 64; 2001 WL 690373 (Tex. June 21, 2001)
Great Dane Trailers, Inc. v. Estate of Wells, 2001 Tex. Lexis 56; 2001 WL 660696 (Tex. June 14, 2001)
Doody v. Ameriquest Mortgage Co., 2001 Tex. Lexis 54; 2001 WL 617927 (Tex. June 7, 2001)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Supplement as of September 21, 2001

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(3) I have joined an opinion authored by other members of the court on which I serve regarding state or federal constitutional issues:

Perry v. Rio, 2001 Tex. Lexis 81; 2001 WL 1044910 (Tex. September 12, 2001)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Supplement as of October 31, 2001

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

3) Opinions that I have authored on state or federal constitutional issues include:

Perry v. Del Rio, 2001 Tex. Lexis 98, 2001 WL 1285081 (Tex. October 19, 2001) (Owen, J., concurring)

I have joined an opinion authored by other members of the court on which I serve regarding state or federal constitutional issues:

In re Perry, 2001 Tex. Lexis 96, 2001 WL 1285060 (Tex. October 22, 2001)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Priscilla R. Owen
Supplemented as of February 15, 2002

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I wrote an article on judicial selection in Texas that was published in the Denton County Bar Association newsletter. A copy of that article as it appeared in the "Denton County Lawyer" is attached.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

3) Opinions that I have authored on state or federal constitutional issues include:

Barnett v. Barnett, 2001 WL 33651828 (Tex. December 6, 2001), 2001 Tex. Lexis 120

I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

In re K.R., 63 S.W.3d 796 (Tex. 2001)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Priscilla Owen
Supplement as of April 12, 2002

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(3) Opinions that I have authored on state or federal constitutional issues include:

Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission, 2002 Tex. Lexis 38; 2001 WL 1835147; (Tex. April 4, 2002) (Owen, J., dissenting)
City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996) (Owen, J., concurring)

I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

City of Austin v. Travis County Landfill Co., L.L.C., 2002 Tex. Lexis 34; 2001 WL 1826849 (Tex. March 28, 2002)
United States Government v. Marks, 949 S.W.2d 320 (Tex. 1997)
Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659 (Tex. 1996)
Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal Dist., 904 S.W.2d 621 (Tex. 1995)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Priscilla Owen
Supplement as of July 5, 2002

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

3) I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

American Type Culture Collection, Inc. v. Coleman, 2002 Tex. Lexis 114; 2002 WL 1433719 (Tex. July 3, 2002)
BMC Software Belg., N.V. v. Marchand, 2002 Tex. Lexis 103, 2001 WL 1898473 (Tex. June 27, 2002)
American Cyanamid Co. v. Geye, 2002 Tex. Lexis 76, 2001 WL 1876346 (Tex. June 6, 2002)
In re R.J.H., 2002 Tex. Lexis 69, 2001 WL 1873054 (Tex. May 30, 2002)
In re A.D., 73 S.W.3d 244 (Tex. 2002)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Priscilla Owen
Supplement as of September 3, 2002

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

3) I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

State v. Hodges, 2002 Tex. Lexis 122; 2002 WL 1906111 (Tex. August 21, 2002)
Bentley v. Bunton, 2002 Tex. Lexis 129; 2001 WL 1946127 (Tex. August 29, 2002)

I. BIOGRAPHICAL INFORMATION (PUBLIC)
Priscilla Owen
Supplement as of January 6, 2002

This is a supplement to the following question:

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

3) Opinions that I have authored on state or federal constitutional issues include:

In re J.F.C., 2002 WL 31890913, 2002 Tex. Lexis 215 (Tex. December 31, 2002)

I have joined opinions authored by other members of the court on which I serve regarding state or federal constitutional issues. Those include:

Bell v. Low Income Women of Texas, 2001 WL 34055993; 2002 Tex. Lexis 216 (Tex. December 31, 2002)

QUESTIONS AND ANSWERS

Responses of
Justice Priscilla Owen to Follow-Up Questions
From Senator Richard J. Durbin
March 19, 2003

1. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

a) Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education, Miranda v. Arizona, Roe v. Wade* – are consistent with strict constructionism? Why or why not?

b) How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

c) As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?

Response:

a) The term "strict constructionism" means different things to different people. Some mean by that term that there must be explicit, direct text in the United States Constitution to support a ruling. There are some provisions in the United States Constitution that are amenable to such "constructionism." However, there are other provisions, such as the Due Process Clause, the Commerce Clause, and the Supremacy Clause that are not as amenable to such "constructionism." The United States Supreme Court has construed and applied the Constitution over time to ever evolving circumstances, providing the contours of many provisions of the Constitution.

In each of the cases you cite, the United States Supreme Court interpreted provisions of the Constitution. In *Brown v. Board of Education*, the Court construed the Equal Protection Clause in a way that many would say comports with "strict constructionism." With regard to *Miranda v. Arizona*, and *Roe v. Wade*, there was extensive debate when those cases were decided as to whether the Court had properly interpreted the Constitution, and that debate has continued unabated to this day. Additionally, in *Miranda*, Justices Harlan, Stewart, White, and Clark dissented, while Justices White and Rehnquist dissented in *Roe v. Wade*. I think that it is fair to say that in light of the long history of the debate over these two cases, and the dissenting opinions, reasonable minds could have differed. Accordingly, these decisions would not be considered examples of a strict application of "strict constructionism." These decisions have been the law for decades. They have been revisited and reaffirmed by the United States Supreme Court. If I am confirmed to the Fifth Circuit, I would apply these decisions faithfully and fully in any case that came before me.

b) With regard to my judicial philosophy, I approach the United States Constitution with the utmost respect for its importance to our nation and its citizens and to our freedoms and the stability of our government. I understand that the Constitution must be faithfully construed and applied, based on precedent, and I am committed to doing so. I have taken a solemn oath to uphold the United States Constitution, and I have carried out that oath to the best of my ability.

In construing and applying the United States Constitution, judges do not write on a clean slate. It would be the rare case indeed in which the United States Supreme Court has not provided at least some guidance through its decisions interpreting and applying the Constitution. As a lower court judge, I am bound to follow all decisions of the United States Supreme Court interpreting the Constitution unless and until they are modified or overruled by the United States Supreme Court. Even if the United States Supreme Court has questioned, but not expressly overruled or modified, one of its own decisions, I, as a lower court judge, am bound by that decision unless and until the United States Supreme Court says otherwise. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

When presented with a Constitutional question, I endeavor to read every case the United States Supreme Court has decided that pertains to the particular matter before me. My task is not to determine whether I personally agree with all the United States Supreme Court has had to say on the subject, but instead to discern what the Court has said and to faithfully apply the Court's reasoning and holdings to the matter before me.

I do not know that I could accurately capture the judicial philosophy of any member of the United States Supreme Court and have not attempted to do so. I have only very general impressions of the philosophies of the members of the United States Supreme Court. When I read the Court's decisions, I do not do so with the aim of capturing any particular Justice's viewpoint, but rather, I focus on the substance of the holding and the reasoning that underpins it.

c) As noted above, in deciding Constitutional issues, I turn first to the precedent from the United States Supreme Court, and it would be the rare case where there is none. In some cases the United States Supreme Court has looked to the intent of the framers and historical context. In other cases, the Court has not done so.

2. During your March 13 confirmation hearing, I asked you whether you had ever ruled on a case that you believe helped to advance an important civil rights principle. I did not understand your answer to this question. Can you please provide a clearer answer?

Response:

During my tenure on the Supreme Court of Texas, the court has not had many cases to come before it that involve civil rights principles, as that term is popularly understood. Cases of that nature are typically resolved in the federal courts. However, a case that might fit in this category is *NME Hospitals v. Rennels*, 994 S.W.2d 142 (Tex. 1999), in which I joined my court's decision holding that a pathologist could sue a hospital for sexual discrimination despite the fact that she had no direct

employment relationship with the hospital in which she worked. She was directly employed by a group of physicians who had a contract with the hospital.

3. At the March 13 hearing, I also asked you to explain how your dissent in the case *Quantum Chemical v. Toennies* (an age discrimination case dealing with the issue of pretext versus mixed-motives theories) was not a setback to the advancement of civil rights. You said that you were unable to adequately explain your opinion at the hearing but would be happy to provide a written response. Please do so. Please note that I am aware of your response to Senator Kennedy's question about this case.

Response:

At the March 13, 2003 hearing, in response to your question regarding *Quantum Chemical v. Toennies*, I indicated that I wanted to refer to my written responses to Senator Kennedy because I wanted to be precise about such a complicated case and the federal and state statutes to which I and a majority of my court both looked. However, when I was unable to locate my responses, you indicated that I could respond in writing, and I certainly appreciate that.

Both the majority and the dissenting opinions in *Quantum Chemical v. Toennies* looked to federal caselaw in construing Chapter 21 of the Texas Labor Code. The Texas statute expressly said that Chapter 21 was intended to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments," and to "identify and create an authority that meets the criteria under 42 U.S.C. Section 2000e-5(c) and 29 U.S.C. 633."[1] The principal difference between the majority and the dissenting opinions was which federal court decisions were more persuasive in light of the express language of the federal law, which Texas law substantially tracked, and the history of the 1991 amendments to the federal Civil Rights Act. The dissenting opinion in *Quantum Chemical v. Toennies*, which I joined, found more authoritative a decision from the Third Circuit, *Watson v. Southeastern Pennsylvania Transportation Authority*,[2] and a decision from the Fourth Circuit, *Fuller v. Phipps*,[3] and found at least some guidance in two United States Supreme Court decisions, *Landgraf v. USI Film Products*,[4] and *Reeves v. Sanderson Plumbing Products, Inc*[5] These cases concluded, and I agreed, based on the history and language of the statute, that Congress did not change the standard of causation through the 1991 amendments to the federal Civil Rights Act.

All of the judges on the courts construing the 1991 amendments were attempting to faithfully construe the statute as written by Congress, and therefore, I do not believe that it can be said that any judge was attempting to advance or set back civil rights any more or less than the statute did. As Senator Cornyn mentioned at the hearing, judges appointed by Presidents from both parties have examined this issue and agreed that the 1991 amendments to the federal Civil Rights Act did not

1 TEX. LAB. CODE § 21.001(1)-(2).
2 207 F.3d 207 (3d Cir. 2000).
3 67 F.3d 1137 (4th Cir. 1995).
4 511 U.S. 244 (1994).
5 530 U.S. 133 (2000).

change the standard of causation. *See Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995).

4. Other than the domestic relations case you discussed at your March 13 hearing, please describe the nature of your *pro bono* legal services prior to becoming a judge.

While in private practice, I did pro bono work in at least two family law matters. One was a divorce. In another, I began representing a woman after she had received notice of a show cause hearing to determine whether she should be held in contempt for violating the provisions of a child custody order. I successfully represented her in that matter. I then spent time counseling her about how to avoid future disputes and filled out a calendar for the next year so that she would know exactly when the child's father was entitled to possession.

I also provided free legal advice regarding a real property matter to a man who had helped me with lawn maintenance for many years and who, I believed, could not afford legal counsel. There were instances in which I provided legal services, and the fees were waived.

Under the Code of Judicial Conduct in Texas, as a sitting judge I am prohibited from giving legal advice with certain exceptions for family members. However, I have contributed monetarily to legal services for the poor.

As part of my responsibilities on the Supreme Court of Texas, I have been involved in attempting to improve legal services to the poor in Texas and access to our civil courts. I was part of a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in additional funds for providers of legal services to the poor of about $3,000,000 to $5,000,000 per year. I and other members of the Court have been active in attempting to restructure how legal services are delivered to the poor in Texas and have been instrumental in facilitating coordination among providers of legal and other services to those who are economically disadvantaged. I have served as the liaison for the Supreme Court of Texas to statewide committees regarding legal services to the poor and pro bono legal services.

I have been a speaker at continuing legal education seminars for lawyers who work for legal aid providers. I also encouraged the Litigation Section of the State Bar of Texas to provide scholarships for legal aid lawyers to attend continuing legal education seminars, and to devote substantive time and efforts at State Bar of Texas Litigation Section seminars to encouraging lawyers, in a positive way, to donate their time and services to legal services to the poor.

I attended a nationwide gathering in 2000, called the Equal Justice Conference, at which those involved in legal services to the poor from around the country shared information about successful programs, and other information about improving access to justice by those who cannot afford legal counsel in civil matters.

5. At your March 13 hearing, I asked you to provide an example of an opinion that you have written on the Texas Supreme Court that was politically unpopular with the established power structure but that you felt was the right thing to do. You said that you could not think of any at the hearing but would provide a written response. Please do so.

I have not comprehensively examined the approximately 900 written decisions in which I have participated as a member of the Supreme Court of Texas. However, I have attached a list of representative cases as Appendix 1. That list includes the following opinions:

City of La Porte v. Barfield, 898 S.W.2d 288, 297 (Tex.1995) (holding that the Political Subdivisions Law waives governmental immunity for retaliatory discharges, allowing recovery for reinstatement and back pay).

University of Texas Medical Sch. v. Than, 901 S.W.2d 926 (Tex. 1995) (holding that medical student expelled on allegations of academic dishonesty had not been accorded due course of law under the Texas Constitution).

Kuhl v. City of Garland, 910 S.W.2d 929 (Tex. 1995) (holding that Political Subdivisions Act waived immunity so that a worker could sue under the Anti-Retaliation Law after he filed a workers' compensation claim and was fired by a city).

Stokes v. Aberdeen Insurance Co., 917 S.W.2d 267 (Tex. 1996) (reversing lower court's dismissal of plaintiff's appeal for technicalities in mail delivery of filing in suit against insurance company).

Barshop v. Medina County Underground Water Conservation District, 925 S.W.2d 618 (Tex. 1996) (upholding constitutionality of water conservation statutes intended to protect the Edwards Aquifer).

S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996) (Owen, J., dissenting) (disagreeing with majority that statute of limitations barred claims of woman whose father allegedly sexually molested her when she allegedly repressed memory until she left home for college).

Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) (Owen, J., concurring) (allowing imposition of punitive damages against manufacturer of asbestos-containing products in products-liability suits).

Clark v. Texas Home Health, 971 S.W.2d 435 (Tex. 1998) (holding that plaintiff nurses had a cause of action under Texas law for retaliatory employment decision taken in response to their expressed intent to report licensed health care practitioner).

Mid-Century Insurance Co. v. Lindsey, 997 S.W.2d 153 (Tex. 1999) (requiring insurance company to pay $50;000 uninsured motorist coverage for a boy's inadvertent act).

Hernandez v. Tokai Corp., 2 S.W.3d 251 (Tex. 1999) (rejecting manufacturer's argument in defective design products liability suit that it had no duty to make the product child resistant if intended only for adult use).

City of Corpus Christi v. Public Utility Comm'n, 51 S.W.3d 231, 270 (Tex. 2001) (Owen, J., dissenting) (concerning statutes that deregulate the electric utility industry in Texas; although Justice

Owen authored the majority opinion for the Court on many issues, she authored a dissent that most likely would have, as a practical matter, impeded electric utilities).

Texas A&M University-Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002) (holding that employee's whistleblower cause of action was not barred by sovereign immunity when University allegedly breached its settlement agreement with the employee).

6. List three Supreme Court cases with which you disagree, and explain why.

When a particular matter before me, I endeavor to read every case the United States Supreme Court has decided that pertains to the issues presented. My task is not to determine whether I agree with all the United States Supreme Court has had to say on the subject, but instead to discern what the Court has said and to faithfully apply the Court's reasoning and holdings to the matter before me. It is my obligation and intent to follow all United States Supreme Court precedent, as I have done on the Supreme Court of Texas. As a lower court judge, I am bound to follow all decisions of the United States Supreme unless and until they are modified or overruled by that Court. Even if the United States Supreme Court has questioned, but not expressly overruled or modified, one of its own decisions, I, as a lower court judge, am bound by that decision unless and until the United States Supreme Court says otherwise. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). I leave it, as I must, to the United States Supreme Court to pass judgment on its own decisions. That said, however, there are, of course, some 19th century Supreme Court cases that Americans appropriately believe were wrong turns for this country, such as the *Dred Scott* and *Plessy* cases that have been overruled and are no longer good law.

The Commentary to Canon 5 of the ABA Model Code of Judicial Conduct provides that a judicial candidate shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." It further says, "Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views." To criticize opinions of a higher court is, I believe, in some tension with this Canon.

7. In terms of judicial philosophy, please name several Supreme Court Justices, living or dead, whom you admire and would like to emulate on the bench.

As I said at the March hearing, I do admire every member of the United States Supreme Court. I admire their intellect and from a judge's perspective, their craftsmanship in writing their opinions. I have had the privilege of meeting and have had discussions with three of the members of the Court, Justices Breyer, Scalia, and O'Connor. (I have listed them in the chronological order in which I met them.) I admire each of them. I have met Justice Breyer on more than one occasion, and his intelligence, wit, grace, and depth of knowledge have impressed me each time. He has also been willing and gracious to share with the members of my court some insights into his court and how they go about judging cases as a nine-member collegial body. Justice Scalia's intelligence, his sense

of humor, and his incisiveness have made an impression upon me as well. As the first woman on the Court, I of course admire Justice O'Connor. She, too, is gracious and intelligent. I find her dedication to sharing our constitutional and other legal principles and precepts with legal scholars, judges, and leaders in other counties particularly admirable.

With regard to judicial philosophy, my experience on my own court tells me that there is no one judge whose philosophy is precisely the same as mine. It is my duty, and I would hope the endeavor of every judge, to approach each matter with a commitment to following precedent, and in the area of statutory construction, to apply the law as written by the legislative branch.

8. You are a board member of the Federalist Society. According to the Federalist Society's mission statement:

> **"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order."**

Do you agree that "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology"? Why or why not?

Response:

I am unfamiliar with this mission statement, and therefore I have no knowledge of its origin or its context. I have no particular experience, knowledge, or other reliable basis on which to make that determination. However, I have had the opportunity to work with many law clerks each year in my chambers and those of the other Justices on my court. Our law clerks typically come to the court immediately upon graduation from law school. It seems that there is a wide diversity of viewpoints among these newly minted lawyers, who come to us from many different law schools.

9. The Federalist Society mission statement also states that one of its goals is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Do you believe that certain priorities need to be reordered? If so, which ones? On which traditional values should there be a premium, and why?

Response:

Again, I am unfamiliar with this mission statement, and therefore I have no knowledge of its origin or its context. However, I do believe that the legal system needs to better address access to our judicial system for the poor and those who do not qualify for legal aid but who nevertheless cannot afford legal services. Our laws are often complicated, and laypersons cannot navigate them

effectively. I believe that the legal system and legislative bodies should focus more on attention on rethinking some of the laws and procedures that create barriers to effective resolution of disputes and vindication of rights.

10. Many Federalist Society members claim that the organization is little more than a debating society, and that it doesn't take official positions on cases. However, the Federalist Society website has a section entitled "Guide to Legal Experts." In that section, it lists several people as legal experts on many different subjects. Four individuals in Texas – Carolyn Graglia, Lino Graglia, Mike Thompson, and Shelton Vaughan – are listed as abortion experts. Do you know any of them personally? Do you have an opinion about whether any of them are "pro-choice"?

Response:

I have met Lino Graglia. He is the father of a lawyer with whom I worked a number of years ago at my former law firm. I have also had attended a few dinners or lunches where he was present. If Carolyn Graglia is Lino Graglia's wife, I have met her as well. I do not know whether either of them is "pro-choice." I do not know Mike Thompson or Shelton Vaughan.

Appendix 1
to Responses to
Questions from Senator Dick Durbin
for Justice Priscilla Owen

Representative decisions include, but are not limited to:

Polaris Investment Management Corp. v. Abascal, 892 S.W.2d 860 (Tex. 1995) (denying corporation's request for mandamus relief regarding trial court's selection of plaintiffs and discovery rulings).

Lofton v. Allstate Insurance Co., 895 S.W.2d 693 (Tex. 1995) (allowing plaintiff to challenge trial court's reduction of award against insurance company).

Crowson v. Wakeham, 897 S.W.2d 779 (Tex. 1995) (holding that an alleged common-law wife's appeal should not have been dismissed in a suit she brought contesting alleged common-law husband's will and suing the executrix for actual and exemplary damages for fraud).

Sanchez v. Hastings, 898 S.W.2d 287 (Tex. 1995) (plaintiff not barred by limitations period from suing law firm for malpractice).

City of La Porte v. Barfield, 898 S.W.2d 288, 297 (Tex.1995) (holding that the Political Subdivisions Law waives governmental immunity for retaliatory discharges, allowing recovery for reinstatement and back pay).

Syntax, Inc. v. Hall, 899 S.W.2d 189 (Tex. 1995) (holding that taxing units could not profit from excess funds derived from the sale of property taken in satisfaction of a judgment for delinquent taxes but must return them to the taxpayer).

Ex parte Anderson, 900 S.W.2d 333 (Tex. 1995) (holding that an order of contempt was not signed sufficiently close to the time that the trial court found that a defendant was in contempt to satisfy due process requirements).

Murray v. Crest Constr., Inc., 900 S.W.2d 342 (Tex. 1995) (holding that when contractor repudiated settlement agreement, subcontractor's waiver of lien was no longer enforceable and subcontractor could recover under quantum meruit).

University of Texas Medical Sch. v. Than, 901 S.W.2d 926 (Tex. 1995) (holding that medical student expelled on allegations of academic dishonesty had not been accorded due course of law under the Texas Constitution).

Rosser v. Squier, 902 S.W.2d 962 (Tex. 1995) (holding that fine levied against husband found in

Rosser v. Squier, 902 S.W.2d 962 (Tex. 1995) (holding that fine levied against husband found in contempt by trial court was excessive when it exceeded statutory limits).

Farmer v. Ben E. Keith Co., 907 S.W.2d 495 (Tex. 1995) (reversing court of appeals's dismissal of plaintiff's appeal as untimely in breach of contract suit against employer).

Ex parte Keene, 909 S.W.2d 507 (Tex. 1995) (holding that trial court lacked authority to hold father in contempt due to its failure to inform father of his right to counsel and right to appointed counsel on the record).

Kuhl v. City of Garland, 910 S.W.2d 929 (Tex. 1995) (holding that Political Subdivisions Act waived immunity so that a worker could sue under the Anti-Retaliation Law after he filed a workers' compensation claim and was fired by a city).

Stokes v. Aberdeen Insurance Co., 917 S.W.2d 267 (Tex. 1996) (reversing lower court's dismissal of plaintiff's appeal for technicalities in mail delivery of filing in suit against insurance company).

Thompson v. Community Health Investment Corp., 923 S.W.2d 569 (Tex.1996) (reversing court of appeals and rejecting corporation's argument that plaintiff's presuit notice in health care liability suit was improperly sent to hospital where deceased was treated).

Continental Airlines v. Kiefer, consolidated with *American Airlines v. Shupe*, 920 S.W.2d 274 (Tex. 1996) (holding federal Airline Deregulation Act does not prevent negligence claims brought against airline companies by injured plaintiffs).

Barshop v. Medina County Underground Water Conservation District, 925 S.W.2d 618 (Tex. 1996) (upholding constitutionality of water conservation statutes intended to protect the Edwards Aquifer).

Maple Run at Austin Municipal Utility District v. Monaghan, 931 S.W.2d 941 (Tex. 1996) (holding statute regarding municipal utility district unconstitutional because it was a special law in violation of theTexas Constitution).

S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996) (Owen, J., dissenting) (disagreeing with majority that statute of limitations barred claims of woman whose father allegedly sexually molested her when she allegedly repressed memory until she left home for college).

Griffin Industries v. Honorable Thirteenth Court of Appeals, 934 S.W.2d 349 (Tex.1996) (granting court access to woman who was unable to pay court costs in suit against corporation for malicious prosecution, false arrest, and wrongful death).

Franks v. Sematech, Inc., 936 S.W.2d 959 (Tex. 1997) (ruling that employee injured by

manufacturer's gate is not barred by statute of limitations from intervening in subrogation action against manufacturer and employer that was timely filed).

Gallagher v. Fire Insurance Exchange, 950 S.W.2d 370 (Tex. 1997) (holding that court of appeals erred in not permitting plaintiff to supplement record in suit against insurance company for failure to provide coverage following burglary).

Littlefield v. Schaefer, 955 S.W.2d 272 (Tex. 1997) (holding liability-release clause unenforceable in wrongful death suit brought against motorcycle race promoter).

Holmes v. Home State County Mutual Insurance Co., 958 S.W.2d 381 (Tex. 1997) (reversing the lower court's dismissal of plaintiff's appeal in suit against insurance company and permitting plaintiff to afford explanation for failure to make timely filing).

Liberty Mutual Insurance Co. v. Garrison Contractors, 966 S.W.2d 482 (Tex. 1998) (holding that state statute provides cause of action for consumers against insurance company employees whose job duties call for them to engage in business of insurance).

In re Jones, 966 S.W.2d 492 (Tex. 1998) (holding that *pro se* litigant satisfied notice requirements for filing affidavit averring inability to give security for costs of appeal).

Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) (Owen, J., concurring) (allowing imposition of punitive damages against manufacturer of asbestos-containing products in products-liability suits).

Clark v. Texas Home Health, 971 S.W.2d 435 (Tex. 1998) (holding that plaintiff nurses had a cause of action under Texas law for retaliatory employment decision taken in response to their expressed intent to report licensed health care practitioner).

In re D.A.S., 973 S.W.2d 296 (Tex. 1998) (extending the existing rules regarding assistance of counsel on appeal to indigent juveniles).

In re Ethyl Corp, 975 S.W.2d 606 (Tex. 1998) (denying defendants' request for mandamus relief from trial court's decision to consolidate plaintiffs in asbestos-exposure litigation).

In re Bristol-Myers Squibb Co., 975 S.W.2d 601 (Tex. 1998) (ruling in favor of plaintiff breast-implant litigants and consolidating claims into a single trial).

Mid-Century Insurance Co. v. Lindsey, 997 S.W.2d 153 (Tex. 1999) (requiring insurance company to pay $50,000 uninsured motorist coverage for a boy's inadvertent act).

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1998) (holding law firm business responsible for negligent misrepresentation of plaintiff, regardless of

lack of privity).

Villarreal v. San Antonio Truck & Equipment, 994 S.W.2d 628 (Tex. 1999) (trial court erred in dismissing plaintiff employee's case against employer for failing to maintain a safe working environment).

NME Hospitals v. Rennels, 994 S.W.2d 142 (Tex. 1999) (permitting pathologist to sue hospital for unlawful employment practices despite no direct employment relationship).

Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) (concluding that client need not prove actual damages in order to obtain forfeiture of attorney's fee for the attorney's breach of fiduciary duty to client).

Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217 (Tex. 1999) (denying mining company's summary judgment because of failure prove as a matter of law that limitations barred claims or that exposure to radioactive materials at company's facility did not cause leukemia).

Hernandez v. Tokai Corp., 2 S.W.3d 251 (Tex. 1999) (rejecting manufacturer's argument in defective design products liability suit that it had no duty to make the product child resistant if intended only for adult use).

Chilkewitz v. Hyson, 22 S.W.3d 825 (Tex. 1999) (holding that plaintiff's naming surgeon as an individual in medical malpractice suit was sufficient to commence suit against the professional association doing business under surgeon's name).

Crown Life Insurance Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000) (ruling that insurance agent has standing to sue insurance company for deceptive or unfair acts or practices in the business of insurance).

Kroger Co. v. Keng, 23 S.W.3d 347 (Tex. 2000) (preventing employer who is nonsubscriber to worker's compensation insurance from raising as a defense that worker was comparatively responsible for on-the-job injury).

Morgan v. Anthony, 27 S.W.3d 928 (Tex. 2000) (holding that woman had offered evidence of severe emotional distress and could pursue claim of intentional infliction of emotional distress)

Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643 (Tex. 2000) (ruling that neither settlement from earlier suit nor statute of limitations barred worker from pursuing claims against suppliers of asbestos products when he developed asbestos-related cancer).

Meritor Automotive., Inc.v. Ruan Leasing Co., 44 S.W.3d 86 (Tex. 2001) (requiring manufacturer to indemnify seller's reasonable costs to defend an unsuccessful negligence claim that was asserted independently of products liability claim).

City of Corpus Christi v. Public Utility Comm'n, 51 S.W.3d 231, 270 (Tex. 2001) (Owen, J., dissenting) (concerning statutes that deregulate the electric utility industry in Texas; although Justice Owen authored the majority opinion for the Court on many issues, she authored a dissent that most likely would have, as a practical matter, impeded electric utilities).

State & County Mutual Fire Insurance Co. v. Miller, 52 S.W.3d 693 (Tex. 2001) (consumer/insured not barred by res judicata from asserting extra-contractual claims against insurance company that do not directly involve prior suit action on question of liability under policy).

Great Dane Trailers, Inc. v. Estate of Wells, 52 S.W.3d 737 (Tex. 2001) (denying trailer manufacturer's claim of federal law preemption in plaintiff's state common law tort claims).

Bragg v. Edwards Aquifer Authority, 71 S.W.3d 729 (Tex. 2002) (holding that regulatory authority's decision to adopt rules for well permits limiting withdrawals from the Edwards Aquifer was an exercise of statutory authority to prevent waste or protect rights of owners of interest in groundwater).

American Cyanamid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002) (holding that farmer's state law claims against herbicide manufacturer for crop damage are not preempted by federal law).

King v. Dallas Fire Insurance Co., 85 S.W.3d 185 (Tex. 2002) (holding that insurance company was legally obligated to defend insured who was subject to underlying action; court views injury-triggering event from insured/consumer's standpoint).

Texas A&M University-Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002) (holding that employee's whistleblower cause of action was not barred by sovereign immunity when University allegedly breached its settlement agreement with the employee).

D. Houston, Inc. v. Love, 92 S.W.3d 450 (Tex. 2002) (holding that when employer exercises some control over its independent contractor's decision to consume alcoholic beverages to the point of intoxication, such that alcohol consumption is required, employer must take reasonable steps to prevent foreseeable injury to independent contractor caused by drunk driving).

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Alabama's Home on the Net

Another good judge and another bad rap

07/30/02

THE DEMOCRATIC leadership in the U.S. Senate is again showing its ugly colors by fighting President George W. Bush's nomination of another superbly qualified judge.

The intended victim this time is Priscilla Owen, a justice on the Texas Supreme Court now nominated for a spot on the U.S. 5th Circuit Court of Appeals.

How qualified is Judge Owen, and how fair? Listen to Lynn Liberato, a Democrat and former president of the State Bar of Texas: "She is the kind of judge I'm always glad to appear in front of because I know that she's going to listen to me, that I'm dealing with her on a level playing field."

John Hill, also a Democrat and former chief justice of the Texas Supreme Court, said Judge Owen's critics are unfairly using just a few opinions to label her a conservative activist. He decried "the process whereby we go to war in the Judiciary Committee against a qualified nominee simply because of the politics of the situation."

The supposed "silver bullet" that the liberal interest groups are using against Ms. Owen is a dissenting opinion she wrote in an abortion case. In the case, two lower courts denied the petition of a teenage girl to procure an abortion without consulting her parents. The Texas Supreme Court, by a 6-3 decision, overruled the lower courts and allowed the abortion; Judge Owen voted to deny it.

The case involved a gray area in Texas' law that, in most cases, requires parental consent for a minor's abortion. On the basis of a close case in which Judge Owen voted to uphold two lower courts, her critics are trying to paint her as a politicized, conservative judicial activist.

That's par for the course in a Senate that has refused even to provide a hearing for 17 of the president's 32 appeals court nominees. And it's further proof that in their quest for political advantage, Senate Democrats have thrown justice out the window.

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Web posted **Friday, September 6, 2002**
3:28 a.m. CT

Editorial: Senate committee rejects Texas judge's nomination

U.S. Senate Judiciary Committee members outdid themselves Thursday. By allowing politics, instead of thoughtful reasoning, to win the day, they denied Texas Supreme Court Justice Priscilla Owen's nomination to a federal appeals court seat.

By a vote of 10-9 along party lines, Owen's appointment to the 5th U.S. Circuit Court of Appeals was defeated. President Bush, who tabbed Owen for the federal bench in May 2001, said the vote was "bad for the country."

Owen had come under much criticism from a coalition of liberal groups. She was labeled anti-abortion, pro-business and overly conservative, almost to the point of being an activist judge.

In rejecting the nomination, Judiciary Committee Chairman Patrick Leahy, D-Vt., and Majority Leader Tom Daschle, D-S.D., said, in effect, that Owen is an ideologue and unqualified.

However, she is a highly respected judge who has served Texas admirably since being elected in 1994. She is a conservative judge, which put her in good standing with the 5th Circuit - thought to be the most conservative of the 13 appeals courts - and with the president.

For the first time, the Senate Judiciary Committee rejected a judicial nominee who was rated unanimously "well-qualified" by the American Bar Association.

Owen is the second Bush nominee to be rejected on a party-line vote. In March, the committee turned down U.S. District Judge Charles Pickering of Mississippi.

Thursday's vote was bad for two reasons. Not only was a fine candidate

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denied her chance to serve the residents of Texas, Mississippi and Louisiana, the states that comprise the 5th Circuit, but the party-line vote almost assuredly guarantees the game of tit for tat played by senators - where Democrats do their best to foil a Republican president's judicial nominations, and vice versa - will continue. This battle of one-upmanship serves no one.

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Editorial: Justice Owen deserves confirmation for court

It took awhile - more than a year, in fact - but Texas Supreme Court Justice Priscilla Owen got her day in the dock last week.

The judge, President Bush's appointee to the 5th U.S. Circuit Court of Appeals, finally defended herself in a hearing before the U.S. Senate Judiciary Committee against specious charges that she is a "judicial activist."

Owen has had a distinguished career on the state Supreme Court. She is a bona fide conservative, precisely the kind of judge Bush said he would appoint to the federal bench. Her so-called "judicial activism" has not been proved by anyone.

Owen underwent rough treatment at the hands of some senators, who tried to tar Owen with the activist brush.

The judge, however, said she has no desire to legislate from the bench and she understands full well that the job she seeks would require her to interpret federal law, not make it.

The Senate has dragged its feet long enough. Bush selected Owen for the 5th Circuit in May 2001.

Owen has made her case. The Senate should confirm her without further delay.

This story printed from the **Amarillo Globe-News Online** at amarillonet.com:
http://www.amarillonet.com/stories/072802/opi_edit2.shtml

August 28, 2002

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Feinstein:

I am writing respectfully to urge you to support the confirmation of Justice Priscilla Owen of Texas to the United States Fifth Circuit Court of Appeals.

Justice Owen is an accomplished jurist of exceptional integrity, character, and intellect. The superb credentials she has earned through her extensive experience as judge and private practitioner make her an extraordinarily well-qualified nominee.

I know her nomination has been before the Senate since May 9, 2001 and it is time she receives a hearing and a vote. As a Texan, I am proud of Justice Owen's integrity and accomplishments.

Thank you for your consideration of my appeal and for your service to our country.

Respectfully,

Hope Andrade
15615 Thrush Gate
San Antonio Tx 78248
210 262 7502
hope5@flash.net

MRS. TOBIN ARMSTRONG

August 22, 2002

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

Re: Justice Priscilla Owen

Dear Senator Feinstein:

I am writing respectfully to urge you to support the confirmation of Justice Priscilla Owen of Texas to the United States Fifth Circuit Court of Appeals.

Justice Owen is uniquely qualified to serve on the federal bench. Her record on the Texas Supreme Court reflects an abiding respect for the rule of law, deference to the legislative branch, absolute fidelity to the canons of ethics, and the highest standard of scholarship. She has also been deeply involved in service to her community, both in her service to the bar and in her contributions to numerous charitable causes. If confirmed, she will serve with honor and distinction.

The American Bar Association has, unanimously, given Justice Owen its highest possible rating. Justice Owen has carried out her duties on the Texas Supreme Court with honor and dignity while interpreting the laws of Texas as they are written and intended by our legislature and our constitution. She is a jurist who follows the law in a principled and judicious manner and has demonstrated her outstanding qualifications.

Those of us who are served by the U.S. Fifth Circuit urge an expeditious confirmation of this outstanding candidate.

Sincerely,

Anne Armstrong

Anne Armstrong

ARMSTRONG RANCH ARMSTRONG, TEXAS 78338

Austin American-Statesman
Monday, February 12, 2001

Law clerk bonuses may violate state law

Group says Supreme Court employees might face a conflict of interest

Associated Press

HOUSTON — The Travis County attorney, responding to a complaint by a public watchdog group, is looking into whether bonuses paid to Texas Supreme Court law clerks violate a law banning gifts to state workers.

At issue is the possibility that a clerk might wind up advising a judge on a case involving his or her future law-firm employer.

The court clerks, usually among the top law school graduates, often receive job offers at the end of their summer jobs working for law firms. As they finish law school, many have already accepted bonuses from law firms.

"The practice of private firms subsidizing court clerks raises serious ethical and legal issues," said Cris Feldman, staff attorney for Texans for Public Justice, a government watchdog group. "If the Supreme Court does not follow the law, no one will."

Texas lawmakers hope to fix the problem. Rep. Sylvester Turner, D-Houston, who chairs an appropriations subcommittee that is reviewing the court's budget, said the issue will be discussed this week.

Court clerks research cases and advise individual justices about appeals during a one-year term. They gain valuable experience and prestige but are paid $37,900 for their year's work at a time when first-year associates at the top Texas firms can make $125,000. Bonuses can be as much as $35,000.

Chief Justice Thomas R. Phillips said the nine justices don't let the clerks work on cases involving their future employers.

But County Attorney Ken Oden's inquiry has pointed out weaknesses in the screening process. Several justices, for example, were unaware that some law firms pay the bonuses before the new attorneys begin work at the court.

Feldman said that in the past eight years, 76 clerks worked at the court at the same time that their immediate future employers had cases pending there. Those clerks faced 402 potential conflicts of interest, Feldman said.

Oden said he has no plans to prosecute anyone, because the bonuses have been a common practice for years and never had been suggested to be illegal or unethical.

"I've found no evidence of any intentional misconduct by clerks, potential clerks, law firms or the court," he said.

But Oden said he can't ignore the fact that the law appears to prohibit the bonuses and that there is a public policy interest in having court workers be free from influence.

The penal code chapter says a judicial employee breaks the law if he "solicits, accepts or agrees to accept any benefit" from a person who might have an interest before the court. A law firm is in violation if it knowingly "offers, confers or agrees to confer any benefit on a public servant" that it knows the worker is prohibited from accepting.

The court has safeguards in place to prevent conflicts, said Daniel Alexander, who clerks for Justice Craig Enoch. But he said he understands that someone who doesn't understand the internal workings of the court "might see an appearance of impropriety."

One possibility is requiring more public disclosure of law-firm bonuses and benefits paid to clerks, Oden said.

State legislators have expressed a willingness to rewrite the statute to exempt the law-firm bonuses. As an alternative, the court has asked for an extra $1 million a year to do away with the 18 clerks (two serving each justice) and to hire full-time staff attorneys.

Austin American-Statesman
statesman.com

The real Priscilla Owen

By John Cornyn
U.S. SENATE
Thursday, March 13, 2003

After 22 months of obstruction, the record on Texas judicial nominee Priscilla Owen will finally be set straight this morning in a U.S. Senate Judiciary Committee hearing. For the second time, Owen comes before the committee and will prove, once again, that she deserves to be confirmed to the 5th U.S. Circuit Court of Appeals. The Circuit's jurisdiction encompasses Texas, Louisiana and Mississippi.

Owen is an impressive attorney and jurist. She graduated at the top of her class from Baylor Law School and edited the Law Review there, during a time when few women entered the legal profession. She received the highest score on the bar exam.

After practicing law in Texas for 17 years, Justice Owen won a seat on the Texas Supreme Court, and Texans re-elected her in 2000 with 84 percent of the statewide vote. Her nomination has received broad, bipartisan support, including former state Supreme Court justices and prominent Texas Democrats such as John Hill and Raul Gonzalez, 15 former presidents of the State Bar of Texas and many other leading Texans.

Owen's qualifications and record of accomplishment caused the American Bar Association to unanimously rate her "well-qualified" for the federal bench -- its highest rating -- which some Democrats have called the "gold standard." But even that was not enough for the 10 Democrats on the Senate Judiciary Committee last year who blocked a vote on Owen by the full Senate.

Democrats on the Judiciary Committee used Owen as a political football last year in an attempt to embarrass President Bush and ridicule Texas during key elections. They tried unfairly to brand the native Texan as an extremist.

Partisan opponents point out that other judges sometimes disagree with Owen. But there is nothing wrong with disagreement; no two judges agree all the time -- which is precisely why the Texas Constitution establishes a Supreme Court of nine justices. When the law is unclear, a good judge like Justice Owen searches in good faith for the right answer.

As a former justice on the Texas Supreme Court, I often agreed with Owen. When we disagreed, I always found her professional and her rulings based on a fair reading of the law.

Abortion advocates criticize her rulings on Texas's parental notification law. Unlike more restrictive states, Texas generally requires minors only to notify one parent before an abortion. The criticism is misplaced: Owen did not write the law, the state Legislature did.

Her opponents claim, disingenuously, that her interpretations of that law are out of the mainstream. Yet the author of the parental notification law, Texas state Sen. Florence Shapiro, filed briefs supporting Owen's view and endorses her nomination to the federal bench. And among the few parental notification cases heard by her court, Owen dissented less frequently than two other justices. Owen's record is hardly one of an extremist.

When we set the record straight, it will be obvious in Washington -- as it has long been in Texas -- that Priscilla Owen is an outstanding person and well-qualified judge who deserves confirmation to the federal court of appeals. After 22 months, Texans and the 5th Circuit have already waited long enough.

Cornyn, a Republican, is a member of the Senate Judiciary Committee.

VICTOR F. BATTAGLIA
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AUG 1 2002

OF COUNSEL
JOHN BIGGS, JR.
GERARD P. KAVANAUGH, SR.
C. BERNARD ABLEMAN

July 29, 2002

The Honorable Joseph R. Biden, Jr.
1105 North Market Street
Wilmington, DE 19801

Dear Senator Biden:

Blake Tartt, Esquire is one of the great lawyers of America. He practices in Houston, Texas. I dictate this letter after talking to him on the telephone today.

Blake believes that Justice Pricilla Owen of the Texas Supreme Court is wonderfully qualified to serve as a member of the Court of Appeals for the Fifth Circuit. He tells me that she has been evaluated by the American Bar Association Standing Committee on the Federal Judiciary and that Committee has unanimously determined her to be well qualified for the appointment.

He is concerned that if she is not confirmed before the end of the year her nomination to the Court may be in danger.

I have known Blake Tartt for many years and know that whatever Blake Tartt tells me, I can take to the bank. I write to ask your consideration in insuring that her candidacy makes it before the Senate for a vote on her confirmation.

While I do not know the lady, I know Blake Tartt and if Blake Tartt says she is qualified, she is qualified.

I would appreciate anything you could do to help see that her candidacy is considered by the Senate.

Respectfully,

Victor F. Battaglia

VFB/fkb

The Beacon Journal

(Akron, Ohio)

July 28, 2002, B2

Judicial caricatures; Senate Democrats resort to their own litmus test

Sen. Orrin Hatch knows "deceptions, distortions and demagoguery," words the Utah Republican used last week to describe Democratic efforts to torpedo the nomination of Priscilla Owen to the 5th U.S. Circuit Court of Appeals in New Orleans. Hatch launched his own missiles at the nominees of Bill Clinton. In this instance, the senator is right. Democrats strained to make their case that Owen, a justice on the Texas Supreme Court since 1994, represents a wayward judicial activist. Sen. Dianne Feinstein of California and other Democrats disagree with Owen rulings. They highlighted the abortion issue (surely to the approving nods of interest groups). A simple difference of opinion isn't grounds for failing to confirm a nominee.

Owen is a conservative. You would expect as much from a nominee tapped by George W. Bush with the help of two Republican senators from Texas. She also carries impressive credentials, including a unanimous rating of "well-qualified" from an American Bar Association that Democrats have saluted in the past for its assessment of judicial nominees.

The federal bench has far too many vacancies, especially on the 6th Circuit Court of Appeals, which serves Ohio, Michigan, Tennessee and Kentucky. The country is ill-served when senators become bogged down in squabbles over what are essentially litmus tests. Yes, Republicans did the same. That doesn't justify the caricaturing of nominees. The real Priscilla Owen deserves confirmation.

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E-Mail: tbishop@bishophummert.com

June 19, 2001

Senator Patrick Leahy
SENATE JUDICIARY COMMITTEE
224 Dirksen Building
Washington, D.C. 20510

RE: Nomination of Justice Patricia Owen for the United States Fifth Circuit Court of Appeals

Dear Senator Leahy:

I have had the privilege of knowing Justice Patricia Owen of the Texas Supreme Court, both personally and professionally, for many years. I cannot imagine a more qualified, ethical, and knowledgeable person to sit on the United States Fifth Circuit Court of Appeals.

I accept the reality that politics is a part of our culture, but I know that when it comes to appointing federal judges, we must transcend politics and look to character and ability. Patricia Owen has the character and ability to make all of us, Democrat and Republican, proud.

I ask that your Committee act swiftly to confirm her nomination to the United States Fifth Circuit Court of Appeals.

Thank you.

Sincerely,

E. Thomas Bishop

ETB:jetxxx

August 23, 2002

The Honorable Joseph Biden, Jr.
United States Senate
221 Russell Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Biden,

I am Justice Owen's friend and pastor.

As you consider this important decision, I offer you my testimony about her. I do so as a lifelong Democrat, and as a sincere admirer of your record of long and honorable service to the party and the country.

Justice Owens has a focus on her calling to serve justice that amazes me. She has simplified her life so that each case can receive her full concentration. Her involvement with our church has been to care for our children with a tenderness that has won the gratitude of all our families, and to quietly help people through terrible illnesses and with marriages when I cannot officiate. She is so self-effacing that, though we are a new (and therefore small) church of mostly working class people, virtually no one in the congregation knew what she does for a living until her nomination put her face in the newspapers in a very heightened way.

I believe these very qualities I have witnessed up close for the past five years – her ability to concentrate on the essentials, her self-effacement, and her empathy for the needs of individuals – will serve us all well, should she be confirmed as a federal judge for the fifth district. She has well deserved the immense respect the people of Texas have for her, and she will continue to inspire respect in the wider arena of the Fifth District.

Your support for her nomination will help the people of the fifth district get a well-qualified judge whose work on the court will help resolve the crisis created by the prolonged vacancy of this position, and your support would powerfully assist the nation in overcoming the reputation for extreme partisanship that now damages the judicial nominating process. Your own teaching on this last point has been helpful to all of us; your vote for Justice Owens will really help a lot on "the Biden Doctrine."

Thank you for your attention to my concerns.

Sincerely,

Rev. Jeffrey Black

Rev. Jeffrey Black
6506 Corpus Christi
Austin, Texas 78729

Cc: The Honorable Orrin Hatch

August 23, 2002

The Honorable Russ Feingold
United States Senate
506 Hart Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Feingold,

I am Justice Owen's friend and pastor, and I was privileged to be present with her during her hearing before the Judiciary Committee in July. Thank you for asking about Justice Owen's and my visit to then Governor Bush about the Alpha ministry. I trust Justice Owen's answer clarified that we were not lobbying for funds or influence, but instead asking to have this ministry included among the other ministries various volunteers offer to Texas prisoners.

As you consider this important decision, I offer you my testimony about her. I do so as a lifelong Democrat, and as a sincere admirer of your public service.

Justice Owens has a focus on her calling to serve justice that amazes me. She has simplified her life so that each case can receive her full concentration. Her involvement with our church has been to care for our children with a tenderness that has won the gratitude of all our families, and to quietly help people through terrible illnesses and with marriages when I cannot officiate. She is so self-effacing that, though we are a new (and therefore small) church of mostly working class people, virtually no one in the congregation knew what she does for a living until her nomination put her face in the newspapers in a very heightened way.

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Thank you for your attention to my concerns.

Sincerely,

Rev. Jeffrey Black

Rev. Jeffrey Black
6506 Corpus Christi
Austin, Texas 78729

Cc: The Honorable Orrin Hatch

August 23, 2002

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Feinstein,

I am Justice Owen's friend and pastor, and I was privileged to be present with her during her hearing before the Judiciary Committee in July. Thank you for your courtesy, restraint, and fairness as you led that hearing.

As you consider this important decision, I offer you my testimony about her. I do so as a lifelong Democrat and a deep admirer of your public service. Justice Owens has a focus on her calling to serve justice that amazes me. She has simplified her life so that each case can receive her full concentration. Her involvement with our church has been to care for our children with a tenderness that has won the gratitude of all our families, and to quietly help people through terrible illnesses and with marriages when I cannot officiate. She is so self-effacing that, though we are a new (and therefore small) church of mostly working class people, virtually no one in the congregation knew what she does for a living until her nomination put her face in the newspapers in a very heightened way.

I believe these very qualities I have witnessed up close for the past five years – her ability to concentrate on the essentials, her self-effacement, and her empathy for the needs of individuals – will serve us all well, should she be confirmed as a federal judge for the fifth district.

I could tell at the hearing that you were deeply troubled by her reference to religious teaching in one of the Jane Doe cases. As a supporter of the separation of church and state, I offer you this thought: as I understand the reasoning of the Supreme Court and the Texas Legislature, in the situation in which a minor feels the need for an abortion but is, for the purposes of that crisis, in effect parentless, then the court must function, in effect, in loco parentis. In a healthy parent-child relationship dealing with this crisis, it is reasonable to assume, if the family had a religious tradition, that the family would turn to that tradition to get support. If the court is forced to step into that role of family for the minor during the crisis, then it seems reasonable to enquire whether the child has a religion, and, if so, if she has consulted it. It is a delicate point, and reasonable people can disagree on it; but Justice Owen's effort to understand the meaning of the Supreme Court's decision that provides the context for the Texas law does not seem to me to be an instance of judicial activism.

Thank you for your attention to my concerns.
Sincerely,

Jeffrey Black

Rev. Jeffrey Black
6506 Corpus Christi
Austin, Texas 78729

cc: The Honorable Orrin Hatch

August 23, 2002

The Honorable Herb Kohl
United States Senate
330 Hart Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Kohl,

I am Justice Owen's friend and pastor, and I was privileged to be present with her during her hearing before the Judiciary Committee in July.

As you consider this important decision, I offer you my testimony about her. I do so as a lifelong Democrat.

Justice Owens has a focus on her calling to serve justice that amazes me. She has simplified her life so that each case can receive her full concentration. Her involvement with our church has been to care for our children with a tenderness that has won the gratitude of all our families, and to quietly help people through terrible illnesses and with marriages when I cannot officiate. She is so self-effacing that, though we are a new (and therefore small) church of mostly working class people, virtually no one in the congregation knew what she does for a living until her nomination put her face in the newspapers in a very heightened way.

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Your support for her nomination will help the people of the fifth district get a well-qualified judge whose work on the court will help resolve the crisis created by the prolonged vacancy of this position, and your support would powerfully assist the nation in overcoming the reputation for extreme partisanship that now damages the judicial nominating process.

Thank you for your attention to my concerns

Sincerely,

Rev. Jeffrey Black

Rev. Jeffrey Black
6506 Corpus Christi
Austin, Texas 78729

Cc: The Honorable Orrin Hatch

August 29, 2002

The Honorable John Edwards
United States Senate
225 Dirksen Building
Washington, DC 20510

Subject: Justice Priscilla Owen

Dear Senator Edwards,

I am Justice Owen's friend and pastor, and I was privileged to be present with her during her hearing before the Judiciary Committee.

I noticed that you had prepared carefully for that day, and that you both listened to her and several times repeated what she had said to make sure you had heard her correctly, and that you noted where her responses affected what you had previously understood.

I have been her friend for several years. She is a person who loves being a judge and does not shrink from accountability, but publicity is not something she seeks. Thank you for the marks of genuine courtesy and respect you extended to her.

As a fellow Democrat, I ask you for your support. Having read your profile in The New Yorker, I am aware that you have been a successful plaintiff's attorney, and that several of her rulings have been against plaintiffs. However, I know her very well, and I know that she is a person of great integrity and compassion. I have seen her tireless work for children, especially for those who come from disadvantaged homes. Her entire presence in the ministry I lead has been focused on helping individuals and has been self-effacing. In fact, when all the publicity about her nomination became prominent, most of the families and children she has befriended were surprised to learn that "Miss Priscilla" is a Texas Supreme Court Justice. I think that those qualities will help make her a wonderful addition to the Federal bench in the 5th District. It may be that the day will come when you are the nominator of judges. It surely will be that someone of our party will have that high duty once again. If the ones nominated in that day are jurists and persons of integrity, like Justice Owen, we will want bipartisan support for them.

I thank you for your attention to my concerns.

Sincerely,

Jeffrey Black

Rev. Jeffrey Black
6506 Corpus Christi
Austin, Texas 78739

cc: The Honorable Orrin Hatch

THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

OPINION

The real extremists

By Jeff Jacoby, 7/28/2002

WHY DO professional abortion-rights advocates anathematize as "antichoice" anyone who favors even minimal regulation of abortion? Their absolutism would be seen as ridiculous in almost any other area of law.

For example: Americans have a fundamental right to own and use land, but no one believes that land use should be entirely untrammeled. A great body of law has developed to regulate what people do with their land - from local zoning ordinances to common law nuisance remedies to federal wetlands and endangered-species statutues. Reasonable people can and do debate the wisdom of particular regulations. But nearly everyone agrees that there must be *some* restrictions on an owner's right to make use of his property. Only a crank would argue that to favor any sort of limitation at all is to be "anti-ownership" or an enemy of landholders.

To take another example, Americans have the constitutional freedom to express their views in public. But no one takes the First Amendment to mean that self-expression may never be restricted. Your right to free speech does not authorize you to utter slander, to threaten the life of the president, to falsely shout "Fire!" in a crowded theater, or to give perjured testimony in court.

Yet when it comes to abortion, there is no such thing as a reasonable restriction - not to the abortion-rights spokeswomen whom we invariably hear from whenever the issue comes up. A 24-hour waiting period? Pre-abortion counseling to discuss possible risks or alternatives? Parental notification when a minor wants an abortion? A ban on partial-birth abortions? The politician who calls for such limits or the judge who upholds them can count on being slammed as a threat to "reproductive rights" and a foe of "choice."

Just ask Priscilla Owen, the Texas Supreme Court justice nominated by President Bush to the Fifth Circuit US Court of Appeals. She is by most accounts a restrained and thoughtful judge; the American Bar Association unanimously pronounced her "well-qualified." But because in several teen-abortion cases she ruled that parental notification was required, she is being excoriated. Planned Parenthood calls her an "anti-choice extremist." The National Organization for Women accuses her of "disdaining women's rights." The National Abortion Rights Action League says she "exemplifies the most extreme hostility to reproductive rights."

But who are the real extremists here? In a new analysis, the Gallup News Service reports that "in general, polling shows wide public support for parental consent laws - policies that are even more restrictive than parental notification." In 1996, a Gallup survey found 74 percent

of Americans in favor of requiring parental consent for a minor's abortion. Since then, the level of support has gone even higher. In a 1998 CBS/New York Times poll, 78 percent wanted parental consent. And in a Los Angeles Times survey two years after that, the figure was 82 percent.

Justice Owen insists her rulings are based on Texas law, not her own personal views. But if they do reflect her personal views, she clearly has lots of company. Are more than four Americans in five "anti-choice extremists?" Or is it NARAL, NOW, and Planned Parenthood that are far outside the mainstream?

In poll after poll, a majority of respondents say that, as a general rule, abortion should remain legal and the government should not interfere with a woman's right to end her pregnancy. But when asked about restricting abortion in specific ways or circumstances, they often say yes.

Thus, 86 percent of Americans would make abortion illegal in the third trimester (Gallup, 2000), and 63 percent would vote to ban partial-birth abortions. Mandatory pre-abortion counseling is favored by 86 percent of the public (Gallup 1996); a 24-hour waiting period by 79 percent (CBS/New York Times, 1998). (These all presuppose a healthy mother and child; Americans overwhelmingly support legal abortion when the mother's health is seriously threatened or when there is likely to be a serious defect in the baby.)

It makes sense that the public does not regard these limitations as unreasonable. Americans recognize that abortion is too serious and tragic to be undertaken lightly. They know that the pro-life slogan "Abortion stops a beating heart" is a statement of fact. So while they support reproductive rights, they do not support unfettered abortion on demand, for any reason at any time.

But that is largely what organizations like NARAL, NOW, and Planned Parenthood *do* support, which is why they vigorously oppose the kinds of abortion regulations that most Americans would endorse. That is their right, of course. But why should their radical viewpoint be the standard for defining "prochoice?" Prochoice is what most Americans are: In favor of the right to choose, but also in favor of common-sense limits on that right. For NARAL & Co. we need a more accurate term. I'd suggest "pro-abortion."

Jeff Jacoby's e-mail address is jacoby@globe.com.

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National Committeewoman
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Roy V. Casanova, Jr.
Legislative Director
Bexar County

July 15, 2002

The Honorable Patrick J. Leahy, Chairman
Committee on Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

We have passed the one-year anniversary of Texas Supreme Court Justice Priscilla Owen's nomination by President Bush to serve on the 5th Circuit Federal Court of Appeals. The President nominated Owen on May 9, 2001, yet she has not received a hearing from the Senate Judiciary Committee. This situation has gone from regrettable to completely irresponsible.

The American Bar Association has unanimously rated Justice Owen "well qualified" its highest possible rating. Justice Owen interprets the law as it is written and intended by the legislature. Justice Owen received the endorsement of virtually every major Texas newspaper when she ran for re-election in 2000 in recognition of her superb qualifications, temperament and impressive record as a principled and restrained jurist who follows the law.

She deserves a prompt and fair hearing. Further delay is not acceptable.

Sincerely,

Roy V. Casanova, Jr.

Roy V. Casanova, Jr.
Legislative Director
RNHA USA

RVC: bjc

Chicago Tribune

August 20, 2002

Ideologues vs. Justice Owen

At least since the 1987 battle over Robert Bork's nomination to the Supreme Court, judicial appointments have been a major arena for conflict in Washington. It doesn't matter if the White House is in Republican hands and the Senate under Democratic control, or the other way around: Whenever a nominee can be tarred as extreme, unethical or incompetent, ideologues paint the most appalling picture in the hope of killing the appointment.

It's not a good way to find the truth or to select good judges. Instead, it fosters irresponsible distortion and discourages strong-minded individuals from accepting judicial posts, while rewarding lawyers whose chief talent is never doing anything, good or bad, to make enemies. The latest fight is over Priscilla Owen, a Texas Supreme Court justice chosen by President Bush for the 5th Circuit Court of Appeals. She got the highest rating from the American Bar Association. To get that endorsement, says the ABA, a nominee "must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

You'd never guess any of these qualities from the attacks on Owen. Senate Democrats and liberal activists have denounced her as a right-wing ideologue and a lap dog for big corporations, particularly Enron. Their favorite evidence is a quotation from fellow Justice Alberto Gonzales, now White House counsel, accusing her of "an unconscionable act of judicial activism" in voting to deny a minor permission to get an abortion without her parents' knowledge.

But judges accuse each other of judicial activism all the time. It's safe to assume that if Gonzales distrusted Owen's instincts, he would have lobbied his boss not to choose her. Today, he says, "She will exercise judicial restraint and understands the limited role of the judiciary."

In the abortion case they disagreed about the application of a Texas law that generally requires parents to be notified. Owen, dissenting from the court's decision to grant permission, made a perfectly rational case that the majority was reading the law too liberally.

As for her views about corporations, it's not surprising that a candidate picked by a conservative president has not been hostile to private business. It's true that, in running for the office, she got campaign contributions from Enron employees and then sat on cases involving the company. But people associated with Enron gave to lots of political candidates, and Owen didn't violate any ethics rules.

Owen is just one of many Bush nominees who have been inexcusably blocked from filling vacant seats on the bench—something that also happened, with equal lack of justification, to many of President Clinton's appointees.

But the only real argument against her is that she's not the sort of choice a Democratic president would make. That's no reason Bush shouldn't have picked her, or that the Senate shouldn't confirm her.

Chicago Tribune

Commentary - August 22, 2002

A conservative judge's 'judicial activism'

Priscilla Owen is not a household name across America, but she has achieved an amazing level of notoriety among left-leaning interest groups, who regard her much as Dalmatian owners view Cruella De Vil. The Texas Supreme Court justice became their Public Enemy of the Month by doing two things: 1) compiling a judicial record that can fairly be described as conservative, and 2) being nominated to the 5th Circuit Court of Appeals by President Bush.

Those offenses were all it took to unleash a torrent of invective against Owen, whose nomination is awaiting Senate action. Ralph Neas, president of People for the American Way, denounced her as an "ultraconservative." The National Abortion and Reproductive Rights Action League said she's possessed by "a strong personal bias against the right to choose that renders her unable to follow the law." The most frequently heard criticism is not from liberals but from a conservative--White House counsel and former Texas Supreme Court Justice Alberto Gonzales, who is quoted as having accused Owen of "an unconscionable act of judicial activism" in how she handled one abortion case. That charge is supposed to prove that she's not only too conservative for liberals, but too conservative for conservatives.

What her opponents don't publicize is that from all evidence, Owen is an excellent lawyer and judge. Fifteen former presidents of the Texas State Bar wrote the Senate Judiciary Committee to announce that though "we profess different party affiliations and span the spectrum of views of legal and political issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate."

The American Bar Association, which is not regarded as a dear friend by conservatives, agrees. Its Standing Committee on the Federal Judiciary unanimously rated Owen "well-qualified." That's the highest score the ABA evaluators give, and they don't hand it out to just anybody who can pass the bar exam and tie her own shoes.

"To merit a rating of 'well-qualified,' " the ABA explains, "the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament." This portrait of Owen doesn't quite match the drooling Neanderthal depicted by her critics.

The judicial activist charge is also hard to square with reality. In the case cited by critics, where Gonzales affixed the label on three dissenting justices, he was clearly beholding the mote in his brother's eye while ignoring the beam in his own.

The dispute involved a 17-year-old high school student who wanted to get an abortion without notifying either of her parents, as required under Texas law. A minor may get a judge to waive the requirement if she can show that she is "mature and sufficiently well-informed" to make the decision alone (or to prevent abuse, which was not an issue).

"Mature" and "well-informed" are not terms of mathematical precision, leaving some room for interpretation. But after hearing her testify, a trial court judge ruled that the girl was not sufficiently well-informed. An appeals court reached the same conclusion. Without the benefit of face-to-face contact with the girl, the Texas Supreme Court overruled them.

There is no "judicial activism" in respecting the findings of a trial court judge, as Owen did. Nor is there anything startling in her view that the law was not supposed to make waivers automatic. In fact, during the legislative debate back in 1999, supporters of the proposal envisioned the bypass mainly for instances of incest and physical abuse.

Critics insisted then that the bill made it too hard to get around the notification rule. One opposing legislator predicted that if the measure passed, not a single waiver would be granted. The legislators who originally sponsored the measure filed a brief in this case, arguing that the whole point of their legislation was to "restore parents' natural authority to act as chief advisors to their minor daughters who become pregnant and seek abortions" and to assure that parents would be excluded only in "exceptional circumstances."

The Texas legislature, a conservative one, passed a restrictive law aimed mainly at assuring the involvement of parents, not preventing it. So how is it "judicial activism" for a judge to read it the way that even its critics read it during the debate? More plausibly, the activism was on the other side. Owen was not giving into the temptation to legislate from the bench, but resisting it.

If Owen had gone along with a more relaxed reading of the law, she might indeed be accused of judicial activism. But not by the people attacking her today.

Steve Chapman is a member of the Tribune's editorial board.

ELEANOR TYLER CHOTE
1512 PRESTON AVENUE
AUSTIN, TEXAS 78703-1904

August 21, 2002

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Subject: Justice Priscilla Owen

Dear Senator Feinstein,

This letter is written to encourage you to support Justice Priscilla Owen to serve as a Justice on the Fifth Circuit Court of Appeals. She is a personal friend of mine and I know her to possess impeccable character and the finest of qualifications for this position.

It is my practice when voting, to vote for the most qualified and ethical person - regardless of party affiliation. Justice Owen is an outstanding example both in her personal life as well as her professional life. She is extremely fair and thorough in everything she does. Her mind is the brightest and her willingness to work very hard are both evident and would be valuable assets in this position of Justice on the Court of Appeals. She has a public servant attitude that is very refreshing in this time of great greed in our country.

Please disregard politics and vote for the person who will make the best justice: Justice Priscilla Owen for the Fifth Circuit Court of Appeals. Thank you for your public servant attitude as shown in your life.

Sincerely,

Eleanor T. Chote

Eleanor T. Chote

cc: The Honorable Orrin Hatch

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RICHARD W. CHOTE
3305 NORTHLAND DRIVE, SUITE 500
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AREA CODE 512
472-8861
FAX 512-476-3685

August 23, 2002

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Feinstein:

I write to encourage you to support the confirmation of Justice Priscilla Owen as Judge of the United States Court of Appeals for the Fifth Circuit. As a Texas Democrat from birth, former law clerk to a Democrat U.S. District Judge appointed by President Johnson, former Assistant to a Democrat Texas Attorney General, and early supporter of Lloyd Doggett (when he ran for the United States Senate), I believe in the party's principles of fairness and consideration of others. So please consider these personal comments about my friend, Priscilla Owen.

We became friends five years ago, working closely in the creation of a new Episcopal church in Austin. She was one of the original fifteen or twenty of us then; there are about 350 now, due in large part to her faithfulness, patience, kindness, and skill in teaching our children, organizing and leading our Altar Guild, and providing wisdom, counsel, encouragement, and caring for all. I have observed her love and compassion lived out over the past five years. I have witnesses her support terminally ill people, grieving widows, scared children, and confused young adults. I know of her soft heart as well as her brilliant mind.

I came to respect Priscilla as the hardest working, caring public servant I have known in my 35 years practicing law. I witnessed the integrity, compassion and diligence with which she approached the task of interpreting Texas' new parental notification statute last year. The pathos she felt for the unknown applicants and their families was palpable as the Court researched, deliberated, and drafted on those cases, to the near exclusion of all other Court business for many weeks, to provide compassionate justice together with clear guidance to the lower courts and attorneys of Texas.

The Honorable Dianne Feinstein
August 23, 2002
Page 2

Priscilla is a humble, self-effacing, and as non-political a person as a Texas judge can be. Many who have known her for years as teacher of their children and head of the Altar Guild only recently learned she is a judge. We know her more as a kind and helpful friend, a reliable leader of young and old, a servant for the good of our community, a caring counselor in time of need, and a respecter of all sorts and conditions of mankind. And she is a humorous and gracious woman, a truly good and delightful person.

We need people like Justice Owen on our highest courts. Republican or Democrat does not matter when it comes to judicial expertise, temperament, character, integrity, and reputation. All thinking people want the best qualified persons on our benches. Priscilla is the best of the best. I respectfully urge your support for Justice Owen's confirmation.

Sincerely Yours,

Richard W. Chote

Richard W. Chote

Cc: The Honorable Orrin Hatch

Congress of the United States
Washington, DC 20515

July 22, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We urge the Senate Judiciary Committee to provide the President's nominee to the U.S. Court of Appeals for the Fifth Circuit, Justice Priscilla Owen, with a fair hearing and swift vote to send her nomination to the Senate floor for confirmation. We are concerned about an attempt by outside groups to distort her record and endanger the ability of qualified women to serve at the highest levels of our federal judiciary.

Justice Owen's stellar academic achievement and professional experience are remarkable. She graduated cum laude from Baylor Law School in 1977 and practiced commercial litigation for seventeen years before her election to the Texas Supreme Court in 1994. Justice Owen has delivered exemplary service on the Court, as affirmed by her receiving positive endorsements from every major newspaper in Texas during her re-election bid in 2000. Noteworthy to the Committee, the American Bar Association Standing Committee on the Federal Judiciary has *unanimously* voted Justice Owen "Well Qualified" for appointment to the Fifth Circuit.

One area where Justice Owen's record is being misconstrued is with Texas' parental notification statute for minors. These cases deal strictly with statutory interpretation of Texas law, not with an issue of a constitutional right under the U.S. Constitution. These are not abortion cases but are rightly issues of parental involvement. Forty-three states have passed some form of parental involvement statute, demonstrating the importance of involving parents in their children's medical decisions.

The Texas statute requires notification of one parent, but not the consent of either parent. Although the U.S. Supreme Court has not ruled on whether a judicial bypass procedure is necessary for notification statutes, Texas law still allows a minor to bypass the notification requirement in certain limited situations. In these judicial bypass cases, the trial court appoints counsel for the minor if she does not have an attorney, and it appoints a guardian ad litem. *If the trial court grants the bypass, there is no appeal.* If the bypass is denied, the minor may appeal to the court of appeals, and again, if the appellate court grants the bypass, there is no further appeal. Only if both the trial and appellate courts have denied the minor's request can the Texas Supreme Court consider the issue. The Court traditionally gives deference to the trial court's factual findings and observances of the minor requesting the bypass.

PRINTED ON RECYCLED PAPER

Out of over 650 bypass cases, the Texas Supreme Court has taken up only twelve cases with difficult factual issues. Although Justice Owen's decisions are consistent with U.S. Supreme Court rulings, including *Roe v. Wade*, Justice Owen's decisions on judicial bypass have dealt exclusively with statutory interpretation. The question before the Texas Supreme Court in every one of these cases is whether parents should be informed of the decisions of their children. Of note, in the Court's most recent judicial bypass decision, Justice Owen concurred in an opinion allowing for a minor to bypass the parental notification requirements. Justice Owen's record demonstrates she is merely upholding the law.

It is harmful to women in the judiciary to turn a nominee's confirmation into a showdown on abortion. If this campaign is pursued, it will have a substantial chilling effect on women in the judiciary by holding women nominees to a different standard than their male counterparts. Priscilla Owen has a proven record of integrity, judicial restraint, and well-thought decisions, and we request that Justice Owen receive a fair hearing based on her exemplary record.

Sincerely,

Signature List

Kay Granger
Jo Ann Davis
Anne Northup
Sue Kelly
Shelley Moore Capito
Ileana Ros-Lehtinen
Barbara Cubin
Melissa Hart
Mary Bono
Sue Myrick
Deborah Pryce

SENATE JUDICIARY COMMITTEE

NOMINATION OF JUSTICE PRISCILLA RICHMAN OWEN TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

THURSDAY, MARCH 13, 2003, 9:30 A.M.
DIRKSEN 106

Mr. Chairman, it is my great pleasure and honor to join my colleague, Senator Hutchison, in introducing this fine and exceptional nominee to the U.S. Court of Appeals for the Fifth Circuit, Justice Priscilla Richman Owen. Senator Hutchison has done an excellent job of describing Justice Owen's background, her experiences, and her exceptional credentials for this seat on the federal bench, and I wholeheartedly agree with her fine comments. I discussed Justice Owen's qualifications for the federal bench, in an op-ed published this morning in the Austin-American Statesman, and Mr. Chairman, I would ask the committee for unanimous consent that that op-ed be included in the record.

Mr. Chairman, I would like to spend a few moments talking with you about my own, personal, unique perspective on this nominee – as a former, fellow Justice of the Texas Supreme Court.

Justice Owen and I served together on the Texas Supreme Court for three years – from the time she joined our court in January 1995, to the time I left the court in October 1997. During those three years, I had the privilege of working closely with Justice Owen. During those three years, I had the opportunity to observe on a daily basis precisely how Justice Owen thinks about the law, and what she thinks about the job of judging, in literally hundreds if not thousands of cases. During those three years, I spoke with Justice Owen on countless occasions about how to read statutes faithfully and carefully, and how to decide cases based on what the law says, and not how we personally would like to see the case come out. I saw her take careful notes and pull the law books from the shelves and study them very very closely. I saw how hard she works to faithfully interpret and apply what the Texas legislature has written. I can testify from my own personal experience, as her colleague and as a fellow justice, that Justice Owen is an exceptional judge, who works hard to follow the law and to enforce the will of the legislature.

Not once did I ever see her try to insert her own political preferences or beliefs into her job as a judge. To the contrary, I can testify that Justice Owen feels very strongly, as do I, that judges are called upon, not as legislators or politicians, but as judges, to faithfully read statutes and to interpret and apply them faithfully to the cases that come before the court.

I also want to take a moment to reflect upon my own experiences as a justice on the Texas Supreme Court and to talk about what it means to be a judge. I can testify to you today that the job of a judge is very, very different from the job of a Senator. Being a

Senator means expressing your personal political views on a whole range of important and controversial issues. Being a judge is exactly the opposite. A judge's personal political beliefs must have no bearing whatsoever on their job as a judge. That's exactly why, when Justices of the Supreme Court come to the Congress to listen to the President's State of the Union address, they do not applaud, and they do not boo. They make no expression whatsoever, because their job is not to state a political view. Instead, their job is to neutrally and faithfully interpret the law as it is written by others, by those who have stated their political views through the enactment of laws.

It has been pointed out that other judges sometimes disagreed with Justice Owen. But that is perfectly normal, and indeed healthy, for judges to do. That is precisely why we have established throughout this country state supreme courts and federal courts of appeals with more than one judge – indeed, with numerous judges. Because we expect judges to disagree. That is no badge of dishonor. That is simply what the job of judging is.

Some have suggested that, when judges disagree, that's a sign that at least some of the judges are behaving politically. But that is nonsense. A state's highest court, like the Texas Supreme Court, gets the most challenging, the most difficult cases in our legal system. The vast majority of cases in our legal system are easy on the law, and those cases are handled in the lower courts. But in some cases, a statute is not clear, and we appoint judges to our appellate courts to work hard to try to interpret them faithfully.

Let me describe one famous case where a statute was not clear, and where judges had to work hard to figure out how best to read the statute and to faithfully apply the will of the legislature. It is a case that is frequently taught in our law schools to demonstrate the difficulties of construing complex statutes and laws. It is a famous U.S. Supreme Court case which required the justices to determine whether a tomato is a fruit or a vegetable, for purposes of a federal tariff law.

As a matter of science, botanically speaking, a tomato is a fruit. But in common parlance, a tomato is a vegetable. Yet it was unclear, based on the text of the federal tariff law, which meaning was intended by the legislature, when it used the terms fruit and vegetable. Judges and justices are frequently called upon to figure out how to interpret statutes like these faithfully. Not surprisingly, in difficult cases such as this, judges may disagree. That doesn't mean that judges are being political – indeed, there's nothing political about whether a tomato is a vegetable or a fruit. It's just good faith judging, good faith interpretation of law. That's precisely why we need judges.

I mention this tomato case in particular because I think it has a direct bearing on our discussion of Justice Owen today. A number of Senators have brought up the fact that Justice Owen and I disagreed in one particular case, Sonnier v. Chisholm Ryder-Co. I do not think it would be fair to attack either Justice Owen or I on how either of us ruled, even though we disagreed on how best to read the Texas law in that case. The case essentially involved whether a tomato chopping machine is real property or personal property. We disagreed in that case, but that does not mean that either of us were guilty

of bringing our personal politics into the court. Many cases present genuinely difficult legal questions, and judges will have good faith disagreements about them. Perhaps, under the best reading of a statute, a tomato is a fruit, perhaps it is a vegetable. Perhaps the legislature meant that a tomato chopping machine is real property, or perhaps it is personal property. Good judges can disagree, and still be good judges.

That is why I am so profoundly troubled by what happened to Justice Owen last year. Senators who opposed her mentioned that other judges would sometimes criticize Justice Owen for doing things like rewriting statutes. Mr. Chairman, as a former judge, who served 13 years on the trial and appellate bench, I can tell you that judges say that all the time. It is frequently part of the robust legal debate that our judges have with one another every single day in this country, and there is nothing extraordinary about it. Good judges struggle to read statutes correctly. It is only natural, then, that when judges of good faith disagree, frequently each judge will claim that the other judge is rewriting the statute.

I asked my staff to look at some of the cases cited against Justice Owen last year. And do you know what they found? After just 20 minutes of research, they were able to determine that every single justice of the state supreme court had been criticized for rewriting a statute at one time or another, looking at just a few of the cases cited by Justice Owen's opponents. In one case, for example, Justices Gonzales, Hecht, Enoch, Abbott, and O'Neill, who comprised the majority in that particular case, were criticized with the following statement: "The Court substitutes what it thinks the statute should accomplish for what the statute actually says." In other words, those five justices were accused of rewriting the statute. In another case, Chief Justice Phillips, and Justices Gonzales, Enoch, Baker, Hankinson, and O'Neill were attacked with the following statement: "The Court does not base its statutory interpretation . . . on the ordinary meaning of those words, or on the purposes the Legislature intended them to achieve, . . . but on its own predilections." In just those two cases, we have every single colleague of Justice Owen criticized for allegedly rewriting a Texas state statute. Are we really saying that every justice on that court, and indeed, on every state and federal appellate court, is therefore a bad judge, and undeserving of confirmation, because they have been criticized of rewriting a statute? That would be nonsense, and I hope that that is not what we are going to say here. Judges are supposed to read the law carefully and to rule how they think the law is most accurately read, and to vigorously explain their disagreements when they disagree. It is terribly unfair, and even dangerous to our justice system, for Senators like us to sit in judgment on these judges simply because they are doing their job.

This whole issue reminds me of the scene from the movie Jerry Maguire, when Cuba Gooding Jr. tells Tom Cruise: "See, man, that's the difference between us. You think we're fighting, I think we're finally talking!" Those who have emphasized critical quotes about Justice Owen from other justices on the Texas Supreme Court think that they are fighting, but actually, the justices are just talking – they are just judging, as they are supposed to do.

I could go on, but I know that my time is short. Let me just close by saying that I served with Justice Owen on the Texas Supreme Court for three years. Based on those three

years of working closely with her on cases, I know her well, and I know that she is a good judge who always tries faithfully to read and apply the law. That is what good judges do. Judges disagree from time to time, but that is exactly what they are supposed to do. We should not condemn them just because they sometimes criticize each other. Instead, we should send Justice Owen's nomination to the floor of the Senate with a positive recommendation, and we should confirm her quickly.

Thank you, Mr. Chairman, for the opportunity to speak on behalf of Justice Owen today.

A6/Monday, February 12, 2001
Corpus Christi Caller-Times

State Supreme Court clerks' bonuses may violate law

Travis County attorney is investigating potential conflict of interest

Associated Press

HOUSTON — The Travis County attorney, responding to a complaint by a public watchdog group, is looking into whether bonuses paid to Texas Supreme Court law clerks violate the state law banning gifts to public servants.

At issue is the possibility that a clerk might wind up advising a judge on a case involving his or her future law-firm employer.

"The practice of private firms subsidizing court clerks raises serious ethical and legal issues," said Cris Feldman, staff attorney for Texans for Public Justice, a government watchdog group. "If the Supreme Court does not follow the law, no one will."

Texas lawmakers hope to fix the problem. Rep. Sylvester Turner, D-Houston, who chairs an appropriations subcommittee that is reviewing the court's budget, said the issue will be discussed this week.

Court clerks research cases and advise individual justices about appeals during a one-year term. They gain valuable experience and prestige, but are paid only $37,900 for their year's work at a time when first-year associates at the top Texas firms can make $125,000. Bonuses can be as much as $35,000.

Chief Justice Thomas R. Phillips said the nine justices don't let the clerks work on cases involving their future employers.

But County Attorney Ken Oden's probe has pointed out weaknesses in the screening process. Several justices, for example, were unaware that some law firms pay the bonuses before the new attorneys begin work at the court.

Feldman said that in the last eight years, 76 clerks worked at the court at the same time that their immediate future employers had cases pending there. Those clerks faced 402 potential conflicts of interest, Feldman said.

Oden said he has no plans to prosecute anyone, because the bonuses have been a common practice for years and never had been suggested to be illegal or unethical.

"I've found no evidence of any intentional misconduct by clerks, potential clerks, law firms or the court," he said.

But Oden said he can't ignore the fact that the law appears to prohibit the bonuses, and that there is a public policy interest in having public servants be free from influence.

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Election of judges is a Texas embarrassment

Judicial nominee was raked over the coals for what should be put at the feet of an ugly election process.

July 26, 2002

Priscilla Owen, a member of Texas Supreme Court, had a rough time of it this week before a Senate panel reviewing her nomination to the federal Fifth Circuit Appellate Court. The grilling had as much to do with her participation in the state's system for electing judges as it had to do with her conservative stance.

Forget for the moment her conservative ideology, except to note that politics is no reason to disqualify a nominee from serving if qualifications are in order, and Owen's qualifications are sound and her judicial and legal experience extensive.

But the point to be made here is that if she suffered any discomfort under senatorial questioning because under Texas' system of judicial selection judges have to seek campaign contributions from the very parties who are likely to have cases in court, then the fault is our own, not that of Owen.

Electing judges, which Texans insist on, opens the door to the appearance of conflict of interest, at best, and, perhaps just as bad, taints the decisions of courts such as the Texas Supreme Court where high-bucks stakes are the norm. And it's well to remember that the days when the Texas Supreme Court had a national reputation for "justice for sale" are not that far behind us. Which is all the more reason to applaud the decision by Texas Supreme Court Chief Justice Tom Phillips, who has decided to forgo all - but one - campaign contributions in his re-election.

Phillips, a Republican who is facing Democrat Richard G. Baker, is committed to running a state-wide race on $5,000, money he received from Gov. George W. Bush's campaign last year. That's no mean feat, given the size of the state and the cost of running the usual campaign in its many media markets.

Of course, it helps that Phillips is an incumbent, is a heavy favorite, has as much name identification as a down-ballot candidate can muster and is a member of the party that has controlled the court for years. And that Baker, his opponent, isn't soliciting contributions and won't accept any from law firms.

However, Phillips' stance is in marked contrast to his incumbent colleagues on the court who are raking in contributions by the thousands, as per tradition. But Phillips is making a point that ought to be widely noted.

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Phillips has long deplored Texas' method of electing judges. He favors getting judges out of politics, either by having gubernatorial appointments or by public funding of judicial elections or nonpartisan elections.

By eschewing campaign contributions, Phillips told Texas Lawyer, "I'd like to run a campaign that just sees what can be done differently."

The Legislature should take notice of the statement that Phillips is making. Or have Texas undergo more embarrassments because it makes judges go around hat in hand.

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The Dallas Morning News

14 A Thursday, July 11, 2002

EDITORIALS

Justices Denied

Attacks on Judge Owen are unwarranted

There's a great saying about how everyone is entitled to one's own opinion, but not to one's own facts. Those intent on undermining President Bush's nominees to the federal judiciary need to remember that. In this free country, they are entitled to voice their concerns. And if they do so in a mature and constructive way, the nomination process and the country will be better off for it. Unfortunately, these days, that rarely happens.

It is not so surprising that the Senate confirmation process has, in the last two decades, gotten so destructive, hyper-partisan and downright nasty. It is terribly disconcerting.

Some say this whole trend started back in 1986 when Democrats savaged Robert Bork, President Reagan's nominee to the Supreme Court. Soon after, the word "Borking" made its way into the political lexicon. The shorthand definition: to do personal damage to the other guy's nominee for political gain. Both parties do it. Slander passing for political dissent.

It has to end, and now seems a good time to do it. After all, we have a popular chief executive halfway through his first four-year term and still the Democratic Senate continues to play childish games and hold up consideration of many of President Bush's nominees to the federal bench. They won't even give many a hearing, but their stalling tactics have served to give the left just enough time to devise the vile and shameful smear campaigns.

The latest target is Texas' Supreme Court Justice Priscilla Owen. A nominee to the 5th Circuit Court of Appeals, Ms. Owen is a well-liked and highly respected jurist. Her legal colleagues, in both parties, call her fair, reasonable and "smart as a whip."

A coalition of liberal groups reportedly planning a caravan to Washington say she is a judicial activist who is — in their words — anti-consumer, pro-business and hostile to civil rights. If any of that were true, one suspects Texans might have caught wind of it during Ms. Owen's eight years on the Texas Supreme Court. Those who know her record best say she is being unfairly subjected to partisan mud-slinging and misinformation

A typical example of distortion: Critics claim her opinion as a state high court justice in favor of Enron showed bias because of a campaign contribution from the Houston company. In truth, the ruling involved a technicality and the entire Texas Supreme Court concurred. The contribution had been made years before when she was a district judge.

For all this abuse, Ms. Owen has not even been given the courtesy of having a hearing date set. That is unacceptable. She should get a hearing at once. And her critics should hold their tongues until the president's nominee gets a chance to be heard.

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July 16, 2002
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OWN A PIECE OF HISTORY

Opinion: Viewpoints

Alberto Gonzalez: Justice Owen is a jurist of integrity

07/16/2002

By ALBERTO GONZALES

Both the president and the Senate have constitutionally assigned roles in the appointment of federal judges. President Bush has fulfilled his responsibility by submitting highly qualified nominees who will be common-sense federal judges, such as Priscilla Owen, my former colleague on the Texas Supreme Court who has been nominated to the 5th U.S. Circuit Court of Appeals.

Justice Owen will receive her Senate Judiciary Committee hearing on Thursday, which regrettably is more than 14 months after the president submitted her nomination to the Senate. Although the Senate has made progress in confirming federal trial court judges, it has failed to act promptly on the president's appeals court nominees, as illustrated by its delay in considering Justice Owen's nomination. Indeed, 23 of the president's 32 appeals court nominees still haven't received Senate votes, and 11 of the president's appeals court nominees, including Justice Owen, have been forced to wait more than a year just for hearings.

As a result of those delays, our courts of appeals are nearly 20 percent vacant, and many of the vacancies, including the 5th Circuit vacancy in Texas, have been classified as emergencies by the Judicial Conference of the United States. Chief Justice William Rehnquist recently labeled the situation "alarming" and echoed Mr. Bush's call for the Senate to grant prompt hearings and up-or-down votes for all judicial nominees.

Now that she finally is receiving her hearing, Justice Owen should be promptly confirmed by the Senate. She possesses exceptional integrity, character and intellect; extensive experience as a judge and lawyer in private practice; and the strong support of both senators from Texas. She has served with distinction on the Texas Supreme Court since 1995 (where I served with her).

Texas holds elections for judges: Priscilla Owen was re-elected in 2000 by an overwhelming majority, and every major newspaper in Texas endorsed her. Before becoming a judge, Justice Owen practiced law at a leading firm in Texas for 17 years. Her academic credentials are impeccable, having graduated with honors from Baylor Law School. She received the highest grade on the Texas Bar Exam. The American Bar Association unanimously rated her "well qualified," its highest possible rating.

Justice Owen also has used her talents to benefit others. She served as the Texas Supreme Court liaison to statewide committees regarding legal services to the poor and pro bono legal services. She worked on a committee that successfully encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars in additional funds for providers of legal services to the poor. She helped organize a group that seeks to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As someone who had the privilege of serving with Priscilla Owen on the Texas Supreme Court, I can say without hesitation that she is extraordinarily well qualified to serve as a judge on the federal appeals court. Some have questioned Justice Owen's qualifications because she and I disagreed at times on the interpretation of a new Texas parental notification statute in 2000. As all judges know, cases of statutory construction often result in disagreements among judges honestly struggling to interpret the statute, particularly when the statute is vague or ambiguous.

The fact that Justice Owen and I disagreed in some cases is unremarkable. My experience serving with Justice Owen squares with the combined judgment of the president, Sen. Phil Gramm, Sen. Kay Bailey Hutchison, the American Bar Association and many others: She is an outstanding jurist and will perform superbly as a federal appeals court judge.

The Senate should confirm Justice Owen promptly and then move quickly to schedule hearings and votes for all of the president's other long-pending nominees.

Alberto R. Gonzales is counsel to the president.

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The Dallas Morning News

July 25, 2002, 18A

Owen Nomination; Critics Are Distorting Texan's Record

After hearing U.S. Court of Appeals candidate Priscilla Owen vilified in recent weeks - called everything from racist to nti-abortion to (gasp!) pro-business - the members of the Senate Judiciary Committee got the chance Tuesday to see for themselves what all the fuss is about. And, after a year in the deep freeze, the 47-year-old Texas Supreme Court justice finally got he chance to defend herself against liberal critics who have distorted her record and character in a bare-knuckled attempt to keepher off the 5th Circuit Court of Appeals.

One of the biggest distortions is that Justice Owen is a "judicial activist" intent on bending and twisting statutes to fit a rigid political agenda. That is the view of Sen. Richard Durbin, a Democrat from Illinois, who tore into Justice Owen for what he said was a tendency to "expand and embellish" in her written opinions. Democratic Sen. Dianne Feinstein of California was more polite but just as direct when she asked Justice Owen point-blank if she was, in fact, a "judicial activist." Justice Owen's response suggests that the Baylor Law School graduate is absolutely clear on what position she is applying for. She has no desire to legislate from the bench, she told Sen. Feinstein. If confirmed, she said, she would do only what the job calls for: interpret the law as written.

Justice Owen can be trusted to do exactly that, say those in Texas legal circles who know her best. Her supporters include Republicans and Democrats alike, and their vote of confidence should count for something - especially when weighed against the smear campaign engaged by the lobbies of the left.

As for Justice Owen's personal views on abortion, or on any issue, they remain totally irrelevant. By all accounts, she has spent the last eight years on the Texas high court doing precisely what she this week promised the Judiciary Committee she would continue to do at the federal level.

Those who oppose a judicial nominee have every right to challenge the nominee. But they do not have the right to - in legal terms - "assume facts not in evidence." For all their political games, grandstanding and name-calling, the assembled critics of Priscilla Owen have presented nothing to discredit her.

The committee should do its best to rectify this situation by scheduling a vote without further delay and approving Justice Owen's nomination. ----------

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SECTION: VIEWPOINTS; Pg. 5J; RENA PEDERSON rperderson@dallasnews.com

LENGTH: 865 words

HEADLINE: Senate didn't get to know the real Judge Owen

BYLINE: RENA PEDERSON

BODY:
The people who know **Priscilla Owen** the best all agree. They say the Texas Supreme Court judge is nothing like the person portrayed by critics of her appointment to the 5th U.S. Circuit Court of Appeals.

Democrats on the Senate Judiciary Committee voted along party lines in September and rejected her appointment. They contended she had an anti-abortion bias and was a tool of big businesses like Enron.

But if they had bothered to check with the people who grew up with her in Waco or worked with her in top law firms in Houston or clerked at the Texas Supreme Court, they would have gotten a different, more accurate picture.

Those sources describe Judge Owen this way: She is a doggedly dutiful legal scholar who couldn't care less about party labels or moneyed interests. Many cite her as a helpful mentor for other women in the legal profession. She prefers cooking for friends to the political or social circuit. Yes, they say, she's a devoted Sunday school teacher, but not what used to be called a "goody-two-shoes" or a narrow-minded religious zealot. She was known to enjoy a few beers with her friends at Baylor University and has a smart sense of humor. She's a water-skier and was spunky enough to try rollerblading in her kitchen a few years ago, breaking her ankle.

The American Bar Association gave the 48-year-old Texas judge its highest rating, "well qualified." Many prominent Democrats from Texas - including former Texas Supreme Court Chief Justice John Hill and former State Bar President Lynne Liberato - spoke up in Justice Owen's defense. But their voices were discounted. A public relations campaign was generated by several interest groups, using snippets from the hundreds of cases that had come before her bench, in order to make her look as bad as possible and snub President Bush.

What particularly dismayed those who know the Texas justice well is that she was made to look anti-abortion and anti-woman. They emphatically insist that, while conservative, she is not an activist or ideologue with an agenda.

*Laura Rowe, who worked with Ms. Owen at the Andrews and Kurth law firm in Houston, said, "I came across her when I was a young lawyer starting out, and she was a great mentor for the other women. She was so smart, hardworking, but funny and normal at the same time. When I met her, I thought 'that's a woman I would like to be like.' She was one of the lawyers that people wanted to work for, tough but fair. It did disturb me to see her vilified."

*Kristin O'Neal, who was a law clerk at the Texas Supreme Court, said, "I understand why people distorted her opinions, because it furthered their agenda, but to say she has some kind of activist agenda is absurd to me. She takes a very logical, methodical approach to everything. They tried to make her look bad for writing an opinion that benefited Enron because she had received a campaign contribution from Enron some time earlier. What people didn't know was that it was a unanimous ruling - and the judges don't select the opinions they write. It's a random drawing. You might disagree with one of her rulings, but I never, ever sensed that she was using her position in an activist manner or to further any personal beliefs. She takes her job and her role very seriously."

*Ruth Miller, who has known Ms. Owen since they were in high school in Waco, said, "I don't know how Priscilla remained so composed and calm, when some of the senators cut her off. I thought she handled herself with dignity, even when she should have been able to continue. What people don't know is that she had to work for weeks and weeks on her own to prepare, on the weekends, no vacation. But she knew I was going through a serious health problem; and so she would call to check on me every week. And in the throes of the confirmation process, she went with me to my appointment at the hospital in Houston and just brought her portfolio with her."

*Nancy Lacy, Ms. Owen's sister, attended the hearings in Washington and sat behind Justice Owen, as did the minister from the church Justice Owen attends in Austin. "It was eye-opening," she said. "It was a hard experience because no matter what she said, they were going to stick with the propaganda. It was obvious. I was hoping they were going to really give her a shot, try to get to know who she really is, ask her thoughtful questions. But the information they had was wrong to begin with. I felt sorry for them at times; their staff didn't do a very good job; it was obvious the special interest groups gave them the information, and they didn't research to see if it was true. The handwriting was on the wall. I just wanted to say to them, 'You're missing the boat. You're missing the opportunity to get to know a really neat person.'"

By all accounts, it was a wearing experience for the Texas judge. Although she understood she had been caught in a political spite match, she couldn't help but be pained by the attacks on her character. Still, her nomination has been resubmitted by Mr. Bush, so Americans may get a chance to see the rest of her story after all.

Rena Pederson is editor at large at The Dallas Morning News.

LOAD-DATE: February 3, 2003

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June 26, 2002

Via Fax 202/224-9516
And Regular Mail

Honorable Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

RE: Nomination of the Honorable Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

This correspondence is sent to you in support of the nomination by President Bush of Texas Supreme Court Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

As the immediate past President of Legal Aid of Central Texas, it is of particular significance to me that Justice Owen has served as the liaison from the Texas Supreme Court to statewide committees regarding legal services to the poor and pro bono legal services. Undoubtedly, Justice Owen has an understanding of and a commitment to the availability of legal services to those who are disadvantaged and unable to pay for such legal services. It is that type of insight and empathy that Justice Owen will bring to the Fifth Circuit.

Additionally, Justice Owen played a major role in organizing a group known as Family Law 2000 which seeks to educate parents about the effect the dissolution of a marriage can have on their children. Family Law 2000 seeks to lessen the adversarial nature of legal proceedings surrounding marriage dissolution. The Fifth Circuit would be well served by having someone with a background in family law serving on the bench.

Justice Owen has also found time to involve herself in community service. Currently Justice Owen serves on the Board of Texas Hearing and Service Dogs. Justice Owen also teaches Sunday School at her Church, St. Barnabas Episcopal Mission in Austin, Texas. In addition to teaching Sunday School Justice Owen serves as head of the altar guild.

Justice Owen is recognized as a well rounded legal scholar. She is a member of the American Law Institute, the American Judicature Society, The American Bar Association, and a Fellow of the American and Houston Bar Foundations. Her stature as a member of the Texas Supreme Court was recognized in 2000 when every major newspaper in Texas endorsed Justice Owen in her bid for re-election to the Texas Supreme Court.

It has been my privilege to have been personally acquainted with various members of the U.S. Court of Appeals for the Fifth Circuit. The late Justice Jerry Williams was my administrative law professor in law school and later became a personal friend. Justice Reavley has been a friend over the years. Justice Johnson is also a friend. In my opinion, Justice Owen will bring to the Fifth Circuit the same intellectual ability and integrity that these gentlemen brought to the Court.

I earnestly solicit your favorable vote on the nomination of Justice Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

Thank you for your attention to this correspondence.

Very truly yours,

Hector De Leon

cc:	The Honorable Orrin Hatch United States Senate 152 Dirksen Senate Office Building Washington, D.C. 20510	Via Fax 202/228-1698 and Regular Mail
cc:	The Honorable Alberto R. Gonzales	Via Fax 202-456-6279
cc:	Viet D. Dinh	Via Fax 202-514-2424

THE DENVER POST

July 25, 2002, B-6

Holding Up Judiciary

Priscilla Owen is far from a household name in Colorado, but residents of the state have reason enough to be interested in her nomination to the Louisiana-based 5th Circuit Court of Appeals.

Owen, who was nominated to the court more than a year ago, finally got a hearing before the Senate Judiciary Committee on Tuesday. She thus had her first opportunity to defend herself against criticism circulated by special-interest organizations, including the National Organization for Women. Owen told the committee her record on the Texas Supreme Court had been inaccurately portrayed, especially in regard to her positions on abortion and corporate matters.

No surprise there. Hearings on judicial nominations have come to be characterized by a well-established formula. A nomination is made, which, in turn, is a signal to opponents to get busy building a case against the nominee. Hearings are delayed long enough for the opponents to complete their work. Further delays are then ordered if it appears opponents need additional time to torpedo the nomination.

Both major parties have been guilty of using these ugly techniques.

The willingness of the Senate to engage in search-and-destroy politics carries a heavy price. In addition to debasing the constitutional process, it has left an inordinate number of vacancies in the federal courts. It also has worked a injustice on a number of nominees who continue to wait for the 'honor' of being the butt of one of these hearings.

Tim Tymkovich, a former Colorado solicitor general, was nominated well over a year ago for a spot on the 10th Circuit Court of Appeals and is among those who have yet to even be given a date for a hearing. The Senate has a serious constitutional role to play in judicial appointments. We in no way suggest that it should be a rubber stamp for every nomination. We do suggest, however, that it forfeits its right to public respect when it virtually invites the partisan spectacles that have now become routine in the Senate Judiciary Committee

The Detroit News

July 25, 2002

Judges Deserve Better than Senate Tactics

Justice Priscilla Owen of the Texas Supreme Court is the latest federal appellate court nominee to have her record distorted by Democratic Party interest groups. However, she at least received a hearing this week. More than half of President George W. Bush's nominees to the federal appellate bench have not been given that courtesy. Justice Owen's treatment illustrates the Democrats' stretching to deny the president the right to name judges to the federal appellate courts - a right vested in him by the Constitution. Justice Owen received top grades from the American Bar Association - which Senate Democrats had earlier declared would be crucial to their consideration of Bush nominees. Since she was deemed "well qualified" by the bar, opponents had to look for other issues.

So they began picking at her record on the Texas Supreme Court. She was declared "out of the mainstream" of the Texas high court by Senate Judiciary Chairman Patrick Leahy, D-Vt. But in fact, as she noted to the senators, she dissented in only 86 of the nearly 900 cases that have come before her, less than 10 percent.

Her opponents have fastened on one case involving parental notification in a teen abortion case in which she dissented and disagreed with her colleague Alberto Gonzales, who was in the court's majority and is now the president's White House counsel.

Addressing part of a dissenter's argument, Gonzales called it "judicial activism."

This disagreement has been seized upon by Justice Owen's detractors. But as columnist Terry Eastland pointed out in the Dallas Morning News, Gonzales was referring to another one of the dissenters, not Justice Owen, in that part of his opinion.

And it is hardly unusual for justices, even those who often think alike, to disagree on the interpretation of statutes and state constitutions. The cases that state supreme courts receive are often difficult, tangled and open to differing views. Just last month,

Justices Clifford Taylor and Robert Young of the Michigan Supreme Court differed with Chief Justice Maura Corrigan and Justice Stephen Markman on a breaking and entering case. Banter was exchanged in their opinions. So what? There is little doubt they would support each other in their candidacies - as Gonzales is supporting the nomination of Owen.

What this fly-specking is really about is dragging out the nomination and hearing process for GOP-nominated judicial candidates and tarring them with the labels "controversial" and "out of the mainstream." There still may not be a vote on Justice Owen's nomination.

The three judges from Michigan nominated last November for the Sixth Circuit Court of Appeals in Cincinnati still haven't received a hearing on the orders of Michigan's U.S. Senators Carl Levin and Debbie Stabenow. The fourth Michigan nominee, named last month, can surely expect a long wait as well.

This is an illegitimate tactic. Yes, GOP senators did it to President Bill Clinton's nominees in the last half of his second term. That doesn't excuse it when Democrats do it - especially in the first half of this president's term.

It evades the senators' constitutional obligation to give the nominees a hearing and a vote. And in putting off votes, it allows the senators to escape accountability for what they are doing. It is unworthy of U.S. senators - particularly those from Michigan.

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September 6, 2002

Owen rejection is shameful politics

Thursday's vote by the Senate Judiciary Committee to reject Priscilla Owen's appointment to the federal bench is a shameful example of partisan politics at its worst. A distinguished justice on the Supreme Court of Texas, Owen was defeated on a straight-party vote of 10-9 in her bid for a seat on the 5th U.S. Circuit Court of Appeals.

Democrats can say all they want, but the vote had nothing to do with Justice Owen's abilities and everything to do with politics, pure and simple. Many Democrats claimed her rulings on the Texas Supreme Court were "extreme," but if that is the case, the beliefs of millions of good, decent Americans are extreme. That simply isn't the case.

Her opponents condemned Owen because she is pro-life and pro-business. She is a Republican, though, and most Republicans feel the same way. Who else is a Republican president going to nominate?

Critics also point out her acceptance of $8,600 in campaign contributions from a then-cash rich Enron Corp. Two years later, she wrote for the majority in an opinion reducing the company's taxes. Yes, that is troubling, but it was a majority opinion and, unfortunately, such contributions are the way statewide judicial races are financed in Texas. Supreme Court Chief Justice Tom Phillips is campaigning for a third term with a pledge to work to change the way Texans select their judges. But the system is what we have and Owen shouldn't be penalized for playing by the rules, even if those rules raise eyebrows.

Owen's rejection by the Judiciary Committee is the second high-profile defeat this year for one of the president's judicial appointments. In March, the committee rejected — also on a straight-party vote — the nomination of U.S. District Judge Charles Pickering of Mississippi to the 5th Circuit Court of Appeals.

As was the case with Justice Owen, critics picked apart Pickering's record, looking for things to criticize. It's funny, but people who praise judicial activism on the left cringe when they see it on the right — and vice versa. Of course we want our judges to follow the law, but if the law were clearly black and white, we wouldn't need judges at all. Like the rest of us, judges bring their own beliefs and experiences with them when they reach decisions, especially those based on their interpretation of the law.

It would be hard to find a more qualified judge than Priscilla Owen. President Bush made a solid choice in naming her to the circuit court bench and Thursday's vote is a terrible disservice to the country.

The vote is just one more example of how partisan politics pollutes the halls of Congress and benefits no one. The politics of Republicans rejecting Democratic appointments and Democrats rejecting Republican appointments must stop.

The people back home are tired of it. We want our government to work for us and do what's best for us — all of us, no matter what our political philosophy or party affiliation.

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July 31, 2002

The Honorable Patrick Leahy
Chairman, Committee of the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Via First-Class Mail and Fax: (202) 224-9516

Re: Priscilla Owen's nomination to the United States Court of Appeals for the Fifth Judicial Circuit

Dear Mr. Chairman:

I am a Texas trial lawyer, a life-long Democrat, and no friend of Priscilla Owen. In spite of this background, I write in support of Justice Owen's nomination to the United States Fifth Circuit Court of Appeals.[1]

In the early 90s, I was an opposing counsel in a contentious lawsuit largely handled by one of Owen's young associates. As this matter dragged on, it appeared we were headed toward an expensive jury trial over a fairly small matter. At that point, I asked if there wasn't someone authorized to meaningfully discuss settlement.

I received a return call from Priscilla Owen, who I did not know, and who had not previously attended hearings in this case. But while she had not personally appeared, very quickly there was no doubt that Priscilla Owen had a complete mastery of the legal, factual, and personal issues involved in this dispute, as well as the equities and opportunities for resolution short of a trial.

Owen and I discussed these issues several times, occasionally heatedly. Eventually, we reached a resolution that was probably fair, even if it did not leave either of us thinking warmly about the other. More to the point, throughout this matter, even though client tempers were heated, and Owen was not impressed with some of my arguments, she was unfailingly courteous, above board, professional, and diligent. She was intellectually tough, but dependably honest.

My views differ in many areas from Justice Owen's, with whom I have no ongoing relationship. That said, I have no doubt whatever, should the Senate approve

[1] In sending this letter, I confirm my recommendation was unsolicited, I am not a political activist, and that no one in our firm has anything pending before Texas' Supreme Court, or is likely to anytime soon.

her nomination, Priscilla Owen will serve our circuit and the United States exceptionally well, and bring honor to her State, her Nation, and her President. She is, in short, a great credit to our profession.

There is little more I can add to this recommendation, but I am ready to visit with you or your staff, if additional information would be helpful to you.

Sincerely yours,

Bill Emmons

Wm. B. Emmons

WBE/bg

cc: The Honorable Orrin Hatch
United States Senate
152 Dirksen Senate Office Building
Washington, D.D. 20510
Fax: (202) 228-1698

BARBARA FISHER
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Austin, Texas 78746

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August 21, 2002

The Honorable Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

RE: Justice Priscilla Owen, Nominee for 5th Circuit Court of Appeals

Dear Senator Feinstein:

I hope you will support Priscilla Owen, a personal friend of mine, as nominee for the Federal 5th Circuit Court of Appeals.

Priscilla has accomplished everything that women have been trying to do for years:

- she has successfully competed with men in what has, traditionally, been a men's field (and believe me, in Texas, when she entered the law, there was no small amount of prejudice against women);

- she has maintained her personal integrity, which is of the highest order, while remaining a committed member of her community;

- she is smart and hard working and funny and open and feminine. She is, much like you, a wonderful example for girls and women who would like to hold leadership positions in any area of prominence in this country;

- she has wonderful personal qualities which include humility (without being a pushover) and a very real sense of her own worth (without being arrogant or masculine).

If you really hope to see women in many positions of leadership and authority in this country, you could vote for no better person to fill that role than Priscilla. Please support a fellow woman, a fellow worker, a fellow human being of the highest qualifications and caliber for this nomination. Your courage and leadership are needed in this area!

Sincerely yours,

Barbara Fisher

cc: The Hon. Orrin Hatch

RICK FISHER
3 Inwood Circle
Austin, Texas 78746

August 21, 2002

The Honorable Russ Feingold
United States Senate
506 Hart Senate Office Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Feingold,

This letter is written to urge you to support President Bush's nomination of Justice Priscilla Owen to the Fifth Circuit Court of Appeals. I have known Justice Owen for five years -- she is a personal friend -- and I know her to be a person of the highest integrity and deepest compassion. I have seen her work wonderfully with children. I have been with her in groups of people from all sorts of backgrounds. The children love and look up to her; and the adults enjoy and respect her, as she does them. She is a person, a woman, whom I admire and whose friendship I value greatly.

Others certainly have written you regarding Justice Owen's professional qualifications. I know that those qualifications are of the highest. But, in addition those qualifications, she is the sort of intelligent, reliable, compassionate and honorable person that our nation has always sought. She will be a credit to the Fifth Circuit. So, again, I urge you to support her nomination.

Sincerely,

cc: The Honorable Orrin Hatch

THE FLORIDA TIMES-UNION
Opinion

(Jacksonville, Florida)

July 26, 2000, B-6

A Fine Choice

Using legitimate criteria – judicial expertise, temperament and reputation – there is no finer candidate for a spot on a federal appeals court than Priscilla Owen, whose nomination was the subject of committee hearings this week.

Owen, an honors graduate who earned the highest grade on the bar exam, has served with distinction on the Texas Supreme Court since 1994 – and is so respected that every major newspaper in Texas endorsed her successful campaign for re-election in 2000.

After she was nominated for the 5th Circuit Court of Appeals, the American Bar Association unanimously gave her the highest possible rating for the job – no small matter since the Senate Judiciary Committee chairman said previously that the ABA's rating is 'the gold standard by which judicial candidates are judged.' A bipartisan group of 15 past Texas Bar presidents endorsed her nomination, as have Democratic former justices.

Still, her nomination is in trouble because she is deemed insufficiently liberal by a few fringe special-interest groups that have considerable influence with the Senate's Democratic leadership.

The main complaint revolves around cases in which young girls wanted to have an abortion without either parent's knowledge.

Under Texas law, a parent must be told unless a judge rules a girl is sufficiently mature and informed to make the decision alone.

Owen contended some youngsters were not informed sufficiently.

That, extremist pro-abortion groups say, proves Owen is a 'judicial activist' who makes rulings based on ideology instead of what the law actually says. Never mind that they have enthusiastically supported judicial activism in the past and that Roe vs. Wade, the decision legalizing abortion, was in itself a blatant act of judicial activism.

Owen is under fire not because she is a judicial activist but because she is perceived as a conservative activist.

The facts are, however, that Owen based her opinion on U.S. Supreme Court guidelines – and the author of the law said she had interpreted it the way the Legislature intended.

Parental notification laws are designed not just to protect children but also to keep pedophiles from coercing their young victims into destroying the evidence before they can be arrested, tried and locked up. They are not something that the courts should routinely circumvent, except under rather limited conditions prescribed by law.

Critics complain, less vociferously, about other Owen opinions – that a person shouldn't collect insurance benefits on a house a spouse destroyed by arson, for example. That, critics insist, proves she is too pro-business. But why should an arsonist be allowed to profit from his own crime?

The appointment is being scandalously politicized. Owen deserves better. More importantly, the American people deserve better.

THE FLORIDA TIMES-UNION
Opinion
JACKSONVILLE.COM
SUBMIT A LETTER • LETTERS FROM READERS • RON LITTLEPAGE

Tuesday, August 20, 2002

Last modified at 9:22 p.m. on Monday, August 19, 2002

JUDICIARY: Wrong weapon

The American Bar Association sent an important message to the U.S. Senate: Stop using the federal courts as a political club for beating President Bush over the head.

The actual wording was politically neutral, a concession to Democrats in the ABA House of Delegates. It simply implored the president and Senate to move quickly in filling judicial vacancies. Clearly the message was intended for the Senate, however, given its egregious stonewalling of Bush's nominees.

There are 80 vacancies on the federal bench, including 27 on appeals courts. Dockets are backing up, and the Senate leadership apparently couldn't care less. Several circuit court nominees have waited for more than a year without even the courtesy of a Judiciary Committee hearing.

At last count, 52 percent of Bush's nominees had been confirmed.

By contrast, 90 percent of the previous president's nominees were confirmed during his first two years in office. Admittedly, Bush hasn't been in office two years yet. Time is running out, however, particularly since Congress generally goes home early in election years -- and there has been no indication by Majority Leader Tom Daschle that he plans to speed up the process.

Daschle and his followers won't allow significant tax cuts, which are badly needed to jump-start the economy. They load down homeland security bills with pork, creating budget deficits that they try to blame on the president. And they refuse to fill judicial appointments, perhaps hoping Bush also will be blamed for the slow pace of justice.

The Senate's Democratic leadership says it is leery of Bush's appointees because many interpret the Constitution to mean only what its authors intended.

But if the Constitution's meaning is to be changed daily, there is no point in having a constitution -- and all inalienable rights are meaningless

because they are subject to repeal at the whim of any judge at any given time.

As the Democrats said when they occupied the White House, there should be no philosophical litmus test for serving on the federal bench. The only issues should be judicial scholarship and temperament. If those criteria were used, nearly all of the president's appointees would be confirmed quickly.

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Fort Worth Star-Telegram

Monday, February 12, 2001

Travis County attorney to review high court clerk bonuses

HOUSTON — The Travis County attorney, responding to a complaint by a public watchdog group, is looking into whether bonuses paid to Texas Supreme Court law clerks violate the state law banning gifts to public servants.

At issue is the possibility that a clerk might wind up advising a judge on a case involving his or her future law-firm employer.

"The practice of private firms subsidizing court clerks raises serious ethical and legal issues," said Cris Feldman, staff attorney for Texans for Public Justice. "If the Supreme Court does not follow the law, no one will."

Texas lawmakers hope to fix the problem. Rep. Sylvester Turner, D-Houston, who chairs an appropriations subcommittee that is reviewing the court's budget, said the issue will be discussed this week.

During a one-year term, court clerks research cases and advise individual justices about appeals. They gain valuable experience and prestige but are paid $37,900 for their year's work. First-year associates at top Texas firms can make $125,000 a year and earn bonuses of as much as $35,000.

Chief Justice Thomas R. Phillips said the nine justices don't let the clerks work on cases involving their future employers.

But County Attorney Ken Oden's inquiry has pointed out weaknesses in the screening process. Several justices, for example, were unaware that some law firms pay the bonuses before the new attorneys begin work at the court.

Feldman said that in the last eight years, 76 clerks worked at the court during the same time that their immediate future employers had cases pending there. Those clerks faced 402 potential conflicts of interest, Feldman said.

Oden said he has no plans to prosecute anyone because the bonuses have been a common practice for years and had never been suggested to be illegal or unethical.

"I've found no evidence of any intentional misconduct by clerks, potential clerks, law firms or the court," he said.

But Oden said he can't ignore the fact that the law appears to prohibit the bonuses, and that there is a public policy interest in having public servants be free from influence.

The penal code chapter says a judicial employee breaks the law if he "solicits, accepts or agrees to accept any benefit" from a person who might have an interest before the court. A law firm is in violation if it knowingly "offers, confers or agrees to confer any benefit on a public servant" that it knows the public servant is prohibited from accepting.

The court has safeguards in place to prevent conflicts, said Daniel Alexander, who clerks for Justice Craig Enoch. But Alexander said that someone who doesn't understand the internal workings of the court "might see an appearance of impropriety."

One possibility is requiring more public disclosure of law-firm bonuses and benefits paid to clerks, Oden said.

State legislators have expressed a willingness to rewrite Texas statutes to exempt the law-firm bonuses. As an alternative, the court has asked for an extra $1 million a year to do away with the 18 clerks, two of whom serve each justice, and hire full-time staff attorneys.

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Posted on Sun, Jul. 28, 2002 Star-Telegram

The Owen case

Before Tuesday's hearing for Texas Supreme Court Justice Priscilla Owen, the last judicial nominee to be questioned so carefully on abortion may have been David Souter.

It was 1990, and President George H.W. Bush had named Souter - then an obscure federal appellate judge in New Hampshire - to succeed Supreme Court Justice William Brennan.

Quizzed by Senate Judiciary Committee members about a woman's right to choose and the high court's Roe vs. Wade ruling, Souter offered a story. He told of counseling a friend who was considering abortion and the deep concern with which he approached the task.

He offered no detail about what advice he offered; he divulged no inkling about his personal views or how he might vote as a justice. And abortion did not become a deal-breaker for Senate approval.

In 1992, Souter voted to uphold a woman's right to choose abortion without undue state interference up to the point of fetal viability.

Now, Owen is no David Souter. And the court to which she has been nominated, the 5th U.S. Circuit Court of Appeals, is not the highest in the land.

But she was questioned extensively last week because of her writings in cases involving Texas' law that requires parental notification for most minor girls seeking abortions.

Abortion wasn't the only topic of concern to Democrats on the

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Abortion wasn't the only topic of concern to Democrats on the committee, given that Owen's critics have called her too pro-business and anti-consumer.

But abortion seemed to have a high profile.

And the Judiciary Committee would be dodging its duty to let this nomination turn on that single issue.

Owen is an intelligent, capable judge with excellent academic credentials and two statewide elections under her belt. But - the administration's claims to the contrary - she's arguably not the most brilliant conservative scholar around, or even the sharpest legal mind on the Texas Supreme Court.

Owen told the Judiciary Committee that she decides cases "on the basis of fair and consistent application of the law." But some of Owen's votes have shown a willingness to second-guess the Legislature and juries and narrowly interpret the Texas Public Information Act.

The 5th Circuit's work is considerably different from that in the Texas Supreme Court, which is the court of last resort for state civil cases. The appeals court handles civil and criminal cases from Louisiana, Mississippi and Texas, and it becomes the final arbiter of many disputes because the U.S. Supreme Court accepts fewer than 100 cases a year.

But the groups lobbying hard both against and in support of Owen are looking beyond New Orleans, the 5th Circuit's home. A jurist from Bush's home state, enjoying as Owen does the backing of presidential adviser Karl Rove, would on a federal appeals court be well-positioned for a Supreme Court nomination.

Interest groups, by definition, are going to bring biased perspectives to the debate, whatever their political perspective. Their rhetoric might distort the facts, and it probably will infuriate the opposing side. But they can add valuable dimension to the debate to ensure that it is full and informed.

Ultimately, though, senators have the duty to sort through the partisan arguments and be driven by more than narrow concerns or litmus tests.

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In his opening statement Tuesday, Republican Sen. Orrin Hatch quoted fellow committee member Sen. Joseph Biden, a Democrat, in defining the senate's role:

"[Judicial confirmation] is not about pro-life or pro-choice, conservative or liberal; it is not about Democrat or Republican. It is about intellectual and professional competence to serve as a member of the third co-equal branch of the government."

It is the job of the Senate - whether it votes Owen up or down - to act from that basis and not from power politics.

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THE WHITE HOUSE

WASHINGTON

April 5, 2002

Dear Chairman Leahy:

In our recent conversations, you suggested that the White House should examine whether contributions Justice Owen received for her campaigns for the Texas Supreme Court raise any legitimate issue with respect to her fitness to serve on the Fifth Circuit. We have done as you have suggested, and I see no basis to question Justice Owen's fitness to serve on the Fifth Circuit. The record reflects that she has at all times acted properly and in complete compliance with both the letter and the spirit of the rules relating to judicial campaign finance.

I am certain you will agree that it was entirely proper for Justice Owen's campaign to receive contributions. Article 5 of the Texas Constitution provides that candidates for the state judiciary run in contested elections, which are partisan under Texas election law, and Canon 4D(1) of the Texas Code of Judicial Conduct provides that the candidates may solicit and accept campaign funds. Like Senators, therefore, candidates for the state judiciary in Texas may receive contributions to finance their campaigns.

To be sure, Justice Owen and many others would prefer a system of appointed rather than elected state judges. In fact, Justice Owen has long advocated appointment of judges (coupled with retention elections). She has written to fellow Texas attorneys on the issue, committed to a new system in League of Women Voters publications, and appeared as a pro-reform witness before the Texas Legislature. She has explained even to partisan groups why judges should be selected on merit. But the people in some states, including Texas, have chosen a system of contested elections for judges. Elected state judges certainly are not barred from future appointment to the federal judiciary; on the contrary, some notable federal appellate judges whom President Clinton nominated and you supported were state judges who had run and been elected in contested elections -- Fortunato Benevides and James Dennis, for example, from the Fifth Circuit.

I am also certain that you would find nothing inappropriate [illegible] which Justice Owen's campaign received contributions. In her 1994 and 2000 elections, Justice Owen's campaign quite properly received contributions from a large number of entities and individuals, with no single contributor predominating. In the 1994 election cycle, her campaign received approximately $1.2 million in contributions from 3,084 different contributors. Included in that total was $8,800 from employees of Enron and its employee-funded political action committee. Employees of Enron thus contributed less than 1% of the total contributions to her campaign. And Justice Owen's campaign, of course, received no corporate contributions from Enron or any Enron-affiliated corporation, as such corporate contributions are not permissible under Texas law. Notably, in the 1994 election, not only did Justice Owen comply with all campaign laws, she went beyond what the law required and voluntarily limited contributions when many other judicial candidates did not do so.

In the 2000 election cycle, Justice Owen's campaign received approximately $300,000 in contributions from 273 different contributors. In that cycle, her campaign received no contributions from Enron or its affiliates, from employees of Enron, or from Enron's political action committee. In addition, Justice Owen ultimately had no Democratic or Republican opponent in the 2000 election

cycle, and she closed her campaign office and returned most of her unspent contributions, an act that I believe is unusual in Texas judicial history.

It was entirely proper for Justice Owen's campaign to receive campaign contributions, including the contributions from Enron employees. Indeed, *seven* of the nine current Texas Supreme Court Justices received Enron contributions, and several of them received more than Justice Owen's campaign received. As this record demonstrates, elected judges certainly did not act improperly in the past, before anyone knew about Enron's financial situation, by receiving contributions from employees of Enron – any more than it could be said that Members of Congress acted improperly in the past by receiving contributions from Enron.

If, as is evident from the foregoing discussion, there was nothing amiss with the fact that Justice Owen received donations or with the sources from which she received them, the only other possible area of concern with her conduct relating to campaign contributors would be her decisions from the bench. Texas Code of Judicial Conduct Canon 3(B)(1) provides that a judge "*shall* hear and decide matters assigned to the judges except those in which disqualification is required or recusal is appropriate." And it is well-established that judicial recusal is neither necessary nor appropriate in cases involving parties or counsel who contributed to that judge's campaign. *See Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 215 (5th Cir. 2001); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999), *rev'd on other grounds*, 41 S.W.3d 118 (Tex. 2001); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App. 1990). Indeed, in any state with elected judges, any other rule would be unworkable. The primary protections against inappropriate influence on judges from campaign contributions are disclosure of contributions and adherence to the tradition by which judges explain the reasons for their decisions. If the people of a state deem those protections insufficient, the people may choose a system of appointed judges rather than elected judges, as Justice Owen has advocated for Texas.

Surmising that the concerns you raised would likely focus on her sitting in cases in which Enron had an interest, we have undertaken a review of her decisions in such cases. We have reviewed Texas Supreme Court docket records and Enron's 1994-2000 SEC Form 10Ks to determine the cases in which Enron or affiliates of Enron were parties to proceedings before the Court since January 1995 (when Justice Owen took her seat). The decisions of the Texas Supreme Court since January 1995 proceedings involving Enron have been ordinary and raise no questions whatsoever.

A judge's decisions are properly assessed by examining their legal reasoning, not by conducting any kind of numerical or statistical calculations. But even those who would attempt to draw conclusions based on such calculations would find nothing in connection with these Enron cases. To begin with, we are aware of no proceeding involving Enron in which Justice Owen cast the deciding vote. In six proceedings in which we know that Enron was a party, Justice Owen's vote can be characterized as favorable to Enron in two cases and adverse in two cases. With respect to the remaining two, one cannot be characterized either way, and she did not participate in the other case because it had been a matter at her law firm when she was a partner. Eight other matters came before the Court in which we know that Enron or an affiliate was a party, but the Court declined to hear them. In those matters, the Court's actions could be characterized as favorable to Enron in four cases, adverse in three cases, and one was dismissed by agreement of the parties. We will supply the Judiciary Committee copies of the cases on request.

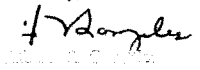
There has been some media attention on one case involving Enron in which Justice Owen wrote the opinion for the Court. *See Enron Corp. v. Spring Creek Independent School District*, 922 S.W.2d 931 (Tex. 1996). The issue in that case concerned the constitutionality of an ad valorem tax statute that allowed market value of inventory to be set on one of two different dates. The Court held that the statute did not violate the state constitution -- and the decision was unanimous. I understand that two Democratic Justices who sat on the Court at that time (Justices Raul Gonzalez and Rose Spector) have written to you to explain the case, indicating that Justice Owen's participation in the case was entirely proper. Moreover, the lawyer who represented a party opposing Enron in this case (Robert Mott) recently was quoted as saying that criticism of Justice Owen for her role in this case is "nonsense." *Texas Lawyer* (April 1, 2002). In my judgment, this case raises no legitimate issue with respect to Justice Owen's confirmation.

Finally, I am informed that, if confirmed, Justice Owen will donate all of her unspent campaign contributions to qualifying tax-exempt charitable and educational institutions, as is contemplated under section 254.204(a)(5) of the Texas Election Code.

I trust that the foregoing will resolve all questions concerning the propriety of Justice Owen's activities in relation to financing her campaigns. As you know, I served with Justice Owen, and I am convinced from my work with her that she is a person of exceptional integrity, character, and intellect. Both Senators from Texas strongly support her nomination. The American Bar Association has *unanimously* rated Justice Owen "well qualified," and one factor in that rating process is the nominee's integrity.

Despite her superb qualifications and the "judicial emergency" in the Fifth Circuit declared by the Judicial Conference of the United States, Justice Owen has not received a hearing for nearly 11 months since her May 9, 2001, nomination. We respectfully request that the Committee afford this exceptional nominee a prompt hearing and vote.

Sincerely,



Counsel to the President

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

cc: The Honorable Orrin Hatch
The Honorable Phil Gramm
The Honorable Kay Bailey Hutchison

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July 19, 2002

Dear Editors:

I write concerning the article appearing in your paper on July 14, 2002 entitled Death *of plaintiff could haunt nominee*, an article that I find to be inaccurate, one-sided and unfair.

The article references a particular case – *Ford Motor Co. v. Miles* – decided by the Supreme Court of Texas in 1998. According to the article, the opinion of the court authored by Justice Owen and which I joined, decided the case on "a question that was not among the issues the Supreme Court had agreed to hear when it accepted the case," implying that the court decided the case on an issue not presented. The statement is misleading. As any experienced practitioner before the court knows, once a case is before the court, the whole case is before the court. The court has the right and ability to decide the case on any ground preserved for review and presented in the briefs. Of note, in this case, the venue issue was vigorously contested in the trial court, in the court of appeals, and in the briefs before the Supreme Court.

The accident which gave rise to the lawsuit occurred in Dallas County, the pickup involved in the accident was sold and serviced in Dallas County, and Ford's regional office was in Dallas County. However, as is their right, the plaintiffs chose to pursue the lawsuit in Rusk County, a county that had no connection to the accident. Ultimately, the Supreme Court agreed with the defendants that the plaintiffs had filed suit in the wrong county and remanded the case for a new trial in a proper county. That decision was well reasoned and follows a long-standing law in Texas that the filing of a lawsuit in an improper county requires reversal.

That leads me to my second point. The delay in the ultimate resolution of the lawsuit, at least in part, was attributable to the plaintiffs and their attorneys. The plaintiffs' attorneys made a strategic decision to pursue the lawsuit in a county that had no relationship to the case. That decision, consciously made by plaintiff's attorneys, resulted in a reversal by the Supreme Court of Texas. Your article should have pointed out that the plaintiffs often shop for a more favorable forum, but they know in advance that if they guess wrong, they risk reversal of the case.

In addition, I must take exception to the article's reliance on information gained from a former Supreme Court of Texas briefing attorney. First, I am disappointed to read the comments of a former briefing attorney regarding the internal operations of the court on any given case. These matters are strictly confidential. Second, as Ms. Hays knows, there are *numerous* reasons why it may take a substantial amount of time to render a decision in a particular case and some of the delay cannot be blamed on the author of the majority opinion. Third, the article should

have disclosed that Ms. Hays is not just "a Dallas attorney," but is the chairperson of the Dallas County Democratic Party.

In sum, your article was unfair to Justice Owen. I served with Justice Owen for a number of years on the Supreme Court of Texas. I found her to extremely bright, hard working, diligent in her work, and of the highest integrity. In my opinion, the United States Senate should move quickly to confirm her nomination to the United States Fifth Circuit Court of Appeals. In the meantime, your newspaper should endeavor to report about her and her work as a jurist in a more even-handed manner.

Raul A. Gonzalez,
Justice, Supreme Court of Texas (retired)

April 1, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Leahy:

We served on the Texas Supreme Court with Justice Priscilla Owen when the case of *Enron Corporation et al. v. Spring Creek Independent School District*, 922 S.W.2d 931 (Tex. 1996) was decided. The issue in this case was the constitutionality of an ad valorem tax statute that allowed market value of inventory to be set on two different dates. In a unanimous opinion, all justices, Democrats and Republicans alike, agreed with the opinion authored by Justice Owen that the choice of the valuation date in ad valorem tax statute did not violate a provision of the State Constitution requiring uniformity and equality in ad valorem taxation. We found the decisions of the United States Supreme Court and other states instructive on this issue.

In our ruling, we agreed with the rulings of the Harris County Appraisal District and the trial court.

Cordially,

Raul A. Gonzalez
Justice, Texas Supreme Court
1984-1998

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Statement of Senator Grassley for Judiciary Hearing on Fifth Circuit Nominee Priscilla Owen, March 13, 2003

Once again, I'd like to welcome Justice Owen to the Senate Judiciary Committee. It's unfortunate that the Senate wasn't able to confirm her nomination last year when it was first offered. As my colleagues know, the Fifth Circuit currently has six vacancies, and the seat Justice Owen will fill, if confirmed, has been labeled by the Judicial Conference as a "judicial emergency", so it's important that we act quickly to fill this judgeship.

Mr. Chairman, I'd like to make a few comments about Justice Owen's qualifications and address some of the criticisms that have been unfairly lodged against this highly qualified individual. First, a few words on Justice Owen's stellar background. Justice Owen graduated from law school with honors, and received the highest possible score on the Texas Bar exam. This feat is ample evidence of the fact that she possesses the needed intellect to be a court of appeals

judge.

But in addition to intellect she has significant courtroom experience. For 17 years she practiced with the Houston law firm of Andrews and Kurth on a broad range of civil matters at the trial and appellate levels. Further, she is currently a Justice on the Texas Supreme Court, elected for a second term in 2000 with 84% of the Texas vote and the endorsement of every major Texas newspaper. She is involved in a number of pro bono and community activities, including the Supreme Court of Texas' Court-Annexed Mediation Task Force, Family Law 2000 and Board of Texas Hearing and Service Dogs, and she teaches Sunday School and serves as the head of the altar guild. Finally, the ABA gave Justice Owen a unanimous rating of "Well Qualified", their highest rating possible.

In spite of her outstanding qualifications, a number of "off-

Hill" attack groups have criticized Justice Owen's record. They claim that she is a conservative judicial activist that doesn't follow the law. An examination of Justice Owen's record on the Texas Supreme Court would reveal that these allegations are inaccurate. In fact, several of her fellow jurists on that Court and other members of the Texas bar, have praised her in their letters to this Committee. They report in these letters that Justice Owen scrupulously follows the law when she interprets statutes and legislative intent. They say that she follows the United States Constitution and the Supreme Court precedent that interprets it.

I would like to highlight a comment from one such letter. In a July 2002 letter to Senator Leahy, the former Democratic Chief Justice of the Texas Supreme Court, John L. Hill wrote that, "After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and

well reasoned, and that her integrity is beyond reproach."

Justice Owen's critics also claim that she has been improperly influenced by campaign funds in her decision-making. But the Texas judicial system allows for campaign contributions and Justice Owen had every right to participate in it. Further, in ruling on a particular case, no one has ever accused Justice Owen of actual wrongdoing, nor has she ever been asked to recuse herself based on the campaign contributions she received. In fact, Justice Owen has been out front in Texas in calling for the overhaul of the state's judicial selection system.

Moreover, Justice Owen is strongly supported by her community. She has received a number of letters in her support from both Republicans and Democrats, singing praise for her integrity, character and morality, as well as her intelligence and legal accomplishments. These letters

counter the allegations charged against Justice Owen. One supporter describes these attacks on her strong record as "breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings."

Unfortunately, just as with the nominations of Miguel Estrada, Jeffrey Sutton, Deborah Cook, and John Roberts, I believe that these critics of Justice Owen have a political agenda. They are requesting us to use their own organizations' agendas as a litmus test as to whether Congress should vote to confirm or reject a judicial nominee. In fact, they only want judges that rule consistent with their ideology, regardless of the law. That's wrong. Differences in one's own beliefs shouldn't be the litmus test in evaluating whether a judicial nomination should or shouldn't be confirmed. Instead, it's the judicial nominee's ability to follow and respect the rule of law.

While on the Texas Supreme Court Justice Owen has proven herself to be a justice who respects the law who resists the temptation to be an activists. I believe that she will continue to be such a judge, should we confirm her to the Fifth Circuit Court of Appeals.

RALPH M. HALL
4th District, Texas

Congress of the United States
House of Representatives
Washington, DC 20515–4304

SCIENCE
RANKING MINORITY MEMBER
ENERGY AND COMMERCE
ENERGY AND AIR QUALITY
HEALTH

July 23, 2002

Chairman Patrick Leahy
Ranking Member Orrin Hatch
Senate Judiciary Committee
Dirksen Senate Office Bldg., Rm. SD-224
Washington, DC 20515

Dear Chairman Leahy and Ranking Member Orrin Hatch:

When I came to Congress, I came with the belief that Presidents, whether Republican or Democrat, have the right to appoint judges as they see fit, and that the Senate had the duty to go the extra mile to confirm the President's nominees. I have changed my mind as I have studied the nominees for the last 20 years. I have the utmost respect for the decisions this President makes – and that includes his judicial appointments. Accordingly, I support President Bush's appointment of Justice Priscilla Owen and the large number of his Federal Judge appointments that have languished in the Senate. I hope that President Bush's nomination will go through as quickly as possible with no further delays.

I appreciate the Senate's hard work on this important matter. With regards, I am

Sincerely,

Ralph

Ralph M. Hall
Member of Congress

RMH:lml

cc: Senator Kay Bailey Hutchison
Senator Phil Gramm

[illegible] Building
[illegible] DC 20515-4304
[illegible]
[illegible] FAX
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Rusk County Courthouse
Henderson, TX 75240
(903) 657-8370
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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

March 13, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing On

"SETTING THE RECORD STRAIGHT: THE NOMINATION OF JUSTICE PRISCILLA OWEN"

Welcome to this hearing on the nomination of Justice Priscilla Owen of Texas to the US Court of Appeals for the Fifth Circuit. Justice Owen, we want to welcome you again to the Committee. A lot of people have been looking forward to this Committee's reconsideration of this nomination. People in my home state of Utah have flooded my office with phone calls and letters and e-mails in support, and I've heard from quite a few folks from Texas and elsewhere across the country as well.

I called this hearing because I believe Justice Owen's treatment in this Committee last September was unfair, unfounded, and frankly a disgrace to the Senate. As several of the Members who voted against her admitted, Justice Owen is a tremendously intelligent, talented and well-credentialed nominee. She earned the American Bar Association's highest rating, unanimously well qualified – and was the first person with that rating ever voted down in this Committee. She is also an honest, decent, fair, principled and compassionate human being and jurist whose service on the Fifth Circuit would be a great benefit to that court and our country. She should have been confirmed last year, and she should be confirmed this year.

I have made these views clear several times, so it should come as no surprise that, after the American voters returned the Senate to the Republicans, and therefore the Chairmanship of this Committee to me, that this Committee will now begin setting straight the mistake it made by halting this nomination in Committee last fall. We will have a hearing; we will have a vote in Committee; and we will give the full Senate an opportunity to vote on this nomination. It is important to note that the Committee vote last year was a straight party-line vote which denied the rest of the Senators an ability to vote on Justice Owen.

Let me be clear about one other thing: I personally do not believe that Justice Owen needs another hearing. Justice Owen gave complete and appropriate answers to all questions. Senator Feinstein, who presided at last year's hearing, was entirely fair and appropriate in that role. As Senator Leahy said before the Committee vote, "Those who have had concerns have raised them and have heard the nominee's responses. To her credit, she has met privately with those who have had concerns, as well as her public testimony, and has answered the follow-up questions." I agree that Justice Owen has answered all relevant questions – and then some – and has provided this Committee with all the information it needs. She is a model witness – one of

the very best this Committee has ever had the honor of considering. This hearing is not a do-over for Justice Owen – it is an encore.

For the Committee, this hearing is about remedying the wrongful treatment provided to Justice Owen. I don't say this to offend any Member of this Committee – I think they all know that I have deep personal respect for each one of them, and I know they voted according to their best judgment at the time. Nevertheless, as I reviewed the transcript of Justice Owen's last hearing, read her answers to written follow-up questions, and then reviewed the comments made at the markup debate, I was struck at the pervasive way in which Justice Owen's answers were almost totally ignored. The same accusations made by Members at her hearing were repeated at the markup as if Justice Owen's answers did not even exist – as if she was never even before the Committee.

Let me give just a couple of examples – there are too many to cover them all.

- At the hearing, Justice Owen was accused of needlessly delaying an opinion in the case of Ford v. Miles, the Willie Searcy case, and it was alleged that the young man died waiting for Justice Owen's opinion. Justice Owen clarified that Mr. Searcy passed away *three years* after the Texas Supreme Court's decision. But the same false allegation was raised and repeated at the markup as if Justice Owen had never given this Committee the correct facts.

- At the hearing, Justice Owen was accused of ruling against abortion rights in cases involving Texas's parental notification law. Justice Owen clarified that the notification statute, and therefore her written opinions, concerned only the law that girls younger than 18 *tell one of their parents*. The right of those girls to obtain abortions was never questioned by the law or by Justice Owen. Yet, as if she had never appeared before the Committee, one Member of the Committee stated during the markup debate that Justice Owen is "frequently in dissent from rulings of the Texas Court majority sustaining a young woman's right to have an abortion." That is simply an outrageous misstatement of the facts.

- Also at the hearing, Justice Owen was accused of not finding in favor of any plaintiffs or consumers – as if a good judge would simply hand out half of her decisions to plaintiffs and half to defendants in a display of ends-oriented activism, rather than look to the law upon which both sides based their arguments. Justice Owen listed a number of cases in which, based on the law, she had ruled on the side of individual plaintiffs, including *GTE v. Bruce*, a case affirming a $275,000 dollar jury verdict in favor of female victims of sexual harassment. But at the markup, several Members repeated the allegation as though her testimony and answers to follow-up questions had been written in invisible ink.

- In her written questions, Justice Owen was asked about her dissent in the case of *Weiner v. Wasson*, the charge being made that the majority opinion had "lectured" Justice Owen about the importance of following precedent. Justice Owen pointed out in a cogent written response that the majority was in fact responding to an argument made by the

> *defendant* that a prior Texas Supreme Court decision should be overturned. At the markup the very same charge was repeated, as though Justice Owen had entered a guilty plea previously.

There are several other examples, including the fact that Judge Gonzales' oft-repeated comment was not directed at Justice Owen, that I do not have the time to get into. But this pattern of ignoring answers is exactly what happened to Justice Owen.

So although we are not beginning anew to review this nomination, and there is no reason simply to rehash old and answered allegations, I nevertheless hope and expect Committee Members – especially those who voted against her – to come to this hearing with a fresh mind, and with a genuine willingness to listen, to consider, and to think again.

We are quite fortunate to have with us today the Senators from Texas, whose support for Justice Owen's nomination is as well-known as it is well-deserved. Texas could not have two finer and more effective public servants in the Senate. Senator Hutchinson has worked tirelessly over the past two years to make sure our colleagues know the facts about Justice Owen's distinguished career, service to Texas, and perhaps most importantly, Justice Owen's high personal integrity, fairness and commitment to equal justice under the law.

Senator Cornyn, although new to the Senate, is certainly not a newcomer to this nomination, to Justice Owen, or to several of the issues that were misunderstood or misconstrued as part of the effort to halt this nomination in Committee last fall. Indeed, Senator Cornyn knows many of these issues better than any other Member of this Committee ever could. Senator Cornyn brings a unique and compelling perspective on Justice Owen's nomination, having served side-by-side with Justice Owen as a colleague on the Texas Supreme Court. He examined many of the same legal issues and knows how she approached them. He knows how judges go about their work. Senator Cornyn understands that judges are called upon to render their very best judgment in frequently difficult and close cases and that sometimes judges will have legitimate differences of opinion among themselves and express themselves accordingly.

I find it particularly significant that Senator Cornyn supports Justice Owen even though they did not always agree on the bench. His support is based on how Justice Owen *goes about the job of being a judge,* not on whether she reaches the same outcome he would. I urge all of my colleagues to think this way. Any attempt to emphasize the points on which Senator Cornyn and Justice Owen disagree will backfire – it only proves the point better. So Senator Cornyn's endorsement of Justice Owen has extraordinary credibility to me, and should, by itself, provide Members of this Committee a fresh view of this nomination.

So I am looking forward to hearing from the Texas Senators, and from Justice Owen. And I am optimistically looking forward to evidence of renewed open mindedness from my colleagues. With that hope, I'll turn to the Ranking Member for any statement he would like to make at this point.

# # #

JACK HIGHTOWER

5905 Doone Valley Court
Austin, Texas 78731
512/452-7327
E-Mail: hitr@onr.com

August 20, 2002

Via Facsimile 202-224-2725

The Honorable Russell Feingold
Committee on the Judiciary
United States Senate
506 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feingold:

It was my privilege to serve as a member of the Supreme Court of Texas with Justice Priscilla Owen for two years prior to my retirement from the bench January 1, 1996. I had not known her personally prior to that time. I knew that she had graduated from my alma mater with honor and was a valued member of the Andrews & Kurth law firm in Houston.

When Justice Owen joined the court she impressed me as being a very quick study because although she had no previous judicial experience she seemed to be able to quickly grasp the issues and frame them into judicial questions with great clarity.

In my opinion she was unbiased and wanted to find the core legal issue in each case.

When she joined the court I knew, of course, that Priscilla was a Republican. She ran and was elected on the Republican ticket. I am convinced that he political philosophy is honestly Republican. That is as it should be. I am a Democrat and my political philosophy is Democratic, but I tried very hard not to let preconceived philosophy influence my decision on matters before the court. I believe that Justice Owen has done the same.

I am also of the opinion that the people are not well served by the partisan election of judges. I have not always been of this opinion, but after two statewide elections for the court, and after raising and spending millions of dollars, I believe that there must be a better way.

Yours truly,

John L. Hill
JP Morgan Chase Tower
600 Travis Street, Suite 3400
Houston, Texas 77002
(713) 226-1230

July 19, 2002

Via Facsimile (202) 224-9516
and First Class Mail

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D. C. 20510

Dear Chairman

President Bush honored impeccable integrity, character, and scholarship when he nominated to the U.S. Court of Appeals for the Fifth Circuit a leading voice for reform in the Texas judiciary: Priscilla Owen.

I came to know Justice Owen several years ago during her service on the Texas Supreme Court, where I had previously served as Chief Justice. Then and now, Justice Owen has distinguished herself as a forceful advocate for reforming Texas's system for selecting judges. Under the state Constitution, for more than 125 years, Texas has selected its judges through contested elections, and the law therefore permits judicial candidates to receive campaign contributions. The system has positive aspects, but one of the downsides is that it invites speculation about whether judges should preside in cases where their contributors appear as attorneys or parties. That's why Justice Owen tirelessly has fought to minimize the influence of campaign contributions in judicial elections.

Reflecting her early commitment to the integrity of the courts, Justice Owen signed a judicial reform pledge during her first campaign in 1994. She has championed several proposed constitutional amendments, including an option for judges to run in non-partisan retention elections. She has written to members of the bench and bar, urging them to back reform. She has argued that the judiciary should be above the influence of partisan politics. And in a unique combination of symbolism and substance, Justice Owen *returned* over a third of her campaign contributions after not drawing a Democrat or Republican opponent during her 2000 re-election campaign.

Justice Owen and I would be the first to admit that the Texas judicial-selection system is in need of reform. But some special interest groups confuse flaws in our system with flaws in our judges. These groups insist on denouncing individual members of the judiciary, when reform of the laws they dislike can only come from amending the Texas Constitution, which Justice Owen strongly supports.

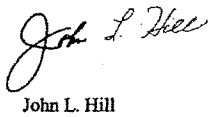
Their attacks on Justice Owen in particular are breathtakingly dishonest, ignoring her long-held commitment to reform and grossly distorting her rulings. Tellingly, the groups make no effort to assess whether her decisions are legally sound, and instead are content to fall back on the canard of an "appearance of impropriety." Nor have they so much as acknowledged Justice Owen's unswerving leadership in seeking reform—reforms of which they presumably approve. The groups lack credibility when they attack Justice Owen for participating in a system that has been in place longer than a century, is mandated by the Texas Constitution, and is not within her ability to change by herself. I know Texas politics and can clearly say that these assaults on Justice Owen's record are false, misleading, and deliberate distortions.

After years of closely observing Justice Owen's work, I can assert with confidence that her approach to judicial decision-making is restrained, that her opinions are fair and well reasoned, and that her integrity is beyond reproach. I echo the American Bar Association's *unanimous* conclusion that she is "well qualified" for the federal bench—the highest rating possible. United States Senators from both sides of the aisle have called the ABA's rating the "gold standard" of a nominee's fitness for the federal bench, and I agree with them. I know personally just how impeccable Justice Owen's credentials are.

After graduating in 1977 from Baylor Law School with honors at the top of her class, Justice Owen earned the highest score on the Texas bar exam. Her academic excellence foreshadowed the exceptional career to follow. Elected twice by the people of Texas, Justice Owen has served with distinction on the Texas Supreme Court for more than seven years. In 2000, every major Texas newspaper endorsed Justice Owen during her successful re-election bid.

President Bush and both Senators from Texas strongly support Justice Owen. I join them and many, many others – of all political stripes – in calling on the U.S. Senate to give this intelligent, ethical, and gifted woman a fair hearing and swift Senate confirmation.

Very truly yours,



John L. Hill

JLH:br

cc: ***Via Facsimile (202) 228-1698***
and First Class Mail
The Honorable Orrin Hatch
United States Senate
152 Dirksen, Senate Office Building
Washington, D. C. 20510

KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510–4304

March 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am dismayed to see the Wall Street Journal report today that some members of the Senate may "target" the nomination of Justice Priscilla Owen to the United States Court of Appeals for the Fifth Circuit. I urge that the Committee on the Judiciary take swift and positive action on her nomination, particularly in light of the fact that Judge Priscilla Owen was among the group of original 11 federal judicial nominees announced by President Bush on May 9, 2001.

Justice Owen's stellar academic achievements and professional experience are remarkable. She earned a cum laude bachelor of arts degree from Baylor University and graduated cum laude from Baylor Law School in 1977. Thereafter, she earned the highest score on the Texas Bar Exam. Prior to her election to the Supreme Court of Texas in 1994, she was a partner in the Texas law firm of Andrews & Kurth LLP where she practiced commercial litigation for seventeen years.

Justice Owen has delivered exemplary service on the Texas Supreme Court, as affirmed by her receiving positive endorsements from every major newspaper in Texas during her successful re-election bid in 2000. Justice Owen enjoys bipartisan support and in connection with her nomination, the American Bar Association Standing Committee on the Federal Judiciary has *unanimously* voted Justice Owen "Well Qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

I thank you and look forward to continuing to work with you and the other members of the Committee to ensure that Justice Owen is carefully and efficiently considered for appointment to the federal bench.

Sincerely,

Kay

Kay Bailey Hutchison

I hope you will give her a fair hearing soon.

BAKER
&
HOSTETLER LLP
COUNSELLORS AT LAW
(Writer's Direct Dial 713-646-1338)
1000 LOUISIANA, SUITE 2000 • HOUSTON, TEXAS 77002-5009 • (713) 751-1600 • FAX (713) 751-1717

23 May, 2001

President George W. Bush
The White House
Washington, D.C.

Re: The Nomination of Justice Priscilla Owen of the Texas Supreme Court to the 5th United States Court of Appeals

Dear Mr. President:

I was very pleased to read that you have nominated Justice Owen to fill the vacancy on the 5th Circuit Court of Appeals. In her service on the Texas Supreme Court, Justice Owen has authored many significant decisions, including at least one case that has saved untold litigation expenses by clarifying issues regarding the Texas statutes of limitations. See *HECI v. Neel*, 982 S.W.2d 881 (Tex. 1998).

Justice Owen and I were adversaries for a number of years in an oil and gas case involving a claim for several million dollars. Throughout the extensive discovery and pre-trial process, as well as during the trial, Justice Owen conducted herself in an exemplary fashion. Always knowledgeable of the facts and the law, she also exercised the cooperation and professionalism in her conduct and respect for witnesses, parties, opposing counsel, and the Court that is so often missing from advocates.

In summary, you have made an excellent choice and it is the sincere hope of many of my fellow trial lawyers in Texas that Justice Owen be promptly confirmed so that she can assume her position on the 5th Circuit. The only objection I can voice is the loss Texas will suffer on our Supreme Court of a very knowledgeable, dedicated jurist.

Most Respectfully,

Jon David Ivey
of Baker & Hostetler

cc: Senator Kay Bailey Hutchison
Senator Phil Gramm

August 21, 2002

The Honorable Joseph Biden, Jr.
United States Senate
221 Russell Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Biden:

I am writing you to encourage you to support Justice Priscilla Owen, President Bush's nominee to serve as a Justice on the Fifth Circuit Court of Appeals. I am a Democrat and believe in our party's principals of fair play and consideration of others. So I want you to know about Justice Owen as you consider her nomination.

Justice Owen is a friend of mine and I have worked with her as a member of our church. She is a wonderful woman. Her personal integrity is the very highest and her compassion for others is outstanding. She cares about people. She is wonderful with children and is a Sunday School Teacher. In addition, she is the chairperson of our Altar Guild Committee spending many hours preparing for our Sunday services. I am a member of the same Altar Guild, and I am proud to serve with Priscilla.

She is an outstanding example of a really good person; caring, compassionate, reliable, and with unfailing good humor. We need people like Priscilla Owen, to whom we can look up, to be our judges.

I urge your support of Justice Priscilla Owen's nomination. And I do this as a good Democrat because I know she is the kind of person we need as our judge.

Sincerely,

Shirley Jarratt
[illegible]
Leander, TX 78641
512-267-6550

cc: The Honorable Orrin Hatch

Cyndi Taylor Krier
Vice President of
Texas Government Relations

August 28, 2002

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Justice Priscilla Owen for Fifth Circuit Court of Appeals

Dear Senator Feinstein:

As a former State Senator and Judge in Texas, I am writing to urge you to support Justice Owen's confirmation to the Fifth Circuit Court of Appeals.

The need is clear and her qualifications are strong: This vacancy on the appellate court for Texas, Louisiana and Mississippi has been declared a "judicial emergency" by the Judicial Conference of the United States. The American Bar Association has unanimously assigned Justice Owens its highest rating of "well qualified".

She has the strong support of her two Texas Senators and the majority of Texans as evidenced in 2000 when she was re-elected by an overwhelming majority of voters.

While you may not agree with every ruling she has written, her opinions are well grounded in Texas law.

As an elected official, I have worked with women in both political parties. Our national, state and local governments benefit by representation from women of a broad range of philosophies. I urge you to keep this in mind and vote to confirm Justice Owen.

Thank you for your leadership.

Sincerely yours,

Cyndi Taylor Krier

Cyndi Taylor Krier

cc: Senator Orrin G. Hatch
Ranking Member, Committee on the Judiciary

9800 Fredericksburg Road San Antonio, Texas 78288-4501 Phone: 210 498 3173 Fax: 210 498 0883

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

OPENING STATEMENT OF SENATOR PATRICK LEAHY
COMMITTEE ON THE JUDICIARY
HEARING FOR JUSTICE PRISCILLA OWEN
NOMINEE TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
March 13, 2003

Today we meet in an unprecedented session to consider the renomination of Priscilla Owen to the U.S. Court of Appeals to the Fifth Circuit. Never before has a President resubmitted a circuit court nominee already rejected by the Senate Judiciary Committee for the same vacancy. Today, this Committee proceeds to grant Justice Owen a second hearing having not allowed either Enrique Moreno or Judge Jorge Rangel, both distinguished Texans nominated to the Fifth Circuit, any hearings at all when they were nominated by President Clinton to the same Fifth Circuit vacancy.

This nominee was fairly and thoroughly considered after a hearing only eight months ago, in an extended session chaired so ably and fairly by Senator Feinstein. Justice Owen's earlier nomination was fairly and thoroughly debated in an extended business meeting of the Committee, during which every Senator serving on this Committee had the opportunity to discuss his or her views of the nominee's fitness for the bench. That meeting and that debate was delayed for some time at the request of the Administration and our Republican colleagues. Unlike the scores of Clinton nominations on which Republicans were not willing to hold a hearing or Committee vote or explain why they were being opposed, Justice Owen's earlier nomination was treated fairly in a process that resulted in a Committee vote in accordance with Committee rules that resulted in that nomination's defeat last year.

Unfortunately, the Chairman has not scheduled a second hearing for Judge Deborah Cook or John Roberts, two nominees whose hearings did not give Senators an adequate opportunity to question them. These were controversial nominees who were shoehorned into a hearing earlier this year that was plainly too crowded to be a genuine forum for determining their fitness for lifetime appointments to federal appellate courts. Democratic members have asked many times that the incomplete hearing record for those nominees be completed, but those requests have been rebuffed. That is a shame. That error was compounded by truncated Committee consideration when the Chairman insisted on proceeding in violation of Rule IV of this Committee and before there was bipartisan agreement to conclude debate on the nominations.

For Justice Priscilla Owen, a nominee who was afforded every possible courtesy and granted full process, there will be a second hearing. I emphasize the various procedural steps followed by the Committee on Justice Owen's nomination in the Democratic-led 107th Senate to contrast them with the treatment of President Clinton's nominees to this very seat during the previous period of Republican control of the Senate. During that time, two very talented, very deserving nominees were shabbily treated by the Senate. Judge Jorge Rangel, a distinguished Hispanic attorney from

Corpus Christi, was the first to be nominated to fill that vacancy. Despite his qualifications, and his rating of Well Qualified by the ABA, Judge Rangel never received a confirmation hearing from the Committee, and his nomination was returned to the President without Senate action at the end of 1998, after a fruitless wait of 15 months.

Frustrated with the lack of action on his nomination, Judge Rangel asked that his name be withdrawn from consideration, and on September 16, 1999, President Clinton nominated Enrique Moreno, another outstanding Hispanic attorney, a Harvard graduate, and a recipient of a unanimous rating of Well Qualified by the ABA, to fill that same vacancy. Mr. Moreno did not receive a hearing on his nomination from a Republican-controlled Senate during its pendency of more than 17 months. President Bush withdrew the nomination of Enrique Moreno and later substituted Justice Owen's name in its place.

It was not until May of last year, at a hearing chaired by Senator Schumer, that this Committee heard from any of President Clinton's Texas nominees to the 5th Circuit, when Mr. Moreno and Judge Rangel testified, along with a number of other Clinton nominees, about their treatment by the Republican majority. Thus, Justice Owen is the third nominee to the vacancy created when Judge William Garwood took senior status so many years ago, but the only one who has been allowed a confirmation hearing.

Let me remind the Committee, the Senate and the American people how this Committee came to have a hearing last year on this controversial nomination. Democratic leadership of the Committee began in the summer of 2001, and we immediately began hearings on President Bush's judicial nominations. We made some significant progress in helping fill vacancies during those difficult months in 2001 and proceeded at a rate about twice as productive as that averaged by Republicans in the prior six and one-half years. As we began 2002 I went before the Senate to offer a formula for continued progress so long as it was balanced bipartisan progress. In that regard, I made some modest suggestions to the Bush Administration — none of which were adopted — and, for my part, to demonstrate my good faith, I committed to hold hearings on a group of President Bush's most controversial circuit court nominees that year.

I not only fulfilled that pledge to hold hearings on Justice Owen among others; by the end of last year I had made sure that the Senate Judiciary Committee had held hearings on more than twice as many controversial circuit nominees as I originally announced. We proceeded with hearings and votes on Judge Charles Pickering at the request of Senator Lott, Judge D. Brooks Smith at the request of Senator Specter, and Judge Dennis Shedd at the request of Senator Thurmond. These were in addition to my January announcement with respect to Justice Owen, Professor McConnell and Mr. Estrada. In short, during my 17 months as Chairman, we proceeded expeditiously but fairly to consider more than 100 of President Bush's judicial nominations despite the lack of comity and cooperation from the White House.

Fairness and fair consideration apparently are not enough. Proceeding almost twice as productively, without White House cooperation, counted for nothing. The President remains intent on packing the federal courts and Senate Republicans seem equally intent on making sure that this scheme succeeds no matter what Senate rules, traditions and precedents need to be overruled or ignored.

In examining Justice Owen's record in preparation for her first hearing and, now again, in preparation for today, I remain convinced that her record shows that in case after case involving a variety of legal issues, she is a judicial activist, willing to make law from the bench rather than follow the language and intent of the legislature. Her record of activism shows she is willing to adapt the law to her results-oriented ideological agenda.

I expect that Senators on the other side will spend the morning trying to recast and rehabilitate Justice Owen's record. I assume that is what the Chairman meant to suggest by the title he selected for this hearing. Surely he did not mean to suggest that Senator Feinstein was unfair or that Senators on this Committee did not proceed fairly to debate and vote on the nomination last year. We did see a recent occasion when a judicial nominee was ambushed on issues on which there was not notice or thorough information or debate, and that nomination was defeated by a party-line vote; but that nomination was not that of Justice Owen but of the first African American to serve on the Missouri Supreme Court, Justice Ronnie White.

I hope that this hearing is not a setting for some to read talking points off the Department of Justice website or argue that there is some grand conspiracy to block all of President Bush's judicial nominees. The consensus nominees are considered expeditiously and confirmed with near unanimity. The nominees selected to impose a narrow ideology on the federal courts remain controversial and some are being opposed. Were the Administration and the Republican leadership to observe our traditional practices and protocols and not break our rules and seek every advantage from the obstruction of Clinton nominees to circuit courts over the last several years, we would be making more progress.

Facts are stubborn and do not change. Written opinions and prior testimony under oath are difficult to overcome. This nomination was examined very carefully a few months ago and rejected by this Committee. To force it through the Committee now based only on the shift in the majority would not establish that the Committee reached the wrong determination last year, but that the process has been taken over by partisanship this year.

No one can change the facts that emerge from a careful reading of Justice Owen's dissents in cases involving a Texas law providing for a judicial bypass of parental notification requirements for minors seeking abortions. Those who suggest that she was just showing deference to the U.S. Supreme Court, cannot change the fact that what she purported to rely on in those cases just is not there. The Supreme Court did not say what she claims it said.

Neither will they change the facts about her activism in a variety of other cases where her record shows a bias in favor of government secrecy and business interests, and against the environment, victims of discrimination and medical malpractice. In these cases she ruled or voted against individual plaintiffs time and time again, earning deserved criticism from her colleagues on the very conservative Texas Supreme Court.

To give a sampling of the stinging criticism no amount of argument can change, in a variety of opinions, members of the Texas Supreme Court majority:

- Have called Justice Owen's views, "**nothing more than inflammatory rhetoric**."
- They have lectured dissents she was part of on the importance of stare decisis.
- They have said that her "**dissenting opinion's misconception . . . stems from its disregard of the procedural elements the Legislature established,**" and that her, "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for" by the appellant.
- They have said that to construe the law as she did "**would be an unconscionable act of judicial activism.**"

Despite the mistreatment of President Clinton's judicial nominees, the Democratic-led Senate of the 107th Congress showed good faith in fairly and promptly acting to confirm 100 of President Bush's judicial nominees. The Senate is now contending over several of President Bush's controversial nominations. This process starts with the President. The President can generate contention in this process, or he can end it. The President has said he wants to be a uniter and not a divider, yet he has sent this nomination to the Senate, which divides the Senate, which divides the American people, and which even divides Texans. To compound the divisiveness, he has taken the unprecedented step of resubmitting this nomination after it was turned down by this committee.

The President also has said he does not want what he calls "activist" judges. Justice Owen, by the President's own definition, is an activist judge whose record shows her to be out of the mainstream even on the conservative Texas Supreme Court.

In my opening statement at Justice Owen's original hearing last July, I said that the question each Senator on this Committee would be asking himself or herself as we proceeded was whether this judicial nominee met the standards we require for any lifetime appointment to the federal courts. I believe that question has been asked and answered.

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HAYNES AND BOONE, LLP

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direct fax: (713) 236-5538
e-mail: lynne.liberato@haynesboone.com

August 30, 2002

h | b

VIA FACSIMILE (202) 224-9516
The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Leahy:

I write to you as a Democrat, as a former State Bar of Texas president, and an appellate lawyer to urge you to support the confirmation of Justice Priscilla Owen of Texas to the United States Fifth Circuit Court of Appeals.

I decried the Republicans subversion of the judicial process during President Clinton's administration and cannot remain quiet if we Democrats follow the same course. President Clinton would not have appointed her, but that should not be the test. I know Priscilla Owen well and she is qualified to be a judge and her appointment should be confirmed.

I appreciate the seriousness with which you approach this responsibility and ask that you grant Justice Owen a prompt hearing and favorable consideration.

Thank you for your service to our country.

Sincerely,

Lynne Liberato

H-341097_1.DOC

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Editorial ... July 27, 2002

No Funds

Judges should be appointed

The hotly contested confirmation hearings about whether Texas Supreme Court Justice Priscilla Owen should be appointed as a federal judge stem largely from the way the state elects judges. The trial lawyers in the Senate have made her campaign contributions a major issue.

Sure, there's a bit of a smokescreen in challenges to some of the opinions she wrote on Texas' highest civil court, but every judge makes controversial rulings. What bothers the senators is that her campaign contributions largely come from business and industry. Further, she won her seat on the court as a Republican — and that clearly, to the senators, signals a conservative bent.

This is a real disservice to Owen. She has been a solid member of the Texas court and is highly qualified to be a federal judge. And it's another reason Texas needs to change the way it selects its appellate judges.

Cathy Cochran, a member of the Texas Court of Criminal Appeals, has announced that she will not accept campaign contributions in her race, and Chief Justice Tom Phillips of the Texas Supreme Court has followed suit. Phillips says he is doing it in protest of Texas' judicial elections system. For the record, Phillips' Democratic opponent, Richard Baker, also is refusing to solicit donations but will accept them if offered.

That's a risky step for both candidates. In statewide judicial campaigns, the costs often exceed $1 million. Without funds, there will be no money for television advertising and name identification. Phillips and Cochran are putting emphasis on small forums and newspaper editorial boards to deliver their messages.

Even if Phillips and Cochran accepted campaign contributions, no one could challenge their integrity or their independence as jurists. As for qualifications, they might well be among the top legal scholars to ever sit on the state's highest courts.

Ever since Phillips joined the court in 1988, he has strongly advocated abolishing Texas' partisan elections of judges in favor of an appointment and retention system. Phillips calls the current elections "dysfunctional."

He's right. As long as we require judicial candidates to raise large sums of money to conduct partisan races, people will be suspicious of the motivations for rulings by the court. That's why the Texas Legislature should act to establish an appointment system with retention elections

when it convenes in January. Let's have a judiciary that is free of the appearance of impropriety.

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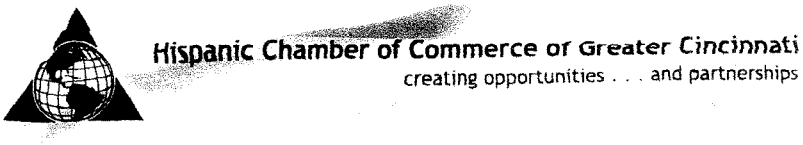

22 July 2002

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Senate Russell Office Building
Washington, DC 20510

Dear Chairman Leahy:

I am writing to convey my support for Priscilla Owen for the position of United States Fifth Circuit Court of Appeals Judge.

Justice Owen has impeccable credentials and has earned great respect in Texas for her fairness, integrity and legal acumen. There is no question that Owen is exceptionally qualified to serve on the court. She graduated first in her class from Baylor University Law School and worked as a partner at a prestigious Houston law firm before becoming the second woman elected to the Texas Supreme Court in 1994.

She served with distinction on the state's highest court, and was endorsed by every major newspaper in the state when she ran for re-election. Justice Owen has been recognized as a judge who adheres to the highest standards and faithfully interprets the law, regardless of her political views. Based on her record, the American Bar Association unanimously rated her "well qualified", the highest ranking possible.

Moreover, the number of unfilled vacancies has prompted the Judicial Conference of the United States, the administrative body of the federal court system, to declare the Fifth Circuit Court a "judicial emergency", and it is imperative that the Senate act swiftly on Owen's nomination.

Justice Owen is the kind of judge that the people of the Fifth Circuit need on the bench – an experienced jurist who follows the law and uses good common sense. I strongly urge the Senate Judiciary Committee to support Justice Owen's nomination.

Very Truly Yours,

Edgar E. Loyd

Edgar E. Loyd
Board of Directors, Hispanic Chamber of Commerce of Greater Cincinnati

PO BOX 2593 • Cincinnati, Ohio 45201 • voice mail (513) 929-2723
Website: www.hispanicccgc.com • Email: president@hispanicccgc.com

PHILIP H. MALLORY

2331 Berwick Drive
Round Rock, TX 78681
Tel. (512) 733-8470

August 20, 2002

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Feinstein,

I am writing you to encourage you to support Justice Priscilla Owen, President Bush's nominee to serve as a Justice on the Fifth Circuit Court of Appeals.

Justice Owen is a friend of mine and I have worked with her as a member of our church. She is a wonderful woman. Her personal integrity is the very highest and her compassion for others is outstanding. She cares about people. She is wonderful with children and is a Sunday School Teacher. In addition, she is the chairperson of our Altar Guild Committee spending many hours preparing for our Sunday services.

She is an outstanding example of a really good person; caring, compassionate, reliable, and with unfailing good humor. We need people like Priscilla Owen, to whom we can look up, to be our judges.

I urge your support of Justice Priscilla Owen's nomination.

Sincerely,

Philip H. Mallory

cc: The Honorable Orrin Hatch

SHARON F. MALLORY

2331 Berwick Drive
Round Rock, TX 78681
Tel. (512) 733-8470

August 20, 2002

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Subject: Justice Priscilla Owen

Dear Senator Feinstein,

I am writing to encourage you to support Justice Priscilla Owen, President Bush's nominee to serve as a Justice on the Fifth Circuit Court of Appeals.

Justice Owen is a woman I admire very much for her integrity and compassion, both in her personal life and in her profession. She has had an outstanding career as lawyer and judge and has won honors and acclaim across the political and community spectrum. Her success, however, has not changed her quiet and unassuming nature.

We need judges, like Priscilla Owen, who care deeply about their country and their fellow citizens and who are willing to use their talents in pursuit of honest justice for all.

Please support Justice Priscilla Owen's nomination.

Sincerely,

Sharon F. Mallory

Sharon F. Mallory

cc: The Honorable Orrin Hatch

CHARLES W. MATTHEWS
5959 LAS COLINAS BOULEVARD
IRVING, TEXAS 75039-2298

May 1, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Building
Washington, D.C. 20510

Re: Justice Priscilla Owen

Dear Senator Leahy:

I recently attended the Fifth Circuit Judicial Conference. One of the major concerns of the judges was the continuing challenge to handle the work of the court despite the vacancies that remain unfilled. In order to ensure the proper administration of justice, these vacancies need to be filled. The courts and the litigators deserve attention to this ongoing problem.

In this regard, I ask you specifically to consider a prompt hearing for Justice Priscilla Owen of Texas, President Bush's nominee to the United States Fifth Circuit Court of Appeals. A hearing will produce ample evidence of her outstanding qualifications. She has received a "well qualified" recognition by the ABA Standing Committee on the Federal Judiciary. The *Dallas Morning News* editorial commented that "Justice Owen's lifelong record is one of accomplishment and integrity."

Justice Owen has served ably on our Supreme Court. She will serve with distinction on the Federal bench.

Thank you for your consideration.

Sincerely,

CWM:mb

The Rev. Michael W. Michie
2806 Tierra Blanco Tr.
Cedar Park, TX 78613
(512) 401-8577

August 31, 2002

The Honorable Joseph Biden
United States Senate
506 Hart Office Building
Washington, DC 20510

Dear Senator Biden,

I would like to encourage you to vote for the approval of my friend, Priscilla Owen, to be a federal judge. I have known Priscilla for almost four years and she has been an active member of the church, St. Barnabas Episcopal, where I am the Associate Vicar. By now, I do not need to embellish her outstanding record as a lawyer and jurist. You have no doubt heard all of those arguments.

I wonder, however, if you have heard about how Priscilla helps teach nine to twelve year olds in our children's church, how she quietly and humbly sets out the flowers and organizes our altar guild, how, to know her, you would have no idea that she was one of the most distinguished people in our state. It has been a sad and frustrating year for me while I have watched how Priscilla's nomination dragged on, and how the media and your colleagues questioned her integrity. Priscilla Owen's complete vocational commitment to her role as a judge, coupled with her kind and humble spirit as a human being, makes her one of the most amazing people I have ever known.

I suppose I should mention that, politically, I have more in common with the folks who oppose Priscilla's nomination than those who her favor her. So it has been an interesting exercise for me to see how political scrutiny often fails to shed even the slightest light on the true measure of a person. I want you to know that the very idea that Priscilla is a judicial activist is outrageous to those of us who know her. No matter what the issue, even those issues where conservatives would demand her vote another way, you can count on Judge Owen to bring her unmatched work ethic to discover the most fair and pure interpretation of the law possible.

I majored in Government at the University of Texas, and thought hard about pursuing a career in campaign management. So I am troubled that our political system has deteriorated to the point where people of the personal integrity of Priscilla Owen have such a difficult time being approved. If there are people out there with higher moral and professional ethics than Priscilla Owen, I challenge you and your colleagues to find her.

If I had doubts about Priscilla personally or politically, I would not write you this letter. So I do so, with the hope that you would approve her nomination and let her serve her

country. If I can be of further assistance, I stand at the ready. Thank you very much for your consideration.

Sincerely,

The Rev. Michael W. Michie

CC: The Honorable Orrin Hatch

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MRT - Politics will unfairly dominate hearing for Justice Owen

Midland Reporter-Telegram 07/23/2002

Justice Priscilla Owen of the Texas Supreme Court has been nominated by the White House for a seat on the 5th U.S. Circuit Court of Appeals.

Texans and President Bush have come to respect Justice Owen.

But not Democrats.

They don't like her strong anti-abortion stance. They also think she's too chummy with President Bush's right hand man when it comes to politics, Karl Rove.

Things could come to a head this week when Justice Owen, who was elected to the Texas Supreme Court in 1994, appears today in a confirmation hearing before the Senate Judiciary Committee.

Will Senate Democrats try to use this as an opportunity to embarrass President Bush? It seems likely.

Democrats are eager to recapture the White House in 2004 and desperately want to try to put a chink in the president's resilient armor. (Polls taken by national news organizations this weekend suggest the American people still have great faith in President Bush, despite the turbulent week on Wall Street.)

Abortion is an extremely emotional issue. There are those firmly entrenched on the right and those just as firmly entrenched on the left. Then there is a huge group of Americans in the middle who are squeamish about the topic and would rather not think or talk about it.

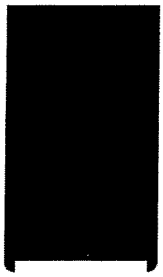
But abortion is likely to return to the front burner this week as Democrats will likely try to take full advantage of the opportunity -- and the national media coverage -- to put themselves in the best possible position to take back the White House in 2004.

Democratic operatives have delved into Justice Owen's past and in addition to her anti-abortion positions discovered that -- like many other candidates in the mid-1990s -- she accepted an $8,600 political contribution from Enron.

Don't be distracted by such tactics.

We have faith President Bush has chosen a fine judge to serve on the federal bench.

But Justice Owen, you won't be in Texas today. You'll be in Washington, D.C.



The stakes are higher and the bite is nastier.

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JOHN BANKS
SANDRA GRIFFIN

July 1, 2002

Hon. Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

RE: Justice Priscilla Owen

Dear Chairman Leahy:

My name is Robert Mott. I was the legal counsel for the Spring Independent School District in the case of *Enron Corporation et al. v. Spring Independent School District*, 922 S.W.2d 931 (Tex. 1996). We were the losing party in this case.

I have been disturbed by the suggestions that Justice Priscilla Owen's decision in this case was influenced by the campaign contributions she received from Enron employees. I personally believe that such suggestions are nonsense. Justice Owen authored the opinion of a unanimous court consisting of both Democrats and Republicans. While my clients and I disagreed with the decision, we were not surprised. The decision of the Court was to uphold an act of the Legislature regarding property valuation. It was based upon United States Supreme Court precedent, of which we were fully aware when we argued the case.

I firmly believe that there is absolutely no reason to question Justice Owen's integrity based upon the decision in this case.

Sincerely,

Robert Mott

RM/lc

cc: Honorable Orrin Hatch

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June 7, 2001

Senator Patrick Leahy
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senator Leahy:

I write in support of the nomination of Justice Priscilla R. Owen to the United States Court of Appeals for the Fifth Circuit.

As a member of the Texas bar who is Board Certified in Civil Appellate Law, I practice frequently before the Supreme Court of Texas, and I keep abreast of its decisions. I have always considered Justice Owens's decisions to be thoughtful, intellectually sound, and respectful of the rights of all Texas citizens.

For your information, I generally support Democratic candidates for national office. In fact, in 1988 I was a delegate to the Texas State Democratic Convention for the Reverend Jesse Jackson. Despite my political preferences, I do not hesitate to recommend Justice Owen for the Fifth Circuit.

Very truly yours,

Stacy R. Obenhaus

SRO:tdh

cc: Presidential Personnel Office
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

DALLAS 1018468v1

GARDERE WYNNE SEWELL LLP

THE OKLAHOMAN

July 25, 2002

Rank Partisanship: Another Judicial Nominee is Savaged

WHEN President Bush retreats to Texas next month for some time away from Washington, he might think about how to deal with rank partisanship in the Senate, which is stiff-arming him on judicial appointments and hurting the country in the process.

Statistics tell the story: So far just 52 percent of Bush's judicial nominees have been confirmed by the Democratic-controlled Senate. According to figures released by the White House, at this point in their presidencies Bush's three most recent predecessors had seen 93.7 percent of their nominees confirmed. It's even worse for Bush's nominees at the appeals court level.

Of his 32 nominees, only 11 have been confirmed, a success rate of 34 percent. At this same juncture in time the three previous presidents had seen 92.3 percent of their nominees confirmed.

What's up with that? Partisan politics, which is why Bush might consider using the power of recess appointment - done while the Senate's in recess and temporary in nature - to get deserving people onto the federal bench.

The pending nomination of Texas Supreme Court Justice Priscilla Owen to the 5th U.S. Circuit Court of Appeals shows what's happening to Bush's nominees. Despite an exemplary legal record and a "well-qualified" rating from the American Bar Association - its highest recommendation - Owen this week was savaged in her Senate Judiciary Committee hearing. Democrats insisted her rulings on abortion, with which they disagree, show she is a judicial activist, and a conservative one at that.

It's a shame. Even the Washington Post's liberal editorial page said that Owen's conservatism is no reason to block her nomination, which will be voted on by the panel in September. "While some of Justice Owen's opinions - particularly on matters related to abortion - seem rather aggressive, none seems to us beyond the range of reasonable judicial disagreement," the Post said.

We wonder how Democrats can look themselves in a mirror as they punish well-qualified individuals like Owen. Judiciary Chairman Patrick Leahy of Vermont called her "outside the mainstream."

Outside the Vermont mainstream, perhaps, but we wouldn't consider that a disqualification.

To the country's detriment, it's the narrow way Leahy and his allies define mainstream that counts. – The Editors.

July 17, 2002

Honorable Joseph R. Biden, Jr.
221 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Biden:

I am writing to you in support of Justice Priscilla Owen who has been nominated by the President to the U. S. Court of Appeals for the Fifth Circuit. I have been observing the progress of Priscilla's appointment, and that process has motivated me to speak out in support of her character and her nomination.

I have known Priscilla and her family for most of my life, both of us having grown up in Waco, Texas. Her late father was one of my strongest supporters in the early days of my young political life. Her sister and brother-in-law are today our dear friends and her mother is one of the finest ladies in our community. I have known Priscilla to be a kind, respectful, hard working and gracious woman who cares deeply about others. She has always had a fine reputation and at no time have I ever known her to be anything but considerate in her dealings with others. She is simply a good and decent person. She has excellent academic credentials and I believe will be fair as a Judge on the Fifth Circuit.

Senator, I am sure that there are opinions of hers as an appellate judge with which you and I might not agree. But they do not justify the kind of character assassination she is having to endure. Her personal integrity, I can assure you, is impeccable, and I did not want to remain silent while such a fine person's character was being so unfairly maligned.

I have the greatest respect for the difficult decision that you must make, and I hope these remarks might assist you in some way. In the event that I may be of any assistance, please feel free to contact me at 254 776-9745.

Thank you for your consideration.

Respectfully,

Lyndon L. Olson, Jr.

Mary Sean O'Reilly

The Conciliation Institute: Mediation and Arbitration
3000 Weslayan, Suite 110
Houston, Texas 77027-5753
Telephone: 713.621.6225 Telefax: 713.621.6204 Toll Free: 1.877.262.02211

August 14, 2002

Dear Senator Feinstein

As a devout and genetic Democrat since the age of twelve, and a participant in the Democratic Party for decades, I write to ask that you support the confirmation of Justice Priscilla Owen to the Fifth Circuit Court of Appeals.

I was a member of an order of Catholic Sisters, the Sisters of Saint Mary of Namur for sixteen years. I am still on the Financial Advisory Committee of our Sisters, and the Dominican Sisters of Texas. I work closely with the Sisters on domestic social justice issues and with our Sisters in Rwanda and Congo. I graduated from University of Houston School of Law in 1977, while in the Order, and worked with abused women and children as a Legal Service trial attorney in family law for six years before being appointed as an associate judge in the Tarrant County, Texas, family courts for seven years. I have subsequently served in various family courts in Texas, always as a Democrat.

From this perspective, I can credibly register my dismay at the attacks against Justice Priscilla Owen. Some news media and interest groups have portrayed her as cold and uncaring, out to help the powerful at the expense of the people. My experience with Justice Owen is the opposite. She is an extremely compassionate, caring woman, who time and again has used her influence on behalf of noble causes.

I met Justice Owen in January, 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force, a working group dedicated to promoting equality for women involved in the Texas legal system. I had given written and oral testimony at the state-wide hearings in various Texas cities as the original Gender Bias Task Force was preparing the State's first comprehensive Gender Bias Report. Justice Owen was one of the three editors of the final Gender Neutral Handbook that is now available to all attorneys and judges in Texas.

Later, in the years 1996 through 1999, I worked with Justice Owen on Family Law 2000, an important state-wide effort, initiated in great part by Justice Owen. Some of the main beneficiaries of this project were the children who are too often ensnared in the legal system. The committee was comprised of judges, lawyers and psychologist, working throughout the state, to

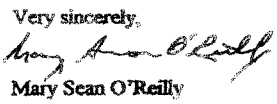
review and implement systemic change in family law and civil procedure regulations. The goal of Family Law 2000 was to make the court system practical, more helpful and affordable for Texas families. We achieved some important goals, including changes in our rules of Civil Procedure, in part due to the tireless efforts and collaboration of Justice Owen with other members of the Supreme Court of Texas.

On another occasion, Justice Owen worked in support of the *Amicus Curie* brief that went to the United States Supreme Court in support of IOLTA funds being available for legal services to indigents in Texas. There have been at least two occasions where Justice Owen and I have had long and comprehensive discussions about the need for quality legal services for families that live in poverty, and I am convinced of her dedication to ensuring that the poor have access to the courts.

Political affiliations and preferences have never gotten in the way of my professional collaborations with Justice Owen. I am a life-time member of the NAACP and have served on the national board of NETWORK, a well-respected Catholic social justice lobby in Washington, D.C. from 1978 through 1984. I have contributed to Emily's List, the Southern Poverty Law Center, The Carter Center, Habitat for Humanity, Democratic US Senate Committees and several Democratic Presidential, House of Representative, State and County Democratic elections for many years, including the presidential campaign of Al Gore and (through Emily's List) to your Senate campaign. I am a pro-choice Democrat.

Notwithstanding our political and philosophic differences in some important areas, I consider Justice Owen to be a long-standing professional colleague of the highest caliber. In the almost eight years I have known Justice Owen, she has always been refined, approachable, even-tempered and intellectually honest. Although we are not close personal friends, we have shared stories of our families, women's issues and some of the challenges that face jurists. She has demonstrated her compassion toward women, families, and the poor. She has used her extremely high level of legal ability and skill for the betterment of her community. I trust Justice Priscilla Owen's sense of the role of the judiciary in the federal and state systems implicitly. I believe Justice Owen to be highly qualified for the federal bench and I know that she will act with great care and independence if given the opportunity to serve our Nation in this capacity. I urge you to reject the absurd attacks that have been made against her and vote to confirm Justice Owen.

Very sincerely,



Mary Sean O'Reilly

Greer H. Pagan
3790 Drake
Houston, Texas 77005

July 23, 2002

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United State Senate
224 Russell Senate Office Building
Washington, D.C. 20510

RE: Nomination of Justice Priscilla Owen

Dear Mr. Chairman:

As a former Briefing Attorney for Texas Supreme Court Justice Priscilla Owen, I am writing in support of the nomination of Justine Owen to serve on the United States Fifth Circuit Court of Appeals. Through my experience, I know Justice Owen to be a thoughtful and thorough justice. In her deliberations, she would interpret the law based on the language in a particular statute or contract, the common law of Texas or the "majority rule" of state courts from around the nation. In my opinion, she was not a "conservative activist" as is alleged by some of her opponents. She worked diligently to determine the law on each particular subject and apply the law to the facts of the case.

It appears that most of the criticism or concern regarding Justice Owen involve two cases: *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931 and *In re Doe*, 19 S.W.3d 249. In the *Enron* case, Justice Owen is accused of impropriety because she accepted political contributions from the Enron political action committee. *Enron* was a case in which a unanimous court (including two Democrats) upheld a state statute. Justice Owen should not be tarnished for the concerns with the system of judicial elections in Texas. In the *Doe* case, a very divided Court was forced to interpret a then-recent state statute on an expedited basis. A thorough review of the opinions in the *Doe* case shows that Justice Owen closely adhered to the jurisprudence of the United States Supreme Court, and her opinion struck a "middle ground" in interpreting the difficult statute. I am sure that after reviewing the actual opinions in these cases, the members of the Judiciary Committee will understand that these accusations and criticisms are unfounded.

The states of Texas, Louisiana and Mississippi would be well served by Justice Owen. I urge the Senate Judiciary Committee to approve the nomination of Justice Owen and to recommend her approval to the full Senate.

Very truly yours,

Greer H. Pagan

cc: The Honorable Orrin Hatch
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Alberto Gonzales
Counsel to the President

Mr. Viet D. Dinh
Assistant Attorney General

UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

September 3, 2002

The Honorable Kay Bailey Hutchison
United States Senate
Washington, D.C.

Dear Senator Hutchison:

You have asked for my opinion concerning whether a state court judge should recuse herself from deciding a case involving a corporation, employees of which contributed to her campaign for judicial election. I understand that this question has arisen in the confirmation hearing of at least one nominee for the United States Court of Appeals, Judge Priscilla Owen of the Texas Supreme Court. I have taught and published extensively on the ethics of lawyers and judges and have given this question considerable thought before writing you this response.

I strongly believe that in most situations a judge should not recuse herself from cases involving a company whose employees contributed to her campaign. A judge also should in most cases not recuse herself from cases involving individuals who contributed to her campaign. To conclude otherwise would give undue weight to the persuasive power of campaign contributions over judicial decision making, and, worse yet, create an easy avenue for litigants to disqualify judges they do not like by contributing to their campaigns. Far better than such a mechanistic and counterproductive recusal rule, which is unsupported in case law and rules of judicial ethics, would be for states to adopt the federal system of appointing, rather than electing, judges. I understand that Justice Owen and other reform minded jurists have urged this solution in Texas (along with retention elections), so far without success.

A system of choosing judges by popular election necessarily involves campaign contributions and the appearance of impropriety that comes with them. I understand, for example, that seven of the nine current Texas Supreme Court Justices received campaign contributions from Enron Corporation employees and that Enron has been a party to several cases before that Texas Supreme Court over the past seven years. Unless one is able to discern which corporations will be the future Enrons, and which will be more responsible corporate citizens, however, it makes no sense to selectively criticize a judge or justice for accepting contributions from Enron employees and not for receiving contributions from employees of other corporations. The only rational method of avoiding the appearance of impropriety created by such contributions would be to ban *all* contributions to judicial campaigns. Because of well-known constitutional constraints on campaign finance legislation, however, a broad ban on campaign contributions would probably require substitution of an appointed judiciary for an elected one. This, once again, is the solution that I understand Justice Owen has urged for the State of Texas.

phone 217-333-0931 • *fax* 217-244-1478

If, however, a state chooses to have judicial elections, appearance of impropriety cannot be avoided simply by requiring judges to recuse themselves from cases involving campaign contributors. First, such a broad recusal rule would implicate judges in so many conflicts that it might be impossible for some cases to be heard at all. Second, such a broad recusal rule would make it extremely easy for litigants to "game" the system simply by making contributions to judges they do not want deciding cases to which they are parties. Trial court judges known to be hard on corporate defendants could, for example, be precluded from hearing product liability cases, and entire sectors of appellate courts could be precluded from hearing appeals. Allowing corporate defendants, or any defendants, thus to choose the judges that hear their cases by contributing to other judges' campaigns, would create an actual impropriety far worse than any apparent impropriety created by the campaign contributions themselves. Criticizing a state judge, or denying her confirmation to the federal bench, because she did the *right* thing and did not recuse herself from a case solely on account of campaign contributions from employees of a party, will invite judges in the future to recuse themselves routinely from such cases. This in turn will invite forum shopping litigants to make contributions in order to induce recusal. Such a simplistic, and just plain *wrong*, approach to judicial ethics will have only perverse effects on the quality of justice in Texas and elsewhere in the country.

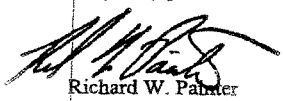
Indeed, the Texas courts have already addressed this question in cases squarely on point. See Williams v Viswanathan, 65 SW3d 685 (Texas App. 2001), citing other similar case law. In *Williams*, the plaintiff sought recusal of a justice because his attorney ran against the justice in a primary, the plaintiff had participated in his lawyer's campaign, and opposing counsel's law firm had contributed to the justice's campaign. The plaintiff's motion for recusal was denied for many of the aforementioned reasons, including that such recusal could lead to an endless round of recusal motions, for example because someone involved in a case refused to contribute to a justice's campaign or contributed to an opponent's campaign. The appellate court affirmed, stating that "[I]ndeed, if such a path were begun, very seldom would the justices of our two courts of last resort be able to perform their mandated duties." Id. at 689.

It comes as no surprise, therefore, that Texas does not require recusal of a judge on account of campaign contributions. Indeed, it would be inappropriate for a judge to voluntarily recuse herself routinely from cases involving campaign contributors or their employees, a recusal policy that would beg for contributions from parties seeking recusal of the judge (a thinly veiled form of extortion by the judge). It thus comes as no surprise that Texas, like other jurisdictions, provides that judges "shall hear and decide matters assigned to the judges except those in which disqualification in required or recusal is appropriate." Texas Code of Judicial Conduct Canon 3(B)(1). In cases where recusal is inappropriate, therefore, it would be unethical for a judge not to hear a case, and most cases involving campaign contributors fall into this category. See *Williams*, supra.

There are, of course, a few exceptions. A situation where a large contribution was made immediately before the donor's case went to trial could be one, although the best approach would be for the campaign contribution to be returned. Another situation would be where the donor explicitly made clear an expectation of favorable treatment, a situation in which the contribution again should be returned. I understand, however, that none of these exceptions applies to the contributions received by Justice Owen, or those received by any of her colleagues on the Texas Supreme Court, from employees of Enron Corporation.

Finally, while I fully understand the desire to require judges to return campaign contributions in a broader range of circumstances, or to otherwise eradicate unsavory appearances created by judicial campaign contributions, such changes should be imposed by the drafters of the Texas Code of Judicial Conduct, not by members of the United States Senate Judiciary Committee through ex-post and ad-hoc moralizing in a confirmation hearing. Rules of judicial ethics in state courts should be carefully considered and drafted by the judges and lawyers affected by them, not by Senators who have no genuine interest in state courts and who seek only to use deliberation over state court ethics as a way to defeat a state judge's nomination to the federal bench. Texas, if it decides to require judges to return campaign contributions in a broader range of circumstances, or better yet to follow Justice Owen's advice and move away from judicial elections altogether, should do so because Texans decide that justice in Texas is better served by these reforms. Neither Justice Owen nor any other current or former member of the Texas Supreme Court should be subjected to criticism by the United States Senate for honestly participating in a system of judicial elections and campaign contributions that the people of Texas have chosen for themselves.

Very truly yours,



Richard W. Painter
Professor of Law
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Darrell E. Jordan
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jordand@hughesluce.com

July 15, 2002

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
224 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

As past presidents of the State Bar of Texas, we join in this letter to strongly recommend an affirmative vote by the Judiciary Committee and confirmation by the full Senate for Justice Priscilla Owen, nominee to the United States Court of Appeals for the Fifth Circuit.

Although we profess different party affiliations and span the spectrum of views of legal and policy issues, we stand united in affirming that Justice Owen is a truly unique and outstanding candidate for appointment to the Fifth Circuit. Based on her superb integrity, competence and judicial temperament, Justice Owen earned her *Well Qualified* rating unanimously from the American Bar Association Standing Committee on the Federal Judiciary - the highest rating possible. A fair and bipartisan review of Justice Owen's qualifications by the Judiciary Committee certainly would reach the same conclusion.

Justice Owen's stellar academic achievements include graduating *cum laude* from both Baylor University and Baylor Law School, thereafter earning the highest score on the Texas Bar Exam in November 1977. Her career accomplishments are also remarkable. Prior to her election to the Supreme Court of Texas in 1994, for 17 years she practiced law specializing in commercial litigation in both the federal and state courts. Since January 1995, Justice Owen has delivered exemplary service on the Texas Supreme Court, as reflected by her receiving endorsements from every major newspaper in Texas during her successful re-election bid in 2000.

The status of our profession in Texas has been significantly enhanced by Justice Owen's advocacy of *pro bono* service and leadership for the membership of the State Bar of Texas. Justice Owen has served on committees regarding legal services to the poor and diligently worked with others to obtain legislation that provides substantial resources for those delivering legal services to the poor.

HUGHES • LUCE LLP

Justice Owen also has been a long-time advocate for an updated and reformed system of judicial selection in Texas. Seeking to remove any perception of a threat to judicial impartiality, Justice Owen has encouraged the reform debate and suggested positive changes that would enhance and improve our state judicial branch of government.

While the Fifth Circuit has one of the highest per judge caseloads of any circuit in the country, there are presently two vacancies on the Fifth Circuit bench. Both vacancies have been declared "judicial emergencies" by the Administrative Office of the U. S. Courts. Justice Owen's service on the Fifth Circuit is critically important to the administration of justice.

Given her extraordinary legal skills and record of service in Texas, Justice Owen deserves prompt and favorable consideration by the Judiciary Committee. We thank you and look forward to Justice Owen's swift approval.

Sincerely,

Darrell E. Jordan

On behalf of former Presidents of the State Bar of Texas

Blake Tartt	Jim D. Bowmer
James B. Sales	Travis D. Shelton
Hon. Tom B. Ramey, Jr.	M. Colleen McHugh
Lonny D. Morrison	Lynne Liberato
Charles R. Dunn	Gibson Gayle, Jr.
Richard Pena	David J. Beck
Charles L. Smith	Cullen Smith

cc: The Honorable Orrin G. Hatch
Office of Legal Policy U. S. Justice Department

LORI R.E. PLOEGER
6516 EAST HILL DRIVE
AUSTIN, TEXAS 78731
(512) 346-0828

JUNE 27, 2002

VIA FACSIMILE AND U.S. MAIL

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, D.C. 20510

Re: Confirmation of the Honorable Priscilla R. Owen

Dear Mr. Chairman:

I am writing to express my unequivocal support for the nomination of the Honorable Priscilla R. Owen, Associate Justice of the Supreme Court of Texas, as a Judge for the United States Court of Appeals for the Fifth Circuit. It was my privilege to serve as Justice Owen's briefing attorney from January to August 1995.

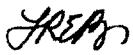
As Justice Owen's briefing attorney, I had the opportunity to observe Justice Owen carrying out her responsibilities on a daily basis. During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly. Justice Owen works indefatigably, reading and analyzing the parties' briefs and the relevant legal authorities, often into the wee hours of the night. In addition to her impeccable work ethic, Justice Owen also brings to the bench a keen legal intellect, which is reflected in well-written opinions that are well-grounded in precedent.

Justice Owen is a role model for me and for other women attorneys in Texas. She attended law school in the mid-1970s, at a time when the ratio of women-to-men was still one in ten at best. She not only attended law school, she excelled, graduating third in her class and serving on the *Baylor Law Review*. Shortly thereafter, she again distinguished herself by obtaining the highest score on the Texas Bar Examination. Her stellar performance continued in her career as a practicing attorney. At age 30, she was made partner of a major Houston law firm when female partners were a rarity. During her 17 years at the firm, she earned the admiration, respect, and friendship of her colleagues. Now in her second term on the Texas Supreme Court, Justice Owen continues to demonstrate the outstanding qualities that have consistently distinguished her as a leader in the legal profession.

June 27, 2002
Page Two

I know that she will bring the same intelligence, diligence, and strength of character to her position as a Circuit Judge for the Fifth Circuit. I strongly urge you and the other members of the Senate Judiciary Committee to support her confirmation.

Sincerely,



Lori R.E. Ploeger

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
Counsel to the President

Viet D. Dinh
Assistant Attorney General

F. John Podvin, Jr.
Partner

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jpodvin@bracepatt.com

July 19, 2002

Via Fax: 202-224-9787

Senator Herb Kohl
United States Senate
SH-330 Hart Senate Office Building
Washington, DC 20510

Re: Justice Priscilla Owen

Dear Senator Kohl:

I am a Wisconsin native who has been transplanted down to Texas. In addition to my loyalty to the Green Bay Packers and the Milwaukee Bucks, I brought with me down to Texas the common sense learned through living in the State of Wisconsin for the first 25 years of my life. That common sense has served me well in Texas, especially in the area of judging the character of people.

I am writing you to encourage you to support Justice Priscilla Owen, President Bush's nominee to serve as a Justice on the Fifth Circuit Court of Appeals. Justice Owen has received broad bipartisan support for her service on the Supreme Court of Texas. Her reputation is that she is one of the smartest judges in Texas who knows the law backwards and forwards, she is very conscientious and is very compassionate on children's and family issues. Her work and judgment are of the highest quality, as reflected in the American Bar Association's highest rating for judges. Importantly, approving Justice Owen to the Fifth Circuit Court of Appeals will add to the diversity of the Fifth Circuit.

As someone with deep Wisconsin roots, I urge you to support the nomination of Justice Owen for the Fifth Circuit Court of Appeals.

Very truly yours,

F. John Podvin, Jr.

FJP/jlh

POA

Policyholders of America 888-648-8823

July 12, 2002

Senator Patrick Leahy,
Senator Edward Kennedy,
Senator Joseph Biden,
Senator Herb Kohl,
Senator Dianne Feinstein,
Senator Russ Feingold,
Senator Charles Schumer,
Senator Richard Durbin,
Senator Maria Cantwell,
Senator Arlen Specter,
Senator Jon Kyl,
Senator Mike DeWine,
Senator Jeff Sessions,
Senator Sam Brownback,
Senator Mitch McConnell
Senator John Edwards
Senator Orrin Hatch,
Senator Strom Thurmond and
Senator Chuck Grassley

By fax to individual offices

Dear Senators:

Policyholders of America ("POA") is a national nonprofit association of policyholders with nearly 20,000 American families in our membership. Every state is well represented by our members. Members range from families on welfare to some of the most affluent in America. Members are all registered voters: 48% voted in Republican primaries, 44% voted in Democratic primaries. Our organization works closely with members from both sides of the aisle on issues impacting the American homeowner, specifically insurance-related issues. We also endorse and oppose various candidates and nominees – both Democrats and Republicans.

As the President of POA, my membership has asked me to write you regarding a nominee to the US Court of Appeals (Fifth circuit), Justice Priscilla Owen.

It may surprise you to learn that a consumer organization like ours *supports* Justice Owen for the US Court of Appeals. A few consumer groups oppose her appointment. Our association of consumers respectfully disagrees: we believe in listening to the voters.

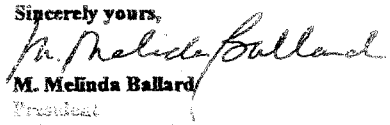
Texans went to the polls and overwhelmingly endorsed Justice Owen. That many Texans could not be wrong. If you believe in the democratic process, Justice Owen deserves to be appointed to the Fifth Circuit.

It should be noted that none of our members have cases before either the Texas Supreme Court of the Fifth Circuit Court of Appeals so we have no "dog in this hunt". The truth is, we know how costly litigation is to pursue, so our organization encourages members to only use the legal system as a last resort.

Justice Owen may be a conservative but she is a fair and impartial Justice. She's a tough Texas gal with heart. She would be a valued asset to the US Court of Appeals for the Fifth Circuit and we urge you to appoint her to the Federal Bench.

Thank you for the opportunity to share our association's views on this important appointment. I welcome any questions or comments you may have and a chance to elaborate on our endorsement of Justice Owen. I also invite you to go to our website and see some of the legislative issues, including Congressman Conyers' HR 5040, that we are endorsing. Our association has also been invited by the House Committee on Financial Services to testify this week about the growing mold problem facing the American homeowner. Hopefully, some time soon, the Senate will address this issue too, so safeguards can be put in place that protect the American homeowner.

Sincerely yours,



M. Melinda Ballard
President
Policyholders of America
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The Last Redoubt: On the Trumpet-Call That Is Justice Owen's Ordeal

BY ROSS MACKENZIE Jul 28, 2002
EDITOR

They're doing unconscionable things to Priscilla Owen, but it's merely a trumpet-call about battles to come.

Of all the things about George Bush that upset the left, the same thing upsets it most that upset it about Ronald Reagan - his conservatism. And what upsets the left most about his conservatism is his determination to put conservatives on the federal courts. The son of the father who gave us Clarence Thomas (and dismal David Souter) for the Supreme Court, is determined to fill seemingly every vacancy across the federal bench with those of Thomas' judicial thinking.

It's infusing the left with the screaming meemies.

Given that there have been no Supreme Court vacancies during this President Bush's term, consider please the appellate courts. Of the 32 Circuit Court nominees sent up by the President, the Senate Judiciary Committee - headed by Vermont's Patrick Leahy, the worst Senator - has deigned to grant hearings to only 17. Worse, of the 11 initial nominees sent up in May of last year, the committee has held hearings on only five; the full Senate has confirmed only three.

OVER THE YEARS, nominees to the federal bench have been blasted, even rejected, for their point of view. Yet rarely has it been the policy to the current degree of an ideologized party controlling the Senate confirmation process to oppose just about all nominees flat-out on political and ideological grounds.

Yes, the lefties opposed Robert Bork. Yes, they "borked" Clarence Thomas. And well earlier they stopped the distinguished Clement Haynesworth and delivered major hits on William Rehnquist, who now sits as the nation's Chief Justice. But now the extreme left has gone over the edge.

Its mouthpieces killed a nominee for the 5th Circuit on hokeyed-up civil rights grounds. They oppose a nominee for the 3rd Circuit because he was a member of an all-male fishing club. They oppose a nominee for the 4th Circuit because he worked as an aide to Strom Thurmond. These days it's Justice Owen's turn: They've been ripping this nominee for the 5th Circuit because - please sit down - her opinions for the Texas Supreme Court suggest she is pro-business and in favor of parental notification.

REALLY.

Pro-abortion extremists hate Justice Owen because she has had the audacity to uphold a Texas law requiring family conversation between parents and their minor daughter contemplating an abortion. And oh dread dread, in this anti-business hour she supports the business sector.

(How much better has been the leftist reception of Rowan Williams, a self-styled "peacenik" just designated the next Archbishop of Canterbury, head of the worldwide Anglican - in the U.S., Episcopal - Communion. Inter alia, he favors ordaining homosexuals [and never mind the problems in the Catholic Church caused largely by homosexuals in the priesthood], terms American operations in Afghanistan "morally tainted," preaches understanding of the motivations of terrorists, says an American enterprise to remove Saddam would be "immoral and illegal," and - as a rank anti-capitalist - detests the Western corporate culture, singling out Disney for its exploitation of children. The left finds him just peachy. Let us all sing "Kumbaya.")

No I'm okay, you're okay regarding Justice Owen. In malign contrast, because she favors not only parental notification but capitalism, lefties in the lobbies and in the U.S. Senate find her disqualified for a seat on the 5th Circuit Court of Appeals.

THIS STUFF has got to stop, but it likely will not stop until the Republicans take control of the Senate. In a country still closely divided on liberal-conservative ideological grounds, the courts are a last redoubt - the battle for them bitter and desperately fought. And imagine the coming combat over Supreme Court vacancies.

Priscilla Owen waited 14 months for a hearing. Senator Leahy has explained the slow pace of hearings and Committee votes as a consequence of the terror-filled "tumultuous year for the nation and also for the Senate." Yet he goes on unctuously - with his minions doing the dirty work - mugging, mauling, and intimidating good judicial nominees (including women and minorities) for their allegiance to a point of view, an ideology, contrary to his own.

Perhaps some surprising sectors are beginning to relent. In an editorial last week The Washington Post called upon the liberal opposition to hike the pace of hearing and confirmation so the appellate courts, at least, can ease their backlogs and begin to function efficiently. It wrote:

Justice Owen is indisputably well qualified . . . .So rather than attacking her qualifications, opponents have sought to portray her as a conservative judicial activist . . . .While some of Justice Owen's opinions - particularly on matters related to abortion - seem rather aggressive, none seems to us beyond the range of reasonable judicial disagreement . . . .Liberals will no doubt disagree with some opinions she would write on the 5th Circuit, but this is not the standard by which a President's lower-court nominees should be judged . . . .In Justice Owen's case, the long wait has produced no great surprise. She is still a conservative. And that is still not a good reason to vote her down.

Oyez!

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July 19, 2002

Senator Patrick J. Leahy
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Via Facsimile

Re: **Justice Priscilla R. Owen**

Dear Senator Leahy:

I am a lawyer at Bracewell & Patterson, L.L.P. in Dallas, Texas. I am writing you because I know Justice Priscilla R. Owen personally and am confident that she will be an asset to our Fifth Circuit. I had the privilege to work as a briefing attorney for the Supreme Court of Texas from 1999-2000. In that capacity, I observed Justice Owen on a daily basis. My first impression of her was that she was very quiet, shy, and would not be very vocal during discussions with her colleagues. I was wrong. Justice Owen is extremely intelligent, and more importantly, she took her job as a Justice seriously. I had no doubt that she read all of the numerous petitions we had each week, and she was prepared to advocate her position on each one. I admired her for being a good listener and for standing up for her opinions. When I think of Justice Owen, I think of a judge who is thorough in her analysis, dedicated to doing the "right thing" versus what makes sense politically, and a prodigious writer. Additionally, I recall during oral arguments that Justice Owen was not bashful about asking counsel the most challenging questions. This type of dialogue benefits the bench and bar.

Besides her obvious competency as a Judge, I also admire Justice Owen as a person. She is very humble and kind. She takes a particular interest in women's, children's, and family matters. Each Christmas, the Court had an auction for a children's charity. Justice Owen was an enthusiastic supporter. I also appreciate how much time she volunteers to judge law school moot court competitions. I have been a competitor and now coach of the Southern Methodist University School of Law moot court team. In my five years of participation, I do not recall Justice Owen ever missing an opportunity to judge the final round at the Texas Young Lawyers' Association moot court competition.

This is the first time that I have written to a United States Senator. I grew up in Canton, Ohio, and relocated to Texas when I worked on Governor Ann Richards' re-election campaign in 1994. Although I identify myself as a Democrat, I will always vote for a

person and not for a party. Justice Owen is a person I whole-heartedly endorse because she is a woman with an impeccable character. I am confident that she is the right choice for our Fifth Circuit.

Very truly yours,

Bracewell & Patterson, L.L.P.

Tricia J. Robinson

Tricia J. Robinson

TJR/jab

171690.1

Linda L. Schlueter

11515 Whisper Breeze
San Antonio, Texas 78230

Attorney at Law
July 23, 2003

Manuel A. Miranda
Via Fax: 202-228-1698

Re: Justice Priscilla Owen

Dear Mr. Miranda:

I am writing in support of Texas Supreme Court Justice Priscilla Owen's nomination to the Court of Appeals for the Fifth Circuit. Justice Owen is a well qualified and respected justice and her nomination should be approved.

As a former law professor and graduate of Baylor Law School, I know of the academic rigors of Baylor Law School and her accomplishments of serving on the Baylor Law Review and graduating cum laude. She continued to distinguish herself by earning the highest score on the Texas Bar Exam.

As a jurist, she is noted for her integrity, character, and intellect. Based on her record, the American Bar Association (ABA) unanimously rated her well qualified, the ABA's highest rating. She has also received the widespread support of Texans in her two elections to the Texas Supreme Court. Contrary to what her detractors say, she is a moderate judge who interprets the law. Although I do not agree with all of her decisions and would favor more conservative nominees, I believe that she is a fair judge.

I am also very concerned that other nominations by President Bush are not being approved. This is a disservice to all Americans. When we do not have enough judges and therefore justice is delayed, then justice is also denied. It is my understanding that there is an unprecedented 19% vacancy rate on the United States Courts of the Appeals. I urged you to put [illegible] qualified nominees such as Justice Owen.

Thank you for your consideration.

Sincerely,

Linda Schlueter

Linda L. Schlueter

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Victor E. Schwartz
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July 18, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: **Nomination of Texas Supreme Court Justice Priscilla Owen**

Dear Mr. Chairman:

Throughout the past three decades, many members of your Committee have been kind enough to ask my views about tort law. I have taught in law school, and practiced on behalf of plaintiffs in the 1970s. I currently practice in the defense firm of Shook, Hardy & Bacon, L.L.P. and represent the American Tort Reform Association. You have appreciated that when I share my views with you, I try my utmost to be objective. Because almost anyone's views on judges are likely to be seen as having bias, I have refrained from commenting on any judicial nominee.

I am now writing you about Texas Supreme Court Justice Priscilla Owen because she has been attacked as being unfair in the very area of my expertise, tort or liability law. Since 1976, I have been co-author of the most widely used torts textbook in the United States, *Prosser, Wade & Schwartz's Cases and Materials on Torts*. I have also served on the three principal American Law Institute Advisory Committees on the new *Restatement of Torts (Third)*. The study of tort law has been the love of my professional life.

Because of my academic and practice obligations, I have had a very deep interest in opinions of law in the field of torts. Naturally, I am familiar with state supreme court judges or justices who are thought to be "pro-plaintiff" or "pro-defendant." In that regard, when I heard about controversies surrounding Justice Owen, I was somewhat puzzled because I had not placed her in either group.

This past weekend, I reviewed most of her principal opinions in tort law. My review of Justice Owen's opinions indicates that any characterization of Justice Owen as "pro-plaintiff" or

"pro-defendant" is untrue. Those who have attacked her as being "pro-defendant" have engaged in selective review of her opinions, and have mischaracterized her fundamental approach to tort law.

Justice Owen's fundamental approach to tort law is to make it stable. On the one hand, she is not a judge who would be likely to jump to the front of a plaintiffs' lawyers petition to expand the scope of tort law. Furthermore, she would be unlikely to allow claims for brand-new types of damages, such as hedonic damages, or create cutting-edge liability claims (*e.g.*, allowing a lawsuit against a fast food chain, where there was no showing that an individual plaintiff's health was actually harmed by eating at that chain). On the other hand, she would not and has not arbitrarily thwarted the rights of plaintiffs under existing tort law.

Let me give you just a few examples. In *Merrell-Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), a decision for which she was roundly criticized by a group called "Texans for Public Justice," Justice Owen held that the evidence was legally insufficient to establish that a birth defect was caused by exposure to the drug Bendectin.® Bendectin® is the only drug that helps alleviate the severe symptoms of morning sickness. It is still approved by the U.S. Food and Drug Administration and regulatory agencies throughout the world. As Justice Owen recognized, the attempts by plaintiff's counsel to tie the birth defects of the plaintiff's child to Bendectin® in the *Havner* case were insufficient. The Supreme Court of the United States itself recognized, in a case involving that very drug, that judges should act as gatekeepers, and not permit juries to make judgments based on bad science. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

I am not surprised that the Association of Trial Lawyers of America (ATLA), the organized plaintiffs' bar, and those who have empathy with that group criticized Justice Owen for her decision. They also criticized the United States Supreme Court when it rendered the *Daubert* decision. ATLA and its sympathizers believe that judges should not act as gatekeepers; rather, they believe that juries should be permitted to weigh scientific evidence as they choose.

Here is the rather interesting point. In a case decided almost simultaneously with *Havner*, not mentioned by "Texans for Public Justice" or other groups criticizing Justice Owen, she would have allowed an adult to pursue a sexual abuse claim against an alleged abuser who purportedly did the wrongful acts when the plaintiff was a child. In the case *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996), expert testimony indicated that the plaintiff had "repressed memories" that arose when the plaintiff was an adult. The majority held that expert testimony was insufficient to warrant the application of the "discovery rule," which would have tolled the statute of limitations. It required "objectively verifiable" evidence of abuse to apply the discovery rule and toll the statute. Justice Owen noted, however, that such evidence was often unavailable, and the unavailability of the evidence is frequently due to acts done by the alleged abuser. She would have held that the repressed

memory evidence was sufficient to toll the statute and allow the claim. I recommend that Members of this Committee read this case and note that Justice Owen wrote the sole dissenting opinion in the case.

In a later case, Justice Owen prevented another plaintiff from falling into a statute of limitations trap. A patient brought a malpractice case against a surgeon in his individual capacity. The patient later amended his complaint, and named the surgeon's professional association as a defendant. The association moved to dismiss the case because the statute of limitations had expired by the time the suit was brought against the association. Writing for the Texas Supreme Court, Justice Owen held that the cause of action brought against the surgeon in his individual capacity preserved the potential of the claim against the association. *See Chilkewitz v. Hyson*, 22 S.W.3d 825 (Tex. 1999).

Justice Owen's views about product liability law strike the same balance. For example, Justice Owen joined in a Supreme Court of Texas opinion that considered a question certified by a federal court as to whether a manufacturer of a product used by adults – a cigarette lighter – might have a duty, in some situations, to childproof the product. Justice Owen joined with the Court in holding that a manufacturer may have such an obligation. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999).

One finds the same sense of "balance" in Justice Owen's opinions in other areas of tort law. In a very interesting opinion, Justice Owen joined with the Texas Supreme Court to strip a defendant business of its defenses based on a plaintiff's fault when that defendant business had decided to opt out of the workers' compensation system. Justice Owen supported the sound public policy that would discourage businesses from opting out of workers' compensation and taking their chance on their vagaries of a tort lawsuit in the workplace. As you and Members of your Committee know, a fundamental reason why workers' compensation was adopted in the first place is so that a worker's fault does not preclude him or her from obtaining compensation for a workplace injury. *See Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000).

I wish to reiterate that I am not suggesting that Justice Owen is a plaintiffs' lawyer's "dream judge." She is not. For example, when the Texas Supreme Court addressed the issue of whether jurors should be told that if they find a plaintiff more than 50% responsible for his or her own injury, the plaintiff might lose, Justice Owen dissented from the majority. The majority found that such information was allowed to go to the jury. Justice Owen believed such action could cause jurors to look more at the effect of the 50% rule than the facts of the case. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998). While not everyone (including myself) would agree with Justice Owen's decision, it is anchored in logical judicial precedent and has a clear public policy basis. *See* Victor Schwartz, *Comparative Negligence*, §17-5(a) (3d Ed. 1994).

My fundamental point is that in the area of tort law, Justice Owen is a moderate jurist; she is neither a trailblazer for plaintiffs nor a captive of corporate interests.

I would be pleased to answer any questions or inquiries by Members of your Committee, and I value your taking the time to read this statement.

Sincerely,

Victor E. Schwartz

cc: The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary

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THE AMERICAN CENTER FOR LAW AND JUSTICE®

Jay Alan Sekulow*
Chief Counsel

*Admitted in Georgia

July 12, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

It is my distinct honor to recommend Justice Priscilla Owen to the U.S. Court of Appeals for the 5th Circuit.

Priscilla Owen is currently a Justice on the Supreme Court of Texas. Prior to her election to that court in 1994, she was a partner in the Houston office of Andrews & Kurth, L.L.P., where she practiced commercial litigation for seventeen years. She earned a B.A. cum laude from Baylor University and graduated cum laude from Baylor School in 1977. While at Baylor, she was a member of the Baylor Law Review. She also earned the highest score in the state on the Texas Bar Exam.

Justice Owen has served as the liaison to the Supreme Court of Texas' Court-Annexed Mediation Task Force and to statewide committees regarding legal services to the poor and pro bono legal services. She was part of a committee that encouraged the Texas Legislature to enact legislation that has resulted in millions of dollars per year in additional funds for providers of legal services to the poor. She has been nominated for a position designated as a judicial emergency by the Administrative Office of the United States Courts.

Justice Owen is eminently qualified and I urge her confirmation by the Senate.

Sincerely,

Jay Alan Sekulow
Chief Counsel

cc: The Honorable Orrin G. Hatch, Ranking Member, Committee on the Judiciary
Office of Legal Policy, U.S. Department of Justice

STATEMENT OF
SENATOR JEFF SESSIONS
ON THE NOMINATION OF PRISCILLA OWEN
September 5, 2002

Mr. Chairman, the nomination of Priscilla Owen represents the culmination of a very dangerous transformation of the confirmation process from a constitutional duty into a bloody political campaign. We have heard many purported reasons for the transformation of the process, including:

- that during the first 100 years of the country the Senate rejected 1 out of 4 Supreme Court nominees because of their ideology,
- that the burden should lie with the nominee to prove their worthiness of confirmation,
- that the Supreme Court is a "right-wing" court,
- that we must respect the ABA rating of the nominee,
- that we cannot allow a circuit judge to overrule Roe v. Wade,

- that we cannot have a right-wing judicial activist on any court who would be out of the mainstream, and

- that we can oppose a judicial nominee based on their personal political views.

Upon close examination in the matter of Justice Priscilla Owen, each of these reasons proves unavailing except the last one – politics.

First 100 Years

We have heard that during the first 100 years of our country's history, the Senate rejected 1 out of 4 Supreme Court nominees because of the nominees' ideology. The record, however, reveals that while a number of nominees to the Supreme Court were not confirmed, it was generally not because of the nominees' ideology. Some nominees, like William Smith of Alabama, declined to serve because of the Court's lack of prestige at the time, some, like Roger Taney, were delayed and then confirmed, and others were not confirmed due to the lame-duck or near lame duck status of the nominating President. For example, Henry Stanberry was nominated by impeached President Andrew Johnson, and defeated because of Johnson's unpopularity, not because of his own views. In fact, only a very few were

rejected because of their own ideology. Thus, the impression that the Senate took an early vigorous role in policing the ideology of the Court is not true.

The Burden

We have heard that the burden should be shifted to the nominee to demonstrate his or her worthiness for confirmation beyond the paper record. If history is to serve as the guide, however, we would do well to examine it with respect to the burden, or lack thereof, on nominees to prove their worthiness of confirmation. During the first 130 years of our country's history, the Senate did not ask nominees any questions at hearings, probing or otherwise. The first nominee to even appear before the Senate was Harlan Fiske Stone in 1925, and nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan II in 1955. Occasionally, the Committee asked a few nominees questions in writing, but there was no probing examination and cross-examination in Committee. It would be difficult indeed for a nominee to bear some illusory burden of earning confirmation, to submit to vigorous cross examination, and to personally convince senators on the Committee that he truly meets the criteria in a way not reflected in his record, if the nominee was absent.

Right-Wing Court

We have heard that the Senate must defeat conservative judicial nominees because the current Supreme Court is far to the "right" of the mainstream and thus in need of "balancing" by "moderate" appointees. The record, however, reveals that the current Court has protected burning the American flag, United States v. Eichman, 496 U.S. 310 (1990), banned voluntary student prayer at high school football games, Sante Fe Independent School District v. Doe, 530 U.S. 290 (2000), stopped the police from using heat sensors to search for marijuana growing equipment, Kyllo v. United States, 121 S.Ct. 2038 (2001), struck down a law to ban virtual child pornography, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), and reaffirmed and expanded abortion rights to include partial-birth abortion, Stenberg v. Carhart, 530 U.S. 914 (2000).

ABA Rating

We heard that the ABA rating was the "Gold Standard" for judicial nominees. But President Bush's nominees are all rated "Qualified" or "Well Qualified." In fact, the ABA unanimously rated Priscilla Owen "Well Qualified."

Roe v. Wade

We have heard that we can't have a judge on the 5th Circuit who would reverse Roe v. Wade. But a judge on the 5th Circuit, or any circuit court, cannot overrule a Supreme Court precedent of any kind, including Roe v. Wade. In fact, in Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), the 5th Circuit adopted Roe v. Wade and Planned Parenthood v. Casey. In addition, Priscilla Owen has never voted against Roe v. Wade, as Byron White did,[1] never called Roe v. Wade "heavy handed judicial intervention," as Ruth Bader Gingsburg did,[2] never voted for a statute to ban abortion as Al Gore did,[3] and never supported a constitutional amendment to ban abortion as Dick Gephardt did.[4] Would all of these fail to pass the lock step

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[1] Doe v. Bolton, 410 U.S. 179 (1973) (White, J., dissenting).

[2] Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality an *Roe v. Wade*, 63 N.C.L.Rev. 375, 385-86 (1985) ("Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.").

[3] Gore voted to amend the Civil Rights Act to define a "person" to include an "unborn child[] from the moment of conception." *1984 CQ Almanac, 76-H to 77 - H, Gore vote on Amendment 242 to HR 5490, the Civil Rights Act of 1984.* This would have statutorily prohibited abortion.

[4] "Mr. Gephardt pledged in a campaign position paper entitled, 'Justice, Your Congressman and the Abortion Issue' released September 5, 1976, that

discipline of the Democratic majority on the Committee?

Judicial Activist

We have heard that we cannot have a conservative judicial activist on the federal bench who would be out of the mainstream. Judicial activism, however, is properly defined as a judge basing a judicial decision on something beside the applicable law, such as his or her personal political opinions. An activist can uphold or strike down a statute, but he or she does so based on political or personal beliefs, not on the text of the law, the intent of the law, or binding precedent. While judges may differ as to interpretations of legitimate sources of law, they should not disagree on which sources are legitimate. The ratified text, the intent of the Framers, and the precedents are legitimate. It is in this way that we ensure that the government derives its just powers from the consent of the governed.[5] Contemporary popular opinion, the raw power of 5 votes, and political

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he would sponsor and work for a Constitutional Amendment to prohibit any abortion except to save the life of the mother." Dick Gephardt, Press Release, 1976.

[5] THE DECLARATION INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed ....").

theories are not legitimate bases for constitutional interpretation. They do not arise from the consent of the governed as evidenced through the formal vote and ratification procedure of constitutional provisions or statutes.

Priscilla Owen's interpretation of a single Texas statute, the parental notification statute clearly follows legitimate sources of the law. She reads the statute clearly. She interprets the words of the statute using the pro-abortion cases of the Supreme Court upon which the statute was based. This is not judicial activism.

And it is less than credible to say that Priscilla Owen is out of the mainstream because she would uphold a Texas law, and the decisions of lower court judges requiring an underage girl to tell one parent before she has an abortion operation. Texas law requires teenage girls to get permission from their parents before they have a tattoo or an ear piercing. It is perfectly reasonable for Texas to at least require a simple FYI before an underage girl has an abortion operation. How does the girl choose a doctor? Who goes with her to the clinic for the operation? What does she do if an infection or other complication arises? That's why 82% of the American people favor parental permission before an underage teenage daughter has an abortion. Indeed, the Supreme Court has upheld such statutory permission/notification

procedures. Only the most extreme liberal groups, like NARAL, Planned Parenthood, and the ACLU, oppose this important right of parents.

Personal Politics

With all of the other reasons not passing muster, we are left with the true standard adopted by the Committee today – personal politics. With this standard, each party can simply strive to advance in the courts a political agenda item that did not garner enough votes to pass in the legislatures. Leading Democrat Joe Califano, has stated that because of "failures of the Congress and White House, ... to legislate and execute laws on a variety of matters of urgent concern to our citizens ..., federal courts have become increasingly powerful architects of public policy ...."[6] Thus, under this theory, the politics of a judicial nominee matters as much as the politics of a legislator. Therefore, we abandon the ideal of the rule of law and politicize the judiciary.

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[6] Joseph A. Califano, Jr., "Yes, Litmus- Test Judges," WASH. POST, Aug. 31, 2001, at A23 (stating that because of "failures of the Congress and White House, whether Democratic or Republican, to legislate and execute laws on a variety of matters of urgent concern to our citizens ..., federal courts have become increasingly powerful architects of public policy, and those who seek such power must be judged in the spotlight of that reality").

Thus, the constitutional nomination and confirmation process degenerates into a bald mudslinging political campaign. Interest groups of are motivated. Spin and character assassination are the order of the day. And votes of judges once on the court are based on the politics of the hour instead of the ratified and enacted law. The people lose control of the law. The law becomes detached from its traditional moorings and the twisting of the ordinary meaning of words to promote an ideological agenda is countenanced.

There are those like Laurence Tribe who say it is an unattainable goal to believe that "somehow the Olympian ideal of a federal judiciary once again above politics and beyond partisan reproach could be restored."[7] I emphatically reject this view.

Our rights are too important to depend on shifting sands of the political whims of unelected judges. Instead, they must depend on the rock of a written Constitution to be interpreted in a reasonably consistent manner as it applies to the changing and evolving facts that come before the courts

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[7] Testimony of Prof. Laurence Tribe before the Subcommittee on Administrative Oversight and the Courts, "Should Ideology Matter?: Judicial Nominations 2001" pp. 9-10 (June 26, 2001).

over the decades. If judges adhere to the written law and its intent, then the people have the control – through their consent – in our Democracy.

In my view, this Committee's vote today represents a rejection of the rule of law, law that can be changed by the people, and represents an acceptance of the political expediency of the hour. This is a drastic change in the ground rules that those on the Left brashly called for early last year. The new low point that we reach today, violates the independence of the federal judiciary and tears at the fabric of our Constitution. What a huge price we are paying for short-term political gain.

I just hope all voting against this nomination have not thought it through. I hope that you will come to see just how fraught with danger this action is and that in the future we will return to the traditional and proven role of the Senate in the advice and consent process.

SENATOR FLORENCE SHAPIRO
DISTRICT 8

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July 15, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy,

I am writing to express, in the strongest possible terms, my unequivocal support for Justice Priscilla Owen's nomination to the U.S. Court of Appeals for the Fifth Circuit.

It is difficult to overstate Justice Owen's extraordinary academic and professional qualifications, as the American Bar Association recognized when it honored her with its highest possible rating: "unanimous well-qualified". I have known Justice Owen for several years and have always been impressed with her extraordinary intelligence and integrity. Her legal career has been marked by accomplishment. Not only has she worked to improve access to legal services for the poor and fought to increase the funding of such programs, she has also helped organize a group known as Family Law 2000, which seeks to educate parents about the effects of dissolving a marriage on children and to lessen the adversarial nature of legal proceedings when a marriage is dissolved.

As a Senator in the Texas Legislature, the manner in which the Texas courts review and interpret our laws is extremely important to me. Justice Owen's opinions consistently demonstrate that she faithfully interprets the law as [illegible] and as the Legislature intended, not based on her subjective idea of what the law should be. I am shocked and saddened to see that partisan and extremist opponents of Justice Owen's nomination have attempted to portray her as an activist judge, as nothing could be further from the truth.

Her opinions interpreting the Texas Parental Notification Act serve as prime examples of her judicial restraint. I was the chief author of the Senate bill, and followed very closely the Texas Supreme Court's opinions regarding the statute. Although some might try to hold up the Texas Parental Notification Act as a litmus test on abortion, they simply cannot make the case. The Parental Notification Act is emphatically not about whether a minor is able to have an abortion, but whether her parent should be notified. The Act nowhere presents the question of whether the Constitution guarantees the right to abortion or the scope of such a right; in fact, it recognizes that a girl may have an abortion. Therefore, when the Texas Supreme Court heard the Jane Doe cases, it was merely interpreting a newly-enacted procedural statute -- passed with overwhelming bipartisan support -- that recognized the legitimate role of parents in such weighty decisions, not the underlying right to an abortion. I appreciated that Justice Owen's opinions throughout the series of cases looked carefully at the new statute and at the

governing U.S. Supreme Court precedent upon which the language of the statute was based, to determine what the Legislature intended the Act to do.

I, along with many of my colleagues – Democrats and Republicans alike – filed a bipartisan amicus curiae brief with the Texas Supreme Court explaining that the language of the Act was crafted in order to promote, except in very limited circumstances, parental involvement. We recognized that there should be exceptions under certain conditions, and allowed a girl three opportunities to demonstrate to a court that she fell within those exceptions. It is important to note that the Texas Supreme Court does not even have an opportunity to hear a case under the Act unless both a trial court and an intermediate appellate court have both already considered the evidence and ruled that a girl does not satisfy the exceptions and must notify one parent prior to having an abortion.

Prior to the passage of the Act, a child could go to a doctor and have an extremely invasive procedure without even notifying one of her parents. At the same time, school nurses were not even permitted to give aspirin to a child without parental consent. Like legislators in dozens of states across America, we realized that something needed to be done to respect the role of parents – that at least one parent should be involved in a major medical decision impacting their minor daughter. Because this was not an "abortion" bill but a "parental involvement" bill supported by lawmakers on both sides of the abortion debate, we were able to pass a bipartisan law that promotes the relationship between parents and their minor daughters and is exceedingly popular with the people of Texas.

Justice Owen is the kind of judge that the people of the 5th Circuit need on the bench - an experienced jurist who follows the law and uses common sense. I strongly urge the Committee to reject the politics of personal destruction pushed by Justice Owen's extremist critics and vote positively on her nomination. She merits immediate confirmation.

Very truly yours,

Florence Shapiro

cc: The Honorable Orrin Hatch
United States Senate

Alberto R. Gonzales
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April 8, 2002

Senator Patrick Leahy
Chairman,
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Nomination to Fifth Circuit of Priscilla Owen

Dear Senator Leahy:

I am writing you as a Democratic member of the Senate Judiciary Committee to request that you hold a hearing and confirm Priscilla Owen to the Fifth Circuit Court of Appeals. Justice Owen's service on the Texas Supreme Court qualifies her to serve on the Fifth Circuit. Moreover, I, as a Democrat, hope she is not subjected to the same treatment that President Clinton's judicial nominees, such as Judge Mike Schattman here in Texas, were subjected to by the Republicans.

I am a life long, liberal Democrat who has voted in every Democratic primary since 1988. I have been active in Democratic Party politics since I was fifteen, supporting people like Lloyd Doggett and Martin Frost. I practice law in Fort Worth, Texas representing Plaintiffs in civil rights, personal injury and employment discrimination cases, including cases in federal court and in the Fifth Circuit. I served as a briefing attorney for Democratic Texas Supreme Court Justice, Jack Hightower, in 1992-93 and as a Staff Attorney for Justice Hightower in 1995. It is during this last stint with Justice Hightower that I became personally acquainted with Justice Owen.

Justice Owen is an impressive woman whose life is filled with accomplishment. Justice Owen grew up in Waco, Texas (Ann Richard's hometown) in a middle class family. She graduated top of her class from Baylor University School of Law. After graduation, Justice Owen went to

work at the Andrews and Kurth law firm in Houston, where she soon became a partner. At Andrews and Kurth, Justice Owen handled mainly commercial litigation and oil and gas cases.

Justice Owen was not politically active prior to winning election to the Texas Supreme Court in 1994. For that election, she bested Democrat Jimmy Carroll, who served as Chief Justice of the Austin Court of Appeals and who I supported. So, naturally, I was suspicious of Justice Owen at first.

In August of 1995, I accepted Texas Supreme Court Justice Hightower's request to serve as his staff attorney until his retirement on January 1, 1996. It was then I saw Justice Owen at work.

Justice Owen worked long hours and read every brief personally. She actually pulled cases from the library instead of relying on what the lawyers asserted the cases stood for in the briefs. She was an invaluable resource to the Court in oil and gas cases because she actually understood oil and gas law.

When Justice Hightower retired, I had been contacted to serve as a law clerk for Mike Schattman, who was nominated by President Clinton in December 1995 to serve as a United States District Judge in the Northern District of Texas. Upon Justice Hightower's retirement, the Texas Supreme Court graciously allowed me to temporarily serve as an overflow staff attorney for the Court until Judge Schattman was confirmed, supposedly in March 1996. I worked mainly with Justice Owen, who undertook to work on reducing the Court's backload, and saw her work up close.

While Justice Owen has been accused by some of being conservative in personal injury cases, she was the only judge on the Court to argue for allowing tolling of the statute of limitations for sexual abuse victims who have repressed memories, as set forth in her dissent in *S.V. v. V.V.*, 933 S.W.2d 1, 28 (Tex. 1996). As this opinion shows, Justice Owen, rather than being result oriented, tries to figure out what the law is and apply it. Her dissent is compelling and compassionate.

Justice Owen is not a social conservative. Her life is a testament to that. She is a career woman who has been single most of her adult life, who has a diverse group of personal friends, and who is tolerant and even supportive of persons who have lifestyle choices different than hers. She

does not tolerate bigotry of any sort.

While the Texas Supreme Court whittled away at the right to privacy in City of *Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) in an overly broad opinion which followed the anti-gay United States Supreme Court opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), Justice Owen, in a concurring opinion, told the Court it was making statements beyond what the facts required and signaled her personal discomfort with the extreme language used by the Court. I believe this is because she did not agree with the Court's veiled attempt to deny homosexuals basic civil rights.

Justice Owen has the highest ethical standards who took steps to make sure she and the Court avoided even the appearance of impropriety. She has consistently supported reform of Texas' system of electing judges which requires them to raise campaign money. Because of the quality of her tenure, Justice Owen was re-elected in 2000 without opposition.

In March 1996, it became clear that Judge Schattman would not be confirmed by the Senate because Bob Dole made Clinton's judicial nominees a campaign issue. Thus, I moved on to the Texas Attorney General's Office where I investigated insurance companies. I was very angry that the Senate Republicans politicized the judicial selection process and prevented me from serving Judge Schattman. But I left my service for the Texas Supreme Court with a great respect for Justice Owen.

As part of my current practice, I represent employees in discrimination and other employment cases. Justice Owen has joined or concurred in several decisions of the Texas Supreme Court that protect employee rights, including *NME Hospitals, Inc. v. Renner*, 994 S.W.2d 142 (Tex. 1999) and *GTE Southwest v. Bruce*, 998 S.W.2d 605, 620 (Tex. 1999)(Justice Owen concurring). On the Fifth Circuit, which is notorious for ignoring United States Supreme Court precedent in employment discrimination cases; I think Justice Owen will be a breathe of fresh air.

I commend you on the rejection of Judge Pickering, who was just plain scary in light of his attitudes on racial issues. Justice Owen is no Judge Pickering. She is a smart, hard working, tolerant, independent woman who is qualified to serve on the Fifth Circuit Court of Appeals. She tries to interpret the law, not make it, as a judge. She will not be a right wing activist judge, but rather someone who respects precedent and legislative

intent. And on social issues, I believe she will be moderate and weigh in on the side of tolerance. Upon receiving a lifetime appointment to the Fifth Circuit, I believe her tenure and legacy will be somewhere between Justices Anthony Kennedy and David Souter and will not resemble the tenure of Justices Scalia and Thomas.

The Republicans' tactics angered me when it came to confirming or even holding hearings for President Clinton's judicial nominees, such as Mike Schattman. But two wrongs do not make it right. That is why I hope you, as a Democrat who believes in fair play, will vote to have a hearing about and to confirm the nomination of Justice Priscilla Owen to the Fifth Circuit Court of Appeals.

Thank you and keep up the fight for working people.

Sincerely,

Jason C.N. Smith

THE TAMPA TRIBUNE

July 25, 2002, 18A

Owen's Judicial Nomination Is Revealing Replay in Senate

Eight years ago, Florida Supreme Court Chief Justice Rosemary Barkett endured a tough six months after President Clinton nominated her to a seat on the 11th Circuit Court of Appeals.

Barkett was well-known as one of the more liberal members of the Florida court, and conservatives fumed at the thought of her sitting on a federal court one step below the Supreme Court of the United States.

Opponents distorted Barkett's record, accusing her of being sympathetic to criminals and pornographers. Although she had followed state law and imposed the death penalty on many occasions, she personally opposed capital punishment. "I think critics are using selective cases to say that I'm not in the mainstream," Barkett told members of the Senate Judiciary Committee. "It's not true," she said.

Nor was it fair.

On Tuesday this familiar and increasingly nasty song and dance continued as committee members began the confirmation hearing of Texas Supreme Court Justice Priscilla Owen, nominated by President Bush a year ago to a seat on the 5th Circuit Court of Appeals in New Orleans.

Unlike Barkett, Owen is a conservative and, like Barkett, is said by supporters to have one of the best judicial minds in the country. It is her conservatism and intellect that strike fear in the hearts of liberal Democrats and have led to her opposition by the same liberal interest groups that helped defeat Judge Charles Pickering a few months ago.

Like Barkett, Owen is seeing her record distorted. She is opposed basically for two reasons: her opinion that parents should be informed when their daughter seeks an abortion and her acceptance of campaign contributions from Enron during her run for the Texas Supreme Court.

Abortion is the key issue, with pro-abortion groups chanting that Owen is "a threat to the reproductive rights of women." But her support of parental consent laws under most circumstances does not prove conclusively that she opposes Roe vs. Wade. It suggests that she, like the U.S. Supreme Court and most Americans, believes that states have the power to limit abortion on demand.

As for the money from Enron, Texas, like other states that elect judges, permits judicial candidates to accept contributions. That does not make her pro-business or pro-crook. She has, in fact, been a vocal advocate for judicial reform in the Lone Star State.

Like Barkett in 1994, Owen enjoys the support of both senators from her home state. But the judiciary committee she faces is not controlled by the president's party.

The Balance Provided By Differences

So she faces an uphill and undoubtedly long fight for confirmation. We hope that somewhere within the ranks of the brutally partisan Democrats on the committee there sits a Connie Mack, a senator who can look beyond his or her party and differences in judicial philosophy to recognize that the strength of the American judiciary is the balance provided by those differences.

In 1994 Mack backed Barkett, remarking, "The question I ask myself is whether the nominee is capable, a person of integrity, and falls within reasonable philosophical bounds."

Representatives of both political parties in Texas say that for Justice Owen, the answer is yes.

Texas Civil Justice League

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Shannon Ratliff
Austin, Texas
Kurt Ross
Austin, Texas
Linda Sickels
Dallas, Texas
Freeman E. Smith
Houston, Texas
Richard C. Stoebner, M.D.
San Angelo, Texas
Frank Sturzl
Austin, Texas
Charles T. Terrell
Dallas, Texas
The Honorable Ralph Wayne
Austin, Texas
The Honorable J.P. Wood
Austin, Texas

March 28, 2002

To Whom It May Concern:

It has come to our attention that Texas Supreme Court Justice and Fifth Circuit Court of Appeals nominee Priscilla Owen has been targeted by a reprint of an old legal publication article which was inaccurate at the time it was printed and is inaccurate now.

The inference in the story is just plain wrong.

In 1994 the TCJL PAC supported a bipartisan slate of candidates for the Texas Supreme Court. In one of our PAC mailers during that campaign cycle, we used photos of three court candidates to help raise money to support their campaigns, each of which cost well over $1 million.

These court candidates, including Priscilla Owen, did not lend their names to a fundraising effort for the TCJL. They did not endorse "tort reform" or any part of our legislative program in any way.

In fact, in the years since Justice Owen was elected to the Texas Supreme Court, less than half the cases in which the Texas Civil Justice League has submitted amicus briefs over the past ten years have been decided in our favor. This is hardly evidence that the Justices are part and parcel of our "political agenda."

In all fairness, please disregard the allegations of that story. These allegations are just not valid.

Ralph Wayne
President
TCJL

George S. Christian
Treasurer
TCJL PAC

Contributions to the Texas Civil Justice Political Action Committee are not deductible as charitable contributions for federal income tax purposes. Contributions are not limited to suggested amounts, and TCJL PAC will not favor or disadvantage anyone based on failure to make a contribution. Contributions to TCJL PAC are subject to reporting to the Texas Ethics Commission. Political advertising paid for by George S. Christian, Treasurer, Texas Civil Justice League Political Action Committee, 401 West 15th Street, Suite 975, Austin, Texas 78701

TEXAS JUSTICE FOUNDATION
8122 DATAPOINT, SUITE 812 SAN ANTONIO, TEXAS 78229 210-614-7157 FAX: 210-614-6656
Website: www.TcJF.org

July 22, 2002

Mr. Manuel A. Miranda
Washington, D.C.

VIA FACSIMILE 202/228-1698

RE: ***Justice Priscilla Owen***

On behalf of the Texas Justice Foundation, I would like to recommend Texas Supreme Court Justice Priscilla Owen for approval to the Fifth Circuit Court of Appeals.

Like the unanimous recommendation of the American Bar Association, and as a former professor of law, I believe that Justice Owen is well qualified. She has been approved by the people of Texas in two election contests. She is an independent, honest, and fair member of the judiciary.

We believe that she is moderate in her views. I personally would like to see President Bush nominate justices who are more conservative then Priscilla Owen. For example, she ruled against our clients in *Hotze v. Brown*. Our clients had sued the mayor of Houston for unilaterally declaring sexual orientation a protected status under the city's anti-discrimination ordinance. Justice Owen joined the Court in reversing a Court of Appeals victory in our favor by ruling that our clients lacked standing.

In another case, she ruled against our clients asserting property rights against a recent government enactment which limited a farmer's right to pump water from his own land.

As you can see, her positions are definitely not activist conservative. Despite our difference of opinion with her on these issues, she is well qualified for her nomination.

Respectfully submitted,

Allan E. Parker, Jr.
CEO & Founder

AEP:clm

Richard Clayton Trotter
Attorney and Counselor at Law
118 Rock Ledge
San Antonio, Texas 78606

July 22, 2002

Senate Judiciary Committee
152 Dirksen Bldg.
Washington, D.C. 20510

VIA FACSIMILE 202/228-0258

RE: ***Justice Priscilla Owen***

I would like to recommend Texas Supreme Court Justice Priscilla Owen for approval to the Fifth Circuit Court of Appeals.

In my opinion she is moderate in her views, President Bush could have nominated justices who are more conservative than Priscilla Owen. The American Bar Association (not a conservative body) has unanimously recommended Justice Owen.

For example, she ruled against the conservative Texas Justice Foundation (a client of mine) in *Hotze v. Brown*, when they had sued, on behalf of their clients, the mayor of Houston for unilaterally declaring sexual orientation a protected status under the city's anti-discrimination ordinance. Justice Owen joined the Court in reversing a lower Court of Appeals opinion holding against the Mayor's decision.

In another case, she ruled against Texas Pecan farmers asserting property rights against a recent government enactment which limited a farmer's right to pump water from his own land. She in essence ruled against the private property rights of landowner's in favor of a socialistic state controlled re-distribution of water resources.

As a former professor of law and a conservative, I also believe that Justice Owen is well qualified despite her somewhat liberal social decisions. She has been approved by the people of Texas in re-election contests. She is an independent, honest, and fair member of the judiciary.

She is barely a conservative, much less an activist conservative. However despite my difference of opinion with her on these issues, she is well qualified for the position for which she has been nominated.

Respectfully submitted,

Richard Clayton Trotter
RCT/rct

SHELTON M. VAUGHAN
6127 BRIAR ROSE DRIVE
HOUSTON, TEXAS 77057-3501

April 19, 2002

Senator Patrick J. Leahy
SR-433
United States Senate
Washington, DC 20510

Dear Senator Leahy:

I am a practicing attorney in Houston, Texas and I am writing to express my concern and alarm at the large numbers of vacancies in the federal judiciary. The efficacy and the very integrity of the American legal system is being compromised as a result of the unnecessary delays in Congress in filling these vacancies.

A year ago there were just over 80 judicial vacancies in the Federal system. Now there are 100. Of those vacancies, the Judicial Conference of the United States classifies 37 of them as "judicial emergencies" due to the lengthy delays and legal compromises that result from the shortage of judges. Clearly the confirmation process is not working properly.

These vacancies are not the result of a lack of judicial nominations. President Bush nominated 66 judges in his first year in office, more than a third again as many as the past three presidents nominated in their first year in office. It is apparent that the delay is occurring in Congress, in the confirmation process. The Senate has an obligation to the citizens of the United States to act promptly upon the President's nominations to the federal bench. Those of us engaged in the daily practice of law are acutely aware of this judicial emergency, which, as Chairman of the Senate Judiciary Committee, you have the power to remedy. It is critical that the Senate Judiciary Committee accelerate the pace of its hearings on these nominees.

In particular, as a Texas practitioner [illegible] Appeals, I urge you to schedule a confirmation hearing for Texas Supreme Court Justice Priscilla Owen, whom President Bush nominated on May 9, 2001 to the Fifth Circuit Court of Appeals. Justice Owen is held in high esteem among lawyers in Texas and has an outstanding record as an attorney and a judge. As you know, the ABA Standing Committee on the Federal Judiciary unanimously voted Justice Owen "well qualified" for appointment to the United States Court of Appeals for the Fifth Circuit.

Not only has Justice Owen had a distinguished career that has garnered recognition across the political spectrum. In addition, the vacancy she was nominated to fill is one of the ones I referred to above, which the Judicial Conference has declared a "judicial emergency." Last year, you said that all judicial nominees would receive a hearing before the Senate Judiciary Committee within a year of their respective nominations. In just a matter of days, on May 9,

2002, it will have been a year since Justice Owen's nomination. I urge you not to break your word, but instead to schedule Justice Owen's confirmation hearing immediately.

While I understand there are some thorny partisan issues involved, I ask that Congress look beyond the smaller political bickerings and understand the damage this situation is causing to our American legal system. Moreover, while the leadership of the Judiciary Committee may have reservations about the ideology of the nominees, their duty as Senators is to provide a fair and prompt hearing and then a vote. Whether the nominee is confirmed or not, the process needs to move forward.

I ask not that Congress compromise its duties or values, I ask only that they carry them out in a timely manner. No one benefits from a legal system suffering from absent judges. For the sake of American justice, I urge you to do all you can to address this problem and, in particular, to promptly schedule Justice Owen's confirmation hearing.

Very truly yours,

Shelton M. Vaughan

cc: Senator Orrin G. Hatch
Senator Phil Gramm
Senator Kay Bailey Hutchison

THE WALL STREET JOURNAL OPINION MONDAY, JULY 22, 2002 A14

A New Borking Excuse

Having sharpened their knives on Charles Pickering and D. Brooks Smith, Democrats on the Senate Judiciary Committee turn tomorrow to Priscilla Owen, President Bush's nominee for the Fifth Circuit Court of Appeals. The accomplished judge had better wear her battle armor.

Borking Svengali Ralph Neas is playing the gentleman this time and letting the ladies do the mugging. This is dirty work, but the gals at the National Abortion Rights Action League (NARAL), the National Abortion Federation and the National Organization for Women are more than up to the job. And when it comes to borking, Chairman Pat Leahy is an equal-opportunity interest-group mouthpiece.

This time the feminist groups are doing the dirty work.

The feminists have put their wiles to work and come up with a new excuse to disqualify Judge Owens: abortion on demand for teenagers. Judge Owen must be defeated, they charge, because her rulings on the Supreme Court of Texas prove she believes a parent usually ought to be informed if his or her daughter wants an abortion.

Judge Priscilla Owen

Judge Owen "is an opponent of abortion rights for minors without their parents' permission," explains NARAL president Kate Michelman, by which she means that the judge is "someone who exemplifies the most extreme hostility to reproductive rights of any of the nominees that President Bush has named."

By this definition, two-thirds of all Americans are dangerous, right-wing extremists. Every poll on abortion shows that most Americans—pro-life and *pro-choice*—think it's reasonable to let mothers and fathers have a role in such a momentous decision for a minor child. The U.S. Supreme Court has also ruled that parental consent does not violate *Roe v. Wade*.

Judge Owen's rulings on teen abortion have nothing to do with her personal opinion but are consistent with Texas law, which is very precise about the conditions under which a court may let a girl have an abortion without notifying a parent. She voted with the majority in nine of the 12 teen-abortion decisions to come before her court. And a teen-abortion case doesn't even get to the Texas Supreme Court unless two lower-court judges—a trial judge and an appeals judge—have rejected a girl's request not to notify her parents.

The pro-abortion groups are working hand in glove with Senator Leahy to defeat Judge Owen. When the Chairman rescheduled her hearing last week, that news was up on Planned Parenthood's Web site before it was even communicated to the Republicans on the committee or the Justice Department. Talk about teamwork.

In the 14 months Judge Owen has been waiting for a hearing, the opposition has had ample time to script other Senatorial attack lines: She's anti-consumer, pro-business and wants to make it easier for anti-abortion radicals to harass women at abortion clinics. Judges are elected in Texas (something Judge Owen has opposed) and it'll be worth the price of admission Thursday to see if any Democrat dares to mention the $8,800 she legally accepted from Enron during her 1994 campaign. That sum, less than 1% of her total contributions, pales in comparison with what Enron gave such Members of Congress as Judiciary Democrat Charles Schumer.

It's no disrespect to nominees who have already run the Judiciary gantlet to say that Judge Owen's fate matters more. At 47 years old, she is widely considered one of the best conservative legal minds of her generation. If she can't get confirmed, it bodes ill for other nominee-luminaries waiting for a hearing, such as Miguel Estrada, Jeff Sutton, John Roberts and Michael McConnell. These are the kind of intellects whose judicial influence would be large on the appeals courts—if they ever get there—and could be potential Supreme Court candidates.

But that, of course, is precisely why Democrats are out to bork every one of them. Of Mr. Bush's 32 appeals-court nominees, 17 haven't yet received a Senate hearing. Like Judge Owen, they'll get that privilege only after all the interest groups are lined up to maul them.

A18 WEDNESDAY, JULY 24, 2002 DM VA

The Washington Post

AN INDEPENDENT NEWSPAPER

The Owen Nomination

THE NOMINATION of Priscilla Owen to the 5th Circuit Court of Appeals creates understandable anxiety among many liberal activists and senators. The Texas Supreme Court justice, who had a hearing yesterday before the Senate Judiciary Committee, is part of the right flank of the conservative court on which she serves. Her opinions have a certain ideological consistency that might cause some senators to vote against her on those grounds. But our own sense is that the case against her is not strong enough to warrant her rejection by the Senate. Justice Owen's nomination may be a close call, but she should be confirmed.

Justice Owen is indisputably well qualified, having served on a state supreme court for seven years and, prior to her election, having had a well-regarded law practice. So rather than attacking her qualifications, opponents have sought to portray her as a conservative judicial activist—that is, to accuse her of substituting her own views for those of policymakers and legislators. In support of this charge, they cite cases in which other Texas justices, including then-Justice Alberto Gonzales—now President Bush's White House Counsel—appear to suggest as much. But the cases they cite, by and large, posed legitimately difficult questions. While some of Justice Owen's opinions—particularly on matters related to abortion—seem rather aggressive, none seems to us beyond the range of reasonable judicial disagreement. And Mr. Gonzales, whatever disagreements they might have had, supports her nomination enthusiastically. Liberals will no doubt disagree with some opinions she would write on the 5th Circuit, but this is not the standard by which a president's lower-court nominees should be judged.

Nor is it reasonable to reject her because of campaign contributions she accepted, including those from people associated with Enron Corp. Texas has a particularly ugly system of judicial elections that taints all who participate in it. State rules permit judges to sit on cases in which parties or lawyers have also been donors—as Justice Owen did with Enron. Judicial elections are a bad idea, and letting judges hear cases from people who have given them money is wrong. But Justice Owen didn't write the rules and has supported a more reasonable system.

Justice Owen was one of President Bush's initial crop of 11 appeals court nominees, sent to the Senate in May of last year. Of these, only three have been confirmed so far, and six have not even had the courtesy of a hearing. The fact that President Clinton's nominees were subjected to similar mistreatment does not excuse it. In Justice Owen's case, the long wait has produced no great surprise. She is still a conservative. And that is still not a good reason to vote her down.

Pamela P. Willeford
3107 Pleasant Run Place
Austin, TX 78705

August 28, 2002

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20520

VIA FAX: 202-224-9516

Dear Chairman Leahy:

I am writing to urge you to support the confirmation of Justice Priscilla Owen of Texas to the United States Fifth Circuit Court of Appeals.

Justice Owen has shown herself to be a fair, dedicated and impartial judge while serving on the Texas Supreme Court. She has proven herself both as a private practitioner and as a judge, and her concern for assuring that those less fortunate receive adequate and fair legal representation is well-documented.

We are fortunate that outstanding individuals like Priscilla Owen are willing to serve in such important capacities in our judiciary system. Her integrity, experience, work ethic, intelligence and sense of fairness are attributes that have earned her the respect of her colleagues in the legal profession, not only here in Texas, but also nationally as shown by the "well qualified" ranking she received unanimously from the American Bar Association's Standing Committee on the Federal Judiciary.

I appreciate the tremendous responsibility that you who serve on the Senate Judiciary Committee have to ensure that the President's judicial nominees meet the highest standards. I believe that Justice Priscilla Owen does meet those standards, and I respectfully request that your committee grant a prompt hearing with favorable consideration for her nomination.

Sincerely,

Pamela P. Willeford

Pamela P. Willeford

Wisconsin State Journal

July 29, 2002, A8

OWEN IS QUALIFIED FOR FEDERAL BENCH

Feingold and Kohl should stop their Senate Colleagues from "borking" Priscilla Owen. Why should Wisconsinites care about Texas Supreme Court Justice Priscilla Owen, nominated by President Bush to the 5th U.S. Circuit Court of Appeals?

* Because "borking" - judging a judicial nominee on political and ideological grounds rather than qualifications - is ugly no matter which party is doing it and must be stopped.

* Because Wisconsin's two senators, Herb Kohl and Russ Feingold, sit on the Senate Judiciary Committee, where the "borking" of Owen is under way. If these two Democrats take the high road and approve Owen even though (horrors!) she is a conservative, their courage could persuade their Senate colleagues to give up this nasty practice. The charge against Owen is being led by the extremist wing of the abortion-on-demand crowd, who are incensed that Owen voted several times to uphold a Texas law that allows teens to get abortions without notifying their parents only in extreme circumstances.

Polls show that a majority of Americans support parental notification laws, and the U.S. Supreme Court has ruled that such laws do not violate the terms established by Roe vs. Wade. Nonetheless, National Abortion Rights Action League President Kate Michelman called Owen "someone who exemplifies the most extreme hostility to reproductive rights of any of the nominees that President Bush has named." My, my.

Other groups complain that Owen's rulings show her to be anti-consumer, anti-worker and pro-business. They say she too often voted to overturn huge jury verdicts in malpractice and product-liability cases. Considering that Texas juries' propensity for handing down outrageous verdicts makes the state a favorite filing-ground for trial attorneys pursuing dubious liability cases, Owen should be applauded for attempting to apply the brakes.

They say she is a "judicial activist" who will try to legislate from the bench. But when U.S. Sen. Dianne Feinstein, D-California, asked her about that charge, Owen responded "If I am confirmed, I will do my utmost to apply the statutes you have written as you have written them, not as I would have written them or others might want me to interpret them."

But none of this should matter much to the Senate Judiciary Committee, which is supposed to examine a nominee's qualifications, fitness for office, and temperament. No one has questioned (yet) her temperament; her qualifications include graduating cum laude from Baylor Law School, getting the top score on the Texas Bar Exam, practicing commercial litigation for 17 years before winning election to the Texas Supreme Court, and getting a unanimous "well qualified" rating from the American Bar Association's Committee on the Federal Judiciary.

Every president has the right to nominate whomever he wants to the federal judiciary. The Senate has the right to grill the nominees over their qualifications, temperament, and fitness for office. Presumably it's that latter term that some senators believe justifies "borking" Owen on abortion rights, etc.

But it's still wrong.

Feingold knows it. That's why he made his courageous vote to confirm John Ashcroft as U.S. attorney general. Feingold didn't like Ashcroft's right-wing politics, but he believed in a president's right to choose his own nominees. Feingold was right.

Feingold and Kohl should both vote to confirm Owen, and should try to convince their colleagues to do likewise. She is well qualified, and that's all that should count.

JULIE P. WOODY
1306 Big Pines
Tomball, Texas 77375
(281) 290-0723

BY FAX (Original sent by mail)
The Honorable Orrin Hatch
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Priscilla Owen for Fifth Circuit Court of Appeals

Dear Senator Hatch:

I write to offer my full and heartfelt support for the nomination of Priscilla Owen for a seat on the U.S. Court of Appeals for the Fifth Circuit.

I graduated from the Yale Law School in 1980 and thereafter practiced law in New York City. Originally from Pennsylvania, I have lived in Texas since 1991 with my husband, Robert, and our two sons. I first met Justice Owen in 1995 when I clerked in 1995-96 for Tom Phillips, Chief Justice of the Texas Supreme Court. While Chief Justice Phillips is a Republican, I am a life-long Democrat.

As a clerk on the Texas Supreme Court, I worked closely with all of the Justices, including Justice Owen, both in chambers and during conferences, which the clerks attended regularly in order to assist the Justices in presenting case reviews and draft opinions. I also worked closely with Justice Owen on several draft opinions dealing with areas of law in which she had special expertise.

As a result of my encounters with Justice Owen during my clerkship, I came to regard her as a judge and legal scholar of the highest calibur. She has a brilliant legal mind that is matched by her legendary work ethic. Her analysis of any issue is rigorous and true to the letter and spirit of the law. Her impeccable ethics and honesty and lack of political motivation in her decision-making were apparent in her discussions of cases and the manner in which she decided them. Justice Owen is among the best and the brightest – she will bring integrity, intelligence and the highest ethical standards to the Fifth Circuit.

Following my clerkship, I had the opportunity to become friends with Priscilla. From 1997 through 1999, my husband, who was in seminary at the time, was assigned to assist at St. Barnabas, a newly formed Episcopal church in Austin. Priscilla was one of the original members and leader of the altar guild. Priscilla worked incredibly hard behind the scenes, never seeking any attention or praise for her efforts. She exemplified servant leadership.

It is hard to imagine a more qualified candidate for the Fifth Circuit than Priscilla Owen. It is my privilege to support her nomination.

Sincerely yours,

Julie Woody

Julie Woody